Response from Daniel Cloake to the Civil Procedure Rule Committee consultation on proposed *Cape v Dring* amendments

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"*The availability of skeleton arguments, and witness statements, deployed in open court hearings is essential to any meaningful concept of open justice*."[1]
The Honourable Mr Justice Nicklin

Introduction

1. In 2019 the Supreme Court handed down judgment in the case of *Cape v Dring*[2]. Lady Hale helpfully described the issues at hand:

   "*This case is about how much of the written material placed before the court in a civil action should be accessible to people who are not parties to the proceedings and how it should be made accessible to them*"

2. Lady Hale concluded the judgment stating:

   "*We would urge the bodies responsible for framing the court rules in each part of the United Kingdom to give consideration to the questions of principle and practice raised by this case.*"

3. On 1st December 2023 the Civil Procedure Rule Committee commissioned a consultation into proposed changes to Civil Procedure Rule 5.4c, currently titled "Supply of documents to a non-party from court records"
4. Daniel Cloake, a blogger who runs what The Times has described as "the investigative court reporting blog, Mouse in The Court"[3], makes the following comments in response to the proposed new rules.

Lack of a generic 'access to information' rule

5. Mr Cloake proposes that CPR5.4c be renamed "Supply of information to a non-party from court records"
6. The CPRC is invited to consider Criminal Procedure Rule 5.8[4] entitled 'Supply to the public, including reporters, of information about cases'
7. CrimPR5.8(6) gives the public the right to the following information about criminal cases, inter alia:

   (a)the date of any hearing in public, unless any party has yet to be notified of that date;
   (b)each alleged offence and any plea entered;
   (c)the court's decision at any hearing in public, ...
   (d)whether the case is under appeal;
   (e)the outcome of the case;

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[1] Nicklin J [Para 32] *Hayden v Associated Newspapers Ltd* [2022] EWHC 2693 (KB) (28 October 2022) https://www.bailii.org/ew/cases/EWHC/KB/2022/2693.html
[2] *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38 (29 July 2019) https://www.bailii.org/uk/cases/UKSC/2019/38.html
[3] https://www.thetimes.co.uk/article/confusion-and-discord-at-fca-over-peer-to-peer-lending-as-early-as-2016-32xv3ltzx
[4] https://www.legislation.gov.uk/uksi/2020/759/rule/5.8/made

(f)the identity of—
(i)the prosecutor,
(ii)the defendant,
(iii)the parties' representatives, including their addresses, and
(iv)the judge, magistrate or magistrates, or justices' legal adviser by whom a decision at a hearing in public was made; and

8. A rule with the same intention is otherwise absent from the civil procedure rules.
9. For example, there is no rule which allows a member of the public to request information about who the claimants legal team is, so that an application for their skeleton argument can be made in advance of the hearing.
10. In the absence of such a rule a request subsequently may have to burden the precious resources of the court.
11. Information that the court holds which would be of assistance to an observer, and should in my respectful submission be available as of right to a non-party, and therefore where applicable should be published on CE-File, includes:
- Hearing notices
- Time estimates
- Details of the lawyers and parties involved
- Future hearing dates

Complicated

12. Mr Cloake submits that the proposed rules are overly complicated such that they would be difficult to understand by the lay-public or by court staff who will be faced with interpreting any subsequent requests.
13. The proposed rule is full of nested arguments and clauses and requires the reader to jump all over the place in order to understand whether their application can be made.
14. Section 1(3) of the Civil Procedure Act 1997 states:
The power to make Civil Procedure Rules is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient.
15. The current wording of the proposed rule, it is the submission of Mr Cloake, is unlikely to be considered "*accessible"* to the lay applicant, or indeed to court staff.
16. Even the current wording can be difficult for court staff to understand. For example on 10/11/2023 Mr Cloake e-mailed a county court and asked:

Dear court staff,
Pursuant to CPR5.4c I wish to obtain the following documents:
1. Particulars of claim
2. Defence
In the following matter: ….

17. He received a response on 22/01/2024 stating inter alia:
Good afternoon
Your request has been referred to the Judiciary for guidance as you are not a party to these proceedings.
18. A subsequent e-mail on 15/02/2024 stated:
There has been a delay in your request as the District Judge raised questions regarding the matter.
The file has been rereferred to the Judiciary for further guidance.

