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Non-Party Access to Court Documents and the
Open Justice Principle:
The UK Supreme Court Judgment in *Cape
Intermediate Holdings Ltd v Dring*

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NON-PARTY ACCESS TO COURT DOCUMENTS AND THE OPEN JUSTICE PRINCIPLE: THE UK SUPREME COURT JUDGMENT IN *CAPE INTERMEDIATE HOLDINGS LTD V DRING*

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Abstract

On the 29th July 2019, the UK Supreme Court rendered a unanimous, eagerly awaited, judgement in the case of *Cape Intermediate Holdings Ltd v Dring*. Broadly speaking, the case concerned the scope and operation of the constitutional principle of open justice. More precisely, the questions before the 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. The 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 largely opens third party access to the court files that have been under the exclusive purview of the court and the parties.

Keywords

Non-party access to documents, open justice, open court, court files, court documents, UK Supreme Court, privatisation of civil justice

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On the 29th July 2019, the UK Supreme Court rendered a unanimous, eagerly awaited, judgement in the case of *Cape Intermediate Holdings Ltd v Dring*.¹ Broadly speaking, the case concerned the scope and operation of the constitutional principle of open justice.² More precisely, the questions before the 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.³

The 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 largely opens third party access to the court files that have been under the exclusive purview of the court and the parties.

1. Background: Product Liability Proceedings before the High Court of Justice

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. The contribution claims in these proceedings were brought before the High Court of Justice by employers, through their insurers (Concept 70 Ltd & others), who had previously been held liable for exposing their employees to asbestos at work.⁴ In particular, the Claimants had been ordered to pay damages to their employees on the basis that they had, as a consequence of having been exposed to asbestos from products manufactured by Cape Intermediate Holdings, contracted mesothelioma.

The trial in this case involved an unusually - and "uniquely in the history of asbestos litigation"⁵ - extensive disclosure exercise which involved the putting together of large quantities of historic material and records relating to asbestos safety and regulation. Such an extensive disclosure exercise was justified by the size of the claim.⁶ On the 14th March 2017, following the conclusion of the trial, but before the judgment could be rendered, the claims between the parties were settled out of court on a confidential basis.

On the 6th April 2017, shortly after learning about the settlement, the Asbestos Victim Support Groups Forum UK (hereinafter "the Forum"), an association providing help and support to persons who suffer from asbestos-related diseases and which was not party to the proceedings, applied to the court requesting access to all of the documents used at or disclosed for the trial. According to the Forum, it had been communicated to them that pursuant to the terms of the confidential settlement, many of the disclosure documents were to be imminently destroyed.⁷

¹ *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38.

² For a comparative discussion on the open justice principle see Burkhard Hess, Ana Koprivica Harvey (eds) *Open Justice: The Role of Courts in a Democratic Society* (Nomos 2019).

³ [2019] UKSC 38 para 2.

⁴ *The Asbestos Victims Support Groups Forum UK v Concept Limited & Ors and Cape Intermediate Holdings PLC* [2017] EWHC 811(QB) para 7.

⁵ [2017] EWHC 811(QB) para 7.

⁶ *Mr Graham Dring v Cape Distribution Limited, Cape Intermediate Holdings Limited, Concept 70 Limited (and others), Aviva PLC* [2017] EWHC 3154 (QB) para 9.

⁷ [2017] EWHC 811(QB) para 11.

Consequently, the Forum applied to the Court to have these documents preserved, as well as to obtain copies of them, pursuant to Rule 5.4C of the Civil Procedure Rules (CPR), which regulates third party access to the “records of the court”.

Under this provision, members of the public who are not parties to proceedings may obtain from the court records copies of certain documents, namely: statements of case (but not any document filed with or attached to that statement, or intended by the party whose statement it is to be served with it),⁸ and judgment or orders given or made in public.⁹ In addition to these narrowly defined rights of access, Rule 5.4C(2) stipulates 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.”

