Neutral Citation Number: [2018] EWCA Civ 1795

Case No: B3/2018/0547, 0547(A) & 0547(B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
Master McCloud
[2017] EWHC 3154 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE HAMBLEN
and
LORD JUSTICE NEWEY

- -

Between :

CAPE INTERMEDIATE HOLDINGS LIMITED	**Appellant/ Defendant**
- and -	
MR GRAHAM DRING (for and on behalf of THE ASBESTOS VICTIMS SUPPORT GROUP)	**Respondent/ Applicant**

Jonathan Swift QC, Geraint Webb QC and James Williams (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Appellant/ Defendant**
Robert Weir QC and Jonathan Butters (instructed by **Leigh Day solicitors**) for the **Respondent/ Applicant**

Hearing dates : 18 and 19 June 2018

- -

Approved Judgment

Lord Justice Hamblen :

Introduction

1. This appeal raises important questions about (i) the powers of the court under the CPR and its inherent jurisdiction to permit access to documents by non-parties; (ii) the way in which the court's discretion should be exercised where an application is within its powers; and (iii) the proper balance to be struck between the application of the principle of open justice and policy considerations concerning the proper and efficient administration of justice.

Procedural and Factual background

2. The Appellant, Cape Intermediate Holdings Ltd ("CIH"), was involved in litigation involving two sets of claims brought against it relating to damages paid out to mesothelioma victims, namely the Product Liability Claims ("PL Claims") and the Cape Distribution Ltd ("CDL") Claim.

3. The PL Claims were contribution claims against CIH, brought on a subrogated basis by insurers who had written employee liability policies for certain employers (mostly building firms). Those employers had compromised mesothelioma claims by their former employees and sought a contribution from CIH on the basis that they had allegedly been exposed at work to asbestos from products it manufactured.

4. The CDL Claim was a subrogated claim by Aviva PLC, acting in the name of its insured, CDL, to whom it had provided employers' liability cover between 1956 and 1966, for a contribution to settled claims for mesothelioma brought by former employees of CDL. The claims concerned contractual indemnity and insurance issues between CDL and its insurers.

5. These two claims were tried together at a six-week trial in the Queen's Bench Division in January and February 2017 heard by Picken J ("the Judge"). The litigation settled before judgment in March 2017.

6. A substantial volume of documentation was involved at the trial of the claims. The PL Claims and the CDL Claim each had a separate hard copy "core bundle" (known as the PL Bundle C and the CDL Bundle C respectively) which comprised both core disclosure documents and documents obtained by the parties from public sources. The PL Bundle C amounted to over 5,000 pages contained in around 17 lever arch files. In addition, all the disclosed documents in both the PL and CDL Claims were available electronically to the parties and the judge in a joint "Bundle D" via the Opus 2 Magnum electronic platform (which included almost 45,000 pages and was not produced in hard copy). Access to Bundle D at the trial was provided for logistical reasons only, so that if counsel wished to refer to a document which had not been included in the hard copy Bundle C, it could be called up on screen immediately from Bundle D without delaying the trial; a copy would subsequently be put in the hard copy Bundle C.

7. The Respondent, Mr Graham Dring, acts on behalf of the Asbestos Victims Support Groups Forum UK ("the Forum"). The Forum provides help and support to asbestos victims. It is in some respects a pressure group and it is involved in lobbying and promoting asbestos knowledge and safety.

8. On 6 April 2017, following the settlement of the PL Claims and the dismissal of all further proceedings, the solicitors Leigh Day issued a without notice application in the name of the AVSGF under CPR 5.4C seeking to obtain, in effect, all documents used at or disclosed for the trial of the PL Claims, including the entirety of the PL Bundle C

and Bundle D (containing all documents disclosed) (the "Application"). The Application was heard by Master McCloud on the same day. The Master made a mandatory injunction requiring the (former) parties to the litigation to return all bundles to the court. This included requiring Bundle D to be transferred from the Magnum electronic platform to a hard drive at a cost of some £1,800 (borne by CIH and the insurer parties to the PL Claims), so that the hard drive could be held by the court. The Master also, unusually, later directed the parties that "any contact concerning this case must be directed to [the Master] and not to Picken J or his clerk".

9. At a directions hearing on 26 June 2017 CIH applied for the substantive hearing to be heard by a High Court Judge, and preferably by the Judge given his familiarity with the trial and with the documents. CIH submitted that this would be in the interests of justice and would also be the most efficient use of court resources. This application was refused by the Master in a written interim judgment handed down on 10 August 2017. She listed the matter for a full hearing before herself, robed and in open court. The matter was then heard before her at a hearing on 9, 10 and 12 October 2017 with both sides being represented by leading counsel.

10. By an email of 29 November 2017 timed at 11.51 the Master stated that no draft judgment would be provided; it would be handed down at 3.30pm on 5 December 2017 and attendance was optional. In this email, the Master also said that she "would consider permissions to appeal of [her] own motion in any event but parties may attend if they or their clients wish". Despite the previous indication to the contrary, the Master emailed an embargoed judgment at 20.52 on 4 December 2017 to be handed down the following day. Her cover email asked the parties to "let me know if attendance is expected" and stated that she would await a copy of an agreed draft order "embodying the decision in due course from counsel".

11. At 10.50 on 5 December 2017 Leigh Day sent an email to the Master and CIH's solicitors, Freshfields, stating that AVSGF would be in attendance. At 11.49 Leigh Day sent a letter by email attaching a draft order drawn up on behalf of AVSGF. They also commented on paragraphs 189-191 of the draft judgment and the direction made by the Master that, permission to appeal having been refused, any renewed application should be made to the Court of Appeal, pointing out that the application would have to be made to a High Court judge.

12. At 11.51 the Master emailed the parties' solicitors stating that the judgment would be handed down at 15.30, that she did not intend to circulate a draft for revisions and that: "Attendance is optional: I shall consider permissions to appeal of my own motion in any event but parties may attend if they or their clients wish".

13. At 12.22 the Master emailed a corrected final page of the judgment in light of the points raised by Leigh Day. At 12.38 the Master emailed the parties with a revised version of the draft order and saying that she would "welcome comments from either side".

14. At 13.20 Freshfields emailed the Master stating that:

> "Given the indication in your email of 29 November (timed at 11.51am) that no draft judgment would be provided, that the judgment would be handed down in Court this afternoon and that attendance is optional, we have not instructed Counsel to attend Court this afternoon.
>
> We will endeavour to agree a draft Order with the Applicant as you have indicated, with a view to providing you with a copy of the draft in the coming days. We note the contents of the

embargoed judgment at paragraphs 190 and 191 in respect of appeal. Instructions will, of course, need to be taken in respect of permission to appeal and the Order will need to make provision for a stay in respect of the provision of any documents to the Applicant pending the outcome of any application for permission to appeal.

We assume that the documents will not be released pending the making of the Order. If this is incorrect, please let me know as soon as possible, so that we can make inquiries with regard to the availability of counsel to appear this afternoon."

15. It appears that this email was not seen by the Master until after the hand down hearing but we were told that AVSGF's counsel, Mr Butters, explained CIH's position to the Master.

16. Following hand down of the judgment the Master made an order in the following terms ("the Order"):

1. "The skeleton arguments, written submissions and transcripts shall for the avoidance of doubt be placed on the court file.
2. Permission is granted to the applicant to obtain copies of the following documents from the records of the court:
    a. The witness statements including exhibits.
    b. Expert reports.
    c. Transcripts.
    d. Disclosed documents relied on by the original parties at trial contained in the paper bundles only.
    e. Written submissions and skeletons arguments.
    f. Statements of case to include requests for further information and answers if contained in the bundles relied on at trial.
3. The documents referred to in paragraph 2 above (which have been held to be part of the Court record) shall be made available forthwith to the applicant's solicitor for copying or scanning. Upon return they and all other documents filed as part of the Court record shall be retained in Court and shall not be destroyed in the usual course of administration without an order of the Court.
4. 'Bundle D' shall be impounded and shall not be destroyed without further order of the court.
5. The applicant is at liberty to apply to the court for a further determination of the status of any documents contained within Bundle D which it is contended were referred to in open court but omitted from the paper bundles.
6. Permission to appeal is refused to both parties of the court's own motion.
7. Any renewed application for permission to appeal shall be made to a Judge of the High Court, having the jurisdiction of the Appeal Court."

17. After being informed of the Order at 17.02 on the afternoon of 5 December 2017, CIH sought clarification from both the Master and Leigh Day as to whether any documents had been uplifted from court by Leigh Day. No response was provided. CIH then applied, out of hours, to the duty High Court judge, Phillips J, for an injunction. Phillips J granted a without notice injunction on the evening of 5 December 2017 to the effect that any document already removed from court pursuant to the Order should not be read, copied, distributed or published until an *inter partes* hearing could take place the next day.

18. It was subsequently clarified by the Master and Leigh Day on the morning of 6 December that boxes of files had been removed by Leigh Day from the Master's room, with her permission, the previous afternoon. It appears that this took place before CIH had been notified of the fact of the Order. A further hearing took place before Phillips J at 14.00 on 6 December 2017 on an *inter partes* basis, at which Leigh Day were ordered to return the documents to the court. The court also (by consent) ordered Leigh Day to write to CIH's solicitors stating whether any documents had been read, copied, published or made available since the documents were removed from the Master's room, and granted a stay of execution of the Order pending appeal.

19. Permission to appeal from the Order was given by Martin Spencer J on 5 March 2018 who ordered that the appeal be heard by the Court of Appeal pursuant to CPR 52.23 in view of the importance of the issues raised.

The grounds of appeal

20. There are four grounds of appeal which may be summarised as follows:

(1) The Master failed correctly to identify which documents the court had power to permit a non-party to copy having regard to CPR 5.4C and the limited nature of the court's inherent jurisdiction in this regard. This led her to make an order of an unprecedented breadth. The court had no jurisdiction to make the order that the Master made under CPR 5.4C.
(2) To the extent the court did have jurisdiction to grant the applicant access to any of the documents sought, the Master applied the wrong discretionary test when determining whether AVSGF should be permitted to access them.
(3) In any event, the Master should have concluded that, having proper regard to the nature and scope of the Application, AVSGF failed to meet the requisite test, whether it be "strong grounds in the interests of justice" or merely a "legitimate interest". Had the Master considered the nature and scope of the Application properly, she could not have ordered the level of access to documents that she did.
(4) The Master erred in respect of the Order made following judgment. Not only was it incorrect in principle for the reasons set out above, but the Order made no provision to address the extraordinary and unprecedented volume of material to which she granted access.

Ground 1 – the extent of the court's jurisdiction

21. The Master purported to make her order pursuant to CPR 5.4C which materially provides that:

> "(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
>
> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
>
> (b) a judgment or order given or made in public (whether made at a hearing or without a hearing), subject to paragraph (1B). […]
>
> (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 the court and a party or another person."

22. The Master considered that the "records of the court" comprised all documents filed with the court and that this included trial bundles and documents, such as skeleton arguments and transcripts, held with them.