It may help your request if you can give detailed reasons as to whom you are to the parties and why you require this information.

19. This was wholly incorrect as the documents should have been provided without any qualification or clarification needed. An authority was provided to that effect and the documents were subsequently sent.

20. This example raises two points – firstly the delay that difficult to understand rules creates, in this case over three months for a basic request.

21. And second, the amount of court staff time and indeed judicial time that is wasted.

22. Mr Cloake submits that the CPRC should proactively take these draft rules to court staff on the front line and ask them what they would do when faced with an e-mail requesting a simple particulars of claim or the like to ascertain whether they are workable.

23. Unlike the distinguished members of the CPRC court staff are unlikely to have the ability to deal with multiple nested layers present in the proposed rules and will either ignore the e-mail (eg as at County Court at Central London which seemingly refuse to deal with these requests at all) or will refer the e-mail onto an already busy judge.

24. The CPRC should also take into account, it is submitted, the positive obligation placed upon public bodies to actively promote access to information under article 10.

25. The rule could be written as follows:

When any of the following conditions are met:

(a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;

(b) where there is more than one defendant, either –

(i) all the defendants have filed an acknowledgment of service or a defence;

(ii) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;

(c) the claim has been listed for a hearing; or

(d) judgment has been entered in the claim.

And when none of the following conditions apply:

(a) The hearing has been in private

(b) A reporting restriction has been placed on the file

(c) Etc…

Non-parties, ie members of the public, are automatically entitled to the following documents from the court records, without judicial approval, upon payment of the £11/document fee:

(a) Claim form

(b) Etc….

26. Mr Cloake really does urge the CPRC to consider the practical realities under which this rule will fall to be considered day-to-day.

"At the hearing"

27. The proposed 5.4C(1) states:

5.4C.—(1) A person who is not a party to proceedings (a non-party) may—

…

(b) obtain at a hearing a copy of a skeleton argument or witness statement as provided for by paragraphs (8) to (10).

28. Notwithstanding the problem with nested clauses para 8 states:

(8) A non-party who has at or in advance of the hearing requested a copy of a skeleton argument shall be entitled to it at the start of the hearing for which the skeleton argument was filed,…

29. Mr Cloake finds this proposed rule very problematic. The introduction of a requirement to request the skeleton argument at the start or in advance of a hearing appears to be wholly unsupported by authority or the principles of open justice.

30. The rule seems to suggest, and will no doubt be relied upon by parties to mean, that there is no entitlement once the hearing has began.

31. The rule could also seem to apply to decisions which were made without a hearing 'on the papers'.

32. Para 43 of *Cape* states the principle of open justice:

"*is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases.*"

33. Mr Cloake considers that someone attending on day 5 of a civil trial after reading about the case in a newspaper, or attending at the hand down of the judgment, or indeed only reading the judgment on BAILII several months after its publication should still be able to understand the issues adduced in support of the parties' cases.

34. The proposed new rule will not allow such a person to do this.

35. Mr Cloake considers that skeleton arguments should remain available for the same amount of time as the availability of transcripts.

36. If it is possible to request a transcript of a public hearing without judicial approval or notice to the parties then it should also be appropriate for non-parties to obtain copies of written submissions too.

37. The CPRC should consider mandating that skeleton arguments (and written submissions) are uploaded to CE-file and are available for non-parties to access for as long as other documents are available.

Cost of simple requests

38. A number of courts use CE-file which has an office copy request function for non parties to use. Given that the system should be able to be used entirely autonomously the CPRC should consider whether to mandate that certain documents should be available free of charge to non-parties to access.

39. As an example the trial of *London Capital & Finance PLC (In Administration) and another v Thompson and others* is currently underway before Miles J at the Rolls Building. It is a case of some public interest. A non-party who wished to understand how the case has progressed so far would need to order over 175 documents on CE-File at a cost of at least £1,925 to do so.

40. Even a simple claim in which a claim form, particulars of claim, defence, response, and a case management order had been made would cost £55 for a non-party to examine.

41. This becomes prohibitively expensive for even well-funded media organisations let alone other classes of non-parties.

42. Mr Cloake submits that the CPRC should consider mandating that documents which are available as of right, and which can be provided by a fully autonomous system such as CE-File, should be available at no cost.

