

# WHAT IS REALISTIC AND ACHIEVABLE FOR NON-PARTIES SEEKING TO ACCESS COURT DOCUMENTS UNDER THE PRINCIPLE OF OPEN JUSTICE FOLLOWING CAPE HOLDINGS V DRING?

What is the significance for practice?

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# *DRING* ...SOME MYTHS?

- It has made clear once and for all the limits of access to documents?
- It is a liberalising approach, favourable to open justice?
- It makes clear the regime for access to documents applies to all courts and tribunals, criminal, civil (even family and employment) throughout the UK.....? (This one is true...)

# WHAT IS *DRING*? .... (1) *FACTS*...

- ***Dring (on behalf of the Asbestos Victims Support Group) v Cape Intermediate Holdings Ltd (MLA intervening)*** [2019] UKSC 38 [2019] 3 WLR 429
- Employers' insurers claimed against asbestos manufacturer after settlement of PI claims by employees
- After 6 week trial but before judgment case settled
- Victims group ("the Group") applied for access under CPR 5.4C (2) to all documents used at or disclosed for the trial including trial bundles as "records of the court"

# WHAT IS *DRING*? ....(2) *FACTS*

- Core trial bundle (Bundle C) – over 5,000 pages – all the documents referred to for the purpose of the trial, whether in written/oral submissions or evidence during the trial (incl any disclosed docs ref to in trial)
- On the application for access, Master ex parte ordered the Group be provided with - hard copy trial bundle incl all disclosed docs in it, all witness statements, experts reports, transcripts of evidence and written submissions
- The electronic bundle (D), containing all disclosed docs in the case, was ordered to be retained at court but not handed over

# WHAT IS *DRING*? ... *THE ISSUES* (1)

- Master had granted access on basis the docs were “records of the court” (CPR 5.4C) or in any event within her power to order at common law
- CA set aside Master’s order as too wide
- (a) “Records of the court” much more limited than she had held [eg not a “record” just because filed at court]
- (b) But court had inherent jurisdiction to allow non-party to obtain a wide range of documents

# WHAT IS *DRING*? ... *THE ISSUES* (2)

- Skip to Supreme Court for the latest word...on “this important case” (per Lady Hale at [15])
- Issues before SC :
- (1) What is the scope of CPR 5.4C(2)? Does it give court power to order access to all documents filed, held at court? **NO**
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- (2) Is access to court documents governed solely by the CPR save in exceptional circumstances? **NO** Or does it have an inherent power to order access outside the CPR? **YES IT HAS IP**
- (3) If there is such a power, how far does it extend and how should it be exercised? **THAT IS THE QUESTION...**

# WHAT DOES *DRING DECIDE*?

- **That there are 2 ways the court can give a non-party access to documents:**
- (1) Under CPR 5.4C – (as of right under (1)) where it is a statement of case, judgment or order given/made in public, or (with permission under (2)) from the “records of the court” a copy of any other document filed
- (2) Under the inherent jurisdiction – any document or information placed before the court or tribunal, where the court determines that the open justice principle requires access and there are no counterbalancing factors which outweigh OJ
- The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state throughout the UK

# ISSUE (1) SCOPE OF “RECORDS OF THE COURT”

- CPR 5.4C:
- (1) *The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of— (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it; (b) a judgment or order given or made in public (whether made at a hearing or without a hearing) ...*
- (2) *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.*

# ISSUE (1) “RECORDS OF THE COURT” (CONTD)

- SC clarifies “records of the court” in this context refers to “those documents and records which the court itself keeps for its own purposes” [21]-[[24]
- It is not every document filed at court (i.e. it would not without more include for example witness statements, correspondence or trial bundles)
- Contrast CPR PD5A, para 4.2A which lists the documents a party to proceedings may obtain from court records unless court orders otherwise: eg claim form, statements of case, attachments to CF, A/S, an application notice and evidence in support (subject to exceptions)

# ISSUE (2) INHERENT POWER TO ALLOW ACCESS

- SC clarifies that the “default position” is that a non-party/the public should be given access to the following types of documents and information [44]:
  - \* Parties’ written submissions
  - \* Documents that have been placed before the court and referred to during the hearing – eg witness statements that stood in chief, expert reports, documents referred to during the hearing
  - \* But this should not be limited to those the judge has been asked to read or has said that s/he has read (For what if s/he failed to read a doc important to understanding its decision?)

