Join the parties – CPR 5.4

By *Jonathan Barnes*

The amendment to Civil Procedure Rule (CPR) 5.4, now in force, has reversed the default position that statements of case (except the claim form) in civil litigation would only be released to the public from the court file if the court gave permission. Now the position is that all statements of case are available simply at the request of any non-party unless the court orders otherwise.

This is a significant change to a longstanding principle of English procedural law — namely that the details of a dispute have remained private between the parties to civil litigation except and until the point at which they have emerged at a public hearing.

The previous regime

Until 2 October, 2006, various versions of CPR 5.4 — and before that, the equivalent Rule of the Supreme Court (Order 63 rule 4) — provided that a person who was not a party to proceedings could obtain a copy of a claim form (writ) from court records on paying a prescribed fee and filing a written request.

The claim form would be available without anything more, provided all defendants had filed an Acknowledgment of Service or a Defence, or the claim had been listed for a hearing, or judgment had been entered. Unless at least one of those threshold conditions was satisfied, however, a non-party would have had to make an application to the court for permission to obtain even a copy of the claim form.

This default position could be reversed by the court on application by any party or person identified in the claim form, making an order that the claim form be restricted, edited or otherwise removed from non-party access.

As concerned all other statements of case, they could only be obtained by a non-party making a successful application for permission for copies. 'Statements of case' are defined by the CPR as being, in addition to claim forms, particulars of claim, defences, part 20 claims, replies and any further information given by a party either voluntarily or under a court order. They do not, however, include documents filed with, attached to or served with statements of case, or witness statements or exhibits.

The change

Now, the default position of non-party access to claim forms has been extended to all other filed statements of case. In other words, a non-party may obtain from court records a copy of any statement of case upon paying a fee and filing a written request.

This default position is reversible on application by any party or person identified in a statement of case. On such application, the court may restrict non-party access to a statement of case altogether, or to a particular person or class of persons, or direct that a statement of case be edited before it is released.

In overall terms, however, the new regime provides general public access for the first time to the central documents filed at court by the parties that describe the detail of their respective allegations against each other.

Range of impact

There is no easily definable limit to the sort of cases that might be affected by this change. Some cases will be obvious candidates for access to the court file to be restricted, with the default position reversed from the beginning: cases based on intrusions into privacy; breach of confidence; commercially-sensitive information; and those in the personal injury and medical fields.

But the new default position will only be reversed, with the court file being restricted, upon a successful application actually being made.

Making headlines

The principal significance of this is publicity. First, common sense suggests that the more information that is available publicly — and therefore to the press — about a case, the more publicity about it there is likely to be.

Secondly, the more sensational the information, the more likely it is to achieve coverage. The nature of many allegations made in statements of case, unilaterally by a particular party and before the court has had any opportunity to exercise some control, is often inflammatory. This is not to assume that the court process is abused, but is simply a reflection that it is quite proper to put forward a serious allegation if evidence appears to exist for it. Whether or not that allegation is verified at trial is another matter.

Thirdly, now that statements of case are made public documents by law (i.e. by the CPR), publication of, or reference to, allegations contained in them is very unlikely to be penalised by, for example, liability in defamation.

No retrospective effect

As originally drafted, the new regime provided for access to all statements of case, both prospectively and including those already filed before the new rules came in. While courts do not retain filed documents indefinitely, this raised the possibility that documents filed under the old regime, going back a number of years, would suddenly become publicly available. That was even though they had been filed under rules that gave parties an expectation that access to them would be restricted.

Following a challenge by the Law Society to this retrospective effect, a further update to CPR 5.4 has made clear that the new rules apply only to statements of case filed on or after 2 October, 2006. Statements of case filed before that date are subject to the previous, more restrictive regime, which has been reinstated for that purpose.

Practical consequences

At their heart, the changes are concerned with ease of availability of statements of case to the public. Where an application is made to restrict the file or a non-party applies

to lift a restriction already made, the court will exercise its discretion based on the circumstances of a particular case. The real significance is that it will now usually be for parties or persons identified in statements of case to make the running and apply for access to be restricted in the first instance.

The policy background for the amendments is stated to be the pursuit of open justice. It is doubtful that applications to restrict the court file will be granted routinely. Rather, an applicant for restriction will have to point to some exceptional factor in a particular case that outweighs the desire for openness. Such factors are likely to include privacy and confidentiality, including the detail of a personal medical condition, and may well arise in cases where private hearings are, in any event, justified.

But the requirement of openness is unlikely to be displaced if an application for restriction is based on no more than the preference of a particular party (or indeed the common preference of the parties taken together) for privacy to be maintained in certain written allegations that have been filed at court.

Practitioners need to be vigilant at an early stage in civil litigation as to the potential for the detail of a particular dispute to become public property as a result of non-party access to documents. It may be that the only available action is to caution a client about the enhanced openness of the new rules. It will, however, be important to identify as early as possible — and make an appropriate application to the court — those statements of case filed by a party that should still properly be restricted from the public gaze.

This article first appeared in *Legal Week* for 1st March 2007. Jonathan Barnes was instructed by Schillings as junior counsel for the Law Society in its successful attempt to prevent the changes to CPR 5.4 having retrospective effect.