IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2018 (IKJ)

IN THE MATTER OF a settlement dated 16 December 2009 (the "Settlement")

Appearances:	Mr Colin McKie QC and Mr Adam Huckle of Maples and Calder for Julius Baer Trust Company (Channel Islands) Limited (the "**Trustee**")
Before:	**The Hon. Justice Kawaley**
Heard:	**On the papers**
Date of Decision:	**14 May 2018**
Draft Reasons Circulated:	**23 July 2018**
Reasons Delivered:	**25 July 2018**

HEADNOTE

Ex parte application for confidentiality order-proposed originating summons concerned with administration of a trust-governing principles-permitted derogations to principles of open justice-Cayman Islands Constitution Order-common law principles of open justice

REASONS FOR CONFIDENTIALITY ORDER
(in Court)

1. The Trustee issued an Ex Parte Originating Summons on March 28, 2018 (the "Confidentiality Summons"). On or about April 25, 2018 I determined that the Confidentiality Summons could appropriately be dealt with on the papers because it was properly to be treated as an interlocutory summons filed in the main proceedings. The Confidentiality Summons sought various protections in relation to a proposed substantive Originating Summons which sought directions in relation to the administration of a Cayman Islands law governed discretionary trust. In essence, permission was sought to place only an anonymised version of Court documents on the public file and for all applications relating to the substantive directions application to be heard in private.

2. On May 14, 2018 I made an Ex Parte Order granting the following significant relief on the Confidentiality Summons:

> "*1. The Confidentiality Summons be treated as having been made by way of ex parte interlocutory summons in this proceeding.*
>
> *2. Upon the said Originating Summons being issued, the Clerk of the Court not place a copy thereof on the Register of Writs and Other Originating Processes (the "**Register of Writs**").*
>
> *3. Upon the Court being satisfied that it be strictly necessary, the Intended Plaintiff do have leave to amend the Originating Summons in substantially the form annexed to this Order at Annex B (the "**Amended Originating Summons**").*
>
> *4. Upon the said Amended Originating Summons being issued, the Clerk of the Court do place a copy thereof on the Register of Writs.*
>
> *5. The Court being satisfied that it be strictly necessary, all documents (save those set out below) filed, or to be filed, in this proceeding be placed in envelopes and thereafter sealed prior to being placed on the Court file, and such sealed envelopes not be open to inspection by any person other than the parties to this proceeding and their attorneys, except with the prior leave of the Court, such application to be made on at least 14 days' written notice to the parties hereto. The Clerk of the Court do place copies of the following documents on the Court file without being first placed in sealed envelopes:*
>
> > *5.1 The Confidentiality Summons;*
> >
> > *5.2 The Amended Originating Summons;*
> >
> > *5.3 This Order, including Annex B but not including Schedule 1 (Confidential) or Annex A (Confidential).*
>
> *6. The Clerk of the Court do place a copy of this Order, including Annex B but not including Schedule 1 (Confidential) or Annex A (Confidential), on the Register of Judgments and Orders.*
>
> *7. The Court being satisfied that it be strictly necessary, all future hearings in this proceeding, including the trial of the Originating Summons, be heard in private.*
>
> *8. Nothing in this Order shall prevent the publication of this Order (but not including Schedule 1 (Confidential) or Annex A (Confidential)) or the reporting of any written reasons delivered in this proceeding, save that the parties be at*

liberty to apply for any orders in respect of any written reasons pursuant to Practice Direction No 4 of 1997 as they may be advised.

9. For the avoidance of doubt, nothing in this Order shall prevent the parties or any other person from publishing, communicating or disclosing any information as was already in, or thereafter comes into, the public domain in the Cayman Islands (other than as a result of breach of this Order).