23. CIH contended that none of these documents, other than statements of case, are properly to be regarded as being part of the "records of the court" and that the Master had no jurisdiction to make the order she did.

24. AVSGF supported the Master's conclusion as to the extent of her jurisdiction. Alternatively it contended that the Master had power to make her order pursuant to the court's inherent jurisdiction.

25. It is accordingly necessary to consider the extent of (i) the court's jurisdiction under CPR 5.4C and (ii) the court's inherent jurisdiction.

The context

26. The issue of jurisdiction needs to be considered in context. The relevant context includes in particular (i) the principle of open justice and (ii) the scheme and provisions of the CPR.

27. The common law has long recognised the importance of the constitutional principle of open justice. Well known statements of the principle and its rationale include:

(1) Lord Shaw in *Scott v Scott* [1913] AC 417 at 477 (citing Jeremy Bentham):

"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) Lord Diplock in *Home Office v Harman* [1983] AC 280 at p303:

"…the reason for the rule is to discipline the judiciary – to keep the judges themselves up to the mark – the form that it takes [is] that justice is to be administered in open court where anyone present may listen to and report what was said".

28. In *R (Guardian News & Media Ltd) v Westminster Magistrates Court* [2013] QB 619 Toulson LJ described at [1] the open justice principle as being "at the heart of our system of justice and vital to the rule of law" and explained how it enables the rule of law to be policed through "the transparency of the legal process". He stressed at [2] that it is "not only the individual judge who is open to scrutiny but the process of justice". It ensures that "judges are accountable in the performance of their judicial duties" and "maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny".

29. The CPR recognises and gives effect to the principle of open justice in a number of ways, including:

(1) The general rule that a hearing is to be in public – CPR 39.2.
(2) The recording of proceedings and any person's right to obtain a transcript of the recording of a hearing – CPR 39APD.6.
(3) The availability for inspection during the course of a trial of witness statements which stand as evidence in chief – CPR 32.13.

(4) The release of parties from their undertaking to use disclosed documents only for the purpose of the proceedings in which they have been disclosed where "the document has been read to or by the court, or referred to, at a hearing which has been made in public" – CPR 31.22.

30. Other CPR provisions of relevance to the right of a non-party to obtain copies of documents from the "records of the court" under CPR 5.4C include:

(1) The right of any person to search any available register of claims – CPR 5.4.
(2) The right of a party to proceedings to obtain from the records of the court a copy of any document listed in paragraph 4.2A of CPR 5APD, and, with permission, "a copy of any other document filed by a party, or communication between the court and a party or another person" – CPR 5.4B.
(3) The definition of "filing" in CPR 2.3 that in relation to a document it "means delivering it, by post or otherwise, to the court office".
(4) The requirement under CPR 39.5(1) that "the claimant must file a trial bundle". The documents that a trial bundle should include are set out at CPR 39APD.3.
(5) Filing involves the date on which the document is filed being recorded on the document – CPR 5APD5.1.
(6) A document filed with the court office is not to be taken out of that office without the permission of the court – CPR 5APD5.5.

31. CPR 5APD addresses "Court Documents". The documents which a party to proceedings has the right to obtain from the court records are listed in paragraph 4.2A of CPR 5APD as follows:

> "(a) a certificate of suitability of a litigation friend;
>
> (b) a notice of funding;
>
> (c) a claim form or other statement of case together with any documents filed with or attached to or intended by the claimant to be served with such claim form;
>
> (d) an acknowledgment of service together with any documents filed with or attached to or intended by the party acknowledging service to be served with such acknowledgement of service;
>
> (e) a certificate of service, other than a certificate of service of an application notice or order in relation to a type of application mentioned in sub-paragraph (h)(i) or (ii);
>
> (f) a notice of non-service;
>
> (g) a directions questionnaire;
>
> (h) an application notice, other than in relation to –
>
> (i) an application by a solicitor for an order declaring that he has ceased to be the solicitor acting for a party; or
>
> (ii) an application for an order that the identity of a party or witness should not be disclosed;

(i) any written evidence filed in relation to an application, other than a type of application mentioned in sub-paragraph (h)(i) or (ii);

(j) a judgment or order given or made in public (whether made at a hearing or without a hearing);

(k) a statement of costs;

(l) a list of documents;

(m) a notice of payment into court;

(n) a notice of discontinuance;

(o) a notice of change; or

(p) an appellant's or respondent's notice of appeal."

32. Paragraph 4.3 of CPR 5APD provides that an application by a party or a non-party for permission to obtain a copy of a document from the court records is to be made by application notice under CPR 23 and "must identify the document or class of document in respect of which permission is sought and the grounds relied upon". Such applications may be made without notice, unless the court directs otherwise – see CPR 5.4D(2).

33. Where permission is not required a written request is made to the court for the document – CPR 5.4D(1)(b).

34. In both cases the prescribed fee has to be paid. That is currently £5 for ten pages or less and 50p for each subsequent page.

35. The procedure for obtaining copies of documents from the court records therefore involves the court copying and providing a copy of the requested document or class of documents for a prescribed fee.

CPR 5.4C(2)

36. The critical issue in relation to the court's jurisdiction under CPR 5.4C(2) is the meaning of the "records of the court". This is not a defined term under the CPR.

37. AVSGF contended that CPR 5.4C(2) is intended to give effect to the open justice principle and that a broad rather than a narrow interpretation should therefore be given to the applicable gateway and the meaning of the "records of the court". In particular, it was submitted that:

(1) The term "records of the court" includes not only a court order emanating from the court but also documents created/provided by parties, as made clear by the fact that (i) CPR 5.4C(2) provides for documents to be part of the "records of the court" which have been filed by a party; (ii) CPR 5.4B(1) provides that the documents listed in para 4.2A of PD5A are "records of the court" and this list includes, for instance, written evidence filed in relation to an application.

(2) The scope of CPR 5.4C(2) is wider than that of the list of documents in para 4.2A of PD5A, as made clear by the comparable provision of CPR 5.4B(2) which gives a party the right, with permission, to obtain a copy of other documents, a provision which otherwise would be otiose.

(3) CPR 5.4C(2) refers to "any other document" and thus sets no limit on the type of

document which can fall within the scope of the records of the court. There is no basis for distinguishing between witness statements, on the one hand, and disclosure documents on the other.

(4) The key to putting a document on the records of the court is filing, as reflected in the wording of CPR 5.4C(2).

(5) Filing, in relation to a document, means delivering it, by post or otherwise, to the court office - CPR 2.3.

(6) It is common ground in this case that the trial bundle was filed at court pursuant to CPR 39.5(1).

(7) As the disclosure documents were filed at court, it follows that they became "records of the court".

38. CIH contended that the "records of the court" relate to formal documents filed, documents generated during the proceedings and correspondence with the court which is held by the court, but that they do not include trial bundles. In particular, it was submitted that:

(1) A trial bundle is neither (i) part of the "records of the court" nor (ii) a "document filed by a party".

(2) The "records of the court" includes formal documents and documents generated during proceedings. It does not include everything the court is asked to read, nor all documents disclosed by the parties.

(3) The list of documents in CPR PD5A is indicative of what is comprised by "records of the court". There is no mention of documents read by the judge or the contents of the trial bundle.

(4) The trial bundle is not a "document filed by a party". A trial bundle may be filed, but it is not a document. CPR 39.5 provides that (emphasis added) "the claimant must file a trial bundle <u>containing documents required</u> . . ." It is a collection of documents of varying degrees of significance that has been assembled for the convenience of the court and the parties. It does not determine any formal step in the proceedings and the court does not normally retain a copy. The bundle may be filed but not the documents in it. The decision to include or exclude a document in the trial bundle is a purely administrative matter to be resolved by the parties.

(5) Filing simply connotes delivery of a document to the court office. It says nothing about the content of the document so filed or whether it is to be regarded as part of the "records of the court".

39. Some support for CIH's approach, and the indicative nature of the list of documents in paragraph 4.2A of 5APD.4, is to be derived from the White Book commentary on CPR 5.4B.3 and "records of the court" at p220 of the 2018 edition, which provides:

> "Rules 5.4B and 5.4C are concerned with the obtaining of copies of documents "from court records" . . . The documents kept in a court office as part of the court's file of particular proceedings include the formal documents issued by the court itself, in particular, forms of process such as claim forms and application notices, and orders. They include much else besides. The long list of documents in Practice Direction 5A (Court Documents), para.4.2A (see para.5APD.4 below) gives an indication of the wide variety of documents that may be generated in the course of civil proceedings and which conceivably may held in court records . . ."

40. In my judgment CIH's core submission is correct. The "records of the court" are essentially documents kept by the court office as a record of the proceedings, many of

which will be of a formal nature. The principal documents which are likely to fall within that description are those set out in paragraph 4.2A of CPR 5APD.4, together with "communication between the court and a party or another person", as CPR 5.4C(2) makes clear. In some cases there will documents held by the court office additional to those listed in paragraph 4.2A of CPR 5APD.4, but they will only be "records of the court" if they are of an analogous nature.

41. This will include a list of documents, but not the disclosed documents themselves. It may include witness statements and exhibits filed in relation to an application notice or Part 8 proceedings (see CPR 8.5), but not usually witness statements or expert reports exchanged by the parties in relation to a trial. Such statements and reports are not generally required to be filed with the court and they will typically be provided to the court only as part of the trial bundles.

42. The receipt document for the trial bundles may be a record of the court, but not the trial bundles themselves. Trial bundles cannot be regarded as being part of the "records of the court" for a number of reasons in addition to those given by CIH as summarised above and in particular:

    (1) Trial bundles are provided for the judge. They are for the judge to use, mark, annotate, re-order or edit as he or she thinks fit. In so doing, no judge would consider that they were adulterating "records of the court".
    (2) Trial bundles may pass through the court office *en route* to the judge, but the court office has no interest in or role in relation to trial bundles, other than acknowledgment of their receipt.
    (3) Trial bundles are routinely destroyed by the judge or (if applicable) his/her clerk after the conclusion of proceedings. This would not be appropriate if they were "records of the court". But nor, often, would it be appropriate to return the judge's bundles, not least because they are likely to contain comments and annotations. Whilst redaction of comments/annotations might be possible that would probably have to be carried out by the judge or his/her clerk and would in any event reveal the fact of comment/annotation. In many cases there would therefore need to be the creation of a new set of unmarked trial bundles.
    (4) Trial bundles are not stored in the court office, nor are they only taken out of the office with the permission of the court, as CPR 5APD5.5 requires.
    (5) The administrative burden for the court office storing trial bundles would be enormous, particularly if they had to be retained as "records of the court" even after the conclusion of proceedings. Trial bundles routinely run to thousands of pages and multiple bundles. In heavy commercial litigation, for example, there will often be over 100 files of trial documents.
    (6) The procedure for obtaining copies of documents from the "records of the court" involves the court office taking and providing copies. Such a procedure clearly contemplates a limited copying exercise. It cannot have been intended that court officers would have to copy thousands of documents, as would be the case with many trial bundles.
    (7) The application for permission for copies to be obtained requires "the document or class of document" to be identified – CPR 5APD4.3. A trial bundle is not a "document or class of document".

