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 Coral Ridge Trust and of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as The Hightree 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 him 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 – Whether file should be sealed where family is wealthy and there are minor beneficiaries whose safety allegedly could be at risk - 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 who was the Founder of a well-known resort throughout the Caribbean created two trusts governed by Bahamian law: both trusts contain "no contest" clauses which give the First Defendant ("the Trustee") a discretion to exclude beneficiaries who make certain claims against the trusts. 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 Plaintiff is seeking the removal and replacement of the Trustee and alleges various conflicts of interest against the Trustee and its failure to carry out the Founder's wishes and that she has wrongfully been deprived of and prevented from using certain assets to which she claims to be entitled. She seeks a declaration that her claim does not engage the "no contest" clauses in the trust instruments and the Founder's Will.

The Trustee applied for the file to be sealed ('the sealing application") on the basis that the proceedings require disclosure of financial information to which the beneficiaries are entitled. For the beneficiaries who reside in Jamaica, the Trustee contends that, if the proceedings are open, their safety would be put at risk by the inevitable publicity of the extent of their wealth. Further, they say that the publicity would adversely affect the minor beneficiaries and the trusts and the Sandals Group business. The Second through Fourth Defendants and the Guardian Ad Litem 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 the Plaintiff's 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, asserting that if the "no contest" issue is determined against the Plaintiff, the need to dispute allegations of fact in their Defences falls away. The Plaintiff opposed the application for extension of time, asserting that the Defences are required to definitively map out the disputes between the parties.

HELD: Dismissing (i) the applications by the Trustee, the Second through Fourth Defendants and the Guardian ad Litem 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 after the "no contest" issue is determined, 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. Costs to the Plaintiff and to the Fifth through Seventh Defendants are to be taxed if not agreed.

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. With respect to the security and safety of the Second and Third Defendants and their immediate family, if information linking their respective families to the value of their assets is leaked out, there is no credible and specific evidence that they

and their immediate family are at particular risk of any such threat. The principles of open justice cannot be calibrated upon the potential risk or belief of irrational actions of a handful of people engaging in what could likely amount to criminal behaviour without clear or cogent evidence to substantiate the same. The Second and Third Defendants and their immediate family already have adequate protection in place.

5. The minor children are aware of their own wealth. With respect to their safety, their relation to the Founder is well-known: **AB v Line Trust Corporation Limited** applied; **V v T** [2014] EWHC 3432 distinguished.

6. 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.

7. The risk of customers becoming aware of the profit margin of a business is inconvenient but is not necessary in the interest of justice and therefore does not justify derogating from the open justice principle: **AB v Line Trust Corporation Limited** applied.

RULING

Charles Sr J:
Introduction

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

(i) An application by the First Defendant, Cromwell Trust Company Limited ("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 in relation to certain "no contest" clauses ("no contest" application), 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 Plaintiff ("Cheryl") filed on 31 January 2022 seeking an order, contingent on the Court determining that the "no contest" clauses

are not engaged, the appointment of a judicial trustee to act as a co-trustee with the Trustee pendent lite ("the Co-Trustee application") and;

(iv) An application by the Second through Fourth Defendants ("the Jamaican 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 regarding the engagement of the "no contest" clauses ("the Jamaican family's extension of time application").

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

[3] 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 Steven Carey, one of the Trustee's directors (and a director or employee of the holding company of the Sandals Group).

[4] The Jamaican family supports the Trustee's application by asking the Court to depart from the constitutional principle of open justice and grant a sealing order. The minor children of the Second Defendant ("Adam") and the Third Defendant ("Jaime") also supported the application for sealing.

[5] Cheryl and the Fifth to Seventh Defendants ("together "the US family") oppose the application, asserting that the circumstances of this case do not warrant the grant of a sealing or privacy order.

[6] With respect to the Trustee and the Jamaican family's application to file and serve their respective defences, they sought extensions until the determination of the "no contest" clauses issue. The US family also opposes this application, contending that the Defences are required to determine the issues.

Background facts

[7] Gordon "Butch" Stewart ("Mr. Stewart") was a well-known Jamaican entrepreneur and Founder of the Sandals Group, a well-known resort in the Caribbean. He was the Founder of two (2) trusts governed by Bahamian law.

[8] Mr. Stewart died on 4 January 2021, leaving two (2) surviving branches of his family. The first branch is the "Jamaican family", comprising his adult children, Adam Stewart, Jamie Stewart-McConnell, Bobby Stewart and Brian Jardim (and their respective families). The second branch is the "U.S. family", comprising Cheryl, his partner of some 30 years, and her three adult children, Gordon Stewart, Kelly Stewart and Sabrina Stewart.

[9] Most of Mr. Stewart'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] Mr. Stewart 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 (including the Sandals Group) to be decanted into five (5) new trusts – one each for Adam, Jaime, Bobby and Brian and one (1) trust for the U.S. family. He wished for these new trusts to receive the shares in the holding companies, including the holding company of the Sandals Group in the following proportions:

(i) US Family Trust: 42%.
(ii) Bobby's Trust: 16.67%.
(iii) Adam's trust: 16.67%.
(iv) Jaime's trust: 16.66%.
(v) Brian's trust: 8%.

[11] Mr. Stewart also left detailed written instructions as to how the businesses should be managed and directed that the U.S. family was to receive US$100 million.

