

Non-parties seeking access to trial documents and the proper application of the ‘open justice’ test (Dring v Cape Intermediate Holdings)

20/07/2020

Dispute Resolution analysis: This case concerned the application of the principles restated by the Supreme Court in respect of non-party access to trial documents either pursuant to the CPR 5.4C(2) or the High Court’s inherent jurisdiction. It is clear that parties do have the prima facie right to access documents which have been referred to at the trial if the provision of such documents is in furtherance of ‘open justice’, however, the previously stated ‘legitimate interest’ test is no longer applicable. This case deals with the first application of the restated test, and the balancing act outlined by Lady Hale in the Supreme Court ultimately led to the application being refused. Written by Georgia Whiting, barrister at 4 King’s Bench Walk.

Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd [\[2020\] EWHC 1873 \(QB\)](#)

For coverage of the earlier decisions in these proceedings, see News Analyses:

- [Supreme Court sets out test for disclosure of court documents to non-parties \(Cape Intermediate Holdings Ltd v Dring \(for and on behalf of Asbestos Victims Support Groups Forum UK\)\)](#)
- [Court upholds non-party’s right to access various documents disclosed at trial \(Cape Intermediate Holdings Ltd v Dring\)](#)
- [In brief: Open justice—CPR Part 5.4C\(2\) \(Dring v Cape Distribution Ltd and others\)](#)

What are the practical implications of this case?

This case is the first application of the principles as restated by the Supreme Court in respect of a non-party seeking access to trial documentation. The Supreme Court confirmed that non-parties to litigation may be entitled to obtain a wide range of documents referred to before the court, and not limited to parties’ written submissions and arguments.

However, in applying this decision in practice, it is clear that parties will be required to justify the fact that the disclosure of such documents would be in accordance with the open justice principle, but also that such access would advance the open justice principle. To do otherwise would mean, in effect, that anybody could make such an application and in very broad terms.

It is also clear that the courts will not allow such parties, in effect, to make a third-party disclosure application in relation to other proceedings, but seeking to do so without regard to the constraints to which a genuine disclosure application would be subject.

Accordingly, witness statements in support of such applications will need to focus on the furtherance of the open justice principle with very specific details as to why this restated test is met. There is no longer a focus on whether or not there is a ‘legitimate interest’ in obtaining these documents.

What was the background?

Cape Intermediate Holdings Ltd (Cape) is a company previously involved in the manufacturing and supply of asbestos. In January 2017 and February 2017, it was the defendant in a six-week trial in the Queen’s Bench Division before Mr Justice Picken. The claim related in part to claims brought against Cape by insurers who had written employers’ liability policies. It was alleged that Cape had been negligent in the production of asbestos insulation boards and had known about the risks in respect of the same, but failed to

disclose them, and the insurers sought a contribution in respect of sums paid to the employees.

The trial in fact resulted in a settlement prior to judgment being handed down. Subsequently, the Asbestos Victims Support Groups Forum UK (Forum), an association providing support to those with asbestos related conditions, applied as a non-party for access to the trial bundles.

At first instance, Master McCloud held that the court had jurisdiction to make the order requested, either pursuant to [CPR 5.4C\(2\)](#) or pursuant to the High Court's inherent jurisdiction, and that it was appropriate to make an order giving Forum access to the trial bundle. The Master's decision was overturned by the Court of Appeal, and subsequently came before the Supreme Court. Each party respectively argued that the decision of the Court of Appeal had been either too restrictive or too lenient.

The Supreme Court dismissed both appeals and clarified the correct approach to the making of such a decision. In particular, they approved the approach as taken in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [\[2012\] EWCA Civ 420](#), in contradistinction to the approach in *GIO Personal Investments Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [\[1999\] 1 WLR 984](#), which the court considered should be regarded as having restated the open justice principle in a way which no longer made it appropriate to apply the 'legitimate interest' approach.

The matter was accordingly remitted to the High Court for a fresh determination of the application pursuant to the clarified test.

What did the court decide?

Based upon Lady Hale's analysis in the Supreme Court, the judge was quite clear, in the circumstances, that a third party should not merely show that access to documents would be in accordance with the open justice principle, but also that such access would advance the open justice principle. If the position were otherwise, and an applicant could merely insist on production of documents on the basis that this would be in accordance with the open justice principle, there would be nothing to stop anybody from making an application and doing so in overly wide terms.

The proper approach was held to be not to seek to impose 'limits' or prior hurdles to the exercise of the court's discretion. Rather, the court should engage in the balancing exercise described by Lady Hale and, in doing so, accord appropriate weight to the various different factors. The judge held that, in the instant case, the documents should not be disclosed for a number of reasons as follows:

- firstly, the reason given by Forum that they should be able to use the documents for other purposes, including separate litigation, did not advance the open justice principle. Specifically, the documents requested were clearly not required by Forum to understand what the issues in the underlying proceedings were
- secondly, although obviously related to the first point, the evidence adduced by the Forum did not really explain how granting access to such documents would advance the open justice principle. The focus was, rather, on seeking to establish a 'legitimate interest' which is no longer the appropriate test
- thirdly, it was noted that nowhere in the evidence was there a suggestion that Forum was unable to understand the issues which arose in the underlying proceedings. As Lady Hale made clear, it is incumbent upon an applicant to justify its position by reference to the open justice principle, and Forum had not done so in the present case
- fourthly, again following on from the previous point, given that this was a discretionary matter, it was telling that Forum already had documents in their possession, including experts' reports and the written opening and closing

submissions, which would allow them to understand the issues and evidence adduced in support of the parties' cases

- fifthly, drawing the previous points together, in making the application, Forum was seeking not to advance the open justice principle, but was simply trying to obtain documentation for deployment in other litigation. Forum was, in effect, trying to make a third-party disclosure application in relation to other proceedings, but seeking to do so without regard to the constraints to which a genuine disclosure application would be subject

Case details

- Court: Queen's Bench Division, High Court of Justice
- Judge: Picken J
- Date of judgment: 16 July 2020

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