Neutral Citation Number: [2020] EWHC 1873 (QB)

Case No: HQ13X02470, HQ12X01829 & Ors.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 16 July 2020

Before:

THE HON. MR. JUSTICE PICKEN

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Between:

GRAHAM DRING (for and on behalf of THE ASBESTOS VICTIMS SUPPORT GROUPS FORUM UK) — **Applicant**

- and -

CAPE INTERMEDIATE HOLDINGS LIMITED — **Interested Party**

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Robert Weir QC and **Jonathan Butters** (instructed by **Leigh Day**) for the Applicant.
Geraint Webb QC and **James Williams** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the Interested Party.

Hearing dates: 15 and 16 June 2020.
Draft judgment supplied to the parties: 10 July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR. JUSTICE PICKEN:

Introduction

1. This case has had an interesting life. It has entailed a six-week trial before me in 2017 which resulted in a settlement prior to judgment being finalised. There were then certain hearings before the Master concerning the applicant's attempts to obtain the documentation which is the subject of the application now before me. This led, in turn, to a hearing before the Court of Appeal and, after that, a hearing before the Supreme Court. That latter hearing resulted in an order that the application be listed before me (or, if not possible, then, another High Court judge), as Lady Hale put it in the Supreme Court's judgment ([2019] UKSC 38) at [50]:

"to determine whether the court should require [the interested party] to provide a copy of any other document placed before the judge and referred to in the course of the trial to [the applicant] ... in accordance with the principles laid down by this court".

2. The background is described in Lady Hale's judgment at [3] to [13]. There is nothing to be gained from my seeking to reformulate what is stated there. It is, however, probably useful to quote at least parts of Lady Hale's description in what follows.

3. At [3] Lady Hale said this:

"The circumstances in which this important issue comes before the court are unusual, to say the least. Cape Intermediate Holdings Ltd ('Cape') is a company that was involved in the manufacture and supply of asbestos. In January and February 2017, it was the defendant in a six-week trial in the Queen's Bench Division before Picken J. The trial involved two sets of proceedings, known as the 'PL claims' and the 'CDL claim', but only the PL claims are relevant to this appeal. In essence, these were claims brought against Cape by insurers who had written employers' liability policies for employers. The employers had paid damages to former employees who had contracted mesothelioma in the course of their employment. The employers, through their insurers, then claimed a contribution from Cape on the basis that the employees had been exposed at work to asbestos from products manufactured by Cape. It was alleged that Cape had been negligent in the production of asbestos insulation boards; that it knew of the risks of asbestos and had failed to take steps to make those risks clear; indeed, that it obscured, understated and unfairly qualified the information that it had, thus providing false and misleading reassurance to employers and others. Cape denied all this and alleged that the employers were solely responsible to their employees, that it did publish relevant warnings and advice, and that any knowledge which it had of the risks should also have been known to the employers."

4. She, then, went on at [4] to describe the documents position at trial:

"Voluminous documentation was produced for the trial. Each set of proceedings had its own hard copy 'core bundle', known as Bundle C, which contained the core documents obtained on disclosure and some documents obtained from public sources. The PL core bundle amounted to over 5,000 pages in around 17 lever arch files. In addition, there was a joint Bundle D, only available on an electronic platform, which contained all the disclosed documents in each set of proceedings. If it was needed to refer to a document in Bundle D which was not in Bundle C, it could immediately be

viewed on screen, and would then be included in hard copy in Bundle C. The intention was that Bundle C would contain all the documents referred to for the purpose of the trial, whether in the parties' written and oral opening and closing submissions, or in submissions or evidence during the trial."

I can confirm, indeed, that it is my practice in trials involving electronic files to ensure that by the end of trial there is a hard copy set of documents which have been referred to during the course of trial.

5. Lady Hale next described, at [5], how, after the trial had ended but before judgment was delivered, the PL claims were settled in March 2017 and how the CDL claim was also settled a month later, again before judgment.

6. She continued at [6]:

"The Asbestos Victims Support Groups Forum UK ('the Forum') is an unincorporated association providing help and support to people who suffer from asbestos-related diseases and their families. It is also involved in lobbying and promoting asbestos knowledge and safety. It was not a party to either set of proceedings. On 6 April 2017, after the settlement of the PL claims, it applied without notice, under the Civil Procedure Rules, CPR rule 5.4C, which deals with third party access to the 'records of the court', with a view to preserving and obtaining copies of all the documents used at or disclosed for the trial, including the trial bundles, as well as the trial transcripts. This was because the Forum believed that the documents would contain valuable information about such things as the knowledge of the asbestos industry of the dangers of asbestos, the research which the industry and industry-related bodies had carried out, and the influence which they had had on the Factory Inspectorate and the Health and Safety Executive in setting standards. In the Forum's view, the documents might assist both claimants and defendants and also the court in understanding the issues in asbestos-related disease claims. No particular case was identified but it was said that they would assist in current cases."

7. Lady Hale, then, stated as follows at [7]:

"That same day, the Master made an ex parte order designed to ensure that all the documents which were still at court stayed at court and that any which had been removed were returned to the court. She later ordered that a hard drive containing an electronic copy of Bundle D be produced and lodged at court. After a three day hearing of the application in October, she gave judgment in December, holding that she had jurisdiction, either under CPR rule 5.4C(2) or at common law, to order that a non-party be given access to all the material sought. She ordered that Mr Dring (now acting for and on behalf of the Forum) should be provided with the hard copy trial bundle, including the disclosure documents in Bundle C, all witness statements, expert reports, transcripts and written submissions. She did not order that Bundle D be provided but ordered that it be retained at court."

8. Lady Hale went on, at [8], to explain that Cape appealed, *inter alia*, on the grounds that: (1) the Master did not have jurisdiction, either under CPR 5.4C or at common law, to make an order of such a broad scope; (2) to the extent that the Court did have jurisdiction to grant access, she had applied the wrong test to the exercise of her

discretion; and (3) in any event, she should have held that the Forum failed to meet the requisite test.

9. As for that appeal, Lady Hale summarised the position in this way:

> *"9. The appeal was transferred to the Court of Appeal because of the importance of the issues raised. In July 2018, that court allowed Cape's appeal and set aside the Master's order: [2018] EWCA Civ 1795; [2019] 1 WLR 479. It held that the 'records of the court' for the purpose of the discretion to allow access under CPR rule 5.4C(2) were much more limited than she had held. They would not normally include trial bundles, trial witness statements, trial expert reports, trial skeleton arguments or written submissions; or trial transcripts. Nevertheless, the court had an inherent jurisdiction to permit a non-party to obtain (i) witness statements of witnesses, including experts, whose statements or reports stood as evidence-in-chief at trial and which would have been available for inspection during the trial, under CPR rule 32.13; (ii) documents in relation to which confidentiality had been lost under CPR rule 31.22 and which were read out in open court, or the judge was invited to read in court or outside court, or which it was clear or stated that the judge had read; (iii) skeleton arguments or written submissions read by the court, provided that there is an effective public hearing at which these were deployed; and (iv) any specific documents which it was necessary for a non-party to inspect in order to meet the principle of open justice. But there was no inherent jurisdiction to permit non-parties to obtain trial bundles or documents referred to in skeleton arguments or written submissions, or in witness statements or experts' reports, or in open court, simply on the basis that they had been referred to in the hearing.*
>
> *10. When exercising its discretion under CPR rule 5.4C(2) or the inherent jurisdiction, the court had to balance the non-party's reasons for seeking disclosure against the party's reasons for wanting to preserve confidentiality. The court would be likely to lean in favour of granting access if the principle of open justice is engaged and the applicant has a legitimate interest in inspecting the documents. If the principle of open justice is not engaged, then the court would be unlikely to grant access unless there were strong grounds for thinking it necessary in the interests of justice to do so (paras 127 and 129).*
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> *11. Accordingly, the court ordered, in summary: (i) that the court should provide the Forum with copies of all statements of case, including requests for further information and answers, apart from those listed in Appendix 1 to the order, so far as they were on the court file and for a fee, pursuant to the right of access granted by CPR rule 5.4C(1); (ii) that Cape should provide the Forum with copies of the witness statements, expert reports and written submissions listed in Appendix 2 to the order; and (iii) that the application be listed before Picken J (or failing him some other High Court Judge) to decide whether any other document sought by the Forum fell within (ii) or (iv) in para 9 above and if so whether Cape should be ordered to provide copies. Copying would be at the Forum's expense. Cape was permitted to retrieve from the court all the documents and bundles which were not on the court file and the hard drive containing a copy of Bundle D. In making this order, the Court of Appeal proceeded on the basis that clean copies of the documents in question were available."*

10. Lady Hale, then, at [12] and [13], outlined the nature of the issues which arose before the Supreme Court in this way:

*"12. Cape now appeals to this court. It argues, first, that the Court of Appeal should have limited itself to order (i) in para 11 above; second, that the Court of Appeal was wrong to equate the court's inherent jurisdiction to allow access to documents with the principle of open justice; the treatment of court documents is largely governed by the Civil Procedure Rules and the scope of any inherent jurisdiction is very limited; insofar as it goes any further than expressly permitted by the Rules, it extends only to ordering provision to a non-party of copies of (a) skeleton arguments relied on in court and (b) written submissions made by the parties in the course of a trial (as held by the Court of Appeal in **GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)** [1999] 1 WLR 984 ('FAI')); and third, that the Court of Appeal was wrong to conclude that the Forum did have a relevant legitimate interest in obtaining access to the documents; the public interest in open justice was different from the public interest in the content of the documents involved.*

13. The Forum cross-appeals on the ground that the Court of Appeal was wrong to limit the scope of CPR rule 5.4C in the way that it did. Any document filed at court should be treated as part of the court's records for that purpose. The default position should be to grant access to documents placed before a judge and referred to by a party at trial unless there was a good reason not to do so. It should not be limited by what the judge has chosen to read."