The Forum applied to the court requesting access to all of the documents used at or disclosed for the trial, including the trial bundles and trial transcripts. The Forum considered that the disclosure of these documents, which they believed would contain valuable information about the asbestos industry’s knowledge of the dangers of asbestos, was likely to have significant implications for other asbestos-related claims. Furthermore, the Forum argued that these documents could assist the claimants, defendants and the courts in pending and future cases when it came to understanding the issues in asbestos-related disease claims.¹⁰

2. The Decisions of the English Courts

2.1 First Instance: The Master’s Broad Interpretation of the Open Justice Principle

The Forum’s application was successful in the first instance. The Master adopted a *broad* understanding of the open justice principle as a guiding principle in granting access to court records pursuant to Rule 5.4C. Notably, in her Judgment of 5th December 2017, the Master stated that Rule 5.4C is “the primary means by which the court’s common law power to allow access to documents to the public from the court record is administered but the common law is the master and not the servant of the rules.”¹¹ In other words, “[s]erved documents not on the records of the court do not fall within rule 5.4C but may be disclosed under the court’s common law powers.”¹²

Consequently, the Master held that she had jurisdiction, both under common law and the relevant procedural rule, to order that a non-party be given access to all the material sought (with the exception of the electronic version of the trial bundle which contained all the disclosed documents in each set of proceedings).¹³ Accordingly, she ordered that the Forum should be provided with a hard copy of the trial bundle, including the disclosure documents in the parties’ core bundle, all witness statements, expert reports, transcripts and written submissions.¹⁴

⁸ Civil Procedure Rules (CPR), Rule 5.4.C (1)(a).

⁹ CPR Rule 5.4.C (1)(b).

¹⁰ [2019] UKSC 38 para 6.

¹¹ [2017] EWHC 3154 (QB) para 79(1).

¹² [2017] EWHC 3154 (QB) para 79(6).

¹³ [2019] UKSC 38 para 7.

¹⁴ [2017] EWHC 3154 (QB) paras 175-177, 184.

2.2. On Appeal: The Court of Appeal's "Narrower View"¹⁵

Cape appealed the Master's order, arguing inter alia that that she neither had jurisdiction under Rule 5.4C nor at common law to make an order of such a broad scope. The appeal was transferred to the Court of Appeal on the basis that it raised important points of practice and procedure.¹⁶

The Court of Appeal partly agreed with Cape and held that the "records of the court" for the purpose of the discretion to allow access under CPR Rule 5.4C(2) were indeed much more limited than the Master had ordered. Contrary to Cape's arguments, however, the Court of Appeal found that the Court undeniably had inherent jurisdiction to permit a non-party to obtain further documents in principle. In the Court's view, such inherent jurisdiction was, nonetheless, limited. In largely following the approach in *FAI*,¹⁷ the Court of Appeal held that the court had the inherent jurisdiction to allow access to all documents which were likely to have been read out in open court had the trial been conducted orally.¹⁸

Conversely, it found that such inherent jurisdiction did not extend to permit non-parties to obtain certain documents simply on the basis that they had been *referred* to in open court.¹⁹ These included trial bundles, documents referred to in skeleton arguments or written submissions, or documents referred to in witness statements/experts' reports, or in open court.²⁰ In other words, the Court of Appeal held that the mere fact that a document had been referred to in court did not mean that it would have been read out had the trial been conducted wholly orally, or that sight of it is necessary in order to understand or scrutinise the proceedings.

Consequently, the Court of Appeal set aside the Master's order. It ordered that the court should provide the Forum with copies of all statements of case including requests for further information and answers, pursuant to Rule 5.4C(1) and that Cape should provide the Forum with copies of the witness statements, expert reports and written submissions. Lastly, it ordered that the application be listed before (ideally) the acting judge in the original proceedings to decide, in line with the principles as interpreted by the Court of Appeal, whether any other document sought by the Forum should be ordered to be disclosed to them by Cape.²¹

2.3. The Judgment of the Supreme Court

Neither Cape nor the Forum were satisfied with this decision and decided to bring their appeal and cross-appeal, respectively, before the Supreme Court.

