

5 Stone Buildings

PRIVACY ORDERS

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Introduction

- When and how is it possible to keep proceedings private?
- Principles and relevant procedural rules
- “Proceedings” = documents and hearings
- Consider specific types of claim: claims involving persons under a disability & trust proceedings

Principles in Tension

Open justice *Scott v Scott*/freedom
of expression (article 10)

v protection of right to respect for
private life (article 8)

How the court resolves the tension

Lord Steyn in *Re S(a child) (Identification of Restrictions on Publication)* [2004] UKHL 47:

- (1) neither has precedence over the other.
- (2) where the the two conflict, need “*an intense focus on the comparative importance of the specific rights being claimed in the individual case*”
- (3) must consider the justifications for interfering with/ restricting each
- (4) the proportionality or ultimate balancing test must be applied to each.

Privacy of Documents: the parties

CPR 31.22(1) : unless parties agree, a party to whom docs disclosed may only use for purpose of those proceedings except where (a) referred to/read at a hearing which has been held in public; (b) the court gives permission

CPR 31.22(2): can seek an order not be disclosed even if read in open court

Privacy of documents: non-parties

- **CPR 5.4C:** generally non-party can only get statements of case (not attachments & only if A of S) and judgment/order made in public BUT court can permit non-party to obtain copies of other docs from the “court records”
- Following Supreme Court’s decision in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, non-party can obtain docs under inherent jurisdiction if satisfy the *Dring* test

Documents referred to in open court

Dring established that the justice principle applies to docs mentioned in open court whether or not read to or by the Judge; for these docs default position is third party should have access (whether or not the case settled before a judicial decision was made)

The Dring test:

But onus on non-party to demonstrate “a good reason”; must show how access will advance the open justice principle

If can, only one side of fact-specific balancing exercise; on other is risk of harm which disclosure may cause to maintenance of an effective judicial process or the legitimate interests of others.

“...There may be very good reasons for denying access. The most obvious of these 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.”

Privacy: documents leading to a judicial decision on the papers

Hamblen LJ (obiter) in CA in *Dring* provided led to judicial decision ordinarily will be disclosed to a third party as open justice principle engaged

Privacy: documents referred to at hearing in private

ABC Ltd v Y [2010] EWHC 3176 Lewison J suggested OJ principle does not apply; only grant access where “*there are strong grounds for thinking that it is necessary in the interests of justice*”

Re Z [2019] EWCOP 55; *ABC v Y* reasoning not survive SC in *Dring* but fact heard in private good reason not to disclose

Privacy: documents filed but not leading to judicial decision

- *Dian AO v Davis Frankel & Mead* [2004] EWHC 2662: if never read by judge, third party can only get if show strong grounds for disclosure in interests of justice (approved by CA in *Dring* followed in *Re Z*)
- *Dring* SC: disclosed docs confidential until “*deployed for the purpose of the proceedings*”; distinction docs filed in bundle and “*the documents and evidence in a case*”.

Privacy: hearings

- **CPR 39.2(3)**: must be heard in private if and only to the extent that the court is satisfied of:
 - one or more of the matters set out in paragraphs (a) to (g) of that rule; and
 - that it is necessary to sit in private to secure the proper administration of justice.

Hearings: CPR 39.2(3)(a) to (g)

- (a) defeat the object of the hearing;
- (b) national security;
- (c) involves confidential info (incl info relating to personal financial matters) & publicity would damage confidentiality;
- (d) private hearing necessary to protect the interests of any child or protected party;
- (e) AWN and unjust to respondent if in public;
- (f) Involves uncontentious matters arising in the admin of trusts or estates; or
- (g) necessary to secure proper administration of justice.

Privacy: orders in specific types of proceedings

- Proceedings involving persons under a disability
- Trust Proceedings

Privacy: interests of a child or protected party

- *Scott v Scott* [1913] AC 417: suggested *parens patriae* jurisdiction excepted from OJ principle.
- Not survived *X (a child) v Dartford & Gravesham NHS Trust* [2015] EWCH Civ 96 and *Dring* in SC.
- OJ principle applies but powerful factor in the balance

***X (a child) v
Dartford & Gravesham
NHS Trust***

- CPR 21.10
- Is derogation from OJ principle strictly necessary?
- What is the minimum required?
- Normal course is to anonymise

Court of Protection

- **COPR 4.2(1)** general rule hearings in private
- **COPR 4.2(2)** can order in public
- **PD4C** will usually do so with reporting restrictions under **COPR4.3(2)**
- **COPR5.9** non-parties can get order for docs filed in COP – *Dring* principles apply *Re Z*

Appeals from hearings in private

- Court of Appeal: CPR 39 applies
- *Norman v Norman* [2017] EWCA Civ 49:
 - Financial relief on divorce
 - CA apply the re S principles
 - procedure for seeking anonymity

Variation of Trusts

- Introduction
 - Traditionally in open Court
 - Increasing move to applications for privacy
 - Turning of the tide
 - *V v T +A* [2014] EWHC 3432



MN v OP

- Court of Appeal
 - Protection of children does not require complete derogation from principle of open justice
 - *X v Dartford and Gravesham NHS Trust* distinguished
 - Approving on behalf of minor under 1958 Act not same as approving compromise
 - Names of children but not young adults anonymised.

MN v OP: comments

- Why is VTA (approval on behalf of child) different from approval of compromise?
- Not clear why argument that adult can agree to vary a trust but child has to have recourse to did not succeed
- Anonymity was granted in the end but very limited.

Procedure

- Practice Note: Variation of Trusts:
Confidentiality Orders Pending the Hearing of
Application
 - Draft Interim Order in Appendix
- Paragraph 24.68 Chancery Guide
- Split out privacy order from substantive
hearing?

Evidence in Support

- Keeping extent of wealth from children
- Sensitive commercial information
- Sensitive medical information about the child
- Risk of harm to child if extent of wealth known.

Other Trust Applications

- Privacy Orders
 - *Beddoe*
 - Approval of compromise
 - *Public Trustee v Cooper*
 - Open Court
 - Construction
 - Rectification
 - Mistake
 - Removal of trustees
- Applications
- S.57 TA 1925

Beddoe Applications

- Highly privileged information
- Good case for hearing to be in private
- Restricted access to the Court files
- Inability to get transcript
 - *Gestrust SA v Sixteen Defendants*[2016] EWHC 3067 (Ch)

Approval of Compromise

- *X v Dartford v Gravesham*
 - anonymity
- BUT ought to be in private
 - Privileged information which has to be discussed

Public Trustee v Cooper

- Article 6 does not apply (not determination of civil rights)
 - *In re Trusts of X Charity* [2003] 1 W.L.R. 2751
 - *Three Professional Trustees v Infant Prospective Beneficiary* [2007] EWHC 1922 (Ch)
- Will depend on the nature of the transaction and whether sensitive information.

Section 57 TA 1925

- *South Downs Trustees Ltd v GH* [2018] EWHC 1064 (Ch) [subject to *MN v OP*]
 - court astute to protect the confidentiality of information and ensure that it is not compromised to the detriment of the parties.
 - court generally tries to give effect to agreements that commercial arrangements should be kept confidential
 - enforced waiver of legal professional privilege.
 - nature of the jurisdiction being exercised by the court is relevant

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Thank you,
any questions?

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