IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 30 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION FOR A CONFIDENTIALITY ORDER

Appearances:

Mr Kyle Broadhurst and Ms Sally Bowler of Broadhurst LLC on behalf of the Applicant

Mr David Lee of Appleby (Cayman) Ltd. on behalf of the proposed Respondent

Before:	**The Hon. Justice Kawaley (in Chambers)**
Heard:	**17 May 2019**
Date of Decision:	**17 May 2019**
Draft Reasons Circulated:	**27 May 2019**
Reasons Delivered:	**29 May 2019**

HEADNOTE

Application for leave to seek judicial review - application filed for protective purposes-interim confidentiality order-settlement of underlying dispute and withdrawal of leave application prior to judicial consideration - application for direction that leave application should not be placed on Register of Writs - whether application for leave to seek judicial review qualifies as "originating process"- character and function of judicial review leave filter - application for order permanently sealing file - confidential information-parameters of open justice principle - whether open justice principle engaged-Grand Court Rules Order 53 r.3, Order 63 r.3(4), 7-8 and Order 5 r.1

REASONS FOR DECISION

Introductory

1. When is a document filed in Court to originate a legal action not an originating process required to be placed on the public file? When it is not a document filed in Court to originate a legal action. That, in a nutshell, is the question which was posed and the answer which was posited when the leave to seek judicial review Applicant and the proposed judicial review Respondent jointly applied for directions in connection with the withdrawal of the application for leave. An Order was sought directing that:

    (a) the application papers relating to an application for leave to seek judicial review which was being withdrawn should not be placed on the public file; and/or

    (b) to protect the confidentiality of some of the materials which had been filed, the file should be sealed in any event.

2. The question was raised against the background of the Court having previously granted interim Orders that the file should be sealed. The application for leave had been filed for protective purposes pending settlement discussions and no judicial consideration of the application had taken place. By the date of the hearing of the application for a Confidentiality Order it was clear that no consideration of the leave application would ever be required.

3. At the beginning of the hearing, I had a nagging sense of discomfiture about the application. Firstly, my instinctive sense was that public law proceedings more than any other must surely engage the open justice principle. Secondly, I had myself previously (in another jurisdiction) decided administratively that an application for leave to seek judicial review was indeed originating process which should be available for public inspection. And, thirdly, I had a natural reticence about being invited to depart from the established local practice. For the avoidance of doubt, nothing in the present Judgment is intended to affect how the Clerk of the Court deals with such applications for other administrative purposes unrelated to the requirement to record such applications in the Register of Writs.

4. By the end of the hearing however, counsel persuaded me through their careful and cogent arguments that the legal case for granting the preferred version of the Order which they sought was sufficiently strong to justify me acceding to the application. I

accordingly directed that the application under GCR Order 53 rule 3 should not be placed on the public file and that, in any event, the file should be closed and not open to inspection without further leave of the Court.

5. These are the reasons for that decision.

The respective submissions

6. Firstly, Counsel for the Applicant, Mr Broadhurst, submitted that an application for leave to seek judicial review, as opposed to an application for judicial review once leave had been granted, was not a document which was required to be placed on the public file pursuant to GCR Order 62 rule 8. It was not a "*writ, originating summons, originating motion or petition*". He conceded that another rule was potentially inconsistent with this, but argued that Order 62 rule 8's clear terms, read in light of Order 53 rule 3, should prevail.

7. GCR Order 5 rule 1(1) defines "*originating process*" as a mode of beginning civil proceedings in the Court "*by writ, originating summons, originating motion, petition or written application*". Order 5 rule 1 (5) obliges the Clerk to place originating process "*on the Register of Writs maintained in accordance with Order 63, rule 8*". (Order 63 rule 8(1) in fact requires the Clerk to create a "*Register of Writs and other Originating Process*"). Counsel very properly conceded that this definition of originating process could be read as expanding that found in Order 62 rule 8 to include an application for leave to seek judicial review, which potentially (on superficial analysis clearly) falls within the words "*written application*". The latter term, counsel also pointed out, was defined in Order 5 rule 1(2) as including applications under Orders 50 rule 11, 85 rule 8, 102 rule 18 and "*(d) any other application which is required by the Rules to be made and determined in writing without an oral hearing*".

