Open and Shut Cases: Balancing Open Justice and Confidentiality

When will the Court grant a sealing order? What is the difference between a hearing in Court, in Chambers, or in *camera*; and when are they appropriate? These are questions that the Court has answered in the latest judgment of the Chief Justice in *SPhinX Group of Companies (in Official Liquidation)* (unrep. 30 January 2017). In short, there is a common law principle of open justice, but it may yield to the paramount principle of doing justice, if the situation requires.

The Court was considering a sanction application by which Scheme Supervisors sought authorization to enter into a settlement agreement with a law firm. The Court also had to decide whether to grant a sealing order in respect of the summons (including its evidence). It was a condition of the settlement agreement that a sealing order be granted; so if not granted, the settlement agreement could not proceed.

The Court looked at the principles under statute and the common law relating to (i) when hearings need not be public; and (ii) when sealing orders may be granted to keep proceedings confidential.

Balance of publicity and confidentiality: principle of open justice subject to overriding principle to do justice

Open justice is a fundamental principle in Cayman Islands legislation. But the "*right to a fair and public hearing*" and the rights of access to information concerning hearings, under sections 7(1) and 7(9) of the Constitution (i.e. Schedule 2 of the Cayman Islands Constitution Order 2009), relate to *inter partes litigation. They do not relate to sanction applications, since such applications do not require the Court to determine rights and obligations of the parties in adversarial legal proceedings. Rather, they require the Court to consider what is in the best interests of the estate and whether the decision of the liquidators for which sanction is sought, is one which the liquidators have taken reasonably in the circumstances.*

However, the principle of open justice is also part of the common law. It therefore does apply to sanction applications (and by extension all interlocutory applications in liquidation proceedings). The Chief Justice cited *Hodgson v Imperial Tobacco* [1998] WLR 1056, 1071 for the propositions that in general the public should have access to court proceedings *and* access to information about what occurs in such proceedings.

The principle of open justice, though, is not unbounded. At times, this general rule as to publicity must yield to the overriding and paramount principle that justice must be done, and limitations can be placed upon public access to hearings and information about hearings.

When the principle of open justice can be displaced is not a matter of discretion. The Court is required "*to balance the general rule as to publicity, against any requirements for confidentiality or privacy in the interests of justice*

that may arise in a particular case" (judgment paragraph 12). The burden of proof is on the person seeking to displace the principle of open justice in the particular case. But both the legislation and the Court's procedural rules anticipate circumstances in which there are exceptions to or limitations on the principle of open justice, both in civil proceedings and in liquidation proceedings.

- The Court may conduct proceedings in Chambers (i.e. in private) or in *camera* (i.e. in secret): see e.g. section 7(10) of the Constitution; GCR O.63 r.3(4); CWR O.24 r.6(1); Practice Direction No 3/1997; Practice Direction No 1/2015.
- Hearings in Chambers are not automatically to be regarded as in *camera*. Members of the public can be permitted to attend hearings in Chambers with the permission of the judge. The fact that the public has no automatic right to attend hearings in Chambers does not however "*automatically cloak them in secrecy*". Nor is there any automatic restriction on the disclosure of what occurred in Chambers (Practice Direction No 3/1997).
- The Court may make orders preventing or restricting the publication of documents or information from hearings, as recognized in Practice Direction No 3/1997. This can be done, for example, by granting a sealing order.
- Going even further, the Court is also entitled to order the closure of the Court file itself. This can be done without the applicant needing to identify a 'clear and present danger' of a move to inspect by other identifiable parties.

In this application, however, the Court was only concerned with the principles relating to whether or not it should grant a sealing order.

Sealing order – Jurisdiction

Documents on the Court file in a liquidation are treated as being in the public domain. This is because the Court file in a liquidation is accessible to various classes of person under the Court rules, including creditors, and the Chief Justice noted that "*A person who obtains access to the Court file is ordinarily under no obligation of confidentiality to the liquidation estate and can disclose any documentation obtained more widely should he wish to do so*" (judgment paragraph 20).

