REDACTED RULING PENDING APPEAL

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2021/CLE/gen/01043

IN THE MATTER of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as The Trust and of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as The Trust.

AND IN THE MATTER OF an application under Section 3 of the Judicial Trustees Act and/or under the inherent jurisdiction of the Court.

BETWEEN

CHERYL HAMERSMITH-STEWART

Plaintiff

AND

CROMWELL TRUST COMPANY LIMITED

First Defendant

ADAM STEWART

(acting in his capacity as the Enforcer, a Member of the Advisory Board and personal capacity)

Second Defendant

JAIME McCONNELL

(acting in her capacity as a Member of the Advisory Board and personal capacity)

Third Defendant

BRIAN JARDIM

Fourth Defendant

GORDON STEWART

Fifth Defendant

KELLY STEWART

Sixth Defendant

SABRINA STEWART

Seventh Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. John Wilson QC with him Ms. Knijah Knowles of McKinney Bancroft & Hughes for the Plaintiff
Mr. Brian Simms QC with him Mr. Marco Turnquest and Mr. Wilfred P. Ferguson Jr. of Lennox Paton for the First Defendant
Mr. Sean McWeeney QC with Mr. Richard Wilson QC (London) and Mr. John Minns of Graham Thompson for the Second, Third and Fourth Defendants
Mr. Terry North with him Ms. Wynsome Carey and Mr. Darzhon Rolle of Alexiou Knowles for the Fifth, Sixth and Seventh Defendants
Mr. John Delaney QC with him Mrs. Lena Bonaby of Delaney Partners for the minor children of the Second and Third Defendants being instructed via Johann Gordon Epstein, their Guardian ad Litem

Hearing Date: 22 April 2022

Trust – Contentious trust dispute - Sealing application – Open justice – Whether matter should be heard in camera - Section 77(3) Banks and Trust Companies Regulation Act 2020

Extension of time to file Defence– RSC – O. 3 R. 4 – Order 31A Rule 18

A wealthy and well-known entrepreneur created two trusts governed by Bahamian law. The Plaintiff, who is the common law widow of the Founder of the two trusts, commenced an action against the Trustee to which the Founder's children as beneficiaries of the trusts were joined.

The Trustee applied for the file to be sealed ('the sealing application"). Some of the Defendants support the application.

The Plaintiff initially did not oppose the sealing application but now opposes it along with the Fifth through Seventh Defendants who are her adult children. They say that the circumstances are not sufficiently compelling to warrant the sealing of the file, effectively the disposal of the open justice principle.

The Trustee and the Second through Fourth Defendants (who were recently joined) also applied for an extension of time to file and serve their respective Defences.

HELD: Dismissing (i) the applications by the Trustee and the Second through Fourth Defendants to seal the file and (ii) the applications for extension of time by the Trustee and the Second through Fourth Defendants to file and serve their respective Defences, the Trustee is ordered to file and serve its Defence not later than 14 June 2022 and the Second through Fourth Defendants are to file and serve their respective Defences within 28 days from the date of this Ruling.

1. Section 77(3) of the Banks and Trust Companies Regulation Act 2020 does not give the Trustee a statutory right to have the proceedings kept confidential. It merely gives the Court a discretion to decide whether to hear an action in private or seal a court file and the exercise of that discretion must be canvassed against the constitutional principle of open justice, which although not an absolute right, is difficult to displace: **Hot Pancakes Limited et al v Amber Louise Murphy et al** SCCiv App. 95 of 2020 and **Standard Chartered Bank (Switzerland) S.A v UBS (Bahamas) Ltd.** [2011] BHS J No 24 applied.

2. The open justice principle is a constitutional one which ought not to be easily emasculated. It is the default position. As such, an applicant seeking a derogation from that position bears a heavy burden of proving to justify such departure: **Hot Pancakes Limited et al v Amber Louise Murphy et al** [supra] applied.

3. There are exceptions to the open justice principle, for example (i) national security concerns; (2) privacy concerns (where the release of confidential information such as private financial records might harm the reputation of one of the parties); (iii) it may be necessary to protect the privacy of a minor and (iv) when legal matters involve uncontentious information unrelated to public issues such as the financial division of an estate after a death. However, the overriding objective in determining whether the open justice principle applies or not is to secure that justice is done. The question of whether open justice should be departed from is a question of principle, turning not on convenience, but on necessity: **Scott v Scott** [1913] AC 417 and **Al Rawi v Security Service** [2012] 1 All ER applied.

