

Legal Update

UK Supreme Court rules on non-party access to documents used in litigation in England & Wales

The UK Supreme Court judgment in *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)*¹ provides definitive guidance on the circumstances in which a person who is not a party to court proceedings may obtain copies of documents held in court during and/or at the end of those proceedings. It clarifies the type of documents that may be obtained and the legal bases on which they may be obtained, and will be a useful tool for non-parties seeking access to court records.

In August 2018, we reported on the Court of Appeal's decision in this important case² (see [Legal Update "Can non-parties obtain copies of documents from the records of the court in England & Wales?"](#)). In both the Court of Appeal and the Supreme Court, the issues turned on the interpretation of CPR rule 5.4C (Supply of documents to a non-party from court records) and the scope of the court's inherent jurisdiction to allow access to documents pursuant to the constitutional principle of open justice.

The Court of Appeal's decision was appealed by both parties. Cape sought to limit the categories of documents which can be obtained from the

court by non-parties, arguing that the Court of Appeal did not have jurisdiction to make the order that it did. By cross-appeal, the Forum argued that the Court of Appeal was wrong to limit the scope of CPR rule 5.4C in the way that it had. The Media Lawyers Association intervened in the appeal, emphasising the importance of the media – described by the President of the Supreme Court, Lady Hale, as the “eyes and ears of the public” – having access to court documents.

The appeal and cross-appeal were heard on 18 and 19 February 2019 by Lady Hale, Lady Arden, Lord Briggs, Lord Kitchin and Lord Sales.

It was not in dispute before the Supreme Court that a non-party is entitled to:

- a) copies of statements of case and judgments or orders given or made in public (in accordance with CPR 5.4C(1)); and
- b) skeleton arguments relied on in court and written submissions made by the parties in the course of a trial pursuant to the court's inherent jurisdiction, as held by the Court of Appeal in *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* (“FAI”)³.

1 [2019] UKSC 38

2 *Cape Intermediate Holdings Ltd v Mr Graham Dring (for and on behalf of The Asbestos Victims Support Group)* [2018] EWCA Civ 1795

3 [1999] 1 WLR 984. See also *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co (Application for Disclosure)* [2003] EWHC 2297 (Comm) and *Cape Intermediate Holdings Ltd v Mr Graham Dring (for and on behalf of The Asbestos Victims Support Group)* [2018] EWCA Civ 1795, para 92.

SUPREME COURT JUDGMENT: SUMMARY

Lady Hale, giving the judgment of the Court, said that the arguments of both Cape and the Forum (above) were incorrect. The Court of Appeal not only had jurisdiction to make the order that it did, but also to make a wider order if it was right to do so. However, the basis for making any wider order is the court's inherent jurisdiction in support of the open justice principle, not CPR rule 5.4C. In Lady Hale's words:

"... the court rules are not exhaustive of the circumstances in which non-parties may be given access to court documents. They are a minimum and ... it is for a person seeking to persuade the court to allow access outside the rules to show a good case for doing so. However, case after case has recognised that the guiding principle is the need for justice to be done in the open and that courts at all levels have an inherent jurisdiction to allow access in accordance with that principle."

COURT RULES WHICH PERMIT ACCESS TO COURT DOCUMENTS, AS EXPANDED BY CASE LAW

The Supreme Court judgment dealt first with the relevant Civil Procedure Rules which permit access to court documents. In particular:

1. The first part of CPR rule 5.4C contains the general rule, which is, broadly, that a non-party may obtain from the court records copies of statements of case and judgments or orders given or made in public, but not until an acknowledgment of service has been filed.
2. CPR rule 5.4C(2) provides that "A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person."

"Records of the court" is defined neither in the CPR nor, so far as the Supreme Court was aware, in any other legislation.

The Supreme Court found that "records of the court" must refer to those documents and records which the court keeps for its own purposes. Record keeping practice may vary over time and current practice should not determine the scope of the court's power to order access to case materials in particular cases.

3. CPR rule 39.9 provides that any court hearing will be recorded unless the judge directs otherwise, and any party or person may require a transcript or transcripts of the recording of any hearing (subject to paying the applicable fee). If the hearing is held in private, however, a non-party may obtain a transcript only if the court allows it.
4. CPR rule 32.13(1) provides that a witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the court otherwise directs.

In *Cape*, the Court of Appeal held that, after the trial, the court has inherent jurisdiction to allow inspection of a witness statement taken as evidence in chief, although the fact that the trial had ended and the amount of time which has passed, may affect whether the court exercises its discretion to permit access. It also held that what applies to witness statements should also apply to experts' reports which are treated as their evidence in chief.

