Neutral Citation Number: [2024] EWCA Civ 1414

Case No: CA-2023-001919

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (AAC)
Mrs Justice Heather Williams
UA-2021-000404-GIRF

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2024

Before:

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal Civil Division)
LORD JUSTICE COULSON
and
LORD JUSTICE MALES

- -

Between:

Derek Moss	**Appellant**
- and -	
The Upper Tribunal	**Respondent**
- and-	
(1) The Information Commissioner (2) Rotherham Metropolitan Borough Council (3) Liam Harron	**Interested Parties**

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Aidan Wills (instructed by **ITN Solicitors**) for the **Appellant**
Eric Metcalfe (instructed by **The Information Commissioner's Office**) for the **First Interested Party**
All other parties did not appear and were not represented

Hearing date: 29 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 November by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1. Introduction

1. This appeal is concerned with the disclosure to a non-party of written submissions made in a case in the Upper Tribunal.

2. At the end of the hearing, the court announced its decision that it would allow the appeal on Ground 1 and that, in those circumstances, it was unnecessary to go on and consider Ground 2. These are my reasons for joining in with that decision.

2. The Background

3. The history of this case goes back to 2015 and has its roots in the child sexual exploitation scandal in Rotherham. A Mr Harron produced a booklet called "Voices of Despair, Voices of Hope" containing contributions from victims and others affected by those shocking events. Rotherham Metropolitan Borough Council ("RMBC") ordered 1,500 copies of the booklet. In September 2015, RMBC informed Mr Harron that they had sought independent expert advice on the content of the booklet and decided not to undertake any further distribution.

4. Mr Harron wanted to know why RMBC had decided to cease distribution of his booklet. He embarked on a campaign against RMBC using (and misusing) the available mechanisms for scrutiny of public bodies. Over the course of the next few years he issued 43 Requests under the Freedom of Information Act (FOIA), 19 Requests for internal reviews in relation to FOIA Requests, 24 Subject Access Requests under Data Protection legislation, and 18 Requests for internal review in relation to Subject Access requests.

5. In the end, the debate came down to a single failure by RMBC to provide Mr Harron one attachment to an email. The attachment, known as the Q&A document, was in fact provided to Mr Harron in August 2016, but the issue remained as to whether the failure to provide that document at a different time was a breach of RMBC's obligations, and in particular the terms of a substituted decision notice which itself arose out of an earlier ruling by the First Tier Tribunal ("FtT").

6. Mr Harron asked the FtT to certify a number of alleged failures as offences which, if the proceedings were before a court, would constitute a contempt of court, pursuant to s.61 of the FOIA. These included the failure in respect of the Q&A document. If certified by the FtT and subsequently confirmed by the UT, the UT would have the power to deal with RMBC for contempt of court. The FtT rejected Mr Harron's other claims in respect of certification but, in respect of the failure to provide the Q&A document, certified it as a contempt.

7. The *Harron* case was dealt with in the UT by Farbey J, the then President of the UT (Administrative Appeals Chamber) ("AAC"). She had a hearing on 18 October 2022 and her judgment was dated 23 January 2023 ([2023] UK UT22 (AAC)). She set aside the FtT decision to certify the offence, remade the decision, and refused to certify an offence.

8. It is unnecessary to set out any parts of Farbey J's judgment. The relevant paragraphs are [69]-[82]. For four separate reasons, she found that the FtT had erred in law in certifying the offence. These were:

(a) The FtT had failed to consider fairness. At no point had Mr Harron ever set out a clear or comprehensible allegation that he ought to have received the Q&A document as part of the FtT requirements in the substituted decision. There was no burden on RMBC to discern, infer or otherwise ascertain for itself that a document that Mr Harron did not want and that he had received long before the substituted decision was a candidate for contempt [70].

(b) The chronology demonstrated that, at the time the Q&A document was attached to an email, there was no existing request for an internal review. One had been made, and then withdrawn, and it was not reinstated until after the document was produced. Farbey J noted at [75] that in its certification decision, the FtT did not adequately explain how a document produced during a period in which no review was pending was - to the criminal standard - a document "'arising from"' a review.