4. The Court must undertake a fact-specific balancing exercise when considering the purpose of the open justice principle and the potential value of the information in question in advancing that purpose and any risk of harm that its disclosure might cause to the maintenance of an effective judicial process or to the legitimate interests of others: **R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society** [1984] 2 All ER 27.

RULING

Charles Sr. J:

Introduction

[1] This Ruling has been redacted pending an appeal against my refusal to grant a sealing order.

[2] There are four (4) extant Summonses before the Court namely:

(i) An application by the Trustee filed on 12 November 2021 seeking an order to seal the file (“the sealing application”);

(ii) An application by the Trustee filed on 12 November 2021 seeking an order for the determination of a preliminary issue, an extension of time for service of its Defence ("the Trustee's extension of time application") and for joinder and representation orders ("joinder and representation application");

(iii) An application by the first family filed on 13 April 2022 seeking an extension of time for the filing of their respective Defences to 28 days after the final determination of the preliminary issue.

(iv) REDACTED

[3] This Ruling considers the sealing application and the extension of time applications of the Trustee and the first family.

[4] By Summons filed on 12 November 2021, the Trustee seeks the sealing of the file. That application was supported by the First and Fourth Affidavits of a director or employee of the holding company.

[5] The first family supports the Trustee's application by asking the Court to depart from the constitutional principle of open justice and grant a sealing order.

[6] The Plaintiff and her adult children oppose the application, asserting that the circumstances of this case do not warrant the grant of a sealing or privacy order.

Background facts

[7] The Deceased was a well-known entrepreneur. He was the Founder of two (2) trusts governed by Bahamian law.

[8] The Deceased died leaving two (2) surviving branches of his family. The first branch is the "first family", comprising his adult children (and their respective families). The second branch is the "second family".

[9] Most of Deceased's wealth was settled into three trusts, two of which are Bahamian and the subject of these proceedings. The Trustee is a Bahamian private trust company that is the trustee of both trusts.

[10] The Deceased left very detailed instructions expressing his wishes as to how the trusts are/ought to be administered after his death. In summary, he expressed that he wanted the trusts to be brought to an end promptly following his death and that the shares in the business holding companies to be decanted into five (5) new trusts.

[11] The Trustee nor the first family have filed Defences.

Law on sealing of files

[12] The general rule with respect to the hearing of proceedings is a centuries' old principle of "open justice" – proceedings are to be held in open Court. Open justice is a fundamental constitutional principle of The Bahamas. Article 20(9) of the Constitution of The Bahamas provides for open justice:

> **"All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligations including the announcement of the decision of the Court, shall be held in public."**

[13] In **Scott v Scott** [1913] AC 417, the House of Lords considered the circumstances under which it is permissible to derogate from open justice. The Court stated that there are exceptions to the open justice principle but that the overriding object in determining whether the open justice principle applies or not is to secure that justice is done. It was made clear that a party seeking to displace the application of open justice must show that it is necessary for the administration of justice. At page 438, the House of Lords expressed this high standard in the following terms:

> **"But unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties."**

[14] Lord Atkinson was of the view that this had to be tolerated and endured because public trials were the best security for the pure, impartial, and efficient administration of justice. At page 463, he stated:

> **"It is not necessary in the present case to determine whether the broad proposition laid down by Sir Francis Jeune (as he then was) in *D. v. D*. (1) is well founded. The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect. I am inclined to think that the practice of which the learned judge approved and in this case inaugurated would restrict this wholesome publicity more than is warranted by authority. And I desire to point out that, if the practice were adopted, and if orders to hear a cause in camera were to have the effect contended for in the present case, this rather injurious result might follow. If perpetual silence were enjoined upon everyone touching what takes place at a hearing in camera, the conduct and action of the judge at the trial, his rulings, directions, or decisions on questions of law or fact, could never be reviewed in a Court of Appeal at the instance of a party aggrieved, unless indeed upon the terms that that party should consent to become a criminal and render himself liable to be fined and imprisoned for criminal contempt of Court, a serious invasion of the rights of the subject."**

[15] In **Al Rawi v Security Service** [2012] 1 All ER 1, the Supreme Court emphasized the limited circumstances in which open justice can be departed from at paragraph 11:

> **"[11] The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott (otherwise Morgan) v Scott* [1913] AC 417 at 476, [1911–13] All ER Rep 1 at 29–30, Lord Shaw of Dunfermline emphasized the decision of the lower court to hold a hearing in camera as constituting 'a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security'. Viscount Haldane LC ([1913] AC 417 at 438, [1911–13] All ER Rep 1 at 9) said that any judge faced with a demand to depart from the general rule must treat the question 'as one of principle, and as turning, not on convenience, but on necessity'."**

[16] Thus, there are exceptions to the open justice principle, for example (i) national security concerns; (2) privacy concerns (where the release of confidential

information such as private financial records might harm the reputation of one of the parties); (iii) it may be necessary to protect the privacy of a minor and (iv) when legal matters involve uncontentious information unrelated to public issues such as the financial division of an estate after a death. However, the overriding objective in determining whether the open justice principle applies or not is to secure that justice is done. The question of whether open justice should be departed from is a question of principle, turning not on convenience, but on necessity.