The decision of the Supreme Court

11. Lady Hale, in giving the judgment of the Court, reviewed a number of authorities, including ***FAI*** and ***R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)*** [2012] EWCA Civ 420, [2013] QB 618, explaining at [34] that:

*"The Court of Appeal had the unenviable task of trying to reconcile the very different approaches taken by that court in **FAI** and **Guardian News and Media**. This court has the great advantage of being able to consider the issues from the vantage point of principle rather than the detailed decisions which have been reached by the courts below. There can be no doubt at all that the court rules are not exhaustive of the circumstances in which non-parties may be given access to court documents. They are a minimum and of course it is for a person seeking to persuade the court to allow access outside the rules to show a good case for doing so. However, case after case has recognised that the guiding principle is the need for justice to be done in the open and that courts at all levels have an inherent jurisdiction to allow access in accordance with that principle. Furthermore, the open justice principle is applicable throughout the United Kingdom, even though the court rules may be different."*

12. Having identified open justice as the guiding principle and specifically by reference to *"the principles established"* in ***Guardian News and Media***, Lady Hale went on at [37] to say this:

"So what were those principles? The purpose of open justice "is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the courts are the administrators" (para 79). The practice of the courts was not frozen (para 80). In ***FAI****, for example, issues of informing the public about matters of general public interest did not arise (para 81). In earlier cases, it had been recognised, principally by Lord Scarman and Lord Simon of Glaisdale (dissenting) in* ***Home Office v Harman*** *[1983] 1 AC 280, 316, and by Lord Bingham in* ***SmithKline Beecham Biologicals SA v Connaught Laboratories Inc*** *[1999] 4 All ER 498, p 512, that the practice of receiving evidence without its being read in open court 'has the side effect of making the proceedings less intelligible to the press and the public'. Lord Bingham had contemplated that public access to documents referred to in open court might be necessary 'to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain'. The time had come to acknowledge that public access to documents referred to in open court was necessary (para 83). Requiring them to be read out would be to defeat the purpose of making hearings more efficient. Stating that they should be treated as if read out was merely a formal device for allowing access. It was unnecessary. Toulson LJ was unimpressed by the suggestion that there would be practical problems, given that the Criminal Procedure Rules 2011, in rule 5.8, provided, not only that there was certain (limited) information about a criminal case which the court officer was bound to supply, but also that, if the court so directs, the officer could supply 'other information' about the case orally and allow the applicant to inspect or copy a document containing information about the case (para 84). But it was the common law, not the rule, which created the court's power; the rule simply provided a practical procedure for implementing it."*

13. She continued at [38]:

"Hence '[i]n a case where documents have been placed before a judge and referred to in the course of proceedings ... 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'. In evaluating the grounds for opposing access, the court would have to carry out a fact-specific proportionality exercise. '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' (para 85)."

14. Lady Hale, then, at [39], referred to ***Kennedy v Charity Commission (Secretary of State for Justice intervening)*** [2014] UKSC 20, [2015] AC 455, describing that as a decision in which the principles laid down in ***Guardian News and Media*** were clearly endorsed by Lord Mance, Lord Toulson, Lord Neuberger and Lord Clarke (in the majority) and not doubted by Lord Wilson and Lord Carnwath (in the minority). She, then, noted that the principles were also endorsed by a unanimous Supreme Court in ***A v British Broadcasting Corpn (Secretary of State for the Home Department intervening)*** [2014] UKSC 25, [2015] AC 588, in which Lord Reed expressly adopted the test laid down in ***Kennedy***, at [41], described by Lady Hale as *"a direct citation"* from ***Guardian News and Media*** at [85], namely:

"Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson JSC observed in ***Kennedy***

v Information Comr (Secretary of State for Justice intervening) *[2015] AC 455, para 113, the court has to carry out a balancing 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 information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."*

15. In passages which are very important for present purposes and which were the subject of extensive submissions by both Mr Robert Weir QC, on behalf of the Forum, and by Mr Geraint Webb QC, on behalf of Cape, Lady Hale, then, went on to say this at [41]-[47]:

"41. The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case.

42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In ***A v British Broadcasting Corpn****, Lord Reed reminded us of the comment of Lord Shaw of Dunfermline, in* ***Scott v Scott*** *[1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard 'with open doors', 'bore testimony to a determination to secure civil liberties against the judges as well as against the Crown' (para 24).*

43. But the second goes beyond the policing of individual courts and judges. It 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. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material.

44. It was held in ***Guardian News and Media*** *that the default position is that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. It follows that it should not be limited to those which the judge has been asked to read or has said that he has read. One object of the exercise is to enable the observer to relate what the judge has done or decided to the material which was before him. It is not impossible, though it must be rare, that the judge has forgotten or ignored some important piece of*

information which was before him. If access is limited to what the judge has actually read, then the less conscientious the judge, the less transparent is his or her decision.

45. *However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said in both* ***Kennedy****, at para 113, and* ***A v British Broadcasting Corpn****, at para 41, the court has to carry out a fact-specific balancing exercise. On the one hand will be 'the purpose of the open justice principle and the potential value of the information in question in advancing that purpose'.*

46. *On the other hand will be 'any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others'. There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case.*

47. *Also relevant must be the practicalities and the proportionality of granting the request. It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day to day control of the court process. The non-party who seeks access will be expected to pay the reasonable costs of granting that access. People who seek access after the proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties may not have done so. Even if they have, the burdens placed on the parties in identifying and retrieving the material may be out of all proportion to benefits to the open justice principle, and the burden placed upon the trial judge in deciding what disclosure should be made may have become much harder, or more time-consuming, to discharge. On the other hand, increasing digitisation of court materials may eventually make this easier. In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate."*

16. Lady Hale, then, turned to the present case, explaining at [49] as follows:

"Cape argues that the Court of Appeal did not have jurisdiction to make the order that it did, not that if it did have jurisdiction the order was wrong in principle. The Forum argues that the court should have made a wider order under CPR rule 5.4C(2). Both are, in our view, incorrect. The Court of Appeal not only had jurisdiction to make the order that it did, but also had jurisdiction to make a wider order if it were right so to

do. On the other hand, the basis of making any wider order is the inherent jurisdiction in support of the open justice principle, not the Civil Procedure Rules, CPR rule 5.4C(2). The principles governing the exercise of that jurisdiction are those laid down in ***Guardian News and Media****, as explained by this court in* ***Kennedy****,* ***A v British Broadcasting Corpn*** *and this case."*

17. Lady Hale, accordingly, went on at [50] to say this:

"In those circumstances, as the Court of Appeal took a narrower view, both of the jurisdiction and the applicable principles, it would be tempting to send the whole matter back to a High Court judge, preferably Picken J, so that he can decide it on the basis of the principles enunciated by this court. However, Cape has chosen to attack the order made by the Court of Appeal, not on its merits, but on a narrow view of the court's jurisdiction. Nor has it set up any counter-vailing rights of its own. In those circumstances, there seems no realistic possibility of the judge making a more limited order than did the Court of Appeal. We therefore order that paras 4 and 7 of the Court of Appeal order (corresponding to points (i) and (ii) in para 11 above) stand. But we would replace paragraph 8 (corresponding with point (iii)) with an order that the application be listed before Picken J (or, if that is not possible, another High Court Judge) to determine whether the court should require the appellant to provide a copy of any other document placed before the judge and referred to in the course of the trial to the respondent (at the respondent's expense) in accordance with the principles laid down by this court."

The application

18. The Forum's application is supported by the same evidence which was before the Master, namely three witness statements by Ms Harminder Bains, a partner in Leigh Day, and a witness statement from Mr Graham Dring, who is the chair of the Forum. Also before the Master were two witness statements made by Cape's solicitor, Mr Jonathan Isted, a partner in Freshfields. In addition, although not before the Master but produced for the purposes of the hearing before the Court of Appeal, before me on the remitted application was a further witness statement from Ms Bains together with a statement from Mr Ian Jones, a senior associate at Freshfields.

19. As previously mentioned, the application before the Master (and so the application before me) was an application which sought the supply of documents to a non-party under CPR 5.4C(2). There was no mention in the application itself of the Court's inherent jurisdiction, although, in the event, this was invoked at the substantive hearing which took place before the Master. No point was taken by Cape, either before me or on any prior occasion, as to the fact that the application itself did not refer to the inherent jurisdiction of the court and only referred to CPR 5.4C(2). I proceed accordingly.

20. In her first witness statement Ms Bains outlined the background to the application and described the documentation which the Forum sought. Specifically, in paragraph 22 Ms Bains referred to witness statements and experts' reports, as well as transcripts of evidence and, then, identified this further category:

"All documents disclosed by Cape and other parties, including… a. Minutes from Board meetings … b. Minutes from meetings that Cape attended with other stakeholders … c. Minutes of all meetings with the Asbestos Research Council … d. Minutes of all

meetings with Her Majesty's Factory Inspectorate ... e. Minutes of all meetings with Government Officials ... f. Press releases ... g. Memorandums and dust sampling results ... h. Research documents and correspondence between Cape and other parties ... i. Advertising campaigns ... j. Draft submissions to Government committees."

