

Volume of Open Justice Turned Down: Confidentiality Orders in Trust Administration

How to strike the balance between open justice and confidentiality? In reasons delivered on 25 July 2018 in respect of an *Ex Parte* Originating Summons (“**Confidentiality Summons**”) issued in March 2018 in connection with **In the Matter of Settlement dated 16 December 2009**, the Grand Court of the Cayman Islands considered whether to make confidentiality orders in the context of a case involving the proper administration of a Cayman Islands discretionary trust. The application raised constitutional and public policy issues pertaining to the tension between the constitutionally-enshrined requirements of open justice and legitimate private grounds for confidentiality.

In short, permission was sought and granted:

- to seal court documents in the proceedings on the public file, save for the Confidentiality Summons, an anonymized version of the substantive Originating Summons and the order of the Court; and
- for all hearings in the proceedings and the trial of the Originating Summons to be heard in private.

The Court also gave guidance about the procedure that was to be followed in applications for confidentiality orders.

Background

The case concerned a non-contentious application by a trustee of a Cayman Islands discretionary trust.

The trustee sought the confidentiality orders in part:

- so as to protect actual and contingent beneficiaries from the personal safety risks of being publicly linked to substantial wealth; and
- because the beneficiaries did not wish these children to become aware of their family’s link to substantial wealth for fear that it would adversely affect their personal development.

Legal Principles

The Court confirmed that the principle of open justice is constitutionally protected, although it is also a principle

at common law. Rights of privacy are also protected under the Cayman Islands Constitution. A balance needs to be struck between these potentially competing rights.

In relation to the principle of open justice, the right to a fair hearing is protected by section 7(1) and 7(9) of the Cayman Islands Constitution. The Court held that these provisions should be construed broadly. However, the principle was expressly limited by section 7(10).

The grounds on which private hearings may take place are circumstances of necessity or expedience involving the following categories of cases:

- where publicity prejudices the public interest;
- in interlocutory proceedings;
- on grounds of public morality;
- the welfare of minors;
- the protection of commercial confidence; or
- the protection of the private lives of persons concerned in the proceedings.

The relevant 'gateways' for seeking confidentiality orders in non-contentious trust applications will typically be the welfare of minors and/or the protection of private lives of persons concerned in the proceedings.

The Court said that, where an offshore jurisdiction promotes the establishment of trusts as an effective mechanism for legitimately conserving and protecting settlors' wealth, the host courts must be at least sympathetic to confidentiality applications made on the basis that the Court should protect the welfare of minor beneficiaries and the privacy of beneficiaries generally so that the trust can be administered in a way which does not prejudice the rights of those potentially interested in it.

The Court suggested that the balance struck between open justice and confidentiality in the Cayman Islands might well weigh more towards confidentiality than might be the case in, for example, England. However, the Court said "*This does not involve any dilution of the basic constitutional and common law test that there is a presumption in favour of open justice and that confidentiality orders should not be granted (or continued) where there is a public interest in transparency.*"

The needs of transparency will be strongest, the Court said, where persons linked to the trust are subject to tax or regulatory proceedings, or the sources and 'concealment' of their wealth are matters which are already the subject of media scrutiny. In such cases there will be an obvious risk that the granting of a confidentiality order will have the effect of the Court providing (or appearing to provide) a cloak for impropriety.

Procedure

Under the Grand Court Rules it is not permitted to file an anonymised form of originating process without prior leave of the Court.

In this case, the Court treated the Confidentiality Summons as an interlocutory summons in the main action issued before the filing of the Confidentiality Summons. The Court found that it had an inherent jurisdiction to grant injunctive relief and that this was the proper basis for granting the confidentiality order by way of interlocutory relief in the proposed action.

Applicants for *ex parte* confidentiality orders have continuing duties to make full and frank disclosure. There is a positive duty to make disclosure to the Court, either before or after a confidentiality order is obtained, if:

- the trustees, beneficiaries or any other persons linked with the trust are or become subject to foreign criminal, tax or other public investigative proceedings; or
- information about the trust or the beneficiaries' wealth is in or enters the public domain.

Moreover, the Court held that the general procedure suggested by the “English Practice Guidance: Interim Non-Disclosure Orders” should be followed in the Cayman Islands, subject to appropriate modifications which may be required to fit the needs of particular cases and the local legal context.

An additional safeguard was proposed by the Trustee in this case. An anonymised version of the substantive Originating Summons endorsed with portions of the confidentiality order (signifying, amongst other things, the right to apply to set it aside) was ordered to be placed on the Register of Writs which is open to public inspection.

Comment

Offshore jurisdictions are in a good position to develop the common law in the balance to be struck between open justice and confidentiality, given the economic importance of confidentiality. At first blush, this may be a case in which the balance between open justice and confidentiality has fallen rather more heavily in favour of confidentiality than might otherwise have been expected. However, the Court was satisfied in the circumstances of the case that *“there was no public interest in open justice which outweighed the countervailing interests of protecting the welfare of minor beneficiaries, protecting the private lives of the adult beneficiaries and generally protecting the Trustee’s ability to peaceably hold and administer the Trust assets”*. The tenor of the Court’s reasoning suggests that the Court may be inclined against granting similar confidentiality orders in cases where there is a greater public interest in open justice.

Please contact the authors if you have any questions.



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