Neutral Citation Number: [2018] EWHC 3586 (Admin)

Case No: CO/2706/2015

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 20/12/2018

Before :

LORD JUSTICE GREEN

Case No. CO/2322/2015

THE QUEEN
on the application of
(1) BRITISH AMERICAN TOBACCO (UK) LIMITED
(2) BRITISH AMERICAN TOBACCO (BRANDS) INC.
(3) BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED

First Claimants

- and-

SECRETARY OF STATE FOR HEALTH

Defendant

AND BETWEEN:

Case No. CO/2323/2015

THE QUEEN
on the application of
(1) PHILIP MORRIS BRANDS SÀRL
(2) PHILIP MORRIS PRODUCTS SA
(3) PHILIP MORRIS LIMITED

Second Claimants

- and-

SECRETARY OF STATE FOR HEALTH

Defendant

AND BETWEEN:

Case No. CO/2352/2015

THE QUEEN
on the application of
(1) JT INTERNATIONAL SA
(2) GALLAHER LIMITED

Third Claimants

- and-
SECRETARY OF STATE FOR HEALTH

Defendant

AND BETWEEN:

Case No. CO/2601/2015

THE QUEEN
on the application of
IMPERIAL TOBACCO LIMITED

Fourth Claimant

- and-
SECRETARY OF STATE FOR HEALTH

Defendant

ACTION ON SMOKING AND HEALTH

Intervener

The following proceedings have also been linked to the above proceedings:

Case No.: CO/2706/2015

Case Name: The Queen (on the application of **TANN UK Limited, TANNPAPIER GmbH, Benkert UK Limited, Deutsche Benkert GmbH & Co KG**) v **SECRETARY OF STATE FOR HEALTH**

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Approved Judgment

Lord Justice Green:

A. Application under CPR 5.4C(2) for disclosure of court documents to a third party

1. There is before the Court an application under CPR 5.4(C)(2) for disclosure from the Court records of certain documents relied upon by the parties in the series of claims for judicial review brought by the tobacco industry and by certain manufacturers of tobacco papers. Judgment was given on 19th May 2015: cf *British American Tobacco et Ors v Secretary of State for Health (Action on smoking and health, intervening)* [2015] EWHC 1169 ("the Judgment"). Appeals by the claimants were subsequently rejected by the Court of Appeal. Permission to appeal to the Supreme Court was refused.

2. The claims sought to have declared unlawful legislation that the Secretary of State, the Defendant to the proceeding, was proposing to introduce regulating the packaging of tobacco products. Paragraphs 1 and 2 of the Judgment described the issue in the following way:

> "1. These applications for judicial review are brought by manufacturers who represent the major part of the world's supply of tobacco products. Legislation was enacted by Parliament which conferred upon the Secretary of State the power to lay before Parliament, for its consideration and promulgation, regulations which restrict the ability of the tobacco companies to advertise their brands on tobacco packaging or upon tobacco products themselves. Parliament duly promulgated The Standardised Packaging of Tobacco Products Regulations 2015 ("*the Regulations*"). These specified the 20th May 2016 as the day upon which they became effective. The Claimants challenge the Regulations as unlawful under international law, EU law and domestic common law.
>
> 2. The decision by Parliament to introduce the Regulations was in large measure in furtherance of the policy laid down by the World Health Organisation (WHO) in a singular treaty of 2004, the Framework Convention on Tobacco Control ("*FCTC*"). This is one of the most widely endorsed treaties in the history of the UN. In this convention the WHO has laid down a series of control measures some of which are said to be mandatory and a further series of measures which contracting states are encouraged to adopt, one of which is a prohibition on advertising on packaging and upon tobacco products. This latter measure is known as "standardised packaging". At base it involves a substantial limitation being imposed upon the ability of manufacturers to advertise or place branding upon the outer packaging or the tobacco product itself. The Regulations do not however involve all tobacco products being sold in a homogeneous, undifferentiated manner. The manufacturers can still place the brand name and variant name upon the box and in this way they can still communicate their identities to consumers

> and differentiate themselves from their competitors. But the manner in which the name and brand may be used is highly regulated in order, in effect, to strip away as much of the attractiveness of the branding or advertising as possible."