10. It is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be imprisoned, fined or have their assets seized.

11…"

3. I now give reasons for that decision.

The factual basis for the Confidentiality Summons

4. The main action was an application for directions by the Trustee seeking the Court's blessing for certain decisions and proposed actions. The principal grounds for seeking the Confidentiality Order were as follows:

   (1) protecting actual and contingent beneficiaries from the personal safety risks of being publically linked to substantial wealth;

   (2) the Settlor's grandchildren who were all minors had all been revocably excluded as beneficiaries. No useful purpose would be served by apprising them of a mere expectancy;

   (3) 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.

5. I only considered grounds (1) and (3) to be material. The fact that they articulated generic concerns often expressed in similar applications did not to my mind weaken their cogency. On the contrary, the familiarity of the concerns relied upon adds to their credibility. It is self-evident that being associated with substantial wealth gives rise to personal safety risks; such risks may be greater in certain parts of the world than in others but are material risks as a matter of common sense in all cases. In my experience it is increasingly common for persons who have accumulated significant wealth to wish their children to live, so far as is possible, 'ordinary' lives and to be unaware of the scale of wealth to which family members potentially have access.

Governing legal principles

6. It was rightly argued by the Trustee that while the principle of open justice is constitutionally protected, so are rights of privacy as well. The following provisions in the Cayman Islands Constitution are particularly pertinent in this regard. Firstly as regards open justice:

> "*7(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time...*
>
> *(9) All proceedings instituted in any court for the determination or existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.*
>
> *(10) Nothing in subsection (1) or (9) shall prevent the court from excluding from the proceedings persons other than the parties to them and their legal representatives to such extent as the court –*
>
> > *(a) may be empowered by law to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, ..., the welfare of minors or the protection of commercial confidence or of the private lives of persons concerned in the proceedings; ...*"

7. Even at the constitutional level, the public hearing requirement is not an absolute one. The Court, where it is "*necessary or expedient*", may conduct private hearings for the "*protection of ... the private lives of persons concerned in the proceedings*".

8. The Trustee submitted that while these general principles were well recognised, they had not before been judicially addressed in relation to trust proceedings by local authority. However, it was argued as a matter of principle that a private hearing was justified on two alternative bases:

   (a) section 7(9) of the Constitution was not engaged at all by the present application, which related merely to the administration of a trust. These were accordingly <u>not</u> "*proceedings instituted in any court for the determination or existence or extent of any civil right or obligation*"; <u>alternatively</u>

   (b) if section 7(9) was engaged by the present application, the character of the proceedings fell within the ambit of a constitutionally permitted exception, having regard to common law open justice principles.

9. It is well recognised that fundamental rights and freedoms provisions in Commonwealth countries should be given "*a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to*": *Minister of Home Affairs-v-Fisher* [1980] AC 319 at 328 (Lord Wilberforce). In my judgment caution is required before adopting a technical legal approach which results in a narrowing of the scope of civil proceedings which are protected by section 7 of the Cayman Islands Constitution.

10. Having sounded that note of caution, it is necessary to analyse the extent to which the narrow construction of the phrase "*civil right or obligation*" involves narrowing the measure of protection provided for the umbrella fair hearing rights. The public hearing requirement, it seems to me, is not a protection for individual litigants so much as a general protection for the independence and impartiality of court proceedings generally. This can be gleaned by common law cases dealing with the open justice principle. As the Trustee's counsel's submissions acknowledged, there is an overlap between the public hearing requirements of section 7 and the freedom of information requirements of section 11 of the Constitution. In *Re The Sphinx Group of Companies (in Official Liquidation)* [2017] 1 CILR 176, Smellie CJ opined as follows (in the context of an application to inspect a liquidation file):

> "*9. Given that the principle of open justice is, however, one of common law, it does not depend exclusively on s.7 of the Constitution being engaged. Rather, the principle requires that, in general, the public should have access to court proceedings and access to information about what occurs in such proceedings.*
>
> *10. This is the right to freedom of information about all aspects of the democratic process that enables members of the public to exercise the right to freedom of expression and participation in good governance. Furthermore s.11 of the Constitution enshrines the principle of open justice more generally in that all persons should be free to 'receive…information without interference.' The right to receive information would therefore apply to all court proceedings, even those where the rights and obligations of adverse parties are not being determined…*
>
> *11. It is recognized, however, that the principle of open justice is not unlimited. Rather, open justice forms part of the overriding principle that justice must be done…*
>
> *12. Limitations can only be placed on the principle where the interests of justice so require…*"

