LONDON SOLICITORS LITIGATION ASSOCIATION ("LSLA")

RESPONSE TO CONSULTATION BY THE CPRC ON ACCESS TO COURT DOCUMENTS BY NON-PARTIES: PROPOSED NEW CPR 5.4C

The LSLA was formed in 1952 and currently represents the interests of a wide range of civil litigators in London. It has over 3700 members throughout London among all the major litigation practices, ranging from the sole practitioner to major international firms. Members of the LSLA Committee sit on the Chancery Court Users Committee, the Rolls Building Users Committee, the Law Society Civil Litigation Committee and the Commercial Court Users Committee to name but a few. As a consequence, the LSLA has become the first port of call for consultation on issues affecting civil and commercial litigation in London, and it has on many occasions been at the forefront of the process of change. Representatives from the City of London Law Society also sit on the LSLA Committee.

This document sets out the response of the LSLA to the CPRC's consultation on a proposed new CPR5.4C.

The LSLA and its members recognise the paramount importance of open justice within the legal system of England and Wales – a foundational constitutional principle. As the Supreme Court has confirmed, the two-fold, principal purposes of open justice are to hold individual courts and judges to account and to enable the public to understand how the justice system works and why decisions are taken. Further, the LSLA considers that open justice and a well-functioning mechanism for providing access to court documents by non-parties together will encourage the use of England & Wales as a dispute resolution forum, giving litigants the opportunity to understand the workings of the court system and gather information as to how claims may progress through the courts.

Through this lens, the LSLA therefore welcomes the consultation on amending CPR5.4C, carefully considering its aims and also the practical realities for solicitors across London. As the LSLA's membership deal with a wide range of cases and act for a diverse range of parties, its members view the proposals from different perspectives when considering the impact on their practice. While this is naturally not necessarily the same for all practitioners, in this response, we seek to set out the common ground together with views on the more challenging practical issues that may need further consideration. We have focused on the principles, rather than the nuance of the precise drafting of the proposed new practice direction.

Rationale for current position

CPR5.4C plays only a small role in guaranteeing open justice – the far larger role being played by our court system (open to the public) and publication of judgments. However, as matters stand, CPR 5.4C addresses the supply of documents to a non-party from court records, specifying two categories of document that may be obtained by non-parties from the records of the court itself without needing any further permission (absent a specific order stating otherwise). The categories of document are (i) statements of case; and (ii) a judgment or order given or made in public. All of these documents are either filed by the parties with the court, or originate from the court, and are stored by the court as part of the court record. Obtaining copies is therefore straightforward both in terms of the legal basis (there is a clear express right) and practically (the court has the documents and can easily provide them, either electronically or in hard copy).

There is also a clear basis for sharing of these types of documents in a common law system which relies on binding precedent. It is helpful for practitioners and parties to see the full legal basis on which a judgment was made and the more information about the arguments before the court the better.

Similarly, it is helpful to see the specific form of orders that the court has previously made. These materials help parties and their legal advisors draw parallels or distinguish their own case.

Additional documents within proposed extended scope

The proposed amended CPR 5.4C seeks to extend the categories of documents which can be obtained by a non-party to include (subject to some nuance) skeleton arguments, witness statements and expert reports. Immediately it is clear that these are very different categories of documents, in that none of them are filed with the court in the same way that statements of case are filed, and nor are they issued by the court, like orders or judgments. Skeleton arguments may at least be provided to the relevant judge, and could be filed in some other way. Witness statements in the context of an application may be filed with the court but in a typical trial neither witness statements nor expert reports are ordinarily formally provided to the court save for in a hearing bundle. Accordingly, there is an immediate practical challenge (not addressed in the proposed amendments) of what the mechanism will be for provision of any of these additional categories of documents together with the cost associated (and who bears that cost). We return to this later.

Principle views

Parking any challenge of practical compliance and the precise drafting of the amended rule, we can see the rationale for codifying the common practice of providing copies of skeleton arguments, upon request, to individuals present at the hearing.

The current drafting of the proposed amended CPR5.4C seems to seek to address this scenario through sub-paragraphs 3(d) and 8. However, the drafting is ambiguous and leaves open the question about access to copies of skeleton arguments outside of this scenario, both in terms of right of access and process. This needs to be clarified so as to avoid any ambiguity, such that sub-paras 3(d) coupled with 8 provide for the exclusive right of access to skeleton arguments. Once a hearing has taken place, any non-party can obtain information about the hearing (and the arguments put forward by the parties) either through review of the judgment or (in many instances) by obtaining a transcript of the hearing through the usual routes.

We can also see that the question of access by individuals present at the hearing to copies of witness evidence (whether witnesses of fact or expert witnesses), where the relevant statement stands as the evidence in chief for that witness, merits careful consideration and discussion. However, this seem to us to be far less straightforward both in terms of the rationale for widespread access to these materials and on a practical basis how access is provided. There is not such an obvious compelling reason to provide non-parties with access to factual or expert evidence, which will by its nature be much more specific to the particular case. When weighed up against the following difficulties, the balance may fall in favour of a more restrictive regime for these documents.

There are five main issues that we see need to be considered further:

- **Confidentiality**: it is frequently the case that aspects of witness and expert evidence are confidential, are not read in open court, and in some cases are subject to confidentiality rings. The courts are used to dealing with these scenarios by, for example, reading silently certain sections of statements and or clearing court rooms for parts of hearings. This allows parties the comfort of using an open and well-respected forum for their dispute resolution, knowing there is a mechanism to preserve confidential information if strictly necessary. If a general right of access is given to witness statements and expert reports, in practice this is likely to lead to more requests by parties to restrict access to documents and require parties to

produce confidential and non-confidential versions of documents, potentially at significant cost, for the sole purpose of providing copies to non-parties if so requested. There could also be follow up requests for documents referred to in witness statements that would again add to cost and complexity, especially if such documents did not originate from the witness but were provided by other parties through disclosure.

- **Timing**: it is unclear from the proposed CPR 5.4C at what point in time non-parties may be able to obtain copies of witness statements or expert reports. To the extent there is any intention for rights of access to apply prior to the evidence standing as a witness' evidence in chief at a hearing, this creates a number of complex issues to be grappled with (such as witness independence, potential for intimidation and reluctance to give evidence) and seems to have less basis in the principle of open justice. There is also a risk of witness evidence being publicly quoted out of context if ready access is given to statements – whilst this risk exists presently, it only arises after evidence is given which neutralises somewhat the impact on the determination of the case.
- **Collateral use**: connected with the question of timing is the issue of collateral use. For example, there are specific provisions addressing the use by a party of witness evidence provided by the other party (for example, CPR 32.12). However, those provisions do not apply to non-parties. It would obviously be untenable to have a situation where a non-party can make use of a witness statement in, for example, other proceedings, but a party could not.
- **Process**: given that witness statements and expert reports are not typically held by the court, outside of the scenario envisaged in sub-paragraph 9 of the proposed amended CPR5.4C, it is far from clear what the process for a non-party to obtain copies of the evidence is intended to be.
- **Cost**: there is no mention in the proposed amended CPR5.4C of costs, who bears them (and the basis for this position), how they are to be determined and how they are to be paid. There are a number of different scenarios to be grappled with, including where different versions of documents are required to be prepared solely because a non-party has requested a copy. For example, if a document needed to be redacted before wider access was granted, this would likely fall to solicitors but would not obviously be a cost the client should bear.

Potential adverse consequences of expanding the rules too far

If the rules go too far, we can see three very real consequences, which – given the duties that solicitors owe to their clients – will be front and centre in the minds of solicitors.

- Applications under proposed sub-paragraph 4 will become routine in many (if not all) cases where there is any sensitivity about access to information by non-parties, even more so if there is any intention for access to be granted to non-parties prior to the hearing where the relevant witness or expert is called. This will potentially take up significant court time, together with adding additional costs for all parties involved.
- Greater consideration will be given by potential parties to avoiding the courts and referring matters to arbitration, to make use of the significantly greater protections on confidentiality. Whilst there are obvious benefits for the parties, this would significantly undermine the rationale put forward for these proposed amendments to CPR5.4C – open justice.
- England and Wales (particularly London) competes on the global stage as a dispute resolution centre, amongst strong competition from other jurisdictions and arbitral institutions. Open justice is a component of the attractiveness of the English and Welsh legal system. However, where international businesses perceive that there are significant downsides in the system, they will not hesitate to move their disputes elsewhere. Further, if professional expert

witnesses became more reluctant to participate in litigation rather than arbitration, this could be damaging to the quality of expert evidence before the courts.

Recommendation

In light of all of the above, we are fully supportive of clarifying expressly in CPR 5.4C that skeleton arguments are to be made available to non-parties present at the hearing to which the skeleton argument relates, and the obligation to provide those skeleton arguments (upon request) sits properly with the parties to the litigation. There are some details to be ironed out in the rules.

However, we are of the view that much more consideration needs to be given to the rationale, practical challenges and direct implications of a prescribed arrangement permitting access to witness evidence and expert evidence as a matter of course. Whilst we would be open to reviewing revised proposals, in light of the nature of the concerns outlined above, we presently find it difficult to see how our concerns could be resolved.

LSLA Committee

7 April 2024