Claim numbers HQ12X01829, HQ13X02470 and others

[2017] EWHC 3154 (QB)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MASTER VICTORIA MCCLOUD

BETWEEN

Mr GRAHAM DRING

Applicant

and

Cape Distribution Limited,

Cape Intermediate Holdings Limited

Concept 70 Limited (and others)

Aviva Plc

Interested parties

JUDGMENT

This written judgment is final and it is directed that no transcript shall be obtained of it.

Keywords

Constitution – access to courts – open justice – court files – court records – public scrutiny of courts – asbestos – mesothelioma – TDN13 – Technical Data Notice 13 – Cape – asbestolux – disclosure – document management

systems – CPR 5.4C(2) – settlement – dispute resolution – health and safety

For the Applicant: Mr Robert Weir QC and Jonathan Butters Esq, counsel instructed by Messrs Leigh Day solicitors.

For the Cape interested parties: Mr Justin Fenwick QC and Mr James Williams Esq, counsel instructed by Messrs Freshfields solicitors.

Hearing: 9, 10 and 12 October 2017

Judgment: 5 December 2017

Authorities referred to in judgment:

Home Office v Harman [1983] AC 280

The Asbestos Victims Support Groups Forum UK v (1) Concept 70 Ltd & Ors, (2) Cape Intermediate Holdings Plc [2017] EWHC 811 (QB)

Mr Graham Dring v Cape Distribution Ltd, Cape Intermediate Holdings Plc, Concept 70 Ltd & Ors (Interested Parties) [2017] EWHC 2103 (QB)

R (Guardian News & Media Ltd) v Westminster Magistrates Court [2013] QB 618

Chan U Seek v Alvis Vehicles Ltd [2005] 1 WLR 2965

NAB v Serco [2014] EWHC 1255

GIO Personal Investment Services Ltd v Liverpool and London Steamship P&I Association Ltd [1999] 1 WLR 984

Dian AO v Davis Frankel and Mead (a firm) [2005] 1 WLR 2951

Barings plc v Coopers and Lybrand [2000] 1 WLR 2353

The Law Debenture Trust [2003] EWHC 2297 (Comm.)

Smithkline Beecham Biologicals SA v Connaught Laboratories Inc [1999] 4 All ER 498

ABC Ltd v Y [2012] 1 WLR 532

Various Claimants v News Group Newspapers Ltd [2012] 1 WLR 2545

R (Taranissi) v HFEA [2009] EWHC (Admin) 130

Sayers v Smithkline Beecham plc [2007] EWHC 1346 (QB)

Dobson v Hastings [1992] Ch. 392

Pfizer Health Ab v Schwarz Pharma Ag [2010] EWHC 3236 (Pat.)

R (On the Application of UNISON) v Lord Chancellor [2017] UKSC 51

Donoghue v Stevenson [1932] AC 562

Yates v HMRC [2014] EWCH 2311 (QB)

Lilly Icos Ltd v Pfizer Ltd (No. 2) [2002] 1 WLR 2253

Marlwood Commercial Inc v Kozeny and others [2005] 1 WLR 104

Williams v University of Birmingham [2011] EWCA Civ. 1242

Nestec SA v Dualit Ltd [2013] EWHC 2737 (Pat.)

Smith (Executor of the Estate of Smith, deceased) v Portswood House Ltd [2016] EWHC 939 (QB)

Blue and Ashley v Times Newspapers Ltd [2017] EWHC 1553 (Comm.)

R (On the Application of UNISON) v Lord Chancellor [2017] UKSC 51

Stokes v Guest [1968] 1 WLR 1776 at 1783

'TDN13' authorities before the court but not referred to in judgment:

Hill and Bellingham v Barnsley and Sons Ltd and others [2013] EWHC 520 (QB)

McGregor v Genco (FC) Ltd [2014] EWHC 1376 (QB)

Macarthy and others v Marks and Spencer and another [2014] EWHC 3183 (QB)

Woodward v SS Energy and Climate Change [2015] EWHC 3604 (QB)

Prescott v University of St Andrews [2016] CSOH 3

SUMMARY

This summary is provided to assist the reader. The main text of judgment prevails in the event of any inconsistency between the summary and the body of the judgment.

Principles and status of the documents in this case

1. The right of access to court is inherent in the rule of law.
2. Openness of justice fosters the scrutiny of the courts by the public, protects the integrity of the court process and assists the development of the law and legal knowledge. It thereby supports the practical effectiveness of the right of access to court.
3. The courts do not merely provide a public service to the 'users' who appear before them. Previous cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless.
5. Access to a court, being not merely the provision of a service to 'users' entails that the parties submitting to the jurisdiction do not have full sovereignty to determine simply by private agreement between themselves the extent to which the public may be made aware of any aspect of the proceedings before the court.
6. There is an inherent and foreseeable possibility that material deployed in court by the parties, or filed upon the records of the court as part of its process, will form part of the corpus of material which may be deployed in other cases, used for the purposes of legal advice, being academically or journalistically discussed, or considered by Parliament.

The rules and common law jurisdiction to order access to documents by the public

7. CPR 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. The rules provide a qualified and controlled system of openness regulated by the court rules in a judicial manner.

8. Where documents are filed on the record of the court then they fall within the scope of CPR 5.4C(2).

9. Served 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 power.

Applicable test

10. Documents filed on the record of the court and which are read or treated as read in court are subject to a default position in favour of the principle of open justice if the applicant has a legitimate interest.

11. Where the applicant has a legitimate interest then the court must still carry out a balancing exercise in relation to any harm to other parties legitimate interests when deciding whether to allow access.

12. Documents on the records of the court which are not read or treated as read are subject to a more stringent test namely that there must be strong grounds for thinking that access is necessary in the interests of justice.

13. The principle of open justice is engaged notwithstanding that a case settles before judgment. It applies to documents in such a case which have been read to or by the court, treated as so read, or which *"have featured in"* the proceedings.

Status of the documents

14. Bundles which have been filed are part of the records of the court. 'Bundle D' in this case does not amount to a bundle filed at court. The paper bundles do fall to be treated as filed.

15. The paper documents other than the bundles were retained in court at the end of trial and held together with the court files, and became documents filed on the records of the court, alternatively the documents other than those in the bundles fall within the court's general discretion as to access. They were deployed in court and placed before the judge including after he retired to consider his decision. They were subject to what Lord Justice Toulson referred to as the 'default position' that access should be given on the open justice principle.

16. The residue of bundle D not already contained in the paper bundles is material which falls outside the scope of the default principle of openness.

17. There is a power to order disclosure of bundle D under the common law jurisdiction of the court, but I do not exercise those powers here.

Legitimate interest and intended use

18. A legitimate interest can include academic interest, use by a pressure group or use in some journalistic form and indeed any number of other uses which are ulterior (in the proper sense of that word) without being illegitimate.

19. Mr Dring acts for a group which provides help and support to asbestos victims. It some respects it is also a pressure group and is involved in lobbying and in promoting asbestos knowledge and safety. Those are legitimate activities and provide legitimate interest.

20. The intended use is to enable him and the forum of which he is an officer, to:

    - make the material publicly available,
    - by making it available to promote academic consideration as to the science and history of asbestos and asbestolux exposure and production,
    - improve the understanding of the genesis and legitimacy of TDN13 and any industry lobbying leading to it in the 1960s and 1970s.
    - understand the industrial history of Cape and its development of knowledge of asbestos safety

- clarify the extent to which Cape is or is not responsible for product safety issues arising from the handling of asbestolux boards
- to assist court claims and the provision of advice to asbestos disease sufferers.

21. Those are legitimate aims.

Specificity of application and balancing exercise

22. The degree of specificity which is possible in an application under rule 5.4C must necessarily be limited in practical terms by the fact that without seeing the documents in the first place the best that can be expected so as to assist the court is that general categories of documents be identified unless there is a particular identified document which known about and is sought.

23. The classes sought in the statement provided with the application were:

    (i) All witness statements

    (ii) Experts' reports

    (iii) Transcripts of evidence

    (iv) All documents disclosed by Cape and other parties.

24. I am satisfied that (in no order of priority) the content of those documents:

    i. would be likely to be of academic and scientific interest as part of public and social discourse as to the history of asbestos safety, regulation and knowledge as it developed during the 20th century,

    ii. would be likely to be considered by advisers advising parties to asbestos litigation as to the merits of their cases whenever issues arise which touch upon Technical Data Notice 13 and connected Regulations,

    iii. is likely to be relevant the product safety of asbestos insofar as understood within the major manufacturers and connected companies as compared with general public at various points in the 20th century, and

iv. is likely to be relevant to the extent to which employer defendants could have been expected to appreciate the risks of asbestos.

25. Partial access to the documents could lead to 'cherry picking' in terms of the publishing of negative material especially if access was only given to material which paints asbestos, and perhaps Cape in a bad light. There is a risk, but a much reduced risk, of cherry picking if access is given less selectively and more rather than less widely.

26. A requirement for special circumstances is desirable in the case of disclosure documents served but not deployed at trial, in this instance bundle D, to ensure that non-parties are not placed in a better position than parties in relation to unused but served disclosure material. I do not consider that grounds have been made out for disclosure in relation to bundle D.

27. I was not presented with substantial evidence or argument from Cape as to harm to it would suffer from disclosure, at the level of particular documents or classes of document within the paper files.

28. I do not regard the *post hoc* concerns now raised by Cape about the privacy of persons named in the documents in connection with asbestos related disease as a ground for refusing public disclosure of these documents as a credible or weighty one in this instance.

Conclusions

29. The balance is in favour of disclosure of:

    i. the witness statements including exhibits,

    ii. expert reports,

    iii. transcripts,

    iv. disclosed documents relied on by the parties at trial ie those in the paper bundles only,

    v. written submissions and skeletons,

    vi. Statements of case to include requests for further information and answers if contained in the bundles relied on at trial.

In formal terms I am therefore allowing the application in relation to document classes (i) to (iii) listed in the statement of Ms Bains dated 6 April 2017 but only partially allowing disclosure of documents in category (iv). I am also allowing disclosure of certain other documents as is apparent from the list just set out.

30. I am excluding from disclosure the contents of bundle D for reasons already given. I am also excluding copies of the disclosure statements of the parties because that would tend to undermine (by giving disclosure by indirect means) the decision I have made that bundle D is not disclosed.

31. The Applicant may return to court to seek a decision as to access in respect of any documents in bundle D which it appears upon consideration were omitted from the paper bundles, yet were in fact relied on at court (this ought to be apparent from the documents for which access has been given as above). Bundle D shall remain impounded in court.

32. The documents subject to disclosure to Mr Dring shall therefore be made available by the court to the Applicant's solicitor as an officer of the court for copying or scanning upon the giving of an undertaking that documents not within the scope of this order, if contained in the files, will not be copied.

33. I direct that the court file and impounded bundle D shall not be destroyed in the usual course of administration of the court without an order of the court.

FULL JUDGMENT

Introduction

1. Lord Diplock in Home Office v Harman [1983] AC 280 at 303C[1] said (in a quotation from Jeremy Bentham and Lord Shaw of Dunfermline):

[1] Cited in R (Guardian News) v Westminster Magistrates' Court (CA) [2013] QB 630.

"Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial".

2. If one were, however, to consider a court in which there was a right for the public to scrutinise every detail of every case, for any purpose without limit, one can readily see that many would fear to venture into it with their business secrets, their family disputes, their most intimate personal details. Every person from businesses with valuable commercial trade information to vulnerable persons would risk losing more – whether financially or in personal terms – than justice might seem to them to be worth.