3. The Claimants advanced a wide array of different legal arguments. In the Judgment I categorised these under 17 different heads though many had multiple sub-arguments. During the proceedings the Claimants relied upon 25 expert reports and the Defendant relied upon 5 expert reports. A significant number contained econometric and statistical regressions analyses addressing the future effect of the proposed new packaging rules upon demand for tobacco in the context of an argument about proportionality. A central plank of the Claimants case was that, according to their economic analysis, the effect of introducing restrictions on packaging design would be counterproductive and would, in fact, lead to an increase in consumption not a decrease. The Defendant adduced expert evidence expressing a contrary view and also attacking the claimant's evidence upon the basis that if failed to meet internationally recognised best practice for expert evidence.

4. Following the hearing an application was received by the Court made by Mr Robert Eckford, on behalf of the "Campaign for Tobacco Free Kids" ("CTFK") of which he is Associate Director. In the application disclosure is sought of Court documents. I set out the details of the documents sought below. CTFK is a Non-Governmental Organisation ("NGO") based in Washington DC that promotes tobacco control measures and legislation worldwide in particular in lower and middle-income countries.

5. In the application it is argued that the analysis and conclusions in the Judgment have significant wider implications for the adoption and implementation of standardised packing of tobacco products in states around the world where CTFK works with governments and other NGOs. This included states within the EU. The application states that disclosure of the documents would aid the understanding of the legal and factual issues surrounding the question of standardised packaging and would promote debate.

6. Prior to making this application Mr Eckford had, on behalf of CTFK, obtained copies of the Statements of Facts and Grounds served by the Claimants and the Detailed Grounds of Resistance served by the Defendant. These were provided under CPR 5.4C(1). These pleadings all refer to the evidence that Mr Eckford now seeks disclosure of.

7. The application seeks evidence tendered on behalf of the Claimant tobacco companies but also the Defendant Secretary of State. In particular the application seeks: (i) the expert reports of Professor Mulligan and Professor Bezant filed by the Claimant, Philip Morris; (ii) the expert reports of Professor Hammond and Professor Chaloupka filed by the Secretary of State; (iii) various letters sent by the World Health Organisation ("WHO") and secretariat of the Framework Convention on Tobacco Control ("FCTC") to the Under Secretary for Public Health together with the *amicus* brief of WHO and FCTC sent to the WHO dispute settlement procedure; (iv) the witness statements of Mr Mean and Mr Derbyshire filed by the Defendant; (v) the witness statement of the Chief Medical Officer in the United Kingdom; (vi) the witness statement of Mr Martin Bowles filed by the Defendant; and (vii) the full

detailed submissions to Ministers of December 2014 (prepared by civil servants following a consultation on the proposed new measures).

8. It is important to record how these documents were used. The volume of documentary material was vast. But by no means all of it was referred to; much was included in the voluminous hearing bundles by way of background material. For instance, the parties included material that they had submitted in the course of prior submissions to Government and in the course of earlier consultative exercises. In contrast, the documents which are the subject of the present application were much more central to the issues being considered. To make the hearing manageable, given the compendious nature of the arguments advanced, it was agreed that the Court would undertake substantial pre-reading by way of preparation. In addition, during the hearing I was invited by counsel to read documents to myself overnight and during adjournments in order to facilitate and expedite oral submissions. This included not just the substance of witness statements and expert reports but also the numerous exhibits attached thereto. These exhibits were referred to not just in the witness statements but also in oral and written argument. In this connection I had the benefit of extensive (nearly 800 pages) of written submissions which also referred to the documents in issue. Once the oral hearing concluded I was left to read and re-read all this material, which I did. Put shortly in a very real sense the documents now applied for comprised material of central relevance to the legal issues arising in the litigation.

B. The power of the Court to order disclosure

9. The rules governing the publication and disclosure of court documents are set out in the Civil Procedure Rules ("CPR").