8. Mr Broadhurst sought to leap over this potential technical hurdle with a more elevated yet fundamental submission. This was, in effect, that an application for leave to seek judicial review was not a civil proceeding at all but an administrative application serving as a filter to determine whether the applicant should be permitted to commence a civil proceeding. He relied in this regard on the commentary in the English 1999 White Book at paragraph 53/14/15, and passages from the House of Lords decision in *Inland Revenue Commissioners -v- National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617 C-E (Lord Wilberforce) and 642F-643A (Lord Diplock).

9. Further and/or alternatively, the Applicant's counsel submitted that the principles of open justice had not been engaged and so the file, containing as it clearly did confidential information, should be sealed in any event. Order 63 rule 3(4) expressly empowers the Court to seal a file or any particular documents on a file. Reference was made to the authoritative guidance on the exercise of this jurisdiction laid down by the

Cayman Islands Court of Appeal in *Sasken Communication Technologies Limited -v- Spectrum Communications Incorporated* [2016] 1 CILR 1 per Rix JA at paragraphs 17, 19. As regards the principles of open justice, in a somewhat wider canvass, reliance was placed on the English Court of Appeal decision in *Cape International Holdings Limited -v- Dring* [2018] EWCA Civ 1795. Mr Broadhurst in his Skeleton relied upon the judgment of Hamblen LJ at paragraphs 27 and 28, and in his oral submissions counsel referred me to paragraphs 120-128 in the same judgment.

10. It was further submitted that this Court has affirmed the same principles of open justice in *Ahmad Hamad Algosaibi and Brothers Company -v- Saad Investments Company Limited* [2017] (2) CILR 788 at paragraph 98 (Anthony Smellie, CJ), and in *Re Sphynx*, FSD 16 of 2009, Judgment dated January 30, 2017 (unreported) at paragraphs [11]-[13] (Anthony Smellie CJ). These cogent arguments, on the facts of the present case, had echoes of the primary argument that the leave application was not a civil proceeding at all. The nub of this nuanced argument was that when considering whether particular documents ought to be sealed, the open justice principle is not even engaged if the relevant documents have not formed part of a judicial decision-making process.

11. Mr Lee for the proposed Respondent supported these submissions both on overlapping legal and additional practical grounds. The most important practical reason he advanced for confidentiality actually supported the primary legal argument that a leave application should not (at least unless or until leave is granted) be placed on the public file at all. An application for leave will typically make criticisms of public authorities, which may be wholly unfounded and to which the proposed respondent will never have the chance to answer if leave is refused. It is undesirable that such allegations, the merits of which will never be adjudicated and to which the proposed respondent cannot effectively respond, should be publically aired.

12. Two critical and essentially generic factors identified by Mr Lee which were relied upon as being relevant to and supportive of exercising the discretion to seal the file were:

    (a) the fact that the Court had made no determination on the application; and

    (b) the fact the proposed Respondent had not been afforded the opportunity to advance its case in answer to the case made against it.

13. These factors also served to fortify the Applicant's primary submission that, <u>prior to the grant of leave</u>, the character of an application for leave to seek judicial review is wholly distinguishable from an originating application which commences civil proceedings which can be pursued as of right.

Legal findings: applications for leave to seek judicial review are not originating process for the purposes of GCR Order 63 rule 8 unless and until leave is granted

The relevant GCR Rules

14. GCR Order 63 rule 8 is the primary rule governing making originating process available for public inspection. It provides:

> "*(1) The Clerk of the Court shall create a file containing, in chronological order, an office copy of every writ, originating summons, originating motion or petition issued by the Court, which shall be referred to as 'the Register of Writs and other Originating Process'.*
>
> *(2) The Register of Writs and other Originating Process shall be open to public inspection upon payment of the prescribed fee.*
>
> *(3) Any person shall be entitled, upon payment of the prescribed fee, to obtain from the Clerk of the Court a certified copy of any writ, originating summons, originating motion or petition contained in the Register of Writs and other Originating Process.*"

15. The term "*Originating Process*" is not defined for the purposes of Order 63 or for the purposes of the Rules generally. Term "*originating process*" is merely defined by Order 5 rule 1(1) for the purposes of "*this rule*". There is some ambiguity as to what Order 5 rule 1(5) means when it requires the Clerk to:

> "*(f) place a second office copy of the originating process (except in the case of divorce petitions and other proceedings commenced in the Family Division) on the Register of Writs maintained in accordance with Order 63, rule 8…*"

16. Does this sub-paragraph have the effect of importing into the narrow Order 63 rule 8 construct of "*Originating Process*" the wider construct of "*originating process*" which is explicitly defined in Order 5 rule 1(1)? Or does the phrase "*in accordance with Order 63 rule 8*" preserve the dominance of the scope of documents which qualify as "*Originating Process*" under that rule? In my judgment, Mr Broadhurst having conceded that the Order 5 rule 1(1) definition of "*originating process*" is a later provision than Order 63 rule 8, I am bound to find that the intent behind Order 5 rule 1(1) is, potentially at least, to broaden the forms of originating process to which Order 63 rule 8 applies. Carefully analysed, however, there is no conflict between the two rules for the purposes of applications for leave to seek judicial review.

17. First and foremost, Order 5, as its heading suggests, is concerned "*commencing civil proceedings*". Order 5 rule 1 defines "*originating process*" as including a "*writ, originating summons, originating motion, petition or written application*". The term "*originating process*" clearly connotes a document which commences a legal proceeding. The critical definition is actually found in Order 5 rule 1(2):

> "*A 'written application' means –*
>
> *(a) a stop notice under Order 50, rule 11;*
>
> *(b) an application under Order 85, rule 8;*
>
> *(c) an application under Order 102, rule 18; and*
>
> (d) *any other application which is required by the Rules to be made and determined in writing without any oral hearing.*" [Emphasis added]

18. Certain applications which do indeed appear to fall within the traditional meaning of originating process are expressly included in the definition. Order 50 rule 11 permits persons interested in certain securities to apply for a stop notice by affidavit. Order 85 rule 8 permits *ex parte* originating applications under section 48 of the Trusts Law for directions or advice. Such applications "*may be made by written submission without any oral hearing*" (Order 85 rule 8(2)). Order 102 rule 18 regulates applications to restore companies to the register under the Companies Law. Each case involves a freestanding application for substantive judicial relief and entails what would ordinarily be understood as commencing civil proceedings. In my judgment:

(a) the *eiusdem generis* rule is engaged by the insertion in Order 5 rule 1(d) of general terms after several specific terms, which must colour the meaning of the general words "*any other application*"; and

(b) the meaning of the general words "*any other application*" in Order 5 rule 1(d) must also be coloured by its wider context of a rule dealing with the commencement of civil proceedings and its deployment in a definition within that rule of a term with a very distinct legal meaning, "*originating process*".

19. In my judgment for "*any other application*" to fall within Order 5 rule 1 so as to be subject to being entered in the Register Writs and other Originating Process under Order 5 rule 1(5) as read with Order 63 rule 8, it must be a type of application which commences a civil proceeding for a substantive legal remedy the entitlement to which will be adjudicated by the Court. However, in the event this nice point of construction is not dispositive as regards a judicial review leave application, because it is possible to conclude on a far more straightforward basis that such applications are not in any event "*required by the Rules to be made and determined in writing without any oral hearing.*"

20. GCR Order 53 rule 3 provides as follows:

> "***Grant of leave to apply for judicial review (O.53, r.3)***
> ***3.*** *(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.*
>
> *(2) An application for leave must be made ex parte to a Judge by filing -*
>
> *(a) a notice in Form No. 53 of Appendix I containing a statement of -*
>
> *(i) the name and description of the applicant;*
> *(ii) the relief sought and the grounds upon which it is sought;*
> *(iii) the name and address of the applicant's attorney (if any); and*
> *(iv) the applicant's address for service; and*
>
> *(b) an affidavit which verifies the facts relied on.*
>
> *(3) The Judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court; in any case, the Clerk of the Court shall serve a copy of the Judge's order on the applicant.*
>
> *(4) Where the application for leave is refused by the Judge, or is granted on terms, the applicant may renew it by applying to a single Judge sitting in open Court:*
>
> *Provided that no application for leave may be renewed in any non-criminal cause or matter in which the Judge has refused leave under paragraph (3) after a hearing.*
>
> *(5) In order to renew his application for leave the applicant must within 10 days of being served with notice of the Judge's refusal, file notice of his intention in Form No. 54 of Appendix I.*
>
> *(6) Without prejudice to its powers under Order 20, rule 8, the Court hearing an application for leave may allow the applicant's statement to be amended,*

whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit.