(c) The subject matter of the Q&A related to the purchase and distribution of the booklet. The questions did not arise from the internal review that had been requested thus the non-disclosure of information did not fall clearly and unambiguously within the terms of the FtT's substitute decision.

(d) Mr Harron had received a copy of the Q&A document in August 2016. As Farbey J noted at [81], "it would be highly unlikely that a court would treat a public authority as a contemnor in relation to something that had already taken place prior to the commencement of any court proceedings." Such a step would be to punish a public authority for a purely technical contempt.

3. The Appellant's Applications

9. By an application dated 31 July 2022, the appellant had sought the parties' written submissions in *Harron* in advance of the hearing before Farbey J. The reason that he gave was that, if he was not provided with them, the Information Commissioner would have an advantage over him in a similar contempt case where he was the claimant (*Moss v Royal Borough of Kingston-upon-Thames, ("Kingston")*). That case was due to be heard by Farbey J on 17 October 2022, immediately before Mr Harron's similar claim against RMBC.

10. By a decision dated 22 September 2022, Farbey J refused the appellant's application for the written submissions. She noted that the Information Commissioner did not intend to take any part in the *Kingston* case, so there was no need and no good reason for the appellant to be served with anything from the Information Commissioner in those proceedings. In respect of Kingston themselves, they had provided the appellant with written submissions on both the issues that they wanted the judge to decide, and their response to the issues that the appellant wanted the judge to decide. The purpose of those documents was to ensure that the appellant would know how Kingston intended to put its case. Farbey J concluded that, in consequence, the appellant "does not need documents from another case to know the issues in his case." She added that "it is not a good or proportionate use of UT's resources to send written submission to a non-party who does not need them."

11. The appellant attended the hearing before Farbey J on 18 October 2022 by way of CVP. After the hearing, on 21 November 2022, he again applied for the parties' written submissions in the *Harron* case. He suggested that the UT had an inherent power and a common law duty to grant third party access to those documents. He also said that the parties in the *Harron* case had no right to be provided with a copy of his request.

12. In her reply on 10 January 2023, Farbey J said she was not prepared to consider the grant of access to the written submissions without informing the parties of the existence of his application. After further exchanges of emails, on 27 January 2023, after judgment had been handed down, the appellant made a formal application for "the parties' written submissions, including the statements of case and skeleton arguments".[1] This was on the basis, he said, that: "I am a campaigner and writer with a particular interest in information rights law and certification/contempt proceedings, and I need copies of the skeleton arguments to see what arguments were deployed in these cases, to enable me to write about them from an informed point of view."

13. The appellant's application was dealt with by the new president of the AAC, Heather Williams J ("the judge"). She issued directions on 15 March 2023 which recorded the appellant's position that it was unnecessary for his application to be disclosed to the parties. The judge disagreed and invited rather than directed them to make written submissions in response to his application. It appears that Mr Harron objected to the provision of his written submissions to the appellant. It is not clear what stance the Information Commissioner took because neither the written submissions made by Mr Harron nor those of the Information Commissioner about his application were provided to the appellant. He therefore did not know what they said and had no opportunity to respond.

4. The Decision Below and the Appeal

14. By a decision dated 8 May 2023, the judge refused the appellant's application. Having set out the legal framework at [17]-[33], and adopting the principles set out by the Supreme Court in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, [2020] AC 629 ("*Dring*") at paragraphs 29-31, she went on to refuse the application. This was because, amongst other things:

    (a) The appellant had not shown a good reason why providing him with the parties' written submissions and skeleton arguments would advance the open justice principle [35]. She said his reason was "expressed in one sentence only, with no detail given".

    (b) The parties' relevant written and oral submissions in the *Harron* case were identified in considerable detail by Farbey J. She said that the appellant "did not engage with this and does not explain why the judgment was insufficient to provide him with an informed understanding of the arguments deployed by the parties" [35].

