Neutral Citation Number: [2022] EAT 12

Case No: EA-2020-000185-DA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 March 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

GUARDIAN NEWS & MEDIA LIMITED — **Appellant (Applicant below)**

- and -

Respondents

(1) DMITRI ROZANOV — **(Claimant below)**

(2) EFG PRIVATE BANK LIMITED — **(Respondent below)**

MEDIA LAWYERS ASSOCIATION — **Intervenor**

- -

GREG CALLUS (instructed by **Guardian News & Media**) for the **Appellant**
JAMES GOUDIE QC (instructed by **Lewis Silkin LLP**) for the **2nd Respondent**

Hearing date: 16 February 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The employment tribunal erred in law in refusing to order EFG Bank to provide copies of skeleton arguments, witness statements and documents referred to in a judgement of the employment tribunal to the Guardian when a journalist sought the documents relatively shortly after the judgment had been sent to the parties. In the unusual circumstances of this case an order requiring the provision of the documents was substituted for the decision of the employment tribunal.

His Honour Judge James Tayler

Introduction

1. This is an appeal brought by Guardian News & Media Limited ("GNM") against a decision of the employment tribunal refusing an application, made subsequent to a final hearing ("the final hearing"), seeking an order that the 2nd Respondent, EFG Private Bank Limited ("EFG"), provide GNM with copies of documents put before the employment tribunal at the final hearing; specifically: the ET1 claim form, ET3 response, skeleton arguments, witness statements and documents from the bundle.

The original employment tribunal proceedings

2. The claimant, Mr Rozanov, was employed by EFG, a private bank, as UK Market Co-ordinator for Russia, Eastern Europe and the CIS countries. The claimant brought proceedings in the employment tribunal claiming that he had been subject to detriment by EFG done on the grounds that he had made protected disclosures; and that he was dismissed for the reason, or principal reason, that he had made protected disclosures. The claim was heard at London Central, EJ Lewis and members, from 25 to 28 June, 2 and 3 July and was considered in chambers on 1 and 2 October 2018. The judgment was sent to the parties on 5 October 2018.

3. The claimant asserted that he had made a number of protected disclosures in relation to compliance generally, and alleging failure to comply with regulatory requirements in respect of a number of specific transactions. At the employment tribunal hearing material was redacted to remove the names of clients of EFG and an anonymity order was made pursuant to Rule 50 of the Employment Tribunal Rules 2013 ("ET Rules"):

> Anonymity and redaction: rule 50
>
> 3. The parties agreed that the names of Bank clients should be redacted. The respondent made a rule 50 application additionally to redact the names of four individuals and to keep a 'confidential annexe' ie a small bundle of three articles.
>
> 4. Three of the four names were 'Individual 2'; 'relative 19' and 'relative 20'. They are from one family. They paid in funds in relation to one of the clients whose names has been redacted. The tribunal agreed to the redaction of the names of the additional three individuals. It was a transaction which would come under close scrutiny as it is the subject of alleged protected disclosures. There was a risk that the identity of that client could be identified were the names

> of these three individuals not redacted. Client confidentiality is very important in the Banking world. Indeed the claimant agreed that clients' names should be redacted.
>
> 5. The confidential annex contained documents which the CROs would have found on internet google searches on that client. We understand it comprised three articles. This information would have been handed to Compliance and, on that basis, Compliance would have decided whether the transaction could go ahead. We accept that articles relating to a certain client would make it clear who the client was. Having agreed on the necessity to keep the client's name redacted, it followed that we should keep these articles confidential. We said the matter could be reopened if necessary when the witnesses were questioned on it. In the event, neither party wished to show the tribunal these documents.
>
> 6. Ex-employee 11 was the former whistleblower. The respondent felt her name should be redacted and not referred to as she had nothing to do with these proceedings and had not chosen to go to a tribunal herself. We did not rule that the name of this individual should be redacted and kept anonymous. We do not know the views off the particular individual, but in any event, we do not see that her position is any different from numerous individuals who are named during proceedings as part of the context for a case. We are unaware of any principle that whistleblowers in this context should get extra protection. The principle of open justice is a strong one and looking at the case law, it is insufficient solely to call to aid the right to privacy. No persuasive case was put to us as to why this person's name should be anonymised.

4. The employment tribunal accepted that most of the disclosures made by the claimant were protected, but rejected the contention that the claimant had been subject to detriment because of making the protected disclosures or that they were the reason for his dismissal. Hence, the claim failed.

5. Journalists attended the hearing at the employment tribunal. As required by Rule 44 ET Rules, copies of witness statements were available for inspection during the hearing. It appears that had the employment tribunal been asked it also would have permitted those attending to see the pleadings, skeleton arguments and documents referred to during the hearing, albeit redacted in accordance with the employment tribunal's Rule 50 Order.

GNM's application

6. On 23 November 2018, 7 weeks after the judgment was sent to the parties, and over four months after the last day of the hearing, David Pegg, a reporter on the GNM newspaper, the Guardian, wrote to the employment tribunal requesting documents from the hearing:

> Please may I request copies of:
>
> a) A number of documents that were referred to in the course of the hearing in the case (these are itemised in Annex A);
>
> b) The ET1, ET3 and any other related or clarifying statements of case documents;
>
> c) Any witness statements and skeleton arguments that were relied upon in open court.

7. An annex attached to the letter set out 54 documents referred to in the judgment ("the documents"). The judgment included extracts of some of the documents. The relevant contents of the other documents were described in the judgment.

8. Mr Pegg explained why he considered that the judgment raised matters of public interest:

> There appears to me to be a number of matters of legitimate public interest arising out of the matters contained in the judgment, including:
>
> i) Evidence that EFG Private Bank Ltd repeatedly and deliberately colluded with high-risk clients and politically-exposed persons (PEPs) in breach of UK anti-money laundering regulations;
>
> ii) Evidence that an employee of EFG Private Bank Ltd attempted to facilitate a transaction of $100m sourced from associates of Ramzan Kadyrov, a Chechen warlord who has been credibly accused of serious human rights atrocities;
>
> iii) Evidence that senior management at EFG Private Bank, including its chief executive, failed to take action when evidence emerged that the same employee had failed to abide by anti-money laundering regulations. [emphasis added]

9. Mr Pegg also stated the reason why he was requesting the documents:

> I require these documents for journalistic reasons, including (1) to better understand the matters referred to in the judgment; (2) to ensure that any reporting of this matter fairly and accurately reflects all the relevant matters in the hearing; (3) for the journalistic purpose of stimulating informed debate about matters of public interest; (4) to obtain further information about this matter that may assist in further enquiries. I believe these give rise to a legitimate interest on my part to have access to these documents. [emphasis added]

10. Mr Pegg summarised the Order he was asking the employment tribunal to make:

> I therefore (1) am seeking permission from you, as the Judge who heard the case, for access to these documents; (2) in so far as the Employment Tribunal has retained copies of them, I request copies of these from the tribunal. I confirm that I will pay any reasonable copying costs involved in this process.

The consideration of the application

11. Mr Rozanov stated by email dated 10 December 2018 that he did not object to the application. EFG objected by letter dated 13 December 2018 sent by their solicitors, Lewis Silkin. EFG asserted that the employment tribunal did not have the power to make such an order, EFG could not be required to provide the documents to GNM and particular care should be taken in dealing with the application because of the Rule 50 Order. In respect of the documents EFG asserted:

> The Respondent has retained a clean copy of the Tribunal bundles in archive, but does not accept that it is under any obligation to provide access to such documents. Without prejudice to that position, there would be significant cost involved in retrieving and locating the documents referred to.

12. On 22 December 2018 the employment tribunal wrote to the parties stating that a two day hearing would be listed to determine the application. On 7 January 2019 the hearing of the application was listed for 16 and 17 April 2019. On 21 February 2019 the employment tribunal wrote stating that the application would be dealt with on paper and directing the provision of written skeleton arguments and replies. Greg Callus, Counsel for GNM, told me he understood that GNM may have requested that the matter be dealt with on the papers as they hoped it would result in a quicker determination.