(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(8) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

(9) If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.

(10) Where leave to apply for judicial review is granted, then -

(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

(b) *if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.*"

21. It is on reflection obvious that there is a fundamental distinction between a substantive application for judicial review, made under Order 53 rule 1 and which Order 53 rule 5 prescribes shall be by "*originating motion*", and an application for leave to make such an application. An application for leave is a form of proceeding, but it is not a substantive proceeding at the end of which the Court grants substantive relief or makes any other form of final adjudication of rights. It is noteworthy that it is only if leave is granted, that interim relief can be granted- "*such interim relief as could be granted in an action begun by writ*". If leave is refused, no substantive proceeding is ever commenced. If leave is granted, the application for leave might be regarded in very general terms to have commenced a civil proceeding but the judicial review application is still in a strict legal sense commenced by the originating motion prescribed by Order 53 rule 5.

22. Although at first blush it might appear that an application under Order 53 rule 3 falls within the definition of "*originating process*" for the purposes of Order 5 rule 1, this first impression does not withstand closer scrutiny. Firstly, Order 53 rule 3 does not "*require*" that leave applications be dealt with without a hearing, it merely creates an option for either an oral hearing or a hearing on the papers. But more fundamentally still, it is also clear that Order 5 rule 1 is concerned with "*originating process*" in accordance with the standard legal or technical meaning of that term.

23. One does not have to take the analysis very much further to conclude that an application for leave to seek judicial review under 53 Order 53 rule 3, if it does not

constitute "*originating process*" for the purposes of GCR Order 5 rule 1, is not required to be placed on the Register of Writs and Originating Process under Order 63 rule 8. The scope of the latter rule clearly would embrace an originating motion for judicial review under GCR Order 53 rule 5, but exclude an application for leave under Order 53 rule 3. Order 63 rule 8 describes the forms of originating process which must be entered in the Register as follows:

> "*(1) The Clerk of the Court shall create a file containing, in chronological order, an office copy of every writ, originating summons, originating motion or petition issued by the Court, which shall be referred to as 'the Register of Writs and other Originating Process'*" [Emphasis added]

24. Order 53 rule 3 describes the mode of applying for leave to seek judicial review as follows:

> "*(2) An application for leave must be made ex parte to a Judge by filing –*
>
> *(a) a notice in Form No. 53 of Appendix I containing a statement of -*
> *(i) the name and description of the applicant;*
> *(ii) the relief sought and the grounds upon which it is sought;*
> *(iii) the name and address of the applicant's attorney (if any); and*
> *(iv) the applicant's address for service; and*
>
> (b) *an affidavit which verifies the facts relied on.*" [Emphasis added]

25. The term "*notice*" in Order 53 rule 3 is to be contrasted with the term "*originating motion*" used in Order 53 rule 5(1):

> "*(1) In any cause or matter, where leave has been granted to make an application for judicial review, the application shall be made by originating motion…*"

26. It is ultimately clear that an application for leave to seek judicial review is not an originating process for the purposes of Order 63 rule 8 and that, despite the apparently sweepingly broad definition of "*application*" in Order 5 rule 1, an Order 53 rule 1 application is not brought within the ambit of Order 63 rule 8 via Order 5 rule 1 after all. Although this conclusion is justified by an analysis of the Rules without regard to the authorities to which I was referred, it must be acknowledged that it is in reality these authorities which help to provide the framing which stimulates a more critical analysis of the relevant procedural regime.

The legal character of applications for leave to seek judicial review and the public policy underpinning the leave filter

27. It is important to record that my acceptance of the proposition that an application for leave to seek judicial review under GCR Order 53 rule 3 is not required to be made available for public inspection under GCR Order 63 rule 8 was based on more than simply a technical interpretation of the relevant Rules. I was satisfied that this was not a drafting loophole which the parties were seeking to exploit. Rather, there are good substantive reasons of legal and public policy underpinning the recognition of a critical difference in character between (a) applications for leave to seek judicial review and (b) substantive applications for judicial review. The dominant purpose of the remedy of judicial review in its modern legal form is to promote the interests of good public administration. And I accepted the submission that the leave filter is specifically designed to ensure that the process of judicial review does not itself undermine the interest of good administration because the Crown in its various emanations is burdened with having to respond to a barrage of unmeritorious public law challenges.