    (c) When the appellant made his earlier application in July 2022 for the parties' written submissions, he gave a different reason for wanting the documents, namely an alleged advantage that the other parties would otherwise have over him in other

[1] The reference to 'statements of case' was misconceived. There are no such documents in the UT. His request was therefore treated as a request for the parties' written submissions only.

proceedings [35]. He had not suggested then that he wanted to have the documents in his capacity as a campaigner and writer.

(d) The appellant's stance: he had sought to argue that the UT administration was under a duty to provide the written submissions to him, despite the rejection of his application in September 2022 and that the parties should not be told of his application. At best, the judge said, "this affords no support for the proposition that he has a good reason for the documents and at worst it positively undermines it" [36].

(e) The judge accepted that the provision of the documents would not cause a risk of harm [37]. But she went on to take into account proportionality considerations [38]. She said that the appellant had not shown that granting his request would not be disproportionate for the UT. The earlier request was refused on that ground but he had ignored it in his recent submissions. She said at [38]:

> "…Disproportionality is all the more likely in circumstances where: no good reason for the request has been shown; a clear understanding of the parties' arguments can in any event be obtained from Mrs Justice Farbey's public judgment; Mr Moss has chosen not to request the submissions from the parties themselves and he could still do so; and he has already made a request for the written submissions that was refused in September 2022."

15. The appellant's grounds of appeal against that decision were twofold. First he argued that the judge "misunderstood or misconstrued a binding decision of a superior court". Although the binding decision is not expressly identified, it is clear from his written submissions that it was intended to be a reference to the decision of the Supreme Court in *Dring*. Secondly, he claimed that the judge's decision breached his rights under Article 6 and Article 10 ECHR. When granting permission to appeal, Andrews LJ noted that the appeal raised potential issues of importance as to the consistency of approach between the courts and the tribunals, and that the court may wish to say something about the practical way in which non-parties should go about seeking to obtain documents.

16. In the last few days, Mr Wills has been instructed by the appellant on a pro-bono basis subject to legal aid being granted. He has not amended the grounds of appeal; indeed he has positively adopted them. As to the first ground, his submission was essentially that there was a 'default position' that anybody who asked for them was entitled to copies of skeleton arguments and written submissions unless there was a good reason for them to be withheld. As to the second ground, it was suggested that a refusal of the documents requested constituted an interference with the appellant's Article 10 rights. Mr Metcalfe, who appeared for the Information Commissioner, was neutral as to the outcome of the appeal, but had some helpful submissions to make about practice and procedure more broadly.

17. I deal first with the common law framework, in order to correct certain misconceptions apparent both in Mr Wills' submissions, and in one or two of the reported cases; and to explain why this court has deliberately decided to eschew the invitation from Andrews LJ to deal with a broader range of issues. I then turn to deal with the first ground of appeal on its merits.

5. The Common Law Framework

5.1 The Authorities

18. These days, it is a trite proposition that open justice is one of the cornerstones of the English legal system: "letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence": see *Scott v Scott* [1913] AC 417; *R v Guardian News and Media Ltd v City of Westminster Magistrates Court* [2012] EWCA Civ 420, [2013] QB 618 ("*GNM"*); and *Kennedy v Charity Commissioner* [2014] UKSC 20, [2015] AC 455 at [110]. Furthermore, as Lord Sumption noted in *Khuja v Times Newspapers* [2017] UKSC 49, [2019] AC 161 at [13], the significance of open justice has "if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions".

19. In *Dring*, Lady Hale identified the two main purposes of the open justice principle. The first was to enable public scrutiny of the way in which courts decide cases; to hold judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly: [42]. The second was to enable the public to understand how the justice system worked and why decisions are taken. For that, they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. She said it was difficult, if not impossible, especially in complicated civil cases, to know what was going on "unless you have access to the written material": [43].