In liquidation proceedings, the jurisdiction to grant a sealing order under CWR O.24 r.6 arises only if:

- The information in question is confidential; and
- Sealing is *necessary* to protect the economic interests of the general body of stakeholders

The Court also has jurisdiction to seal documents on the Court file as part of its inherent jurisdiction to control its own process, to the extent necessary to supplement (but not contradict) O.24 r.6: *HSH Cayman 1 GP Limited v ABN AMRO* [2010] 1 CILR 114.

Sealing order – Discretion

Assuming there is jurisdiction to grant the sealing order, the Court can go on to consider whether or not to

exercise its discretion in the particular case.

The Chief Justice referred to previous case law suggesting that, at the discretion stage, the Court could only exercise its discretion to make a sealing order for the purpose of protecting the economic interests of the general body of stakeholders and that the Court's power cannot be exercised for the benefit of third parties (here the counterparty to the settlement agreement who insisted that a sealing order be a condition of the settlement).

The Chief Justice said that that was too narrow a statement of the position. Rather, the Court must have regard to the wider and overriding principle of doing justice. Of course, in a liquidation context, the protection of the economic rights of stakeholders and the interests of justice will often be one and the same. But, depending on the circumstances of the case, the Court should take into account other factors. This will include consideration of the nature of the Court proceedings themselves.

Sealing order – Decision on the Facts

The Court held that there was jurisdiction to consider its discretion, since both limbs of the jurisdictional test were satisfied – the information was confidential and sealing was necessary to protect the economic interests of the general body of creditors.

In terms of discretion, the Court decided to exercise its discretion and grant the sealing order, holding in part that:

- Publication of the confidential information would harm the economic interests of stakeholders.
- The nature of a sanction application weighed in favour of granting the sealing order.
  - There was not the same public interest in the subject matter of the proceedings being made public, as there would be in relation to an *inter partes* action, since sanction applications do not lead to the determination of civil rights and obligations.
  - The evidence involved in sanction applications may be confidential and often privileged. "*It is essential to the proper conduct of liquidation proceedings that the liquidator is able to communicate freely with the judge in this manner to assist the judge in exercising his supervisory function with full knowledge of the facts*" (judgment paragraph 30.3).

- Maintaining confidentiality incentivizes potential defendants to avoid the publicity of *inter partes* litigation by settling with the estate; and does not impede the estate from reaching settlements with potential defendants.
- Stakeholders would still have oversight of the Scheme Supervisors' actions, since they would still be entitled to general information about the actions taken.
- Any person would still be entitled to apply to the Court to inspect the sealed documents, but such an application would be on notice to the Scheme Supervisors, who might then seek to enter into a non-disclosure agreement with the applicant.

Commentary

Whether the public is to be excluded from a hearing and whether subsequent publication of information relating to a hearing is to be limited are two different questions requiring separate treatment. The fundamental analysis, though, will be similar in each case.

"*Publicity is the very soul of justice*", as the House of Lords said in *Scott v Scott* [1913] AC 417 (a decision cited by the Chief Justice). However, the principle of publicity may need to cede to the overriding principle of doing justice in particular cases, if the situation so requires (but not as a matter of mere discretion). The Courts in offshore jurisdictions such as the Cayman Islands, where confidentiality is an important part of the attraction of the jurisdiction from a commercial perspective, are in a good position to develop the common law in terms of how the balance between publicity and confidentiality should be struck.

The Chief Justice in this case has provided a welcome explanation of the general principles.

In addition, the Court has helpfully clarified that "*it will often be appropriate that sanction applications in respect of settlement agreements be kept confidential*" (judgment paragraph 30.6) and that affidavits for sanction applications (not limited to seeking sanction to enter into a settlement agreement) may contain confidential or privileged information.

Hamid Khanbhai
Consultant

hkhanbhai@campbellslegal.com

Alistair J. Walters
Partner

+1 345 914 5861
awalters@campbellslegal.com