28. As noted above, reliance was placed on *dicta* from the House of Lords case of *Inland Revenue Commissioners-v-National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617 C-E (Lord Wilberforce) and 642F-643A (Lord Diplock). This is one of the leading English authorities on the function and scope of the remedy of judicial review (in particular, the requirement that an applicant demonstrate that he has "*sufficient interest*" in the subject-matter of the application in order to be granted leave to pursue it). In describing the function of the requirement of obtaining leave, Lord Wilberforce stated:

> "*...There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications...*"

29. Lord Wilberforce identified the leave filter as protecting both the courts and public bodies from obviously unmeritorious applications. As Lord Diplock noted, this case was the first occasion for the House of Lords to consider the then new Order 53 of the Rules of the Supreme Court, as a statutory remedy of judicial review replaced the old prerogative writs in England and Wales in 1978. Lord Diplock considered the function of the leave requirement more broadly in the following passage in his speech:

> "*The procedure under the new Order 53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or 'threshold', stage is regulated by rule 3. The application for leave to apply for judicial review is made initially ex parte, but may be adjourned for the persons or bodies against*

whom relief is sought to be represented. This did not happen in the instant case. Rule 3(5) specifically requires the court to consider at this stage whether 'it considers that' the applicant has a sufficient interest in the matter to which the application 'relates.' So this is a 'threshold' question in the sense that the court must direct its mind to it and form a prima facie view about it upon the material that is available at the first stage. The prima facie view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.

The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived." [Emphasis added]

30. This reasoning confirms that the leave filter is partly to protect the courts from being burdened with "*trivial complaints*". But it also adds an important additional layer to the policy goal described by Lord Wilberforce, which was preventing "*public bodies being harassed by irresponsible applications*". It seems quite obvious that if public bodies had to respond to every judicial review application which was filed, no matter how frivolous, their work would not only be interrupted by dealing with the complaints. Their work might also have to be placed on hold because of anxieties as to their ability to legally carry on with it while a challenge is pending. In light of these very practical and important considerations, the distinction between the leave stage (of which the public body will generally be blissfully unaware) and the substantive application stage (if leave is granted) becomes even more clear. This reasoning is not materially undermined by the fact that in some cases, in my experience exceptional cases, a judge may invite the respondent to be served and to assist the Court on the question of leave.

31. Mr Broadhurst in his oral submissions added an interesting gloss to support this authority which provided for the proposition that placing leave applications on the public register would be contrary to the interests of good administration. Because such filings were today commonly published, leave applications would in practice quite likely come to the attention of the public body concerned causing the harm Lord Diplock opined the leave filter was designed to prevent. Mr Lee, of course, also pointed out that it was undesirable that allegations which a public body might never have a legal opportunity to refute should enter the public domain, particularly in the Internet era, if leave to pursue a substantive application is not granted.

32. I regarded the quoted extracts from *Inland Revenue Commissioners-v-National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617 C-E (Lord Wilberforce) and 642F-643A (Lord Diplock), together with counsel's submissions, as powerful arguments which added important flesh to the bare bones of the technical analysis that applications for leave to seek judicial review are not originating process

which should be open to public inspection pursuant to GCR Order 63 rule 8 if leave is not granted.

Legal findings: the open justice principle is not engaged where an application for leave to seek judicial review is filed and withdrawn without being judicially considered so the relevant file may appropriately be sealed

The relevant rule

33. GCR Order 63 rule 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 or otherwise suitably bound and be 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 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.*" [Emphasis added]

34. The application for the file to be sealed arose in this way. The documents relating to the leave to seek judicial review application were required to be placed on a file under Order 63 rule 3(1). Although the starting position is that only the parties can inspect a file (rule 3(3)), there is the potential for "*any person*" to apply to inspect a file (rule 3(5). Order 63 rule 3(4) empowers the Court in its discretion to seal a file or any documents in a file by ordering that it shall be "*closed and not open to inspection by any party or other person except with leave of the Court*". The application, to a significant extent, included confidential information.