[17] Section 77 (3) of the Banks and Trust Companies Regulation Act, 2020 provides as follows:

> **"In any civil proceedings where information is likely to be disclosed in relation to a customer's bank account, those proceedings may, if the court of its own motion or on the application of a party to the proceedings, so orders, be held in camera and the information shall be confidential as between the court and the parties thereto."**

[18] The leading Bahamian authority on the exercise of section 77 to determine whether proceedings should be held in camera and/or the file sealed is **Standard Chartered Bank (Switzerland) S.A v UBS (Bahamas) Ltd.** [2011] BHS J No 24. UBS applied for the matter to be heard in camera and the file sealed. In considering the application, Barnett CJ (as he then was) examined section 19(2) of the Bank and Trust Companies Regulation Act (the equivalent of section 77(3) of the 2020 Act) and stated that it should be read in conjunction with Articles 20(9) and 20(10) of the Constitution on the exceptions to open justice. There must be compelling reasons to depart from the default/general position of proceedings being held in public. He reasoned that without more, the mere risk of disclosure of a customer's information about a customer's affairs is not enough to justify proceedings being held in private. He stated:

> **"the mere fact that information about a customer's affairs is likely to be disclosed is not without more sufficient to order that the proceedings be held in private. The law reports are replete with cases in which affairs of a customer of financial institutions are disclosed albeit that they are mostly cases in which a customer is a party"**

[19] Barnett CJ cited with approval the dicta of da Costa Ag. CJ in **International Bank of Washington and Price Waterhouse v D. Cross and D.P. Hamilton, The Official Liquidators of Mercantile Bank and Trust Company Limited** (No. 38 of 1980, Equity Side, Supreme Court, Bahamas, unreported) that in deciding whether to hold proceedings in private and/or seal a file, the conflicting interests between preserving privacy and disclosure in the interests of justice, the competing interests must be weighed to ultimately determine which prevails.

> **"When there is a clash between the public interest (i) that harm should not be done to the national or the public service by the disclosure of certain documents and (ii) that administration of justice should not be frustrated by the withholding of them, their production will not be ordered if the possible injury to the nation or public service is so grave that no other interests should be allowed to prevail over it, but, where the possible injury is substantially less the court must balance against each other the two public interests involved. So, where there is a conflict between preserving the privacy and protecting confidential information and disclosure in the interest of justice the competing interest must be weighed to determine which ultimately will prevail.**
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> **So in considering an application of the nature of that before me one must weigh the public interest which requires that a litigant should be able to lay before a court of justice all relevant evidence and the public interest which requires that confidentiality of information should be respected and to balance the one against the other. In exercising its discretion the court should be careful to impose conditions that will safeguard the confidentiality of information disclosed in order to prevent any abuse of such information. The court must ensure that only such disclosure is made as the interests of justice demand."**

[20] Barnett CJ determined that the customer's information would be sufficiently protected if he was referred to by a pseudonym. He said that it was not possible, at that early stage, to determine whether the privacy could be protected by having a public trial and redacting client information. Therefore, he reserved his position on whether the trial should be held in camera until after discovery.

[21] Although the application in **Standard Chartered Bank** was made after the proceedings had already been heard and it was a major factor for why section 77 did not arise and for why the Court ultimately refused, it comprehensively explains

the effect of section 77, and explains how the competing interests are to be weighed.

[22] The recent Court of Appeal decision of **Hot Pancakes Limited et al v Amber Louise Murphy et al** SCCiv App. 95 of 2020 most comprehensively expressed the Bahamian position on the open justice principle. It made it clear that section 77(3) does not give a right to the applicant for the proceedings to be kept confidential. Rather it confers on the Court a *discretion* to determine whether the privacy is warranted. Sir Michael Barnett P. expressed the need for compelling evidence beyond the mere fact that the action would disclose financial information:

> **"21 . … the anonymization of a report of a hearing in open court or of a judgement relating to a hearing in open court is a departure from the default position founded on the public interest and so the burden of justifying that departure falls on the person seeking that anonymization. See para 55 of Adams v SSWO [2017] UKUT 9.**