43. The principle of open justice does not require non-parties to have access to trial bundles. Trial bundles routinely include a large number of documents which are never referred to at trial but are included on a precautionary basis. Whilst, as discussed below, there may be cases where it is necessary to inspect some specific documents in order to understand and scrutinise the trial process, inspection of entire trial bundles is unlikely to be required for this purpose.

44. There is also Court of Appeal authority supporting the proposition that trial bundles are not part of the court records. In *GIO Personal Investment Services Ltd v Liverpool & London* Steamship *P&I Ass. Ltd* [1999] 1 WLR 984 the court was concerned with an application by a non-party, FAI, to obtain copies of documents referred to in witness statements and of opening skeleton arguments and any documents referred to therein. In considering that application Potter LJ observed as follows at p992-3:

> "….the documents in respect of which FAI seek an order are in no sense part of any public record to which FAI, as a third party to the litigation, enjoys right of access. "Public records" are those documents which fall within the provisions of the Public Records Act 1958 . They include court records and, in particular, the records of, or held in, a department of the Supreme Court, including records of any proceedings in the court, such as writs and decrees. However:
>
> "a court file is not a publicly available register. It is a file maintained by the court for the proper conduct of proceedings. Access to that file is restricted. Non-parties have a right of access to the extent, but only to the extent, provided in the rules:" *per* Sir Donald Nicholls V.-C. in *Dobson v. Hastings* [1992] Ch. 394, 401–402.
>
> Provision is made by R.S.C., Ord. 63, rr. 4 and 4A as to the circumstances in which the public may have access to the files of the Supreme Court. In this respect, rule 4 makes a distinction between the right of search and inspection by a party to a cause or matter which is unrestricted in respect of all documents filed in the Central Office or (by virtue of rule 11) in district registers (including affidavits filed in that cause or matter with a view to its commencement) and the right of search and inspection enjoyed by a member of the public, which right is restricted to the documents specified in paragraph (1)(*a*) and (*b*). Those are the copy of any writ of summons or any other originating process, any judgment or order given or made in court or a copy of any such judgment or order. Leave of the court is required for a member of the public to have access to any other documents filed in the relevant office or registry: see paragraph (1)(*c*). Thus, 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."

45. RSC Ord 63 r. 4 was the predecessor of CPR 5.4B and C and was in materially similar terms, save that it referred to "documents filed in the Central Office" rather than "records of the court". Potter LJ went on to observe at p993 that the documents so filed would not include skeleton arguments or trial bundles:

> "…They are not in my view to be taken as extending to skeleton arguments or trial bundles which are not documents required to be filed, let alone held by the court as a public record. Such documents are simply lodged with the court so that the court can communicate them to the judge dealing with the case as a matter of administrative convenience and, after the end of the case, are returned to the custody of the parties".

46. The *GIO* case was followed and applied by Flaux J in *British Arab Commercial Bank v Algosaibi Trading Services Ltd & Others* [2011] EWHC 1817 (Comm) in relation to an application by a non-party for access to exhibits to witness statements in a trial which had settled before any oral evidence was given. Flaux J observed as follows at [19]-[20]:

> "19 Where a witness is not called, all one is therefore dealing with in terms of exhibits are documents which have found their way into the trial bundles, because the exhibits would, rather than being exhibited to the witness statements in the trial bundles, have formed part of the chronological bundles at trial. Even where such documents are on the judge's reading list, it does seem to me that the decision of the Court of Appeal in the GIO case does stand fairly and squarely against any suggestion on the part of [counsel for the applicant] that her clients are entitled to have access to those documents.
>
> 20 Exhibits are not covered by 32.13 and, correspondingly, they are not covered by 32.12. Although [counsel for the applicant] says the rule is cast very widely, it only refers to witness statements and I am simply not prepared to accept that it covers exhibits to witness statements as well. [Counsel for the applicant] also seeks to put her application under rule 5.4, but that is only concerned with court records and given that witness statements do not form part of the court record or court file in the Commercial Court, *a fortiori* exhibits to those statements do not either…"

47. In reaching a contrary conclusion the Master placed reliance on two first instance decisions in which it was seemingly assumed that trial bundles could be part of the "records of the court" - *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)* [2005] 1 WLR 2965 (Park J) and *NAB v Serco* [2014] EWHC 1225 (Bean J). In neither case was the meaning of "records of the court" in issue or subject to argument and accordingly no real assistance can be derived from them. The Master's approach appears to have been that any documents filed with the court become "records of the court" and remain so for as long as the court holds them. For reasons already given, however, filing is not synonymous with becoming a court record, and indeed communications with the court, which are treated as being part of the "records of the court", would not necessarily be filed. Moreover, for accessibility to depend entirely on the happenstance of what is or is not in the court's possession at any particular moment would be arbitrary and would create uncertainty and inconsistency.

48. For the reasons outlined above, in my judgment the Master was wrong to conclude that the trial bundles were "records of the court" and she accordingly did not have jurisdiction to order copies to be obtained of the trial bundle documents under CPR5.4C(2).

49. The Master's finding that the trial bundles were "records of the court" was the essential basis upon which she ordered copying of the documents listed in the Order. The Order in fact went further and also treated skeleton arguments and trial transcripts as being part of the "records of the court".

50. As the *GIO* case makes clear, skeleton arguments are not part of the "records of the court". They are not documents required to be filed; often they will go direct to the judge rather than to any court office; they are advocates' documents rather than party

documents; they represent argument. As Colman J stated in *Law Debenture Trust* [2003] EWHC 2297 at [17]:

> "…opening written submissions are merely tools of advocacy and, unlike pleadings, or case memoranda or case management questionnaires, are not part of the court records. A copy is provided to the judge to facilitate presentation of the case and there is no requirement for filing or the keeping of a copy in the Registry. Indeed, the skeleton argument is normally sent to the Commercial Court Listing Office or, to save time, direct to the judge's clerk, for passing on to the judge. At the end of the trial, it is usually destroyed by the judge or returned to the parties. Further, CPR 31.22 has no application because its function is confined to documents in the possession or control of a party which have been provided to other parties in the course of disclosure. Written submissions do not fall within this class of document, they belong to counsel, not their clients."

51. AVSGF faintly suggested that a skeleton argument might be regarded as a "communication between the court and a party or another person". It is not a communication. It is the presentation of the advocate's argument, expressed in writing rather than merely orally, in the interests of efficient case management.

52. Transcripts are equally not part of the "records of the court". In this case the parties arranged for a transcription service from a private provider to supply transcripts to the judge during the course of the trial. These are not documents which are required to be or are filed with the court; they are usually provided directly to the judge; the judge will treat them as his or her working documents; at the end of the case they will be destroyed or returned to the parties. Any court office involvement will only be as a matter of administrative convenience.

53. In any event, the proper means of obtaining a trial transcript is set out in CPR 39APD6. If, as in this case, a private transcription service was provided at trial then the appropriate and most cost effective course of action is likely to be to seek a copy from the provider, making payment of any requisite fee.

54. The Order made in this case was of unprecedented scope and went far beyond the relatively narrow confines of CPR5.4C(2). For the avoidance of doubt, I consider that it should be made clear that the "records of the court" for the purpose of that rule do not generally include:

    (1) The trial bundles.
    (2) The trial witness statements.
    (3) The trial expert reports.
    (4) The trial skeleton arguments or opening or closing notes or submissions.
    (5) The trial transcripts.

55. It follows that the one category of the documents listed in the Order to which AVSGF is entitled are "Statements of case to include requests for further information and answers if contained in the bundles relied on at trial." Statements of case may be obtained without permission under CPR5.4C(1)(a) and under CPR 2.3(1) "statement of case" includes particulars of claim, defence and reply and any further information provided.

The court's inherent jurisdiction

56. CIH accepted that the court had an inherent jurisdiction to provide certain materials to non-parties but submitted that it was limited by the GIO decision and the CPR to skeleton arguments and written submissions only.

57. AVSGF submitted that the court's powers to allow access were broad and that, in light of the open justice principle, it was particularly important that they be so if, as I have held, CPR5.4C(2) is to be restrictively interpreted.

58. There are a number of authorities of relevance to the court's inherent jurisdiction and to the status of the *GIO* decision. I shall concentrate on the Court of Appeal authorities and address them in chronological order.

59. *Dobson v Hastings* [1992] Ch 394 concerned contempt proceedings brought against a journalist and her newspaper following publication of articles based on information obtained from an official receiver's report contained in a court file relating to pending proceedings to disqualify directors. Leave of the court to inspect the report had not been obtained as required under RSC Ord. 63 r.4. It was held that any further publication of the information would amount to contempt. The judgment of Sir Donald Nicholls V.-C. included at p401-2 the following passage relating to the inspection of documents on the court file under the RSC regime then in force:

> "The Rules of the Supreme Court do not expressly prohibit inspection and taking copies of documents otherwise than in accordance with the rules. What the rules do is to require parties to proceedings to file certain documents in the court office. Ord. 63, r. 4 provides that of the documents which must be filed, some are to be open to general inspection. Other documents may be inspected with the leave of the court. Rule 4 provides further that this requirement is not to prevent parties to proceedings from inspecting or obtaining copies of documents on the file. In my view these provisions do not make sense unless they are read as indicating that, save when permitted under the rules, documents on the court file are not intended to be inspected or copied. That is the necessary corollary of the rules granting only a limited right to inspect and take copies. In other words, a court file is not a publicly available register. It is a file maintained by the court for the proper conduct of proceedings. Access to that file is restricted. Non-parties have a right of access to the extent, but only to the extent, provided in the rules. The scheme of the rules is that, by being filed, documents do not become available for inspection or copying save to the extent that access to specified documents or classes of documents is granted either generally under the rules or by leave of the court in a particular case.
>
> The purpose underlying this restriction presumably is that if and when affidavits and other documents are used in open court, their contents will become generally available, but until then the filing of documents in court, as required by the court rules for the purposes of litigation, shall not of itself render generally available what otherwise would not be. Many documents filed in court never see the light of day in open court. For example, when proceedings are disposed of by agreement before trial. In that event, speaking generally, the parties are permitted to keep from the public gaze documents such as affidavits produced in

> preparation for a hearing which did not take place. Likewise with affidavits produced for interlocutory applications which are disposed of in chambers. Again, there are certain, very limited, classes of proceedings, such as those relating to minors, which are normally not heard in open court. Much of the object sought to be achieved by a hearing in camera in these cases would be at serious risk of prejudice if full affidavits were openly available once filed.
>
> In all cases, however, the court retains an overriding discretion to permit a person to inspect if he has good reason for doing so."

60. AVSGF placed particular reliance on the statement made that "if and when affidavits and other documents are used in open court, their contents will become generally available" and suggested that it was of general application. The context was, however, documents on the court file, not documents generally. It was addressing the exercise of the court's discretion in relation to a jurisdiction which it had under the rules, rather than the issue of jurisdiction.