10. CPR 5.4C is concerned with the supply of document to non-parties from court records. Prima facie, the "*general rule*" is that: "*a person who is not a party to proceedings may obtain from the court records a copy of (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it; (b) a judgment or order given or made in public (whether made at a hearing or without a hearing), subject to paragraph (1B).*"

11. CPR 5.4C(2) confers a discretion or power on the Court to order the production of other documents filed by a party:

> "(2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person."

12. The rules say that the application may be made without notice. The Court can therefore decide the matter upon the basis of the application alone and without seeking submissions from the other parties. But the Court also has the power under CPR 5.4D(2) to direct that notice be given to any person who might be affected by the its decision. This provides:

> "(2) An application for an order under rule 5.4C(4) or for permission to obtain a copy of a document under rule 5.4B or rule 5.4C (except an application for permission under rule

> 5.4C(6)) may be made without notice, but the court may direct notice to be given to any person who would be affected by its decision."

13. In *R (Guardian News and Media Ltd v City of Westminster Magistrates Court* [2012] EWCA Civ 420 ("Guardian News and Media") at paragraph [69] the Court of Appeal made clear that CPR 5.4C is the expression of a broader principle of open justice, not its *locus classicus*. The power of the Courts to order disclosure is part of its inherent jurisdiction:

> "The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied."

Later at paragraph [85] the following was stated:

> "In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

14. The Court thus has the power to order disclosure to give effect to open and transparent justice *even* in cases not covered by formal rules of procedure. See eg *Blue v Ashley* EWHC 1553 (Comm) per Leggatt J.

15. It is apparent that there are limitations inherent in both the CPR and in the inherent jurisdiction of the Court. These stem from the fact that the volume of documentation produced and before the Court in modern litigation routinely exceeds, by some margin, that which is properly necessary to decide the case. How the balance between transparency and open justice, on the one hand, and the efficiency of judicial proceedings, on the other, is struck has been debated by the Courts over many years. Most recently the issue was considered by the Court of Appeal in *Cape Intermediate Holdings Ltd v Dring* [2018] EWCA (Civ) 1795 ("Cape") where the Court has sought to pull together the underlying principles.

16. With respect to the CPR the Court ruled (paragraph [40]) that the expression "*court records*" in CPR 5.4C meant:

> "… essentially documents kept by the court office as a record of the proceedings, many of which will be of a formal nature. The principal documents which are likely to fall within that description are those set out in paragraph 4.2A of CPR 5APD.4, together with "communication between the court and a party or another person", as CPR 5.4C(2) makes clear. In some cases there will documents held by the court office additional to those listed in paragraph 4.2A of CPR 5APD.4, but they will only be "records of the court" if they are of an analogous nature."

17. With respect to the inherent jurisdiction, the Court examined the evolution of the case law highlighting how in some respects it was not always consistent. It is not necessary, in order to decide this application, to review all of that pre-existing case law. I do however need to refer to a few key points.

18. In particular the judgment in *GIO Personal Investment Services Ltd v Liverpool & London Steamship P&I Ass. Ltd* [1999] 1 WLR 984 ("GIO") was considered still to be authority for the proposition that there was no inherent jurisdiction to allow a non-party access to trial documents *simply* on the basis that they have been referred to in a skeleton argument, witness statement, expert's report or in court.

19. However, it was also recognised that the law and policy had moved on since *GIO* was decided in 1999. Indeed, even at the time there was a recognition of the need to ensure that the law remained in step with broader principles of open justice. In *SmithKline Beecham v Connaught* [1999] 4 All ER 498 ("SmithKline") the Court was concerned with whether the implied undertaking in relation to disclosed documents no longer applied (under RSC Ord. 24 r.14A, the predecessor of CPR 31.22) where they had been read to or by the Court, or referred to in open Court. It did not address the right of non-party access to documents. At the end of the hearing the Judge indicated that he had read all the material and he made his decision. One party then applied for a declaration that it was free to use documents which had been referred to in the reading guide given to the Judge to aid preparation, as the implied undertaking no longer applied. The Court of Appeal ruled that a document came within Ord. 24 r.14A even if not read in *open* court "*… if it is pre-read by the court and referred to by counsel in a skeleton argument which is incorporated in submissions in open court, or if the document is referred to (even though not read aloud) by counsel or by the court*": per Lord Bingham CJ at page [509]. He also observed:

> "Since the date when Lord Scarman expressed doubt in *Home Office v. Harman* as to whether expedition would always be consistent with open justice, the practices of counsel preparing skeleton arguments, chronologies and reading guides, and of judges pre-reading documents (including witness statements) out of court, have become much more common. These means of saving time in court are now not merely permitted, but are positively required, by practice directions. The result is that a case may be heard in such a way that even an intelligent and well-informed member of the public, present throughout every hearing in open court, would be unable to obtain a full

> understanding of the documentary evidence and the arguments on which the case was to be decided.
>
> In such circumstances there may be some degree of unreality in the proposition that the material documents in the case have (in practice as well as in theory) passed into the public domain. That is a matter which gives rise to concern. In some cases (especially cases of obvious and genuine public interest) the judge may in the interests of open justice permit or even require a fuller oral opening, and fuller reading of crucial documents, than would be necessary if economy and efficiency were the only considerations. In all cases the judge's judgment (delivered orally in open court, or handed down in open court in written form with copies available for the press and public) should provide a coherent summary of the issues, the evidence and the reasons for the decision.
>
> Nevertheless the tension between efficient justice and open justice is bound to give rise to problems which go wider than Order 24, rule 14A. Some of those problems were explored in the judgment of Potter L.J. in *GIO Personal Investment Services Ltd v. Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd Intervening)* [1991] 1 W.L.R. 984. As the court's practice develops it will be necessary to give appropriate weight to both efficiency and openness of justice, with Lord Scarman's warning in mind. Public access to documents referred to in open court (but not in fact read aloud and comprehensibly in open court) may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain."

20. In *Cape* the Court of Appeal concluded that law and policy had indeed moved on and a statement of the law was summarised (*per* Hamblen LJ) at paragraphs [112] and [113]:

> "I would accordingly summarise the current position on the authorities as follows:
>
> (1) There is no inherent jurisdiction to allow non-parties inspection of:
>
> (i) trial bundles;
>
> (ii) documents which have referred to in skeleton arguments/written submissions, witness statements, experts' reports or in open court simply on the basis that they have been so referred to.
>
> (2) There is inherent jurisdiction to allow non-parties inspection of:

> (i) Witness statements of witnesses, including experts, whose evidence stands as evidence in chief and which would have been available for inspection during the course of the trial under CPR 32.13.
>
> (ii) Documents in relation to which confidentiality has been lost under CPR 31.22 and which are read out in open court; which the judge is invited to read in open court; which the judge is specifically invited to read outside court, or which it is clear or stated that the judge has read.
>
> (iii) Skeleton arguments/written submissions or similar advocate's documents read by the court provided that there is an effective public hearing in which the documents are deployed.
>
> (iv) Any specific document or documents which it is necessary for a non-party to inspect in order to meet the principle of open justice."
>
> 113. The court may order that copies be provided of documents which there is a right to inspect, but that will ordinarily be on the non-party undertaking to pay reasonable copying costs, consistently with CPR 31.15(c). There may also be additional compliance costs which the non-party should bear, particularly if there has been intervening delay."

21. In relation to exhibits to witness statements (including experts reports) the Court in *Cape* held that there was no general right to access to such exhibits *simply* because they were attached or referred to but "*it will be different if they are read or treated as being read in open court*". Moreover, if it was not possible to understand a statement or report without seeing an exhibit or attachment then the court had inherent jurisdiction to allow inspection. This would be necessary "*…to meet the principle of open justice*": *ibid* paragraph [99]. The Court generally endorsed the caution given by Lord Bingham in *SmithKline* that there was a need to prevent a gap emerging between what passed into the public domain in theory and in practice: *ibid* paragraph [90].

C. Submissions of the parties

22. Before making this ruling, I exercised the power to give notice, by giving to all the parties in the litigation 28 days in which to serve written submissions in response to the application. I indicated my provisional view which was that I was minded to grant the application but I made clear that I would make no final decision pending receipt of any submissions that the parties might wish to make.