11. I fully endorse this reasoning. It implicitly requires section 7 and section 11 to be read together when deciding whether or not any form of confidentiality order should be made

in relation to civil proceedings broadly construed. It sidesteps the narrow construction of "*civil right or obligation*" in favour of a more robust approach which assumes that open justice principles are always potentially engaged. I find this analytical approach more rigorous and persuasive than the narrower approach which has on at least one occasion been adopted by the English courts. In *Re Trusts of X Charity* [2003] 3 All ER 860, a comparatively early European Convention on Human Rights ("ECHR") English case, Sir Andrew Morritt V-C held (at para. 12):

> "*An application to the court by trustees for directions may well affect but does not normally determine the civil rights of anyone. ... This, essentially administrative, jurisdiction is designed to provide guidance to the fiduciary as to the proper exercise of his powers in the problematic circumstances with which he is faced. Only rarely could it be said to determine the rights of anyone.*"

12. The modern English '*Practice Guidance: Interim Non-disclosure Orders*' [2012] 1 WLR 1003, to which the Trustee's counsel also helpfully referred, clearly recognises the interaction between privacy and open justice rights and commends the following stridently pro-open justice approach:

> "*10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice .... Derogations should, where justified, be no more than strictly necessary to achieve their purpose.*
>
> *11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test. ...*
>
> *12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: .... Anonymity will only be granted where it is strictly necessary, and then only to that extent.*"

13. The Practice Guidance goes on to address the interaction between the privacy rights under article 8 of ECHR and the principles of open justice. Section 9(1) of the Cayman Islands Constitution similarly provides:

> "*(1) Government shall respect every person's private and family life, his or her home and his or her correspondence.*"

14. In my judgment, and I accept that these issues have not received the benefit of full argument before me, the privacy rights guaranteed under section 9(1) of the Constitution are fully fledged fundamental protections which are entitled to be broadly interpreted and given effect to in their own right. It is fair to assume that some fundamental freedoms have more general importance than others because they underpin the main pillars of democracy. As Smellie CJ noted in *Re Sphinx* (at para. 10), "*the right to freedom of information about all aspects of the democratic process…enables members of the public to exercise the right to freedom of expression and participation in good governance*". The fair trial rights including the right to a hearing before an independent and impartial court also forms part of the central underpinnings of the Bill of Rights. However, there is a danger that in placing too much emphasis on the importance of open justice the countervailing protected rights of privacy will be diminished to an unacceptable degree. The various elements of the Bill of Rights form part of interlocking system or code and must be construed so far as possible in a consistent manner.

15. I incline to the view that section 7(10) of the Constitution is the most reliable guide as to the basic grounds upon which the open justice principle may be limited, taking into account the allied rights to receive information under section 11 of the Constitution and of privacy under section 9, because these grounds are formulated as exceptions to the general rule that civil hearings should be heard in public. Embedded, implicitly, in section 7(10) is an acknowledgment of the fact that a judicial assessment must be made of the conflicting elements of open justice (section 11(1)) and privacy rights (section 8(1)). Section7 (10), it bears repeating, provides as follows:

> "*(10) Nothing in subsection (1) or (9) shall prevent the court from excluding from the proceedings persons other than the parties to them and their legal representatives to such extent as the court –*
>
> > *(a) may be empowered by law to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, …*[public morality], *the welfare of minors or the protection of commercial confidence or of the private lives of persons concerned in the proceedings; …*"

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

    (a) where publicity prejudices the public interest;

    (b) in interlocutory proceedings;

    (c) grounds of public morality;

(d) the welfare of minors;

(e) the protection of commercial confidence;

(f) the protection of the private lives of persons concerned in the proceedings.

