Singapore Journal of Legal Studies
[2011] 510–532

ACCESS TO COURT RECORDS: THE SECRET TO OPEN JUSTICE

VANESSA **YEO***

This paper concerns the legal framework governing non-party access to court records in Singapore. It provides a brief comparative study of the access frameworks in Australia and the UK. From this comparative analysis, guiding principles and procedures are distilled to facilitate suggestions on how Singapore's current access regime may be reformed. Open justice and the freedom of information and expression may be fundamental principles, but they do not mandate an unquestioned right of access to judicial records as the interests of justice may be served by both disclosure and non-disclosure. Both principles must be balanced against competing considerations, such as confidentiality and the right to a fair trial. An access regime is not built on open justice alone. It must adeptly reconcile all the competing factors in a manner which best secures the proper administration of justice.

I. INTRODUCTION

Non-party access to court records is very much a live issue in many jurisdictions today. It raises interesting questions on the extent to which the court may control the disclosure of information on its records to the public. Recent legal developments in Singapore have suggested that this would be an opportune time to re-examine our legal framework governing non-party access to court records.[1] Generally, the court relies on the following mechanisms to regulate the availability of court information to the public: (a) holding a hearing *in camera* (*i.e.*, private hearings); (b) restricting access to documents on the court records; and (c) restricting the publication of proceedings and related court information, including the identity of parties and information pertaining to the existence of the proceedings themselves (*i.e.*, non-publication orders). This article examines the restrictions on access to documents on the court records in particular. After a brief introduction in Part I, Part II looks at the current legal framework governing non-party access to court records in Singapore. Part III focuses on the corresponding frameworks in Australia and the UK. Part IV

* I am grateful to Ms. Sarah Shi and Dr. Ou Yang Youheng for their invaluable comments and suggestions. All errors are, of course, my own.

[1] In December 2010, TODAY newspaper published an article based on information which access by the public had been restricted by a court order. MediaCorp Press, which publishes TODAY, had obtained the sealed information from a confidential source. The High Court eventually ordered MediaCorp Press to disclose the identity of its source. Both MediaCorp Press and the source also apologised to the Court for breaching its sealing order. See newspaper article titled "MediaCorp source apologises to court. PPL director said he did not know information was going public" *The Straits Times* (7 April 2011).

analyses the different approaches discussed in Part III and draws out some normative principles which govern access regimes. With the principles elucidated in Part IV in mind, Part V proposes improvements to the present access regime in Singapore.

Before commencing on the discussion proper, it must be noted that while this article only focuses on non-party access to court documents, any review of such a regime necessarily impinges on the two other mechanisms (*i.e.*, private hearings and non-publication orders), as all three mechanisms are interrelated with one another. For instance, public access to court proceedings is largely facilitated by the press' reporting of court proceedings, which in turn depends on the press having access to proceedings, either directly by being allowed to be present in proceedings, or indirectly by being allowed access to relevant court documents and transcripts. With this in mind, this paper turns to Part II, which concerns the current non-party access regime in Singapore.

II. The Current Framework in Singapore

The access regime in Singapore comprises of the *Rules of Court*,[2] statutory provisions governing access in specific situations[3] and the court's exercise of its inherent jurisdiction.

Order 60 rule 4 of the *Rules of Court* is the main rule providing for non-party access to court information. It reads as follows:

> Right to search information and inspect, etc., certain documents filed in Registry (O. 60, r. 4)
> 4.—(1) Any person shall, on payment of the prescribed fee and without leave of the Registrar, be entitled to search the information referred to in Rule 2[4].
> (2) Any person may, with the leave of the Registrar and on payment of the prescribed fee, be entitled during office hours to search for, inspect and take a copy of any of the documents filed in the Registry.

---

2 Cap. 322, R. 5, 2006 Rev. Ed. Sing. [*Rules of Court*].

3 For example, the *Legal Profession Act* (Cap. 161, 2001 Rev. Ed. Sing.), s. 93(6); *Women's Charter* (Cap. 353, 2009 Rev. Ed. Sing.), s. 2; *Business Registration Act* (Cap. 32, 2004 Rev. Ed. Sing.), s. 18.

4 "Rule 2" refers to o. 60 r. 2, which concerns information that is to be maintained by the Registry. Order 60 rule 2 states:

> (1) The Registrar shall cause to be maintained such information as is prescribed or required to be kept by these Rules and by practice directions issued by the Registrar. (2) The Registrar may maintain at his discretion all the information referred to in paragraph (1) in such medium or mode as he may determine.

The predecessor provision of o. 60 r. 2 prior to the *Rules of Court (Amendment) Rules 2006* (S. 637/2006 Sing.) [*2006 Amendments*] provided a list of documents to be kept by the Registrar. These comprised a cause book, an originating summons book, an originating motion book, an interpleader summons book, a summons in chambers book, a writs of execution book, a distress book, a probate book, a caveat book, a service book, an adoption book, an Accountant-General's direction book, an index of wills, registers of appeals (including a register of appeals to the Court of Appeal and a register of appeals from the Subordinate Courts) and such account books and other books as are prescribed or required to be kept by the then existing *Rules of Court*, *supra* note 2 and such other books as may from time to time be found necessary. This list of specific books, registers and indices was deleted by the *2006 Amendments* and replaced by a new concept of 'information' which the Registry must maintain (see Jeffrey Pinsler, *Singapore Court Practice 2009* (Singapore: Lexis Nexis, 2009) 1246).

(3) Nothing in paragraph (2) shall be taken as preventing any party to a cause or matter searching for, inspecting and taking or bespeaking a copy of any affidavit or other document filed in the Registry in that cause or matter or filed therein before the commencement of that cause or matter but made with a view to its commencement.

As can be seen, the type of document sought determines non-party access in Singapore. But for documents containing information which the Registry is obliged to maintain under o. 60 r. 2 (see o. 60. r 4(1)), non-parties must seek the Registrar's leave before access may be had to "any of the documents filed in the Registry" (see o. 60 r. 4(2)). Part II of *The Supreme Court Practice Directions*,[5] para. 23(4), supplements the *Rules of Court* by providing guidance as to the type of information which must be maintained under o. 60 r. 2. This includes: (a) details of all originating processes;[6] (b) details of writs of execution, writs of distress and warrants of arrest; (c) details of appeals filed in the Court of Appeal; and (d) any other information as may from time to time be found necessary. Upon payment of the prescribed fee (and where leave is additionally required, the grant of leave), non-parties have an unfettered right of access. This was affirmed by Yong Pung How C.J. in *Lee Kuan Yew v. Tang Liang Hong and another*[7]:

32 …Once revealed in court, [an affidavit] became a public record. Indeed, it seemed to us that is why O 60 r 4(1)[8] of the Rules of Court states: "Any person may, with leave of the Registrar and on payment of the prescribed fee, be entitled during office hours to search for, inspect and take a copy of any of the documents filed in the Registry."

33 We could find no authority, nor were we referred to any, to suggest that an affidavit, once read out before the court, remained protected from revelation in the absence of any privilege claimed. *Such a document became a public record, with the necessary consequence that there would appear to be an accompanying unfettered right to reveal it*.

In addition to o. 60 r. 4, the following provisions, *inter alia*, also facilitate non-party access to documents on the court records: (a) o. 42 r. 2 and 3, which govern access to judgments; (b) o. 68 r. 9, which provides for the confidentiality of adoption files; (c) o. 71 r. 47, which concerns access to wills; and (d) o. 89B r. 3, which concerns confidentiality of documents pertaining to production orders under o. 89B r. 2.