23. The Tobacco companies and the manufacturers of tobacco papers, the Claimants in the proceedings, did not oppose the application. They did not make any substantive submissions.

24. The Defendant, the Secretary for State, sought a series of extensions of time to enable it to consider its position and to make submissions. Ultimately it made limited

submissions which can be summarised as follows: (i) the application applies for documents from court file pursuant to CPR 5.4(C)(2); (ii) the Secretary of State objected to the documents being provided to the Applicant; (iii) CPR 5.4(c) was concerned with obtaining copies of documents "*from court records*" by a party who was not a party to the proceedings; (iv) the extent of the categories of documents falling within CPR 5.4(C)(2) was explained in *Cape* where the Court of Appeal ruled (at paragraphs [40ff]) that, for the purposes of CPR 5.4(C)(2), "*the records of the court*" did not include, *inter alia*: trial bundles, trial witness statements, or trial expert reports; (v) it followed that the Applicant was not entitled to the documents sought since they did not fall within the ambit of CPR 5.4(C)(2); (vi) since the application was made pursuant to CPR 5.4(C)(2) the Secretary of State did not address the issue of the inherent jurisdiction and if the Court intended to consider its powers under inherent jurisdiction then the Secretary of State wished to address the Court on the question of the limitations on the Court's inherent jurisdiction set out in *Cape*. I should make clear that having given an initial and provisional indication of my view, and having given the Secretary of State a series of quite lengthy extensions of time, I declined to grant a yet further extension of time to enable submissions about inherent jurisdiction to be made. If the Secretary of State had wished to address this then, in my view, ample opportunity was given for such submissions to be made. There is no proper basis to hold up further the making of the order sought in the Application.

25. The Intervener, Action on Smoking and Health ("ASH"), supported the application for disclosure and made a number of substantive points about the potential future relevance of the material sought. I can summarise their submissions as follows. First, the decision by the UK to follow the lead of the Australian Government to introduce legislation was considered by the tobacco industry as significant in that there was a risk that many other countries might follow the lead of the UK Government and this encouraged the tobacco industry to invest in challenging the legislation in the UK. Second, my judgment, and its endorsement by the Court of Appeal subsequently, has provided comfort to Governments around the world considering adopting the same or similar legislation on plain packaging. Third, plain packaging legislation is now being introduced around the world in the Americas, Africa, Asia and the Western Pacific. As of the date of the ASH submissions plain packaging legislation existed in 8 jurisdictions and was under consideration in a further 24. Fourth, the tobacco industry was still mounting campaigns against plain packaging, including in the UK, notwithstanding the legal position in the UK. The industry had for instance cited statistics produced by academics at University College London (UCL) which purported to show that smoking had increased since the introduction of the plain packaging rules. ASH submitted however that even the academics who generated the data were saying that it had been misrepresented. Fifth, ASH contended that the reason that the industry was still advancing such arguments and evidence was to seek to deter third countries from introducing plain packaging legislation and there was a concern (by the anti-smoking lobby) that smaller and middle-income countries might be chary of taking on the tobacco industry in litigation. Sixth, given this context ASH submitted that the arguments that were rejected in the UK by the High Court and Court of Appeal were still being advanced elsewhere in the world. Seventh, in these circumstances ASH argued that in relation to the expert evidence sought by the applicant it was important that it should be available in the public domain so that it could (variously) be assessed against criticisms made of it in the Judgment or

(conversely) against the reasons why it was accepted. Either way, it would assist other governments to understand the full context to this evidence and other evidence of a similar nature.

26. In recording the submissions of ASH as to the significance of evidence *now* being tendered by the tobacco industry (which I have not seen) I am, of course, not expressing any view about that evidence. The relevance of the point lies in ASH's contention that transparency about the material adduced before the High Court in the UK should be placed into the public domain so that all concerned can view it and form their own conclusions about the evidence and this would thereby provide context to new and analogous evidence being adduced by the tobacco sector.

D. The principle of open justice as applied to documents relied upon in, and by, the Court

27. In this case the documents sought are all documents read out in open court and/or which I was invited to read in open court and/or which I was invited to read outside court and/or which I did read: See paragraph [8] above.