21. It will be apparent that the application, therefore, was widely couched, embracing the entirety of Bundle D (the documents disclosed in the proceedings), and so not confined to documents contained in Bundle C (the documents to which reference was made during the course of the trial). Mr Weir QC made clear before me, however, that, following the provision of some of the documents sought by the Forum, the application is now limited to Bundle C documents. Mr Webb QC told me (although Mr Weir QC did not agree every detail) that this bundle consists of approximately 5,000 pages, the Forum having already now received somewhere in the region of 1,716 pages of other documents, amounting to some four lever arch files. Those documents were, indeed, before me on the hearing of the application and include all pleadings (some 231 pages), including Part 18 Requests and Replies, written opening submissions (some 442 pages), witness statements (10 pages), experts' reports (623 pages) and written closing submissions (409 pages).

22. In her first witness statement, at paragraph 23, Ms Bains went on to give as *"reasons"* why *"the documents will be valuable"* the following:

"i. It would assist the Court to understand the knowledge within the industry about the number of asbestos related disease cases in the UK and overseas (for example in the vicinity of the mines operated by asbestos manufacturing companies);

ii. It helps for background to detail the research that the asbestos industry were carrying out and the relationship between the large asbestos manufacturing companies, both in the UK and overseas. It also helps to understand the relationship they had with other stakeholders, such as the Factory Inspectorate, the British Occupational Hygiene Society, Asbestosis Research Council, Asbestos Information Committee and any organisations undertaking research on behalf of the asbestos industry in relation to asbestos;

iii. It helps to know the dates that various asbestos materials were manufactured, there relative costs and when alternative materials were developed, their costs and any reasons why those asbestos-free materials were not developed and/or marketed earlier;

iv. It helps to know the quantities of asbestos materials which were manufactured and, where asbestos-free alternatives were made, where and how they were made ...;

v. It helps to understand what steps the manufacturers were taking to carry out research, who did that research, and the arrangements for the publication of the research – i.e. was it checked by the manufacturers and amended before it was published (and what organisation did the research);

vi. It helps to understand what discussions were taking place behind the scenes with other stakeholders, including the Factory Inspectorate and HSE - what research did the Asbestos Research Council ('ARC') make available to them to determine the numerical standards and other guidance which published dust concentrations TDN13

and TDN42 for example, were the figures supplied by ARC and, if so, were they the only figures.

vii. Were any discussions taking place in Whitehall with government about the loss of jobs within the industry, who were they taking place with and what was the outcome of those discussions;

viii. How did information in relation to crocidolite being the main cause of mesothelioma become published? What did they know about amosite for example. How did the ARC justify publishing information that the risk of mesothelioma was limited to crocidolite?

ix. What influence went on with Her Majesty's Factory Inspectorate ('HMFI') and HSE in relation to setting numerical limits and standards. How did HMFI come to adopt the British Occupational Hygiene Society ('BOHS') standard, how did the BOHS get published? What risks did that consider?

x. What did Cape know about 'safe' levels of asbestos in the 1960s? Were Cape carrying out research before that time in the UK or overseas and what were the findings of that research?

xi. What did Directors of Cape know about the dangers of asbestos?

xii. What did the expert witnesses say in their reports? This could narrow issues and save costs in future cases (i.e. prevent need for engineering evidence on similar cases)

xiii. Were the limits and standards based on safe levels of exposure levels which the industry thought were achievable with very little cost in terms of engineering controls? Could the industry put profit before safety and did HMFI let them?

xiv. The documents may help to resolve the issue of limits and standards and availability of sampling in the 1960s. This is an area of significant disagreement between the experts."

23. Ms Bains, then, concluded in paragraph 24 by saying this:

"As stated above, I specialise in asbestos-related disease cases. Accordingly, the documents may not only assist the Defendants and Claimants, but also the Court in understanding the issues and may, in fact, narrow the legal issues."

24. In his witness statement, Mr Dring gave certain details concerning the role played by the Forum. As he put it in paragraph 4:

"The main role of the Forum is to speak with one voice on behalf all the Groups on important issues affecting asbestos victims. To that end, the Forum attends meetings of the All Party Parliamentary Occupational Safety and Health Group and is invited to inform Ministers on policy developments and to respond to Government consultations. The Forum is recognised as an authentic and legitimate representative of asbestos victims and their families … ."

25. Mr Dring went on, under the heading *"Why I am bringing this claim"*, to state as follows in paragraph 7:

"On behalf of the Forum I am bringing this claim because we consider that the documents which were preserved by Order dated 6 April 2017, and are now in the Royal Courts of Justice for safekeeping, will greatly benefit victims of asbestos related diseases to prove their claims in negligence against Defendants …".

26. He, then, said this in paragraph 8:

"I see many asbestos disease sufferers. In my experience, they are a particularly risk adverse group, especially when it comes to litigation. The vast majority will never have dealt with a legal professional; with the possible exception of the solicitor who dealt with their house sale. Their prime concern is ensuring their family is financially stable and as secure as possible as a result of their illness, or subsequent death. This is their main interest in pursuing a personal injury case against a negligent employer. Therefore, from my understanding, the documents will greatly assist in establishing negligence in current ongoing claims which are being pursued, and in future claims."

27. In paragraph 12, under the heading *"Why it is in the public interest for the court to determine this matter"*, he stated as follows:

"There are estimated to be approximately 2,600 new mesothelioma sufferers per annum in the UK with a similar number of asbestos related lung cancer cases. In addition to this, there are hundreds of others each year newly diagnosed with other asbestos diseases, such as asbestosis and pleural thickening. In view of this and because the right to health and safety at work and just compensation for breach of that right is of fundamental importance to society the Forum believes it is in the public interest that this matter is considered. The public have an interest in the prevention of harm occasioned by negligence and civil compensation plays an important role in deterring work-related negligence. Quite apart from civil compensation there is a clear public interest in developing the fullest knowledge and understanding as to how the epidemic in asbestos-related disease arose so that institutional or individual wrongdoers can be held to account and the necessary lessons learned. There is also profound public sympathy for sufferers of mesothelioma and genuine concern that they should be treated justly and fairly."

The Forum's position before me (in outline)

28. It was Mr Weir QC's position that this is a case in which the Forum has a *"legitimate interest"* in the Bundle C documents sought and that *"the default position"* identified by Lady Hale in the Supreme Court at [44] applies. As such, he submitted, again by reference to what Lady Hale had to say at [44], *"the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing"*, namely here the documents comprising Bundle C. Granting the Forum access to such documentation would, Mr Weir QC submitted, advance the open justice principle in the manner described by Lady Hale at [43] since it would *"enable the public to understand how the justice system works and why decisions are taken"*, specifically they would be *"in a position to understand the issues and the evidence adduced in support of the parties' cases"*.

29. Mr Weir QC submitted, in this context, rightly, that it makes no difference that the underlying proceedings settled before a judgment was produced. He pointed not only

to what Hamblen LJ had to say in the Court of Appeal at [124] and [126] but also to ***In the matter of Z*** [2019] EWCOP 55, in which, referring to the decision of the Supreme Court in the present case, Morgan J had this to say at [21]:

"It is clear that where there is a hearing in open court, the open justice principle is engaged and the principles laid down by the Supreme Court in Dring as to the disclosure of documents apply. This is the position even if there is no judicial decision following the hearing in open court because, for example, the case is settled before judgment. That was the position in Dring itself. In the Court of Appeal in that case, there is a detailed discussion as to why the open justice principle is relevant to disclosure of documents to a non-party where there has been a hearing in open court even where there is no judicial decision: see at [123]-[126]."

Morgan J added this at [23], which is also relied upon by Mr Weir QC:

"The Court of Appeal in Dring, at [126] and [128], approved the approach adopted in Dian. Thus, the open justice principle applies where there has been a hearing in open court (whether or not a judicial decision was given) and to an application which leads to a judicial decision on the papers (that is, where there has not been a hearing in open court). Further, something akin to the open justice principle applies where there has been an application which is not pursued but where 'there are strong grounds for thinking that it is necessary in the interests of justice' to allow a non-party to have access to the relevant documents."

30. Nor, Mr Weir QC also observed, again relying on what Hamblen LJ stated in the Court of Appeal, this time at [135], and also on what Morgan J had to say in ***In the matter of Z*** at [26], does it matter that the Forum's interest is other litigation. As Morgan J put it:

"Finally, as to the legal principles as to open justice, it is clear that an entirely private or commercial interest in a document can qualify as a legitimate interest: see the Court of Appeal in ***Dring*** *at [135]. That does not, however, mean that all things which qualify as legitimate interests are to be given identical weight when carrying out the balancing exercise described above. Some legitimate interests will be more weighty than others."*

31. Mr Weir QC submitted as to the balancing exercise required to be undertaken that it is a balancing exercise which has, in the present case, already been undertaken by the Master (and upheld by the Court of Appeal). Mr Weir QC pointed out, as to this, that there was no appeal to the Supreme Court in relation to the Master's exercise of discretion and the Court of Appeal's upholding of the exercise of that discretion. As a result, it was his submission that the Court is now bound, on this application, to grant the Forum access to the documents in Bundle C which are sought; there is no residual discretion which can, he suggested, legitimately be exercised.

32. Mr Weir QC's alternative position was that, if the discretion still falls to be exercised at this juncture, then, it should be exercised in favour of the Forum so as to mean that access is provided to the documents contained within Bundle C.

33. It was his submission, in this connection, that the discretion is broad and, in particular, that there is no requirement that a non-party applying to access court documents must establish that the purpose marries up with the rationale for the principle of open justice.

34. As to how the Court should exercise its discretion, Mr Weir QC submitted that, if access to the documents with which the Forum has already been provided satisfies the *"principal purposes of the open justice principle"*, as the Supreme Court must have thought is the case, then, it must follow, *a fortiori*, that access to the underlying documents (the Bundle C documents) does so also.