Other than by the *Rules of Court*, access to court information may be granted pursuant to the court's inherent jurisdiction. In the absence of specific legislation

---

[5] Supreme Court of Singapore, *The Supreme Court Practice Directions* [the *PD*], online: Supreme Court <http://app.supremecourt.gov.sg/data/doc/ManagePage/98/ePD2010/ePD2010.htm>.

[6] Including: (i) details of interlocutory applications; (ii) details of appeals filed therein; (iii) details of admiralty proceedings; (iv) details of caveats filed against arrest of vessels; (v) details of probate proceedings, including wills and caveats filed therein; (vi) details of bankruptcy proceedings; and (vii) details of winding up proceedings against companies and limited liability partnerships. See the *PD*, *ibid*. at para. 23(4)(a).

[7] [1997] 2 S.L.R.(R.) 862 [*Lee Kuan Yew*] at paras. 32-33 (C.A.) (emphasis added).

[8] *Lee Kuan Yew*, *ibid*. was decided before the *Rules of Court* were amended in 2006. The "O 60 r 4(1)" referred to in this paragraph is the present o. 60 r. 4(2).

and/or rules of court governing non-party access to documents on court records, the Australian and English courts have frequently exercised their inherent jurisdiction to grant non-party access. In *Law Debenture Trust Corporation (Channel Islands) Ltd. v. Lexington Insurance Co*,[9] Colman J., relying on the earlier case of *Gio Personal Investment Services Ltd. v. Liverpool and London Steamship Protection and Indemnity Association Ltd. and Others*,[10] invoked the court's inherent jurisdiction to allow non-party access to written opening submissions as he was of the view that such access would be in the interests of open justice. Colman J. had to rely on the court's inherent jurisdiction as provisions in the *English Civil Procedure Rules 1998*[11] before it was amended[12] did not allow him to grant such access.[13]

III. The Framework in Australia and the United Kingdom

A. *Australia*

1. *Common law right of access*

The Australian access regime is a composite of various legislative provisions and the Australian rules of court. There is generally no common law right of access to documents on court records in Australia, although the press may report on open court proceedings. In *John Fairfax Publications Pty Ltd v. Ryde Local Court*,[14] Spigelman C.J. of the New South Wales ("NSW") Court of Appeal explained this absence of a right of access with reference to the "principle of open justice", which he said was a principle and not a right in itself to court documents:[15]

> Neither the Claimants, nor the public at large, have a right of access to court documents. The "principle of open justice" is a *principle*, it is not a freestanding right. It does not create some form of Freedom of Information Act applicable to courts. As a principle, it is of significance in guiding the court in determining a range of matters including, relevantly, when an application for access should be granted pursuant to an express or implied power to grant access. However, it remains a principle and not a right.

The principle of open justice, which requires the court to conduct its business in public as a safeguard against judicial impropriety, is often the reason why non-parties should be allowed to access some court documents.[16]

A similar position was taken by the Supreme Court of Victoria in *Herald & Weekly Times Ltd v. The Magistrates' Court of Victoria*,[17] where the Court of Appeal said that the "open court" rule, as recognised in jurisdictions such as the UK, "has not

---

9 [2003] EWHC 2297 (Comm) (H.C.) [*Law Debenture Trust*].

10 [1999] 1 W.L.R. 984 (C.A.) [*GIO Personal Investment*].

11 S.I. 1998/3132 [*CPR*].

12 [*Former CPR*].

13 Access was possible under neither the *Former CPR*, r. 5.4(2) (as the documents were not part of the court's records) nor the *Former CPR*, r. 31.22 (as the documents belonged to counsel, and not the party).

14 [2005] NSWCA 101 [*John Fairfax*].

15 *Ibid.* at para. 29 (emphasis in original).

16 *Infra* Part IV.B.

17 [2000] 2 V.R. 346 (Vic. S.C.A.) [*The Herald CA*].

yet been extended to acknowledge any such right [of access]".[18] There are echoes of the *John Fairfax* distinction between a *principle* and a *right* in this case. Both the NSW and Victorian Courts of Appeal found that the principle of open justice did not operate to accord non-parties a right of access to court documents.

John Fairfax and *The Herald CA* ought to be read with the case of *Titelius v. Public Service Appeal Board & Ors*,[19] where the Supreme Court of Western Australia diverged from its NSW and Victorian counterparts to find a general common law *right* to inspect court orders made in open court, unless a statute or the court precluded access. It must be noted that this right of access in Western Australia is a narrowly circumscribed one, as it pertains only to *court orders* and not other types of documents on court records. Ipp J. was of the view that there was "considerable authority" that pleadings, affidavits, and other documents filed in court were "not ordinarily available for public inspection".[20]

B. *Access Under Statutes*

Since non-parties do not have an automatic right to access court records in most Australian courts, rights of access only exist where, and to the extent that, they are provided for by the rules of court and other legislative provisions.[21] The Australian courts are generally allowed to promulgate their own rules pertaining to access. This has led to the development of markedly different access regimes across Australia.

The miscellany of approaches which have developed across Australia may be roughly grouped into four categories. The first group consists of regimes, such as those of the High Court of Australia, which confer on non-parties unqualified rights of access to documents held on court records. In the High Court of Australia, any person may, with the exception of some documents, inspect and/or take copies of "any document filed in an office of the Registry".[22] Some commentators have attributed this "liberal position on access" to the fact that work at the High Court is primarily appellate in nature. It does not conduct trials as such and rarely examines witnesses.[23]

---

[18] *The Herald CA*, *ibid.*, at para. 40.

[19] [1999] WASCA 19 [*Titelius*].

[20] *Titelius*, *ibid.* at para. 99.

[21] See *e.g.*, *Civil Procedure Act 2005* (N.S.W.), s. 72 (information which may allow a party or witness to be identified); *Witness Protection Act 1995* (N.S.W.), s. 26 (disclosure of the identity of witnesses in legal proceedings). For a list of other legislative provisions restricting access to court files in New South Wales, see also Austl., Commonwealth, New South Wales Attorney General's Department, *Review of the Policy on Access to Court Information* (April 2006) [*NSW Review*] at 9, online: Attorney General's Department of NSW <http://www.agd.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/vwFiles/Access_to_Court_Information.pdf/$file/Access_to_Court_Information.pdf>.

[22] See *High Court Rules 2004* (Cth.), r. 4.07.4, online: Australian Government ComLaw <http://www.comlaw.gov.au/Details/F2011C00009/Html/Text#param17>. The excluded documents are: "affidavits and exhibits to affidavits which have not been received in evidence in Court" (r. 4.07.4(a)) and "documents containing information disclosing the identity of a person where disclosure of the identity of that person is prohibited, whether by Act, order of the Court or otherwise" (r. 4.07.4(b)).

[23] See Sharon Rodrick, *Open Justice, the Media and Avenues of Access to Documents on the Court Record* (2006) 29(3) U.N.S.W.L.J. 90 [*Rodrick*] at 128, online: University of New South Wales Law Journal [*Rodrick*] <http://www.austlii.edu.au/au/journals/UNSWLJ/2006/40.html>.