[23] At paragraph 26, he made it clear that section 77(3) merely gives the Court a discretion (as opposed to a right to the applicant) to determine whether the proceedings should be kept confidential. He further explained at paragraph 27 that to justify the anonymization of a judgment or hearing proceedings in camera, more is required than the mere fact that the litigation will disclose financial information:

> **"26. … section 77(3) confers no legal right on [the applicant] to have civil proceedings brought by them to be kept confidential. As I said in Standard Chartered Bank v UBS [2011] 2 BHS J. No 24 that section does not give a customer a statutory right to have his court proceedings held in private. It simply gives the court a discretion, Parliament used the word "may" not "shall"."**
>
> **"27. As to the right at common law whereby the court can exercise a discretion to anonymize a judgment, I am not satisfied that the mere fact that the action discloses information about the financial affairs of a Plaintiff is sufficient to justify the exercise of a discretion to hear an action in private or to anonymize a judgment which should otherwise be made in public. I made this point before in paragraph 9 of the Standard Chartered Bank v UBS decision."**

[24] Barnett P. stated that the confidentiality obligations are the same as the common law notwithstanding that confidentiality is important to the financial services industry.

> **"31. … Whilst confidentiality is important to the financial services industry, the confidentiality obligations under Bahamian law are the same as exist at common law. This is made clear by section 77 (7)(a) of that Act which provides that 'Nothing contained in this section shall (a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer'. … the obligation of confidentiality is the same bot at common law as well as under the statute."**

[25] In support of his position, Barnett P. considered and cited at paragraph 28 of the said ruling, the recent observations of the English Court in **Justyna Zeromska-Smith v United Lincolnshire Hospitals NHS Trust** [2019] EWHC 552 (QB**)** wherein Martin Spencer J, had to consider balancing a party's privacy with the concept of open justice determined that although a case would likely involve exploration of intimate details of a party's private and family life, the full force of the "open justice" principle and the interests of the press in reporting the proceedings, including the names of the parties, should not be derogated from.

Discussion/Analysis

[26] Mr. Simms Q.C. appearing as Counsel for the Trustee acknowledged that the open justice principle is the starting point: that proceedings ought to take place in open court. However, he submitted that this case falls within the exceptions to the rule on the basis that it involves confidential matters and this is an offshore financial jurisdiction.

[27] Mr. Simms QC submitted that there are several reasons why the Court ought to exercise its discretion under section 77 to hold the proceedings in camera and seal the file. By the enactment of the 2011 Trustee Amendment Act, which provides a means of resolving disputes through arbitration, Mr. Simms QC argued that Parliament has reinforced the public policy of protecting trust matters from prying eyes and ensuring confidentiality. Further, he stated that the provision gives the

Court a far greater discretion than statutes in other jurisdictions to specifically hear matters in camera and to seal files.

[28] Mr. Simms QC submitted that The Bahamas is a jurisdiction where trust disputes can be arbitrated in private by virtue of the 2011 Trustee Amendment Act.

[29] Mr. North submitted that the principles of open justice cannot be calibrated upon without clear or cogent evidence to substantiate the same.

[30] Mr. North referred to the case of **R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society** [1984] 2 All ER 27 and submitted that in dealing with this issue, the Court must undertake a fact-specific balancing exercise when considering the purpose of the open justice principle and the potential value of the information in question in advancing that purpose and any risk of harm that its disclosure might cause to the maintenance of an effective judicial process or to the legitimate interests of others.

[31] Mr. Delaney QC stated that (redacted).

Effect on Trusts

[32] In my judgment, the effects on the trusts, asserted by the Trustee are no more than inconveniences. If the risk was sufficiently compelling to justify derogation from open justice, many parties to litigation would be entitled to sealing orders, which would undermine the effectiveness of the principle of open justice itself.

[33] In this regard, Mr. Wilson QC and Mr. North, whose arguments are attractive, contended that disclosure of private information is an ordinary incident of litigation which could always have detrimental effects on parties to the proceedings. The fact that (REDACTED) is held via a trust structure makes no difference to the fundamental position that proceedings being heard in public is the best means of securing pure, impartial and efficient administration of justice. It is not evidence that is clear and cogent to justify the derogation from the open justice principle.

[34] I do not consider that the first family not having commenced the proceedings to be a probative fact toward their position that the proceedings should be confidential. What is relevant is that they are parties to the proceedings. In that regard, Mr. Simms QC's reliance on the Court's decision in **Standard Chartered Bank** is relevant. In that case, one of the important facts which compelled the Court to err on the side of privacy was the fact that the customer whose information was in issue was not a party to the proceedings. That was what seemed to turn the decision in favour of privacy. However, parties to litigation ought to be prepared to have information disclosed, whether they have commenced the proceedings or not. The first family have failed to explain how the publicity of the proceedings would negatively affect the trusts.

