



***Cape v Dring*: High Court clarifies the proper approach to applications by non-parties for access to documents referred to at trial under the inherent jurisdiction and open justice principle**

The *Cape v Dring* litigation concerns an attempt by a non-party to obtain copies of the trial bundle used during a six-week asbestos trial involving Cape which settled before judgment in early 2017. At first instance the Master granted the non-party permission to have copies of all documents, including the trial bundle of 5000 pages of disclosure, referred to at the trial. The Supreme Court confirmed in July 2019 that the non-party was entitled to written submissions, witness statements and expert reports under the inherent jurisdiction of the court, but remitted the question of what, if any, documents in the trial bundle the non-party should obtain to the original trial judge. On 16 July 2020 Picken J considered that question and held that Mr Dring was not entitled to receive any other documents.

BACKGROUND

1. In April 2017 the Asbestos Victims Support Group Forum UK (an unincorporated association now acting through its Chairman, Mr Dring), applied under CPR 5.4C to obtain copies of documents used in a six week High Court asbestos trial before Picken J. The litigation settled in March 2017, after trial but before judgment. The Forum was not a party to the litigation and no representative of the Forum had attended the trial.
2. The application substantially succeeded before Master McCloud, who held in December 2017 (at [2017] EWHC 3154 (QB)) that Mr Dring should be given

copies of all the documents he sought save for documents disclosed but not put before the court.

3. Cape's appeal succeeded in part: in July 2018 the Court of Appeal held (at [2019] 1 WLR 479) that the Master had adopted too broad a view of the scope of CPR 5.4C. It accepted Cape's contention that the "records of the court" for the purposes of CPR 5.4C should be construed narrowly. It included documents on the court file (such as pleadings) but not the trial bundle, disclosed documents or written submissions.
4. However, the Court of Appeal also held that the court's inherent jurisdiction to permit access to documents pursuant to the open justice principle extended to all documents read by the judge and/or read out in open court. On this basis, the Forum was granted access to all witness statements, expert reports and written submissions under the inherent jurisdiction. The Court of Appeal considered that the Forum might also be entitled to copies of the disclosure documents contained in the trial bundles and referred to during the trial, and remitted the case to the original trial judge to determine this issue.
5. Cape appealed to the Supreme Court, and the Forum cross-appealed. In July 2019, Lady Hale delivered the judgment of the court (at [2020] AC 629). Both appeal and cross-appeal were dismissed. The Supreme Court restated the principles to be applied in applications of this nature. It did not vary the remission of the remainder of the application to the High Court to determine whether any of the disclosure documents in the trial bundle should be provided to the Forum.
6. The Supreme Court instructed the High Court to apply the principles which it had set out, rather than those advanced by the Court of Appeal. The Supreme Court emphasised the importance of the principle of open justice. It also held (at §41) that it was "*not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case.*"

THE REMITTED APPLICATION

7. On the remitted application, Picken J considered the Supreme Court's decision in detail. The Forum's primary position was that the judge had no discretion to exercise as it had been held to have the necessary "*legitimate interest*" and the Master's exercise of discretion on this basis remained valid; accordingly, the

court was obliged to order that the Forum be provided with copies of all 5000 pages of disclosure documents contained in the trial bundle and referred to during trial.

8. The Judge rejected this submission and concluded that he was required to exercise his discretion afresh (§45). Instead, he accepted Cape's central submission that the Supreme Court's judgment was a restatement of the legal principles applicable to applications of this nature (rather than an attempt to reconcile different approaches taken in different cases). In particular, on a proper construction of the Supreme Court's judgment, the "legitimate interest" approach as set out in *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984 was no longer correct (§61).
9. Picken J also rejected the Forum's submission that there was a "default position" that access to documents would be granted unless countervailing factors could be raised by the respondent to the application. He accepted Cape's submission that, properly understood, the "default position" did not really assist the Forum (§69) because the applicant first had to demonstrate why he seeks access and how granting him access will advance the open justice principle. It was in the context of an applicant who had already discharged that burden that Toulson LJ (as he then was) had referred to the default position in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618. However, the Judge rejected Cape's further submission that this requirement should, in effect, be treated as a prior hurdle or freestanding prerequisite; rather, as the Forum characterised it, there was a "sliding scale".
10. In conducting the balancing exercise required, Picken J noted that the mere fact that documents were sought for other litigation was no bar to the court ordering them to be provided. But for seven reasons (§§98-119), he considered that the Forum's application did not advance the second principal purpose of the open justice principle (relied on by the Forum), namely "to enable the public to understand how the justice system works and why decisions are taken" (per Lady Hale, at §43 of the Supreme Court Judgment). One of the fundamental points was that it was clear that the Forum had already been granted sufficient documentation to enable it to understand the proceedings well, and it had in fact demonstrated its detailed understanding of the proceedings and the evidence adduced at trial by its own submissions. In essence, the real motivation behind the application was to obtain the disclosure documents for

use in other proceedings rather than to understand any particular aspect of the original proceedings; the Forum was, in effect, making a third-party disclosure application, but without the constraints to which a genuine disclosure application would be subject (§115).

11. Picken J was also influenced by two other factors: first, that if the Cape documents were ordered to be provided to the Forum and then used in other litigation, Cape would be unable to offer any context to or explanation of those documents (§118). Secondly, he considered that it was significant that the Forum had not made an application during the course of the trial itself – a factor also identified as relevant by the Supreme Court. Had it done so then a range of options would have been open to the trial judge to facilitate the Forum’s understanding of the proceedings, which would have been likely to fall short of ordering that the Forum should be provided with copies of all the relevant disclosure documents; the Forum should not be in a better position merely because it failed to make its application at the time of the trial (§120).
12. On these bases, the application was refused and the Forum was left with the material on the court file, plus the written submissions and witness and expert evidence it had already been provided with. Permission to appeal was refused.

COMMENT

13. Picken J’s judgment is a very careful analysis of the Supreme Court’s decision and how the relevant principles should be applied in practice. The judgment demonstrates that applicants who are unable to satisfy the relevant principles will be denied access to disclosure documents even if they can identify some “*legitimate interest*” for wanting to obtain the documents. Further, it suggests that the court will be astute to attempts by third parties to use the open justice principle to obtain disclosure of documents by the back door in circumstances in which such access will not genuinely advance the open justice principle.
14. Geraint Webb QC and James Williams, both of Henderson Chambers, appeared before Picken J and have acted for Cape throughout the proceedings, instructed by Jonathan Isted and his team at Freshfields Bruckhaus Deringer.

Henderson Chambers
17 July 2020