The second group allows non-parties *prima facie* access to documents on court records, but gives the court the power to restrict access. This describes the position taken by the Victorian Supreme Court in respect of civil proceedings.[24] The *Supreme Court (General Civil Procedure) Rules 2005* lays out a presumption in favour of access,[25] unless the documents sought are "confidential" in nature.[26] *XYZ 1 v. State of Victoria*[27] suggests that it would be rare for an entire file to be sealed for confidentiality.[28]

The third group of jurisdictions simply requires leave for non-party access in all cases, thereby granting the courts a wide discretion to determine access. Prior to 2010, the Supreme Court of New South Wales fell within this group. Before the Court of Information Act 2010 was introduced,[29] rule 36.12(2)(b) of the *Uniform Civil Procedure Rules 2005* (N.S.W.)[30] provided that pleadings and documents other than judgments or orders that had been filed in proceedings could only be accessed by non-parties "appearing to have a sufficient interest in the proceedings".[31] The Supreme Court of New South Wales Practice Note No. SC Gen 2 on Access to Court Files additionally provided that "[a] person may not search in a registry for or inspect any document or thing in any proceedings except with the leave of the Court",[32] and that "[a]ccess to material in any proceedings is restricted to parties, except with the leave of the Court".[33] It appears that non-party access would usually be granted in respect of a specified list of documents, unless the judge or registrar dealing with the application considered that those documents should remain confidential. These documents were listed in para. 7 of the NSW Practice Note on Access to Court Files,[34] and included: (a) "pleadings and judgments in proceedings that have been concluded, except in so far as an order has been made that they or portions of them be kept confidential"; (b) "documents that record what was said or done in open court"; (c) "material that was admitted into evidence";[35] and (d) "information that would have been heard or seen by any person present in open court". The courts in NSW

---

[24] *Cf.* the position *vis-à-vis* criminal proceedings. See *Supreme Court (Criminal Procedure) Rules 2008* (Vic.), r. 1.11(4), which prohibits inspection of documents filed in a proceeding to which the rules relate, unless the court or the relevant officer of the court so directs.

[25] *Supreme Court (General Civil Procedure Rules) 2005* (Vic.), r. 28.05(1) Online: Australian Legal Information Institute <http://www.austlii.edu.au/au/legis/vic/consol_reg/sccpr2005433/s28.05.html>.

[26] *Ibid.*, r. 28.05(2). For a list of confidential files and documents on files, see online: Supreme Court of Victoria <http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/Supreme+Court/Home/Practice+and+Procedure/Prothonotary_s+Office/File+Searches/>.

[27] [2001] VSC 233 [*XYZ 1*].

[28] *XYZ 1*, *ibid*. at para. 23.

[29] Court of Information Act 2010 No 24 (NSW.) [Court of Information Act 2010], Online: 12 Australian Legal Information Institute <http://www.austlii.edu.au/au/legis/nsw/consol_act/cia2010216/>.

[30] [*Uniform Civil Procedure Rules*].

[31] For access to judgments and orders, see *Uniform Civil Procedure Rules*, *ibid*., r.36.12(1), online: Australasian Legal Information Institute <http://www.austlii.edu.au/au/legis/nsw/consol_reg/ucpr2005305/s36.12.html>.

[32] Supreme Court of New South Wales, *Supreme Court—Access to Court Files*, Practice Note No. SC Gen 2 [*NSW Practice Note on Access to Court Files*] at para. 5, online: New South Wales Supreme Court <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/355>.

[33] *Ibid*. at para. 6.

[34] *Ibid*. at para. 7.

[35] Such material includes, *inter alia*, physical exhibits. Increasingly, parties are using electronic mediums in proceedings, such as video and audio tapes, CD-roms and DVDs. Arguably, these could fall within "material that was admitted into evidence".

were reluctant to allow non-parties access to documents in ongoing proceedings as they were of the view that "material that is ultimately not read in open court or admitted into evidence" should not be released to the public.[36] As for documents which did not fall within the list enunciated in para. 7, for instance, "documents which are only partly read out in court, or which are not read out but merely referred to, or which are simply handed up to the judicial officer without being admitted into evidence, for example, hand-up briefs",[37] para. 7 additionally provided that non-parties could not access such documents unless a judge or registrar was satisfied that there were "exceptional circumstances" justifying access.[38]

Not all material which was held by the court fell to be considered for non-party access under para. 7. Paragraph 14 of the *NSW Practice Note on Access to Court Files* stated that often, affidavits and witness statements which had been filed in proceedings were never read in open court because they "contain matter that is objected to and rejected on any one of a number of grounds or because the proceedings have settled before coming on for hearing".[39] Non-parties could not be able to access such documents. Access to "scandalous, frivolous, vexatious, irrelevant or otherwise oppressive" material in affidavits, statements, exhibits and pleadings could also be denied, as the court had the power under the *Uniform Civil Procedure Rules* to strike such material out.[40] Even where material had been "read in open court or is included in pleadings", there could nevertheless still be "good reason for refusing access" to them.[41] Paragraph 16 of the *NSW Practice Note on Access to Court Files* provides that otherwise unobjectionable material may concern "matters that are required to be kept confidential by statute" or by "public interest immunity considerations (e.g. applications to authorise listening devices, affidavits in support of suppression orders)".[42]

The fourth and final group of jurisdictions combines the three approaches illustrated above. The *Federal Court Rules 2011* articulate a specified list of documents which non-parties may access as of right unless the court orders otherwise.[43] Documents which do not fall within this list require leave for access.[44] Documents falling within this specified list include originating applications or cross-claims, judgments, orders, pleadings, and statement of facts. Similarly, the NSW Court Information Act 2010, which was enacted last year to overhaul the previous complex system governing access to court information in New South Wales, distinguishes between "open access information" and "restricted access information". The former category of information includes originating process, pleadings, written submissions, transcripts for open court proceedings,[45] statements and affidavits admitted into

36 *NSW Practice Note on Access to Court Files*, *supra* note 31 at para. 15.

37 See Austl, Commonwealth, New South Wales Law Reform Commission, *Contempt by Publication* (Report No. 100) (2003) at footnote 14 read with para. 11.6, online: Law Link, New South Wales <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r100toc>.

38 *NSW Practice Note on Access to Court Files*, *supra* note 31 at para. 7.

39 *NSW Practice Note on Access to Court Files*, *supra* note 31 at para. 14.

40 *Ibid*.

41 *NSW Practice Note on Access to Court Files*, *supra* note 31 at para. 16.

42 *Ibid*.

43 See, respectively, *Federal Court Rules 2011* (Cth.) [*Federal Court Rules 2011*], r. 2.32(2), online: Australian Government ComLaw <http://www.comlaw.gov.au/Details/F2011L01551>.

44 *Federal Court Rules 2011*, *ibid*., r. 2.32(4).

45 *Court of Information Act 2010*, *supra* note 28, at s. 5.

evidence, records of judgment given, and any direction or order made in proceedings. Access to such information may be had unless the court otherwise orders in a particular case.[46] The latter includes all information that is not "open access information". Such information includes information in affidavits or statements which have been rejected, struck out or otherwise not admitted.[47] Access to "restricted access information" requires leave of the court.[48]

C. *United Kingdom*

1. *General framework of access*

The basic position under English law is that the common law does not give non-parties any right of access to judicial records. Thus, non-parties have no right to access documents on court records except where expressly provided for by statute.[49] The denial of an automatic right of access flows from the fact that the court's records are "not a publicly available register" but "a file maintained by the court for the proper conduct of proceedings".[50]

The primary provisions governing the availability of documents to non-parties in civil proceedings can be found in the English rules of court (*i.e.*, the *CPR*[51]), and other statutory provisions which govern access in specific situations.[52] *CPR* r. 5.4C provides a comprehensive regime governing the access to and disclosure of court documents to non-parties. A closer look at *CPR*, r. 5.4C suggests two significant features.

First, it does not lay down a general rule that the public has full and unqualified access to documents held on the court records.[53] Rather, the framework is a bifurcated one. Some documents may be accessed as of right, others require permission to be accessed.

Second, the type of document sought affects the ease and extent of access. English law draws a distinction between, on one hand, "a statement of case"[54] and "a judgment or order given or made in public (whether made at a hearing or without a

---

46 *Court of Information Act 2010*, *supra* note 28, at s. 8.

47 *Court of Information Act 2010*, *supra* note 28, at s. 6.

48 *Court of Information Act 2010*, *supra* note 28, at s. 9.