3. One must not therefore reach for an intellectually comfortable, but over-generalised, belief that 'openness is always and necessarily for the best'. It is more nuanced than that. The law and the rules of court have developed to provide a framework for ensuring that a balance is struck between openness to the public, and the protection of the core function of the court which is the doing of justice in the case before it. Cape for example here argued that "open justice" must not be seen as the answer to each and every application for access to court records. There is a judicial process under the court rules and the decision is made accordingly, and not by blindly following a principle without regard to the facts of a given case. That is why in this case I must approach the case on its own facts, whilst applying the underlying rules and principles.

4. This judgment deals with significant questions as to a member of the public's rights of access to documents *'filed on the records of the court'* which include material relating to the history and development of knowledge in the 20th century about the risks of asbestos.

5. As is by now well understood, exposure to inhaled asbestos can cause terminal illness, as well as disability. The extent to which society adapted its outlook towards the risks of asbestos in the 20th century is evidenced by the long history of case law, reports and articles which paint the public picture of what was understood to be the case in terms of risks and reasonable safety requirements when handling asbestos-containing products.

6. The impact of asbestos related disease in this country (I confine myself to this country but the wider story of asbestos is a global one) in legal terms includes the large number of claims for damages for injury and death caused by wrongful asbestos exposure, often by employers who are covered by insurance dating back several decades. It also includes secondary victim claims, such as the child of an asbestos worker parent, who goes on to develop mesothelioma decades after the parent's death, and where the exposure during childhood was from asbestos fibres clinging to the overalls of the parent on their return home at the end of each working day.

7. When one looks at asbestos-related torts one often has to consider quite historic material, and to consider what the extent of knowledge at the material time was about the risks of exposure. It is in that context that the material contained in the files which are the subject matter of this application must be seen.

8. In this case, the documents in question to which Mr Dring seeks access were in court for the purposes of a lengthy trial conducted by Picken J, which in broad terms raised questions about what was known, and when, about the product safety of asbestos by the best known manufacturer of the product (Cape and its connected companies). It was litigation brought by insurers. This was referred to as the Product Liability litigation to distinguish it from a separate claim, with which I do not concern myself here but which was heard at the same trial. The documents comprise the trial bundles (one of which, bundle D, was supplied 'on line' at trial via a document management system and not on paper), the skeletons, submissions and daily transcripts which were provided to the judge. Also sought are statements of case to the extent not already provided. Bundle D comprised the totality of the parties' disclosure documents whether or not deployed at trial. The other bundles were 'core' bundles and only contained documents actually relied on at the trial.

9. Unusually (and I suspect uniquely in the history of asbestos litigation), the disclosure exercise involved the putting together of extensive quantities of historic material and records relating to asbestos safety and regulation in a way which one can safely take it would have been disproportionate in a run-of-the-mill asbestos claim. This claim was large enough to justify

such expenditure and time. Mr Isted for Cape in his first witness statement gave a succinct summary of the litigation at para. 10:

> *"In the Product Liability claims, the insurers alleged that the employees had been exposed to asbestos dust when working with, or in the vicinity of others working with, 'Asbestolux' and 'Marinite' boards (asbestos insulation boards which had been manufactured and supplied by members of the Cape group of companies). The principal allegation was that Cape and/or the relevant subsidiary company manufacturing 'Asbestolux' and 'Marinite' boards had failed adequately to warn of the risks arising from occupational asbestos exposure."* and at 19:
>
> *"Over the course of two weeks, expert evidence was given by Mr Martin Stear, for the Claimants, and by Professor Sir Alasdair Breckenridge and Professor Roger Wiley for Cape... Following the conclusion of the trial, but before any judgment had been handed down, the Product Liability claims and the CDL claim settled."*
>
> And at 18 in his second statement:
>
> *"As part of the negotiated settlement, an arrangement was reached whereby the legal representatives acting for the Claimants in the Product Liability and CDL claims would destroy their hard copy bundles (or would, in the alternative, return their hard copy bundles to their clients) and their access to the electronic trial bundle would be withdrawn. The purpose of this, so far as Cape was concerned, was to ensure that their confidential documents were not used in an unauthorised manner or placed in the public domain without their knowledge."*

10. I will not go into detail of the pleadings in the underlying case but an example averment which highlights the flavour of the case is at 3.2.4 of the Amended Particulars of Claim. This was, in summary, a case about what Cape knew and when, in the 1960s and 1970s or before, about the risks of asbestos exposure and the behaviour of its products when subject to manipulation so as to give off fibres which could cause mesothelioma. It raised questions about whether Cape knew but

knowingly failed to take steps to make clear the risks involved of which it was said to be aware. Para 3.2.4 of the Amended Particulars states:

> *"By way of single example, the Claimant relies upon the transcript of the evidence given by two of [Cape's] directors (Dr Gaze and Mr Higham) given on the 4th and 5th June 1975. The combined effect of their evidence was that they could direct the activities of their subordinate companies in respect of health and safety; that they had known of the risk of asbestos causing mesothelioma from around 1960; that they either did or ought to have provided warnings to the companies they were selling asbestos to in the USA in or around 1960; that they could have put warnings on their board products from around 10 years prior to their giving evidence in 1975".*

11. The trial proceeded to a conclusion and the judge retired to consider a reserved decision, but prior to judgment a settlement was reached out of court. I have set out more of the history in two previous judgments as follows, to which it is essential to have reference when reading this judgment:

    (i) *The Asbestos Victims Support Groups Forum UK v (1) Concept 70 Ltd & Ors, (2) Cape Intermediate Holdings Plc* [2017] EWHC 811 (QB) and

    (ii) *Mr Graham Dring v Cape Distribution Ltd, Cape Intermediate Holdings Plc, Concept 70 Ltd & Ors (Interested Parties)* [2017] EWHC 2103 (QB) and reference should be had to those judgments because I will not repeat their contents here.

12. Those decisions suffice to demonstrate the importance placed by the applicant on content of the files in court, and the reader will see there some reference to 'tweets' and other public statements by counsel in the underlying claim as to their significance and indeed also quoting some of their scientific content (which is not denied by Cape but as to the implications of which there is considerable disagreement for another day). The opposition and deployment of legal resources on the part of

the interested Cape parties rather signals that the application is of importance to them too.

13. Powerpoint slides from a public conference, placed in evidence before me, indicate that counsel for Mr Rawlinson QC for Concept 70 following the conclusion of the underlying trial felt that the disclosure in this case revealed that *"Cape was still selling Asbestolux in 1980."*, *"Significant omissions in previous cases"*, *"Handling AIB produced dust levels much higher than anticipated"* and *"May become the single most important weapon against TDN13[2]"*.

14. This judgment is necessarily a lengthy one in part because of the weight of authority cited to the court and argued over by leading counsel appearing with their juniors for the greater part of three days and in part because of the significance of the matters argued over which span areas such as openness of justice and the protection of the legitimate rights of litigants, and the public interest, if any, in the material in this case. I have accordingly split the judgment into two parts.

Structure of this judgment

15. In **Part 1** I deal with the legal issues which relate to matters of principle, jurisdiction and process. In that Part I have set out the parties' arguments and then my decision.

16. In **Part 2** I deal with issues as to the standing of the applicant, specificity of the application and the balancing exercise in relation to this application, and in that Part my decision is set out at the same time as a consideration of the points made by the parties.

17. In considering judgment I had before me the following witness statements:

For Mr Dring:

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[2] Technical Data Note 13 was a document created in the 1970's which – and here I tread carefully because it is a matter of controversy – referred to or gave guidance as to a minimum level of asbestos exposure which was at the time regarded by the body which produced it as being acceptable. It is a matter of controversy which I do not need to resolve here as to whether TDN13, which appears to have been influential in the regulation of the asbestos industry, was a species of 'safety standard' or whether it was the creation of the asbestos industry for self-serving ends whilst knowing the true risks of asbestos exposure.

Harminder Bains (6/4/17, 8/6/17, 22/9/17)

Graham Dring (5/6/17)

For Cape:

Jonathan Isted (19/6/17, 8/9/17)

Part 1: Principles, Jurisdiction and Process

18. The applicable court rule in this case in civil cases is CPR 5.4C(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 a court and a party or another person."*

Applicant's argument

19. The applicant through Mr Weir QC argued that, albeit he did not need necessarily to go beyond the court rules themselves (the scope of the court's discretion found there being ample, he said, for his client's purposes), the power of the court to allow disclosure of documents exists as a matter of common law. The court rules exist, in this context, to provide a process rather than to create the power.

20. To that effect he cited R (Guardian News & Media Ltd) v Westminster Magistrates Court [2013] QB 618, per Toulson LJ at 75. This was in the context of criminal procedure rules:

> *"... I do not consider that the provisions of the Criminal Procedure Rules are relevant to the central issue. The fact that the rules now law down a procedure by which a person wanting access to documents of the kind sought by the Guardian should make his application is entirely consistent with the court having an underlying*

power to allow such an application. The power exists at common law; the rules set out a process."

Meaning of the expression "Records of the Court"

21. Mr Weir argued that rule 5.4C includes all documents which are 'in the court file'. Per Park J in Chan U Seek v Alvis Vehicles Ltd [2005] 1 WLR 2965 at 18:

> *"18. Documents (a), (b) and (c) listed in the application notice are within the records of the court. They are the particulars of claim, the defence and the reply. The documents at (d) in the application notice are not within the records of the court. They are "request and replies to requests for further information". The documents within (e) of the application notice are within the records of the court. They are the witness statements of six named witnesses. The documents within (f) are not. Although they are described as exhibits, the documents identified in para (f) are in fact numbered pages in one of the many files of documents which were used in the trial. Those files were removed by the parties when the case settled. Thus they are not part of the records of the court."*

22. Mr Weir's position was that the effect of the decision as to (f) in *Chan U Seek* was that the bundles used a trial (in *Chan U Seek*, actually some pages within the bundles) were in principle part of the records of the court but that it appeared from the quotation that, once having been removed from court at conclusion of the case, the court took the view that documents in (f) had 'thus' – ie by that means – ceased to be a part of the records of the court.

23. I was taken to NAB v Serco [2014] EWHC 1255 per Bean J. at 39 which was relied on as providing rather more recent clarity that court bundles are indeed part of the records of the court, at least as long as they remain within the court's possession:

> *"CPR 5.4C recognises that there may be a legitimate public interest in the inspection not only of statements of case lodged with the court, but also, with permission, other documents such as witness statements or exhibits placed on the court file. The public interest is not confined to cases where the court has given judgment and it is*

sought to see whether the underlying documents provide further illumination of the judgment. It may be just as significant to discover why a case settled. It is true that an application to inspect documents under CPR 5.4C(2) may be made too late to be effective if all the copies of court bundles have been returned to the parties, as is the usual practice when a case has been concluded and no appeal is pending. But that is a matter of mechanics. In this case, at the time when the Guardian made its application, the court had retained the witness statements and exhibits."

24. I was briefly taken to some history on the openness or otherwise of bundles to the public. In Gio Personal Investment Services Ltd v Liverpool and London Steamship P&I Association Ltd [1999] 1 WLR 984 at 995 F per Potter LJ:

> *"So far as concerns documents that form part of the evidence or core bundles, there has historically been no right, and there is currently no provision, which enables a member of the public present in court to see, examine or copy a document simply on the basis that it has been referred to in court or read by the judge. Insofar as it may be read out it will "enter the public domain" in the sense already referred to and a member of the press or public may quote what is read out but the right of access to it for purposes of further use of information depends on that person's ability to obtain a copy of the document from one of the parties or by other lawful means. There is no provision by which the court may, regardless of the wishes of the parties to the litigation, make such a document available to a member of the public, nor, so far as such documents are concerned, do I consider that any recent development in court procedure justifies the court contemplating such an exercise under its inherent jurisdiction..."*

25. In *NAB v Serco* Bean J noted at para. 29 that he did not regard the case of *GIO* as any longer good law on this point, partly because of the non-citation of one authority in that case, partly because the CPR had been introduced and the decision had been reached under the old court rules (the RSC), and lastly that:

"Quite apart from the Rules, the common law approach to the disclosure of documents in core bundles has changed significantly since 1998, as shown by the most recent authority of R (Guardian News and Media Ltd) v City of Westminster Magistrates Court [2013] QB 618..."