35. It is not clear on the face of the rule how the discretion to seal the file should be exercised.

Balancing the interests confidentiality with the open justice principle

36. I accepted the submission that although in many cases an application to seal a file (or refuse an application by a non-party access to it) may require the Court to balance the

interests of open justice with countervailing confidentiality or privacy rights, the open justice principle was not engaged in the present case. Not only was the application for leave a precursor to a substantive civil proceeding, but the application had not even been judicially considered in any event.

37. This Court is bound by the Cayman Islands Court of Appeal decision in *Sasken Communication Technologies Limited-v-Spectrum Communications Incorporated* [2016] 1 CILR 1 upon which Mr Broadhurst relied. Rix JA (at paragraphs 17, 19) opined as follows:

> "*17 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 Smellie, C.J. in the case of* Ahmad Hamad Algosaibi & Bros. Co. *v.* Saad Invs. Ltd. *(1) (2011 (1) CILR 326, at paras. 25–26)*...
>
> *19... 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.*"

38. *Sasken* was a case involving substantive proceedings to enforce an arbitration award and an application to seal documents which were protected by contractual confidentiality obligations. Those proceedings were presumably commenced by originating process which was entered in the public Register pursuant to Order 63 rule 8. The Cayman Islands Court of Appeal effectively held that the fact that the documents were subject to contractual confidentiality protections was sufficient to justify an Order under Order 63 rule 3(4). This decision did not directly consider the open justice principle, but appeared to me to provide authoritative support for the proposition that protecting confidential information is legitimate rationale for exercising the discretion to seal a case file.

39. The Applicant's counsel referred to *Re Sphynx*, FSD 16 of 2009, Judgment dated January 30, 2017 (unreported) at paragraphs [11]-[13] (Anthony Smellie CJ). In this case the Chief Justice directly addressed the open justice principle as an aspect of the common law and Cayman Islands constitutional law. The case concerned the right of public access under the Companies Winding Up Rules Order 24 rule 6 to documents placed on the Court file in relation to a sanction application. Because the open justice

principle was clearly engaged and the central issue was whether grounds existed to dilute the principle, the parameters of the transparency principle were considered in helpful detail. As regards the scope of the common law open justice principle, the Chief Justice crucially held as follows:

> *"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. The principle of open justice would ordinarily therefore apply to all court proceedings, including such as the present for the sanction of liquidators' decisions and whether partisan or otherwise.*
>
> *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. As such, at common law, the general rule as to publicity must yield to this overriding principle and limitations can be placed upon the access to information by the public.*
>
> *12 But these limitations are not left to the individual discretion of the judge based simply on what is convenient or desirable in the circumstances. Limitations can only be placed on the principle where the interests of justice so require. The court is therefore 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...*
>
> *13 That there can be exceptions or limitations to the principle of open justice to ensure that justice is done, both in the context of conducting hearings* in camera *or in private (*i.e. *in chambers) and in the context of keeping documents or information relating to those court hearings confidential, is also expressly recognized by legislation and court procedure in the Cayman Islands. This is the case both in civil proceedings generally and in liquidation proceedings more specifically. In particular, s. 11(2)(b) of the Constitution provides, among other things, that the principle of open justice can be limited—*
>
> > *'for the purpose of protecting the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of*

information received in confidence, [and] maintaining the authority and independence of the courts . . .'

Further, both the Grand Court Rules 1995 and the Companies Winding Up Rules 2008 expressly permit for documents to be sealed on the court file..."

40. Smellie CJ cannot sensibly be understood as expressly or impliedly opining that the open justice principle extends to administrative proceedings such as applications for leave to seek judicial review which have not even been the subject of any judicial determination. With typical acuity, he left the door open for cases to which the open justice principle might not apply by stating (at paragraph 10):

"*...The principle of open justice would ordinarily therefore apply to all court proceedings, including such as the present for the sanction of liquidators' decisions and whether partisan or otherwise.*" [Emphasis added]

41. *In Ahmad Hamad Algosaibi and Brothers Company -v- Saad Investments Company Limited* [2017] (2) CILR 788 at paragraphs 92- 98, Anthony Smellie, CJ stated:

"*92 The common law imperative to open justice is now well understood. It recognizes the great importance of access to the proceedings and records of the court for public scrutiny of the justice system to ensure public confidence in its integrity. The principle is well recognized by this court. For instance, in a different context in these very proceedings this court declared, upon an inter partes application (as set out in the headnote to the report (2011 (1) CILR at 327)):*

> *'Generally, parties to litigation (including civil and interlocutory proceedings) would be entitled to know the reasons for the court's decisions, following from the principle of open justice. They would ordinarily be entitled to access all aspects of the case file. However, the court could restrict such access, if necessary for the more fundamental principle of the proper administration of justice.'*

93 As the principle of open justice has developed at common law and as will be discussed below, it is now settled that while members of the public—non-parties—will not ordinarily be entitled to inspect the court files beyond the Public Registers, they may be granted such access upon application by leave of the court. This is, indeed, as reflected in O.63, r.3(5) itself, as set out above at para. 74.