49 See *Dobson v. Hastings* [1992] Ch. 394 [*Dobson*] and *Gio Personal Investment*, *supra* note 10. For a historical background to the UK's position on non-party access to documents on court files, see William Ollie Key, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or on Camera* (1982) 16 Ga. L. Rev. 659; *Rodrick*, *supra* note 23.

50 *Dobson*, *ibid.* at 401.

51 *Supra* note 11.

52 Such as proceedings related to family and insolvency matters.

53 *Chan U Seek v. Alvis Vehicles Ltd* [2004] EWHC 3092 at para. 21 (Ch.) [*Chan U Seek*].

54 For the meaning of "statement of case", see *CPR*, *supra* note 11, r. 2.3 (Interpretation). It includes, *inter alia*, claim forms, particulars of claims (where not included in a claim form), and defences. Under the *CPR*, proceedings are commenced by a "claim form", rather than by writ of originating summons (*CPR*, r. 7.2.1); formal exchanges between parties are known as "statements of case", rather than "pleadings". A statement of case includes the "particulars of claim" (known as the "statement of claim" in Singapore), the defence and any corresponding reply.

hearing)" in *CPR*, r. 5.4C(1)[55] and, on the other, "any other document filed by a party, or communication between the court and a party or another person" in *CPR*, r. 5.4C(2). Non-parties may, without first obtaining the court's permission, obtain a copy of documents falling under *CPR* r. 5.4C(1), but access to documents under *CPR* r. 5.4C(2) is contingent on the court's permission. The significance of this distinction can be seen in *ABC*, where Lewison J. remarked:[56]

> Under [*CPR*, r. 5.4C], the default position is therefore that [a non-party] is entitled to a copy of a statement of case; but not any other document. Thus even if he wanted to see a copy of a witness statement, deployed in the course of a trial held in public, the default position is that he is not entitled to it. He is entitled to a copy of a judgment or order given or made in public, but not to a judgment or order given or made in private.

It was this distinction which led Lewison J. to conclude that an order to seal an entire court file from non-parties was inappropriate and unnecessary.[57] As "an order will always be necessary for a non-party to obtain anything other than a statement of case or a judgment or order made or given in public",[58] orders to pre-emptively seal the whole file thus "serve[d] no useful purpose".[59] There was no need to pre-emptively prevent access where no access existed in the first place.

2. *Documents under CPR, r. 5.4C(1)*

vis-à-vis access to documents falling within *CPR*, r. 5.4C(1), the fact that leave is not required does not mean that non-parties may access them at liberty. *CPR*, r. 5.4C(3) imposes restrictions on their availability. These limitations are based on the stage at which proceedings are when access is sought.[60] Generally, the statement of case

---

[55] *Supra* note 11. See also *Miscellaneous Provisions Relating to Hearings*, Practice Direction 39A [*Practice Direction 39A*] at para. 1.11, online: Justice <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part39a.htm>, where a member of the public may obtain a copy of an order made at a hearing in public if he pays the appropriate fee. See also *ABC Ltd v. Y* [2010] EWHC 3176 at para. 9 (Ch.) [*ABC*].

[56] *ABC*, *supra* note 51 at para. 9.

[57] In *ABC*, Master Bowles had ordered that, subject to further order, "non-parties may not obtain copies of documents on the court file". Later, a consent order was recorded and, among other things, Master Bowles' order relating to the sealing of the court file was made permanent.

[58] *ABC, supra* note 51 at para. 10.

[59] *Ibid*. at para. 9.

[60] *CPR*, r. 5.4C(3) states:

> A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if—
>
> (a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;
>
> (b) where there is more than one defendant, either—
>
> (i) all the defendants have filed an acknowledgment of service or a defence;
>
> (ii) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;
>
> (c) the claim has been listed for a hearing; or
>
> (d) judgment has been entered in the claim.

or judgment or order may only be obtained after an acknowledgment of service or defence has been filed, the claim has been set down for hearing, or judgment has been entered.

Where a non-party is entitled to a copy of the statement of case under *CPR*, r. 5.4C(1), a party or any person identified in that statement of case may apply for relief under *CPR*, r. 5.4C(4), including an order that the non-party be restrained from obtaining a copy of the statement of case. However, the court's power to restrict access under *CPR*, r. 5.4C(4) is confined to that of statements of cases and nothing else. *ABC*[61] is authority that *CPR*, r. 5.4C(4)(d), which gives the court power to "make such order as it thinks fit", does not allow the court to restrict access to other documents on the record.[62] Indeed, it has been said that there is no need for the court's powers under *CPR*, r. 5.4C(d) to cover other parts of the court records, since permission to access documents falling outside *CPR*, r. 5.4C(1) is always required.[63] Lewison J. also remarked in *ABC* that he "[did] not see what power [was] given to the court to order that a non-party may not obtain a judgment or order given or made in public".[64]

When will orders under *CPR*, r. 5.4C(4) be made? Case law suggests a threshold of necessity and proportionality, *i.e.*, such orders will only be made where it is necessary and proportionate to do so. Orders must also be limited to what the particular circumstances of the case require. Tugendhat J. cautioned in *G & G v. Wikimedia Foundation Inc* that:[65]

> Hearings in private under CPR 39.2 (3) and orders under CPR 5.4C (4) are derogations from the principle of open justice. They must be ordered only when it is necessary and proportionate to do so, with a view to protecting the rights which claimants (and others) are entitled to have protected by such means. When such orders are made, they must be limited in scope to what is required in the particular circumstances of the case.

3. *Documents under CPR, r. 5.4C(2)*

CPR, r. 5.4C(2) encompasses a wide range of documents, and non-parties must "identify the documents or class of document in respect of which permission is sought and the grounds relied on" in their applications for access.[66] The "general tenor" of the law appears to favour disclosure of documents that have "entered into the public domain".[67] This facilitates access to a wide range of documents, including transcripts that were read in court or by the judge "as part of his responsibility for

61 *Supra* note 51.

62 *ABC, supra* note 51 at para. 9.

63 *Ibid.*

64 *ABC, supra* note 51. at para. 10.

65 [2009] EWHC 3148 at para. 17 (Q.B.) [*Wikimedia*]. Cited with approval in ABC, *supra* note 54 at para. 19. See also *Gray v. UVW* [2010] EWHC 2367 (Q.B.); *JIH v. News Group Newspapers Ltd* [2010] EWHC 2818 (Q.B.).

66 *Court Documents*, Practice Direction 5A [*Practice Direction 5A*] at para. 4.3, online: Justice <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part05a.htm>. See also *Dian AO v. Davis Frankel and Mead (a firm) and another (OOO Alfa-Eco intervening)* [2005] 1 W.L.R. 2951 (Q.B.) [*Dian AO*].

67 *Chan U Seek, supra* note 49 at para. 30.

determining what order should be made",[68] statements of witnesses who testified at trial,[69] written submissions,[70] skeletal arguments[71] and judgments which were given in private (arguably on the basis that they fall within the category of "communication between the court and a party"[72]).[73] The access regime is not limited to documents in ongoing cases, but also includes documents in concluded cases. In *Chan U Seek*,[74] Park J. noted that there was no provision restricting non-party access to documents in ongoing actions. He further observed that Coleman J. and Moore-Bick J. had ordered the disclosure of documents in *Law Debenture Trust*[75] and *Dian AO*[76] respectively. Although both involved cases which had come to an end, disclosure was nevertheless ordered on both occasions. While both cases were decided before *CPR*, r. 5.4C was introduced, there is nothing in the wording of *CPR* r. 5.4C(5) which suggests that Park J.'s observations in *Chan U Seek* is no longer relevant.