61. *Dobson v Hastings* was considered by the court in the *GIO* case. *GIO* involved an application by a non-party, FAI, for disclosure of various classes of documents. Before the first instance judge, Timothy Walker J, the application had been for the trial bundles and other documents. The application was refused as a matter of discretion. The judge did, however, grant an application made under RSC Ord. 38 r.2A(12) for inspection and copies of witness statements ordered to stand as evidence in chief. On appeal the application was narrowed so as to seek copies of documents referred to in witness statements and of opening skeleton arguments and any documents referred to therein. FAI wanted access to these documents to assist it in assessing what defences and/or claims against third parties it might have in a closely related action in which the same brokers and sub-brokers were involved in placing certain reinsurance.

62. The procedural background to the application was that before the trial started there had been a settlement between the plaintiff reinsurers and the defendant reassured and there had also been a settlement between the assured and the third party brokers. That left for trial claims over by the head brokers against two third party sub-brokers. After short oral openings, counsel for the head brokers and sub-brokers respectively placed before the judge lengthy written openings and invited him to read them following which they would deal with any queries and the trial could proceed. The trial was then adjourned for five days to give the judge reading time. In the course of this period the claimant head brokers settled with one of three sub-brokers, leaving in issue its claim against the other two sub-brokers. These latter did not appear and accordingly, when the trial resumed, the judge went on to prepare and two days later to deliver judgment on that claim. In the meantime FAI had made its disclosure application.

63. The court considered first FAI's application for the documents referred to in the witness statements under RSC Ord. 38 r.2A (the predecessor of CPR 31.22). The court rejected this application on two main grounds as set out at p990:

> "The first reason is that, on their plain words, they [the rules] impose upon the court a power in respect of witness statements only and they do not extend to cover documents referred to in those statements. That is because, as a matter of ordinary terminology, a distinction clearly exists between a statement and documents referred to in that statement…

> The second reason is that nothing in the history or context of the introduction of the rule leads one to suppose that the Rule Committee intended thereby to introduce a provision which would enable a third party to the litigation to obtain access to inter partes documents which had previously (unless by agreement with the parties) been unavailable to any member of the public whether or not he or she attended court to hear the oral evidence of the witness in question".

Potter LJ noted that the documents had not been scheduled as an attachment to the witness statements and that there might be an argument that in such a case they formed part of the witness statement and that "nothing in this judgment is intended to pre-empt the decision or direction of any court faced with such an argument in future."

64. The court then considered FAI's application for copies of the written openings, skeleton arguments and the documents referred to therein. This application was advanced on the basis of the inherent jurisdiction of the court and in reliance on the principle of open justice.

65. In relation to the application for copies of the documents FAI relied on the passage from Sir Donald Nicholls V.-C.'s judgment in *Dobson v Hastings* cited above and in particular the reference to content of documents used in open court becoming "generally available". Potter LJ commented as follows:

> "I do not regard the words of Sir Donald Nicholls V.-C. as extending beyond the context in which they were spoken, i.e. as reflecting the likelihood that leave to inspect a document lodged upon the court file will readily be granted if the document has been read out in open court. They are not in my view to be taken as extending to skeleton arguments or trial bundles which are not documents required to be filed."

He accordingly treated the comments made in *Dobson v Hastings* as relating only to the circumstances in which the court would give leave to inspect documents on the court file (now the "records of the court").

66. Potter LJ then referred to various of the cases concerning the open justice principle and described them as reflecting a policy of "open doors" but noting at p994-5 that:

> "They do not condescend to greater particularity than that and they certainly do not seek to suggest that, in devising and applying its procedures for the expeditious dispatch of judicial business, the public should be given access to such documentary material as may be before the court by way of evidence."

67. Potter LJ then stated as follows:

> "Historically, the matter has been dealt with in the courts of this country in the following manner. While a trial is in progress, subject to the constraints of space, and save where the paramount interests of justice dictate to the contrary, the public and the press have enjoyed a right of access to the court in order to witness the trial process conducted in accordance with procedures laid down in the rules of court; there is also an obligation on the judge to give a reasoned judgment in open court. Once the trial is over, for the purpose of enabling the press and public (as well as the

> parties) to have access to a record of the evidence and the judgment, R.S.C., Ord. 68, rr. 1 and 2 provide that in every proceeding in the High Court an official shorthand note shall, unless the judge otherwise directs, be taken of any evidence given orally in court or of any summing up or judgment by the judge. If any party so requires, the note shall be transcribed and supplied at charges authorised by the court and it is expressly provided that nothing in the rule shall be construed as prohibiting the supply of transcripts to non-parties. There are facilities for application to be made directly to the official shorthand writers in that respect. In order to cover the lacuna that would otherwise exist in respect of a witness statement ordered to stand as evidence-in-chief, the provisions of R.S.C., Ord. 38, r. 2A(12)–(16) have been introduced, the court having no power to vary or override such provisions.
>
> …
>
> So far as concerns documents which form part of the evidence or court 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. If and in so far 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 or information depends upon 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 procedures justifies the court contemplating such an exercise under its inherent jurisdiction."

68. The court accordingly rejected the application for copies of the documents. It, however, granted the application for the skeleton arguments/written submissions, explaining as follows at p995-7:

> "the arguments for such an exercise in respect of the written submissions of counsel, or of skeleton arguments which are used as a substitute for oral submissions, seem to me to be a good deal stronger. [counsel for the respondent] for G.M.R. has emphasised the primary but limited purpose of the "public justice" rule, namely to submit the judges to the discipline of public scrutiny. As he neatly put it, it is designed to give the public the opportunity to "judge the judges" and not to judge the case, in the sense of enabling the public to engage in the same exercise of understanding and decision as the judge. That of course is true. However, the confidence of the public in the integrity of the judicial process as well as its ability to judge the performance of judges generally must depend on having an opportunity to understand the issues in individual cases of difficulty. As Lord Scarman observed in *Home Office v. Harman* [1983] 1 A.C. 280, 316:

> "When public policy in the administration of justice is considered, public knowledge of the evidence and arguments of the parties is certainly as important as expedition: and, if the price of expedition is to be the silent reading by the judge before or at trial of relevant documents, it is arguable that expedition will not always be consistent with justice being seen to be done."

This is particularly so in a case of great complication where careful preliminary exposition is necessary to enable even the judge to understand the case. Until recently at least, the opportunity for public understanding has been afforded by a trial process which has assumed, and made provision for, an opening speech by counsel. Further, the introduction in the Commercial Court, followed by general encouragement, of the practice of requiring skeleton arguments to be submitted to the court prior to trial was, as the name implies, aimed at apprising the court of the bones or outline of the parties' submissions in relation to the issues, rather than operating as a substitute for those submissions…. If, as in the instant case, an opening speech is dispensed with in favour of a written opening (or a skeleton argument treated as such) which is not read out, or even summarised, in open court before the calling of the evidence, it seems to me impossible to avoid the conclusion that an important part of the judicial process, namely the instruction of the judge in the issues of the case, has in fact taken place in the privacy of his room and not in open court. In such a case, I have no doubt that, on application from a member of the press or public in the course of the trial, it is within the inherent jurisdiction of the court to require that there be made available to such applicant a copy of the written opening or skeleton argument submitted to the judge.

In exercising his discretion in this regard, Timothy Walker J. seems to have regarded the particular interest and purpose of FAI in seeking to obtain copies of counsel's written submissions, namely to obtain a full understanding of the issues and to identify the documents going to those issues as the possible subject for subpoena in parallel litigation, as a reason to refuse access which he might otherwise have been disposed to grant to a differently motivated member of the public. Yet, quite apart from the interest 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 the outcome 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. It does not seem to me that the purpose of FAI in this case was in any sense improper.

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.

> That said, the issues canvassed upon this appeal plainly raise matters appropriate for consideration in the course of the revision of the rules of court currently being conducted in relation to the proposed introduction of various civil justice reforms in the wake of Lord Woolf's report, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (July 1996), whether by way of some specific provision in the rules, or as the subject of a practice direction. It is of great importance that the beneficial saving in time and money which it is hoped to bring about by such new procedures should not erode the principle of open justice."

69. The *GIO* case is therefore authority that the court has an inherent jurisdiction to allow non-parties to obtain copies of skeleton arguments/written submissions used in lieu of oral submissions. The reason for this is that open justice requires that the public have the same opportunity to understand the issues in a case as they would have had if the openings had been given orally.

70. *GIO* is also authority that the court's inherent jurisdiction does not extend to allowing non-parties access to trial documents generally, even if they have been referred to in witness statements, in skeleton arguments, or in court, or have been read by the judge. As Potter LJ pointed out, where documents have been read out in open court they may be reported and quoted, but there had historically been no right to obtain a copy of the document itself, nor was there any such right under the RSC.

71. The decision nevertheless emphasises the importance of the principle of open justice and recognised that the forthcoming CPR might provide for a wider right of access of non-parties to documents. In the event, the scheme and provisions of the most relevant provisions of the rules are materially similar under the CPR and the RSC.

72. *SmithKline Beecham v Connaught* [1999] 4 All ER 498 concerned whether the implied undertaking in relation to disclosed documents no longer applied under RSC Ord. 24 r.14A (the predecessor of CPR 31.22) because they had "been read to or by the Court, or referred to, in open Court". It did not therefore directly concern the right of a non-party to documents. The context was an application by SmithKline to revoke a patent granted to Connaught in which the judge had been provided with a pre-trial reading guide which invited him to read certain documents. The application was not resisted by Connaught, although it was not consented to. After a short hearing the judge said that he had read all the material and had concluded that the application for revocation was well founded. Connaught then applied for a declaration that it was free to use certain documents which had been referred to in the reading guide as the implied undertaking no longer applied. The court allowed the appeal, ruling that a document came within Ord. 24 r.14A even if it is not read in open court "if it is pre-read by the court and referred to by counsel in a skeleton argument which is incorporated in submissions in open court, or if the document is referred to (even though not read aloud) by counsel or by the court" – per Lord Bingham CJ at p509. At the end of his judgment Lord Bingham addressed the tension between efficient justice and open justice, making reference to the *GIO* case, and stating as follows:

> "Since the date when Lord Scarman expressed doubt in *Home Office v. Harman* as to whether expedition would always be consistent with open justice, the practices of counsel preparing skeleton arguments, chronologies and reading guides, and of judges pre-reading documents (including witness statements) out of court, have become much more common. These means of saving time in court are now not merely permitted, but are

> positively required, by practice directions. The result is that a case may be heard in such a way that even an intelligent and well-informed member of the public, present throughout every hearing in open court, would be unable to obtain a full understanding of the documentary evidence and the arguments on which the case was to be decided.
>
> In such circumstances there may be some degree of unreality in the proposition that the material documents in the case have (in practice as well as in theory) passed into the public domain. That is a matter which gives rise to concern. In some cases (especially cases of obvious and genuine public interest) the judge may in the interests of open justice permit or even require a fuller oral opening, and fuller reading of crucial documents, than would be necessary if economy and efficiency were the only considerations. In all cases the judge's judgment (delivered orally in open court, or handed down in open court in written form with copies available for the press and public) should provide a coherent summary of the issues, the evidence and the reasons for the decision.
>
> Nevertheless the tension between efficient justice and open justice is bound to give rise to problems which go wider than Order 24, rule 14A. Some of those problems were explored in the judgment of Potter L.J. in *GIO Personal Investment Services Ltd v. Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd Intervening)* [1991] 1 W.L.R. 984. As the court's practice develops it will be necessary to give appropriate weight to both efficiency and openness of justice, with Lord Scarman's warning in mind. Public access to documents referred to in open court (but not in fact read aloud and comprehensibly in open court) 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."