13. GNM provided written submissions drafted by Mr Callus and Ben Hamer of Counsel reiterating and expanding a little on the rationale for the application and expanding the request for documents to include the full trial bundle. It was stated:

> 51. GNM seeks the above documents for a number of reasons. Importantly, the documents sought would greatly assist in facilitating a better understanding of the case and the Judgment itself. Further, the wider view of evidence referred to in the judgment and in open court would allow fair and accurate reporting of the matter.
>
> 52. The underlying subject matter discussed in the Judgment is of public interest including questions of compliance with Financial Conduct Authority and Prudential Regulatory Authority obligations as well as the Bank's handling of the dismissal. Consequently, the material is also sought to obtain further information to assist in enquiries. [emphasis added]

14. A copy of the liability judgment highlighting each passage in which a document was referred to and adding a description of the document was attached to GNM's submission.

15. EFG provided a written submission drafted by Thomas Croxford Q.C. contending that the employment tribunal was *functus officio* (had completed its task so had no remaining jurisdiction to make the order), had no power to require a party to provide any documents to either the employment tribunal (presumably by way of re-filing) or GNM, and that if any such discretionary power did exist the employment tribunal should decline to exercise it. EFG asserted that fair reporting of employment tribunal proceedings can only be undertaken by a journalist who has listened to the oral evidence (or at least has a transcript of the oral evidence). Mr Croxford contended that the ET Rules provide a full and appropriate scheme for access to documents during, but not after, a hearing. EFG contended that the employment tribunal would face very substantial practical difficulties in providing documents after a hearing.

16. The Guardian in its reply characterised the arguments advanced by EFG as follows:

> a. "the Tribunal is now functus officio and has no basis for hearing the application or making any Order as a result" **("the Functus Argument")**;
>
> b. "the Tribunal has no power to require a party to furnish either the Tribunal or GNM with any documents" **("the Vires Argument")**; and
>
> c. "if such discretionary power exists, the Tribunal should decline to exercise it" **("the Discretion Argument")**.

17. I shall adopt those labels for the three arguments that were initially advanced by EFG for resisting the order sought by GNM.

18. On 1 May 2019 the employment tribunal wrote to the parties stating that the panel had met but considered that it would be unwise to determine the application before the judgment of the Supreme Court in **Dring v Cape Intermediate Holdings Ltd**. EJ Lewis also noted that the employment tribunal did not hold clean copies of any of the documents other than the ET1 claim form and ET3 response.

19. On 29 July 2019 GNM wrote to inform the employment tribunal that the Supreme Court had given its judgment in **Dring** [2019] UKSC 38, [2020] AC 629. GNM emphasised that the Supreme Court held "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".

20. There was further correspondence, including about the ongoing delay. By letter dated 23 October 2019 Lewis Silkin stated that, having reflected on **Dring**, EFG accepted that the employment tribunal had the power to make the order sought, but contended that the power was subject to significant qualifications and restrictions. Accordingly, the Vires Argument and Functus Argument were no longer advanced, leaving only the Discretion Argument.

21. By the time the employment tribunal met in Chambers on 2 and 3 January 2020 the scope of the application was agreed:

> The issues as they now stand
>
> 14. The Guardian's application is now as follows:
>
> (a) For disclosure by the tribunal of the ET1 and ET3
>
> (b) For an Order that the respondent provide GNM with the following documents (since the tribunal does not hold clean copies):

(i) Skeleton arguments

(ii) Witness statements

(iii) Trial bundle; alternatively those documents in the trial bundle which were referred to in the tribunal's judgment.

(c) That GNM will pay copying costs of (a) and (b) above.

(d) That (a) and (b) above be disclosed without the redactions in respect of Bank clients generally and that the rule 50 order be lifted in relation to 'individual 2', 'relative 19' and 'relative 20'.

The decision of the employment tribunal

22. The decision of the employment tribunal ("the Decision") was sent to the parties on 9 January 2020. The employment tribunal ordered that copies of the ET1 claim form and ET3 response held by the employment tribunal would be provided to GNM. The employment tribunal refused to lift the anonymity order or to require that EFG provide the other documents requested. I shall return to the reasoning of the employment tribunal having set out the basis upon which the appeal is advanced.

The Notice of Appeal

23. By a Notice of Appeal, sealed by the EAT on 20 February 2020, GNM sought to appeal against the Decision. The appeal was limited, it being stated at paragraph 3 of the Notice of Appeal that:

> The Appellant does not seek to appeal the refusal of access to the trial bundle or refusal of the application to set-aside the Order made under Rule 50 for redaction and anonymisation.

Progress of the appeal

24. By an order dated 3 July 2020 Laing J permitted the matter to proceed to a full hearing. By an order dated 20 October 2020 Laing J permitted the Media Lawyers Association ("the MLA") to intervene.

The reasoning of the employment tribunal challenged in the appeal

25. The employment tribunal directed itself to the relevant law, in some considerable detail, at paragraphs 17 to 34 of the Decision. At paragraphs 41 to 46 the employment tribunal concluded that the principle of open justice was engaged, but only to a very limited extent:

> 41. Throughout our deliberations, we have borne in mind the overriding importance of the open justice principle.
>
> 42.Given the conflict of Convention rights and other interests in this case, we have scrutinised each element. It is for GNM to explain how granting access to the documents will advance the open justice principle.
>
> 43.Having regard to the three matters of public interest identified in Mr Pegg's letter, we find that the reason for requesting. access is to explore whether the Bank colluded with high-risk clients in breach of the UK's money-laundering regulations. Although GNM's formal submissions of 12 March 2019 add that the public interest included questions of compliance with regulatory authorities as well as the Bank's handling of the dismissal, we do not accept the latter was the purpose. It was not referred to in Mr Pegg's letter and is referred to only briefly as an afterthought in the legal submission. The Guardian has therefore not satisfied us that its purpose relates to the treatment of the claimant.
>
> 44. The Supreme Court in Dring identifies two principal purposes of the open justice principle. In short, they are to hold judges to account and subject them to public scrutiny, and to enable the public to understand how the justice system works and why decisions are taken. The Guardian's purpose does not advance these purposes because it does not aim to examine the claimant's treatment (which was the subject of his claim) or the tribunal's investigation of that issue.
>
> 45. We bear in mind that, had Guardian reporters attended the hearing, they could have made any use of the information revealed as they wished. However, they did not attend, and now make an application based on the principle of open justice.
>
> 46. We do not go as far as saying the principle of open justice is not engaged at all. Dring contemplates there could be further purposes for the open justice principle, although there is no indication as to what these might be. Furthermore, it is possible that GNM might pursue avenues of exploration which are tangentially relevant to the claimant's treatment and his case. However, this is not a situation where a newspaper wishes to report on the case itself or on issues of treatment of whistleblowers for example. When put into the equation with conflicting rights and interests, the argument that granting access will advance the open justice principle is weaker than it might otherwise be when a request is made by the media. [emphasis added]

26. The employment tribunal went on to refuse the application made in respect of redaction, including refusing to revoke the anonymity order. That determination is not a subject of this appeal.

27. The employment tribunal set out its reasons for ordering that copies of the ET1 claim form and ET3 response be provided from the employment tribunal file and refusing the request that EFG provide clean copies of the witness statements, skeleton arguments and redacted documents:

> 59. We now consider whether to grant GNM's application to disclose the various categories of documents (set out at paragraph 8 above), albeit still in their redacted form. Apart from an additional point on the trial bundle, our reasoning applies to all the categories.
>
> 60. A big concern here is that the request was made after the proceedings had concluded and that the tribuna1 no longer holds any documents apart from the ET1 and ET3. This would mean

making an order for disclosure against the respondent (the claimant says he has not retained hard copies) many months after the case has ended.