35. In any event, he went on to submit, if a purely commercial interest in documents can satisfy the relevant requirement, then, the Forum's public interest (whether for use in other litigation or for informing the public about a matter of obvious public interest and concern) must clearly do so also.

36. Mr Weir QC also highlighted how Cape has not raised any countervailing interests in response to the application at any stage. On that basis, he suggested, there is no reason not to apply the default position, and so to order provision of the documentation.

37. Furthermore, Mr Weir QC submitted, there are no issues of practicality or proportionality which arise in this case given the retention by Cape of clean, electronic, copies of the bundles.

Cape's position before me (in outline)

38. Mr Webb QC submitted that Mr Weir QC's primary position that the Court has no fresh discretion to exercise is not tenable since, if Mr Weir QC were right and there is now no discretion to be exercised, then, the Supreme Court would not have remitted the matter in the way which it did.

39. Mr Webb QC, further, submitted that this is not a case in which the principle described by Lady Hale in the Supreme Court judgment at [43] is applicable. He submitted, specifically, that the Forum is unable to establish (the burden being upon it, as Mr Weir QC acknowledged) that the Bundle C documents are required in order for it to be understood *"how the justice system works"* in the sense described in the third sentence of [43], namely in order *"to understand the issues and the evidence adduced in support of the parties' cases"*.

40. Mr Webb QC observed, in this context, that the Supreme Court decision ought to be regarded as a restatement of the open justice principle, in particular that the *"legitimate interest"* approach is no longer the appropriate approach. Mr Webb QC submitted that, in place of such an approach, the Supreme Court in the present case had simplified matters by, in essence, stipulating that a third party has no right to documents but has to make out a case both as to why it should obtain such documents by reference to the open justice principle and as to how the open justice principle will be advanced by provision of the documents sought. The Court will, then, consider, Mr Webb QC submitted, whether the applicant has shown that there are no countervailing factors or, if there are, consider whether such factors ought to mean that the documents are not provided, as part of a balancing exercise which will also take into account whether production would be impracticable or disproportionate. On this basis, Mr Webb QC submitted, the Court should conclude that the reason given by Mr Dring (and amplified by Ms Bains), namely that the Forum should be able to use the documents for other purposes, including in relation to other litigation, has nothing to do with the open justice principle and will do nothing to advance that principle.

41. Mr Webb QC additionally submitted that, in weighing the various factors in deciding whether an order ought to be made, regard should be had to the fact that, if the documents are obtained, then, Cape is in no position to make representations concerning its own documents in such other proceedings as they might come to be deployed in. This, Mr Webb QC suggested, is a factor which should mean that no order is made.

42. Mr Webb QC lastly submitted that it would, in any event, be impracticable or disproportionate to require that the Bundle C documents are provided, and so that the order sought ought not to be made.

Discussion

A residual discretion?

43. It is convenient to start by addressing Mr Weir QC's primary submission that the Court has no discretion but is, on the contrary, obliged to order production of the documents in Bundle C because the Master has already decided, in the exercise of her discretion (upheld by the Court of Appeal), that such documents should be provided.

44. Mr Weir QC had in mind, in this context, the following passages in the judgment of Hamblen LJ in the Court of Appeal at [133]-[138]:

> *"133. [Cape] submitted that this shows that [the Forum'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 Forum] 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 [the Forum] 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 [**FAI**] and **Law Debenture Trust** and **Dian**, it will be an interest in related litigation.*
>
> *136. In the present case, [the Forum'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 [the Forum] 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 [Cape'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."

45. This was a submission which Mr Weir QC described as one which he could *"not quite let go"* since his position was that the *"legitimate interest"* approach discussed below remains appropriate. It is not, however, a submission which I can accept. As Mr Webb QC pointed out, if Mr Weir QC were right and there is now no discretion to be exercised, then, the Supreme Court would not have remitted the matter in the way which it did. The Supreme Court having remitted the application to me, in order that I should decide it in accordance with the principles set out by Lady Hale, it cannot be right that it is now incumbent upon me simply to make the same order as the Master did. The more so, in circumstances where in the Court of Appeal, at [54], Hamblen LJ described the Master's order as being *"unprecedented"* in scope.

"Legitimate interest" no more?

46. The point, in fact, goes further, however, since the fact that the Supreme Court made the order which it did itself serves to demonstrate not only that the approach adopted by the Master should be revisited by me but also that the approach adopted by the Court of Appeal, on appeal from the Master, should also be revisited. Were the position otherwise, then, again, the Supreme Court would not have remitted the matter to me but would, instead, itself have made whatever order it considered to be appropriate.

47. I am clear that Mr Webb QC was right when he characterised the Supreme Court as having essentially restated the applicable principles. This is apparent from Lady Hale's reference at [34] to the Court of Appeal having *"had the unenviable task of trying to reconcile the very different approaches taken by that court in **FAI** and **Guardian News and Media"***. It is apparent also from the fact that Lady Hale went on, in the next sentence, to refer to the Supreme Court as having *"the great advantage of being able to consider the issues from the vantage point of principle rather than the detailed decisions which had been reached by the courts below"*. Lady Hale was here recognising that there were difficulties in reconciling previously decided cases and taking the opportunity to restate the core principles in recognition of this.

48. That this is the position is underlined by Lady Hale's later reference, at [49], to the principles governing the exercise of the inherent jurisdiction as being *"laid down in **Guardian News and Media**, as explained by this Court in **Kennedy**, **A v British Broadcasting Corporation** and this case"*. Lady Hale was making it clear that, as between ***Guardian News and Media*** and ***FAI***, the approach adopted in the former (albeit as *"explained"*) is to be preferred over the approach adopted in the latter.

49. As I see it, it was precisely because, as Lady Hale observed at [31], the Court of Appeal in the present case *"largely adopted the approach in **FAI**, while recognising that in*

certain respects the law had been developed" that the Supreme Court decided that the case should be remitted to me.

50. That the Court of Appeal did, indeed, largely adopt the approach in ***FAI*** is clear from a number of passages in the judgment of Hamblen LJ. Thus, having considered ***FAI*** and a number of other cases which adopted the ***FAI*** approach, Hamblen LJ went on, at [85], to refer to ***Guardian News and Media***, specifically the following passages in the judgment of Toulson LJ (as he then was):

"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."

51. Hamblen LJ, then, at [86], recorded the Forum as having *"submitted that the default position described by Toulson LJ now represents the law in both criminal and civil proceedings"* and that to the extent that ***FAI*** *"is authority for a more restrictive approach, it no longer represents good law".*

52. He went on, at [87], to record Cape's submission that ***Guardian News and Media*** is a case which was concerned only with criminal proceedings and, in any event, was wrongly decided, before observing at [88] that, in his judgment, ***FAI*** *"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 had been referred to in a skeleton argument, witness statement, expert's report or in court".*

53. Hamblen LJ, then, had this to say at [89]:

*"There is, however, one aspect of [**FAI**] 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 [**FAI**] 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."*

54. Later, when considering the exercise of the Court's discretion at [115] to [130], Hamblen LJ referred to ***Dian AO v Davis Frankel & Mead*** [2005] 1 WLR 2951 and ***Pfizer Health AB v Schwarz Pharma AG*** [2010] EWHC 3236 (Pat), specifically in the case of the latter, at [120], the summary of the applicable principles provided by Floyd J (as he then was) at [20], as follows:

"i) There is no unfettered right to documents on the court file except where the rules so specify ...;

ii) The requirement for permission is a safety valve to allow access to documents which should in all the circumstances be provided ...;

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 ...;

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 ...;

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."

55. Hamblen LJ, then, at [123], described Cape as having 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"*.

56. Hamblen LJ rejected that submission, at [124], as follows:

"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."

57. Hamblen LJ made essentially the same point at [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."

58. He, then, at [127] identified the principles applicable to the exercise of the discretion in relation to an application under CPR 5.4C(2) by a non-party as entailing the Court having *"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"*. In this respect, he identified relevant factors as being 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."

59. Hamblen LJ clarified at [129], by reference to ***FAI*** (amongst other cases), that these various factors, in his view, applied also to the Court's inherent jurisdiction:

*"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 [**FAI**], **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."*

60. It is clear, therefore, that, as far as the Court of Appeal was concerned, the *"legitimate interest"* approach adopted in ***FAI*** applied. Indeed, Hamblen LJ went on, at [131] to [138] to address the issue of *"legitimate interest"* by reference to the Master's decision that the Forum had such an interest in the documents sought.

61. It seems to me, in the circumstances, that Mr Webb QC must be right when he submitted that the Supreme Court's decision to remit the matter to me, taken together with Lady Hale's approval of the ***General News and Media*** approach (*"as explained"*) in contradistinction to the ***FAI*** approach, must mean that the Supreme Court should, indeed, be regarded as having restated the open justice principle in a way which no longer makes it appropriate to apply the *"legitimate interest"* approach.

The proper approach

62. It is necessary, in the circumstances, to consider what, in line with the Supreme Court's judgment, is the appropriate approach now to adopt in place of the *"legitimate interest"* approach applied in ***FAI***.

63. The answer is that, consistent with the statement of principle by Lord Toulson in ***Guardian News and Media*** (as quoted by Lady Hale at [2]), the Supreme Court took a broad view of the Court's inherent jurisdiction. This is reflected, indeed, in what Lady Hale had to say concerning limits, at [41] (in the last sentence), namely:

"It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case."