28. The starting point of all true justice is that it should be done and be seen to be done in public. It is difficult to understate the importance of transparent justice. It is fundamental to democracy. It is a powerful discipline upon judges and the parties. All that is said and done in a court is and should *prima facie* be subject to public scrutiny. It ensures that the press can report and thereby educate those who cannot attend. It is a cornerstone of the confidence that the public repose in those whose daily task it is to take difficult and intractable decisions that the process which leads to the end decision is subject to view and comment. As such open justice serves to protect the judiciary from ill-informed or mischievous speculation about the reasons behind a decision.

29. The principle applies forcefully in proceedings where decisions of pubic authorities are in issue. In *A v British Broadcasting Corporation (Scotland)* [2015] UKSC 25 ("A v BBC(S)") Lord Reed posed the rhetorical question - "*Who is to guard the guardians*?" He answered (at paragraph [23]):

> "In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny"

30. Transparency and openness are not just about allowing the public into court rooms. They are also about furnishing those wishing to witness or understand how justice is performed with information which facilitates that understanding. The common law principle of open justice remains malleable, and "… *the application of the principle of open justice may change in response to changes in society and the administration of justice*": *A v BBC(S)* (*ibid*) at paragraph [40].

31. An illustration of how the principle evolves and applies to new situations is found in the judgment in *R (on the application of DSD) v Parole Board of England and Wales* [2018] EWHC 694, where the Divisional Court reviewed Rule 25(1) of the Parole Board Rules 2016 which stipulated that information regarding proceedings under

those Rules, including the names of persons concerned with them *"... must not be made public*." The Divisional Court held that this restriction was *ultra vires* and contrary to the principle of open justice, and specifically, the "*right of the public to receive information which flows from the operation of that principle"* (cf per Sir Brian Leveson PQBD at paragraph [177]). The following was also observed:

> "170. The open justice principle includes the obligation to hold hearings in open court to which the public has access (see Attorney General v Leveller Magazine Ltd [1979] AC 440 , at 450, per Lord Diplock); the right of the press and others to report on legal proceedings (see Khuja v Times Newspapers [2017] 3 WLR 351 at [16], per Lord Sumption); the placing into the public domain of judicial decisions (see R (Mohammed) v Foreign Secretary [2011] QB 218 , at [37] - [41], per Lord Judge CJ and [189], per Lord Neuberger MR), even in cases where there has been a closed material procedure; and, the obligation to ensure that evidence or information communicated to a court is presumptively available to the public (see R (Guardian News & Media) v City of Westminster Magistrates Court [2013] QB 618)."

32. The principle of open justice by its very nature has a wide class of beneficiary. In *Kennedy v Charity Commissioners* [2014] UKSC 20 the Supreme Court extolled the importance of openness in government and (paragraph [1]) made express reference to the importance of the press and NGOs in the analogous context of open and transparent decision making:

> "Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; *likewise the press, NGOs and individuals concerned to report on issues of public interest*".
>
> (Emphasis added)

33. An NGO (such as the applicant) is thus entitled to benefit from these principles. In *Privacy International v HMRC* [2014] EWHC 1475 (Admin) the High Court was concerned with a challenge to a decision by HMRC (which had regulatory responsibility for supervising export regulations) not to prosecute a company that had supplied malware to a foreign state which had then allegedly been used by its security forces for surveillance and the suppression of civil activists. The sale by the company to the state concerned was said to be in breach of export regulations. Privacy International, the London based pressure group that campaigns for privacy protection and surveillance safeguards in law, complained on behalf of the activists themselves to HMRC, which however decided not to prosecute. The decision was challenged by way of judicial review. One issue arising concerned the duty of public bodies, such as HMRC, to supply information about their prosecutorial policies to third parties, including NGOs (such as Privacy International). In finding in favour of Privacy

International the Court explained that, even in relation to information that at one stage in a process (for example during an investigation into a possible crime) might be confidential for good reason, the need for confidentiality could disappear when the matter later came before a court.