4. *Court's discretion in respect of Category Two documents*

The court's discretion to allow access to documents under *CPR*, r. 5.4C(2) is to be exercised in accordance with the *CPR*'s overriding objective of ensuring that cases are disposed of justly.[77] Accordingly, it was said in *Dian AO*[78], *ABC*[79] and *Pfizer Health AB v. Schwarz Pharma AG*[80] that where the purpose of seeking access is to monitor that justice was done, particularly in an ongoing case, access ought to be granted,[81] for the principle of open justice would be operating at its strongest. However, where access is not sought for that purpose, but the court has nevertheless read those documents and the applicant has a legitimate interest in seeking access, the court would still lean in favour of disclosure.[82] As for documents which were filed but not read by the court, access would still be granted, but only if there are "strong grounds for thinking that it is necessary in the interests of justice to do so".[83]

---

[68] *Barings plc. (in liquidation) v. Coopers & Lybrand (a firm) and Others* [2000] 1 W.L.R. 2353 at para. 52 (C.A.). See also *Practice Direction 39A*, *supra* note 51, which provides that anyone who pays the appropriate fee can obtain a transcript of a hearing in public (*Practice Direction 39A*, para. 6.3) or a transcript of a judgment given in public (*Practice Direction 39A*, para. 1.11).

[69] *CPR*, r. 32.13 allows a non-party to inspect, during the course of trial, witness statements which are being used as evidence-in-chief, unless the court orders otherwise.

[70] See *Gio Personal Investment*, *supra* note 10, where the UK Court of Appeal said that a non-party was *prima facie* entitled to inspect and make copies of the written opening submissions or skeleton arguments which the trial judge had referred to, provided the court had accepted that they were substitutes for oral submissions, and the non-party had legitimate reasons for wanting copies of them. See also *Law Debenture Trust*, *supra* note 9.

[71] *Ibid*.

[72] *CPR*, *supra* note 11, r. 5.4C(2).

[73] *ABC*, *supra* note 51 at para. 9.

[74] *Supra* note 49.

[75] *Law Debenture Trust*, *supra* note 9.

[76] *Supra* note 62.

[77] See *CPR*, *supra* note 11, r. 1.2.

[78] *Supra* note 62.

[79] *Supra* note 51.

[80] [2010] EWHC 3236 (Pat) [*Pfizer Health*].

[81] See *Dian AO, supra* note 62, at para. 20; *Pfizer*, *ibid.* at para. 20.

[82] See *Dian AO, supra* note 62 at para. 56; *Pfizer*, *supra* note 76 at para. 20; *ABC*, *supra* note 51, at para. 42.

[83] See *Dian AO, supra* note 62 at para. 57; *Pfizer*, *supra* note 76 at para. 20; *ABC*, *supra* note 51 at para. 42.

This is because the principle of open justice is not engaged in such situations. This stricter test of necessity would also apply in cases where "the court has considered the question of access to documents on the court file and has restricted access", or where "the applicant is seeking documents filed for the purposes of a hearing that after due consideration the court has decided should take place in private".[84]

The fact that parties agree to seal documents as against non-parties will not affect the court's exercise of its discretion. In *Lilly ICOS Ltd v. Pfizer Ltd (No 2)*, Buxton L.J. said:[85]

> Simple assertions of confidentiality and of the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document.

Lord Woolf M.R had earlier cautioned against rubber-stamping the parties' desires as well. In *R v. Legal Aid Board ex p Kaim Todner*,[86] he said:[87]

> Sometimes the importance of not making an order, even where both sides agree that an inroad should be made on the general rule, if the case is not one where the interests of justice require an exception, has been overlooked. Here a comment in the judgment of Sir Christopher Staughton in *Ex parte P*… 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 [of open justice] to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason why it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing…

5. *Use of disclosed documents*

A matter related to the availability of documents to non-parties is the extent to which *parties* may make collateral use of documents which have been disclosed. The *CPR*, r. 31.22(1) provides that parties may only use disclosed documents for the purpose of the proceedings in which they were disclosed, unless one of the stated exceptions applies, for instance, where "the document has been read to or by the court, or referred to, at a hearing which has been held in public".[88] Importantly, the *CPR*, r. 31.22(2) goes on to state that even if a document has been read to the court or by it, or referred to at a public hearing, the court may nevertheless restrict or prohibit further use of that document. To this extent, one may perceive an overlap between the court's power to grant non-party access under the *CPR*, r. 5.4C, and its power under the *CPR*, r. 31.22 to control how parties may 'use' documents which have been disclosed in the course of proceedings. Where a party is free to 'use' a disclosed

[84] *ABC*, *supra* note 51, at para. 42.

[85] [2002] 1 W.L.R. 2253 at para. 25 (C.A.) [*Lilly ICOS*].

[86] [1999] Q.B. 966 [*Kaim Todner*].

[87] *Ibid*. at 977. Cited with approval in *ABC, supra* note 51 at para. 16.

[88] *CPR*, *supra* note 11, r. 31.22(1)(a).

document as it wishes, it will be able to make the document available to a non-party, unless there is a court order prohibiting such disclosure.[89]

IV. Analysis of the Law on Non-Party Access

A. *Observations*

Having examined the respective positions in Australia, the UK and Singapore, this article makes three observations in respect of those positions. First, reform of the law on access in Singapore is long overdue. Second, there are significant similarities and differences between the Australian and English regimes. Third, the European Convention on Human Rights has had considerable impact on the development of the English access regime.

1. *Reform in Singapore*

The first observation that may be made is that there is a pressing and urgent need for a set of clear and comprehensive guidelines in Singapore. Other than the *Rules of Court*,[90] para. 23(4) of the *PD*[91] and the rather dated case of *Lee Kuan Yew*,[92] there is no further guidance explaining how o. 60 r. 4[93] is to be applied. In particular, it is unclear how the Registrar exercises his or her discretion under o. 60 r. 4(2).

Further, the current scheme is simplistic, incomplete and lacks important details. First, para. 23(4)(d) of the *PD* requires the Registry to maintain "details" pertaining to a series of proceedings but it is not clear what these "details" are. Second, it appears that access to documents under o. 60 r. 4(1) may not be restricted at all. This is a significant inadequacy, as it is not uncommon to find sensitive and confidential information in those documents. For years, the practice has been to apply for a blanket sealing order. Indeed, such orders have been granted on several occasions. However, on what basis does the court make such orders? Is it the court's inherent jurisdiction? Or is it based on statutory provisions which give the court the power to do so? A greater problem pertains to *when* the court may order that a document, or indeed an entire file, be sealed as against non-parties. There is presently no guidance as to when the court may make such sealing orders.

2. *Comparing the frameworks in Australia and the UK*

A second observation that can be made is that despite the differences as to: (a) when non-party public access may be presumed; (b) whether leave of court is required for such access; and (c) the types of documents which may be accessed, significant similarities may be discerned across the Australian and English frameworks. Three similarities deserve mention.

---

89 *Lilly ICOS*, *supra* note 81, at para. 5.
90 *Supra* note 2.
91 *Supra* note 5.
92 *Supra* note 7.
93 *Rules of Court*, *supra* note 2.

First, non-parties often do not have an automatic right to access documents on court records, except where, and to the extent that, legislation or the rules of court confer such a right.

Second, the rules of court form the primary repository of rules governing the availability of documents to non-parties. These are often expressed in general terms and supplemented by practice notes or practice directions. The *Federal Court Rules*[94] in Australia, for instance, should be read with various protocols setting out how parties, non-parties, and the media may respectively obtain access to documents.[95] Likewise, the NSW *Uniform Civil Procedure Rules*[96] and English *CPR*[97] should be read with the *NSW Practice Note on Access to Court Files* and UK *Practice Direction 5A*[98] respectively.