20. The importance of skeleton arguments in the conduct of civil justice, and the centrality of such documents to notions of open justice, was identified 25 years ago by Lord Bingham of Cornhill CJ in *SmithKlein Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 at 511-512. He said:

> "The result is that a case may be heard in such a way that even an intelligent and well-informed member of the public, present throughout every hearing in open court, would be unable to obtain a full understanding of the documentary evidence and the arguments in which the case was to be decided…public access to documents referred to in open court (but not in fact read aloud and comprehensively in open court) may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain."

A similar point was made by Nicklin J in *Hayden v Associated Newspapers Ltd & Anr* [2022] EWHC 2693 (KB) ("*Hayden*"), where at [32] he said that "arguably, skeleton arguments (and other documents containing a party's written submissions) are some of the most important documents in modern civil litigation".

21. There are two recent cases which have set out the correct approach to the provision of documents to non-parties. The first is the decision of this court in *GNM*. That was a case involving the extradition of two British citizens on corruption charges by the

USA. The Guardian sought the opening notes and skeleton arguments produces by both sides, together with other materials.

22. Toulson LJ (as he then was) gave the principal judgment of the court. He noted at [76] that "The Guardian had 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." He went on to say at [85]:

> "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."

23. In *Dring*, the Supreme Court was concerned with a claim for numerous trial bundles. Employees of a company who had been exposed to asbestos brought a claim against the employer's insurers. There was a six-week trial in the High Court but, after the trial had ended but before judgment, the claim was settled. The applicant sought copies of the documents used or disclosed at trial on behalf of a group which supported victims of asbestos-related diseases. The Court of Appeal had refused disclosure of some documents under CPR 5.4C(2), but granted access to others under its inherent jurisdiction.

24. That decision was upheld by the Supreme Court. They referred back to Toulson LJ's judgment in *GNM* and noted that the principles laid down there had been endorsed by the majority of the Supreme Court in *Kennedy*. The critical paragraphs can be found in the judgment of Lady Hale:

> "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* [2015] AC 588 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"'.
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> 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.
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> 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."

25. Although we were referred to a number of other authorities, the majority of them pre-dated *Dring*, and were intensely fact-specific. Others contained passages in which judges sought to paraphrase or apply the principles from the two leading cases, some more successfully than others. Moreover, it became apparent during Mr Wills'

submissions that, even if could not be described as a tension, there were differences of emphasis in *GNM*, on the one hand, and *Dring*, on the other, which appear to have created a certain amount of confusion. Therefore, with some hesitation, I identify what I consider to be the main principles to be derived from these cases on disclosure to non-parties, with particular regard to *Dring.*

5.2 The Applicable Principles from GNM and Dring

26. A non-party does not have the *right* to see every document referred to in every case. Lady Hale was quite explicit about that at [45] of *Dring*. Therefore, to the extent that it is said that there is a "'default position'" to that effect, it is wrong. It was not what the Supreme Court said in *Dring*, and to suggest otherwise misunderstands what Toulson LJ himself said at [85] of *GNM*, and fails to give proper weight to the full paragraph. To take just one example, if there was a "default position" that every document placed before a judge and referred to in the course of proceedings could be provided to any non-party who asked for it, whoever they were and for whatever reason, there would have been no need for Toulson LJ to go on, in the same paragraph, to identify that "where access is sought for proper journalistic purpose, the case for allowing it will be particularly strong".

27. The first step therefore 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 per Lady Hale at [45] of *Dring*). The first step in the process, therefore, is for the non-party to show a good reason for seeking disclosure, and that test needs to be satisfied in every case. I agree with Mr Wills that it is a low threshold[2], at least where what is being sought are copies of skeleton arguments or written submissions which are central to an understanding of the case, and that in many or most cases it will be easily cleared. But it is a threshold and it needs to be surmounted.

28. There was some debate about what Lady Hale meant by explaining "how granting him access will advance the open justice principle". In my view, that simply means that the non-party must explain how access will allow him or her to follow the case and understand the reasons why the judge decided the case in a particular way.