On the one hand, Cape argued that the Court of Appeal did not have the inherent jurisdiction to make the broad order that it did. Notably, it contended that the Court of Appeal was "wrong to equate the court's inherent jurisdiction to allow access to documents with the principle of open justice; the treatment of court documents is largely governed by the Civil Procedure Rules and the scope of any inherent jurisdiction is very limited".²² The Forum, on the other hand, argued that the court should have made a wider order under CPR Rule 5.4C(2).²³ Notably, the Media Lawyers Association intervened

¹⁵ [2019] UKSC 38 para 50.

¹⁶ [2019] UKSC 38 para 8.

¹⁷ *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 ("FAI").

¹⁸ [2019] UKSC 38 para 32; [2018] EWCA Civ 1795 para 107: "documents read or treated as read in open court".

¹⁹ [2018] EWCA Civ 1795 para 112 (1). Emphasis added.

²⁰ [2018] EWCA Civ 1795 para 112 (1).

²¹ [2019] UKSC 38 para 11.

²² [2019] UKSC 38 para 12.

²³ [2019] UKSC 38 para 13.

in the proceedings before the Supreme Court, emphasising the importance of media access to court documents in order to report on the proceedings.²⁴

The Supreme Court rejected both Cape's appeal and the Forum's cross-appeal. It held that not only did the Court of Appeal have jurisdiction to make the order that it did, but it also had inherent jurisdiction to make a *wider* order if it were right to do so.²⁵ Furthermore, contrary to the submission of the Forum, the basis for making any such wider order was the court's inherent jurisdiction in support of the open justice principle, and not the relevant provisions of the CPR. In the words of the Court, it was "the common law, not the [procedural] rule which created the court's power; the rule simply provided a practical procedure for implementing it".²⁶

Consequently, according to the Court, the Civil Procedure Rules 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*²⁷ in addition to which the court had to exercise its inherent jurisdiction under the constitutional principle of open justice.

Notably, the Court held that pursuant to the open justice principle, the default position – as established in *Guardian News and Media Ltd*²⁸ – 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".²⁹ Therefore, contrary to the holding of the Court of Appeal, the Supreme Court held that the requirement for a document to have been read out or treated as having been read out in open court was excessive. Instead, in line with *Guardian News and Media Ltd*, mere reference to the documents in open court was satisfactory for the inherent jurisdiction to cover access to such documents.

When exercising the inherent jurisdiction and evaluating the grounds for opposing access to court documents, the Supreme Court stressed that a court would have to carry out a fact-specific proportionality analysis: "Central to the court's evaluation will be the: purpose of the open justice principle; the potential value of the material in advancing that purpose, and any risk of harm which access to the documents may cause to the legitimate interests of others."³⁰ Among such legitimate interests, the Court included the reasons of 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.³¹

The Supreme Court ordered that the Court of Appeal's order for access to the various documents would stand, with one change. Namely, the application would be listed before the High Court judge (preferably Picken J, the acting judge in the original proceedings) in order to determine whether the court should require Cape to provide copies of any other documents placed before the judge *and referred to* in the course of the trial, in accordance with the (broader) understanding of the open justice principles as set out by the Supreme Court.³²

²⁴ [2019] UKSC 38 para 14.

²⁵ [2019] UKSC 38 para 49.

²⁶ [2019] UKSC 38 para 37.

²⁷ [2019] UKSC 38 para 34.

²⁸ *R (Guardian News and Media Ltd) v City of Westminster Magistrate's Court and another (Article 19 intervening), Guardian News and Media Ltd v Government of the United States* [2012] EWCA Civ 420.

²⁹ [2019] UKSC 38 para 38 quoting *Guardian News and Media Ltd* [2012] EWCA Civ 420 para 85.

³⁰ [2019] UKSC 38 para 38 quoting *Guardian News and Media Ltd* [2012] EWCA Civ 420 para 85.

³¹ [2019] UKSC 38 para 46.

³² [2019] UKSC 38 para 50.

3. Analysis of the Supreme Court's Decision

3.1. The Purposes and the Application of the Principle of Open Justice

The Court reiterated the significance of the constitutional principle of open justice on numerous occasions in its judgment and underlined that there should be no doubt about the importance and universality of the principle. The question, rather, is how the principle should be applied in any given case. In this regard, several observations can be made with regard to the Court's findings.

