

Re-affirmation of the principle of open justice (ABC v Shulmans LLP)

27/09/2019

Dispute Resolution analysis: In this case, the court was asked to consider whether it should depart from the principle of open justice in circumstances where a claimant had commenced a claim that might, should details of the claim become public, breach certain confidentiality obligations in a deed of settlement. The court re-affirmed the principle of open justice and explained that derogations from that principle were only possible in certain cases—here, the court explained that ‘while the court may use its powers to afford protection for information whose release into the public might cause harm [...] this will have to be justified by the circumstances and should be as narrowly used as possible. The existence of an obligation of confidence, per se, does not shift the balance’. Written by Oliver Browne, Partner and Chair of the London Litigation & Trial Department at Latham & Watkins.

ABC v Shulmans LLP [\[2019\] EWHC 2458 \(Comm\)](#)

What are the practical implications of this case?

This case tested the principle of open justice. Both parties to the proceedings, and the court, accepted that the starting point in terms of understanding the principle is now the decision in *Cape Intermediate Holdings Ltd (Appellant/CrossRespondent) v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) (Respondent/Cross-Appellant)* [\[2019\] UKSC 38](#), [\[2019\] All ER \(D\) 161 \(Jul\)](#), (especially at paras [1], [2], [42] and [43]).

In *Dring*, the Supreme Court explained that ‘[w]ith only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done’ and relied on the following comments from Toulson LJ comments in *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court (Article 19 intervening)* [\[2012\] EWCA Civ 420](#), [\[2012\] 3 All ER 551](#), [\[2012\] All ER \(D\) 18 \(Apr\)](#):

‘Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law [...] How is the rule of law itself to be policed? [...] In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.’

In the present proceedings, the claimant’s position was as follows—‘to give proper effect to the principle of open justice the court must ask whether there is a sufficient general public interest in publishing a report of proceedings, that identifies the party, to justify curtailment of a person’s rights under the ECHR’. In other words, the claimant argued that because he had certain rights, including under Article 8 of the European Convention on Human Rights (ECHR) (‘Everyone has the right to respect for his private and family life, his home and his correspondence’), arising as a result of confidentiality provisions contained in a settlement deed, those rights trumped the principle of open justice.

In responding to the claimant’s position, the court very clearly explained that ‘the principle of open justice is not simply a gateway to a balancing exercise but a fundamental aspect of our judicial system and the rule of law’ and that (following *Dring*) derogations from the principle of open justice depend very heavily on the facts of the particular case. In short:

‘legitimate countervailing rights may be tested against the principle of open justice, in order to determine whether there should be a derogation. I do not accept that one starts by testing open justice against the “interest” that a member of the public might have in any particular fact. Indeed, I cannot see that as a relevant question.’

This case then is a re-affirmation of the strength of the principle of open justice and a reminder that a derogation from that principle ‘will have to be justified by the circumstances and should be as narrowly used as possible’.

What was the background?

The claimant settled a dispute with his former corporate employer, and the individual who owned that corporate employer. As explained in the judgment, '[t]he individual is a prominent businessman, whose name is well known'. Following settlement, the claimant commenced proceedings against his former solicitors (the defendant) alleging that the defendant had given negligent advice, or failed to give proper advice, in respect of the litigation, as a result of which, in substance, the claimant was compelled to accept a settlement under the deed amounting to a fraction of his true entitlements. Specifically, the claimant alleged that he ought to have been advised to persist with his claims in the Employment Tribunal and that he suffered the loss of a chance of success in those claims, estimated at 'at least 80%' in respect of the claim for unfair dismissal and 'at least 45%' in respect of a whistle blowing claim.

The relevant settlement deed contained the following term—'[t]he terms of this Deed are confidential to the Parties who shall keep its terms, the negotiations between the Parties and their representatives leading to its terms, and the facts and matters and allegations which were in dispute in the Tribunal Proceedings and Court Proceedings (except to the extent that any of the foregoing are already in the public domain at the date hereof) confidential and not disclose them to, or otherwise communicate them to, any third party other than.... (c) pursuant to an order of a court of competent jurisdiction...'.

As a result, purportedly in order to avoid any possible breach of the confidentiality clause in the settlement deed, the claimant applied for various orders pursuant to [CPR 5](#) and [39, section 11](#) of the Contempt of Court Act 1981 and Articles 8 and 10 of the ECHR. The orders include an order that the names of the claimant and certain other parties be anonymised on all court papers, that various redactions be made to statements of case, orders and other documents, that restrictions be placed on the rights of third parties to access court documents and that there be reporting restrictions on certain information.

What did the court decide?

The court was asked to examine four circumstances advanced by the claimant which were said to give rise to privacy rights which justified the orders sought on the application. Those four circumstances, and the court's decision on each, are as follows:

- the fact that there was an element of the case concerned with the claimant's medical history. The court noted that where a claimant, in bringing an action, refers to his/her medical history, that might indicate that the claimant may have foregone his/her right to privacy. The court opted for a pragmatic solution, redacting the relevant paragraphs of the statement of case that deal with the claimant's medical history until the first CMC
- the fact that the subject matter of the action was a settlement agreement, the terms of which were protected by confidentiality provisions. The court was troubled by this suggestion, not least because the claimant was not compelled to disclose the terms of the settlement deed and could seek a permissive order from the court anyway as contemplated by the settlement deed itself. Ultimately the court concluded that even if the confidentiality provisions in the settlement deed gave the claimant Article 8 rights, they would not allow a derogation from the principle of open justice, in a claim brought by the claimant himself
- the fact that the agreement involved the settlement of court proceedings. The court rejected 'the submission that the Claimant can rely on the confidentiality provisions in the Deed to achieve a derogation from the principle of open justice in his own proceedings' adding 'the fact that settlements of legal proceedings are seen as a good thing does not to my mind alter that conclusion'
- the likelihood that the claim would involve the disclosure of documents otherwise subject to legal professional privilege. Having considered the limited waiver likely to be made by the claimant, the court concluded that did not justify the relief being sought

Accordingly, the application was dismissed.

Case details

- Court: High Court, Queen's Bench Division (Commercial Court)
- Judge: Adrian Beltrami QC (sitting as a High Court judge)

- Date of judgment: 25/09/19

[Oliver Browne](#) is a partner and chair of the London litigation & trial department at Latham & Watkins, and a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact caseanalysis@lexisnexis.co.uk.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

FREE TRIAL