> "62. Some indication of the balance to be struck between disclosure and non-disclosure can be seen from the tenor of the judgments in *Kennedy*. In that case the Supreme Court was concerned with inquiries conducted by the Charity Commission and their relationship with judicial or quasi-judicial proceedings. It was, as Mr Peretz correctly pointed out, in this particular context that the Court emphasised the high importance attached to open justice and to transparency. The present case involves legal process but at a much earlier stage. Investigations conducted by HMRC are equivalent to police investigation which might or might not lead to a prosecution. They are operations which are necessary precursors to court proceedings. This has to be borne in mind when considering the implications of *Kennedy*. Different considerations apply. When matters come to court there is a powerful presumption that they should be conducted in public and this necessarily impacts upon the availability of documents used in those proceedings. However, before the proceedings come to court, whilst investigations are ongoing, the position is not so clear cut. The police will necessarily need to keep some facts secret: the fact that they intend to conduct a search of a premises; when that will be; the address, etc. Months later, when the prosecution is underway, those same facts may well have lost any vestige of confidentiality or secrecy they ever had. They will be facts referred to quite openly in Court."

34. Later, the Court explained that NGOs and pressure groups performed an important public function:

> "76. The position of HMRC in the Decision letter that legitimate NGOs can submit dossiers by way of complaint but thereafter are entitled to no information by way of update is not a rational one. Pressure groups share many similarities with the press. They can act as guardians of the public conscience. As with the press their very existence and the pressure they bring to bear on particular issues and upon those who are responsible for governance of those issues, is one of the significant checks and balances in a democratic society. They have, therefore, a significant role to play."

35. The High Court later placed the role of NGOs into a broader judicial context. The Court observed that: "*The role that NGOs play in enforcing legal rights in court is an acknowledged and important one*": *ibid* paragraph [78].

36. This brings me to the issue of documents adduced by the parties which form part of the case. Often the arguments before a court are technical and complex and the public

may be none the wiser by simply sitting and listening to discussion or analysis of them. Increasingly judges sitting in open court also rely upon documents which they have read before the hearing starts, or which they are invited to "*read to themselves*" as the hearing progresses, or during adjournments between sittings, or even after the hearing is over when they are preparing judgments. They are not read out aloud. They are still of course an integral part of the Court proceedings even though those attending will be left largely oblivious as to the content and relevance of such material.

37. It will be evident from the discussion of principle above that, in cases such as the present, the power should be exercised presumptively in favour of disclosure. This was confirmed in *Guardian News and Media* (*ibid*) where the application was for access to documents placed before a District Judge and referred to during extradition hearings. The Court of Appeal observed that the practice of introducing documents for the consideration of the Judge, without them being fully read out in open court, had become commonplace in civil and, to a lesser extent, in criminal proceedings. The newspaper in question (the Guardian) had a serious journalistic purpose in seeking access to the documents and wished to be able to refer to them for the purpose of stimulating informed debate about the way in which the justice system dealt with suspected international corruption and the system for extradition of British subjects to the USA. At paragraph [77] the Court of Appeal set out a presumption or strong default position in favour of courts (positively) *assisting* disclosure:

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

38. Finally, transparency is not an absolute. There are of course cases where *some* degree of anonymity or confidentiality is necessary. But the courts jealously control the extent to which they hear cases in private or keep evidence away from public gaze either totally or even for a specified and limited period of time. The circumstances when this occurs (usually concerned with the interests of children or vulnerable complainants in certain types of criminal case or the security of the state or involving cases of significant commercial or personal confidentiality) are the exception and not the norm because they amount to a departure from the fundamental principle of openness. Because the principle is not absolute the Court retain their supervisory power to decide not to grant disclosure. An illustration is found in *Blue v Ashley* (ibid) where, in a case attracting media interest, the court refused to sanction the disclosure of witness statements to be used at trial the contents of which had been referred to in interlocutory proceedings. The Judge inferred that the application for disclosure was to enable the press to report the evidence that wold be given at the future trial. The Judge did not consider that this engaged the principle of open justice.