First, the Court emphasises that the constitutional principle of open justice applies to *all* courts and tribunals in the United Kingdom exercising the judicial power of the state. In other words, the courts' inherent jurisdiction to decide what open justice requires exists equally in relation to civil, criminal and family cases.³³ With respect to the latter, it should be recalled that the present judgment comes on the heels of significant developments with regard to the application of the open justice principle in UK family courts. At this point, it suffices to mention the recent case of *Re R (A Child) (Reporting Restrictions)*³⁴ in which a journalist brought an appeal against a reporting restriction order (RRO) issued in a first instance family court hearing preventing the journalists reporting the information which had previously been made public in a judgment of the Court of Appeal.³⁵ Notably, this outcome led to the issuing of draft guidance by the President of the Family Division on 8th May 2019,³⁶ who acknowledged the importance of the Family Justice system being "as open and transparent as is possible, whilst, at the same time, meeting the need to protect the confidentiality of the individual children and family members whose cases are before the court".³⁷

Second, the Court provides a brief but significant analysis of the purposes of the open justice principle. In addition to the well-known purpose of enabling public scrutiny of the way in which courts decide cases,³⁸ the Court, interestingly, puts significant emphasis on the so-called didactic or educational purpose of the principle. The Court also acknowledges that there may be additional purposes of the principle, but it does not engage in further discussion of this matter.³⁹

Importantly, the Court underlines that the principle of open justice serves to enable the public to *understand* how the justice system works and why decisions are taken. The Court essentially talks about the "qualitative" dimension of procedural openness,⁴⁰ meaning that the principle of open justice is not only about providing an insight into judicial activities and functions; it is equally about making those activities and functions understandable and, therefore, *truly* accessible to the public. This issue is found to be particularly relevant in modern civil proceedings which involve, for reasons of procedural efficiency, voluminous written arguments and evidence that are often not read out in open court. Consequently, it is difficult for the public to understand what is going on in these proceedings unless access to the written material is provided. The present case, therefore, illustrates that the more the

³³ [2019] UKSC 38 paras 36, 41.

³⁴ [2019] EWCA 482 Civ.

³⁵ See Louise Tickle, "Why I fought for the right to open up family courts to greater scrutiny" (The Guardian, 19 February 2019) available at <<https://www.theguardian.com/society/2019/feb/19/right-open-family-courts-scrutiny-high-court>>.

³⁶ Rt. Hon. Sir Andrew McFarlane, President of the Family Division, "President's draft guidance as to reporting in family courts" available at <<https://www.judiciary.uk/wp-content/uploads/2019/05/Presidents-Guidance-reporting-restrictions.pdf>>.

³⁷ Rt. Hon. Sir Andrew McFarlane, President of the Family Division, "View from the President's Chambers" (May 2019) para 29, available at <<https://www.judiciary.uk/publications/latest-view-from-the-presidents-chambers/>>.

³⁸ [2019] UKSC 38 para 42.

³⁹ For further discussion of the various purposes (or functions) of the principle of open justice, see e.g. Cécile Chainais, "Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology: Theoretical Perspectives and Comparative Law" in Burkhard Hess, Ana Koprivica Harvey (eds) *Open Justice: The Role of Courts in a Democratic Society* (Nomos 2019) 59 ff; Judith Resnik, 'The Democracy in Courts: Jeremy Bentham, "Publicity", and the Privatization of Process in the Twenty-first Century' (2013) NoFo 10, 84.

⁴⁰ Burkhard Hess, Ana Koprivica Harvey, "Open Justice in Modern Societies: What Role for Courts?" in *Open Justice: The Role of Courts in a Democratic Society* (Nomos 2019) 17, n 44, referring to the example of the "accessibly-written judgments", promoted by Sir Ernest Ryder in "Securing Open Justice", *ibid* 128.

proceedings rely on written submissions, the more acute the issue of access to court documents becomes.