64. The Supreme Court's broad approach to the open justice principle is further confirmed by what Lady Hale went on to say in the paragraphs which follow. Thus, she recognised at [42] (in the first sentence) that the *"principal purposes of the open justice principle are two-fold and there may well be others"*, before going on to identify the first as being *"to enable public scrutiny of the way in which courts decide cases"* and the second being, as stated at [43], *"to enable the public to understand how the justice system works and why decisions are taken"*.

65. In any event, whether or not the *"legitimate interest"* approach remains valid in the light of the Supreme Court's decision, it was Mr Weir QC's position that this is a case in which *"the default position"* identified by Lady Hale at [44] applies, namely where *"the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing"* (here, the Bundle C documents).

66. It was Mr Weir QC's submission that there is no prior hurdle to the exercise of the Court's discretion through the balancing of relevant considerations of the type suggested by Mr Webb QC, namely that the third party applicant should have to establish that production of the documents would advance the open justice principle in the sense that it is not sufficient for an applicant to come to the Court and say that it wants the Court to order that it be provided with documents read by a judge on the basis of the open justice principle but for a reason (however otherwise legitimate) which is not itself rooted in the open justice principle.

67. Mr Weir QC submitted that, instead, the Court should, in effect, proceed straight to the balancing exercise. As he put it, an application such as this *"proceeds on a sliding scale"*. It is, accordingly, appropriate for the Court to decide, in the exercise of its discretion and weighing up the factors for and against the making of an order, that in a given case the open justice principle does not warrant the making of the order sought. What the Court should not do, Mr Weir QC suggested, is require that a good reason be shown by the applicant as to why the documents sought would advance the open justice principle and, only if such a good reason is shown, then proceed to the balancing exercise referable to the Court's discretion. In short, it was Mr Weir QC's submission that the discretion is broad and, in particular, there is no threshold requirement that a non-party applying to access Court documents must establish that the purpose marries up with the rationale for the principle of open justice before the discretion comes to be exercised. In this respect, Mr Weir QC made the point that, if access to the documents with which the Forum has already been provided satisfies the *"principal purposes of the open justice principle"*, as the Supreme Court must have thought is the case given that at [50] Lady Hale made it clear that the Supreme Court was upholding the decision of the Court of Appeal insofar as certain documents were concerned, then, it must follow, *a fortiori*, that access to underlying documents (the Bundle C documents) does so also.

68. In support of his core submission that it is incumbent upon a third party making an application for production of documents to show a good reason why those documents will advance the open justice principle, Mr Webb QC quibbled with Mr Weir QC's reliance on what Lady Hale had to say at [44] concerning *"the default position"* being *"that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which had been placed before the court and referred to during the hearing"*. He submitted that this does not detract from the obligation on the part of the third party to identify how the open justice principle justifies the application in the particular case. This, he submitted, is clear from the way in which Lady Hale described matters at [43], specifically the references to the public needing *"to understand how the justice system works and why decisions are taken"* and to their having *"to be in a position to understand the issues and the evidence adduced in support of the parties' cases"*.

69. It was Mr Webb QC's submission that nothing which Lady Hale went on to say in this paragraph or at [44] detracts from such a requirement. Indeed, he suggested, it is clear from what Lady Hale went on to say at [45] that, whilst the Court has the *"power to allow access"*, an applicant has *"no right to be granted it"*. Mr Webb QC submitted, in effect, that the first sentence of [45], beginning with the word *"However"*, should be treated as though it carried directly on from the third sentence in [43], ending with the words *"evidence adduced in support of the parties' cases"*. In those circumstances, Mr Webb QC suggested, Lady Hale's reference to *"the default position"* being as stated in [44] does not greatly assist the Forum. On the contrary, Mr Webb QC submitted, the position is as clearly stated by Lady Hale in the second sentence in [45], namely that:

> *"It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle."*

70. The position is underlined, Mr Webb QC submitted, by Lady Hale's reference in the last sentence of [47] to non-parties not seeking access *"unless they can show a good reason why this will advance the open justice principle"* - as well as *"that there are no*

countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate".

71. It seems to me that Mr Webb QC must be right about this, and so that a third party making an application for access to documents should show that the documents will advance the open justice principle. This appears, indeed, to be what Lady Hale was saying in the passages to which I have referred. It is also consistent, on a proper analysis, with what was decided in ***Guardian News and Media*** since it is important to appreciate that in that case, as Toulson LJ made clear at [82], the applicant, The Guardian, had *"put forward credible evidence that it was hampered in its ability to report as full as it would have wished by not having access to the documents which it was seeking"*.

72. This followed an earlier passage, at [76], where Toulson LJ said this:

"I turn to the critical question of the merits of the Guardian's application. The application is for access to documents which were placed before the District Judge and referred to in the course of the extradition hearings. The practice of introducing documents for the judge's consideration in that way, without reading them fully in open court, has become commonplace in civil and, to a lesser extent, in criminal proceedings. The Guardian has a serious journalistic purpose in seeking access to the documents. It wants to be able to refer to them for the purpose of stimulating informed debate about the way in which the justice system deals with suspected international corruption and the system for extradition of British subjects to the USA."

73. It was with this journalistic purpose in mind that Toulson LJ went on to say at [82] as follows, after referring to The Guardian as having *"put forward credible evidence"*:

"That being so, the court should be cautious about making what would really be an editorial judgment about the adequacy of the material already available to the paper for its journalistic purpose."

74. It was also with this journalistic purpose in mind that Toulson LJ had a little earlier made this observation at [79]:

"The first objection is based on too narrow a view of the purpose of the open justice principle. The purpose is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the courts are the administrators."

75. This, then, is the context for what Toulson LJ went on to say at [85], as expressly adopted by Lord Reed in ***A v BBC*** at [41] and quoted with apparent approval by Lady Hale at [39]. In other words, in stating what he did at [85], Toulson LJ would have had in mind the evidence which was before him on the part of The Guardian which was specifically directed towards the open justice principle. It is in this respect that Toulson LJ described *"the default position"* being *"that access should be permitted on the open justice principle"*, going on immediately afterwards to observe that *"where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong"*. He, then, went on to state, in terms, that:

"Central to the court's valuation 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".

76. The reference to the material's potential value *"in advancing that purpose"* is entirely consistent with the proposition put forward by Mr Webb QC that a third party making an application such as this should have to show that the documents sought will advance the open justice principle and that it is not sufficient merely that the applicant is heard to say that documents should be made available in accordance with the open justice principle irrespective of whether those documents will, once made available, advance *that* principle (as opposed to serve some other purpose).

77. The same point was made by Lord Toulson (as he had by then become) in ***Kennedy*** at [113], citing from his judgment in ***Guardian News and Media*** at [85], and, before doing so, describing the open justice principle as *"never"* being *"absolute because it may be outweighed by countervailing factors"*.

78. I am quite clear, in the circumstances, that a third party should not merely show that access to documents would be in accordance with the open justice principle but also that such access would advance the open justice principle. If the position were otherwise, and an applicant could merely insist on production of documents on the basis that this would be in accordance with the open justice principle, there would be nothing to stop anybody making an application and doing so in overly wide terms. That clearly is not what the Supreme Court (whether in this case or in ***Kennedy*** or ***A v BBC***) can have contemplated would justify an application under the inherent jurisdiction.

79. It does not follow, however, that Mr Webb QC was right when he submitted that there is, in effect, a prior hurdle to the exercise of the Court's discretion on an application such as this since nothing in the authorities, including Lady Hale's judgment in the present case, leads me to conclude that there is such a freestanding prerequisite. On the contrary, it seems to me that Mr Weir QC was probably right to describe there being something of a *"sliding scale"*. Where a particular case appears on that *"sliding scale"* will depend on a range of factors, including whether access to the documents will advance the open justice principle and, if so, consistent with the concept of a *"sliding scale"*, to what extent.

80. Indeed and in fairness, Mr Weir QC made it very clear during the course of his submissions that it is not the Forum's position that, as Mr Webb QC characterised it, the open justice principle is engaged simply because the documents sought were referred to in submissions or other evidence and that this is, in effect, an *"open sesame"* to obtaining the Bundle C documents. Mr Weir QC acknowledged, in terms during the course of his reply submissions, that even the so-called *"default position"*, described by Lady Hale at [44] and upon which he relied so heavily, is still subject to the exercise of the Court's discretion (and so the *"sliding scale"*, to which he referred).

81. I agree with Mr Weir QC, therefore, that the proper approach is not to seek to impose *"limits"* (as described by Lady Hale at [41]) or prior hurdles to the exercise of the Court's discretion. Rather, the Court should engage in the balancing exercise described by Lady Hale (as well as Lord Reed and Lord Toulson) and, in so doing, accord appropriate weight to the various different factors. The fact that a third party is seeking documents for collateral purposes which have only a limited connection with advancing

the open justice principle will not, therefore, operate as a bar to the ordering of production but will be a factor which will weigh less heavily in the appropriate balancing exercise than if the position were otherwise and the documents sought would more significantly advance the open justice principle.

82. That this must be the proper approach is, I agree with Mr Weir QC, demonstrated by the fact that, despite remitting the matter to me, the Supreme Court nonetheless upheld the Court of Appeal's decision, dismissing the appeal brought by Cape against the Master's order, to require that Cape make available various documents to the Forum. As Mr Weir QC pointed out, if Cape's submission as to the appropriate legal approach were right, then, the appeal before the Supreme Court would have been allowed in part and the Forum would not have been permitted to have access to the documents to which it has already had access. The Forum must, in short, Mr Weir QC submitted, have done sufficient to trigger the open justice principle and, indeed, to demonstrate that that principle would be advanced by its being given access to *those* documents in order for at least that level of documentary access to be permitted.