29. If there is no good reason for granting disclosure, that is the end of the matter, and the application must fail. No balancing exercise is required. But if there is a good reason, it is then necessary to consider any countervailing factors. Those will most obviously include the risk of any harm or prejudice that may be caused by the disclosure of the documents to a non-party. In addition, there is what Lady Hale describes at [47] of *Dring* as "the practicalities and the proportionality of granting the request". As she explained, an application made during the trial when the material is readily available is one thing; an application made thereafter is much less likely to succeed because it may not be practicable to provide the material and, even if it was, "the burdens placed

[2] In *Aria Technology Ltd v Revenue and Customs Commissioners* [2018] UK UT 111 (TCC), [2018] 1WLR 4377, at [25], the judge used the expression "a strong presumption…that non-parties should be allowed access to documents relating to proceedings that are held in the UT records." However, for the reasons that I have already given, there is no such presumption, strong or otherwise. Rather, the position is that access needs to be justified, albeit that there is a low threshold for doing so.

on the parties on identifying and retrieving the material may be out of all proportion of the 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 time-consuming, to discharge."

30. The point was made during submissions that, if read literally, the last sentence of [47] of *Dring* might be taken as requiring the non-party to demonstrate that there were no countervailing factors, and to show that granting the request would not be impracticable or disproportionate. In my view, it is plain that that was not what Lady Hale meant. The last sentence of [47] is a distillation of the factors which apply in any application for disclosure to non-parties. She did not intend to suggest that the non-party should address, for example, issues relating to the risk of harm: how could a non-party know that there might be a risk of harm arising from the disclosure of a document that he or she has not even seen? The sentence is a summary, and nothing more than that. Countervailing factors and impracticabilities or lack of proportionality will be matters which, at least in the first instance, one would expect an objecting party to raise: see *Goodley v The HUT Group and Others* [2021] EWHC 1193 (Comm) at [44].

5.3 Other Considerations

31. Parts of the written submissions provided by both Mr Wills and Mr Metcalfe, on behalf of the Information Commissioner, dealt with the procedural rules and guidance relating to disclosure to non-parties. However, the UT rules, which apply across the four UT chambers, do not contain any specific rules governing access to documents by non-parties. The AAC has issued no guidance on the topic. The Immigration and Asylum Chamber has, however, issued a Practice Guidance (Practice Guidance (Upper Tribunal: Anonymity in Asylum and Immigration Cases) [2022] 1WLR 2078 [42]-[44]), which provides that any request by a non-party for documents should first be directed to the party or parties and that, if disclosure is refused, any application must be made to the principal resident judge.

32. In relation to court proceedings, CPR 5.4C(1) sets out a general rule that a non-party may obtain from the court records a statement of case (but not any documents filed with or attached to the statement of case). Whilst r.5.4C(2) also permits them to obtain from the records of the court a copy of any other document filed by a party, that can only happen if the court has given prior permission. There have been a number of cases about what may be available from court records. In *Hayden* that was a central issue, although Nicklin J also indicated at [65] that he could see no basis on which a person requesting copies of a statement of case under r.5.4C(1) should have details of their enquiries made available to the parties.

33. It would not be helpful to make any detailed observations about the tribunal rules, the guidance, or the CPR in this judgment. There are two reasons for that. First, it is agreed that there are no rules governing the AAC, and the CPR is of no direct application to this case, so any discussion would not assist in addressing the issues in this appeal. Secondly, I am aware that the topic of disclosure of documents to non-parties, and therefore potential amendments to r.5.4C, is being considered in detail by the Civil Procedure Rules Committee. There has been an extensive public consultation and the CPRC's work has now reached an advanced stage. Any proposals by the CPRC in relation to court proceedings may also need to mesh with

the wider requirements of the new Open Justice and Transparency Board. In those circumstances, it would be inappropriate to trespass beyond the narrow confines of this case.

34. In the light of the submissions of both parties, however, I make three general observations about good practice in the UT regarding skeleton arguments and written submissions:

(a) It is sensible that, in the first instance, non-parties should where practicable seek such documents directly from the party which has created them. To that extent, I agree with paragraph 49(e)(i) of Mr Metcalfe's skeleton argument, in which that point is made.