17. To the extent that the common law in the Cayman Islands has developed (as elsewhere) the position whereby the mere fact that a hearing is interlocutory is insufficient to guarantee privacy, the relevant 'gateways' for accessing a confidentiality order in relation to a non-contentious trust application will typically be (d) ("*the welfare of minors*") and/or (f) ("*the protection of the private lives of persons concerned in the proceedings*"). The Trustee's counsel referred to my own Supreme Court of Bermuda decision in *Re The G Trusts* [2017] SC (Bda) 98. In that case, giving reasons for making a similar confidentiality order and having regard to similar conflicting fundamental rights, I stated:

> "*7...This Court is also entitled to construe domestic law rules, whether procedural or substantive, so far as possible so as to conform to Her Majesty's international obligations in respect of Bermuda. In this regard, the following provisions of the First Protocol to the European Convention on Human Rights articulates a broad principle which is also relevant to confidentiality orders in trust cases:*
>
> ***'ARTICLE 1***
> ***Protection of property***
>
> <u>*Every natural or legal person is entitled to the peaceful enjoyment of his possessions.*</u> *No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. [emphasis added]* ".

18. In my judgment, this is an ECHR-protected fundamental right which, though not as broadly expressed in the Cayman Islands Constitution, does find some limited recognition in section 15(1). Where an offshore jurisdiction promotes the establishment of trusts as an effective mechanism for legitimately conserving and protecting settlors' wealth, the host courts must to my mind be at least sympathetic to confidentiality applications such as the one made in the present case. The Trustee is effectively asking

the Court to 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 public interest in the Cayman Islands on confidentiality applications may, in terms of an initial knee-jerk judicial response at least, be somewhat less cynical about confidentiality than might be the case elsewhere. Were a local version of the English Practice Guidance on Interim Non-disclosure Orders to be developed, the volume of the open justice theme might well be toned down from 'fortissimo' to 'mezzo fortissimo'.

19. 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 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 this Court providing (or appearing to provide) a cloak for impropriety.

Application of governing principles to the facts of the present case

20. In *Re The G Trusts* [2017] SC (Bda) 98, I suggested that grounds for confidentiality similar to those relied upon in the present case were sufficient, but also explained important limitations on the granting of such relief:

> "*8. The most common grounds on which confidentiality orders are sought are the following:*
>
> - *if details of the wealth with which the beneficiaries are linked enters the public domain, the beneficiaries will potentially be subjected to unjustified public attention;*
> - *if minor beneficiaries become aware of the wealth with which they are contingently connected during their minority, their ability* [to] *enjoy a healthy and normal childhood will likely be impaired;*
> - *(less commonly) if details of the wealth with which the beneficiaries are linked enters the public domain.*
>
> *9. It is important to add that such orders are made on the implicit understanding that:*

- *the applicant trustees as regulated persons are subject to an ongoing duty to ensure that the trust itself and, so far as the trustees can reasonably ascertain, the beneficiaries themselves, are compliant with any applicable onshore tax obligations as regards any distributions which they receive;*

- *the applicant trustees as regulated persons are compliant with their own AML/ATF obligations with respect to any assets received by the trust(s);*

- *the trust structure is a genuine one and is not on its face being operated in an artificial eye-brow raising manner; and*

- *should the trustees, beneficiaries or any other persons linked with the trust become subject to foreign criminal, tax or other public investigative proceedings, any confidentiality order initially made will be liable to be set aside.*

10. It is also important to note the generic context in which confidentiality orders are made:

- *apart from the fact that Court approval is required because of the legal mechanics of trust law to rearrange the basis on which the trust assets are administered, the subject-matter of the proceedings would in all other contexts be regarded as confidential, private and/or subject to legal privilege. The ordinary citizen who consults his solicitor about revising his will is not required to disclose the content of his will and his discussions with his solicitor to the general public;*

- *the information sought to be kept confidential has not yet lost its confidentiality because it has, to some extent at least, entered the public domain. This is the sort of sharp tension which exists between privacy and open justice in questions where injunctive relief is sought to restrain the press from publishing private information (see e.g. JIH-v-Newsgroup Newspapers Ltd [2011] EWCA 42).*"

21. Applicants like the Trustee in the present case who obtain ex parte confidentiality orders are subject to continuing duties to make full and frank disclosure: *KL and NN-v-Sunday Newspapers Limited.* [2015] NIQB 88 (considered further in paragraph 27 below).