Third, the Court provides further clarifications for the test to be applied by a court when considering whether and how much access to grant to third parties. In addition to the abovementioned test adopted in *Guardian News and Media*,⁴¹ and upheld in *Kennedy*⁴² and *A v British Broadcasting Corporation*,⁴³ the Court includes that the practicalities of granting third-party access to court documents is another element to consider when deciding on request for access to documents.⁴⁴ The Court acknowledges that the burdens placed on the parties in identifying and retrieving the sought material after the trial has ended (as was the situation in the present case) may be disproportional to the benefits of the open justice principle. Similarly, the task for the trial judge when deciding on the disclosure in such circumstances may become much harder or more time-consuming; the Court, however, does acknowledge that the digitisation of court materials might ease this task in the future. Accordingly, where possible, it was advised that the application to obtain access to court documents should be made during the trial so that the material is readily available and identifiable. In any case, the third-party who seeks access shall be expected to pay the “reasonable costs” of obtaining such access.⁴⁵

Finally, the Court touches upon the legitimate interest of a third party to gain access to court documents. The Court states that it is for the person seeking access to explain the reasons for the request and how gaining access to these documents would advance the open justice principle. Notably, the Court makes an explicit reference to the media in this context, stating that “in this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access.”⁴⁶ Consequently, the judgment recognises and perhaps even encourages the media to exercise their right of access to court documents and thus facilitate enhanced public scrutiny of the justice system.

3.2. “Records of the Court”

In its judgment the Court reflects on the definition (or rather, the impossibility of providing one) of “the records of the court”.⁴⁷ The Court acknowledges that what constitutes the records of the court is a rather fluid concept, as practice may vary over time depending on the needs of the court. It does, however, attempt to provide a minimal definition by stating that the court record of any civil case would include, at the very least, the claim form and the judgments or orders that resulted from that claim. On the other hand, one would not expect that it would contain all the evidence put before the court.

Notably, the Court underlines that the principle of open justice is completely distinct from the practical requirements of running a justice system. In the words of the Court, “the reasons why the court keeps certain records and the reasons why access may be granted are completely different from one another”.⁴⁸

3.3. A Telling Postscript to the Judgment

Finally, a note should be taken of the Supreme Court’s message contained in the Postscript of its judgment. The message is addressed to the drafters of the court rules and essentially reads as an

⁴¹ [2012] EWCA Civ 420 para 85.

⁴² *Kennedy v Information Commissioner (Secretary of State for Justice intervening)* [2015] AC 455 para 113.

⁴³ *A v British Broadcasting Corporation (Secretary of State for the Home Department intervening)* [2014] UKSC 25, para 41.

⁴⁴ [2019] UKSC 38 para 47.

⁴⁵ [2019] UKSC 38 para 47.

⁴⁶ [2019] UKSC 38 para 45.

⁴⁷ [2019] UKSC 38 paras 22-24.

⁴⁸ [2019] UKSC 38 para 24.

invitation to them to consider whether the open justice principle places any obligation upon the parties to continue to cooperate with the court in furthering the open justice principle once the proceedings are over. Given that such an obligation is at present not pronounced in the applicable rules, nor argued in the present case, one may deduct from this that the Court is appealing to the drafters to consider revising the rules to that effect.

4. Assessment

4.1. The Judgment from a Comparative Perspective: Divergent Practices of the Application of the Open Justice Principle

The basic idea behind open justice appears to be simple and universally accepted: a legal rule that requires courts and other adjudicative bodies to conduct their proceedings in public.⁴⁹ The principle of open justice is also widely recognised as an indispensable element of the rule of law and thus of great importance for the functioning of democratic societies.⁵⁰ The idea contained in the maxim that justice must be seen to be done is well-established and guaranteed by most international, constitutional, and statutory legal texts. It is, indeed, referred to by the Supreme Court at the very outset of the present judgment.⁵¹ Yet while the straightforward idea behind the principle remains universal, its application often varies across different jurisdictions. 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.⁵² In the context of third-party access to documents before courts this is particularly visible.

