

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**Civil Appeal NO: 23 of 2014**

**CAUSE NO: FSD 96 of 2014 (AJJ)**

**IN THE MATTER OF the Foreign Arbitral Awards Enforcement Law (1997  
Revision)**

**AND IN THE MATTER OF an application for the enforcement of an ICDR Arbitral  
Award dated 27 June 2014 in Case No. 50-117-T-00924-12**

**BETWEEN:**

**SASKEN COMMUNICATION TECHNOLOGIES LIMITED**

**Plaintiff / Respondent**

**– and –**

**SPREADTRUM COMMUNICATIONS INC.**

**Defendant / Appellant**

**Before: The Rt. Hon. Sir John Chadwick, President  
The Rt. Hon. Sir Bernard Rix, Justice of Appeal  
The Hon. Sir George Newman, Justice of Appeal**

In the presence of Shelley White of Walkers for the Appellant, the application being unopposed.

Heard and Judgment delivered: 1 May 2015  
Transcript of oral ruling released: 10 May 2015

**RIX JA**

This is an appeal which concerns the proper interpretation and practice under O.63 of the Grand Court Rules which, under O.63 r.3, deals with the filing of documents.

O.63 r.3 provides as follows:

"1. Every document required to be filed in any proceeding must be placed on the Court file relating to such proceeding and sealed with a seal showing the date upon which the document was filed.

2. Any document requiring to be filed which is more than 50 pages shall be placed in a ring binder and otherwise suitably bound and kept with and deemed to form part of the Court file.

3. Subject to paragraphs (4) and (5), the Court file relating to any proceeding shall be open to inspection only by the parties to that proceeding.

4. The Court may order that the Court file relating to any proceeding or any specific document therein be closed and not open to inspection by any party or other person except with the prior leave of the Court.

5. The Court may give leave in special circumstances on application to any person not a party to the proceedings to inspect the Court file or to take a copy of any document on the Court file relating to those proceedings."

Other provisions under O.63 deal with the creation of a register of judgments (see r.7), and a register of writs and other originating process (see r.8). The effect of those latter rules is that by means of such registers all originating process and judgments are open for public inspection upon the terms, such as paying the prescribed fee which are set out in those Rules.

With those exceptions, however, the effect of O.63 r.3(3), (4) and (5), is that there is only limited inspection of the documents on a court file. Essentially, only parties to the proceedings in question can inspect documents on the Court file, and even parties, as well as any third persons, may not inspect documents on such a file which have been closed by order of the court under r.3(4) "except with the prior leave of the Court". As for any other person not a party to the relevant proceedings, such other persons have no automatic right to inspect a Court file, save with leave given on application under subrule (5). That is the essential background to this appeal.

Now, this case concerns an entirely uncontroversial enforcement of an arbitration award, in respect of which the Plaintiff in these proceedings sought enforcement of the award without controversy on the part of the defendant. The award therefore was enforced by order of the court, but the parties were agreed — albeit it was the Defendant who made the running in this respect — that two documents in particular should be closed within the Court file with assistance of an order of the court under O.63 r.3(4) because the contract between the parties specified that certain matters were confidential, which matters were addressed in the two documents in question, one of which was an affidavit and the other a skeleton argument.

So the parties came before the court to request the closing of the file with respect to those two documents. Despite a draft consent order presented to the court for the purposes of its assistance, the court, Mr Justice Andrew Jones QC, requested argument from counsel on the question of closing of the documents in question before he gave any such order as requested. In effect, the judge was concerned about his power to order such closure in circumstances where r.3(3) stated that a file was, in any event,

open to inspection only by the parties. He, therefore, regarded the requested order as being unnecessary.

In order to give effect to the obvious intention that the court did have power to order closure of a file in relation to any documents therein, the judge considered that that rule only arose in limited circumstances in which the party or parties requesting closure could identify what I might call a clear and present danger of an application for inspection together with the ability to identify the person or persons or categories of person who might be anxious to inspect the file.

The parties' concern, nevertheless, was that although the Court file was not open to inspection without the leave of the court, nevertheless, under r.3(5), the court could give leave on an application made to inspect the file without the parties being given any notice of that application. The parties, therefore, submitted to the judge that the obvious intent of r.3(4)'s exception to permit inspection of a closed file "with the prior leave of the court" could only properly arise upon notice to the parties in the proceedings in question. The court rejected that submission on the basis that such an interpretation of the Rules would involve a fetter on the discretion of the court. He, therefore, as I have mentioned above, made sense of the provision allowing closure of a file, either in total or in respect to particular documents, by interpolating a requirement of a clear and present danger of an application in the way that I have already mentioned.