61.The Guardian did not apply for disclosure until roughly 6 weeks after the judgment was sent out and four months after the last day of the hearing. It is now 6. months since the last day of the hearing. It is true that the delay in dealing with the application has in part been due to tribunal availability, but some time lapse in dealing with applications is to be expected. Moreover, it was only logical to await the outcome of the Supreme Court decision in Dring.

62.Had GNM attended the original hearing and made its requests then, it would have been far simpler. Facilities are available for journalists to attend and see all the documents referred to. We appreciate that GNM may not have resources to attend every hearing, but we are in a more difficult situation now where an Order would have to be made against the respondent.

63. The respondent would have to retrieve the papers, identify clean copies, identify the categories of document ordered and supply them to GNM. It would have to calculate the copying costs, which GNM has undertaken to cover. It would be entitled to request the costs of legal supervision of the exercise. The tribunal could order this, but in turn the amount might become the subject of dispute.

64.Regarding the trial bundle, the tribunal did not at the hearing read the entire bundle. That would not be usual in a lengthy employment tribunal case where bundles are nearly always prepared prior to witness statements and frequently contain many hundreds of pages of irrelevant or unnecessary documents which are never referred to. We cannot now say which documents we did read other than those explicitly referred to us by the parties during evidence or set out by us in the judgment. If we were to order disclosure of only those documents referred to in the judgment, there is then the additional task, falling on either the respondent and/or the tribunal of identifying the page number of the documents referred to and highlit by GNM.

65. When weighed against the principle of open justice, we believe this is disproportionate. The case was heard in open court. There was a very detailed judgment. Other newspapers were able to make reports at the time. Media and other third parties were free to attend, listen and take copies. It is now more than 6 months after the hearing concluded and three months since the judgment was sent out.

66. We have mentioned why we do not believe the principle of open justice is powerfully engaged by the purpose of GNM's application. But even if we are completely wrong on that and it is a strong factor, we still think an Order against the respondent now would be disproportionate for the reasons given above.

67. Nevertheless, the tribunal does hold the ET1 and ET3 on file. It is not unduly onerous for the tribunal to make a copy of these two documents and send them to GNM. No redactions appear necessary to us and in any event, this is the form in which these pleadings appeared in the trial bundles. Copies of these documents will be sent to the respondent by separate letter. [emphasis added]

The appeal

28. The appeal is advanced on three grounds:

Ground 1-The Tribunal failed to properly define the scope of the open justice principle

Ground 2 -The Tribunal's decision that granting the documents would not advance the open justice principle was perverse

Ground 3 - The Tribunal's evaluation as to the proper balance between open justice and the countervailing factors tending away from disclosure was clearly wrong

The Answers

29. Mr Rozanov did not oppose the appeal. EFG submitted an answer relying on the employment

tribunal's grounds for refusing the application, and one additional ground:

> That the documents sought engaged or potentially engaged the Article 8 European Convention privacy rights of the individuals identified in them, as the Tribunal recognised in [50]-[54) of the Decision, with the result that in any event, before the Tribunal could lawfully direct access to any of the documents sought in accordance with s.6 of the Human Rights Act, GNM would be required to justify the disclosure of each document sought, rather than its compendious approach by an application for categories of documents.

The Law

Open Justice

30. In **Dring** Baroness Hale of Richmond PSC reiterated the oft stated importance of the open justice principle:

> As Lord Hewart CJ famously declared, in R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256, 259, 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'. That was in the context of an appearance of bias, but the principle is of broader application. With only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done."

31. The employment tribunal described the open justice principle at paragraph 41 as being of "overriding importance". The employment tribunal's self direction as to the importance of the open justice principle cannot be faulted:

> 18. The starting point is the common law principle of open justice. In *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2012] 3 All ER 551 CA, the Court of Appeal described the principle of open justice as follows:
>
> > Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. 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.
>
> 19. This was echoed by the Supreme Court in *R (on the application of C) v Secretary of State for Justice* [2016] UKSC 2:
>
> > The rationale for a general rule that hearings should be held in public was trenchantly stated by" Lord Shaw of Dunfermline in the leading case of Scott v Scott [1913] AC 417 at 477, [1911-13] All ER Rep 1 at 30. He quoted first from Jeremy Bentham:
> >
> > > In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any other checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.
>
> 20. In Scott v Scott [1913] AC 417 HL, Lord Atkinson acknowledged the importance of the principle in the following terms:

> ... The hearing of a case in public may be. and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect ...

The purposes of the open justice principle

32. In **Dring** Baroness Hale stated:

> 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* [2015] AC 588, Lord Reed JSC 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.

33. The employment tribunal directed itself as to the purposes of the open justice principle by reference to the two purposes identified by Baroness Hale in **Dring** and stated:

> *Dring* contemplates there could be further purposes for the open justice principle, although there is no indication as to what these might be.

34. The purposes of the open justice principle have been considered in a number of authorities, although at times there is possibly some conflation between the overlapping issues of the purposes of the open justice principle, the steps that need to be taken to achieve open justice and the use that can properly be made of material that comes to light as a result of a public hearing.

35. In **R v Legal Aid Board ex parte Kaim Todner** [1999] QB 966 Lord Woolf MR, when considering why the courts should be vigilant in considering applications that involve a derogation from the open justice principle, stated:

> Here a comment in the judgment of Sir Christopher Staughton in Ex parte P., The Times, 31 March 1998; Court of Appeal (Civil Division) Transcript No. 431 of 1998, is relevant. In his judgment, Sir Christopher Staughton states: "When both sides agreed that information should be kept from the public that was when the court had to be most vigilant." The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so

> important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.
>
> 5. Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary. [emphasis added]

The Public Interest

36. There is clearly a high public interest in justice being open. There is an important distinction between the public interest in the open justice principle and any specific public interest in the subject matter of the case being determined; they are different things. It is in the public interest that proceedings be conducted in public whether or not the subject matter of the proceedings raises any matter of public interest. The public need to be able to see that justice is being properly administered even in the most mundane of case. In **Fallows v News Group Newspapers Ltd** [2016] ICR 801, at paragraph 48(iii) Simler J (President) stated:

> The open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication in an employment case to contend that the employment tribunal proceedings are essentially private and of no public interest accordingly.

37. The open justice principle may also serve the important additional purpose of bringing to light matters of public interest. In **Home Office v Harman** [1983] 1 AC 280, 316 Lord Scarman stated:

> "Justice is done in public so that it may be discussed and criticised in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case."

38. Where a derogation from the open justice principle is being considered, in conducting the balancing exercise any public interest in the subject matter of the proceedings may be a factor that weighs in the balance towards the hearing being conducted in public.

Convention Rights

39. The employment tribunal properly directed itself as to the Convention rights that are in play in considering issues of open justice:

> 22. This principle of open justice is .also an aspect of the right to a fair trial, provided by art 6 of the European Convention on Human Rights. Art 6(1) says:
>
> > In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all Or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 23. Art 10 is also relevant. Art 10(1) says:
>
> > Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas Without interference by public authority and regardless of frontiers . ...
>
> 24. As with art 6, art 10 rights are qualified. Art 10(2) says:
>
> > The exercise of these freedoms, since it carries with it duties and responsibilities, may be-subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic Society ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> 25.Other Convention rights (including the right to respect for a private life under art 8) may outweigh the requirement for public access to judicial proceedings or pronouncements. Art 8 says:
>
> > 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> >
> > 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

40. The employment tribunal also properly directed itself as to the exercise to be conducted where Convention rights compete:

> 27. Where Convention rights give rise to competing interests, the House of Lords in *Re S (a child) (identification: restrictions on publication)*, [2004] UKHL 47, [2004J 4 All ER 683 said:
>
> > ... neither article has as such precedence over the other ... where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary .... the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each ... [emphasis added]

41. Just as there must be an intense focus on any competing Convention rights, if it is said that there should be a derogation from the open justice principle that is justified by factors other than countervailing Convention rights, the proportionality of any derogation must also be the subject of intense focus.

The Press

42. The employment tribunal repeatedly noted that a journalist from the Guardian could (and it is hard not to infer that the employment tribunal considered should) have attended the public hearing, in which case they would have been able to inspect the documents they were seeking after the event.

43. The role of the free press in open justice was summarised by Lord Sumption JSC in **Khuja v Times Newspapers Ltd**, [2017] UKSC 49, [2019] AC 161, paragraph 16:

> It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so.

44. The MLA pointed out in their written submission for this hearing:

> 34. Over the past decade the media's ability to cover court proceedings in all courts and tribunals has declined. While proceedings may take place in open court, it is no longer the case that media organisations will have the capacity to cover hearings to the extent that once was the case. Often it is only with retrospect, following a judgment, that the importance of proceedings is truly understood. For example, an unexpected result in proceedings may generate a legitimate interest in how proceedings were conducted and could raise issues of public interest and concern. Practically, a media even be aware of a particular case until a public judgment. In any case, it is only after judgment, in many cases, that editorial interest in a particular case can be determined.
> 35. It is simply not feasible for a media organisation to devote the resources to cover live proceedings. Often there is not continuous coverage of even the most important cases. The reality is that it is not possible, even for large media organisations (and particularly smaller ones), to cover every hearing. Effectively requiring a media organisation to send a reporter to a hearing in order to be able to properly report and obtain documents from the hearing would mean sending a reporter to every hearing on the off chance that there would be editorial interest in the case. It is simply not feasible. There are not enough journalists to cover this, and financially it would be ruinous. The burden placed on media organisations, as the Judgment appealed does, is wholly disproportionate.
>
> 36. This trend has been exacerbated by the unprecedented Covid-19 pandemic. In circumstances where resources and access has been necessarily reduced, the role of the media as a public watchdog should not suffer, and it need not suffer if a flexible approach to access to documents following the conclusion of proceedings is adopted.

45. It would be unrealistic not to take judicial notice of the fact that the resources of the media are limited, and increasingly thinly spread, with the consequence that just as in the case of members of the public there are "purely practical reasons" why the press cannot attend every hearing, or attend every day of a lengthy hearing. The press have an important role in reporting the judgments of courts and tribunals. It is in the public interest that they have the necessary information to be able to do so fairly and accurately.

46. Judges have recognised that they should not substitute their opinion about how a story should be reported for that of newspaper editors. The point made by Lord Rodger in **In re Guardian News and Media Ltd** [2010] UKSC 1; [2010] 2 AC 697, in the context of an application for an anonymity order is of general significance, para 63:

> Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH&Co KG v Austria* 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors". See also Lord Hope of Craighead in In re British Broadcasting Corpn [2010] 1 AC 145, para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.

The role of rules of procedure

47. Rules of procedure make provision as to the inspection of material so as to ensure open justice. For example CPR 32.13(1) provides that:

> A witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the court otherwise directs. [emphasis added]

48. The employment tribunal in this case considered the provisions in place at the time of the final hearing that permit inspection of documents during the course of a hearing:

> 37. Rule 44 says: 'Subject to rules 50 and 94, any witness statement which stands as evidence in chief shall be available for inspection during the course of the hearing by members of the public attending the hearing unless the Tribunal decides that all or any part of the statement is not to be admitted as evidence, in which case the statement or that part shall not be available for inspection.'
>
> 38. The respondent also draws our attention to the Presidential Guidance - General Case Management (2018). Guidance Note 2 paragraph 15 says that the tribunal will need 5 copies of the trial bundle for a full Tribunal including '1 to be shown to the public or media, where appropriate'. Paragraph 17 says:
>
> > 'Because it is a public hearing, the Tribunal will enable persons (including the press 8.nd media present at the hearing to view documents referred to in evidence before it (unless it orders otherwise).'
>
> 39. Paragraph 19 of Guidance Note 3 says that parties should bring 5 copies of their witness statements to the hearing if there is a full tribunal panel, ie 1 copy for the witness table, 1 for each member of the tribunal panel and '1 to be shown to the public and media, Where appropriate'.
>
> 40. Paragraph 24 says 'Rule 44 provides that any witness statement, which stands as evidence in chief, shall be available for inspection during the course of the hearing by members of the public (that includes media) attending the hearing.'

49. From 8 October 2020, no doubt as a result of the increased number of remote hearings during the Coronavirus pandemic, Rule 44 of the ET Rules was amended by addition of the words "Where a hearing is conducted by electronic communication under rule 46, inspection of the witness statement may be otherwise than during the course of a hearing."

50. The scheme in the employment tribunal permits inspection of witness statements and documents at the hearing. This begs the question of whether there is an implicit limitation allowing inspection during the hearing, but not thereafter. To cut to the chase – there is not. This is clear from the two key authorities that consider the approach to be adopted to applications to obtain documents after a hearing: **Regina (Guardian News and Media Ltd) v City of Westminster Magistrates' Court and another (Article 19 intervening)** [2012] EWCA Civ 420, [2013] QB 618 and **Dring**.

City of Westminster and **Dring**

51. It is important to understand the underlying facts in these two key authorities. In **City of Westminster** Toulson LJ set out the facts and the reasoning of the district judge:

> 7 Extradition proceedings were brought by the US Government under the Extradition Act 2003 against two individuals alleged to have been involved in the bribery of Nigerian officials by Kellogg Brown and Root (KBR), a subsidiary of the well known US company Halliburton.
> 8 The two people were Geoffrey Tesler, a London based solicitor, and Wojciech Chodan, a former executive of MW Kellogg, a company associated with KBR. Both men are British citizens.
>
> 9 The Tesler extradition application was heard over five days between November 2009 and January 2010. The Chodan application was heard on 22 February 2010. The hearings were conducted in open court throughout. The US Government was represented by David Perry QC and the defendants were similarly represented by leading counsel. The district judge gave judgment in the Tesler case on 25 March 2010 and in the Chodan case on 20 April 2010. Both defendants were ordered to be extradited.
>
> 10 Prior to the delivery of the district judge's judgments, the Guardian wrote to the court asking to be provided with copies of various documents which had been referred to in the course of the extradition hearings. In summary the documents were:
>
> > 1. The opening notes and skeleton arguments submitted on behalf of the US Government and the skeleton arguments submitted on behalf of the defendants.
> >
> > 2. Affidavits submitted by William Stuckwisch, the US senior trial attorney responsible for the conduct of the prosecutions.
> >
> > 3. Other affidavits or witness statements submitted by prosecutors for the US Department of Justice.
> >
> > 4. Correspondence between the Serious Fraud Office ("SFO") and the US Department of Justice discussing which agency should prosecute the case.

> 5. Correspondence between solicitors acting for MW Kellogg and counsel for Mr Tesler on the subject of whether MW Kellogg was being prosecuted by the SFO and an accompanying witness statement from the solicitor acting for Mr Tesler, which had been handed up to the judge at the hearing on 28 January 2010.

11 The judge gave a judgment on 20 April 2010 ruling against the Guardian. She acknowledged the importance of the principle of open justice. She emphasised that the public and press had not been excluded from any part of the proceedings. She stated that all the issues relied upon by any of the parties had been fully set out in oral submissions in open court by senior counsel in one case over a period of four days and in the other case over a whole day. Every member of the public and the press in attendance heard the clear and able expositions of all the issues in great detail. Copies of her written judgments setting out her reasons for ordering extradition were available to any member of the public or press requesting them. After considering the case law and the Criminal Procedure Rules she held that "this court does not have the power to direct the provision of the documents requested". She concluded by referring to problems which would arise if she were wrong in her view of the law:

> "Practical problems would arise if the view was taken that the decision I have just outlined is wrong in principle and that members of the press and the public may require as of right to be provided with written copies of documents and exhibits relied upon in the open court proceedings. There are a very large and growing number of extradition cases, many with a high public profile, passing through this court in a very tight timetable required by the Extradition Act [2003]. To whom would any 'direction' for the provision of the material be directed? In this case the applicants wish to see affidavits and files of correspondence some of which are provided by the Government, some of which are provided by the defence. In these cases alone the requested documents run to hundreds of pages. The court itself is provided the papers by the parties in extradition proceedings. Those documents are not usually retained by the court at the conclusion of the hearing but are forwarded to the Secretary of State, the High Court or returned to the parties as appropriate. The court has very limited court staff time and photocopying facilities. The practical problems in producing copies of voluminous correspondence in sufficient time for contemporaneous reporting of the case for any member of the press or the contemporaneous understanding of any member of the public, who required them as of right, whether or not they had attended the court hearing, would be immense and lead to inevitable delays and public expense. Open justice requires that criminal proceedings are conducted in open court with access to the public and the press who may see, hear and report on those proceedings and subject them to proper public scrutiny. That course has been followed in both these cases. I am not granting the application." [emphasis added]

52. Toulson LJ held that the open justice principle is a matter of inherent jurisdiction:

> 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. The fact that magistrates! courts were created by an Act of Parliament is neither here nor there. So for that matter was the Supreme Court, but the Supreme Court does not require statutory authority to determine how the principle of open justice should apply to its procedures.

53. The jurisdiction was not limited by the provisions of the Criminal Procedure Rules:

> 73 More fundamentally, although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice principle may be affected by an Act of Parliament, Parliament should not be taken to have legislated so as to limit or control the way in which the court decides such a question unless the language of the statute makes it plain beyond possible doubt that this was Parliament's intention. …

> 75 Similarly, 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. [emphasis added]

54. Toulson LJ considered the general merits of the application:

> 76 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.
>
> 77 Unless some strong contrary argument can be made out, the courts should assist rather than impede such an exercise. The reasons are not difficult to state. The way in which the justice system addresses international corruption and the operation of the Extradition Act 2003 are matters of public interest about which it is right that the public should be informed. The public is more likely to be engaged by an article which focuses on the facts of a particular case than by a more general or abstract discussion. [emphasis added]

55. Toulson LJ identified "four main counterarguments" which he rejected for the following reasons; the first was that "the open justice principle is satisfied if the proceedings are held in public and reporting of the proceedings is permitted":

> 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.

56. Of the second counterargument "that to allow the Guardian's application would be to go further than the courts have considered necessary in the past" Toulson LJ stated:

> 80 The second objection is correct but not of itself decisive. The practice of the courts is not frozen.

57. The third counterargument was that "in the present case the issues raised in the extradition proceedings were ventilated very fully in open court, and there is no need for the press to have access to the documents which they seek for the purpose of reporting the proceedings". Toulson LJ held:

> 82 I do not regard the third objection as a strong objection on the facts of this case. The Guardian put forward credible evidence that it was hampered in its ability to report as fully as it would have wished by not having access to the documents which it was seeking. 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.
>
> 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. It is true that there are possible alternative measures. A court may require a document to be read in open court, but it is not desirable that a court should have to take this course simply to achieve the purpose of open justice. A court may also declare that a document is to be treated as if read in open court, but that is merely a formal device for the exercise of a power to allow access to the document. I do not see why the use of such a formula should be required. It may have the advantage of ensuring that other parties have an opportunity to comment, but that can equally be achieved if, in a case such as the present, the applicant is required to notify the parties to the litigation of the application.

58. The fourth counterargument was that "that to allow the application would create a precedent which would give rise to serious practical problems":

> 84 I am not impressed by the fourth objection, based on the practical problems which it is said would arise if the Guardian's application were to succeed. Rule 5.8 of the Criminal Procedure Rules 2011 provides a sensible and practical procedure where a member of the public, including a reporter, wants to obtain information about a case or to inspect or copy a document. The applicant may be required to pay an appropriate fee; it must specify what it wants; and it must explain for what purpose the information is required.

59. Toulson LJ set out the default position:

> 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.

60. A significant factor in the assessment was the absence of a risk of harm to any other party:

> 87 In this case the Guardian has put forward good reasons for having access to the documents which it seeks. There has been no suggestion that this would give rise to any risk of harm to any other party, nor would it place any great burden on the court. Accordingly, its application should be allowed.

61. Toulson LJ recognised that the decision constituted a development of the common law:

> 90 Although I disagree with the reasoning of the courts below, I recognise that this decision breaks new ground in the application of the principle of open justice, although not, as I believe, in relation to the nature of the principle itself.

62. The Court of Appeal had adopted a considerably more restrictive approach 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. In **Dring** the Supreme Court took the opportunity to resolve the disparity in favour of the approach adopted in **City of Westminster** "from the vantage point of principle".

63. Again, it is instructive to consider the underlying facts as described by Baroness Hale:

> 2 This case is about how much of the written material placed before the court in a civil action should be accessible to people who are not parties to the proceedings and how it should be made accessible to them. It is, in short, about the extent and operation of the principle of open justice. …
>
> 3 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 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.
>
> 5 After the trial had ended, but before judgment was delivered, the PL claims were settled by a consent order dated 14 March 2017 and sealed on 17 March 2017. The CDL claim was also settled a month later, before judgment.
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> 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 r 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 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 r 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.

64. The employment tribunal in this case quoted the following key passage from the judgment of Baroness Hale:

> 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. ..
>
> 44 It was held in *Guardian News and Media* [2013] QB 618 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 [2015] AC 455, 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".
>
> 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.

> 48 It is, however, appropriate to add a comment about trial bundles. Trial bundles are now generally required. They are compilations of copies of what are likely to be the relevant materials- the pleadings, the parties' submissions, the witness statements and exhibits, and some of the documents disclosed. They are provided for the convenience of the parties and the court. To that end, the court, the advocates and others involved in the case may tag, mark or annotate their copies of the bundle as an aide memoire. But the bundle is not the evidence or the documents in the case. There can be no question of ordering disclosure of a marked up bundle without the consent of the person holding it. A clean copy of the bundle, if still available, may in fact be the most practicable way of affording a non-party access to the material in question, but that is for the court hearing the application to decide. [emphasis added]

Disclosure of documents to third parties

65. Baroness Hale added a coda about disclosure by a party to a third party after proceedings are concluded:

> 51 We would urge the bodies responsible for framing the court rules in each part of the United Kingdom to give consideration to the questions of principle and practice raised by this case. About the importance and universality of the principles of open justice there can be no argument. But we are conscious that these issues were raised in unusual circumstances, after the end of the trial, but where clean copies of the documents were still available. We have heard no argument on the extent of any continuing obligation of the parties to co-operate with the court in furthering the open justice principle once the proceedings are over. This and the other practical questions touched on above are more suitable for resolution through a consultative process in which all interests are represented than through the prism of an individual case.

66. It is to be noted that in **Dring** the disclosure was to a third party and, but for the fact that the Master had ordered re-filing of the bundles, most of the documents that were ordered to be provided to the applicant would not have been in the court's possession. While rules would be very welcome that deal with how such applications should be made and the practicalities of ordering disclosure and any costs reasonably associated, a court or tribunal can make such an order pending the enacting of such rules.

67. In **Blue v Ashley**, [2017] EWHC 1553 (Comm), [2017] 1 WLR 3630, while refusing an application to provide a third party with witness statements, that had been referred to at a pre-trial hearing but had not yet stood as evidence-in-chief, Leggat J stated at paragraph 10:

> The fact that the court may no longer have a copy of a document on its file (for example, because the document was filed only in hard copy and was returned after the hearing) will not prevent the court from ensuring that a non-party can obtain a copy, if the open justice principle requires this. The court could, for example, order one of the parties to file the document again or to provide a copy directly to a non-party. Moreover, there is nothing in the CPR which precludes the court from making an order under its common law powers to enable a non-party to obtain a copy of a document which has been served in the litigation, even if the document has not been filed by a party.

68. In **Goodley v The Hut Group** [2021] EWHC 1993 (Comm), Calver J ordered that a party provide a copy of a report referred to in a judgment given in 2014 to a journalist from the Guardian.

69. In this case EFG accepted that the employment tribunal did have the power to order it to provide the documents to GNM. The Vires Argument had been abandoned before the employment tribunal determined the application.

Referring to material in open court

70. Mr Callus placed considerable emphasis on his submission that there can be no reasonable expectation of privacy in matters which are ventilated in open court at a public hearing, although he accepted that there can be countervailing Article 8 rights. He relied on the judgment of Lord Sumption JSC in **Khuja**, a case in which an individual who had been referred to by name at a criminal trial sought an injunction to prevent the press naming him: paragraph 34:

> (1) PNM's application is not that the trial should be conducted so as to withhold his identity. If it had been, the considerations urged by Lord Kerr and Lord Wilson JJSC in their judgments in this case, might have had considerable force. But it is now too late for that. PNM's application is to prohibit the reporting, however fair or accurate, of certain matters which were discussed at a public trial. These are not matters in respect of which PNM can have had any reasonable expectation of privacy. The contrast between this situation and the case where a newspaper responds to a tip-off about intensely personal information such as a claimant's participation in private drug rehabilitation sessions could hardly be more stark.
>
> (2) That is not the end of PNM's article 8 right, because he is entitled to rely on the impact which publication would have on his relations with his family and their relations with the community in which he lives. I do not underestimate that impact. There is force in the judge's observation that the public nature of the trial, combined with the notoriety of the case, especially in the Oxford area, means that some people will know of the allegations about PNM in any event. But whether that be so or not, the impact on PNM's family life of what was said about him at the trial is no different in kind from the impact of many disagreeable statements which may be made about individuals at a high profile criminal trial. A defendant at such a trial may be acquitted, possibly on an issue of admissibility, after bruising disclosures have been made about him at the trial. Within the limits of professional propriety, a witness may have his integrity attacked in cross-examination. He may be accused by other witnesses of lying or even of having committed the offence himself. All of these matters may be exposed in public under the cloak of the absolute immunity of counsel and witnesses from civil liability, and reported under the protection of the absolute privilege from liability for defamation for fair, accurate and contemporaneous publication. The immunity and the privilege respect the law's conviction that the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public.

71. The fact that reliance can be placed on Article 8 rights even where information has been aired in open court is demonstrated by the decision of Heather Williams QC, sitting as a deputy High Court Judge, in **TYU v ILA Spa Ltd** [2022] ICR 287 in which a person who had not been a party, or a witness, in employment tribunal proceedings was stated in the judgment to have been "suspected

of dishonesty, which the employer had referred to the police, and that employees had told an internal investigation they had been frightened by her intimidating behaviour". In refusing an Order after the judgement had been issued to redact the person's name the employment judge had not carried out the fact-sensitive assessment to balance her Article 8 rights against Articles 10 and 6 and open justice. The matter was remitted, clearly on the basis that an anonymity order could potentially be made in such circumstances having regard to the individual's Article 8 rights, including protection of reputation.

The appellate test on balancing of Convention rights and proportionality applicable in the EAT

72. The test that the EAT should adopt when considering appeals against decisions of the employment tribunal on applications for orders that would derogate from the open justice principle, that involved balancing of Convention rights and deciding proportionality, has been considered on a number of occasions. The EAT has adopted a test derived from that applied by the civil courts. In **Fallows** Simler J described the test applied by the EAT:

> 51 Finally, before turning to the arguments advanced by Mr Tomlinson, both sides agree that the scope for this appeal tribunal to interfere with the employment judge's decision depends on a finding that there was an error of principle or that he reached a decision that was plainly wrong or outside the ambit of conclusions reasonably open to him. In *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554 the Court of Appeal identified the approach as follows:
>
> > 8. It is now clearly established that a balancing exercise between articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") conducted by a first instance judge is treated as analogous to the exercise of a discretion. Accordingly, an appellate court should not intervene unless the judge has erred in principle or reached a conclusion which was plainly wrong or outside the ambit of conclusions that a judge could reasonably reach: see, for example, Lord Browne of Madingly v Associated Newspapers Ltd [2008] QB 103, para 45. In JIH v News Group Newspapers Ltd [2011] EMLR 15, para 26, Lord Neuberger MR said: 'While [the decision of the lower court] did not involve the exercise of a discretion, it involved a balancing exercise, with which, at least as a matter of general principle, an appellate court should be slow to interfere.'

73. In **Queensgate Investments LLP and others v Millet (Media Lawyers Association intervening)** [2021] ICR 863, at paragraph 90, I quoted the passage in **AAA** in which the exercise was referred to as "being analogous to the exercise of a discretion". **AAA** was cited with apparent approval by the Court of Appeal in **PJS v News Group Newspapers** [2016] EWCA Civ 100 at paragraphs 42 to 43. However, when **PJS** reached the Supreme Court, **PJS v News Group**

Newspapers [2016] UKSC 26; [2016] AC 1061, three days after judgment was handed down in **Fallows**, Lord Mance added a note of caution in adopting reasoning by analogy, at paragraph 20:

> The exercise of balancing article 8 and article 10 rights has been described as "analogous to the exercise of a discretion": *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, para 8). While that is at best only an analogy, the exercise is certainly one which, if undertaken on a correct basis, will not readily attract appellate intervention. [emphasis added]

74. That passage from **PJS** was quoted with approval by the Supreme Court on the day this appeal was heard in **ZXC v Bloomberg LLP** [2022] UKSC 5 at paragraph 156.

75. The risk of drawing an analogy with the exercise of a discretion is that a decision that is made by exercising a discretion could result in a number of answers more than one of which could be right, whereas balancing Convention rights and assessing proportionality should only result in one right answer; the reticence of the appellate courts from intervening resulting from the fact that the first instance judge will generally be best placed to conduct the balancing exercise and determine the correct answer; and so should be subject to review on appeal with a due degree of deference.

76. After substantial judicial consideration, the test in appeals in the civil courts is now clear. The test was considered in the case of **In Re B** [2013] UKSC 33, [2013] 1 WLR 1911. Lord Neuberger stated at paragraph 91:

> 91 That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was "plainly" wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson JSC says in para 44, either "plainly" adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of it considers it to have been "merely" wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.

77. The test was approved, and slightly clarified, in **Regina (R) v Chief Constable of Greater Manchester Police and another** [2018] UKSC 47, [2018] 1WLR by Lord Carnwath:

> 64 In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle -whether of law, policy or practice- which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable law in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR r 52.11(3), it is not enough that

> the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34:
>
> > "the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong . . ."

78. In **TYU** Heather Williams QC quoted this paragraph from **R(R)** in setting out the correct appellate test in the EAT.

79. There is a potential distinction between the appellate test adopted by the civil courts, such as the Court of Appeal considering an appeal from the High Court and the EAT considering an appeal from the employment tribunal. Appeals to the Court of Appeal are governed by CPR 52.21:

> 52.21—(1) Every appeal will be limited to a review of the decision of the lower court unless—
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (2) Unless it orders otherwise, the appeal court will not receive—
>
> (a) oral evidence; or
>
> (b) evidence which was not before the lower court.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence. [emphasis added]

80. The appellate powers of the Court of Appeal are widely drawn. The drafting of CPR 52.21 explains the focus on the words "review" and "wrong" in the authorities about appeals to the Court of Appeal involving the balancing of Convention rights and proportionate interference with Convention rights. The appellate jurisdiction of the EAT is more narrowly drawn by Section 21 of the **Employment Tribunals Act 1996**:

> 21.— Jurisdiction of Appeal Tribunal.
>
> (1) An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an employment tribunal …[emphasis added]

81. Nonetheless, the EAT has adopted a test derived from the civil courts to appeals involving the balancing of Convention rights and proportionate interference with Convention rights.

82. The extent to which the appellate jurisdiction in such appeals may be limited where a statutory appeal is permitted only where an error of law is established was considered by the Supreme Court in **Director of Public Prosecutions v Ziegler and others** [2021] UKSC 23, [2021] 3WLR 179. **Ziegler** concerned an appeal by way of case stated to the Divisional Court pursuant to section 111 of the Magistrates' Courts Act 1980 which provides that:

> (1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved … [emphasis added]

83. The Supreme Court held by a majority, Lord Sales JSC and Lord Hodge DPSC dissenting (who considered the same test should be applied by all appellate courts to appeals against decisions that involved balancing Convention rights or considering whether an interference with a Convention right was proportionate), that any challenge to the underlying factual determination must be limited to where the determination was perverse, whereas the balancing of Convention rights or determination of whether there has been a proportionate interference with a Convention right could be overturned if the assessment was determined on review to be "wrong" because such an error in the balancing exercise would constitute an error of law.

84. Lady Arden JSC summarised her conclusion as follows:

> *Standard of appellate review applying to a proportionality assessment.* The standard of appellate review applicable to the evaluation of the compliance with the Convention requirement of proportionality is that laid down in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079 ("R (R)"), at para 64, which refines the test in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 ("In re B"), which was relied on by the Divisional Court. R (R) establishes a nuanced correctness standard but in my judgment that standard is limited to the evaluative assessment of proportionality and does not extend to the underlying primary and secondary facts to which (in this case) the test in *Edwards v Bairstow* [1956] AC 14 continues to apply. That test imposes an "unreasonableness" standard and so, unless it is shown that the findings were such that no reasonable tribunal could have made them, the primary and secondary factual findings of the trial judge will stand. Lord Hamblen and Lord Stephens JJSC agree with this: analysis of the standard applying to the findings of fact (judgment, para 49).

85. At paragraph 106 Lady Arden JSC stated:

> In short, I would hold that the standard of appellate review applicable in judicial review following R (R) should apply to appeals by way of case stated in relation to the proportionality assessment but not in relation to the fact-finding that leads to it. [emphasis added]

86. Lord Hamblen and Lord Stephens JJSC held at paragraph 52:

> Whilst we agree that the approach to whether there is an error of law in relation to an issue of

> proportionality determined in a case stated is that set out in In re B, as clarified by the later case law, *Edwards v Bairstow* remains the overarching appellate test, and the alleged error of law has to be considered by reference to the primary and secondary factual findings which are set out in the case.

87. I consider that in an appeal from the employment tribunal the EAT should adopt a similar approach; so that insofar as an appeal raises compliance with a Convention requirement of proportionality the overarching appellate test is that an error of law must be established; any underlying fact-finding can only be overturned if it is perverse, in the sense that no reasonable tribunal could have made it, whereas the evaluative assessment of proportionality based on those facts can be overturned on the **R(R)** nuanced correctness standard; if on a review as described in **R(R)** the assessment is held to be "wrong".

Conclusions

88. The employment tribunal referred to the "overriding importance" of the open justice principle, but treated it as being far from overriding in this case. The employment tribunal concluded at paragraph 44 that the open justice principle was not advanced by the purposes for which GNM sought the documents. The employment tribunal did not state that the open justice principle was not engaged at all, but held that it was weaker than might be the case in other applications for documents made by the Press. It is apparent from paragraph 44 that the employment tribunal considered that the two principal purposes underlying the open justice principle identified by Baroness Hale in **Dring** did not apply in this case.

89. GNM contends by Ground 2 that the determination was perverse and/or by Ground 1 that too narrow an approach was adopted to the open justice principle. EFG contends that the employment tribunal properly directed itself in law and reached a conclusion that was fully open to it.

90. I consider that the employment tribunal's conclusion that the open justice principle was not strongly engaged was fundamentally flawed because the employment tribunal focused only on the reasons GNM gave for contending that the subject matter of proceedings raised matters of public importance and did not consider the other reasons that GNM relied upon, which it described as journalistic reasons, to explain why they wished to obtain the documentation. It was the "journalistic"

reasons that were of particular relevance in considering the underlying purposes of the open justice principle.

91. The public interest matters referred to by the employment tribunal at paragraph 43 were those identified by GNM as arising from the subject matter of the judgment. The employment tribunal referred to 3 matters of public interest that were raised in the original application. In the application GNM did refer to 3 matter of public interest which it described as being "matters of legitimate public interest arising out of the matters contained in the judgment": (1) the assertion EFG had colluded with high risk clients and politically exposed persons; (2) that an employee of EFG had aided attempts to facilitate a large transaction sourced from an associate of a person who credibly had been accused of serious human rights atrocities and (3) evidence that senior management at EFG failed to take action when evidence emerged that an employee had failed to abide by anti-money-laundering regulations. The employment tribunal must have been referring at paragraph 43 to the passage in the application in which GNM set out the 3 reasons why it considered the subject matter of the judgment raised matters of public interest. That passage was followed by a further section in which Mr Pegg set out 4 "journalistic" reasons why he was requesting the documents: (1) to better understand the matters referred to in the judgement; (2) to ensure that any reporting of the matter was fair and accurate; (3) for the journalistic purpose of stimulating informed debate and (4) to obtain further information about the matter to assist in further enquiries. This passage was not referred to by the employment tribunal. The first two "journalistic" reasons clearly fall within the two principal purposes of the open justice principle identified by Baroness Hale in **Dring**, and the third, and possibly fourth, have at least some foundation in the wider purposes explained in the authorities mentioned above.

92. At paragraph 43, the employment tribunal having referred to the 3 matters of public interest identified above, stated that GNM in its subsequent written submission had sought to add, as further matters of public interest, the question of compliance with regulatory authorities and the bank's handling of the claimant's dismissal. The tribunal rejected those latter two matters as being genuine reasons why GNM considered the subject matter of the proceedings was of public interest. The

employment tribunal made this decision without GNM having been given the opportunity to comment on the suggestion that it was being disingenuous.

93. The employment tribunal did not refer to the preceding paragraph in which GNM stated that it sought the documents because they would greatly assist in facilitating a better understanding of the case and the judgement and so would allow fair and accurate reporting. These are matters that come firmly within Baroness Hale's core purposes of the principle of open justice.

94. At paragraph 43, the tribunal stated that the Guardian had not satisfied it that its purpose in seeking the documents related to the treatment of the claimant. The employment tribunal adopted far too narrow an approach to the open justice principle. Material should be made available so that the judgment can be properly understood. It may result in material being released that is of wider general public interest than the matters in issue in the particular hearing, as was stated by Lord Scarman in **Home Office v Harman**.

95. It is sufficient to allow this appeal that I consider that the first two "journalistic" reasons for seeking the documentation fell within the core purposes of the open justice principle. The employment tribunal erred in law in holding that the open justice principle was not strongly engaged. Far from this being a case in which the principal of open justice was not strongly engaged, the converse was the case. GNM set out proper journalistic reasons for seeking provision of the documentation. The public interest in the underlying subject matter of the proceedings was something that should also have weighed in favour of granting the application.

96. At paragraph 46, the tribunal, noted that in **Dring** Baroness Hale contemplated further possible purposes for the open justice principle in addition to the two that she had identified, but the tribunal stated that there was no indication as to what they might be. However, the authorities I have quoted above clearly go wider than the two principle purposes identified by Baroness Hale.

97. The employment tribunal had granted the application for redaction of client names and anonymity pursuant to Rule 50 ET Rules. When the employment tribunal considered the application for the provision of the documents in redacted form, the issue of countervailing Article 8 and/or

confidentiality rights had fallen away. Those matters were only raised by the employment tribunal in the section dealing with the question of whether the redaction should be removed and the Rule 50 order should be revoked. EFG sought to raise the issue of confidentiality and/or Article 8 rights in this appeal as being alternative reasons for supporting the Tribunal's decision refusing to provide copies of skeleton arguments, witness statements and the documents referred to in the tribunal's judgement. The assertion must be limited to the documents referred to in the judgment as it has not been suggested that personal information that would interfere with Article 8 rights or breach confidentially was set out in the skeleton arguments or witness statements. No examples have been given of how there would be such an interference with Article 8 rights or breach of confidentiality should the documents referred to in the judgement be provided to GNM.

98. EFG had, no doubt, in their application for the Rule 50 Order sought such protection as was necessary to protect the Convention rights of individuals and protect confidential information referred to in documentation in the bundle because the documentation would be available for inspection at the hearing. EFG's solicitors must have taken steps to ensure that the redaction was carried out properly to protect any such legitimate interests.

99. When considering the application for provision of redacted documents, the employment tribunal was weighing up what it described as the overriding principle of open justice against the practical difficulties that would arise from documentation being made available to GNM after the hearing, in comparison to what the situation would have been had the request been made at the hearing. The only significant reliance on practical difficulties prior to the decision of the employment tribunal was set out in Lewis Silkin's letter of 13 December 2018. The letter referred only to the bundle. It was stated that the respondent had retained a clean copy, but without prejudice to its position that it could not be put under any obligation to provide such documents, there would be "significant costs" involved in retrieving and locating the documents referred to in the judgment. There was no suggestion that there would be practical difficulty in retrieving and providing copies of the skeleton argument and witness statements. Mr Goudie, on instructions, suggested that there was

some unspecified difficulty in retrieving the witness statements and skeletons. It is implausible that the respondent, having known since 6 weeks after the judgement was sent to the parties, that the documentation was being sought by GNM, cannot easily obtain clean electronic copies of the skeletons and witness statements from their computer records.

100. I have identified what I consider to be the appropriate appellate test in this type of appeal. While decisions balancing Convention rights, or considering proportionate interference with Convention rights, can be overturned if they are "wrong", the EAT applies its usual deference to any underlying factual determinations. In this case there was no evidence to suggest that there was any real practical difficulty in providing copies of skeleton arguments and witness statements and no particularised evidence of any real difficulty or significant cost in providing copies of the redacted documents referred to in the judgment. The concerns that the employment tribunal raised of its own motion harked back to days where boxes of hardcopy documents would have to be obtained and then the relevant documents would need to be extracted and individually photocopied. The judgment conjures up a picture of a solicitor's office of the 70s. In **Dring** Baroness Hale noted that the increasing digitisation of court materials would make provision of documentation easier. That process has accelerated during the Coronavirus pandemic. Even without considering the computer systems a modern firm of solicitors will have, the simple fact is that no specific evidence of the costs associated with provision of the documents referred to in the judgment was provided by EFG.

101. In **Dring** Baroness Hale referred to the practicalities and proportionality of granting such requests and noted that it is highly desirable that an application is made during the trial. However, for reasons set out above, it is not always practical for the media to attend hearings even in some cases where there is a significant public interest in the case being properly reported. While I accept that the tribunal was entitled to note that the application could have been dealt with more easily at trial, I do not see how any practical difficulty resulting from the delay in the application could have been found by a reasonable employment tribunal to have been sufficient to countervail the principle of open justice.

102. By the time the tribunal determined the application, EFG had abandoned the functus and vires arguments. They cannot be revived on appeal. EFG cannot argue that the employment tribunal had no power to order that it provide the documents direct to GNM.

103. Many of the concerns raised by the employment tribunal were precisely those that were rejected by Toulson LJ in **City of Westminster**. It is not sufficient to suggest that because the hearing was held in public a Guardian journalist could have attended and that the public nature of the hearing was the limit of what could be necessary to secure open justice.

104. There was no evidence before the tribunal to suggest that there would be significant cost involved in providing the documents. In **Dring** it is stated that those seeking provision of documents may be required to pay reasonable costs. I consider that the costs referred to are those of copying documents. Often there will be no such costs in the digital age. I do not consider that the authorities support the suggestion of the employment tribunal that EFG's solicitors could charge for the cost of legal supervision when identifying and providing the documents. Parties are able to resolve their disputes in the employment tribunal free of charge. As a component of the costs of bringing or defending a claim the parties provide documentation to the tribunal. Subject to reasonable copying costs, where appropriate in this digital age, the very limited cost involved in complying with an application of the type in this appeal should be seen as part of the costs of preparation for the hearing, as is the provision of spare witness statements for the public at the hearing and ensuring that a an unmarked copy of the bundle is available for those attending. The fact that spare witness statements and a clean copy of the bundle were required to be available for the public at the hearing should mean that those copies would be available after the hearing without any additional expense.

105. In this case, the documents were clearly identified by GNM, both in tabulated form and by highlighting and identifying the documents on an annotated copy of the judgement. The application is now limited to provision of the documents referred to in the judgement. It is of a far more limited scope than the production of the vast quantities of documentation ordered in **Dring**.

106. I consider that the decision of the employment tribunal to give more weight to the possible minor inconvenience in providing the documents than to the principal of open justice means that the determination reached by the employment tribunal was wrong. If necessary I would say plainly wrong, and go so far as to find it was perverse in the sense of it being a decision that no reasonable tribunal could have reached in the circumstances of this case on a proper direction of law. This is an unusual case in which any Article 8 or confidentiality issues had been dealt with by redaction and by the Rule 50 Order. GNM, have chosen not to appeal the Rule 50 order or to seek unredacted documents and have wisely limited their application for redacted documents to those referred to in the judgment. In those unusual circumstances, I consider that applying the approach in **Jafri v Lincoln College** [2014] IRLR 544 this is a case in which there is only one possible right answer and that the order should be made in favour of GNM for disclosure of the documents sought in the appeal, subject to the payment of any reasonable copying costs; although I hope that the respondent will provide the documents in electronic form at no cost.

107. In this appeal the documentation that it is contended the employment tribunal should have ordered be supplied to GNM is considerably more limited than that sought in the original application made to the employment tribunal. The practical problems in dealing with such applications after a hearing are potentially much greater where documentation is sought from the bundle which may include material that raises Article 8 issues or otherwise infringes confidentiality rights of the parties, or others. In such cases it may be necessary for the matter to be considered at a hearing, as was suggested should be the general approach at paragraph 38 of **Goodley v The Hut Group** [2021] EWHC 1993. A particular issue may arise where, as is commonly the case, only part of a document has been referred to in an open hearing, often because only part of the document is relevant. Such documents are generally put in the bundles in their complete form so that any relevant section can be read in context. This means that there may be a great deal of irrelevant information that may raise issues of confidentiality and/or under Article 8. I do not consider that the fact that a section of a document has been referred to in an open hearing necessarily means that the whole document should

also be treated as having been referred to in the open hearing. There could be a document that may be relevant because it includes details of matters such as the claimants pay and personal information but also includes details about other employees' pay and personal information that is confidential and in respect of which there is no proper reason for the material to be put into the public domain.

108. It is important that in drafting skeleton arguments and witness statements parties remember that such documents can generally be inspected at hearings, and may be provided thereafter. Parties should also bear in mind that the bundle of documents will generally be open for inspection at or, in appropriate circumstances, after a hearing. This might provide a welcome spur to ensure that documentation provided in bundles is limited to that relevant, in the sense of supporting or being adverse to a party's case, and necessary to determine the issues in dispute.