94 In keeping also with the principle as developed, it is now also settled that public access to documents which are on the court file but would otherwise be unavailable but for an application to the court will also be available in keeping

with the default position once the documents (or their contents) enter into the public domain by being referenced by the court during the proceedings in which they are filed.

95 It is this aspect of the open justice principle that I see as presenting a particular challenge for its application in this case.

96 In this massive case, literally hundreds of affidavits and witness statements, but not their exhibits or other attachments, have been filed. Many but not all of them have been referenced by the court, depending on whether or not the different issues which they addressed had to be resolved by the court instead of by agreement between the parties at the different interlocutory stages. As Mr. Ford explains, tens of thousands of documents, running to hundreds of thousands of pages, have been provided by AHAB alone by way of discovery. In keeping with the rules of court, the discovery given by the parties is not filed with the court.

97 In a different category under cl. 1(c)(iv) of the administrator's summons, as already mentioned, some 20,000 pages of transcripts have been generated during the course of the trial, which spanned 129 days in court. While sought under the open justice principle, these too are not available from the records of the court and so can only become available by the court imposing upon the parties to provide them.

98 With those introductory observations, I proceed by first recognizing the rationale and purpose of the open justice principle. It has been explained in different ways by erudite judges. A recent and highly persuasive exposition by Toulson, L.J. (as he then was) comes from his lead judgment on behalf of the English Court of Appeal in R. (Guardian News & Media Ltd.) (18). In the case, journalists from The Guardian newspaper sought disclosure of skeleton arguments of counsel, affidavits and witness statements submitted to the court, but only some of which were referenced in open court, in the extradition proceedings against two British subjects brought at the instance of the United States of America ([2012] EWCA Civ 420, at paras. 1–5):

> *'1. Open Justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodies—who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in Scott v Scott [1913] AC 417, 477:*
>
> > *'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'*

2. This is a constitutional principle which has been recognised by the common law since the fall of the Stuart dynasty, as Lord Shaw explained. It is not only the individual judge who is open to scrutiny but the process of justice. In a valuable report by the Law Commission of New Zealand on Access to Court Records, 2006, Report 93, the Commission summarised the principle at paragraph 2.2:

> *'Open justice is a fundamental tenet of New Zealand's justice system. It requires, as a general rule, that the courts must conduct their business publicly unless this would result in injustice. Open justice is an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties. It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny, and that "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."'*

3. The Commission quoted, at paragraph 2.11, in the following passage from the judgment of the President of the Court of Appeal, Woodhouse P, in Broadcasting Corporation of New Zealand v Attorney General [1982] 1 NZLR 120, 122:

> *'. . . the principle of public access to the Courts is an essential element in our system. Nor are the reasons in the slightest degree difficult to find. The judges speak and act on behalf of the community. They necessarily exercise great power in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to the facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process may be regarded as fulfilling its purposes.'*

4. There are exceptions to the principle of open justice but, as Viscount Haldane explained in Scott v Scott, they have to be justified by some even more important principle. The most common example occurs where the circumstances are such that openness would put at risk the achievement of justice which is the very purpose of the proceedings.