Third, where leave is required, the court or registrar takes into account broadly similar issues in deciding when and how to exercise its discretion. These include how countervailing considerations such as confidentiality and privacy ought to be reconciled with the need for open justice, and whether the applicant has a 'sufficient' or 'proper' interest in the proceedings to justify access to the court records. Of those issues, the principle of open justice is central to the court's consideration. It has been reiterated time and again that the court is guided by the principle of open justice when exercising its discretion. Consequently, access to non-parties is often dependent on, *inter alia*, whether a relevant part or the whole of the document requested has been admitted into evidence or read out/discussed/referred to in open court, whether the information would have been heard or seen by any person present in open court and whether the court has ordered that the document remains confidential. Different formulations to these respective effects may be found in the different rules of court, supplementary materials and judicial pronouncements.

3. *The impact of the European Convention on Human Rights on the English framework of access*

The third and final observation is that English jurisprudence in this area of the law is heavily influenced by the *Convention for the Protection of Human Rights and Fundamental Freedoms*[99] which, as a result of the *Human Rights Act 1998*,[100] is part of English law. Section 6 of the *HRA* makes it unlawful for a public authority, including the courts, to act in a way which is incompatible with an *ECHR* right. Where a party is seeking to restrict public access to particular court records, he is in fact asking the court to exercise its power to uphold his right to private and family life under art. 8(1).[101] Yet, where the court makes an order restricting such access, this could be regarded as being contrary to the public's right to freedom of

---

94 *Supra* note 43.

95 See Federal Court of Australia, *Access to Court documents and transcript*, online: Federal Court of Australia <http://www.fedcourt.gov.au/courtdocuments/courtdocuments.html>.

96 *Supra* note 29

97 *Supra* note 11.

98 *Supra* note 62.

99 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [*ECHR*].

100 (U.K.), 1998, c. 42 [*HRA*].

101 *ECHR*, *supra* note 95, art. 8(1) states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence".

expression under art. 10, which includes the freedom to receive information without interference.[102] Where conflicting *ECHR* rights are involved, English law requires the court to balance all competing claims.[103] All articles in the *ECHR* are to be treated equally; no one right has "*as such* precedence" over another,[104] and the weight to be placed on competing interests will depend on the factual matrix of each case. The preferred approach is to curtail *ECHR* rights in a manner which is no more than necessary.[105] The *ECHR* does not bind Singapore. Thus, English cases ought to be read carefully.

B. *Guiding Principles on Non-Party Access to Documents on Court Records*

1. *Principle of open justice and the freedom of information and expression*

The key tension at the heart of the issue is that the interests of justice may be served by both disclosure and non-disclosure. Judicial preference in Australia and the UK has always tended towards open justice.[106] At the 31st Australian Legal Convention in 1999, Spigelman C.J. of the NSW Court of Appeal said:[107]

> [T]he principle of open justice—is one of the most pervasive axioms of the administration of justice in our legal system. It informs and energises the most fundamental aspects of our procedure and is the origin, in whole or in part, of numerous substantive rules. It operates subject only to the overriding obligation of a court to deliver justice according to law.

This principle of open justice is derived from the common law. In the UK it is also guaranteed by the *ECHR*. The primary reason why open justice is central to the legal system is that public scrutiny is an "important safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice".[108] In the famous words of Jeremy Bentham, open justice "keeps the judge, while trying, under trial".[109]

Accordingly, there is a line of established authority, tracing back to the seminal case of *Scott v. Scott*,[110] which upheld the principle of open justice as a means of

---

[102] *ECHR*, *supra* note 95 art 10 states, *inter alia*, that "[e]veryone 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".

[103] See *e.g.*, *Re Guardian News and Media Ltd and others* [2010] 2 W.L.R. 325, at para. 43 (S.C.) [*Guardian News*].

[104] *Guardian News*, *ibid.* at para. 51 (emphasis in original). See also *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593 at para. 17 (H.L.) [*In re S*].

[105] See *ABC*, *supra* note 51 at para. 19, citing *Wikimedia*, *supra* note 61, at para. 17.

[106] "Publicity", Bentham wrote, "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". See *Home Office v. Harman* [1983] 1 A.C. 280 (H.L.) at 303.

[107] J.J. Spigelman, "Seen to be Done: The Principle of Open Justice" (Keynote address at the 31st Australian Legal Convention, Canberra, 9 October 1999), (2000) 74 Austl. L.J. 290, online: New South Wales Supreme Court <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_091099>.

[108] *Per* Lord Diplock in *Attorney-General v. Leveller Magazine Ltd.* [1979] A.C. 440 (H.L.) at 450.

[109] *Supra* note 102. See also *Rodrick*, *supra* note 23 at para. 93.

[110] [1913] A.C. 417 (H.L.) [*Scott*].

furthering the interests of justice, unless a countervailing consideration overrode it in the interests of justice. In a particularly eloquent exposition on the importance of the principle of open justice, the Lord Chief Justice, Lord Judge and Lord Neuberger M.R. stressed in *The Queen on the application of Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*[111] that it was crucial that the court administers justice in public. According to the Lord Chief Justice:[112]

> Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited.

The second reason for giving effect to the principle of open justice is that the public has a legitimate interest in knowing what happens in proceedings. Consequently, the public has a right to receive information and the press is entitled to impart the same to the public. The principle of open justice "goes beyond proper scrutiny of the processes of the courts and the judiciary".[113] In the words of the Lord Chief Justice:[114]

> 39 … The principle has a wider resonance, which reflects the distinctive contribution made by the open administration of justice to what President Roosevelt described in 1941 as the "…first freedom, freedom of speech and expression". In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.
>
> 40. Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights…
>
> 41 … [T]he principles of freedom of expression, democratic accountability and the rule of law are integral to the principle of open justice and they are beyond question… They function to enable justice to be done between parties.

This can also be seen in Lord Neuberger M.R.'s comments in the same case:[115]

> This principle [*i.e.*, the principle of open justice] is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public. What goes on in the courts, like what goes on in Parliament or in local authority

---

[111] [2010] EWCA Civ 65 [*Mohamed CA*].

[112] *Ibid*. at para. 38.

[113] *Supra* note 107 at para. 39.

[114] *Ibid*, at paras. 39 to 41.

[115] *Ibid.* at para. 176.

meetings or in public inquiries, is inherently of legitimate interest, indeed of real importance, to the public.

In practical terms, what the principle of open justice requires is for the judicial system to operate publicly, unless this would result in injustice. This would entail the public being able to, *inter alia*, attend court proceedings, inspect court documents and publish what transpired in open court.[116] It is also because of the principle of open justice that the English courts have refused to restrict public access, even though parties have agreed to such restrictions. Quite clearly, parties cannot *inter se* waive the public's entitlements.

Yet, the principle of open justice is not so fundamental as to *mandate* a *per se* right of access to judicial records all the time. The main aim of the courts is to ensure that justice is done. While the administration of justice in the open would serve this purpose, it must be remembered that it is not an absolute end in itself. Openness will not be paramount if it hinders the proper administration of justice. Thus, the Australian and English courts, whilst recognising the importance of the principle of open justice, have nevertheless eschewed the notion that a right of access to judicial records must *automatically* flow from this principle. In *Bernardus Hubertus Van Stokkum and The People Named In Schedule A & Ors v. The Finance Brokers Supervisory Board*, the Supreme Court of Western Australia said that it would be "wrong in principle and contrary to the authorities" to say that "the fundamental principle of open justice mandates the grant of leave".[117] Similarly, the Supreme Court of NSW said in *Australian Securities and Investments Commission v. Rich* that "free access by the media to the contents of a court file is not, in absolute terms, a proposition flowing from the principle of open justice".[118]

Equally, open justice does not equate to unfettered access to documents on the court records. Thus, even though the principle of open justice requires non-parties to be granted access as far as possible, the courts have refused non-parties *carte blanche* to trawl through their records in search of relevant material. In *Dian AO*, Moore-Bick J. required the non-party to identify "with reasonable precision" the documents which he wished to obtain copies of.[119] Further, where an applicant is merely interested in using the court records as a repository of useful information, the English courts have also indicated that they would be unwilling to grant access as a matter of routine; access would only be granted when there are "grounds for thinking that it is necessary in the interests of justice to do so".[120]

Since the main aim of the courts is to ensure that justice is done, the Australian and English courts have recognised that the operation of the principle of open justice is not, and should not be, absolute. Lord Neuberger M.R. recognised the need for exceptions from publicity in *Mohamed CA*, where he acknowledged that the principle of open justice, whilst "fundamental", must "occasionally yield to other factors", such as "the need to safeguard children and other vulnerable people, the need to prevent

---

[116] Adrian Zuckerman, "Super Injunctions—Curiosity-Suppressant Orders Undermine the Rule of Law" (2010) 29 C.J.Q. 131 at 133.

[117] [2002] WASC 192 at para. 11.

[118] [2001] NSWSC 496 at para. 23.

[119] *Dian AO*, *supra* note 62, at para. 32.

[120] *Dian AO*, *supra* note 62 at para. 57.

the court's orders being thwarted, and the need to protect the public interest".[121] Be that as it may, the fact remains that the principle is a fundamental tenet of both the Australian and English legal systems. Consequently, whilst derogations are allowed, it is in fact difficult to derogate from the principle in practice. Derogations, where allowed, are always no more than is necessary in the interests of justice. It is also for this reason that the English courts often construe statutory exceptions to the principle of open justice in a strict and narrow fashion. The courts also loathe to expand the list of exceptions which allow the principle of open justice to be departed from. As Lord Steyn "clearly and unambiguously" observed in *In re S* ,[122] given the number of statutory exceptions, "the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice".[123]

2. *Competing principles—protection of confidential information and the right to a fair trial*

So what are the relevant principles which would justify displacing the principle of open justice? Two principles come to mind in particular. These are, first, the protection of confidential information, and second, the right to a fair trial.

Vis-à-vis protection of confidential information, parties, witnesses and other participants of an action are often compelled to divulge information they would ordinarily not have revealed otherwise. While this compulsory surrender of information is required for the proper administration of justice, fears of negative repercussions consequent upon publication may deter people from seeking redress or giving evidence before the court. Thus, where the law does not insulate sensitive information from damaging disclosure, the court's ability to resolve disputes justly and fairly would inevitably be affected. As the House of Lords said in *Scott*:[124]

> … if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made.

As for the right to a fair trial, public access to particular documents before and/or during the hearing itself may, in some cases, influence the court's decision, thereby prejudicing the conduct of a fair trial. Accordingly, considerations of the right to a fair trial will, under certain circumstances, be a valid basis for derogating from the principle of open justice.

V. Recommendations

The views of the Australian and English courts as to the role and purpose of the principle of open justice and its relationship with other principles have had considerable

---

[121] *Mohamed CA*, *supra* note 107, at para. 134.
[122] *Supra* note 100.
[123] *Ibid.* at para. 20.
[124] *Supra* note 106 at 446.

bearing on the structure of their respective access regimes. With those regimes in mind, this section makes recommendations as to how the current access regime in Singapore may be improved upon.

A. *The Proposed Framework for Access*

As demonstrated, a range of models exists for managing access to court records. These can be conceptually represented on a spectrum, ranging from free access to court records and court records guarded by the courts playing the role of gatekeepers of information. This article proposes an intermediate approach. It is believed that the competing principles underlying any access regime may be best balanced by identifying a set of documents which are ordinarily treated in a manner consistent with free access and subjecting all other documents to an additional level of check. A summary of the recommended framework is as follows.

First, the *Rules of Court*[125] should be amended to implement a comprehensive regime for access to documents held on court records. Access here means search, inspection and copying. This access regime under the *Rules of Court* should be of general application, subject to the provisions in more specific enactments such as the *Adoption of Children Act*,[126] *Children and Young Persons Act*[127] and the *Mental Capacity Act*.[128]

Second, the proposed scheme should be a two-tiered system based on the nature and type of document sought. It is proposed that there should be two categories of documents.

The first category contains documents which are open to public access upon request and payment of a prescribed fee, unless the court orders otherwise. The court's permission to access documents in this category is not required. Documents which would be classified under this category should include judgments and orders which were given or made in public (whether made at a hearing or without a hearing),[129] writs, originating summons and pleadings (but not documents filed with or attached to them) in cases where either a defence has been entered or the case has been set down for trial and transcripts of open court proceedings. Applications may be made to the court to restrict access to documents under this category, but the court will only exercise its discretion under exceptional circumstances and, where exercised, to an extent which is no more than necessary in the circumstances.[130] It will be for the applicant who is seeking to restrict access to demonstrate why the restriction is necessary. Where the court is not convinced that access to the otherwise accessible document ought to be restricted, it should not exercise its discretion to restrict access, even if both the applicant and its opponent agree that access to the public ought to be restricted.[131] Where the court is convinced that access should be restricted, the applicant should then file an additional

---

[125] *Supra* note 2.
[126] Cap. 4, 1985 Rev. Ed. Sing.
[127] Cap. 38, 2001 Rev. Ed. Sing.
[128] Cap. 177A, 2010 Rev. Ed. Sing.
[129] This follows the approach in the UK's *CPR*, *supra* note 11, r. 5.4C(b).
[130] This follows the approach in *Wikimedia*, *supra* note 61.
[131] This follows the approach in *Lilly ICOS*, *supra* note 81.

document which omits the confidential information, unless he is able to convince the court that redaction is not reasonably practicable. Where redaction is possible, non-party access can be granted to the redacted document. Where redaction is however not possible, the court may then refuse access to the entire document altogether.

The second category is the residual category and will consist of all other documents on the court's records which do not fall within the first category. This would include, for instance, judgments or orders that were given in private, written submissions, affidavits, exhibits, skeleton arguments, material which was admitted into evidence, material which any person present in open court could have heard or seen and other material which the court maintains in connection with an action. Access to this category of documents will always require the court's permission. The onus is on the applicant who is seeking access to convince the court to grant access. Parties who would be affected by the disclosure should also be notified and given the opportunity to explain why the document in question should not be disclosed; it is not the court's responsibility to identify controversial materials on behalf of affected parties. The court will then consider the arguments of all relevant parties before reaching a decision as to how its discretion ought to be exercised. The court's power to either grant or withhold access should also include a power to impose such conditions as it deems necessary. For instance, the court should be able to make the release and subsequent use of formerly restricted documents conditional upon certain terms.

Third, where the court is required to exercise its discretion, be it to grant or withhold access, it is suggested that the court's overarching concern should always be to ensure that justice is administered properly and fairly in the circumstances. To this end, the fundamental principle of open justice, *viz.*, encouraging fair and accurate reporting of court proceedings and decisions and the freedom to seek, receive and impart information, must be balanced against other competing principles such as the need to protect confidential information and the right to a fair trial. When carrying out this balancing exercise, it is further suggested that the court should take into account the nature of the information in question, the applicant's reason or reasons for seeking or restricting access, the stage at which the action is at when the request for access or restriction of access is sought and any other matter the court deems fair and just in the circumstances.