73. The decision in *SmithKline Beecham* treats documents which have been pre-read by the court and which are then referred to in open court, or in a skeleton argument incorporated in oral submissions in court, as no longer subject to the implied undertaking of confidentiality pursuant to what is now CPR 31.22(1)(a). Unless a court order restricting or prohibiting such use was made under CPR 31.22(2), such a document could therefore be released to a non-party, but it does not follow that there is any right for a non-party to access the document.

74. In his *obiter* comments at the end of his judgment Lord Bingham recognised, however, that there may be a need to grant greater public access to documents referred to in open court, with suitable safeguards, and stressed the importance of preventing too wide a gap developing between what passes into the public domain in theory and in practice. He was thereby recognising that there was as yet no right of public access to documents which are referred to in open court.

75. *Barings v Coopers & Lybrand* [2000] 1 WLR 2353 concerned transcripts of interviews conducted as part of a Board of Banking Supervision investigation into the collapse of Barings. The relevant issue was whether the transcripts had been "made available to the public" in directors' disqualification proceedings so as to lose any restriction on disclosure under section 82 of the Banking Act 1987. The case did not concern the

right of a non-party to documents although this was described as a "related question". In giving the judgment of the court Lord Woolf MR identified the general issue raised in the following terms:

> "41 This raises an important general issue as to how to reconcile the requirement that court proceedings are required to be open to the public so that the public can be aware of what happens in court proceedings with the increasing resort to practices such as the judge reading documents in his room away from the public gaze. If the judge does not state in open court what he has read what is assumed to be the position in the absence of evidence to the contrary?
>
> 42 It is important to note that this is a different although related question to that which arises under R.S.C., Ord. 63, r. 4 (and now under C.P.R., Part 5) on an application for permission to inspect documents on the file of the court. It is also distinct from the question of the use to which documents disclosed on discovery can be put.
>
> 43 As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings."

76. Lord Woolf then referred to *In re Hinchcliffe* [1985] 1 Ch 117 which was cited as providing clear statements of this basic principle. He then said that this issue had been "helpfully considered" by the court in *GIO* but noted that "unfortunately" *In re Hinchcliffe* had not been cited to the court in that case. The significance of this comment is unclear. *In re Hinchcliffe* was concerned with the entitlement to see exhibits to an affidavit. As already noted, Potter LJ in *GIO* expressly left over the question of whether attachments to a witness statement would be regarded as part of a witness statement

77. Lord Woolf proceeded to set out passages from Potter LJ's judgment in *GIO* at p994-996, following which he stated as follows:

> "50 *GIO Services* involved an application to obtain copies of the documents. Here D. & T. do not require the court's assistance for this purpose. D. & T. only need to establish that the absence of any evidence that Jonathan Parker J. actually read the documents is not fatal to their case; that even without such evidence the documents, because of their use in the proceedings, were available to the public for inspection. This is not without significance because Potter L.J. thought that the comment which he cited of Sir Donald Nicholls V.-C. in *Dobson v. Hastings* [1992] Ch. 394, 402 when he said "if and when affidavits and other documents are used in open court, their contents will become generally available" should be read restrictively. In our judgment the contrast which Sir Donald Nicholls V.-C. drew between that position and documents on the court file is accurate.
>
> 51 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 C.J. in *SmithKline Beecham Biologicals S.A. v. Connaught Laboratories Inc.* [1999] 4 All E.R. 498, 512d–e. As Lord Bingham C.J. 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 CPR 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.
>
> 52 Here the transcripts were put forward by the department as part of the evidence on which the department relied to obtain orders of disqualification. If the transcripts had been read in open court they would have been in the public domain. If they were read by the judge, in or out of court, as part of his responsibility for determining what order should be made, they should be regarded as being in the public domain. This is subject to any circumstances of the particular case making it not in the interests of justice that this should be the position.
>
> 53 When documents are put before the court for the purpose of being read in evidence as here the onus is no longer on the person contending they have entered the public domain to show this has happened. The onus is on the person contesting this is the position to show that they did not enter the public domain because, for example, the judge did not in fact read them or because of the need to protect the ability of the court to do justice in a particular case. This is the only practical solution. The judge cannot be cross-examined as to what he has or has not read."

78. AVSGF submitted that these passages show that "when documents are put before the court for the purpose of being read in evidence" then they "enter the public domain" unless it can be shown that the judge did not in fact read them. If so, there is authority that it is no more than a prima facie rule – see *Eurasian National Resources Corporation Ltd v Dechert LLP* [2014] EWHC 3389 (Ch) at [57]. Reliance was also placed on the apparently wider interpretation given by Lord Woolf to what was said by Sir Donald Nicholls V.-C. in *Dobson v Hastings* as to the consequence of documents being used in court than that given by Potter LJ in *GIO*.

79. *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] 1 WLR 2253 was a patent case which concerned whether the implied undertaking had been released under CPR 31.22 because a document "has been read to or by the court, or referred to, at a hearing which has been held in public". The document had been treated as confidential during proceedings but had been referred to during a public hearing. The patentee applied for an order to maintain confidentiality after the proceedings had terminated. The Court of Appeal allowed the appeal and granted the order requested having regard, in particular, to the very limited role the document had played in the trial.

80. In giving the judgment of the court Buxton LJ referred to *GIO* and noted at [5] that the court was not directly concerned with the rights of access to documents of non-parties, but that it could impact indirectly on the position of non-parties in two ways, namely:

> "First, if a party is at liberty to "use" a disclosed document, he may no doubt make it available to a non-party, in the absence of a special order preventing that. Second, if the court does make an order under CPR r 31.22(2), but the document in question comes into the possession of a third party, for instance by accident or theft, then any use by the third party of the document with knowledge of the court's order will arguably be a contempt."

81. Buxton LJ then considered the *SmithKline Beecham* and *Barings* decisions and concluded at [8] that they supported the following approach to CPR 31.22(1)(a):

> "First, there are taken to fall under the rule certain categories of document, in particular those coming within the prereading of the judge. It does not have to be established that the judge has actually read the documents: once the category is established, it is for a party alleging that they have not in fact been read to establish that fact, something that has to be achieved without inquiry of the judge: see *Barings v Coopers & Lybrands* [2000] 1 WLR 2353, 2367, para 53. Second, it therefore follows that not everything that is disclosed or copied in court bundles falls under this rule: the *Connaught* approach is restricted to documents to which the judge has been specifically alerted, whether by reference in a skeleton argument or by mention in the "reading guide" with which judges are now provided at least in patent cases. Third, since the *Connaught* approach is based upon the assumed orality of a trial, documents, however much pre-read by the judge, remain confidential if no trial takes place, but the application is, for instance, dismissed by consent, albeit by a decision announced in open court: see *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498."

82. He then observed at [9] as follows:

> "9 The central theme of these rules is the importance of the principle that justice is to be done in public, and within that principle the importance of those attending a public court understanding the case. They cannot do that if the contents of documents used in that process are concealed from them: hence the release of confidence once the document has been read or used in court. As this court recognised in the *Connaught Laboratories Inc* case, there may be some artificiality about that approach. That is because full access to documents deemed to have been read or used in court may give third parties at least the possibility of much more fully studying and understanding the case and the issues in it than if they merely heard the documents read aloud. Nevertheless, that paradox helps to underline this court's concern that economical means of using and referring to the documents, understood amongst the lawyers, should not exclude the spectators from comprehension of the case."

83. In relation to the court's approach to the document in question in the case, which had been referred to in open court, Buxton LJ stated at [25] that the considerations which had guided the court included the following:

> "(i) The court should start from the principle that very good reasons are required for departing from the normal rule of publicity. …The already very strong English jurisprudence to this effect has only been reinforced by the addition to it of this country's obligations under articles 6 and 10 of the Convention.
>
> (ii) When considering an application in respect of a particular document, the court should take into account the role that the document has played or will play in the trial, and thus its relevance to the process of scrutiny ….. The court should start from the assumption that all documents in the case are necessary and relevant for that purpose, and should not accede to general arguments that it would be possible, or substantially possible, to understand the trial and judge the judge without access to a particular document. However, in particular cases the centrality of the document to the trial is a factor to be placed in the balance.
>
> (iii) In dealing with issues of confidentiality between the parties, the court must have in mind any "chilling" effect of an order upon the interests of third parties: see paragraph 5 above.
>
> (iv) 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. Those reasons will in appropriate cases be weighed in the light of the considerations referred to in sub-paragraph (ii) above.
>
> (v) It is highly desirable, both in the general public interest and for simple convenience, to avoid the holding of trials in private, or partially in private…."

84. The trilogy of cases, *SmithKline Beecham, Barings* and *Lilly Icos,* support a broad approach to what documents are to be treated as read by the court for the purpose of CPR 31.22(1)(a) and involve an assumption that the judge will have read documents to which he has been specifically referred. As is noted in *Lilly Icos* at [8], this only applies to documents "to which the judge has been specifically alerted, whether by reference in a skeleton argument or by mention in the "reading guide" with which judges are now provided".

85. The final relevant Court of Appeal case is the *Guardian News* case. This concerned extradition proceedings and a journalist's request to be provided with documents which had been referred to by counsel in open court but not read out in detail. It was contended that these were documents that would have been pre-read, that it was not possible to understand the full case against those extradited without seeing the documents, and that they were needed for the journalistic purpose of stimulating informed debate about matters of public interest. The application was granted on appeal and in his judgment Toulson LJ, with whom the other judges agreed, made a number of generalised statements about the open justice principle and its application to documents referred to in open court. These included the following:

> "69 The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied.

> 70 Broadly speaking, the requirements of open justice apply to all tribunals exercising the judicial power of the state.
>
> ….
>
> 75 … I do not consider that the provisions of the Criminal Procedure Rules are relevant to the central issue. The fact that the rules now lay 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.
>
> ….
>
> 83 The courts have recognised that the practice of receiving evidence without it being read in open court potentially has the side effect of making the proceedings less intelligible to the press and the public. This calls for counter measures. In *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 Lord Bingham referred to the need to give appropriate weight both to efficiency and to openness of justice as the court's practice develops. He observed that public access to documents referred to in open court might be necessary. In my view the time has come for the courts to acknowledge that in some cases it is indeed necessary….
>
> ….
>
> 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; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, 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."

86. AVSGF submitted that the default position described by Toulson LJ now represents the law in both criminal and civil proceedings. It was submitted that this is consistent with what Sir Donald Nicholls V.-C. said in *Dobson v Hastings* and with the jurisprudence of this court, as developed in the *SmithKline Beecham, Barings* and *Lilly Icos* cases. To the extent that the *GIO* case is authority for a more restrictive approach, it no longer represents good law.

87. CIH submitted that the *Guardian News* case is concerned with criminal proceedings and the interrelationship between the court's inherent jurisdiction and the Criminal Procedure Rules. It does not address the CPR, the relevant provisions of the CPR or

the authoritative status of *GIO*. CIH also reserved the right to argue that the case is wrongly decided and goes too far.

88. In my judgment, *GIO* still stands as Court of Appeal authority that there is no inherent jurisdiction to allow a non-party access to trial documents simply on the basis that they have been referred to in a skeleton argument, witness statement, expert's report or in court. In particular:

(1) *SmithKline Beecham, Barings* and *Lilly Icos* were not directly concerned with a non-party's access to documents.
(2) *Guardian News* was so concerned, but in the context of criminal law and procedure.
(3) None of these cases states that *GIO* was wrongly decided or that it no longer represents good law.
(4) Whilst there appears to be some criticism of aspects of the *GIO* decision in *Barings*, that criticism appears misplaced since *In re Hinchcliffe* was relevant to an issue which *GIO* did not determine and Potter LJ's interpretation of Sir Donald Nicholls V.-C.'s comments in *Dobson v Hastings* is correct – they did relate to documents on the court file.

89. There is, however, one aspect of the *GIO* decision in relation to which I consider that law and practice has moved on, as Potter LJ recognised may well occur. That is in respect of documents read or treated as being read in open court. It is clear from *SmithKline Beecham, Barings* and *Lilly Icos* that the category of documents treated as having been read in open court has expanded, at least for the purposes of CPR 31.22. Moreover, the rationale in *GIO* for allowing a non-party access to skeleton arguments may be said also to apply to any document which would have been read out in open court had it not been pre-read.

90. It is important, as stressed in cases such as *SmithKline Beecham,* to prevent a gap developing between what passes into the public domain in theory and in practice. Growing emphasis on the written presentation of argument and evidence has increased that risk. I shall seek to summarise what I consider to be the current legal position by reference to the main different categories of documents.

Trial bundles

91. *GIO* is clear authority that there is no inherent jurisdiction to allow inspection of trial bundles – see also the decision of Flaux J in the *British Arab Commercial Bank* case.

Skeleton arguments

92. Since *GIO* it has been apparent that the court has inherent jurisdiction to allow non-parties to obtain copies of the parties' skeleton arguments, provided that there is an effective public hearing in which that written argument is deployed – see, for example, the *Law Debenture Trust* case at [28]-[35]. In my judgment, the same would apply to other advocates' documents provided to the court to assist its understanding of a case such as chronologies, dramatis personae, reading lists and written closing submissions.

Witness statements

93. Under CPR 32.13 non-parties have the right to inspection of witness statements which stand as evidence in chief during the course of the trial. The current rule provides as follows:

> "(1) A witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the court otherwise directs.
>
> (2) Any person may ask for a direction that a witness statement is not open to inspection.
>
> (3) The court will not make a direction under paragraph (2) unless it is satisfied that a witness statement should not be open to inspection because of –
>
> (a) the interests of justice;
>
> (b) the public interest;
>
> (c) the nature of any expert medical evidence in the statement;
>
> (d) the nature of any confidential information (including information relating to personal financial matters) in the statement; or
>
> (e) the need to protect the interests of any child or protected party.
>
> (4) The court may exclude from inspection words or passages in the statement."

94. Unless a contrary order is made, non-parties accordingly have a right of inspection of such witness statements "during the course of the trial". CIH submitted that the rule defines and limits the rights of non-parties and that there can only be inspection "during the course of the trial".

95. Whilst it is correct that it is only "during the course of the trial" that a non-party may inspect witness statements as of right, in my judgment it does not follow that the court may not allow such inspection thereafter. There may be just as important reasons for seeking to understand proceedings the day after a trial concludes or settles as during the trial itself. If termination of the trial is a complete cut off point, the working of the rule would often be arbitrary; cases may settle at any time, and the likelihood of settlement will usually be unknown to non-parties. Whilst the fact that the trial has terminated and the passage of time may well be relevant to the exercise of the court's discretion to allow inspection of a witness statement, I consider that it should be recognised that the court has inherent jurisdiction to allow inspection after trial of a witness statement which otherwise falls within the pre-conditions for inspection set out in the rule.

96. In my judgment witness statements in this context includes experts' reports, as CIH accepted. An expert whose report stands as his evidence in chief is providing witness evidence, for which his report stands as his statement. This is supported by the reference to expert medical evidence in CPR 32.13(3)(c). Even if that be wrong, I consider that the court's inherent jurisdiction to allow non-parties access to experts' reports should mirror that in relation to witness statements.

Exhibits to witness statements

97. In my judgment *GIO* remains good authority that there is no inherent jurisdiction to allow non-parties to obtain copies of documents which are simply referred to in a witness statement. The question of whether the same applies to exhibits or to scheduled attachments to witness statements was left open by the court in *GIO*.

98. In two cases at first instance it has been held that the court has no inherent jurisdiction to allow inspection of exhibits to witness statements – the *British Arab Commercial Bank* case (Flaux J) and *Nestec SA v Dualit Ltd* [2013] EWHC 2737 (Pat) (Birss J). In both cases it was stressed that CPR 32.13 was limited to witness statements and did not extend to exhibits and that the rule was materially unchanged since the time of the *GIO* decision, which remained binding authority. Birss J explained the position as follows in *Nestec:*

> "27 It seems to me that obtaining copies of documents of the kind in issue in this case raise different questions from access to witness statements, experts reports and skeleton arguments, as Potter LJ explained in the *GIO* case. Third parties are given access to documents like skeletons, witness statements and experts reports because the idea is that the trial is in public and a person could sit in court and hear what is said — they could write it down and they could quote and reproduce it. The modern paper-based approach to proceedings should not provide a fetter to that open justice.
>
> 28 But copies of other documents raise different considerations. A third party sitting in court does not ordinarily have unfettered access to such materials, e.g. the photographs sought on this application. Such access does not normally allow a third party to take copies of photographs which are used in court. A journalist could write up the proceedings and describe what has happened but that is a different thing. In my judgment, the law explained in *GIO* governs the matter in relation to documents 2 to 8 and the rules of court have not, save for CPR r5.4C about the court records and r32 about witness statements, sought to change anything since that case.
>
> 29 One might imagine all kinds of safeguards and balances which might be required to be dealt with in such a rule if it covered exhibits and other similar documents. It might deal with handling the timing of applications of this kind, confidentiality, any copyright in the documents, the rights of third parties and, no doubt, other things."

99. A contrary conclusion was reached by Bean J in *NAB v Serco Ltd* [2014] EWHC 1255, although he does not appear to have been referred to the decisions of Flaux J and Birss J. Bean J relied in particular on *In re Hinchcliffe* and the comments made about that case by the court in *Barings,* stating at [25] that "the authorities indicate that documents exhibited to an affidavit or witness statement are to be treated for the purposes of inspection as if they formed part of the affidavit or witness statement itself". That may have been the case in relation to exhibits to affidavits at the time of the decision in *In re Hinchcliffe,* but witness statements often attach a wide range of documents, many of which cannot be regarded as being adopted as part of the statement. Moreover, by the time of the trial attached documents will simply be part of the trial bundle and *GIO* makes clear that there is no inherent jurisdiction to allow inspection of trial bundles. To the extent that Bean J suggested in *NAB v Serco* that *GIO* is no longer good law, I respectfully disagree. The relevant subsequent Court of Appeal decisions have all been addressed above. As already observed, none of them state still less hold that *GIO* is wrongly decided, although they recognise the need for the law to keep up with modern court practice, as Potter LJ himself did.

100. In my judgment there is no inherent jurisdiction to allow inspection of exhibits to trial witness statements simply because they are or were exhibited. The same would apply to documents referred to or exhibited to experts' reports. It will be different if they are read or treated as being read in open court. Moreover, if it is apparent that, notwithstanding the exercise of a non-party's rights to inspect documents under CPR 5.4C and under the court's inherent jurisdiction and a consideration of the transcript, it is not possible to understand the statement/report without seeing a particular document or documents exhibited, attached or referred to, then I consider that the court would have inherent jurisdiction to allow inspection, as it would be necessary to do so to meet the principle of open justice, as further discussed below.

Documents read or treated as read in open court

101. CPR 31.22 provides:

> "(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.
>
> (4) For the purpose of this rule, an Electronic Documents Questionnaire which has been completed and served by another party pursuant to Practice Direction 31B is to be treated as if it is a document which has been disclosed."

102. This rule reflects the balance struck in the CPR between the principle of open justice and litigants' private rights to keep their documents confidential. Unless a contrary order is made, confidentiality will be lost where "the document has been read to or by the court, or referred to, at a hearing which has been held in public". Where that requirement is met, the question arises whether the court should be regarded as having inherent jurisdiction to allow non-party access to such documents, or some of them.

103. The principle of open justice requires seeking to place non-parties in an equivalent position to that which they would have been in had the trial been conducted orally, as trials used to be. It is in relation to the reading of documents that the tension between efficient and open justice is most acute. It is increasingly common for judges to be invited to read documents for themselves. That may arise during the course of the hearing itself, or it may involve pre-reading, overnight reading or post-hearing reading.

104. The *Barings* case suggests that there is a presumption in relation to the reading of documents. In my judgment, in the context of non-parties' access to documents, any such presumption should be limited to documents which the judge is specifically invited to read. Judges are conscientious and will read particular documents when asked to do so, but the time pressures on them are such that it is not realistic to assume or presume that they will read documents simply because they have been referred to in some document, whether it be a skeleton argument, witness statement, expert's report or some other trial document.

105. This is reflected in modern civil trial practice in which reading lists are commonly provided so as to identify what documents the judge should pre-read. The quantity of documents in such lists is likely to be considerably less than the multiple documentary references scattered through a skeleton argument. Further documents may be read as the trial progresses, often as and when they are put to witnesses, but it is unrealistic to assume that they will be read outside court, unless the court is invited to do so.

106. It is also reflected in the *Lilly Icos* decision in which it was said that the judge is to be treated as having pre-read documents to which he/she had been "specifically alerted" in the skeleton argument or reading list – i.e. those which the judge has been invited to read.

107. I accept that developments since *GIO* mean that the court should now be regarded as having inherent jurisdiction to allow non-parties access to documents read or treated as read in open court, but it is important that that category of documents is clearly defined and that it does not go too far and put non-parties in a markedly better position than they would have been when trials were conducted orally.

108. Based on current civil court practices, I would accordingly confine the jurisdiction to documents which are read out in open court; documents which the judge is invited to read in open court; documents which the judge is specifically invited to read outside court, and documents which it is clear or stated that the judge has read. These are all documents which are likely to have been read out in open court had the trial been conducted orally.

109. In relation to documents which are referred to in open court, if it is clear from the reference to the document that the judge must have read it then that would be within the court's jurisdiction. The mere fact that a document has been referred to in open court does not, however, mean that it would have been read out in court had the trial been conducted orally, nor does it follow that sight of the document is relevant or necessary in order to understand or scrutinise the proceedings. The reference may, for example, have been merely passing or unnecessary. Consistently with the *GIO* decision, I do not consider that the court's jurisdiction presently extends to grant non-parties access to a document "simply on the basis that it has been referred to in open court" – see *GIO* at p995G.

Other documents necessary to meet the principle of open justice

110. In any case there may be specific documents which do not fall within the categories of documents within the court's inherent jurisdiction identified above, in respect of which confidentiality has been lost under CPR 31.22, but which, notwithstanding inspection of all documents available to non-parties in accordance with the principles set out above and of the transcript, it is necessary for a non-party to inspect in order to meet the principle of open justice. It will be so necessary where it is not possible for a reasonable observer to understand the trial evidence, argument or issues without inspection of the document or documents in question.

111. The court would have inherent jurisdiction to allow the non-party access to such documents. As stated by Toulson LJ in the *Guardian News* case, the court has inherent jurisdiction to decide how the principle of open justice applies.

112. I would accordingly summarise the current position on the authorities as follows:

(1) There is no inherent jurisdiction to allow non-parties inspection of:
   (i) trial bundles;
   (ii) documents which have referred to in skeleton arguments/written submissions, witness statements, experts' reports or in open court simply on the basis that they have been so referred to.

(2) There is inherent jurisdiction to allow non-parties inspection of:
   (i) Witness statements of witnesses, including experts, whose evidence stands as evidence in chief and which would have been available for inspection during the course of the trial under CPR 32.13.
   (ii) Documents in relation to which confidentiality has been lost under CPR 31.22 and which are read out in open court; which the judge is invited to read in open court; which the judge is specifically invited to read outside court, or which it is clear or stated that the judge has read.
   (iii) Skeleton arguments/written submissions or similar advocate's documents read by the court provided that there is an effective public hearing in which the documents are deployed.
   (iv) Any specific document or documents which it is necessary for a non-party to inspect in order to meet the principle of open justice.

113. The court may order that copies be provided of documents which there is a right to inspect, but that will ordinarily be on the non-party undertaking to pay reasonable copying costs, consistently with CPR 31.15(c). There may also be additional compliance costs which the non-party should bear, particularly if there has been intervening delay.

114. In the light of my conclusion on inherent jurisdiction it follows that the Master had no jurisdiction to allow inspection of a number of the categories of documents identified in the Order. The documents for which it is likely that there was jurisdiction are the witness statements (but not exhibits), expert reports and written submissions and skeleton arguments. It may also be that there is jurisdiction to allow inspection of a number of the documents relied on at trial, but not on the generalised basis set out in the Order.

Ground 2 – The exercise of the court's discretion

115. In considering the exercise of the court's discretion under CPR 5.4C(2) both parties referred to and relied upon the decisions of Moore-Bick J in *Dian AO v Davis Frankel & Mead* [2005] 1 WLR 2951 and Floyd J in *Pfizer Health Ab v Schwarz Pharma Ag* [2010] EWHC 3236 (Pat).

116. In *Dian* non-parties sought permission to inspect various documents on the court's file in proceedings which they considered might assist them in subsequent litigation. The case had settled before trial so the documents sought related to interlocutory applications. These included applications which had been determined in court and on the papers and also an application for summary judgment which had not ultimately been pursued.

117. In his judgment Moore-Bick J stressed that a non-party has no right to inspect the court file and that it is necessary for the applicant to identify with reasonable precision the documents in respect of which permission for inspection is sought and to lay before the

court the grounds upon which permission is sought. This is borne out by the requirements of 5APD4.3.

118. In determining whether to grant permission Moore-Bick J identified an important consideration as being whether the documents were read by the court as part of the decision making process. This was the case in relation to affidavits sworn in respect of an application for permission to serve out of the jurisdiction (although this would have been dealt with on the papers) and applications for an injunction and for security for costs, but not for the affidavits relating to an abandoned summary judgment application. In relation to the former category of documents Moore-Bick J considered that anyone with a legitimate interest ought generally to be given permission for inspection. In relation to the latter category of documents, he considered that permission ought generally to be refused unless there were strong grounds for thinking it is necessary in the interests of justice to allow inspection.

119. At [56]-[57] Moore-Bick J explained the difference between the two categories of documents as follows:

> "56 In the present case, although Alfa 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 issues that arise in the litigation in the Caribbean. I did not accept the submission that the link is too tenuous to make it appropriate to allow any access to the records at all. Moreover, I think that in the case of documents that were read by the court as part of the decision-making process, the court ought generally to lean in the favour of allowing access in accordance with the principle of open justice as currently understood, notwithstanding the view that may have been taken in the past about the status of hearings in chambers.
>
> 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 or statements 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 that the court should be willing to give access to documents of that 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. In the present case the likelihood is that the parties' respective cases are set out in some detail in the affidavits sworn in support of the application for a freezing order, the application to serve out of the jurisdiction and the application for security for costs. At this stage I am not satisfied that it is necessary in the interests of justice to go beyond them."

120. *Dian* was considered and followed by Floyd J in the *Pfizer Health* case in which he summarised the main principles to be derived from it at [20] as follows:

> "i) There is no unfettered right to documents on the court file except where the rules so specify: *Dian* at [20];

> ii) The requirement for permission is a safety valve to allow access to documents which should in all the circumstances be provided: *Dobson v Hastings* at page 406;
>
> iii) The principle of open justice is a powerful reason for allowing access to documents where the purpose is to monitor that justice was done, particularly as it takes place: *Dian* at [30];
>
> iv) Where the purpose is not to monitor that justice was done, but the documents have nevertheless been read by the court as part of the decision making process, the court should lean in favour of disclosure if a legitimate interest can still be shown for obtaining the documents: *Dian* at [56];
>
> v) Where the principle of open justice is not engaged at all, such as where documents have been filed but not read, the court should only give access where there are strong grounds for thinking that it is necessary in the interests of justice to do so."

121. Floyd J added the following observation at [21], with which I agree:

> "21. I would add that the procedure under the CPR should not in general be used for obtaining copies of documents which are available from public sources."

122. The decision in *Dian* concerned documents which would ordinarily be on the "records of the court" as defined earlier in the judgment. Application notices and any written evidence filed in relation to an application are listed in paragraph 2A of 5APD.4 and are likely to be a main focus of CPR 5.4C applications. *Dian* provides useful guidance in relation to such applications and I agree with the distinction it draws between applications and accompanying written evidence which have been considered as part of a decision making process and those which have not been judicially considered at all. The former engage the open justice principle; the latter do not.

123. CIH sought to extrapolate from the reasoning of the decision in *Dian* and suggested that the same approach and distinction applies to trials in cases which settle before judgment. It was submitted that documents that relate only to a trial in a matter which settled are not covered by the principle of open justice, for the simple reason that if no judgment is delivered there is no need, nor is it possible, to supervise the judicial process. Many documents may be read by the court, but what is relevant is whether they have been read as part of the process of making an actual judicial decision. If they have, the principle of open justice is engaged. If they have not, it will not be – even if that is because the parties resolve the dispute (or particular application) before a judicial decision is made.

124. I do not agree that the open justice principle is to be viewed as narrowly as this. In relation to trials I accept that there has to be an effective hearing for the principle to be engaged. Once there is a hearing, however, the right of scrutiny arises, the principle of open justice is engaged and it will continue to be so up and until any settlement or judgment. The same will apply to the hearing of interlocutory applications.

125. The point is well illustrated by Colman J's decision in the *Law Debenture Trust* case. That case concerned an application for inspection of skeleton arguments in a case which had settled. Colman J held that such an application should not be granted if a case settles before the hearing commences, even if the skeleton argument had been read. That was because in those circumstances the observer of a public hearing would suffer

no disadvantage. Once, however, there was a hearing then from the outset the judge's conduct of the hearing would be informed by what he had pre-read and the principle of open justice is engaged. That principle relates to the course and conduct of a hearing; not simply its determination. Having cited Lord Bingham's judgment in *SmithKline Beecham* at p509-510, Colman J stated as follows:

> "28. Thus the substance of this passage is that if there had been no effective hearing save for the purpose of obtaining from the judge an order which reflected the parties' settlement of their dispute, the application for access to disclosed documents, which the judge had been invited to read and had read before the hearing, would have been refused because the trial never reached the stage where his consideration of such documents was in substitution for their having been read out to enable him to take a judicial decision. On the facts of that case, however, the trial did commence; there was a very short hearing because the application to revoke the patent was not conceded but not opposed and the judge used his familiarity with the documents in question to arrive at his order of revocation.
>
> 29. It is thus essential for a court invited to exercise its inherent jurisdiction to grant to a non-party access to written skeleton or outline submissions to investigate what part they are playing or have played in the trial. For example, there can be little doubt, in my judgment, that if a case settles before the hearing commences but after the judge has read the submissions, the jurisdiction should not be exercised in favour of access. In such a case no observer of a public hearing would have been denied knowledge of submissions made at that hearing by reason of their having been committed to writing.
>
> 30. Where, however, the hearing commences and counsel provides the judge with written submissions which are not read out in court or not fully read out and the hearing ends in a judgment, there can equally be little doubt that the court's discretion ought to be exercised in favour of access. The non-party observer will otherwise have been deprived of the whole or part of that which was submitted to the judge. The result would be the same if by the end of the trial, certain issues had been abandoned.
>
> 31. But what happens where the trial begins, where the judge has read the submissions, but where the whole case is settled before judgment, perhaps after many days of hearing? In order to resolve this question it is necessary to answer one essential question of principle. Is the existence of a judgment or other judicial decision of the court a pre-requisite of the exercise of the jurisdiction in favour of access? For if it is, the absence of such a judgment or decision would lead to the conclusion that every time the settlement of a case intervened before the application for access was decided, further public scrutiny of written submissions would be closed off.
>
> 32. In the passage which I have already cited from the judgment in *Gio*, at page 996 F-G, the Court of Appeal expressly contemplated "an application from the press or the public in the

course of the trial" being granted there and then. That was not what happened in that case where, by the time when the application came to be heard, a judgment had been given, albeit not determining issues between the claimant brokers who had already settled but whose submissions were previously included in the submissions provided to the judge in the course of opening.

33. Although it is clear that in *SmithKline Beecham v. Connaught Laboratories*, supra, the court reached its conclusion on the grounds of there ultimately being a judicial determination of the revocation issue by contrast with that issue having been resolved without a hearing by consent, I do not read Lord Bingham's reasoning as necessarily involving existence of such a judgment in cases where the trial has already commenced and the written submissions have already been deployed at the hearing in substitution for, or as auxiliary to, oral argument. There had in that case never been a hearing at which the submissions could have been so deployed. Access to them only became justifiable because the use which the judge ultimately made of them to arrive at his decision was to proceed as if there previously had been a hearing at which the case had been orally opened or at least at which counsel had, as in *Gio*, put in the submissions after orally introducing the issues. There would thus never have been a process of relevant substitution but for the effect of the judge's reliance on the submissions to reach his conclusion.

34. In this analysis, it is clear from the authorities 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, so that the public may be satisfied that the courts are acting justly and fairly and the judges in accordance with their judicial oath. 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 of the trial on a day to day basis. There may be in the course, even of the first few days of a potentially long and complex hearing numerous occasions for judicial decision-taking with regard to the conduct of the hearing. These are all part of the public judicial function. The judge's knowledge of the issues may be and often is of vital relevance to such decision-taking. Once he has read the written submissions he may well be better equipped to perform this vital function. In this way, the submissions play an active role in facilitating the conduct of the trial from the very moment when they have been read and the trial has commenced. It is for this reason, that in my judgment, the public policy of openness requires that the outside observer should be given access to these materials in the course of the hearing before judgment, as envisaged in *Gio*. If such an order is appropriate before judgment in an on-going trial, there is no logical objection to such an order where, as in the present case, the hearing proceeded for several days and then settled.

35. Does this approach require qualification on the grounds that the oral submissions advanced in parallel with the written

> submissions never got as far as a particular point in those written submissions? In principle, the answer to this question must be No. The hearing was proceeding at the time of settlement and the written submissions had by then been read by the court in order to facilitate the conduct of that hearing. The fact that the parallel oral opening had not covered the whole ambit of those written submissions does not mean that they had not been relied upon by the court to inform itself of the totality of the issues for the purposes of the conduct of the hearing so far at it proceeded."

126. The principle of open justice is accordingly engaged as soon as there is an effective hearing. It may be more fully engaged if the hearing proceeds to a judgment, but it is still engaged. The only circumstance in which a judicial decision is likely to be necessary to engage the principle is where the application is determined on the papers and so there is no hearing, as was the case with one of the applications in *Dian.*

127. As to the principles to be applied when the court is considering whether and how to exercise its discretion to grant permission for copies to be obtained by a non-party of the records of the court under 5.4C(2) the court has to balance the non-party's reasons for seeking copies of the documents against the party to the proceedings' private interest in preserving their confidentiality. Relevant factors are likely to include:

(1) The extent to which the open justice principle is engaged;
(2) Whether the documents are sought in the interests of open justice;
(3) Whether there is a legitimate interest in seeking copies of the documents and, if so, whether that is a public or private interest.
(4) The reasons for seeking to preserve confidentiality.
(5) The harm, if any, which may be caused by access to the documents to the legitimate interests of other parties.

128. I would endorse the general approach adopted in *Dian* and *Pfizer Health* that the court is likely to lean in favour of granting permission under 5.4C(2) where the principle of open justice is engaged and the applicant has a legitimate interest in inspecting the identified documents or class of documents. Conversely, where the open justice principle is not engaged, the court is unlikely to grant permission unless there are strong grounds for thinking that it is necessary in the interests of justice to do so.

129. In relation to the court's inherent jurisdiction the factors relevant to the exercise of discretion are likely to be such as those set out in paragraph 127 above. In the light of the guidance provided in *GIO, Barings* and *Lilly Icos,* and the importance of the principle of open justice, the court is likely to lean in favour of granting access to documents falling within the categories set out in paragraph 112(2) above where the applicant has a legitimate interest in inspecting the identified documents or class of documents.

130. As to CIH's appeal on this ground, in relation to all documents in respect of which I have found there to be jurisdiction I reject the contention that the open justice principle is not engaged, and in particular that it is not so engaged because there was a settlement.

Ground 3 – whether AVSGF could show a "legitimate interest" in or "strong grounds in the interests of justice" for access to the documents.

131. CIH challenged the Master's decision that AVSGF had a legitimate interest in the documents requested.

132. At [124] the Master summarised AVSGF's interest as follows:

> "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*."*

133. CIH submitted that this shows that AVSGF's stated intention is simply to publish all the documents it obtained in the hope that someone else might make use of them. Mr Dring himself (or his organisation) do not propose to undertake any substantive research on the documents themselves or indeed do anything with them at all. They rely on unidentified others to do this at some unknown time in the future. It was submitted that the Master wrongly assumed that because the AVSGF was pursuing "legitimate" (i.e. lawful) activities it could therefore show a "legitimate interest" in obtaining the documents on the application; that this is an erroneous reading of the "legitimate interest" test, and that, even if it is read as not setting a particularly high bar, it cannot be correct that anyone pursuing any lawful activity then meets the relevant test to obtain documents under CPR 5.4C if the "open justice" principle is engaged.

134. In my judgment the Master was clearly entitled to find that AVSGF had a legitimate interest and this finding is not open to challenge on appeal.

135. As the authorities make clear, an entirely private or commercial interest in a document can qualify as a legitimate interest. Often, as in *GIO* and *Law Debenture Trust* and *Dian,* it will be an interest in related litigation.

136. In the present case, AVSGF's interest is of a public nature. The Forum provides help and support to asbestos victims, it is in some respects a pressure group and it is involved in lobbying and promoting asbestos knowledge and safety. All these qualify as providing a legitimate interest, as the Master found at [124]. The Master recognised at [152] that the material which AVSGF sought was of "legal, social and scientific interest". As set out by the Master at [5] of her judgment of 6 April 2017 there was a "public interest in a general sense in asbestos liability and injury litigation, given the death toll and injury toll that has arisen down the years."

137. There is more to be said for CIH's argument that it has not been shown that there are *strong* grounds in the interests of justice for access to the documents, but it is not necessary to decide this issue since, on my analysis of the applicable principles, it does not arise.

138. In relation to documents which fell within her jurisdiction, I would accordingly reject the challenges made to the exercise of the Master's discretion.

Ground 4 - the order made and the procedure adopted for handling the process

139. The unusual procedure adopted leading up to the making of the Order is set out earlier in the judgment. On the basis that, in my judgment, the Order should be set aside on jurisdictional grounds, it is unnecessary for me to consider in this judgment the concerns relating to the way in which this application was managed and determined although I agree with the criticisms of them contained within the judgment of Sir Brian Leveson P and agree with the views which he expresses. I also agree that steps should be taken to ensure that they are not repeated in the future.

Conclusion

140. For the reasons outlined above I would allow the appeal on ground 1 and set aside the Order on jurisdictional grounds. Although there may be some documents covered by the Order for which there was jurisdiction to allow inspection, there are so many problems raised by the terms in which the Order was made that I consider that the whole Order should be set aside. In the light of the guidance provided by this judgment, I trust that the parties will be able to agree an order which reflects the categories of the requested documents which there is a right to inspect. In default of agreement, written submissions should be made by both parties so that a decision on paper can be made as to the final order on this appeal.

Newey LJ:

141. I agree with both judgments.

Sir Brian Leveson P:

142. I entirely agree with the judgment of Hamblen LJ and with the disposal of this appeal in the way which he proposes. In the light of the conduct of the Master, however, I consider it necessary to deal in greater detail with the fourth ground of appeal concerning the procedure which she adopted because there are a number of features of her conduct which cause very real concern. It is sufficient if I summarise them.

143. In relation to the initial conduct and management of the Application leading up to the final hearing, I consider that the Master was wrong:

(1) To allow the application when originally made to proceed on a without notice basis. The unprecedented scope of the order being sought should have made it apparent that it was appropriate to involve CIH from the outset.
(2) To arrogate the proceedings to herself and to refuse the application that it be heard by Picken J. In most cases such as this it will clearly be more appropriate that, if possible, such an application should be heard by the trial judge. Given the nature of the issues raised, however, in any event, it was a matter which should have been heard by a High Court Judge.
(3) To order that there be no contact concerning the case with Picken J or his clerk, an order for which there would appear to be no jurisprudential basis or appropriate justification.
(4) To order a mandatory injunction which effectively required the parties to spend £1,800 to transfer Bundle D onto a hard drive which she then ordered to be delivered up to and retained by the court after the case had settled. Again, there was no proper basis for making such orders and neither did the Master explain on what basis the court purportedly had jurisdiction to do so.

144. The point was made that CIH did not seek to appeal the order of the Master in relation to her retention of the case. When we pressed Mr Swift (who was not instructed before the Master), he made it clear that a decision had to be made whether to risk a failed

challenge to the order with the result that the matter would have to be argued before the Master against the background of a challenge to her decision to retain the case. That reason fails to credit the recognition that all judges have of the fact that appellate courts can perfectly properly approach a particular issue in different ways. The failure to appeal would have meant that this concern could not have generated a successful appeal at this stage: it does not, however, make the original decision correct or an appropriate exercise of discretion.

145. Having heard the application, there are also a number of highly unsatisfactory features of the process adopted by the Master in relation to the handing down of her judgment and the making of an order at that hearing. In particular, as to the former, I consider that the Master was wrong:

(1) To make a final order at a hand down hearing, which was arranged at unsatisfactorily short notice, at which CIH was not represented, having been told that the parties should attempt to agree an order and that attendance at the hand down was optional.

(2) To make a final order which had not been agreed and upon which CIH was yet to set out its position.

(3) To make a final order despite Mr Butters' explanation of CIH's position as set out in Freshfields' email of 13.20 (which, although sent to her, she had not seen). Although Freshfields would have been better advised to attend (given all that had transpired in the case), it was wrong to criticise them for not doing so when it had been made clear that they were not required to do so and would be given the opportunity to agree a final order.

(4) Not only to make the final order in terms which she knew Freshfields did not agree but to put it into immediate effect in CIH's absence and without any opportunity for representations to be made.

(5) To determine permission to appeal of her own motion, before any such application had been made or the grounds for so doing identified.

146. Finally, there are a number of unsatisfactory features of the final order itself and of the managing of the logistics of the process. In particular:

(1) The Master's order contained no safeguards to protect the integrity and availability of the court records and the other documents subject to the Order. It simply stated that the documents "shall be made available forthwith to the applicant's solicitor for copying or scanning".
(2) On the day judgment was handed down, the Master permitted Mr Dring's representatives to take six boxes of files with them when they left the court, notwithstanding her finding that the documents were part of the court file. This meant that anyone else wanting to access the records of the court would be unable to do so. Furthermore, court staff would have no role in supervising the copying of the documents and there was no way of ensuring that all documents removed were ultimately returned.
(3) In any event, having held that all of the trial bundle was part of the court record, the effect of the Master's actions was to permit original documents on the court records (rather than copies) to be released to Leigh Day. This was contrary to the express wording of CPR 5.4C.
(4) The Order also made no provision for any identification of which original documents from the court file were in fact being released to Leigh Day (no index of the documents removed by Leigh Day being provided), nor for payment of the

relevant fees, nor for any chain of custody in respect of those original court file documents, nor for any express requirements as to how or when they should be returned.

147. I regret to say that none of the foregoing represents appropriate practice in the Queen's Bench Division. Whether by Practice Direction or Practice Note, steps should be taken to ensure that allocation between Master and judge is appropriate and that 'own motion' decisions are not made in this way.