The exercise of discretion in this case

83. The question, in such circumstances, is whether, in the exercise of the Court's discretion, conducting the necessary balancing exercise, it is appropriate that the Forum should be given access to the further (Bundle C) documents which it seeks.

84. Mr Weir QC submitted that the reasons given by Mr Dring and Ms Bains justify the making of an order for production of the documents contained in Bundle C. As previously observed, he relied for these purposes on Lady Hale's observations at [43], submitting (I repeat, correctly) that the fact that the documents are sought for the purposes of other litigation (in all probability not involving Cape but between claimant employees and their employers) is no bar to the making of an order. Mr Weir QC made the point, in particular, that the Bundle C documents are documents which, whilst they were seen by the Court (as it happens, by me as the trial judge), will not be available in other litigation (and so seen by other judges) unless the present application is successful.

85. Mr Weir QC submitted, based on the evidence from Mr Dring and Ms Bains, that the documentation is required in order to enable the Forum to understand the evidence adduced in support of the parties' cases in the proceedings which took place before me. He suggested that having sight of the (admittedly very lengthy) experts' reports is no substitute for being able to look at the underlying documentation.

86. Indeed, as already mentioned, it was Mr Weir QC's position that, the Forum having already obtained access to the written submissions and experts' reports, thereby obtaining what he described as *"hearsay evidence"* as to the content of the Bundle C documents, then, it must follow, *a fortiori*, that access to those underlying documents would also be appropriate. I am not impressed, however, by this contention. I cannot accept the proposition that, since the Forum already has an understanding of issues and evidence from sources which have already been made available to it, so it follows that the Forum should have access to underlying documentation (including documentation referred to in the material which the Forum has) which, necessarily, will not give it an understanding which it does not already have.

87. Specifically, Mr Weir QC made reference to TDN13 issued by the Factory Inspectorate in 1970 and a decision of the Court of Appeal in 2011, namely ***Williams v University of Birmingham*** [2011] EWCA Civ 1242. In that case, Aikens LJ observed as follows in relation to TDN13 at [61]:

"In my view the best guide to what, in 1974, was an acceptable and what was an unacceptable level of exposure to asbestos generally is that given in the Factory Inspectorate's 'Technical Data Note 13' of March 1970, in particular the guidance given about crocidolite. The University was entitled to rely on recognised and established guidelines such as those in Note 13. It is telling that none of the medical or occupational hygiene experts concluded that, at the level of exposure to asbestos fibres actually found by the judge, the University ought reasonably to have foreseen that Mr Williams would be exposed to an unacceptable risk of asbestos related injury."

88. Mr Weir QC relied on this case as demonstrating that TDN13 is especially relevant. He referred also, fairly it should be said, to ***Bussey v 00654701 Ltd (formerly Anglia Heating Ltd)*** [2018] EWCA Civ 243, [2018] ICR 1242, in which Jackson LJ had this to say concerning ***Williams***, at [50] and [51]:

"50. I hasten to say that I am not criticising the actual decision in **Williams***. The deceased in that case was exposed to very low levels of asbestos for a relatively short time. The total exposure in* **Williams** *was much lower than the total exposure in the present case. The Court of Appeal very properly took into account the provisions of TDN13 in addition to the expert evidence.*

51. I am not, therefore disputing any of the legal principles stated in **Williams***. Nor am I questioning the actual decision reached. The only gloss which, respectfully, I would place on the* **Williams** *judgment is this. Paragraph 61 should not be read as making TDN13 a universal test of foreseeability in mesothelioma cases."*

Mr Weir QC observed that, in the circumstances, TDN13 remains relevant, if no longer determinative as regards foreseeability.

89. Mr Weir QC went on to refer to ***Baker v Quantum Clothing Group Ltd*** [2011] 1 WLR 1003, [2011] UKSC 17, in which Lord Dyson said this at [101]:

"There is no rule of law that a relevant code of practice or other official or regulatory instrument necessarily sets the standard of care for the purpose of the tort of negligence. The classic statements by Swanwick J in **Stokes** *and Mustill J in* **Thompson v Smiths Shiprepairers (North Shields) Ltd** *[1984] QB 405 which have been quoted by Lord Mance at paras 9 and 10 of his judgment remain good law. What they say about the relevance of the reasonable and prudent employer following a 'recognised and general practice' applies equally to following a code of practice which sets out practice that is officially required or recommended. Thus to follow a relevant code of practice or regulatory instrument will often afford a defence to a claim in negligence. But there are circumstances where it does not do so. For example, it may be shown that the code of practice or regulatory instrument is compromised because the standards that it requires have been lowered as a result of heavy lobbying by interested parties; or because it covers a field in which apathy and fatalism has prevailed amongst workers, trade unions, employers and legislators (see per Mustill J in* **Thompson** *at pp 419-420); or because the instrument has failed to keep abreast of the latest technology and*

scientific understanding. But no such circumstances exist here. The Code was the result of careful work by an expert committee. As the judge said, at para 87, the guidance as to the maximum acceptable level was 'official and clear'. He was entitled to accept the evidence which led him to conclude that it remained the 'touchstone of reasonable standards' for the average reasonable and prudent employer at least until the publication of the consultation paper on the 1986 draft Directive (para 48)."

90. It was Mr Weir QC's submission, in the light of what Lord Dyson had to say here, that there is (he would say at a minimum) scope for claimants in other litigation to allege that TDN13 is appropriately to be regarded as *"compromised"*. It is on this issue, Mr Weir QC submitted, that the underlying documents contained in Bundle C (or some of them) will be (or may be) of significant value to claimants or potential claimants in other proceedings.

91. Mr Weir QC added that it is no answer for Cape to suggest that the documents could simply be obtained by individual litigants through disclosure within individual proceedings because *inter partes* disclosure would only apply in actions against Cape, whereas most asbestos claims are brought against the employer and, furthermore, the Court would be most unlikely to order disclosure to the level obtained in the 6-week trial in this case in an ordinary asbestos claim on grounds of proportionality.

92. Mr Weir QC observed also how Lady Hale had, at [50], noted that Cape had not *"setup any counter-vailing rights of its own"*. He submitted that there is no evidence before the Court of harm to Cape's interests in respect of any particular document, observing that Cape was in a position to provide evidence as to the nature and impact of the documents but did not do so.

93. Furthermore, as previously mentioned, Mr Weir QC suggested that no issues of practicality or proportionality arise in this case given the retention by Cape of clean, electronic, copies of the bundles and given that the Forum will meet all copying costs.

94. For his part, Mr Webb QC submitted that it is not a case in which the principle described by Lady Hale in the Supreme Court at [43] is applicable. He submitted, specifically, that the Forum is unable to establish (the burden being upon it, as Mr Weir QC acknowledged) that the Bundle C documents are required in order for it to be understood *"how the justice system works"* in the sense described in the third sentence of [43], namely in order *"to understand the issues and the evidence adduced in support of the parties' cases"*.

95. On this basis, Mr Webb QC submitted, exercising the discretion afresh, the Court should refuse the application for the Bundle C documents since the second aspect of the open justice principle identified by Lady Hale, as set out at [43], is not engaged at all, the Forum's objective having no connection with the open justice principle.

96. It will be appreciated that this is a submission which I cannot accept, at least in its purest form. As I have explained, in my view, the question of whether the documents in Bundle C will advance the open justice principle (and, if so, to what extent) *is* a matter which falls to be considered by the Court but not as a freestanding issue arising before the Court's exercise of discretion and, instead, as part of the balancing process which is entailed in the Court deciding how the discretion should be exercised.

97. It is, then, to that balancing exercise (and the discretion) to which I now come. As I shall explain, I have reached the clear conclusion that it would not be appropriate to order production of the Bundle C documents to the Forum. I say this having regard to the authorities to which I have referred (in particular, Lady Hale's description of the open justice principle) and having regard to Mr Weir QC's *"sliding scale"*, for a number of reasons.

98. First, I agree with Mr Webb QC that, in truth, the reason given by Mr Dring (and amplified by Ms Bains), namely that the Forum should be able to use the documents for other purposes, including in relation to other litigation, does not advance the open justice principle. Specifically, the documents in Bundle C which are sought are clearly not required by the Forum in order to understand what the issues in the underlying proceedings were and what the evidence concerning those issues constituted.

99. Secondly, although obviously related to the first point, the evidence adduced by the Forum in support of the application does not really explain how granting access to such documents will advance the open justice principle. The focus is, rather, on seeking to establish a *"legitimate interest"* when, as previously explained, that is no longer the appropriate focus. I make it clear that I acknowledge that the use of documents in other litigation represents no bar to an application. However, the collateral purpose identified by Mr Dring and Ms Bains, in truth, has no real connection (or, in any event, an insufficient connection) with the open justice principle. Still less does it advance (or sufficiently advance) that principle.

100. Thirdly, it should be noted that nowhere in the evidence is there a suggestion that the Forum is unable to understand the issues which arose in the underlying proceedings or the evidence which was adduced in those proceedings. On the contrary, it is clear that there is no difficulty with this at all. However, in line with the approach explained by Lady Hale in this case, it is incumbent upon an applicant to justify its application by reference to the open justice principle. In my view, the Forum has not done this adequately in the present case. There is no evidence which approximates or even comes close, for example, to the evidence which was before the court in ***Guardian News and Media*** concerning the ability of the third party to understand the underlying proceedings.