43. Mr Cloake contends it would not be appropriate to charge for access to a court room, or indeed for access to BAILII, and the same principle should apply for court documents where the cost of access can be considered negligible.

Cost of complex requests

44. Para 2 of the proposed new rules states:

> *(2) A non-party may, if the court gives permission, obtain from the court records a copy of any other document…*

45. Para 5 of the proposed new rules states:

> *(5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23*

46. Para 6 of the proposed new rules states:

> *(6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the document, or to obtain an unedited copy of it, may apply on notice to the party or person identified in the document who requested the order, for permission.*

47. Three paragraphs talking about applying for permission, but it's seems to be only the person asking for a restriction for access in para 5 who has to pay the fee of £275 under Part 23.

48. Mr Cloake submits that the CPRC should set out clearly who has to pay what and in which circumstances.

49. For instance, say Mr Cloake attends a hearing where reliance is placed upon an e-mail which is said to contain a "smoking gun" revelation. In order to obtain a copy of this e-mail is it right that he would have to pay what amounts to a £275 tax on asking the court to grant access?

50. Or is it the case whereby he should ditch the provisions within the CPR and instead rely upon the inherent jurisdiction argument in *Cape?*

51. The CPRC is asked to consider the advice of Sir Andrew McFarlane, the then President of the Family Division, in his "Guidance as to reporting in the Family Courts[5]"

52. At para 16 the guidance states:

> *Finally, in seeking to vary/lift reporting restrictions, the standard approach as to costs in children cases will apply and a reporter, media organisation or their lawyers should not be at risk of a costs order unless he or she has engaged in reprehensible behaviour or has taken an unreasonable stance.*

53. Mr Cloake recognises that a person applying to alter reporting restrictions is a different kettle of fish to someone seeking non party access to court documents but he asks the CPRC to consider the principle – that someone attempting to promote the principle of open justice ("*Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law*"[6] – Toulson LJ) should not face financial consequences for doing so when they act in a reasonable manner.

A lacuna in documents

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[5] https://www.judiciary.uk/wp-content/uploads/2019/10/Presidents-Guidance-reporting-restrictions-Final-Oct-2019-1.pdf

[6] https://www.bailii.org/ew/cases/EWCA/Civ/2012/420.html

54. Mr Cloake asks the CPRC to question whether applications for permission to appeal should be a class of document which is available as of right to non-parties.

55. We have a situation where one can obtain a judgment and the resultant order from the lower court (albeit for £22). Where one can subsequently obtain the order granting permission to appeal (for £11), but one has no right to ask for a copy of the application to appeal – ie to see what it's being said is apparently wrong with the decision.

56. In June 2021 Mr Cloake did just this in a case which went to the court of appeal. He was able to obtain copies of the order, which stated inter alia:

> "*Decision: permission granted, limited to Grounds 2 and 4*"

57. However, when he asked for copies of the grounds he was told by court staff:

> *With regarding to obtaining the Grounds of Appeal, you will need to complete an application form given reasons why you want the grounds as you are not a party to these processing, plus the application fee is £528.00.*

58. Is this intentional?

Continuing Obligations on the parties

59. Para 51 of *Cape* states:

> *We have heard no argument on the extent of any continuing obligation of the parties to co-operate with the court in furthering the open justice principle once the proceedings are over.*

60. Mr Cloake is disappointed that this has not been considered in the new rules.

61. In *Goodley v The Hut Group Ltd* [2021] EWHC 1193 (Comm) (06 May 2021)[7] a non-party was granted access a report which had been referred to in open court six-years-previously. The court did not have a copy of the report on their file, but ordered one of the parties to the original proceedings to provide the report.

62. Mr Cloake considers that the CPRC should enshrine this authority in the rules.

Conclusion

63. Mr Cloake considers that this is a once in a generation opportunity to catch up on decades of authorities which have developed and promoted the rights of the public to understand what is going on in their courts by allowing them access to documentation.

64. The CPRC should not be hesitant in being ambitions in order to codify these rights in order to make future requests easier to make, in order that the public's faith and confidence in the civil justice system can only be increased.

65. Mr Cloake is prepared to elaborate on any of these points, and provide further information to the CPRC upon request.

[7] https://www.bailii.org/ew/cases/EWHC/Comm/2021/1193.html