(b) In the event of objections or difficulties, the non-party should make an application for the documents to the UT. That should be done on notice to the parties: the reference in *Hayden* to the possibility of an application being made without notice to the parties is specifically directed at r.5.4C(1) and the right in court cases to see statements of case. That rule has no application in the UT, where there is no such thing as statements of case and the third party has no equivalent right.

(c) If such an application is made, the party or parties who object to disclosure will then have an opportunity of setting out the reasons for their objection. Those should also be provided to the non-party, so that he or she can, if necessary, comment upon them. If the basis of the objection is the confidentiality or sensitivity of the material in question, then of course the details should not be provided to the non-party.

35. The process I envisage ties back to the issue of proportionality and [47] of *Dring*. If the tribunal has to rule at the start of or during a hearing on, say, the provision of skeleton arguments to a non-party, all the relevant material would be immediately available, and it should be a relatively straightforward exercise. But once the hearing is finished and judgment given, the process that I envisage – which is necessary to ensure fairness between the parties and the non-party – is going to become much more burdensome for the UT. Thus, as Lady Hale said in *Dring*, the longer the delay, the greater the chances will be that a request for disclosure by a non-party will be rejected on proportionality grounds.

6. Ground 1 of the Appeal

36. Ground 1 asserts that there was an error of law because the judge failed to take into account the principles set out in *Dring.* Various criticisms of her reasoning (which I have summarised at paragraph 14 above) are now made by Mr Wills. His main point is that the judge failed to explain properly or at all why she rejected the appellant's reason for seeking disclosure.

37. Referring back to the distillation of the principles set out at paragraphs 26-30 above, the first question is whether the appellant complied with Lady Hale's test in [45] of *Dring*: did he provide a good reason why it would advance the principle of open justice for him to be given the skeleton arguments? It is worth reminding ourselves that his reason was put in the following terms:

> "…I am a campaigner and writer with a particular interest in information and rights law and certification/contempt proceedings, and I need copies of the skeleton arguments to see what arguments were deployed in these cases, to enable me to write about them from an informed point of view…"

38. Faced with this stated reason, the judge therefore had three options. She could accept the reason and go on to consider any countervailing factors as to why disclosure should not be made. If she was not sure that she had sufficient information to conclude that the reason met the relevant test, she could have asked for more information. And if she rejected the reason she could say so, and explain why. On analysis, however, the judge did none of these things.

39. Although the judge complained that the reason was "expressed in one sentence only, with no detail given", she did not seek any further information about it. Her conclusion was that the appellant has not shown a good reason, but she did not explain why she had reached that view. She did not engage with his stated reason at all. Although she pointed out correctly that it was different from the reason given at the time of the appellant's first application, she did not say that, in consequence, she did not believe the reason stated in January 2023 for obtaining the written submissions. Moreover, it was unsurprising that the appellant's original reason was not re-stated, given that the *Kingston* case had been heard and determined by the time he sought the written submissions on 27 January 2023. His original reason was no longer relevant, a point that does not appear to have occurred to the judge.

40. For these reasons, I consider that the judge erred in law. She rejected the stated reason without saying why, and did not set out any justification for her rejection.

41. I therefore reconsider the material before the judge. In my judgment, the appellant's stated reason meets Lady Hale's test. It could have been more detailed, and it is not entirely clear why the appellant, who is a committed blogger, did not refer to his website in the application. But, reminding myself of the low threshold (paragraph 27 above), it seems to me that the appellant had (just) surmounted it.

42. That then leads on to the consideration of countervailing factors. It is accepted that there was no risk of harm, which the judge herself acknowledged at [37]. Despite the judge's hint to the contrary, there was no disproportionality, given that the request was made a day or two after the judgment had been handed down, when the written submissions would have been readily available. This was not a case where there was a significant delay between the judgment and the request which, for the reasons noted above, might make a real difference to the disproportionality argument. So any balancing exercise in this case would only serve to confirm that the appellant should be granted disclosure of the written submissions.