26. In Blue and Ashley v Times Newspapers [2017] EWHC 1553 (Comm.) Leggatt J considered the scope of the court's general discretion to allow disclosure of documents in circumstances where a document had been served but not filed. He concluded at 10 that:

"there is nothing in the Civil Procedure Rules which precludes the court from making an order under its common law powers to enable a non-party to obtain a copy of a document which has been served in the litigation, even if the document has not been filed by a party"

Is there a difference of approach between documents depending on the extent of their use or non-use in court?

27. Mr Weir's position was that the line of authorities on access to court records shows a difference of approach as between documents read to, or treated as read to in open court, and those not so treated. Per Potter LJ in *GIO* (*supra.*) at 993B,

".... while the parties to an action have free access to affidavits and other documents filed in the action, a member of the public requires leave to obtain such access which, no doubt, will be readily given if the affidavit or other document has been read in open court[3]."

Per Moore-Bick J in Dian AO v Davis Frankel and Mead (a firm) [2005] 1 WLR 2951:

"The affidavits referred to in the orders were, as I have said, considered by the court as part of its judicial function. They may have been read out in the course of the proceedings, but I think it more likely that they were read by the judge in private as part of

[3] In GIO, this extended to witness statements ordered to stand as evidence in chief (ie, not in a literal sense 'read' aloud in open court), but not to exhibits referred to in them.

his preparation for the hearing and that particular passages were referred to at the hearing itself. In accordance with the practice of the court the hearings would all have taken place in chambers rather than open court, but it is clear from authorities such as Barings plc v Coopers and Lybrand [2000] 1 WLR 2353 and the Law Debenture Trust case [2003] EWHC 2297 (Comm) that these affidavits ought to be treated as if they had been read in open court and that anyone with a legitimate interest ought to be allowed reasonable access to them in accordance with the principle of open justice. [...]

57. On the other hand, I do not consider that the court should be as ready to give permission to search for, inspect or copy affidavits that were not read by the court as part of the decision-making process, such as those filed in support of, or in opposition to, the application for summary judgment in this case. These were filed pursuant to the requirements of the rules but only for the purposes of administration. The principle of open justice does not come into play at all in relation to these documents. I do not think the court should be willing to give access to documents of the kind as a routine matter, but should only do so if there are strong grounds for thinking that it is necessary in the interests of justice to do so."

Per Park J in *Chan U Seek* (*supra.*) at 31:

"... the courts favour disclosure rather than withholding of materials if the materials have featured in proceedings in open court..."

Per Toulson LJ in *R (Guardian News) v Westminster Magistrates' Court (supra.)* at 85:

"In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle"

The role of 'open of justice' in public access applications under the CPR

28. Mr Weir argued that the dicta especially in *Guardian News* clearly favour the position that where a document is read or treated as read in court then accessibility to the public is the default position. In *Chan U Seek* the characterisation was whether documents featured in proceedings in open court. He cited Smithkline Beecham Biologicals SA v Connaught Laboratories Inc [1999] 4 All ER 498 509c-e and Barings plc v Coopers and Lybrand [2000] 1 WLR 2353 at 52-52, to the effect that strict reading in court is not required: modern practice favours pre-reading, and the use of statements as evidence in chief for example, and that the effect of *Barings* is that the onus is on a party opposing disclosure to show that a document had not entered the public domain.

29. As to the principles applicable when applying the concept of open justice, in the *Guardian News* case at 79 I was referred to Toulson LJ's observation that the purpose of the openness principle is to *"enable the public to understand and scrutinize the justice system of which the courts are the administrators"*. It was argued however that the fact that the openness principle has that as its purpose does not mean that an applicant has to show that in any given application to the court he personally has as his aim the scrutiny of the justice system. It was sufficient, on Mr Dring's case, that there is a legitimate interest in seeking disclosure.

30. Counsel relied, by way of an example said to illustrate his point, on the *Gio* case. In that case the party seeking disclosure of documents filed on the record was not doing so for the purpose of scrutinising proceedings in our courts: it was seeking them expressly for its own commercial use. The judge at first instance refused access. The Court of Appeal reversing that decision held at 996G-997A that:

> *'... quite apart from the interests of the press (who are members of the public for this purpose) most persons who attend a trial when they are not parties to it or directly interested in it do so in furtherance of some special interest, whether for purposes of education, critique or research, or by reason of membership of a pressure group, or for some other ulterior but legitimate motive. ... In my view the appropriate judicial approach to an application of this kind in a complicated case is to regard any member of the public who for legitimate reasons applies for a copy of counsel's written*

opening or skeleton argument, when it has been accepted by the judge in lieu of an oral opening, as prima facie entitled to it".

31. He also cited ABC Ltd v Y [2012] 1 WLR 532 per Lewison J at 42 dealing with cases where a document has formed part of the decision making process

> *"In such a case if an applicant can show a 'legitimate interest' in having access to the documents the courts should lean in favour of allowing access"*

32. Also cited was Vos J as he then was in Various Claimants v News Group Newspapers Ltd [2012] 1 WLR 2545 at 65 where he reiterated that the court will lean in favour of disclosure where a document has been read by or to the judge. In that case at 66 Vos LJ did however also indicate that there that the court should look to the use which will be made of the documents and that it is necessary to consider how far the documents are *'truly required ... in order to properly understand and report the court proceedings in which they were referred to and relied upon'.*

What constitutes a 'legitimate interest' for the purpose of public access to the court record?

33. I was taken to *The Law Debenture Trust* (documents disclosed where they might provide a basis for an allegation of fraud), R (Taranissi) v HFEA [2009] EWHC (Admin) 130 at 6: "*An application for disclosure for the purposes of collateral litigation does not mean in any sense that the order cannot be made*"), *Chan U seek*: application for purposes of pursuing a news story, held to be a legitimate interest, and Sayers v Smithkline Beecham plc [2007] EWHC 1346 (QB) (expert reports disclosed to ensure that decision makers elsewhere were not deprived of information as to the possibility that a flawed process of analysing data had been used).

34. In *Sayers* in particular at para. 21 Keith J said in relation to rule 5.4C(2):

> *"It should be noted that the rule only applies to documents which have been filed with the court. It does not, for example, apply to documents which have been referred to in the documents filed with the court, but which were not themselves filed with the court. And*

even with documents filed with the court, the authorities draw a distinction between documents which have been read or been treated as having been read in open court on the one hand, and documents on the other which, though filed, have never been read or been treated as read by the judge. Anyone with a legitimate interest in having access to a copy of a document which has been read or been treated as read by the judge should normally be allowed to have it." (The judge then referred to the higher *Dian AO* test for unread documents, and to the balancing exercise for the court to perform).

Does settlement before judgment make a difference?

35. Mr Weir argued that, following The Law Debenture Trust [2003] EWHC 2297 Comm. the fact that a case settled without judgment did not prevent the open justice principle from applying. Per Colman J at 31-34 who observed at 34 that

> *"... the essential purpose of granting access to such documents is to provide open justice, that is to say to facilitate maintenance of the quality of the judicial process in all its dimensions ... that however does not involve merely the perceived quality of final judgments with reference to the evidence, the submissions and the law, but the quality of judicial control on a day to day basis. ... if such an order is appropriate before judgment, ... there is no logical objection to such an order where, as in the present case, the hearing proceeded for several days and then settled."*

36. The above was a case where what was sought were copies of advocates' submissions. In *NAB v Serco*, Bean J at 39 stated dealing with access to various documents in the hearing bundles:

> *"The public interest is not confined to cases where the court has given judgment and it is sought to see whether the underlying documents provide further illumination of the judgment. It may be just as significant to discover why a case settled. It is true that an application under CPR 5.4C(2) may be made too late to be effective if all the copies of court bundles have been returned to the parties, as is the usual practice when a case has been concluded ad no appeal is pending. But that is a matter of mechanics. In this case, at*

the time the Guardian made its application, the court had retained the witness statements and exhibits."

Cape's argument

37. Mr Fenwick QC pointed out, I suspect correctly, that this application is unprecedented as to its scope. It was Cape's position that not only is this application unprecedented in scope, it is also in Cape's view an application lacking any clearly defined legitimate purpose.

38. It was said that there is no legal basis for the order sought and that the court lacks jurisdiction to make it. Indeed it was said that the evidence in support was insufficient to enable this court to decide the application at all. Cape had given an undertaking to preserve the documents in question so that future litigants could apply for disclosure if the rules and law permit on an inter parts basis and in the light of this.

39. Properly characterised, this application was in truth a 'fishing expedition' of the sort so often referred to in courts and in case law that one is tempted to observe that fishing may be what the man on the Clapham omnibus does during his rare days off. It was said to be speculative, and even if (which was opposed) it was allowed at all it should be on a limited basis only.

Principle of open justice

40. There was no dispute by Cape that the main relevant rule is 5.4C(2). It is a rule which was said to be similar to the old rule of the RSC, namely RSC Ord. 63 r4. Dobson v Hastings [1992] Ch. 392 per Sir Donald Nicholls V-C was cited at 406 thus:

> *"Cases and circumstances vary so widely that any attempt to legislate in detail in advance for access to particular types of documents in particular types of cases across the whole spectrum of High Court litigation would be impossible. So the rules provide, in effect, a general prohibition but with a built-in safety valve: any person may apply, ex parte, (viz. with minimum formality and*

expense) to the court for leave. The court will then consider all the circumstances."

41. The purpose of the principle of open justice was characterised by Cape in reliance on the *Dian AO* authority very differently from the approach advocated by Mr Weir.

42. It was Cape's position that the principle of open justice was not engaged at all in circumstances where a case had settled (as was the case in both *Dian AO* and the case now before me). At para. 30 of *Dian AO* Moore-Bick J stated that:

> *"30. It could be argued that the principle of open justice demands that the court records be open to all and sundry as a right in order to enable anyone who wishes to do so to satisfy himself that justice was done in any given case. But that has never been the law and it is not what rule 5.4 says. ... The principle of open justice is primarily concerned with monitoring the decision-making process as it takes place, not with reviewing the process long after the event. In this context it is interesting to note that CPR 32.13 dealing with witness statements provides that a statement which stands as evidence in chief at the trial is open to inspection only during the course of the trial.*
>
> *31. This point is of some relevance in the present case because the action in question was begun in 1994 and was concluded by compromise in 1996. [The applicant non-party] has no interest in the performance of the judicial function in that case, which as far as one can tell was in any event very limited. It simply seeks permission to use the court file as a source of potentially useful information to assist it in other litigation. That does not in my view engage the principle of open justice."*

43. Cape's position on the above, and in relation to the passages from *Dian AO* which I have quoted above in relation to Mr Weir QC's argument (paras. 56-57 of the *Dian AO* judgment) was that the proper interpretation of the dicta relied on by Mr Dring's counsel the open justice principle was simply not engaged at all if a case settled before trial

44. Cape stressed, as I think was not in issue between the parties, that where documents had not been read to the court as part of the decision making process then per Moore-Bick J *"the court should only do so if there are strong grounds for thinking that it is necessary in the interests of justice to do so".*

45. The essence of the position followed by Cape was summarised in Pfizer Health Ab v Schwarz Pharma Ag [2010] EWHC 3236 (Pat.) where Floyd J as he then was confirmed that: (i) there was no unfettered right of access to court records, (ii) the requirement for permission was a safety valve to allow access to documents which ought to be provided, (iii) that the principle of open justice was a powerful reason for allowing access where the purpose is to monitor that justice was done, particularly as it takes place, (iv) that where the purpose was not the monitoring of justice was done, the court should lean in favour of disclosure if a legitimate interest could be shown and the documents had been read by the court as part of the decision making process, (v) that where the principle of open justice is not engaged such as where documents have not been read at all, what was required were strong grounds for thinking that disclosure was necessary in the interests of justice, and (vi) that the CPR procedure for access to documents should not be used where copies of documents are available from public sources.

46. Mr Fenwick QC noted in his skeleton that the Dian AO case had been followed in *ABC v Y*, but that Lewison J as he then was had observed in *ABC v Y* that it may have been "putting the point a little too high" for Moore-Bick J to have concluded that the principle of open justice was not engaged at all in a case where the purpose of seeking access was not to scrutinize the doing of justice. It was his position however that the later case law established that the narrower position of Moore-Bick J was to be preferred.

47. The case having settled, and on the footing that *Dian AO* was to be preferred and showed that the principle of open justice does not apply to a settled case, the appropriate standard for me to apply to this case was not the generous approach of leaning in favour of access but rather the higher threshold of requiring Mr Dring to show strong grounds for thinking that disclosure was necessary in the interests of justice. Such

could not be made out in this case and Cape's position was that disclosure should be refused.

The impact of *Guardian News* on the approach to public access

48. Mr Fenwick reserved his client's position as to a possible future challenge in a higher court to the *Guardian News* decision, which is a Court of Appeal authority. Whilst he accepted that the *Dian AO* case has to be read in the light of that decision, there were aspects which he stressed assisted Cape's analysis. The opening paragraph of *Guardian News* was in terms which were to the effect that the purpose of open justice was the scrutiny of the courts, which was consistent with *Dian AO*.

49. In terms of how far *Guardian News* ought to assist me, Cape stressed the fact that the applicant in that instance was a newspaper and the court was influenced by the reasons for seeking the documents namely access which the court considered to be on a matter of genuine public interest and journalistic purpose. (Paras. 76, 82 and 87 spoke in terms of the serious journalistic purpose and the credible evidence put forward as to the need for access so as to report on a matter of public interest). Good reasons had been put forward by the Guardian.

50. In the context of this application the role of 'good reasons' was on Cape's case particularly important. I was taken to para. 85 where Toulson LJ as he then was said

> *"I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality 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 material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."*

51. This, together with the fact that PD 5A para 4.3 expressly required an application for access to specify the document or class of documents sought and the grounds for the application together meant that a court faced with an application of this sort had to be in possession of the

necessary grounds and the necessary level of specificity of application in order to carry out the balancing exercise referred to in *Guardian News*.

Reading CPR 5.4C(2) in the light of CPR 31.22: not providing the public with rights greater than the parties themselves

52. Cape advanced an argument that one must look at the provisions of CPR 5.4C(2) alongside the inter partes disclosure provisions of the CPR in rule 31.22 and also CPR 5.4B.

53. Rule 5.4B applies to parties to the litigation and under that rule there was no blanket right to copies of all documents from the court records. Rather there is a specific list of available documents beyond which an application has to be made. It was said to be significant that those inter partes provisions which set out a list of allowed documents markedly do not refer to giving access to disclosure material. The rules as to access between the parties to disclosure material are in CPR 31.22:

> **"31.22**
>
> (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.
>
> (3) An application for such an order may be made –
>
> (a) by a party; or

(b) by any person to whom the document belongs."

54. In Marlwood Commercial Inc v Kozeny and others [2005] 1 WLR 104 the Court of Appeal per Rix LJ held that in order for an order to be made under rule 31.22(1)(b), ie the grant of permission by the court for the use of disclosure documents other than for the purpose of the proceedings in which they are disclosed, "special circumstances" are needed. Per Rix LJ at 43:

> *"... where permission is sought for release from the obligation imposed by the rule against collateral use of disclosed material, it is for the applicant to make good his case, cogently and persuasively, that there are special circumstances which justify such permission an that permission will not occasion injustice to the person giving disclosure: see Crest Homes plc v Marks [1987] AC 829."*

55. Clearly, said Mr Fenwick, Mr Dring is not a party and hence cannot avail himself of the inter parties rights to apply for permission to make use of disclosure documents for a collateral purpose. He had applied only under rule 5.4C(2) which was a significant feature since whereas rule 31.22 permitted a party to make collateral use of documents referred to in court, rule 5.4C(2) made no reference to documents of that type at all. That rule merely referred to a right to seek access to documents filed on the records of the court. That was said to be a significant restriction on the jurisdiction of the court. Alternatively if there was jurisdiction to allow access to disclosure documents at all then the application ought at least to meet the standard of 'special circumstances' demanded in the case of an application inter partes under rule 31.22 applying the *Marlwood* dicta. It would be wrong for a member of the public unconnected with the case to have greater rights to access and use of disclosure documents than the parties themselves.

56. Mr Fenwick referred in support of the above to the judgment of Keith J in *Sayers v. SmithKline Beecham plc [2007] EWHC 1346* at para 22 (otherwise known as the MMR/MR vaccine litigation) where Keith J said:

> *"The first report of Professor Bustin and the reports of Professor Simmonds and Professor Rima were never read or ever treated as having been read by me. The Secretary for Health should therefore have access to them only if there are strong grounds for thinking*

that access to them is necessary in the interests of justice. But there is a further consideration. The reports draw on materials which were disclosed by the claimants, namely the reports on the data provided by the tests carried out on the specimens taken from the claimants and the controls. It follows that the Secretary for Health is seeking access, albeit indirectly, to information contained in documents which were disclosed by the claimants. That explains why, when Merck wanted to use the evidence of Professor Bustin and Professor Simmonds in the proceedings brought against it in Philadelphia, it regarded itself as required by rule 31.22 to seek the court's permission to use that evidence. By the same token, the Secretary for Health accepts that, if he is to be able to obtain copies from the court records of the first report of Professor Bustin and the reports of Professor Simmonds and Professor Rima, he should not be in a better position than the defendants would have been if they were making an application under rule 31.22."

Status of the various documents and bundles

57. Trial bundles were not, it was argued, documents 'filed' by a party. A trial bundle could be filed, but it was not 'a document'. Reliance was placed on the fact that CPR 39.5 provides that the claimant 'must file a bundle containing the documents required ...', which was taken to highlight the distinction between filing a bundle, on the one hand, and filing the documents within it, on the other. Reference was made to the fact that often the term 'lodged' was used rather than filed, albeit the rule does state 'filed' in relation to bundles. (In *Gio*, which was cited, it was said that bundles were not 'filed', and that was relied on by Mr Fenwick (though I note that *Gio* was decided under the former court rules and not the CPR: there was no issue that under the CPR the rules require the filing of bundles today).

58. As to the other documents such as skeletons and submissions, those were documents which had been dealt with (in *Gio*) under the court's common law jurisdiction rather than as documents filed on the court record. *Gio* remained good law to the effect that there is no general rule which enables documents to be obtained by the public to see and copy a

document merely because it has been referred to in court. Nestec SA v Dualit Ltd [2013] EWHC 2737 wad cited as indicating that the court there had refused access to documents contained in bundles (whether under CPR 5.4C(2) or the court's common law jurisdiction) and had treated *Gio* as good law.

59. Bundle D could not be treated as 'filed' in accordance with CPR 39.5 because court files in the Queen's Bench Division are on paper and not electronic, because 'filing' required delivery to the court office and in any event CPR 5.5 provided that a 'practice direction may make provision for documents to be filed or sent to the court' by electronic means and there was no provision for electronic filing of bundles. The position therefore was that documents in the QBD must be filed on paper and bundle D therefore was not capable of being 'documents' filed on the records of the court.

Lack of legitimate interest in this case

60. On Cape's case Mr Dring had no personal or private interest in the material sought, such as he might if he were a potential asbestos litigant, as he accepted, and so what remained was therefore essentially a matter of whether the material was disclosable in the public interest. It was said that the extent of the public interest asserted by the applicant was 'dubious at best'.

61. In particular Cape disagreed with the suggestions in the witness statements filed for the applicant that TDN13 was being (by implication wrongly) accepted by courts in this country as having been a type of 'safety standard' and that there was an interest in ascertaining whether in truth TDN13 merely set a level of exposure acceptable to the asbestos industry to suit its own ends. There were general indications in the evidence that defendants in unspecified cases were disputing liability based on TDN13 being an historic safety standard. All this was said to be wrong in both fact and law. I was taken to the very well known case of Williams v University of Birmingham [2011] EWCA Civ. 1242 at 5-6 in the appendix to judgment, per Aikens LJ, where he stated:

> *"the Factory Inspectorate issued 'Technical Data Note 13' in March 1970. It was entitled 'Standards for Asbestos Dust Concentration for Use with the Asbestos Regulations 1969'. Note 13*

contained guidance on how the Factory Inspectorate would interpret he definition of 'asbestos dust' used in reg 2(3) of the 1969 Regulations, which included 'dust consisting of or containing asbestos to such an extent as is liable to cause danger to the health of employed persons' for the purposes of deciding when it should enforce the 1969 Regulations. In summary, where the average concentration of chrysotile, amosite and fibrous anthophylite was recorded as below 2 fibres per cubic centimetre or 0.1mg/m^3 the inspectorate would not seek to enforce the substantive regulations".

62. At para. 61 of the judgment Aikens LJ stated:

> *"In my view the best guide to what, in 1974, was an acceptable and what was an unacceptable level of exposure to asbestos generally is that given in the Factory Inspectorate's 'Technical Data Note 13' of March 1970, in particular the guidance given about crocidolite. Compare Ward v The Ritz Hotel (London) Ltd [1992] PIQR P315, where the majority of the Court of Appeal held that in deciding whether the risk of injury from falling over a low level balustrade was reasonably foreseeable, a hotel should have been aware of and be guided by minimum heights and safety standards published by the British Standard's recommended standard for the height of any balustrade. The University was entitled to rely on recognised and established guidelines such as those in Note 13. It is telling that none of the medical or occupational hygiene experts concluded that, at the level of exposure to asbestos fibres actually found by the judge, the University ought reasonably to have foreseen that Mr Williams would be exposed to an unacceptable risk of asbestos related injury."*

63. In Mr Fenwick' s submission then, TDN 13 was thus not a safety standard but guidance as to a threshold for enforcement action and the Williams case was merely treating it as a guide as to what would have been done (quoting Stokes v Guest [1968] 1 WLR 1776 at 1783) by *'the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know'.*

64. There was no doubt that today the dust exposure levels in TDN13 did not prevent development of mesothelioma but that did not affect the criteria by which the employers of past decades were to be judged.

65. It was misconceived according to Cape, for Ms Bains acting for Mr Dring to raise possible challenge to TDN13 which the law did not regard as a safety standard in any event, and the exercise in this case was a 'major fishing expedition' in the hope that something might turn up. There was no legitimate interest in this case and, beyond the misconceived suggestion that TDN13 was being treated by courts as a safety standard there was no other identified purpose beyond mere generality.

66. The true purpose was revealed by the conclusion of Ms Bains' third witness statement in which she stated that the applicant would make available the documents to other lawyers, academics and the public in general. That was not a legitimate interest for the purposes of the court's balancing exercise. If mere publication sufficed as a legitimate interest then all an applicant would need to do to secure access to court records was to assert that he would publish it. That would defeat the need for rule 5.4C(2).

Decision as to Part 1

The constitutional principle of accessibility of the courts

67. In *R (On the Application of UNISON) v Lord Chancellor* [2017] UKSC 51 the Supreme Court considered the lawfulness of certain court fees which had been imposed by the Lord Chancellor in the system of Employment Tribunals in this country. Questions of whether the level of those fees unlawfully interfered with access to justice were considered. Fees play no role in the decision which I must make, but the observations of their Lordships about the role of the courts in providing access to justice and developing the common law are relevant.

68. In UNISON at para. 65 the Court noted (in the context of the fees legislation but relevantly to any process of the sort undertaken there) that:

"In determining the extent of the power conferred on the Lord Chancellor by section 42(1) of the 2007 Act, the court must consider not only the text of that provision, but also the constitutional principles which underlie the text, [...]"

69. Per Lord Reed in UNISON (giving a judgment with which the whole court agreed):

"66. The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings. [...]".

68. [...] Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.

69. Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance. [...] it is not always desirable that claims should be settled: it[4] resolved a point of genuine uncertainty as to the interpretation of the legislation governing equal pay, which was of general importance, and on which an authoritative ruling was required.

[4] Referring to the example of Donoghue v Stevenson [1932] AC 562.

70. Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless. [...]

71. But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.

72. [...] although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail."

70. This application does not concern direct access to a *hearing* in the courts by Mr Dring, in the sense in which it was considered in UNISON. He has no case which he is pursuing or wishes to pursue and does not anticipate bringing one. Rather his application concerns his (and the public's) rights of access to documents concerning the cases of litigants whose claims have already been before the court and heard in public.

71. It is clear from the evidence before me in the witness statements of Mr Dring and his solicitor that the purpose of his application includes obtaining the documents for such matters as making it available publicly, causing or promoting academic consideration and discussion of that material in relevant fields of study, and (by ensuring the material is

available to inform them and their advisers and to be used in court if appropriate) facilitating current or future cases which relate to asbestos exposure in the courts. It is self-evident that the purpose of seeking disclosure is not the scrutiny of the doing of justice during the currency of the trial because the trial was over before the application was made.

72. Mr Dring is an officer and member of the Asbestos Victims Support Groups Forum (UK) and I set out in my decision in [2017] EWHC 2103 (QB) at paras. 46-47 extracts from some of the evidence before me which deal with the nature of that group and the uses of the material anticipated by Mr Dring. I refer to that judgment so as not to overburden this judgment with quotation.

The open justice principle

73. The ability of the public to access records of court proceedings (subject always to the control of the court in an appropriate case where justice would be defeated or impaired by disclosure[5]) engages constitutional notions of open access to the courts in ways which are relevantly similar to but not identical with the direct form of access to court considered in UNISON. In particular:

(i) The right of access to court considered in UNISON is inherent in the rule of law.

(ii) It seems to me that openness of justice, of the sort considered here fosters the scrutiny of the courts by the public, protects the integrity of the court process and assists the development of the law and legal knowledge. It thereby supports the practical effectiveness of the right of access to court.

(iii) The courts do not merely provide a public service to the 'users' who appear before them. Rather, previous cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless.

(iv) Although it is often desirable that claims arising out of alleged breaches of the law should be resolved by negotiation or mediation, those procedures

[5] I shall return to this aspect below.

can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail.

74. Access to a court, being not merely the provision of a service to 'users' as if they are consumers of a product akin to the dispensing of stamps, entails that the parties submitting to the jurisdiction do not have full sovereignty to determine simply by private agreement between themselves the extent to which the public may be made aware of any aspect of the proceedings before the court.

75. This brings with it *at least as a default position* an inherent and perfectly foreseeable possibility that material deployed in court by the parties, or filed upon the records of the court as part of its process, will form part of the corpus of material which may be deployed in other cases, used for the purposes of legal advice, being academically or journalistically discussed, or considered by Parliament. Thus in *Chan U Seek* (*supra.*) at 31:

> *"... the courts favour disclosure rather than withholding of materials if the materials have featured in proceedings in open court..."*

and Per Toulson LJ in *R (Guardian News) v Westminster Magistrates' Court (supra.)* at 85:

> *"In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle"*

76. The earlier cases such as *Gio* (prior to the CPR) and *Dian AO* and which are more conservative in their approach to disclosure of court documents must be read in the light of the development of the law in *Guardian News*.

77. In particular one sees a clear progression of the view taken by the courts in the more recent era if one examines the judicial progression of thought starting at *Gio* at 995F, doubted to be good law in the post *Guardian News* era in *NAB v Serco* at 29 and ending most recently in *Blue and Ashley* at para 10 with Leggatt J's statement of the breadth of the common law jurisdiction to order disclosure of served documents. The

message which emerges from the authorities is that the common law discretion is a wide one but its exercise is case specific. The rules regulate its exercise but do not limit those powers.

78. 'Knowledge' that there is a fair and just system of adjudication available if Alternative Dispute Resolution fails, which was one of the benefits of open access to the courts referred to in UNISON would be ineffective if it was merely an article of faith among lawyers or those who have had court experience. The process and operation of the court, as well as the substance of any decisions and their legal basis must be accessible if knowledge of the fairness of the system is to be real and not illusory.

79. Summing up therefore:

(1) CPR 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.

(2) Where documents are filed on the record of the court then they fall within the scope of CPR 5.4C(2). (If documents are removed from court, Blue and Ashley v Times Newspapers Ltd [2017] EWHC 1553 (Comm.) may provide a basis for saying that the court can require them to be returned but in this instance the documents had not in fact been removed from court).

(3) Documents filed on the record of the court and which are read or treated as read in court are subject to a default position in favour of the principle of open justice if the applicant has a legitimate interest.

(4) Where the applicant has a legitimate interest then the court must still consider the balancing exercise in relation to any harm to other parties legitimate interests when deciding whether to allow access.

(5) Documents on the records of the court which are not read or treated as read are subject to a more stringent test namely that there must be strong grounds for thinking that access is necessary in the interests of justice.

(6) Served 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. *Gio* and

Nestec support a narrow approach to exercising that jurisdiction where documents are sought which fall outside rule 5.4C. *Blue and Ashley* draws the scope of the powers widely but also approaches their exercise cautiously.

Is the principle of open justice engaged at all in cases which settle before judgment?

80. I do not accept that the correct interpretation of *Dian AO* is that put forward by Cape namely that the open justice principle is not engaged where a case has settled before judgment, and nor to I understand Lewison J to have been affirming such an interpretation of *Dian AO* in the *ABC v Y* case. To follow why I take that view I must consider briefly the facts of *Dian AO* and then turn to specifically what Moore-Bick J said.

81. The application in *Dian AO* concerned an application for access to the court file in a case which had settled. It appears from the report that the case did not proceed as far as in the case before me (the judge notes at para. 31 that the judicial function had been as he puts it 'very limited' in that case). The applicant there initially sought access to all documents in the court file. I need not go into the full detail of the court's discussion of the various documents in the case but it is of note that the court in *Dian AO* was faced specifically with two types of document namely (a) those which had been used, at least to some extent or other, as part of the judicial process on for example a security for costs application and an injunction application, and (b) affidavits which had been filed as part of a summary judgment application which had been compromised by way of unconditional leave to defend, and which had not ultimately been through any type of judicial consideration.

82. The court allowed access to the documents which had played a role in judicial process, but refused access to the affidavits for the abortive summary judgment application.

83. Against that backdrop one then looks carefully at the dicta relied on by Cape in support of the proposition that the open justice principle does not apply to a settled case, and looks to see whether what is said in that case actually makes out the assertion by Cape in the footnote to para. 13 of its skeleton that in *Dian AO* there was a dictum that "*a settled case does not engage the principle of open justice*".

84. I do not see that it is a tenable proposition that when properly read, Moore-Bick J was making such an assertion. At para. 30 of *Dian AO* the court said that the principle of open justice was:

> *"primarily concerned with monitoring the decision-making process as it takes place, not with reviewing the process long after the event."*

The court then observed that the claim had ended by compromise in 1996 (ie, long before the application for access) and stated at 31 that the applicant had:

> *"no interest in the performance of the judicial function in that case ... It simply seeks permission to use the court file as a source of useful information to assist it in other litigation. That does not in my view engage the principle of open justice."*

The judge then (at 56-57) found that:

> *"In the present case, although the [applicant] is not interested in whether justice was properly administered in the Dian case, I think it does have a legitimate interest in obtaining access to documents on the court record in so far as they contain information that may have a direct bearing on the issues that arise in [the other litigation it was involved in]. I did not accept the submission that the link is too tenuous ... Moreover, I think that in the case of documents that were read by the court in as part of the decision-making process, the court ought generally to lean in favour of allowing access in accordance with the principle of open justice as currently understood"*

85. It is clear to me that the dicta stated above are not consistent with an interpretation of judgment in *Dian AO* that a settled case does not engage the principle of openness. Rather the meaning conveyed was that:

(i) if the purpose of access is **not** to scrutinise the judicial process as it is taking place but is some other reason then the principle of open access is not *for that reason* engaged and

(ii) if the applicant has a legitimate interest which is not too tenuous, and the documents have been read in court, then the court leans in favour of access "*in accordance with the principle of open justice*" to quote the specific words of Moore-Bick J again.

86. There is no realistic reading of the above quoted passages which leads to the conclusion that Moore-Bick J was of the view that a settled case does not engage the principle at all, unless one is prepared to ignore the last eleven words of the above quotation.

87. Proceeding further, one can then see that the setting of a higher threshold for the summary judgment documents in *Dian AO* whereby, such documents not having been read by the court as part of the decision making process, they were subject to the 'strong grounds' test was a reference to the facts set out (at para. 47 of his judgment) in which he makes it clear that the summary judgment affidavits had merely been filed and never read by the court because the application was compromised before any hearing or judicial consideration took place.

88. I accept that the fact referred to by Cape that *The Law Debenture Trust* case cited did not concern the rule with which I am now concerned weakens somewhat the force of argument by Mr Weir that it is authority that settlement out of court does engages the principle of open justice in an application such as this. But with due respect to the Cape argument and to Mr Fenwick it seems to me that the *NAB v Serco* case is on point, did concern the type of application before me and was clear, per Bean J at 30 that *"The public interest is not confined to cases where the court has given judgment and it is sought to see whether the underlying documents provide further illumination of the judgment. It may be just as significant to discover why a case settled."*

89. That Bean J in *NAB v Serco* was referring to the public interest in open justice, specifically, and not merely the public interest in a very general sense is clear from the opening of the very next paragraph of that judgment in which he confirms that *"I have considered whether the public interest in open justice is outweighed in this case by the risk of harm to the legitimate interests of others."*

90. The principle of open justice is engaged notwithstanding that a case settles before judgment. It applies to documents which have been read to or by the court, treated as so read, or which (using the formulation in *Chan U Seek) "have featured in"* the proceedings

Which documents were filed on the records of the court in this case?

91. In this case the main group of documents with which I am concerned are those marked as Bundles A to F. 'Bundle' D was provided solely in electronic form via a document management system and is a large repository of disclosed documents. The other bundles were on paper and are a selected set of material which was gradually expanded during the trial as documents which had been expressly referred to were moved across from D to the paper bundles, enabling a cumulatively completed paper core bundle for the judge by the end of the case (whilst still ensuring the judge had all documents in the case, via bundle D, if required to be deployed). Mr Weir's case was that all of those files A to F were the trial bundles, filed as such, and that there could be no question that 'Bundle D' was anything other than a part of the trial bundles and therefore was part of the 'records of the court' at trial just as were the paper files.

92. In addition to the paper bundles, there were at court a set of daily transcripts of trial which had been given to the judge, and the usual miscellaneous documents generated during the case and deployed before the judge such as written submissions etc.

93. It does not appear that (as had been thought to be the case when the *ex parte* application was made to me for the re-filing of the bundles etc) any relevant documents forming the subject of this application had been removed from court as at the time the application was made.

94. The CPR require, in rule 39.5 expressly, that bundles for trial be 'filed' unless the court orders otherwise. The expression is not 'lodged' or 'delivered' or some other variant, but 'filed'. Other parts of the CPR, notably parts of PD 5A use terms including 'filed, lodged or held' at the court, but not the rule as to bundles.

95. Neither myself as the managing master nor Picken J ordered otherwise in relation to the filing of bundles. The case law already cited above such as *NAB v Serco* amply establishes that bundles which have been filed are part of the records of the court. They fall within the court's jurisdiction in principle as to allowing access accordingly. Cape's argument that because the CPR refers to 'bundles' being filed, that does not imply that the documents in them are filed. That seems to me an unrealistic approach:

bundles are simply collections of documents and when a bundle is filed necessarily so are the documents within it.

96. As regards bundle D, that differed from the others in that it was a purely digital bundle.

97. Cape was incorrect to assert that the QBD does not keep electronic court files. It does do so, as well as files on paper, but it is correct that the system in use electronically is a very basic record of case progression and events maintained by staff.

98. However Cape is correct to assert that 'bundle D' does not amount to a bundle filed at court. It is notable that PD 5.4A at 2.2 states that "(1) Unless the nature of the document renders it impracticable, be on A4 paper of durable quality having a margin, not less than 3.5 centimetres wide,". That and other provisions imply that the basic position as to filing at court is, absent a Practice Direction in accordance with rule 5.5, a paper exercise.

99. Practice Direction 5B allows documents to be sent, in some circumstances, by email. It makes no provision for filing of documents in the QBD electronically. Practice Direction 51O, in force from 16 November 2015 does make provision for filing of documents electronically (though even it requires paper bundles to be filed as well as electronic ones), but that PD applies only to "The Rolls Building Jurisdictions", and this case was not proceeding under one of those jurisdictions.

100. 'Bundle D' was made available as a digital resource in court much as if a hard drive had been retained on the solicitors' row in court so that documents could be extracted from it, but in my judgment one cannot conclude that bundle D was filed.

101. Apart from the bundles, there were other documents deployed in court such as skeletons, written submissions and transcripts on a daily basis. Clearly those were placed before the judge and referred to.

102. There is a legitimate question whether all of those were technically 'filed' or not, and whether handing a document to a judge directly or via staff in court is necessarily always the same thing as filing it. The authorities generally appear to treat submissions and skeletons as

permitted to be disclosed under the common law jurisdiction rather than as being filed and triggering rule 5.4C.

103. In this instance the documents other than the bundles were retained in court at the end of trial and held together with the court files, rather than, for example, being looked at and handed back to the advocates, and in my judgment that suffices in the particular circumstances of this case to cause them to have become documents filed on the records of the court at least for so long as they are at court.

104. If I am wrong, then the documents other than those in the bundles fall within the court's general discretion as to access and I would reach no different conclusion as to them than I do below on the basis that they were (and are) part of the records of the court.

105. Cape correctly accepted in any event that I can direct that any document not filed, be placed on the court file and I return to that at the very end of this judgment.

Whether filed documents have been sufficiently read or treated as read by the judge so as to give rise to a starting point of openness?

The bundles other than bundle D

106. Mr Weir QC correctly argued that following Smithkline Beecham Biologicals SA v Connaught Laboratories Inc [1999] 4 All ER 498 509c-e and Barings plc v Coopers and Lybrand [2000] 1 WLR 2353 at 52-52, one has to take into account that modern practice encourages the pre-reading of bundles by judges.

107. I note also that in *Barings* at 51 the following passage from the judgment of Lord Woolf MR highlights the expectation which there was at that time that the coming into force of the Human Rights Act 1998 and the CPR would have certain effects on the approach to disclosure of court documents:

> *"The tension between the need for a public hearing of court proceedings and what happens in practice in the courts will be increased when the Human Rights Act 1998 comes into force and*

the courts will be under an obligation to comply with article 6. Already, this court has recognised the need to give "appropriate weight to both efficiency and openness of justice" in the judgment of the court given by Lord Bingham of Cornhill CJ in Smithkline Beecham Biologicals SA v Connaught Laboratories Inc. [...] As Lord Bingham CJ recognised, it "may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain." Since the Civil Procedure Rules came into force it is important to reduce the gap since judges will be increasingly performing their role out of court as well as in court."

108. In this instance the bundles on paper were deployed in court and placed before the judge including after he retired to consider his decision. They therefore not only formed part of the records of the court but I consider that by having been placed before the judge and relied on by the parties, they were subject to what Lord Justice Toulson referred to as the 'default position' that access should be given on the open justice principle, in *R (Guardian News) v Westminster Magistrates' Court at 85.* Cases such as *Sayers* are examples of the approach to take.

109. The same reasoning applies to the documents other than bundle D namely the submissions, skeletons and transcripts provided to the judge.

Bundle D

110. Leaving aside the question which I have answered in the negative above as to whether bundle D was 'filed', referring back to the default position set out by Toulson LJ in *R (Guardian News) v Westminster Magistrates' Court,* the placing of documents before a judge is one relevant aspect of whether the default position of openness applies. The other aspect referred to by Toulson LJ at para 85 of his judgment is that of whether a document was referred to, having been placed before the judge.

111. In the case of bundle D that is problematic because the intention of the parties in producing bundle D at all was that where documents were referred to they would be copied across to form part of the other, paper, bundles on paper. The documents in bundle D (save where they were the same as in the other bundles) were by definition documents which

the judge had not been invited to consider, as I understand the evidence from Cape as to how the document bundles were used.

112. Mr Weir QC submitted to me that if Cape could show that any of the documents in bundle D were not read by the judge then the court should adopt the more stringent test set out in *Dian AO* namely that the court should not allow access unless there are strong grounds for thinking that it is necessary in the interests of justice to do so.

113. I do not agree that such a specific approach is necessary in the case of bundle D. Absent human error in transferring or coping documents across from bundle D to the other bundles on paper, the residue of the contents of bundle D were materials that the judge had not been asked to use, had not been referred to and to which, if wishing to take them into account, he would doubtless have come back to alert the parties and ask to hear argument about them such that they would then be referred to and treated as read.

114. It seems to me that without piercing the veil of the judicial retiring room one can see readily that bundle D did not form part of the material placed before the judge *for the purpose of his decision*. It was not material which featured in the decision-making process or was read or treated as read by the court.

115. Therefore the residue of bundle D not already contained in the paper bundles is material which falls outside the scope of the default principle of openness. I shall make provision below for dealing with any stray documents which failed to be copied across to the paper files but which were referred to.

116. In terms of the potential for an order for disclosure of bundle D under the common law jurisdiction of the court, I consider that those powers are in principle available (firstly) because it was technically placed before the judge in the sense that it was available using the document management system and (secondly) following *Blue and Ashley* per Leggatt J at 10 the court's powers do extend in principle to ordering disclosure of served documents to the public even if not filed at court. I discuss *Blue and Ashley* further in Part 2 of this judgment under the Balancing exercise.

The use to which the documents will be put and whether there is a legitimate interest in access in this case

117. Following *Gio* and *ABC v Y* referred to in argument, once a document has been sufficiently deployed in court to give rise to the starting point of openness, there is still a need for the applicant to show a legitimate interest (and thereafter to consider the 'balancing exercise' in relation to possible harmful effects to others' legitimate interests).

118. A legitimate interest can from those authorities include academic interest, use by a pressure group or use in some journalistic form and indeed any number of other uses which are ulterior (in the proper sense of that word) without being illegitimate. One might decide for example that if a member of the public sought access to documents for the purposes of fraud or of making undue use of court resources there may be no such legitimate interest but such is not the case here.

119. In *Various Claimants v News Group* it is fair to say that Vos J adopted a robust approach where it was alleged that disclosure would risk prejudicing a criminal trial, and that is very obviously a case where the court must tread carefully. He indicated at para. 66 that the court must look at the uses to which the documents would be put and the extent to which they were truly required to understand and report the proceedings.

120. I accept the basic point that the court must evaluate whether there is a legitimate interest. I do not agree (if such was intended by Vos J in *Various Claimants v News Group,* which I doubt) that legitimate interest is limited to whether documents are required only to understand and report proceedings. It is appropriate to consider that aspect, but the scope of legitimacy of interest is a broad one illustrated by *Gio* and by *ABC v Y.*

121. Cape attacked the idea that enabling the detailed examination of the origins of TDN13 and its basis at the time it was created was an aim which was legitimate, because the idea put forward on behalf of the applicant that TDN13 has been treated as a 'safety standard' in asbestos litigation was lacking in legal substance. Based on Cape's interpretation of *Williams v Birmingham*, it was said to be the case that the court had merely treated TDN13 as guidance. Moreover the approach there was

and remained good law and had for example been applied in Smith (Executor of the Estate of Smith, deceased) v Portswood House Ltd [2016] EWHC 939.

122. As to TDN 13 with due respect to Cape, the question whether TDN13 was a safety standard, was guidance, or was in some sense a bogus document created by industry acting in its own self-interest or something else entirely, is not a matter I need delve into beyond being satisfied that there is a real debate, having public interest, as to the validity and origins of TDN13.

123. I need not determine anything about TDN13 in this judgment other than that it is the subject of a legitimate desire by Mr Dring to further the public knowledge and consideration of how it came about and how it should be approached in law, including potentially in future claims involving Cape itself.

124. In this instance the evidence, which I accept, is that Mr Dring acts for a group which provides help and support to asbestos victims. It some respects it is also a pressure group and is involved in lobbying and in promoting asbestos knowledge and safety. Those are legitimate activities and provide legitimate interest. The evidence before me demonstrates that the intended use is to enable him and the forum of which he is an officer, to:

- make the material publicly available,
- by making it available to promote academic consideration as to the science and history of asbestos and asbestolux exposure and production,
- improve the understanding of the genesis and legitimacy of TDN13 and any industry lobbying leading to it in the 1960s and 1970s.
- understand the industrial history of Cape and its development of knowledge of asbestos safety
- clarify the extent to which Cape is or is not responsible for product safety issues arising from the handling of asbestolux boards
- to assist court claims and the provision of advice to asbestos disease sufferers.

125. Those are legitimate aims. I do accept that if an applicant under CPR 5.2C(2) merely asserted that he wanted access to documents so that he could publish them, and gave no basis for the importance or effects of so doing or his motives, it would not in that bare form be persuasive. To that extent I accept Cape's position that an assertion of a mere intention to publish the material obtained would, if it sufficed without more particularity, essentially deprive rule 5.4C(2) of much of its purpose. But that is not the position here. It is clear from the evidence what the intended use is and why.

Part 2 – The standing of the applicant, the specificity of the application and the balancing exercise

Standing of the applicant

126. Cape submitted that this application was a nullity and had to be dismissed. The application had been issued originally in an urgent ex parte basis and had named the Forum as the applicant. The Forum had no legal personality.

127. Where an application is made urgently, it is unsurprising that a situation could arise where counsel proceeded, as was the case, on the basis that he believed the Forum to have a legal personality. I must ask myself whether the effect of the Forum having been named in error as the applicant means that this application must be dismissed. Such would be grossly disproportionate. Mr Dring was substituted as applicant and the irregularity was cured. The proper course is for me to decide the application on that basis.

Specificity of the application

128. I consider that the degree of specificity which is possible in an application under rule 5.4C must necessarily be limited in practical terms by the fact that without seeing the documents in the first place the best that can be expected so as to assist the court is that general categories of documents be identified unless there is a particular identified document which known about and is sought. The Practice Direction

envisages that classes of documents should be identified and does not expect more than that.

129. In this case at a late stage the applicants, challenged by the respondents to be more specific, and I think attempting to help, provided a detailed list of documents. That approach is undesirable where, as was the case, the identification of the documents based on that list would have required insight into the minds of the parties. Asking for 'all witness statements' would be a proper request in form albeit broad, but not a request such as 'all material relied on by the Claimant to establish a particular proposition' which to my mind confuses this type of access application with a species of disclosure application as between parties to a claim and lacks practical precision as regards the court's ability to know what documents are intended.

130. Cape's position was that the application was simply too vague. The application was attacked as being effectively a request for all documents including the parties' disclosure. It did not specifically identify which documents sought were 'part of the records of the court' and which were sought under the court's general discretion, or the grounds on which they were sought. It was Cape's position that this had the effect that the court could not properly grant permission under the rules and could not properly carry out the balancing exercise envisaged in *Guardian News* at para. 85.

131. I do not accept the criticisms by the Cape parties that the application as a whole is too vague to enable it to be decided or fails to identify the classes of document sought. This application in strict point of form as issued is effectively an application for the entirety of the documents at court but nonetheless the classes of document were listed (but with a 'catch all' request at the end which meant that the net effect was to request all documents). The classes sought in the statement provided with the application were:

    (i) All witness statements

    (ii) Experts' reports

    (iii) Transcripts of evidence

    (iv) All documents disclosed by Cape and other parties.

132. The classes of documents sought are readily identified and they are the ones presently occupying several metres of shelf space and a hard disk in my courtroom. I must interpret the rule and Practice Direction to rule 5.4C as being subject to the principle of proportionality in the way in which courts allocate their resources and accordingly in this judgment I have taken the same flexible approach I would with any member of the public and that is to consider the extent and form of disclosure which in my judgment is appropriate, given the classes of documents sought and the reasons given, with any countervailing considerations.

133. In these applications, which Masters often encounter in an unopposed form, the usual approach is a relatively informal consideration of the request and not an overly time consuming or resource-heavy process. The courts must balance their limited resources with the need to give effect to openness, and a complex or overly detail-heavy approach would be unattractive risk being an excessive use of precious court resources.

The Balancing exercise

Balancing the constitutional right of open access to the courts and court processes, and the constitutional rights of parties to receive justice through the courts

134. The constitutional right of access to a court would be unacceptably impaired if the act of going to court, perhaps having no choice other than to do so in some instances, necessarily entailed that every detail of every case was available to the public.

135. Claims involving trade secrets, intimate personal details, libels and falsehoods which would be damaging if re-published, and no doubt other forms of information could be disclosed if court proceedings were unavoidably 'open' to their fullest extent, and such could in serious cases defeat the point of bringing the claim at all, or place an unacceptable commercial 'price' on access to the court in much as the imposition of court fees impaired access in the UNISON case.

136. Since the prime duty of a court is to do justice (now a principle reflected in the overriding objective, which re-states the common law but does

not replace it), it will sometimes be the case that the constitutional right to openness of court process is overridden by considerations of doing justice. In such cases it is the court's duty to restrict access to extent necessary to ensure that justice can be done effectively.

137. To that end the rules of court provide a qualified and controlled system of openness regulated by the court rules in a judicial manner. The court rules provide a system whereby in an appropriate case a party may seek orders from the court restricting publication of documents.

138. In addition to seeking orders as to non-disclosure of documents from the file, a party may also seek in an appropriate case to have proceedings held in camera, or for proceedings to be anonymised wholly or partly (the latter being commonplace in asbestos cases concerning dying mesothelioma victims whose cases proceed in the specialist Masters' rapid access asbestos courts which I described in some detail in my judgment in Yates v HMRC [2014] EWCH 2311 (QB)). I have not been informed in this case of any applications made for hearings in camera or for anonymity.

139. The above forms of protection are not the sole protections for a party. I accept, as Cape argued, that there is a need to perform a balancing exercise along the lines envisaged in *Guardian News* with its reference there to a balancing exercise in terms of looking at the legitimate interests of the applicant and the potential for harm to the interests of others in the event of disclosure.

The importance of the documents on file

140. I am satisfied based on the evidence in the witness statements before me from Mr Dring and Ms Bains that (in no order of priority) the content of these documents:

    i. would be likely to be of academic and scientific interest as part of public and social discourse as to the history of asbestos safety, regulation and knowledge as it developed during the 20th century,

    ii. would be likely to be considered by advisers advising parties to asbestos litigation as to the merits of their cases whenever issues

arise which touch upon Technical Data Notice 13 and connected Regulations,

iii. is likely to be relevant the product safety of asbestos insofar as understood within the major manufacturers and connected companies as compared with general public at various points in the 20th century, and

iv. is likely to be relevant to the extent to which employer defendants could have been expected to appreciate the risks of asbestos (in that regard the material will not necessarily assist claimants as against employers per se, if, as the applicant's side suspect, TDN13 was essentially a bogus standard created by the asbestos industry).

141. The point was made for Mr Dring in evidence that it would be most undesirable if courts dealing with matters relating to asbestos safety and TDN13 were to have to proceed in ignorance of the matters in these documents. To the extent that the documents would in principle be available for disclosure in the usual course of a court claim *inter partes* that ought to be a diminished concern but it is not fully diminished because considerations of proportionality come into play in personal claims relating to mesothelioma given the value of such claims, and hence it may be that in practice the disclosure process would not suffice.

142. This is perhaps best highlighted by noting that the post-Jackson approach to proportionality means that even if disclosure in the courts of a claim is necessary it should not be ordered if to do so would be disproportionate. Therefore, the availability of *inter partes* disclosure orders in mesothelioma claims cannot be a complete answer to the risk that a court may proceed without access to the material contained in these files.

143. A similar concern, in that it reflects a desire to ensure that courts are not kept in ignorance of material, was highlighted in Smithkline Beecham Biologicals SA v Connaught Laboratories Inc [1999] 4 All ER 498 at 511h per Lord Bingham CJ who said:

"It is in our view unsatisfactory if in the proceedings elsewhere decisions are made in ignorance of the grounds which led the Patents Court in this country to hold the patent invalid. [...] Connaught should not be in a worse position than if the materials on which Laddie J relied in making his decision had been read aloud in open court, but nor in our opinion should they be in a better position."

144. I accept that here there was no ultimate decision and hence the point made as to knowledge of the basis for a decision does not apply but it is a closely related and in my view valid concern expressed by the applicant here that directing the material in this case not to be accessible by the public would risk the courts proceeding without the parties being in a position to draw that material to the judge's attention when appropriate.

145. This in turn relates closely back to the points already made above that the courts are not a private dispute resolution forum but rather they play a public role in informing other cases both as to law and procedure and, as the above quotation shows to be desirable, as to facts and knowledge in specialist areas.

Cape's interests and risk of harm due to disclosure

'Cherry picking'

146. I accept the concerns of Cape in submissions that partial access to the documents could lead to 'cherry picking' in terms of the publishing of negative material especially if access was only given to material which paints asbestos, and perhaps Cape in a bad light. There is a risk, but a much reduced risk, of cherry picking if access is given less selectively and more rather than less widely.

147. This court is not, save in relatively unusual circumstances, the arbiter of how the public discuss the content and implications of legal proceedings before the courts. Mr Dring and the public at large may place emphasis on some matters which were gone into in court, rather than others, just as counsel in the original case (after its conclusion) did himself in relation to certain of the 'test data' mentioned in the powerpoint slides quoted in

my previous judgments, but a benefit of openness of justice in a democracy is that balance can be provided by the Cape parties who themselves have the information and an at least equal ability to make public any information they wish for the sake of balance.

Upholding settlements between parties

148. As to Cape's argument that there is a public benefit in ensuring that settlements reached by the parties are upheld in any given case and indeed the CPR encourage settlement and require the court to encourage it. I agree that if parties are concerned that the 'dirty washing' or the trade secrets and so forth contained in material which needs to be considered at trial would all emerge in public even in the event of a settlement, then that might discourage settlement. (However one might well say that conversely such a concern if true might encourage ADR out of court in the first place). But the prime concern as to disclosure is surely met by the fact that the rules provide a very effective framework for genuinely concerned parties to seek non-disclosure orders or orders for hearings in camera during the trial and before the material in question is ventilated in public.

149. If material is sufficiently sensitive that the ends of justice would be interfered with by public ventilation of it then the means exist to ensure that orders are made to that effect: it is telling that this whole trial took place without such orders being sought and that the settlement took place despite the evidence having been given and submissions made openly in court.

150. It is no matter to this court that, after having 'gone public' in court, the parties may later have decided that a term of settlement would be confidentiality or as here the destruction or return of the documents, unless the court has specific evidence and reasons why damage would be caused by adhering to the principle of openness. In Lilly Icos Ltd v Pfizer Ltd (No. 2) [2002] 1 WLR 2253 per Buxton LJ at 25 *"Simple assertions of confidentiality and of the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document."*

151. It would be very unattractive basis to conclude that the principle of openness should be ousted here so as to respect an agreement that documents freely deployed in open court without apparent concern at the time should cease to be available to public scrutiny merely because the parties so agree privately.

152. It would be damaging to confidence in our open court system for proceedings of this sort to appear to have taken place in a manner inaccessible to the public after the event. This relates back to the important observation that the courts are not a private dispute resolution forum for the parties akin to mediation or arbitration and that the public interest in developing the law, and in ensuring confidence in the substance and process of justice are in play whenever parties submit to the jurisdiction of the court. *A fortiori* where the material is of legal, social and scientific interest.

Prevention of spurious claims

153. A further objection by Cape was that restricting access would help to prevent spurious claims. There is mileage in that point to the extent that releasing the information may indeed prompt more claims in relation to harm said to be done by asbestos, and therefore one may assume that among those claims there will be spurious or weak cases which might not otherwise have been attempted.

154. One must balance that side effect with the prospect that meritorious claims may well also arise if it is the case that, when the subject of TDN13 next comes to be considered by me or another judge, the documents in these files persuade the court that the standards were known by the industry to be unfounded or not well founded. It will be for the courts, provided as they are with the necessary tools of costs and case management, to dispatch hopeless claims with the usual vigour of the Masters' corridor mirrored one hopes in other courts. The asbestos 'court' as I called it in *Yates v HMRC* in the Masters' corridor is well able to sort the wheat from the chaff.

Impact on the disclosure process in future claims

155. Cape argued that there could be impact, if access is given, upon the willingness of parties to give disclosure to each other in claims. This in my judgment particularly applies to bundle D which consisted of served disclosure documents not read or relied on at trial. Cape argued, albeit that the case of *Sayers* referred to did not strictly decide the point because it was conceded, that by analogy with CPR 31.22 if a party seeks access to documents which are not filed on the records of the court but are instead part of the disclosed material in the case which has not been filed, then a test of 'special circumstances' should apply equivalent to the approach taken to the courts under CPR 31.22 for disclosure documents not read at trial.

In an application under rule 5.4C(2) which might give rise to public access to documents which originated in the parties' disclosure documents, does a further test of 'special circumstances' apply analogous to CPR 31.22?

156. It will be recalled that Cape cited the *Marlwood* case and a dictum of Keith J in *Sayers* arguing that a member of the public ought not to be allowed access to disclosure documents on a basis which was more advantageous than a party under the inter partes rules as to disclosure, even if they did amount to part of the records of the court which was not accepted).

157. *Marlwood* and *Sayers* do not assist me in relation to documents which have been referred to in court and which form part of the records of the court. Where the *Sayers* case does assist, is the case of disclosure documents which are not filed and not referred to in court. In that event Keith J adopted the test of '*special circumstances*' by analogy with rule 31.22 referring to *Marlwood* albeit he did so on the basis of a concession by the Secretary for Health.

158. It seems to me that such an approach is desirable to ensure that non-parties are not placed in a better position than parties in relation to unused but served disclosure material, and also that the concerns I have expressed above as to the possible chilling effects of regular use of the wide common law powers mentioned in *Blue and Ashley* are avoided.

159. If mere disclosure between the parties without deployment in court was to trigger the openness principle for all items disclosed one can see that

parties would err on the side of giving only the disclosure required by the rules and no more. It would more seriously be a significant chilling factor in the willingness of parties to come to court at all if there was a low threshold to be applied to orders for disclosure of such served documents at common law. That is a strong countervailing consideration where one is considering disclosure of the type of unfiled, and unread material in bundle D.

160. In *Blue and Ashley* Leggatt J at para. 12 made the point that it is one thing to conclude (as I have done in the preceding parts of this judgment) that in relation to documents such as those in bundle D the court has a common law power to direct disclosure but it is another to decide that the power should be exercised in a given case. In my judgment if documents are not ones deployed in court but are unused (but served) disclosure materials then a cautious approach and special circumstances are required.

161. This litigation was about the subject of asbestos safety and the development of knowledge in the areas in which Mr Dring is interested including TDN13. The parties were at trial were fully represented and deployed the documents which went to the issues in the case. The proceedings did not refer to documents in bundle D without them being copied to other bundles, and there does not seem to me to be any ground to think that an appreciation of the unused in bundle D which were not seen as sufficiently relevant to be relied on could realistically further aims of Mr Dring which one might see as legitimate in relation to this case and this subject matter (I deal with legitimacy of his aims below).

162. A concern of Cape in argument is that full disclosure of documents might also discourage parties from taking a pragmatic approach to document management in document-heavy cases to the judge via means such as the document management system used here and described in Cape's evidence. I can see and accept that if the mere presence in court of the entirety of the disclosure documents meant that they formed part of the record or were easily amenable to public access under the courts common law powers, that such would be a risk.

163. I have already concluded above that bundle D was not 'filed'. In this case even though applying cases such as *Blue and Ashley* there is a jurisdiction to order access to it at common law, I do not see grounds or special circumstances for ordering disclosure of it here. There is every reason to encourage parties to ensure that a system is available so that documents within disclosure and which are referred to, are made available effectively to the court. It is only at the point where documents play a role in the proceedings that the openness principle applies.

Cape's undertaking to preserve the documents

164. Cape has offered to retain the documents itself so that in principle they are available as a target for applications for disclosure by parties in the course of actual or contemplated litigation in future. Such is a sensible position but it does not go to the issue here. Mr Dring is not a party or likely party to litigation involving asbestos and nor are no doubt many of the members of the public, academics and lawyers who would nonetheless be informed by access.

165. The principles and focus of disclosure rules differ from the rules as to open justice. Open justice is aimed at scrutiny and understanding of court proceedings, decisions, process and settlement, and the holding of judges to account. Disclosure in the course of a claim is a very different creature and does not by itself imply any degree of later public access. Therefore whilst Cape's position as to availability of this group of documents is laudable it does not affect my decision. It is also difficult to see that in a routine asbestos case the value of the claim would permit search and disclosure to the extent which was, unusually, appropriate in this case.

That the transcripts provided to the judge were paid for by the parties and not Mr Dring

166. A point was made by Cape about the fact that the parties bore the costs of the daily transcripts. That is correct and indeed the parties bore the cost of the files, paper and copying of documents for the judge too. I do not see that the fact that a party has chosen to bear the cost of a

transcript to assist the judge, and has then deployed that transcript in court so that the judge can make his decision, can in any way displace the openness principle based on the notion that the transcript cost him money.

Evidence of specific harm to Cape's interests in relation to specific documents or classes of documents sought

167. I consider that (absent the applicant failing to make out a case that the 'default position' as to openness applies) it is for the objecting party to show why particular documents or classes of documents sought would risk doing it harm if disclosed.

168. I have considered whether it is necessary therefore for me to consider each and every document in the paper bundles and other paper documents and to ascertain whether there is a risk of harm to the legitimate interests of Cape in disclosure of each such document to the extent which would outweigh the legitimate interests of Mr Dring in having access.

169. In this instance the nature of the application as issued was in respect of all documents on the court file and in disclosure, and Cape as a represented party was in a position if it so wished to direct specific argument to me as to particular issues with particular documents or classes which it was aware were within the files.

170. It, of course, had the advantage of knowing what the material consisted of, which Mr Dring does not in any detail. I was not presented with substantial evidence or argument from Cape as to harm to it at the level of particular documents or even classes of document within the paper files. Looking at the second witness statement of Mr Isted which deals with the countervailing considerations for me to take into account, at para. 6(d) it is notable that none of the areas of objection there condescend to particulars as to harm likely to be done to Cape itself in respect of disclosure of any of the wide range of documents applied for. I do not accept that Cape was unable to put forward evidence of potential harm to its interests for me to consider, merely because of the breadth of the material sought.

Privacy concerns

171. Mr Isted in his second witness statement raised a concern that among the materials, there may be references to individual previous employees in the claims which had been brought against the various insured clients of the claimants, who suffered from asbestos related diseases and that those people would not have been aware at the time that their medical conditions could be made public.

172. No further detail is given about this objection but I must take into account the privacy rights of such people in the event that these documents relate to them. That is tempered by the sad fact that mesothelioma invariably causes the death of the sufferer and that the product liability cases related to claims settled by insurers which were necessarily some considerable time ago. The particular gentleman who is named in the Product Liability Particulars of Claim (one suspects really as an example of many) is a Mr Roy Irwin. His claim was issued in 2012. It was settled in 2012. It related to his employment in the 1970s during the era of 'Technical Data Note 13'. He developed mesothelioma, on assumes in or about 2012 which triggered his claim. It is virtually impossible that Mr Irwin is alive today, given the prognosis of mesothelioma. I do not consider that his privacy rights outweigh the public interest in disclosure in this case. If he were, contrary to my expectation, to be alive today then I would expect the applicant's solicitors to inform me and arrangements could be made to ask for his views as to the disclosure of any material which relates to his medical condition.

173. I was not presented with specific argument by Cape as to particulars of other individuals whose medical conditions might be referred to in the documents. It seems to me that to the extent those materials were deployed in open court and read by the judge, and that that was done without asking them, if they are still alive, then their privacy has already substantially been lost. I was not told of any individuals whose consent had been sought for by the parties for the use of their medical condition-related material in court in this claim. The impact on their privacy, if they are still alive today, is therefore very much reduced by the fact of there having been the prior use of their material in open court. In mesothelioma claims the specialist masters regularly make anonymity

orders to protect dying claimants and it was open to the parties or the court to have made such orders in this case but it appears neither side felt such was appropriate. I do not therefore regard the *post hoc* concerns now raised by Cape about their privacy as a ground for refusing public disclosure of these documents as a credible or weighty one.

Conclusions

174. This judgment relates to the Product Liability claim documents (helpfully the files were separately marked as to which claim they related to in view of the simultaneous consideration of some claims related to insurance cover).

175. As to statements of case, submissions and skeletons, those say no more than would either have been said orally or by reference, or would be treated as a substitute for oral submissions, and the public interest, and Mr Dring's interest in seeing them so as to understand the manner in which the evidence and arguments developed about the safety history of asbestos, and how the issues were met by each side in the light of the documents relied on, is clear.

176. As to transcripts of daily hearings, these are no more than a non-party could obtain by paying for a transcript and the same considerations apply as above in terms of understanding the manner in which the evidence and arguments developed about the safety history of asbestos.

177. The statements, expert reports and the documents relied on by the parties in the trial bundles (ie those other than bundle D) if disclosed may well expose Cape or others to litigation in a general sense. I accept that some claims might take place which lack merit, and it seems to me that the statements, reports and documents are the items which most engage that concern. But in general if these documents do expose Cape to potential litigation then they would be likely to be disclosable in any event as between the parties.

178. There is a strong public interest in facilitating a better understanding of the history of asbestos safety and the origins of TDN13. There is a legitimate interest in ensuring that material deployed in this case is available to courts and legal advisers in the interests of both consistency

of decision making and provision of advice as to merits or lack thereof, and to enable the public to discuss and consider how the material in this case led to a settlement.

179. I consider therefore that the balance is in favour of disclosure of:

vii. the witness statements including exhibits,

viii. expert reports,

ix. transcripts,

x. disclosed documents relied on by the parties at trial ie those in the paper bundles only,

xi. written submissions and skeletons,

xii. Statements of case to include requests for further information and answers if contained in the bundles relied on at trial.

180. I agree with Cape that partial disclosure of documents relied on at trial could create a public image which is biased or incomplete by way of 'cherry picking'. Cape's preference was of course for no access to be given so as to avoid such a risk. The long list of types of document sought by the applicant which was produced shortly before trial highlights the risk that very targeted access to solely 'negative' documents in a complex story would be undesirable. I therefore conclude that it would serve no useful purpose to 'fillet' the documents within the above categories. They were all before the court and relied on, by definition. To 'edit' the files in this case would itself verge on appearing to censor the record of proceedings without any real basis for doing so and would be a disproportionate exercise absent there having been specific submissions by Cape as to concerns about particular documents.

181. In formal terms I am therefore allowing the application in relation to document classes (i) to (iii) listed in the statement of Ms Bains dated 6 April 2017 but only partially allowing disclosure of documents in category (iv).

182. I am also allowing disclosure of the written submissions and skeletons (these were not referred to in the first statement in support of the application when issued but were in substance sought in Ms Bains' final statement).

183. The inclusion of statements of case is based upon an indication in Ms Bains' second statement that not all the pleadings had been made available to her client from the court file to date and that the missing statements of case were therefore requested. Inclusion of requests for further information and answers appears reasonably necessary to the understanding of the case.

184. I am **excluding** from disclosure the contents of bundle D for reasons already given. I am also **excluding** copies of the disclosure statements of the parties because that would tend to undermine (by giving disclosure by indirect means) the decision I have made that bundle D is not disclosed.

185. The Applicant may return to court to seek a decision as to access in respect of any documents in bundle D which it appears upon consideration were omitted from the paper bundles, yet were in fact relied on at court (this ought to be apparent from the documents for which access has been given as above). Bundle D shall remain impounded in court.

186. The documents subject to disclosure to Mr Dring shall therefore be made available by the court to the Applicant's solicitor as an officer of the court for copying or scanning upon the giving of an undertaking that documents not within the scope of this order, if contained in the files, will not be copied.

187. I direct that the court file and impounded bundle D shall not be destroyed in the usual course of administration of the court without an order of the court.

188. It was accepted by Cape that the court has a discretion to direct that a document be placed on the court file if it so chooses. Whilst I have decided that the skeletons, submissions and transcripts were effectively filed in the circumstances of this case, I direct that the transcripts, submissions and skeletons shall for the avoidance of doubt be placed on the court file in any event.

Permission to appeal

189. I have indicated in advance to the parties that I will consider permission to appeal of my own motion.

190. In my judgment there is no real prospect of a successful appeal and no other good reason for an appeal and I therefore do not grant permission to appeal to either party insofar as I have decided points against them.

191. It may be that this case, in the event of an appeal, ought to be heard by the Court of Appeal in view of the need for reasonable expedition of cases which relate to mesothelioma claims, the importance of the documents to which I have alluded in this judgment, and because the decision of Lord Justice Toulson to which I have referred was itself at Court of Appeal level and is central to the approach taken as to the default position being openness of access. I respectfully express that view. However as a matter of jurisdiction, this court having refused permission to appeal, any renewed application must be made to a Judge (other than a Master), having the jurisdiction of the Appeal Court.

MASTER VICTORIA MCCLOUD

5 December 2017