# ISSUE (2) OPEN JUSTICE PRINCIPLE

- Access is the default position in recognition of the importance of the open justice principle (OJP) [34]-[40]
- SC held:
- (1) *“Unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what [the OJP] requires in terms of access to documents or other information placed before the court or tribunal in question”* [41]

# ISSUE (2) OJP (CONTD)

(2) That the principal purposes of OJP are two-fold “and there may well be others”:

- (a) To enable public scrutiny of the way in which the courts decide cases – hold judges to account for their decisions; instill public confidence etc. [42]
- (b) To enable the public to understand how the justice system works and why decisions are taken. *“For this they have to be in a position to understand the issues and the evidence in support of parties’ cases”*[43]

# ISSUE (3) BALANCING OJP AGAINST OTHER INTERESTS

- SC at [39] approved the approach of the CA and its following summary of the balancing exercise in *R (Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2013] QB 618:
- “*Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson JSC observed in [Kennedy v Information Comr \(Secretary of State for Justice intervening\)](#) [2015] AC 455 , 525, para 113, the court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.*”

# ISSUE (3) BALANCING EXERCISE (CONTD)

- SC at [40]: *“It follows that there should be no doubt about the principles. The question in any particular case should be about how they are applied.”*
- Looking at the other side of the balance from OJP, it is clear that [45]-[46]:
- (1) Although the court has power to give access, the requester has no right to it (unless the rules grant such a right)
- (2) It is for the requester to (i) explain why s/he seeks the information/document and (ii) how granting access to it will advance the open justice principle

# ISSUE (3) BALANCING EXERCISE (CONTD)

- (3) *“It may well be that the media are better placed than others to demonstrate a good reason for seeking access”* [45] [eg in furtherance of a proposed publication in the public interest in connection with the proceedings in question]
- (4) But the court has to carry out a fact-specific balancing exercise. *“On the one hand will be ‘the purpose of the [OJP] and the potential value of the information in question in advancing that purpose’”* [45]
- (5) On the other side of the balance will be *“any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others”* [46]

# ISSUE (3) COMPETING INTERESTS

- (6) *“There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case.”* [46]

# ISSUE (3) PRACTICALITIES OF ACCESS

- SC also makes clear that it will also be relevant to consider the “practicalities and the proportionality of granting the request.” [47]
- For example – it is said that it is highly desirable that the application for access is made during the trial when the material is readily available, parties are before the court and trial judge in day to day control of the process

# ISSUE (3) PRACTICALITIES OF ACCESS (CONTD)

- *“People who seek access after the proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties may not have done so. Even if they have, the burdens placed on the parties in identifying and retrieving the material may be out of all proportion to benefits to the open justice principle, and the burden placed upon the trial judge in deciding what disclosure should be made may have become much harder, or more time-consuming, to discharge.”*  
[47]

# ISSUE (3) PRACTICALITIES OF ACCESS (CONTD)

- *“On the other hand, increasing digitisation of court materials may eventually make this easier.”*
- *“In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate.” [47]*

# FINALLY...UNRESOLVED ISSUES..(1)

- The facts in *Dring* are actually quite narrowly
- Therefore the following observations and questions come to mind  
(by way of example):
  - (a) SC focuses on trials but it is obviously not limited to trials
  - (b) It is predicated on the hearing having been heard in open court
  - (c) It is unlikely that generally access to the whole trial bundle would be granted: though contrast Employment Tribunal procedure which specifically provides for the public to access the trial bundle when it is made available in the tribunal room

# UNRESOLVED ISSUES..(2)

- (d) It is significant that SC distinguishes access requests made promptly or during the trial (hearing) with those made later – this may have implications for journalism where for example the original hearing was not known about at the time but media subsequently learned of it (say 6 months later) and wished to publish a story about it.
- (e) What about where the media wish to access documents not to aide a court report or story about the proceedings (i.e. for OJP purposes), but to “fish” for material for a tangentially related story?

# UNRESOLVED ISSUES..(3)

- (f) More broadly – there is a question as to whether information/documents must be relevant to the issues which the court has to determine in the proceedings in order for the OJP to be engaged (or at least powerfully engaged) [see emphasis in [44]]
- (g) If the issues are plainly irrelevant – eg where a document was mistakenly adduced in open court but contains information irrelevant to the decision to be made – does this not mean the OJP purposes cannot be prayed in aid?
- (h) What about the qualification in [42] “*there may well be others*” [OJP purposes]?

# SO...CONCLUSION

- *Dring* facts relatively esoteric
- Not such clear guidance as first seems
- GOOD FOR BUSINESS...?

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