

Dispute Resolution
Case Law Update
Rosling King LLP



Background

The Asbestos Victims Support Groups Forum UK (**'the Forum'**), applied to the Court, under CPR rule 5.4C, for access to all documents used at or disclosed for the trial where asbestos manufacturer Cape Intermediate Holdings (**'Cape'**) was the Defendant. The Forum was not a party to either set of proceedings involving Cape which settled after trial but before judgment. The Forum's application for access, including to the full trial bundle, was allowed by the Master at the first instance. Cape subsequently appealed.

The Court of Appeal allowed Cape's appeal, limiting access to the Forum to statements of case held by the Court pursuant to CPR rule 5.4C and witness statements, expert reports and written submissions listed in the Appendix 1 of the Master's Order. Pursuant to CPR rule 5.4C, a person who is not a party to proceedings may obtain from the Court copies of a statement of case and any judgments or orders made, and, if the Court gives permission, copies of any other document filed by a party or communication between the Court and a party.

Cape appealed to the Supreme Court, arguing that the Court of Appeal did not have jurisdiction to make the order it did, and that disclosure should have been limited only to the statements of case held on the Court file. The Forum cross appealed on the grounds that the Court of Appeal had been wrong to limit the scope of CPR rule 5.4C in the way it did, and that the Court should have made a wider order. The appeal concerns the scope of CPR rule 5.4C, and whether the Courts have the inherent jurisdiction to order access to documents for non-parties.

The Decision

The Supreme Court dismissed the appeal and cross-appeal. The Court found that the Court of Appeal had the inherent jurisdiction to make the order it did, and also had jurisdiction to make a wider order if it were right to do so. The basis of making any wider order would be under the open justice principle, not CPR rule 5.4C. The orders for access already made by the Court of Appeal were upheld by the Court. However, the balance of the application was re-listed to determine whether the Court should require Cape to provide copies of any other documents placed before the Court and referred to in the trial to the Forum.

The constitutional principle of open justice applies to all Courts, which have the inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the Court. The question is how that inherent jurisdiction should be exercised in the particular case, meaning the extent of any access permitted by the Court's rules should not be considered as determinative. Lady Hale delivering her judgment to the Court drew on the principles laid down in *R (Guardian News and Media) v City of Westminster Magistrates' Court* to reaffirm the default position: 'the public should be allowed access, not only to the parties' submissions and arguments, but also to the documents which have been placed before the Court and referred to during the hearing.' The default position should be that access should be permitted on the basis of the open justice principle, not CPR rule 5.4C. If the principle of open justice is not engaged, the Courts would be unlikely to grant access, unless there are strong grounds for the request in the interests of justice.

The Court found that, although it has the power to permit access, the applicant has no right for

access to be granted (save in cases where the rules grant such a right). A non-party seeking access must explain why he seeks it and how granting access will advance the open justice principle. In short, it is for the party seeking to persuade the Court to allow access outside the usual rules to show good cause for doing so. The Courts would be likely to grant access if the open justice principle is engaged and the applicant has a legitimate interest in inspecting the documents. The Court found that when evaluating the grounds for access a fact-specific proportionality exercise should be carried out, where the purpose of the open justice principle, the potential value of the material in advancing that purpose and any risk of harm which access may cause to the legitimate interests of others, are central.

Commentary

The Court concluded that when exercising its discretion under CPR rule 5.4C or its inherent jurisdiction to permit access, it had to balance the non-party's reasons for seeking disclosure against the party's reasons for wanting to preserve confidentiality. Central to the Court's fact-specific balancing exercise are the countervailing principles for denying access, including the protection of national security, privacy interests, trade secrets or commercial confidentiality. The practicalities and proportionalities of granting access will also be relevant, in cases where proceedings are over.

The Supreme Court's decision sends a message to the bodies responsible for framing the Court rules to give consideration to the questions of principle and practice raised by this case. The Court confirmed that there can be no argument over the importance and universality of the principle of open justice. The principal purposes of the open justice principle are two-fold: to hold Courts and Judges to account, and to enable the public to understand how the justice system works and why decisions are taken. It is worth noting that non-parties should not seek access unless they can show a good reason why it will advance the open justice principle, that there are no countervailing principles which may be stronger, and that granting the request will not be impracticable or disproportionate. The Court advises that it is highly desirable to make the application for access during the trial, because non-parties seeking access after proceedings are over may encounter difficulties particularly in terms of practicality and proportionality.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.