43. In the light of the foregoing, it is unnecessary to spend too much time on the other reasons advanced by Mr Wills as to why the judge reached the wrong conclusion. But I agree with him that it was quite irrelevant to the application for disclosure that Farbey J had set out in some detail in her judgment what the submissions had been. To the extent that the judge relied on that as another reason for refusing this request, she was wrong to do so. It would be difficult for a member of the public fully to scrutinise the judicial decision-making process in circumstances where he or she only

had the judgment to go on, because it may inaccurately summarise the submission or may miss an important point, an example that Lady Hale gave at [44] of *Dring*. Furthermore, if it was the right approach, it would mean that when the UT was considering an application for disclosure to non-parties, it would have to consider the underlying judgment and to decide whether or not it accurately summarised the submissions. That would be a further unnecessary and wasteful burden on the UT.

44. Mr Wills also complained that the judge seemed to rely on other irrelevant matters, such as the appellant's failure to apply to the parties first; his claim that the UT was under a duty to provide the information; and that the parties should not be told of his application. In my judgment, although these matters were not front and centre in the judge's refusal of the appellant's application, and each to some extent reflected poorly on the appellant, none of them was of relevance to the disclosure issue. To the extent that the judge took them into account in refusing the application, she was again wrong to do so.

45. For all these reasons, therefore, I considered that the first ground of appeal has been made out. As was explained at the conclusion of the hearing on 29 October 2024, it is therefore unnecessary to consider the second ground of appeal.

LORD JUSTICE MALES

46. I agree with the reasons given by Lord Justice Coulson for allowing this appeal. I agree also that we should go no further than is necessary in order to decide the appeal. The extent to which non-parties should have access to written material deployed before a court or tribunal and whether such material should be provided by the court or tribunal or by the parties, raise important issues of principle involving considerations of open justice, finality and resources which are best considered, and are currently being considered, by the Rules Committee and the Open Justice and Transparency Board. Moreover, while the principle of open justice is firmly embedded in our law, its application may vary as between courts and tribunals and between different kinds of tribunal. This too needs to be considered from a wider perspective than a single case can bring to bear.

LORD JUSTICE UNDERHILL

47. I too agree with Coulson LJ's reasons for allowing this appeal. The Appellant was wrong to contend that in the absence of any applicable rules he was as a matter of common law absolutely entitled to see the documents which he sought: as Coulson LJ demonstrates, it is clear from para. 45 of the judgment of Lady Hale in *Dring* that a non-party seeking access to documents that were before the court or tribunal must show some "good reason" or "legitimate interest". But although the reasons that the Appellant gave were unhelpfully sparse they were in my opinion also just sufficient to get over what is in this kind of case a low threshold; and I agree that there were in this case no countervailing considerations sufficient to justify denial of access to these particular documents. In that connection I would note that the considerations identified by Coulson LJ at paras. 29 and 35 above did not apply in the present case because prior to taking the decision to refuse access Heather Williams J had decided that it was appropriate to seek the parties' views, and had done so; but in other circumstances, particularly where the application is made further away from the date

of the decision, the court or tribunal may decide that it is disproportionate for it to have embark on that exercise at all.

48. As both Coulson LJ and Males LJ observe, it is not desirable that we say anything more about the issue of access by non-parties to documents held by court or tribunals than is necessary to decide the present case. As Lady Hale made clear in a postscript to her judgment in *Dring* (para. 51), how to strike the necessary balance between the legitimate interests of non-parties in such access and the interests of the parties themselves and others, and also the resource implications, is best considered by the respective rules committees – that is, the Civil Procedure Rules Committee ("the CPRC") and the Tribunals Procedure Committee ("the TPC"). We know that the issue is currently being considered by the CPRC, and the TPC may well wish to consider it also: the characteristics of the various tribunals whose procedure is within its remit are different from those of the civil courts (and also differ considerably between different tribunals). Our concern in this appeal is only with the position at common law in circumstances where there are no applicable rules, which it is to be hoped will not be the case for much longer.