The same does not apply to exhibits to witness statements or experts' reports unless it is not possible to understand the statement or report without seeing a particular document or documents in the exhibit, in which case access should be permitted under the court's inherent jurisdiction.

THE PRINCIPLE OF OPEN JUSTICE

The principle of open justice is summarised in our August 2018 Legal Update. Further, in *R (Guardian News and Media Ltd) v City of Westminster Magistrates Court*⁴, Toulson LJ in the Court of Appeal held that the time had come to acknowledge that public access to documents referred to in open court was necessary in some cases.

4 [2013] QB 618

Lady Hale quoted further from this judgment: “In a case where documents have been placed before a judge and referred to in the course of proceedings ... the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong”.⁵ The principles laid down in *Guardian News* have been endorsed by the Supreme Court in two subsequent cases⁶.

Thus, Lady Hale states, there should be no doubt about the principles. “The question in any particular case should be about how they are to be applied.”

THE EXERCISE OF THE COURT’S INHERENT JURISDICTION IN SUPPORT OF THE OPEN JUSTICE PRINCIPLE

Unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what the open justice principle requires in terms of access to documents or other information placed before the court or tribunal in question.

Where the court has power to allow access under its inherent jurisdiction, however, the non-party has no right to be granted it. The non-party applicant must explain why access is sought and how granting access will advance the open justice principle. The court must undertake a “fact-specific balancing exercise” considering “the purpose of the open justice principle and the potential value of the information in question in advancing that purpose” and “any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others”⁷. The Supreme Court referred, by way of examples of very good reasons for denying access, to considerations of national security, the protection of privacy interests and trade secrets, and commercial confidentiality.

Practical issues and proportionality will also be relevant, for example, the timing of the request. The Supreme Court stated that it is “highly desirable” that any application is made during the trial when the material is readily available. If documents are sought after the trial, the court may find that the burden placed on the parties to identify and retrieve the documents sought is disproportionate.

A TASK FOR THE RULE COMMITTEE?

Lady Hale concluded by urging the bodies responsible for the court rules in all parts of the UK to consider the questions of principle and practice raised by this appeal. Issues to be considered include the extent of any continuing obligation on the parties to cooperate with the court in furthering the open justice principle, once the proceedings are over.

WHERE DOES THE SUPREME COURT’S JUDGMENT IN CAPE LEAVE US?

A non-party may obtain the following documents, as of right:

- a) copies of statements of case and judgments or orders given or made in public⁸;
- b) witness statements which stand as evidence in chief during trial⁹; and,
- c) on payment of a fee, transcript(s) of any court hearing held in public¹⁰.

Cape confirms that, in addition, a non-party may obtain the following pursuant to the court’s inherent jurisdiction in support of the open justice principle, unless inconsistent with statute or rules of court:

- a) experts’ reports during trial and witness statements and experts’ reports after trial¹¹;
- b) documents forming exhibits to witness statements and/or experts’ reports if it is impossible to understand the statement or report without seeing a particular document or documents¹²;

⁵ *R (Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2013] QB 618, para 85.

⁶ *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2015] AC 455 and *A v British Broadcasting Corpn (Secretary of State for the Home Department intervening)* [2015] AC 588.

⁷ See *Kennedy* para 113 and *A v British Broadcasting Corpn* para 41

⁸ CPR rule 5.4(1)

⁹ CPR rule 32.13

¹⁰ CPR rule 39.9

¹¹ CPR rule 32.13, as expanded by the Court of Appeal in *Cape*.

¹² Court of Appeal in *Cape*

- c) skeleton arguments and written submissions, provided that there has been an effective public hearing at which they were deployed¹³;
- d) other advocates' documents provided to assist the court's understanding of the case, including chronologies, dramatis personae, reading lists and written closing submissions¹⁴;
- e) transcript(s) of any court hearing held in private (on payment of a fee)¹⁵; and, most importantly,
- f) any documents which have been placed before a judge and referred to in the course of proceedings¹⁶. The documents which may be obtained are not limited to those which the judge has been asked to read or has said they have read.

If you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

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Whilst the court has the power to order that a non-party may access the documents referred to in (a) to (f) above, it will do so only if the applicant has satisfied the court that it should exercise its jurisdiction to allow access in the particular case, having undertaken the fact-specific balancing exercise explained above.

¹³ Court of Appeal in *FAI*, and expanded by subsequent cases (see footnote 3).

¹⁴ Court of Appeal in *Cape*

¹⁵ CPR rule 39.9

¹⁶ *Guardian News*, as endorsed by the Supreme Court for the third time, in *Cape*.

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