In respect to this conclusion of the judge and the submissions of the parties before him, it is necessary to mention a recent Practice Direction, No.1 of 2015, headed "Applications for Sealing Orders and for inspection of Court Files in Civil Proceedings Grand Court Rules O.63 r.3". This Practice Direction was not in place at the time of the argument before the judge and of his judgment. It was published on 16 March 2015. It is a Practice Direction of the Chief Justice, The Honourable Anthony Smellie, dated 20 February 2015. It therefore was not in play at the time of the hearing and judgment below.

The Practice Direction explains how documents may be closed, or sealed as it is there expressed, so as not to be open to inspection by anyone without the leave of the court, but also explains how such closure or sealing is to be effected and how applications to inspect a Court file may also be effected. Thus, there are detailed provisions about how the sealing of all or part of a Court file may be made by letter to the Clerk of the Court and determined by a judge administratively under r.3(4), and the effect of such an order of the court, an order which the Practice Direction also makes clear may be made by a judge on his own motion.

There is also detailed Practice Directions as to how an application for inspection of a Court file may be made under r.3(5). I will read those Practice Directions:

"Application for inspection of Court Files.

An application under O.63 r.3(5) for leave to inspect a Court file may be made by letter to the Clerk of the Court and may be determined administratively by the Clerk of the Court unless the Clerk is of the view that the matter should be referred to a Judge for determination. The application should contain:

1. The identity of the person seeking leave to inspect and, where that person is an attorney or agent, the identity of his principal. Where the person applying is an agent, written authority of the principal must be furnished.
2. A concise statement of the reason for the request; and
3. A description of the portion of the Court file that the applicant wishes to inspect."

The Practice Direction does not deal specifically with the consequences of a file being sealed or closed, either in whole or with respect to certain documents. All that it says in respect to such consequences is contained in the opening paragraph of the Practice Direction which reads, in part:

"A judge of the Court may order that all or part of a Court file may be sealed and therefore not open to inspection by anyone without leave of the Court: O.63.63 r.3(4). Such leave is granted upon application by any person who is not a party: O.63.63 r.3(5)".

Although the Practice Direction, as I have said, does not deal specifically with the consequences of sealing or closure under r.3(4), it is possible that an argument could be raised by inference that an application for leave to inspect a sealed file could be made in exactly the same way as an application to inspect an unsealed or unclosed Court file in the manner subsequently described in the Practice Direction, namely, by administrative application by letter to the Clerk of the Court with the possibility that the matter could then be referred to a judge for determination, but without any provision for notice being given to the parties. That question of whether notice should be given to the parties in circumstances where the court has made an order for the sealing or closure of a Court file, in whole or in part, is the bone of contention on this appeal.

In my judgment, the judge was in error in not acceding to the submissions of the parties before him that the purpose and function and utility, therefore, of a sealing of a file under r.3(4) was to ensure that no one could get access to the closed file or closed documents without notice to the parties in the proceeding in question. In effect, the Rules in O.63 r.3(3), (4) and (5), while requiring the leave of the court at each stage of the Rules that are discussed, do not descend into detail as to how the leave of the court in special circumstances is to be obtained. That is left for practice or inference, according to the rationale of the Rules themselves. In my judgment, it is a necessary inference of the rationale of the possibility of sealing or closure by order of the court that that order cannot be undone and permission cannot be given on application to any other or third party without the parties who obtained closure of the file in the first place being given notice of the application to inspect in question. It may well be that it makes good,

practical and administrative sense to allow applications for closure or applications to inspect to be made in the first place by letter to the Clerk of the Court, or, in effect, if the Clerk of the Court refers that letter to the court by way of ex parte application to the court. That administrative convenience, however, does not explain what is to happen if a Court file has been closed or sealed, and it is therefore necessary to obtain that leave of the court which is expressly required under r.3(4) itself in that subrule, 'except with the prior leave of the Court'.