Most significantly, there must invariably be a positive duty to make disclosure to the Court either before or after a confidentiality order is obtained if:

(a) the trustees, beneficiaries or any other persons linked with the trust are or become subject to foreign criminal, tax or other public investigative proceedings; and/or

(b) information about the trust or the beneficiaries' wealth is in or enters the public domain.

22. The present Applicant, however, very properly invited the Court to impose additional safeguards into the Confidentiality Order's terms. In short, an anonymised version of the substantive Originating Summons endorsed with portions of the Confidentiality Order (signifying, *inter alia*, the right to apply to set it aside) were ordered to be placed on the Register of Writs which is open to public inspection.

Procedure applicable to confidentiality order applications

23. The Trustee's counsel explicitly sought guidance on the correct procedure for the present application. The present application was made by Ex Parte Originating Summons before the substantive Originating Summons was filed. To do otherwise would have defeated the purposes of the interim relief. I was invited to direct that the Ex parte Originating Summons be treated as an interlocutory summons in the main action issued before the filing of the Originating Summons. I acceded to this aspect of the application. Paragraph 1 of the Confidentiality Order provided as follows:

> "*1. The Confidentiality Summons be treated as having been made by way of ex parte interlocutory summons in this proceeding.*"

24. The following submissions were made:

> "*40. There is no judgment in the CILR which resolves the question as to whether the Trustee should properly proceed by way of ex parte originating summons or interlocutory summons. There is similarly no reported English judgment under the RSC of which the Trustee's attorneys are aware.*
>
> *41. In Northern Ireland, whose rules of court appear to be based on the RSC, Stephens J considered this in Sunday Newspapers Ltd, albeit in the context of a writ action for libel. The facts of that case were as follows. KL and NN issued a writ for libel against Sunday Newspapers Ltd. They used initials in the writ rather than their own names. They did not apply for, or obtain, any order to permit them to do so. Stephens J held that:*

*'The identity of the plaintiffs, and accordingly the requirement on them to use their full names in the Writ, is an integral part of civil proceedings ... The requirement for the plaintiffs to use their names can also be discerned from Order 6, Rule 1 of the [Northern Irish Rules of the High Court ("**NIRHC**")] which provides that every Writ must be in form 1, 2, 3 or 4 ... as appropriate. Each of those forms requires the plaintiffs' first and surnames to be inserted: see 6/1/14 of The Supreme Court Practice 1999 and the equivalent provision in 7APD.4 Civil Procedure 2015.'*

and

'It is not consistent with the principle of open justice, with the freedom of expression of others, or with the [NIRHC] for the plaintiffs to have used their initials as opposed to their first and surnames on the Writ. Absent any order of the court granting anonymity and reporting restrictions the plaintiffs should not have issued the Writ using their initials.'

42. NIRHC O. 6, r. 1 states: 'Every writ must be in Form No.1, 2, 3 or 4 in Appendix A, as is appropriate.' GCR O. 6, r. 1 and RSC O. 6, r. 1 are in substantially the same form: 'Every writ must be in Form No.1, of Appendix [1][A].' NIRHC Form 1 (General Form of Writ of Summons) is substantially the same as GCR Form 1 and RSC Form 1. (NIHCR Form 2 is in the same form as Form 1 except that the particularised statement of claim is indorsed; Form 3 concerns a writ in a probate action; and Form 4 for a writ to be served out of the jurisdiction. Nothing turns on the reference in Sunday Newspapers to Forms 2, 3 and 4.) <u>Accordingly, the application of the principle stated at para. 6/1/4 of the Supreme Court Practice 1999 and relied upon by the judge is equally applicable to writs issued in this jurisdiction: 'The writ must contain the plaintiff's Christian or other first names and surname; the forms appear to require this'</u>

