

UPDATE

# Where justice requires confidentiality

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The principle of open justice requires that justice must literally be seen to be done. But there are occasions when openness of court proceedings will be at odds with the requirements of justice. The Cayman Islands courts have often been required to find the right balance, particularly in proceedings relating to the administration of private trusts, where confidentiality of the proceedings may be a necessity for the protection of the interests of beneficiaries, the dispensation of which may well defeat the very interests of justice.

In a recent decision<sup>1</sup> Justice Kawaley, of the Cayman Islands Grand Court, illustrated the balancing act the court must perform between private needs and public requirements.

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## Introduction

On 28 March 2018, the Julius Baer Trust Company (Channel Islands) Limited (the **Trustee**) issued an *ex parte* originating summons seeking various protections in proceedings regarding a Cayman Islands law governed discretionary trust (the **Trust**). The main action was an application for directions by the Trustee seeking the Court's approval for proposed actions in relation to the Trust. The Trustee sought a confidentiality order whereby only anonymised versions of court documents would be placed on the public register, and all applications relating to the substantive directions hearing would be heard in private.

The Trustee submitted that a confidentiality order was necessary to protect the actual and contingent beneficiaries from the safety risks of being publically linked to substantial wealth, and to protect the minor beneficiaries from being aware of their family's substantial wealth, as it had the potential of adversely affecting their personal development and welfare. A third ground that no useful purpose would be served by apprising the settlor's minor grandchildren that they had been revocably excluded as beneficiaries was not considered by the judge to be material.

## Right to a public hearing vs right to privacy

The right to a public hearing of proceedings determining civil rights or obligations is enshrined in the Cayman Islands Constitution (the **Constitution**) at s.7(9) which provides that "*All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public*".

The Trustee relied on s.7(10)(a) of the Constitution to assert that the public hearing requirement is not absolute and the court may conduct hearings in private for the protection of the private lives of persons

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<sup>1</sup> *In the matter of a Settlement dated 16 December 2009*, unreported, 25 July 2018.

concerned in the proceedings. S.7(10)(a) states that "*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, or in the interests of public morality, the welfare of minors or the protection of commercial confidence or of the private lives of persons concerned in the proceedings".*

In the alternative, the Trustee also relied on two additional bases for justifying a private hearing, namely – that s.7(9) was not engaged in the proceedings relating to the administration of a trust as these were not proceedings for the determination of any "*civil right or obligation*"; or that the character of the proceedings was such that they fell within the ambit of a constitutionally permitted exception, with regard to the common law principles of open justice.

In analysing the phrase "*civil right or obligation*" Justice Kawaley cautioned against adopting a technical legal approach that would narrow the scope of civil proceedings protected by s.7 of the Constitution. He accepted that the public hearing requirement is not a protection for individual litigants so much as it is protection for the independence and impartiality of court proceedings generally. The principle of open justice is a common law principle and does not depend exclusively on s.7 of the Constitution being engaged. The court also considered the overlap between the public hearing requirements of s.7 and the freedom of information requirements of s.11 of the Constitution, finding that the two sections must be read together when deciding whether or not to grant any form of confidentiality order.

In the process Justice Kawaley seemingly eschewed the more narrow construction of "*civil right or obligation*" taken by the English courts. Whilst accepting that some fundamental freedoms, such as the right to a fair hearing before an independent and impartial court forms part of the central underpinnings of the Bill of Rights, he firmly cautioned against the danger of placing too much emphasis on the importance of open justice over the countervailing rights to privacy guaranteed under s.9(1) of the Constitution. Significantly, in this regard, the judge took a view of the public interest which takes into account the status and position of the Cayman Islands as an offshore jurisdiction which promotes the establishment of trusts as an effective mechanism for legitimately conserving and protecting the settlors' wealth. At the same time, Justice Kawaley emphasised that applicants who obtain confidentiality orders are still subject to ongoing duties to ensure that the trust and trust beneficiaries are compliant with any applicable tax or regulatory obligations. He also pointed out that a confidentiality order is always liable to be set aside should public interest require.

The judge identified s.7(10) of the Constitution as the most reliable guide for determining the grounds on which open justice may be limited. The grounds specified in that subsection are: where publicity prejudices the public interest; in interlocutory proceedings; grounds of public morality; the welfare of minors; the protection of commercial confidence; and the protection of the private lives of persons concerned in the proceedings.

Applying that guide and the principles arising from his analysis the judge made the confidentiality order sought.

## Conclusion

In an era of increasing insistence on public scrutiny into private lives, especially of the wealthy, this case demonstrates that there will still continue to exist legitimate grounds, underpinned by the Bill of Rights in the Cayman Islands Constitution, for protecting the confidentiality of certain court proceedings. The court's stance is a bold one, taken against an ever advancing tide towards openness without exception. In doing so, the court confirmed that it is legitimate to recognise and give effect to factors which help to define the public interest in the Cayman Islands which might be less relevant to other societies. The approach to the issue in Cayman may therefore be different to the approach in other jurisdictions, but by no means less legitimate.

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