101. Fourthly, again following on from the previous point, and perhaps most crucially given that this is a discretionary matter, it is telling that the Forum already has documents, in the form of experts' reports in particular but also the written opening and closing submissions, which enable it to understand the issues and the evidence adduced in support of the parties' cases. The experts' reports, in particular, were very lengthy and set out substantial extracts from the underlying documents. Any reader of those experts' reports, and the various written submissions, could be in no doubt as to what the issues were and what the evidence adduced by the parties comprised. Mr Webb QC submitted, indeed, and I tend to agree, that the Forum already has *"everything short of the documents"* in Bundle C.

102. Mr Webb QC gave as an example a passage in Cape's written closing submissions at trial, a document which runs to some 146 pages, at paragraph 118.6, which reads as follows:

"At a meeting on 2 May 1972 between CIH's Mr Cross and Messrs Luxon and Wilkie of HMFI, the former recorded that Mr Luxon:

'... mentioned the strong feelings expressed that amosite was tending to be regarded by some people in the US in a similar category to crocidolite. I emphasised to Mr Luxon and Mr Wilkie that this represented a misunderstanding of Selikoff's point of view that there was no justification for regarding any one type of asbestos as more or less harmful than another and that all types should be subject to strict control but not prohibition, unless the controls were impossible to apply effectively.'"

This was a quote from a document which is to be found in Bundle C but to which the Forum does not have access. Plainly, however, the Forum knows what the document states precisely because it is quoted in this passage.

103. The same applies to many other documents which are quoted in Cape's written closings (including in an even more lengthy 171-page appendix). It is not, however, only Cape's written submissions which provide such information since there are also the written submissions (in each case again lengthy written submissions) which were produced by the other parties to the proceedings. These, too, contain quoted extracts from the underlying documents which are to be found in Bundle C.

104. There are also the (equally lengthy) experts' reports to consider. These, again, are documents which the Forum has already been provided with.

105. To take an example concerned with TDN13 in particular, the report prepared by Martin Stear refers to a particular document described as *"Document 249 D4-00296"*, as follows:

"Document 249 D4-00296 'Dust Assessment Working Group, Research Committee, Chairman of Environmental Control Committee' 20 April 1972 and provided in Cape's additional disclosure, suggests that measurement had not started by this time and was planned to take place over the subsequent two years. The minutes of the fourteenth meeting of the ARC Environmental Control Committee, 22 February 1973, stated that:

'Very little progress had yet been made in one important activity, the collection of information on probable dust counts. The need for this had been demonstrated recently by the Factory Inspectorate's draft Technical Data Note on 'Probable Dust Concentrations in the Construction Industry' which had included some very high dust counts taken by F.I. These had been countered to some extent by ARC's own information on insulation boards, but this had been limited and additional data would have been desirable. The Factory Inspectorate was likely to take similar action in other fields, and, if data was not available from the ARC, they would have to rely on their own counts. There was no obligation to publish ARC results if they were unhelpful, but the information should be available within ARC so that it could be used if and when desirable. Help in this matter had been requested by the F.I. some time ago, and it was in the ARC's interest to provide it" (D8-1998)."

106. The next paragraph of Mr Stear's report, paragraph 5.51, reads as follows:

"'Minutes of asbestos dust assessment conference' 20 and 21 June 1974 (D2-2190). Those present were representatives of various subsidiaries of Cape Industries Limited and this document states that:

'At this point Mr Cross referred to the Department of Employment's earlier request to the A.R.C. to produce a list of probable dust concentrations in construction products for various operations with asbestos based materials on building sites. This was, in fact, taken up by the HMFI who published their findings in Technical Data Note No. 42. Mr Cross explained that a request was now being made to Companies in the Group to provide information on dust levels for various types of jobs within their factory environments or in respect of the conditions of use by customers of the various asbestos products to the Environmental Control Committee (ECC).'"

107. Another example concerns what is stated in the same report at paragraph 5.66. This reads:

"'Joint symposium on prevention and control of fires in ships, Tuesday 20th June, 1972' (D2-1911), 'Paper No. 5 "Health Hazards (Asbestos - Its Effects and Safety Precautions)"' by Dr Smither and Mr A A Cross (stated to be of the ARC), reported 'dust levels in typical operations'. This stated, in Table 1, that:

a) cutting incombustible board gave levels of 100 fibres/ml where there was no exhaust ventilation and 1.1 to 4.45 fibres/ml where there was portable exhaust ventilation; and

b) drilling resulted in an exposure of 1.0 to 1.95 fibres, without exhaust and 0.7 to 0.95 fibres/ml with exhaust."

108. Paragraph 5.67, then, goes on as follows:

"These figures were said to have been produced by the ARC (and are also reported in 'Practical methods for protection of men working with asbestos materials in shipyards, A A Cross et al', D2-232), which is undated. Table 4 of both documents (reproduced below) also reported the potential for high exposure, where the ARC membrane sampling method was used."

109. Table 4, then, follows. Interestingly, although no coincidence obviously, it is this table which was produced (together with other underlying documents) as part of a talk given by barristers at 12 King's Bench Walk, Mr Michael Rawlinson QC and Ms Gemma Scott, who appeared in the underlying proceedings. The PowerPoint presentation (including Table 4 and the other documents to which reference was made) appears as an exhibit to Ms Bains' second witness statement made in support of the application, where she described it as follows in paragraph 16:

"One of the slides shows a summary table referring to average [sic] of all concentrations. These provide a range of dust levels from 19.4 f/ml to 89.3 f/ml from various tasks being carried out with AIB with background dust levels of 10.5 f/ml. These are average concentrations within a much wider range of results as shown in the table."

110. Mr Stear's report, then, goes on at paragraph 5.69 to state as follows:

"This report also stated that fire-insulation boards may be used for bulkheads in board form, or with special finishes of veneer or plastic sheeting, to form the decorated wall panels of cabins and accommodation quarters generally. Further that, cutting of these with power tools gives relatively high concentrations:

'Manufacturers of these materials in the United Kingdom have introduced methods of surface sealing, that while these have resulted in some reduction in dust arising from handling the boards, they have not effected any improvement in the dust levels from cutting and drilling. It has been shown, however, that by the development of suitably designed tools equipped with local exhaust ventilation, the level of dust in the operator's breathing zone can be controlled to a considerable extent.

Ideally, panels should be cut to the sizes and shapes required ready for fitting with the minimum of adjustment on the vessel under construction. If materials cannot be obtained from the manufacturers ready cut, then a workshop should be set up on shore suitably equipped with dust extraction equipment. Such equipment, when properly designed and operated will reduce dust levels to the extent that personal protection is not necessary.

Even when these arrangements are made, it is not always possible to avoid some final cutting to fit. Occasional hand cutting or drilling will only produce moderate amounts of dust. Nevertheless it is recommended that respirators should be worn when this work has to be done in confined spaces. Suitably shrouded tools for cutting and drilling have been designed which can be connected to portable dust extraction equipment. Such equipment is capable of controlling the dust to levels where respiratory protection is no longer required. Tests carried out by officials assessors have confirmed that levels lower than 5 fibre/ml may be expected when performing cutting and drilling with these tools. The equipment can also be used for vacuum cleaning purposes and is relatively inexpensive (see table 4).

One of the larger British shipyards has established a special on-shore cutting shop equipped with saws, sanders and veneering equipment and with an exhaust ventilation installation guarantee to control the concentrations of asbestos dust at not more than 2 fibres/ml. The same yard has/also established standard working practices for joiners fitting non-combustible asbestos boards on ships under construction. These practices provide for the use of portable vacuum cleaners for cleaning working areas, for de-dusting clothing of workmen at the end of the working period, and for providing local exhaust ventilation when occasional cutting has to be done. The arrangements also include the provision of a segregated area on the ship at a point convenient for the joinery work. This is simply done by the erection of screens made up of battens and PVC sheeting. It provides in effect an on-ship workshop equipped with a power saw fitted with a dust extraction device, as well as vacuum equipment for collecting spilt sawdust and chippings.

It has been found that by the use of properly designed dust extraction devices, the carefully planned supply of materials involving minimum on-site fabrication, and the maintenance of good standards of industrial hygiene, incombustible boards can be worked without creating hazardous quantities of dust. It has also been found that, in carrying out these measures, the amount of labour involved in shipboard work has been considerably reduced. This saving can more than compensate for the cost of such relatively inexpensive equipment as has been described."

111. Paragraph 5.70, then, states as follows:

> *"'Summary of dust survey taken on building sites and in customer premises", and dated (D2-242), stated that the tests were to show where customers' problems would arise under the new Asbestos Regulations. The results were said to show that there was less of a danger from inhaling asbestos dust when cutting and handling asbestos cement, successful dust suppression can be achieved by efficient dust extraction with particular emphasis on hood design, and the main problems were found in the handling and cutting of low-density high fibre content materials."*

112. Mr Stear, then, set out in paragraph 5.71 *"the relevant tables of results ... that include work with Maronite and Asbestolux"*. Again included among these tables is a table described as *"Summary 1 - Lowest and Highest Concentrations - fibres per cc"* which appears in the presentation to which Ms Bains refers.