43. GCR O. 7, r. 2(1) and RSC O. 7, r. 2(1) are to similar effect regarding originating summons as GCR O. 6, r. 1 and RSC O. 6, r. 1 are as to writs. GCR Form 2 (Originating Summons-general form), like GCR Form 1, seems to require the plaintiff to state the full name of the parties. <u>Accordingly, the principle stated above in Sunday Newspapers is equally applicable to an inter partes originating summons such as the Main Application, and therefore an inter partes originating summons cannot be issued in anonymised form without the permission of the Court.</u>" [Emphasis added]

25. I accepted that under the Grand Court Rules it was not permissible to file an anonymised form of originating process without prior leave of the Court. The solution commended to me was to find, following Stephens J in the Northern Irish case of *KL and NN-v-*

Sunday Newspapers Limited. [2015] NIQB 88 that an application for an anonymisation order was in substance and effect an application for an injunction. If it was, then an ex parte interlocutory summons could be issued in the anticipated main action, which (apart from being more convenient administratively and more sound legally), also permitted a non-resident FSD Judge to deal with the matter on the papers. In that case, Stephen J held:

> "*13. ... Order 29 Rule 1(3) enables a plaintiff to make an application for an injunction before the issue of the Writ where the case is one of urgency. Both anonymity orders and reporting restriction take the form of prohibitory orders. The power of the High Court to make anonymity and reporting restriction orders also arises under section 6 of the Human Rights Act 1998 read in conjunction with section 91 of the Judicature (Northern Ireland) Act 1978 which latter provision enables the court to grant injunctions: see paragraph [30] of Re Guardian News and Media Ltd [2010] 2 AC 697 at 716; In Re British Broadcasting Corporation [2010] 1 AC 145 paragraph [57] and In Re S (a Child) [2005] 1 AC 593 at paragraph [23]. On the basis of those authorities I consider that anonymity orders and reporting restriction orders are injunctions and that an application can be made under Order 29 Rule 1(3) prior to the issue of proceedings or alternatively under section 91 of the Judicature (Northern Ireland) Act 1978 which expressly provides that the High Court may at any stage of any proceedings grant a mandatory or other injunction in any case where it appears to the court to be just and convenient to do so for the purposes of any proceedings before it and, if the case is one of urgency, the court may grant such an injunction before the commencement of the proceedings. The urgency in cases such as this arises not only because of an imminent threatened event occurring, namely publication, but also because if the proceedings were issued in an unanonymised form the purpose of an anonymity order could be defeated so that there is an urgent need for anonymity.*"

26. It was submitted that this Court possessed a corresponding 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. I agreed. Under section 11(1) of the Grand Court Law, this Court is made a superior court of record vested with jurisdiction corresponding to that of the English High Court and its various Divisions. The legal framework is in this respect substantially the same as in Northern Ireland and England and Wales. Order 29, rule 1 of the Grand Court Rules provides as follows:

> "**Application for injunction (O.29, r.1)**
>
> *1. (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or*

not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

(2) Where the applicant is the plaintiff and the case is one of urgency such application may be ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."

27. What are now called confidentiality orders were, as I recall, in the 1990's known as title restraining orders, because they restrained the Court's staff from entering particulars of the parties in a cause book or other register list of filings which was open to public inspection and the public generally from otherwise publishing the identity of the parties. In *KL and NN-v-Sunday Newspapers Limited.* [2015] NIQB 88, the Court went on to propose that the English '*Practice Guidance: Interim Non-disclosure Orders*' should generally be followed in Northern Ireland. That was following an *inter partes* hearing and full argument. I am not presently clear precisely to what extent the nuances of the English guidance on this topic is properly applicable in the Cayman Islands. The Trustee's submissions did not contend that the English Practice Guidance should be approved root and branch. However, specific reference was made by counsel to two aspects of the Practice Guidance which I have no hesitation about endorsing.

