

New Article on Non-Party Access to Court Documents and the Open Justice Principle

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Ms Ana Koprivica Harvey (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law) recently posted a new paper in the MPILux Research Paper Series, titled Non-Party Access to Court Documents and the Open Justice Principle: The UK Supreme Court Judgment in Cape Intermediate Holdings Ltd v Dring. Below is an overview provided by the Author.

This article analyses the eagerly awaited the UK Supreme Court judgment in *Cape Intermediate Holdings Ltd v Dring*, unanimously delivered on 29th July 2019. Broadly speaking, the case concerned the scope and operation of the constitutional principle of open justice. More precisely, the questions before the Supreme Court were how much of the written material placed before a court in a civil action should be accessible to persons other than the parties to the proceedings, and how such access should be facilitated.

Case Background

The documents to which access was sought related to a lengthy trial in product liability proceedings against Cape Intermediate Holdings, a company involved in the manufacture and supply of asbestos. Following the settlement of the proceedings, the Asbestos Victims Support Groups Forum UK (the Forum), which was not a party to the dispute, applied to the court under Rule 5.4C of Civil Procedure Rules (CPR) for access to all documents used at or disclosed for the trial, including trial bundles and transcripts. The relevant Rule 5.4C CPR provides that a person who is not a party to proceedings may obtain from the court records copies of a statement of case and judgment or orders made in public, and, 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’. In first instance, it was held that jurisdiction to grant the order sought existed either under Rule 5.4C or at common law. Following the appeal by

Cape, the Court of Appeal limited the originally broad disclosure to the Forum to (i) statements of case held by the court pursuant to Rule 5.4C; (ii) provision by Cape of witness statements, expert reports and written submissions, and (iii) an order that the application for further disclosure be listed before the trial judge or another High Court judge to decide whether any other documents had lost confidentiality and had been read out in court or by the judge, or where inspection by the Forum was necessary to meet the principle of open justice. Neither Cape nor the Forum were satisfied with this decision and decided to bring their appeal and cross-appeal, respectively, before the Supreme Court. In essence, the appeal considered the powers of the court pursuant to the Civil Procedure Rules or its inherent jurisdiction to permit access to documents used in litigation to which the applicant was not a party, and contested the scope of such powers. The Supreme Court unanimously dismissed the appeal and cross-appeal.

Supreme Court Judgment

Notably, the Supreme Court clarified that the scope of the court's power to order access to materials to non-parties is not informed by "the practical requirements of running a justice system" (referring thereby to the keeping of records of the court, as laid down in Rule 5.4C), but the principle of *open justice*. In other words, according to the Court, the CPR are not exhaustive of the circumstances in which non-parties could be given access to court documents. On the contrary, they are considered a "minimum in addition to which the court had to exercise its inherent jurisdiction under the constitutional principle of open justice".

Furthermore, the Court held that pursuant to the open justice principle, the default position – as previously established in *Guardian News and Media Ltd* – was that the public should be allowed access not only to the parties' written submissions and arguments, but also to the documents which had been placed before the court and referred to during the hearing.

As there seems no realistic possibility of the judge making a more limited order than the Court of Appeal, the Supreme Court upheld the orders for access already made by the Court of Appeal, with one change. It ordered that the balance of the application be listed before the judge in the original proceedings to determine whether the court should require Cape to provide a copy of any other document placed before the judge and referred to in the course of the trial to the Forum, at the Forum's expense, in accordance with the principles laid down in the Supreme

Court's judgment.

Assessment

This judgment is significant for at least two reasons. On the one hand, it provides an extensive analysis of the court's power to allow third parties access to court documents under the constitutional principle of open justice. In so doing, the judgment revisits the contents of the open justice principle and its application in the context of modern, predominantly written-based, civil proceedings. On the other, the judgment provides certain guidance on the circumstances in which a third party may obtain access to court documents and, to some extent, clarifies the type of documents that may in principle be obtained. As a result, the judgment provides broad third party access to the court files that have previously been under the exclusive purview of the court and the parties.

The present article provides an assessment of the Court's findings, focusing on the interpretation of the open justice principle in relation to non-party access to court documents. In doing so, the article analyses the judgment in both comparative and the internal, UK legal context.

Seen from a comparative law perspective, the present judgment is a reminder of just how drastically different the approaches to the application of the open justice principle may be. In the context of third-party access to documents before courts this is particularly visible. These differences may be explained by the recent practice of exclusive reliance of the UK Supreme Court on the common law principle of open justice where non-party access to court documents is concerned. In other words, it is argued that, by employing the "common law exclusivity" approach, the Supreme Court has over time further developed the principle of open justice which has come to encompass a broader non-party access to court documents.

Observed within a broader context of the developments within the UK judicial system, the Supreme Court judgment may be understood as a reaction to the increasingly expressed concerns regarding the privatisation of civil justice. This is all the relevant so given the fact that the case at hand was settled out of court before the open judgment could be rendered. From a practitioner's point of view, the judgment may potentially influence the parties and their counsels' decision as to the type and number of documents they wish to file in a given case.

It is concluded that the Supreme Court judgment represents a point of departure for future applications for access to court documents. The judgment is not the end of the road, neither for the parties to the present dispute, nor with regard to future applications for access to documents. For the purposes of *Cape Intermediate Holdings v Dring*, the judgment requires the High Court to now consider whether further access should be granted pursuant to the open justice principle as interpreted by the Supreme Court. It remains to be seen how the High Court will now decide this case.