> *5. While the broad principle and its objectives are unquestionable, its practical application may need reconsideration from time to time to take account of changes in the way that society and the courts work. Unsurprisingly there may be differences of view about such matters.' [Emphasis supplied.]*"

42. The quoted extracts which merit reproduction in full set out a cogent exegesis on what the parameters of the open justice principle actually are. The principle's primary function was, somewhat surprisingly, articulated over 100 years ago. Lord Shaw of Dunfermline in *Scott -v- Scott* [1913] AC 417, 477 in the now famous passage opined as follows:

> "*Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.*"

43. In my judgment the quoted judicial statements make it relatively clear that the open justice principle is not engaged at all in relation to an application for leave to seek judicial review which has not even been considered by the judge. The primary parallel finding was that such an application was not a fully-fledged application for a judicial determination at all and unless leave was granted, so that no public record need even be made of the filing of the application. Where no decision has even been made on the merits of the leave application, no question arises of the need to keep "*the judge himself while trying under trial.*" The position may well be different as regards a leave application which has been considered by a judge and refused, and the position is obviously quite different where leave has been granted and a substantive proceeding has been commenced. No need arose to consider the legal position in those different scenarios in the present case.

44. The open justice principle is also likely to be at least potentially engaged if the fact of the filing of an application for leave to seek judicial review has already entered the public domain, whether or not leave is granted and (perhaps) even if the application is never adjudicated. Principles as fundamental as open justice are not rigid or formulaic and must always be moulded to suit the particular factual context in which the principles arise.

45. I find further support for the conclusion that the open justice principle was not even engaged in the present case because the leave application was never judicially considered in the English Court of Appeal case of *Cape International Holdings Limited -v- Dring* [2018] EWCA Civ 1795. This decision confirms the soundness of the analysis of Smellie CJ in *Re Sphynx*: the open justice principle is closely connected to the presumption of public hearings and that its central policy imperative is ensuring the integrity of the adjudicative process by subjecting it to public scrutiny. For present purposes, it suffices to refer to a brief conclusory paragraph from the helpful judgment from Hamblen LJ:

> "*126. The principle of open justice is accordingly engaged as soon as there is an effective hearing. It may be more fully engaged if the hearing proceeds to a judgment, but it is still engaged. The only circumstance in which a judicial decision is likely to be necessary to engage the principle is where the application is determined on the papers and so there is no hearing, as was the case with one of the applications in Dian.*"

46. I accordingly accepted the submission that a sealing Order was appropriate in the present case because, in circumstances where an application for leave to seek judicial review had been filed but not judicially considered, the open justice principle was (subject to one *caveat*) not even engaged. Even it had been, the confidential nature of much of the material on the file justified a sealing Order in any event.

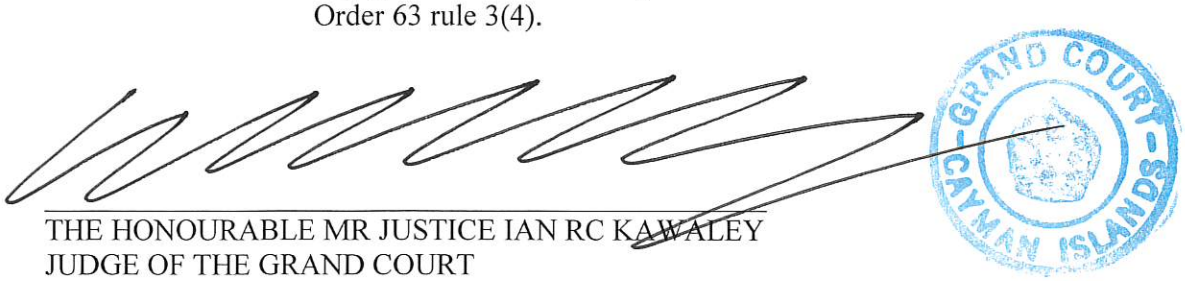
47. The one *caveat* is that counsel sensibly agreed that it was appropriate for the present judgment, explaining the one decision which was made in relation to the withdrawn application which was never considered on its merits, ought properly to be made public, albeit in anonymised form. A decision that the open justice principle has not been engaged itself engages the open justice principle.

Summary

48. For the above reasons I granted a Confidentiality Order on May 17, 2019 directing that the application under GCR Order 53 rule 3 which was being withdrawn should not be entered in the Register of Writs and that the file should be sealed. This was based on the legal findings, which I would not have arrived at without the assistance of counsel's illuminating submissions, that:

(a) an application for leave to seek judicial review is not required to be entered in the Register of Writs and Originating Process pursuant to GCR Order 63 rule 8 as read with GCR Order 5 rule; and

(b) where an application for leave to seek judicial review is withdrawn without being judicially considered, the open justice principle is not engaged and the Court may on cause shown seal the file under GCR Order 63 rule 3(4).



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT