

Consultation on non-parties having increased access to documents filed at court

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In this article, Robert Corrigan of Kennedys discusses the Civil Procedure Rules Committee's consultation on a proposed new CPR 5.4C (Access to Court Documents by Non-Parties). The proposed reforms, which flow from the UK Supreme Court judgment in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, present some potential concerns.

The current Civil Procedure Rules (CPR) relating to the right of non-parties (parties not directly involved in a case) to access documents on the court file have been subject to recent consultation, which closed on 8 April 2024. A decision or further update from the Civil Procedure Rules Committee (CPRC) is now awaited.

CPR 5.4C governs the access of non-parties to documents from court records. The rule provides that non-parties, for example journalists, researchers, charities and campaign groups can obtain certain documents from court records. The rule can also be used by non-parties who have a claim related or similar to ongoing litigation.

Currently, the general rule under CPR 5.4C is that a non-party can obtain (without the court's permission) statements of case as well as judgments or orders which were made in public. They may only obtain other documents on the court record with permission of the court.

Background to the consultation

One of the main triggers for the consultation was the Supreme Court's decision in *Cape Intermediate Holdings Limited v Dring* [2019] SC38. This case concerned a party engaged in the manufacture and supply of asbestos. A support group (a non-party) sought access to all documents disclosed by Cape prior to the trial. The Court of Appeal allowed the support group access to statements of case, as well as expert reports and written submissions, which the Supreme Court upheld on appeal.

The Supreme Court added that the default position was that the public should be allowed access not only to the parties' submissions, but also documents placed before the court and referred to during a hearing. This was inconsistent with the current wording of CPR 5.4C. As such, the Supreme Court urged a consultation to take

place to explore the questions of principle and practice raised by the case.

The consultation opened in February 2024 and closed in April 2024 (see [Legal update, Civil Procedure Rule Committee: consultation on proposed new CPR 5.4C \(Access to Court Documents by Non-Parties\)](#)). A CPRC meeting took place on 7 June 2024, where the plans relating to the rule change were temporarily paused to allow the new Transparency and Open Justice Board to carry out the first phase of its work.

Proposed amendments to CPR 5.4C

The proposed re-drafted CPR 5.4C(1) is described by Lord Birss, Deputy Head of Civil Justice, as "reasonably modest in text, but reasonably significant in nature". Along with statements of case, orders and judgments, the revised rule will extend the documents a non-party can obtain from the court (without the court's permission) to include:

- Skeleton arguments.
- Witness statements and affidavits (but not the exhibits).
- Expert reports (except medical reports).

The right of non-parties to disclosure of these documents will exist after the defendant has filed an acknowledgment of service or defence, a hearing has been listed or judgement entered. Non-parties will therefore have access to documents at an early stage in proceedings and even if a document is eventually not relied on or referred to at trial.

Under a new CPR 5.4C(8) and (9), a non-party who, during or in advance of a hearing, has requested to

receive a skeleton argument once the hearing has started or a witness statement when the relevant witness had been called, will be provided with the document by the party who relied on it. The advantage of this is not entirely clear given the right to obtain these documents once they have been filed at court but it may cover situations where a person sat in the public gallery requests copies of documents for the first time (perhaps to follow the proceedings). It may also cover rare situations where a skeleton argument or witness statement is referred to at a hearing but had not been filed at court in advance.

The proposed new rule provides (similarly to the existing rule) that a party can make an application to restrict access of these classes of documents to non-parties. Parties can also seek that parts of a document are redacted before being shared with a non-party. In such a situation, the court is likely to balance the applicant's interests against the interests of open justice.

Potential concerns

It remains unclear when the proposed changes will be implemented. However, they are likely to be welcomed by the media, legal researchers, charities and campaigners. Once implemented, we can expect to see more in-depth press coverage of high-profile disputes, well before a matter has reached trial.

These changes are likely to cause some concern amongst expert witnesses in terms of potential increased publicity and scrutiny of their written evidence.

While the disclosure of medical reports is excluded from the proposed amended rule, other types of expert reports may contain sensitive personal information, for example, financial expert reports used to assess quantum in personal injury claims. The CPRC has, however, noted the possibility of amending the current

CPR 32.13 (availability of witness statements for inspection) to also make similar provisions for expert reports, which may alleviate some of these concerns.

The sharing of expert reports or witness statements containing highly confidential or commercially sensitive information may be of concern to the parties to the litigation. In some situations, this may push some parties to look at other means of resolving disputes, such as via arbitration or even potentially avoiding England and Wales as the jurisdiction to bring the claim, where possible.

The new rules do not appear to account for situations where a witness statement or skeleton argument is filed in support of an application made without notice. Is a non-party still entitled to receive copies without permission of the court? If so, it runs the risk of those documents making their way into the hands of the respondent and potentially defeating the object of the application.

The proposed drafting of the rule indicates that a party who wishes to keep a document out of the hands of non-parties will need to make a pre-emptive application. This will increase costs for that party and add to the burden on court resources.

Conclusion

Overall, the proposed amended rule will have its supporters and critics. Many would see the further promotion of open justice as a positive, while others think that the current proposed draft does not strike the right balance.

The CPRC met on 4 October and are due to meet again on 1 November 2024. It is hoped there will soon be further clarity about if or when the amendments will be implemented.

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