28. Firstly, as noted above, I fully embrace the importance of full and frank disclosure on confidentiality applications as these principles are quite obviously of local importance. As Stephens J observed:

> "*[17] Amongst other matters paragraph [30] of the guidance emphasises the obligation on the applicant to make full, fair and accurate disclosure of all material information to the court. It states:*
>
> > '*Particular care should be taken in every application for an interim non-disclosure order, and especially where an application is made without notice, by applicants to comply with the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case,* ... '
>
> ...

The guidance makes it clear that in relation to applications for orders such as anonymity and reporting restriction orders the obligation applies in relation to every application regardless of whether it is ex parte or on notice. Anonymity and reporting restriction orders affect the public who are not represented in court and also affect other media organisations and those who wish to use social media. The obligation of full and frank disclosure continues to apply given the public interests in play even if the application is on notice and I consider that it continues to apply even if an interim order is made so that if further information that could lead to the order being set aside becomes available to the applicant then the court and the parties should be informed."

29. Secondly, the Trustee's Written Submissions contended that the general procedure suggested by the English Practice Guidance should be followed in the Cayman Islands:

> "*46. Stephens J also held at para. 16 that the general procedure for applying for anonymity and reporting restriction orders should closely follow the Practice Guidance: Interim Non-Disclosure Orders and the model order annexed to it, suitably adapted to the procedure in Northern Ireland. That Practice Guidance considers, among other matters, applications for permission to issue proceedings in anonymous form and provides the following relevant guidance:*
>
> *46.1 Para. 16 and Clause 3 of the Model Order – mere consent of the parties for anonymisation is not sufficient (applying H v News Group Newspapers at para. 21);*
>
> *46.2 Para. 18 – the respondents to the proceedings and any non-parties who are to be served with or otherwise notified of the order should be given advance notice of the application and served with a copy of the application and supporting documentation;*
>
> *46.3 Para. 31 – applications must be supported by clear and cogent evidence which demonstrates that, without the specific exception sought, justice could not be done;*
>
> *46.4 Para. 45 – the Court should wherever possible give a reasoned, necessarily redacted and/or anonymised, judgment; and*
>
> *46.5 Schedule B of the Model Order at para. (3) – plaintiff to undertake to issue proceedings.*"

30. The Trustee's counsel informed the Court that similar applications in the past had either been on an *ex parte* on notice or *inter partes* basis. In the present case notice of the

confidentiality application had been given to the adult beneficiaries who would have been served with the main originating summons. These beneficiaries all consented to the application. It was correctly conceded that in this context, implicitly at least, more often than not the persons given notice of what would in most instances be an *ex parte* confidentiality application would have an interest in consenting to the application. As the Master of the Rolls stated in *JIH v News Group Newspapers* [2011] 1 WLR 1645 (at paragraph 21):

> "*(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.*"

These general procedural principles appear to me to be suitable for following in the local context, subject to appropriate modifications which may be required to fit the needs of particular cases and the local legal context.

Summary

31. As Smellie CJ noted in *Re Sphinx*, "*open justice forms part of the principle that justice must be done*". What doing justice means in the present context of interim applications for confidentiality orders in trust administration cases may be summarised as follows. The Court is required to act as a judicial watchdog, with one eye on the private needs of locally established trusts and the other eye on the public requirements of open justice. In procedural terms, such applications may properly be commenced following the procedure applicable to interlocutory injunction applications, commenced by interlocutory summons issued in the intended action. That is because the relief sought and granted is in effect an interlocutory injunction.

32. The Confidentiality Order was made in the present case on the Trustee's ex parte application because, applying the above principles to the material placed before me, I was satisfied 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.

IAN RC KAWALEY J
JUDGE OF THE GRAND COURT