On the one hand, public access to docket sheets, pleadings, and briefs filed with courts is familiar in the United States, predicated on a mix of common law and constitutional traditions.⁵³ Similarly, Canadian rules impose the availability of remote access to the public (i.e. via internet) to all court documents, in addition to obtaining access on the courts' premises.⁵⁴

On the other hand, in European civil law jurisdictions, third-party access to court files is generally subject to more stringent requirements.⁵⁵ By way of example, the non-party access to civil case court files may be permitted under the German Act of Civil Procedure (ZPO) either pursuant to the parties' consent or if the applicant demonstrates legitimate interest in the case.⁵⁶ According to the case law, such legitimate interest presupposes that applicant's rights are affected by the contents of the requested file, or that the process itself (or at least the underlying facts) are of concrete importance

⁴⁹ Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (OUP 2002) 1.

⁵⁰ Burkhard Hess, Ana Koprivica Harvey, "Open Justice in Modern Societies: What Role for Courts?" in *Open Justice: The Role of Courts in a Democratic Society* (Nomos 2019) 9.

⁵¹ [2019] UKSC 38 para 1.

⁵² Burkhard Hess, "The concept of the open court and its relationship to social media", to be published in the Yearbook of the Institute of the Academia of Science of Bologna 2018, n 11 ff.

⁵³ Judith Resnik, "The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and Google Spain)" in Burkhard Hess, Ana Koprivica Harvey (eds) *Open Justice: The Role of Courts in a Democratic Society* (Nomos 2019) 183, referring to *Hartford Courant Co v Pellegrino* 380 F3d 83, 93–96 (2d Cir 2004); *United States v Amodeo* 44 F3d 141, 145–46 (2d Cir 1995); *Brown & Williamson Tobacco Corp v FTC* 710 F2d 1165, 1179 (6th Cir 1983).

⁵⁴ See Model Policy for Access to Court Records in Canada, September 2005, available at <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf>.

⁵⁵ For a relatively recent comparison, see the European Parliament Study, "National Practices with Regard to Accessibility of Court Documents", PE 474.406 (2013) available at <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474406/IPOL-JURI_ET\(2013\)474406_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2013/474406/IPOL-JURI_ET(2013)474406_EN.pdf)>.

⁵⁶ Zivilprozessordnung (ZPO) § 299 II: Dritten Personen kann der Vorstand des Gerichts ohne Einwilligung der Parteien die Einsicht der Akten nur gestatten, wenn ein rechtliches Interesse glaubhaft gemacht wird.

to the legal interests of the applicant.⁵⁷ Conversely, some other continental EU member States, such as Finland and Slovenia, provide for a very broad access to court files in their legislation.⁵⁸

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.⁵⁹ As emphasised by Lord Toulson in the case of *Guardian News and Media Ltd* (which the present judgment fully follows): "The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied."⁶⁰ In other words, it may be argued that, by employing the "common law exclusivity" approach,⁶¹ 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.⁶²

Such extension of the principle of open justice to third-party access to court files by the UK Supreme Court could be viewed with a degree of bewilderment by its continental counterparts, where the right of access to court documents generally falls under a special legal regime. In the majority of continental jurisdictions, when it comes to access to information relating to the judiciary and, more specifically, to court files, the courts are either completely exempt from rules regulating access to documents, or such rules cover only administrative (operational) aspects of the courts' functions. The latter also describes the current situation at the Court of Justice of the European Union.⁶³

4.2. Continuing the Trend of "Common Law Exclusivity"⁶⁴

The Supreme Court's "seemingly novel methodology"⁶⁵ is further reflected in the lack of any reference to the relevant provisions of the European Convention on Human Rights, namely Article 6 (right to a public hearing) and Article 10 (right to receive and impart information) in the present judgment. Instead, the Court relies exclusively on the open justice principle under the common law. In fact, this lack of reference is perfectly in line with the abovementioned approach currently deployed by the Supreme Court. It is perhaps best illustrated in the words expressed by Lord Toulson in *Guardian News and Media Ltd*:

"I base my decision on the common law principle of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries to which I have referred. Collectively they are strong persuasive authority. The courts are used to citation of Strasbourg decisions in abundance, but citation of decisions of senior courts in other common law jurisdictions is now less

⁵⁷ OLG Nürnberg, Beschluss vom 14.01.2014, Az. 4 VA 2218/13, Rn. 9; Oberlandesgericht des Landes Sachsen-Anhalt, Beschluss vom 27.05.2010, Az. 5 VA 11/10, Rn. 11; Schleswig-Holsteinisches Oberlandesgericht, Beschluss vom 20.01.2009, Az. 12 VA 11/08, Rn. 6.