E. Conclusion

39. I have decided to grant the Application. I have an inherent jurisdiction to order disclosure of the documents in question. It is immaterial that the documents sought might, technically, not all fall within the scope of the CPR. It would be artificial of me to conclude otherwise.

40. The Applicant has advanced a variety of reasons explaining why disclosure should be ordered.

41. It is not evident from the jurisprudence which explains *why* open justice is important that, in a case where evidence has been freely referred to at the substantive hearing, the *reason* why a person seeks access should be determinative. Since, with only very limited exceptions, any member of the public is entitled to walk unhindered and without having to give an explanation, into a court to witness proceedings, it is hard to see why such a person making a request for documents which assists an understanding of those proceedings, should have to justify the request. Openness is an important constitutional virtue *in its own right*, and the Courts are unlikely, in cases such as the present, to wish to become the arbiters of the subjective reasons why individuals seek access.

42. In this case the Applicant did not attend the hearing but would have had an unfettered right to be present and to listen to the argument. This is not a case where anyone raised an argument during the hearing to the effect that any of the material now being sought, was subject to some overriding security, confidentiality or other claim which served to limit its disclosure to the public.

43. In such circumstances it is difficult to resist the conclusion that having asked, the Applicant should be entitled, without more, to the documents in question. But to the extent that the reasons are germane they are in this case compelling. The point of departure is that the documents should be made available absent some good reason to the contrary. There are no such reasons here.

44. In short: (i) the documents were all referred to in pleadings, evidence and submissions before the Court and they were all read and taken into consideration by me in preparing the Judgment; (ii) the documents raise issues relating to public safety and health; (iii) the issue of standardised packing is an issue of broad *continuing* importance to the international community; (iv) the evidence, or material similar to it, is *still* being advanced by the tobacco industry in the UK and in other jurisdictions, according to ASH; (v) conclusions arrived at in the Judgment about this evidence are better understood with the actual evidence itself being available in the public domain; (vi) wider transparency might thereby assist other interested persons, countries and courts to form their own views about the merits or otherwise of the competing arguments; (vii), there were no grounds cited at the time of the litigation to justify preserving the secrecy of the documents in issue and none arise now: (viii) it is not relevant that the litigation is at a end.

45. Further, the decision in favour of disclosure in this case is strengthened by Article 5(3) of the FCTC, promulgated by the World Health Organisation (WHO) and the accompanying guidelines, which urge a proactive approach to transparency in dealing with documentation and reporting by the tobacco industry: See for details the Judgment at paragraphs [151]-[175] and [331]-[332].

46. The approach that I adopt is also consistent with that adopted in the US where the Courts, in the wake of litigation there concerning the alleged suppression by the

tobacco industry of relevant health information, ordered the disclosure into the public domain of vast amounts of internal tobacco industry documents. All of this (exceeding circa 50 million documents) is now searchable online facilitated by means of a practical guide produced for that purpose by the WHO: See Judgment at paragraphs [19] and [300].

47. The Secretary of State has suggested that some parts of the document identified at paragraph [7(vii)] above include legally privileged material. So far as I am concerned the Application relates to the material served for the purposes of being used in open court. To the extent, if at all, that such material included what is *now* (but not then) said to be privileged then privilege has been waived by virtue of its non-restricted use during the hearing. To the extent however that the documents were redacted to preserve privilege *at the time* then it is the redacted document that is to be disclosed. My decision does not disturb privilege properly claimed at the time.

48. For all these reasons I order that the documents in issue are be disclosed to the applicant and to CTFK and thereby into the public domain.

F. Post-script: Delay in the addressing of the application

49. There has unfortunately been considerable delay in the addressing of this application. That delay was not caused by the applicant. Following the hearing of the claims for judicial review, for various reasons, the documents relating to the case were wrongly sent for destruction. Following lengthy searches by Court staff, it transpired that the documents were still held electronically. It was only upon this discovery that it was possible to retrieve them. It is acknowledged that this application should have been dealt with much earlier because resolution of such applications upon a timely basis is also an important aspect of transparent and open justice. In principle the Court is empowered to charge for the costs of making documents available. In this case, to take account of the fact that the delay in determining this matter lies with the Court, I direct that all charges be waived.