In my judgment, the judge was in error not to appreciate that a Court file sealed at the request of a party or parties to a proceeding could not be unsealed by the giving of permission to some third party without the opportunity of a party in whose favour the sealing or closure was originally made being given the opportunity to address submissions to the court. To enable that to take place, it is necessary to infer that notice of the third party's application for leave to inspect the file be given to the parties in question. Such notice will not be necessary, of course, where the applicant's only concern is to inspect the file to the extent that it has not been closed; but if that party wishes to inspect a closed file, or parts of the file that have been closed, it is a necessary inference, in my judgment, that notice be required to be given to the parties concerned in the proceeding in question.

The giving of such a notice is not only required, in my judgment, by the rationale of the Rules as a whole, but it is also, in my judgment, an error of the judge to suggest that the giving of such a notice would be, in any way, a matter of fettering the subsequent discretion of the court. The giving of notice would be there in order to assist the court in exercising its discretion with the assistance of submissions from the parties in question. That would not be a fettering of the discretion of the court, but an aid to the exercise of the discretion of the court.

Similarly, in my judgment, the judge was in error to interpolate into r.3(4) the need for the identification of a clear and present danger on the part of identified other persons, or categories of person, an interpolation which the judge only made in order to give sense to the Rules where he otherwise saw no need for a rule requiring closure of a file in whole or in part.

So the position, in my judgment, is this. First of all, an order for closure may be made at the request of a party or parties to a proceeding without them needing to identify a clear and present danger of a desire to inspect by other parties. It is sufficient if, for good reason, the closure of a file, in whole or in part, is needed in the interests of justice. That is the ultimate requirement for the purpose of this rule, which has been laid down by Chief Justice Smellie in the case of Ahmad Hamad Algosaibi and Brothers Company v. Saad Investments Limited [2011 (1) CILR 326]; see paras. 25 and 26.

In that case, the Chief Justice found the interests of justice for closure fulfilled in circumstances where it was necessary for a schedule identifying the origins from which security for costs could be given to be kept confidential, even from other parties in the

same proceedings, in circumstances where those other parties had no right or interest or concern in that matter so far as the proceedings themselves were concerned.

Those peculiarities of that case do not in any way concern us in this case. The position in this case is that under the contract between the parties there was a requirement of confidentiality which disclosure of the two documents in question would have upset. The judge accepted that that was the case. In my judgment, he should have concluded that the interests of justice permitted and required the sealing of the documents in question, so that if any third person wished to inspect the Court file, they would not be able to do so without the permission of the court in circumstances where that permission could not be obtained without the court hearing from the parties in question on that application before any order of unclosing or unsealing of the file was made.

So far as the subsequent Practice Direction is concerned, my feeling is that there was no intention in the Practice Direction to address the specific question which has arisen in this case, which is what was to happen if a closure or sealing order had been made, of how, in such circumstances, the question of notice to the parties concerned with that closure order should or should not be given. Nevertheless, as I have pointed out, there is a possible argument or inference that could be drawn, as the Practice Direction is drafted at present, that no such requirement of notice to the parties need be given. I would like to make it clear, for my part, that any such argument or inference is not sound. If drawn, it would run contrary to the rationale and requirements of the Rules themselves. It is, of course, the case that a Practice Direction may assist in developing the practice of a rule, but it cannot run inconsistent with the rule.

Since it is my judgment that the rule requires notice to be given to parties in whose favour a closure order has been made, it must follow that that closure order cannot be undone without notice being given to the parties in question. It would probably be better if that was made clear by an amendment to the Practice Direction in question in case future persons or parties, in ignorance or oversight of this judgment, if my brothers agree with what I am suggesting, should, by wrong inference as to the Practice Direction as it stands, be misled as to the meaning and effect of the Rules in question.

Therefore, for these reasons, I would allow this appeal and grant a closure or sealing order under r.3(4) with respect to the two identified documents, and I would, with respect, suggest that the Practice Direction No.1 of 2015 is amended to take account of this judgment. Of course, any amendment to the Practice Direction is a matter for the Chief Justice.

NEWMAN JA: I agree.

CHADWICK, President: I also agree with the order that My Lord has proposed. I should make it clear that this appeal does not turn on the terms of Practice Direction No.1 of 2015, which was issued after the order under appeal.

I should also make it clear that the Practice Direction is of course the Practice Direction of the Chief Justice, and it is for him to determine what its contents should be, but he may wish to consider whether some clarification is needed in the light of the judgment of this court on the appeal that is before us.