⁵⁸ European Parliament Study, "National Practices with Regard to Accessibility of Court Documents", PE 474.406 (2013) 21-29.

⁵⁹ For further discussion, see Christina Lienen, "Common law constitutional rights: public law at a crossroads?" (2018) 4 Public Law 649.

⁶⁰ [2012] EWCA Civ 420; [2013] Q.B. 618 para 69.

⁶¹ Christina Lienen, "Common law constitutional rights: public law at a crossroads?" (2018) 4 Public Law 653-654.

⁶² It should be noted, however, that non-party access to court documents has been previously granted under the inherent jurisdiction in order to ensure open justice. See e.g. *GIO Personal Investment Services Ltd v Liverpool & London Steamship Protection and Indemnity Association Ltd* [1998] EWCA Civ 3538 and *Church of Scientology of California v Department of Health and Social Security* [1979] 1 W.L.R. 723.

⁶³ The CJEU is exempt from the obligation to provide access to documents save for when exercising its administrative tasks, pursuant to Art 15(3) TFEU. At present, it does not provide for its own procedural rules regulating third-party access to judicial documents. For further discussion see e.g. Alberto Alemanno, Oana Stefan, "Openness at the Court of Justice of the European Union: Toppling a Taboo" (2014) 51 Common Market Law Review 97; Michal Bobek, "Epilogue: Past and Looming Challenges to Open Justice" in *Open Justice: The Role of Courts in a Democratic Society* (Nomos 2019) 277 ff.

⁶⁴ Christina Lienen, "Common law constitutional rights: public law at a crossroads?" (2018) 4 Public Law 649.

⁶⁵ Christina Lienen, "Common law constitutional rights: public law at a crossroads?" (2018) 4 Public Law 653.

common. I regret the imbalance. The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere."⁶⁶... "Although I disagree with the reasoning of the [Strasbourg] courts below, I recognise that this decision breaks new ground in the application of the principle of open justice, although not, as I believe, in relation to the nature of the principle itself."⁶⁷

This and other (inconsistent) approaches, particularly in cases which concern access to documents and a right to a fair hearing,⁶⁸ bear certain risks. As pointed out by one author, one can quite easily imagine a situation where the common law provides a lower standard of protection than the ECHR.⁶⁹

4.3. Implications for Practice

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.⁷⁰ This is all the more relevant 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. Time invested in analysing which documents the judge will genuinely require in order to decide the case will help reduce the number of documents that may eventually be disclosed to third parties.⁷¹

In conclusion, it could be claimed that the Supreme Court judgment represents a point of departure for future applications for access to court documents. However, 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 will be of significant interest to see how the High Court will now decide this case.

⁶⁶ [2012] EWCA Civ 420 para 88.

⁶⁷ [2012] EWCA Civ 420 para 90.

⁶⁸ For example, *Osborn v The Parole Board* [2013] UKSC 61; [2013] 3 W.L.R. 1020, para 2; [2015] A.C. 455, para 133.

⁶⁹ Christina Lienen, "Common law constitutional rights: public law at a crossroads?" (2018) 4 Public Law 654.

⁷⁰ See e.g. John Sorabji, "Open Justice and the Privatisation of English Civil Justice" in Burkhard Hess, Ana Koprivica Harvey (eds) *Open Justice: The Role of Courts in a Democratic Society* (Nomos 2019) 253 ff; Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010).

⁷¹ Adam Greaves and Liz Williams, "Supreme Court provides new test for non-party access to materials on court file" (Lexology, 2nd August 2019) available at <<https://www.lexology.com/library/detail.aspx?g=6a8453ff-8595-49fa-8ac1-8ee6f19ccae6>>.



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