113. Mr Stear, then, went on, in paragraphs 5.72 to 5.74, as follows:

> *"5.72 The report does not state the exact circumstances in relationship to each measurement and whether any precautions, such as extraction, were employed. For each set of results, additional tables are provided classifying the results as under 2 fibres/ml, 2 to 4 fibres/ml, 4 to 10 fibres/ml and over 10 fibres/ml.*
>
> *5.73 These exposure surveys may be those referred to in minutes of meetings., However I do not know the extent to which this data was shared with the HMFI/HSE and the extent to which it influenced the data in their publications. I have not seen any documentation that suggests the exposure data was shared with HMFI.*
>
> *5.74 The various exposure data sources suggest higher levels than reported in HSE's documents TDN42 and EH35. Whilst this seems a reasonable conclusion to me, it is difficult to know to what extent ARC were finding higher levels than the Factory Inspectorate. There is little detail with regard to the exact circumstances of exposure and of the sampling methodology, other than it was probably by this time, sampling and analysis by the ARC's new membrane filter method. However, I have very broadly taken the Factory Inspectorate's figures and used the means, as far as possible, from document D2-242 ...".*

114. The detail apparent from these various passages, which were highlighted by Mr Webb QC purely by way of illustration, belies any suggestion on the part of the Forum that it lacks a proper understanding of the issues which arose in the underlying action or that it does not know what evidence was adduced by the parties in those proceedings. Indeed, as Mr Webb QC observed, it is instructive that in an appendix to Mr Weir QC's skeleton argument for the purposes of the hearing before me the Forum had no difficulty in setting out in considerable detail what it has been able to ascertain from the experts' reports and written submissions in the underlying litigation. I agree with Mr Webb QC that this is, indeed, as he put it, *"a striking demonstration of why further documents are not required by the Forum in order to understand the trial process or otherwise to further the open justice principle"*. He was right to say that the Forum's representatives demonstrate in this appendix *"an excellent understanding of the issues in the litigation as well as the position adopted by the parties and the arguments advanced in respect of those issues"*. He was right, therefore, also when he submitted that the appendix

"amply confirms that the Forum can show no good reason why the provision of a further 5,000 pages of documents will advance the open justice principle".

115. Fifthly, although in truth this point draws the previous points together, in making the application, the Forum is seeking not to advance the open justice principle but simply trying to obtain documentation for deployment in other litigation. The Forum already knows what the issues in the underlying litigation were and what the evidence before the Court in that litigation entailed. The real motivation behind the application is a concern on the part of the Forum that it would be more useful from an evidential perspective were the underlying documents contained within Bundle C to be available for use in other litigation. In that sense, the Forum is, in effect, making a third party disclosure application in relation to other proceedings but seeking to do so without regard to the constraints to which a genuine disclosure application would be subject.

116. As Mr Webb QC pointed out, the CPR make very clear provision for the situations in which a person can obtain documents for use in litigation, including pre-action disclosure where appropriate and justified. For example, a person can seek to obtain disclosure (as Mr Webb QC emphasised, subject always to safeguards such as CPR 31.22 in respect of the use of documents): by an application for pre-action disclosure under CPR 31.16 against a respondent *"likely to be a party to subsequent proceedings"*; by a third party disclosure application under CPR 31.17; against a defendant after commencement of a claim in accordance with the standard disclosure provisions under CPR 31.6; in limited circumstances, via a ***Norwich Pharmacal*** order (preserved by CPR 31.18); and pursuant to the Court's power to make a search order under section 7 of the Civil Procedure Act 1997.

117. The Forum has not sought to bring an application on the basis of any of these provisions. Instead, it now purports to rely on the inherent jurisdiction.

118. Sixthly, but related to the point just made, I consider that there was some substance in a further submission which was made by Mr Webb QC. This was that, whilst it needs obviously to be appreciated that the position is different where documents have been deployed in proceedings before the Court so as to bring into play the potential application of the open justice principle compared with the situation where documents have merely been disclosed but there has been no hearing so as to mean that the open justice principle is not applicable, nonetheless, it is relevant to consider, as part of the exercise of discretion, the fact that documents produced pursuant to an application such as the present under the Court's inherent jurisdiction are documents to which the 'implied undertaking' now to be found in CPR 31.22 has no application. Indeed, it is the Forum's avowed intention that the documents should be used in other proceedings or at least made available for such use. That necessarily will be without any restriction. However, as Mr Webb QC pointed out, Cape will have no ability (at least ordinarily) in such other proceedings to put forward any explanation as to particular documents of its own in the way that Cape was able to do in the underlying proceedings in which the documents were disclosed and, then, deployed at trial. As Mr Webb QC submitted, in weighing the various factors in deciding whether an order ought to be made, regard should be had to this. It is by no means a decisive factor. It is, however, a consideration which does seem to me to need to be taken into account. It is certainly a countervailing factor.

119. Seventhly, I consider there to be substance also in Mr Webb QC's submission that regard should be had to the fact that the Forum chose not to make an application during the course of the trial. Plainly, this does not preclude an application being made at this juncture. However, it is instructive to have regard to the position had an application been made at an earlier stage prior to the conclusion of the trial, as opposed to at a point after the proceedings had settled. I am clear that, had an application been made at trial, then, appropriate steps would have been taken in order to ensure that the Forum (and its representatives) had the awareness described by Lady Hale in her judgment in this case at [43].

120. Such measures might have included, for example, allowing a computer screen to be looked at as and when documents in what was to become Bundle C were cited. I consider it unlikely, however, that the Court would have required that the entirety of that bundle be made available to the Forum. Given this, it would seem odd that the Forum should now, through the making of the present application, be put into a better position than would have been the case had the application been made at trial. As Mr Webb QC submitted, there is a very real difference between the Court permitting non-parties inspection of documents during the course of a trial (so as to enable the trial process to be fully comprehensible), on the one hand, and the Court ordering a party, after the trial has been settled and all further proceedings dismissed, to deliver up documents to such third parties for those third parties to make whatever use of them they might wish. Put shortly, had the Forum sought production of the Bundle C documents at trial on the basis now put forward in support of the present (later) application, as set out in Mr Dring's and Ms Bains' witness statements, I am clear that the Court would have declined to order production.

121. All in all, taking account of the submissions which were made, respectively, by Mr Weir QC and Mr Webb QC, and weighing the factors in support of the application against the countervailing factors to which I have made reference in what is, as Lady Hale put it at [45] (by reference to both ***Kennedy*** and ***A v BBC***) *"a fact-specific balancing exercise"*, I have come to the clear conclusion that the appropriate exercise of discretion in this case results in a decision that the Bundle C documents ought not to be made available to the Forum.

122. Indeed for reasons which have already been stated, I have the distinct impression that in the present case the open justice principle is being used by the Forum for a purpose which goes further than is legitimate (using that word in a non-technical sense) on an application such as this. It seems to me that Mr Webb QC was right when he drew an analogy with the situation which arose in a recent decision in the defamation context, Warby J observing in ***Barclay v Barclay*** [2020] EWHC 1180 (QB) as follows at [21]:

"... the Court's machinery can sometimes be used as a mechanism for the 'laundering' into the public domain, with the protection of the privileges that attend fair and accurate reporting, of material that it suits one party to deploy in a public arena, as part of a litigation strategy. I emphasise that I am not, by saying that, indicating that that is what I consider to be going on here. However, it is a factor that has to be considered as part of the Court's decision-making in any individual case, because every individual decision may be relied on as some sort of precedent in future cases."

123. I should, lastly, mention two further matters.

124. The first concerns Mr Webb QC's suggestion that it would, in any event, be impracticable or disproportionate to require that the Bundle C documents are provided, and so that the order sought ought not to be made. I do not agree with this. In practical terms, very little would be required in order to comply with the order sought. Bundle C already exists, in circumstances explained in a moment, and so to supply it would be a straightforward matter.

125. The second concerns the status of Cape on this application and, related to this, the nature of the order which the Forum seeks. It was Mr Webb QC's submission that the Forum, in effect, seeks a mandatory injunction against Cape requiring Cape to produce the Bundle C documents. The order of the Court of Appeal, indeed, in paragraph 7 required that Cape *"shall, on payment by [the Forum] to [Cape] of [Cape's] reasonable copying costs, provide [the Forum] with one copy of each"* of the documents listed in Appendix 2 (namely witness statements, experts' reports and written submissions). The Supreme Court's order was to similar effect (see paragraph 2) and, indeed, paragraph 1 of the order was framed in these terms:

"The application be listed before Mr Justice Picken (or, if that is not possible, another High Court Judge) to determine whether the Court should require [Cape] to provide a copy of any other document placed before the judge and referred to in the course of the trial to [the Forum] (at [the Forum's] expense) in accordance with the principles laid down by this Court".

In other words, again, the focus is on what Cape might be required to provide directly to the Forum.

126. Furthermore, in the Court of Appeal, the mandatory nature of the relief sought was expressly recognised by Sir Brian Leveson P when, albeit in relation to Bundle D rather than Bundle C, he described the Master as having ordered *"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"* (see paragraph 143(4)).

127. Mr Webb QC submitted, in the circumstances, that it would be wrong to characterise Cape as being merely an interested party and, for that reason, to treat Cape's observations on the application as somehow lacking the significance which they might otherwise have. He pointed out, indeed, that, following the Court of Appeal's judgment, Cape adopted an essentially pragmatic position by suggesting that its solicitors should hold the relevant documents pending final determination of the application by me or another High Court judge after the remitted hearing contemplated by the Court of Appeal had taken place.

128. As will be apparent from what I have had to say in this judgment, I have approached the application on the basis that, in practice, the position of Cape is a position which ought properly to be taken into account. In truth, Mr Weir QC approached matters in the same way. To be clear, however, I have not placed any weight on the fact that, again in practice, were an order for production to be made, it would be an order which would amount to a mandatory injunction against Cape. Put differently, I am unpersuaded that this is a feature which matters for discretionary purposes in this case.

Conclusion

129. For the reasons which I have given and in the exercise of my discretion, in accordance with the principles laid down by the Supreme Court in this case, I have decided that no other document (specifically the documents contained in Bundle C) should be provided to the Forum.