[35] Mr. Wilson QC submitted that the sealing/privacy order is not necessary.

Whether the circumstances warrant a sealing order

[36] As I have already stated, open justice is the default position. Any party seeking to displace the application of this very fundamental and century old principle has a heavy burden. As stated in **Scott v Scott**, the threshold required for derogation from open justice is that it is necessary for the administration of justice.

[37] It is necessary to clarify the *effect* of section 77(3). I agree with Mr. McWeeney QC that section 77 (3) recognizes the importance of confidentiality in relation to sensitive information and goes further by imposing criminal sanction for its breach. However, the Trustee as well as the first family are still required to proffer clear and cogent evidence to satisfy the Court that such confidentiality is required to the degree which requires displacing the open justice principle.

[38] Both Mr. Wilson QC and Mr. North correctly argued that the provision does not give the Trustee a statutory right to have the proceedings confidential. It merely gives the Court a discretion to decide whether the proceedings should be confidential and the exercise of that discretion must be canvassed against the

constitutional principle of open justice, which although not an absolute right, is difficult to overcome/override.

[39] Notwithstanding public policy, however, in the circumstances, it is not sufficient to justify the derogation from open justice.

[40] Mr. McWeeney QC submitted that the fact that the Plaintiff resiled from her initial position of not opposing the sealing application is relevant. Mr. Wilson QC, however, offered an explanation for her change in position.

[41] Ultimately, it is the Court that has to determine whether the matter should be sealed or not, bearing in mind the constitutional principle of open justice. This principle, as I earlier stated, is rooted in deep and long history dating back hundreds of years and it could be traced to decisions made before the signing of Magna Carta in 1215. This principle is viewed as an underlying or core principle of English law. Today, the concept is so widely accepted that there is a general presumption that there should be judicial openness. Now, in The Bahamas, it has constitutional connotations.

[42] Taking into account the particular facts of this case, I am not satisfied by the evidence. It is therefore difficult to see how the publicity of the litigation will have any material/substantial additional effect.

[43] The fact that the litigation may be inconvenient but does not warrant the displacement of the open justice principle. The rationale for this principle is important in deciding whether the circumstances presented are so compelling to override it. In **Scott v Scott**, the rationale for the openness is because it is the best means of securing the "*pure impartial and efficient administration of justice, the best means of winning for it public confidence and respect*." That said, the open justice principle is embedded in the Constitution and so, it ought not to be easily emasculated.

[44] In determining whether the default position of open justice or the exception of a sealing order should obtain, the overriding objective is that the order secure that justice is done. The Trustee and the first family have not demonstrated that the sealing order is necessary in the interests of justice. Rather, they have merely proved that it is more convenient. It is not in the interest of justice to depart from the constitutional principle of open justice.

[45] I am also not convinced that there is a need for a Confidentiality Club on any information, in particular, as requested by Mr. McWeeney QC:

[46] As this matter progresses, the Court has the inherent power to anonymize the names of any parties and/or to redact confidential financial documents. At this stage, the necessity to do so does not arise.

Extension of time application

[47] The Trustee and the first family applied for an extension of time to serve their respective Defences. As such, they ask that they all be excused from filing their Defences until the determination of the pending application.

[48] Order 3 Rule 4 and Order 31A Rule 18 of the Rules of the Supreme Court gives the Court the discretion to extend or shorten the time for compliance with the rules of the Court.

[49] I agree with Mr. Wilson QC that the filing of the Defences is required to mark the parameters of the case. The Trustee has had the benefit of almost a four (4) month extension of time. It should therefore file and serve its Defence on or before 14 June 2022.

[50] The first family has requested an additional 28 days to receive instructions and produce a draft Defence. Unlike the Trustee, they did not enter the action until 8 April 2021. Accordingly, they ought to file and serve a Defence within 28 days from the date of this Ruling. The Court is very generous to them both.

Conclusion

[51] In the circumstances, the evidence does not show that it is necessary for the administration of justice that the proceedings be held in private. The Trustee and the first family have merely shown that a sealing order would be more convenient. As such, the sealing application is refused.

[52] In addition, it is not excusable for the Trustee and the first family not to file and serve their respective Defences because factual disputes may fall away depending upon the determination of preliminary issues. The issues between the parties must be identified. This must be done by filing their respective Defences.

Dated this 30th day of May 2022

Indra H. Charles
Senior Justice