Vis-à-vis the nature of the information in question, it is anticipated that the type of documents which applicants would commonly seek to restrict access would involve sensitive, confidential or potentially prejudicial information. Common examples of such documents include documents that contain information pertaining to minors and other vulnerable persons (especially information which may allow them to be identified), commercially confidential information (*e.g.* trade secrets, financial accounts) which if disclosed would unreasonably prejudice the interests of the party who had either supplied the information or who is subject to it, information which may prejudice or damage Singapore's national security and/or international relations with other countries, and information which if disclosed would render the object of the hearing otiose. The extent to which the relevant information is already part of the public domain should be considered when the court determines whether it is necessary to either allow or withhold access. In *Mohamed CA*, Lord Neuberger M.R. explicitly

said that he would have acquiesced to the respondent's request to redact parts of an open judgment, which were alleged to contain information, publication of which would harm the public interest in national security, but for the fact that the purportedly confidential information had already been released into the public domain by the open publication of a US judgment.[132]

In respect of the applicant's reason or reasons for seeking or restricting access, common reasons include the following. For instance, the press might want to access particular documents to report on the progression of ongoing court proceedings. Other members of the public may also seek to use court records as a repository of information for research purposes (for example, for use as precedents in similar actions).

The stage at which the proceedings are at when access is sought is a pertinent factor, as it affects the balance of competing principles. Pleadings often contain untested allegations. Publicising such allegations during the earlier stages of an action could cause the public to have an unbalanced picture of the proceedings, especially if responses to the allegations have not been filed, and the allegations are eventually struck out by the court[133] or withdrawn by parties as the action progresses. The risk of occasioning such prejudice would not be as acute after proceedings have ended.

Finally, the *Rules of Court*[134] should be supplemented by guidelines in the *PD* and judicial pronouncements concerning, *inter alia*: (a) the meaning and scope of "court records" (*i.e.*, the scope of the second category of documents); and (b) how the court's discretion to either restrict or permit access should be exercised. It is proposed that such guidance should not be set in stone through codification in the amended *Rules of Court*, but should instead be enunciated by the court in its decisions and/or contained in the *PD* which supplement the amended rule. This would allow the law to be more responsive to the changing manner in which cases are conducted. The move from oral to written advocacy has necessitated changes in the way non-parties access court information in other jurisdictions. For instance, English law now allows non-party access to written submissions when this was not possible before.[135] With the increasing move towards electronic court records and paper-less proceedings, the access regime must be able to respond swiftly to developments in modern technology.

B. *Analysis of the Proposed Framework*

The recommended framework should, in most cases, ensure that open justice is not achieved at the expense of other important principles, such as the need to protect confidential information and the right to a fair trial. The principle of open justice should be a fundamental tenet upon which our legal system is based. However, it is also recognised that it would be necessary to withhold access at times. Hence, the proposed framework is a bifurcated one.

---

[132] See *Mohamed CA, supra* note 107, at para. 191.

[133] Passages might be struck out where they contain, for instance, scandalous, frivolous and vexatious allegations.

[134] *Supra* note 2.

[135] *Gio Personal Investment*, *supra* note 10; *Law Debenture Trust*, *supra* note 9.

The first category contains documents which are so essential to the administration of justice in public that access should generally be uninhibited. Documents falling within this category would thus be those which, *inter alia*, inform the court as to what the dispute is, what each party has to say in respect of their respective positions and what the court makes of the dispute. Notwithstanding this, these documents may sometimes contain information which should not be released into the public domain. Thus, the proposed framework includes a mechanism by which the presumption in favour of access may be rebutted. But because the documents in this category constitute the core documents of every action, a stringent test of exceptionality and necessity must be satisfied before public access may be denied. The significance of the nature of the documents in this category also explains why, where possible, the proposed framework favours redaction over restriction of access to the entire document altogether. It also explains why access to originating processes and pleadings is restricted by time.[136] The imposition of a time element seeks to balance the importance of these documents with concerns that availability during the early stages of an action may bring about an unbalanced picture of the matter in the public's mind. It allows the public to be cognisant of the court's workings whilst protecting the interests of parties at the same time. Much as the court has a role to play in upholding the principle of open justice, it also has a duty to safeguard the interests of the parties before itself.

The second category consists of documents which, if not published, might make following a case difficult (though not impossible), but if published, would be more likely than documents under the first category to cause injustice to parties. This tension is managed by attributing a fairly wide scope to this category, and then interposing an intermediary to screen through all requests for access. Due to the move from oral to written advocacy, it is proposed that this category should include all documents which the court maintains in connection with a proceeding, to the extent that they were relied upon by the court in its decision-making process, rather than just information which one may hear or see by attending open court. Increasingly, materials are not read out loud in open court but placed before the court in their written form. The changing manner in which proceedings are conducted has been observed to make "the curial and adjudicative process less and less comprehensible to the person in the public gallery".[137] The proposed scope of the second category addresses this phenomenon by ensuring that the public may access materials which are, in one way or another, related to the decision-making process.

At the same time, it is recognised that because the scope of this category is almost unlimited and sensitive material, if present, would more likely than not be situated in documents falling under this category (especially affidavits and exhibits) rather than the first category,[138] there is greater potential for documents in this category to be published, at the expense of parties, but for purposes not in the least connected with the principle of open justice. For instance, not all press reports further, or are

---

[136] Recall: It was proposed that leave to access writs, originating summons and pleadings should not be required where access is sought after: (i) a defence has been entered; or (ii) the case has been set down for trial.

[137] *McCabe v. British American Tobacco Australia Services Ltd* [2002] VSC 150, at para. 19.

[138] While originating processes and pleadings may contain sensitive material, often, these are merely summaries of the actual evidence.

even related to, the interests of open justice.[139] Very often, the press is interested in "potentially newsworthy" facts which are however of "no real significance to the issues in the case".[140] This concern is, to some extent, also exacerbated by the increasingly widespread phenomenon of non-traditional journalism (*e.g.* widely accessed blog posts the authors of which are not held to the standards of balanced journalism) and the ease of dissemination of information via the Internet. In view of this greater potential for abuse and prejudice, the proposed framework thus requires all requests for access to be assessed. Nonetheless, the court's duty to protect the interests of parties before itself is not unlimited. For this reason, the proposed framework does not require or expect the court to trawl through documents in search of information which ought not to be disclosed. It places the onus on parties to draw the court's attention to information which ought not to be published.

VI. Conclusion

As early as in the 1950s, openness, fairness and impartiality were recognised as key characteristics to be reflected in tribunal procedures. In 1957, the Franks Committee on "Administrative Tribunals and Enquiries" advocated "publicity of proceedings" and "knowledge of the essential reasoning underlying the decisions",[141] but also recognised that there were "occasions on which… justice may be better done, and the interests of the citizen better served, by privacy".[142] These principles remain just as relevant today. This article offers recommendations in the context of access to documents on court records as to how publicity and privacy may be best balanced to achieve justice. It has been said that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[143] The broader issue however is whether seeing justice done may in itself defeat justice. An access regime is not built on open justice alone. It must adeptly reconcile all competing factors in a manner which best secures the proper administration of justice.

---

[139] See *e.g.*, the recent case involving prominent surgeon, Dr Susan Lim. The press reports focused on salacious details of the case, especially the fees which Dr Lim had charged her foreign patient, when the trial before the High Court was not about whether Dr Lim had in fact overcharged her patient, but whether the Singapore Medical Council ought to appoint a second disciplinary committee to investigate an accusation by the Health Ministry that she had overcharged her patient. See "Surgeon inflated $400 bill to $211,000" *The Straits Times* (24 February 2011).

[140] *Chan U Seek*, *supra* note 49, at para. 10.

[141] Geoffrey Marshall, "The Franks Report on Administrative Tribunals and Enquiries" (1957) 35 Public Administration 347. See also Tim Vollans, "Justice being seen to be done?" (2006) 122 Law Q. Rev. 572 at 575.

[142] *Ibid*.

[143] *R v. Sussex Justices; Ex parte McCarthy* [1924] 1 K.B. 256 at 259.