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Supreme Court rules that all courts and tribunals are subject to the open justice principle

The Supreme Court has ruled in the case of *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] that all courts and tribunals that exercise the judicial power of the state are subject to the 'open justice' principle.

The principles of open justice are that the public can understand and scrutinise the court, thereby enabling the public to understand the issues and evidence that is provided by parties.

Civil proceedings have moved from being dominated by oral evidence to proceedings that generate a great deal of written evidence. As this movement has continued, questions have arisen as to how much of the written material placed before the court in a civil action should be accessible to those who are not parties to the proceedings and how this material should be made accessible to them. As most of the evidence is now reduced to writing and is not read out in court it is almost impossible to know what happens in court without access to the written material which, therefore, hinders open justice.

Lady Hale, delivering the Supreme Court's judgment, said of access to court documents that "the court rules are not exhaustive of the circumstances in which non-parties may be given access to court documents. They are a minimum..."

As per *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* (Article 19 intervening) [2012] EWCA Civ 420, the default position as to court documents is that "the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing."

The court has the power to grant access to these documents, however the applicant does not have an automatic right to be granted access to them. The applicant must put forward a cogent case as to how access will advance the open justice principle following which the court will balance against the possible harm caused by disclosure, such as the release of confidential information.

Also to be considered are the proportional and practical aspects of granting a request. It is advisable that the application for the written material is to be submitted during the trial as the documents would be readily available at this point. After the trial has concluded the likelihood of a successful application diminishes with time as identifying and retrieving the documents becomes practically difficult as the court and parties may not have retained them and, as such, the effort required to reproduce them may not be proportional to the principle of open justice.

Increasing the scope of access beyond the default position in relation to court documents is therefore “the inherent jurisdiction in support of the open justice principle, not the Civil Procedure Rules, CPR rule 5.4C(2).” The aforementioned CPR subsection states that:

“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.”

With reference to CPR 5.4C(2), “records of the court” is outlined in the judgment delivered by Lady Hale as meaning “documents and records which the court itself keeps for its own purposes” and is, therefore, distinct from the purposes for which non-parties may be given access to court documents.

Judgment may be viewed at: <https://www.bailii.org/uk/cases/UKSC/2019/38.html>

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