[12] Cheryl commenced this action alleging that the Trustee has failed to carry out Mr. Stewart's wishes and that it has interfered with her using assets to which she is entitled. Further, she asserts that the Trustee is conflicted since the majority of its directors are subordinates of Adam, one of the adult children of the Jamaican family. She seeks a declaration that her claim does not engage "no contest" clauses in the trust instruments and in Mr. Stewart's Will. The other relief sought is contingent on the grant of that declaration.

[13] The Trustee nor the Jamaican family have filed Defences.

Law on sealing of files

[14] 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."**

[15] 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."**

[16] 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."**

[17] 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'."**

[18] 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.

[19] 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."**

[20] 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"**

[21] 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.**
>
> **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."**

[22] 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.

[23] 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.

[24] 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.**

[25] 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."**

[26] 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."**

[27] 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

[28] 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.

[29] 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. He emphasized that section 77(3) makes no distinction between administration and hostile trust matters. 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.

[30] 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. This is, according to him, an indication that the public policy of The Bahamas is that it is appropriate to hear hostile matters in private. If a settlor in settling a trust post 2011 could ensure privacy even where a hostile dispute arose, said Mr. Simms QC, it must be that a settlor who was deprived the benefit of that provision (the trust having been settled before 2011) but expressed wishes of absolute confidentiality in the deed, such wishes would be protected under the statutory discretion of the Court even in hostile matters.

[31] Mr. Simms QC said that the public policy in The Bahamas still remains the prioritization of the protection of financial affairs of customers and beneficiaries.

[32] In support of his contention, Mr. Simms QC relied on **BBH v CIBC et al** 578 of 2004, where Lyons J ordered that a contentious matter on the allegation of breach of trust should be heard in camera and the file sealed. Mr. Simms QC also relied on **Standard Chartered Bank** where Barnett CJ (as he then was) ordered a customer's identity be anonymized in contentious litigation where the banks disputed who should take a loss in relation to a client account that was transferred shortly before the collapse of the Madoff fund.

Safety and development of minor children

[33] Mr. Simms QC together with Mr. McWeeney QC and Mr. Delaney QC submitted that the safety of the beneficiaries, and in particular the minor beneficiaries (the minor grandchildren of Mr. Stewart), is at risk if the proceedings are not sealed. According to Mr. Simms QC, save for Adam, who is the current Sandals Group Executive Chairman, the beneficiaries have low profile lives. Having regard to their privacy, the value of the trust assets and the popularity of Sandals, the perceived wealth poses a substantial threat to their safety. He emphasized the evidence of Steven Carey that the litigation and publicity therefrom has resulted in the Trustee having concerns regarding all of the beneficiaries, but that the safety concerns for those in Jamaica are exacerbated by the danger there.

[34] Mr. Simms QC also relied on the evidence of Jamie, the mother of some of the minor children in Jamaica, that if such information became public, she would have to consider leaving Jamaica. Mr. McWeeney highlighted the evidence of Ms. Gilbert, an insurance broker with expertise in kidnapping and extortion risks in Jamaica that "*[i]f information about the value of Sandals & Beaches were to get out into the public domain, my advice to you would be to leave the country immediately by private plane.*"

[35] Both Mr. Simms QC and Mr. McWeeney QC relied on **BBH v CIBC**, where the Court sealed the file in a trust case that concerned a high profile and wealthy family. Based on the evidence, the Judge believed that there was a real risk to the security. Mr. McWeeney QC urged the Court to give special consideration to the fact that the beneficiaries are minors, relying on **Hot Pancakes Limited** which emphasized that it is an important consideration.

[36] However, I agree with Mr. Wilson QC who appeared as Counsel for Cheryl and Mr. North who appeared as Counsel for the Fifth through Seventh Defendants that the evidence relied on in an effort to demonstrate a real risk to the beneficiaries' safety does not rise to the standard required to warrant a privacy order. Mr. Wilson QC correctly emphasized Dudley CJ's reasoning in **AB v Line Trust Corporation Limited & Ors** 2016/ORD/100 that although the Court would consider the minority of those affected, the possibility of negative effects on minors does not, in itself, render it necessary for the proceedings to be held in private:

> **"[e]xposure to litigation especially if there is an element of publicity is always liable to cause distress and thereby affect the wellbeing of individuals who are involved in or are related to those involved in litigation. But in my judgment the possible impact that the present litigation could have upon X and Y is, particularly in the context of a family with potential access to huge wealth, part and parcel of the stresses of the life they have been born into. In my judgment the impact it may have upon them does not come near to it being necessary to order the anonymisation of the parties"**

[37] I agree with Mr. Wilson QC's distinguishing of the instant case from **V v T** [2014] EWHC 3432, where the privacy order was made in circumstances where the minor beneficiaries had no knowledge of the degree of their wealth. Here, however, the minor beneficiaries are aware. This fact is unfavourable to the Jamaican family's argument that the publicity of the case would negatively impact the development of the children's values of education and hard work. Mr. Wilson QC also submitted that the instant facts are far less compelling than in **AB v Line Trust Corporation Limited**, where the minor beneficiaries had not been introduced to the extent of the family's wealth which the Court considered might expose them to "false friends" and the evidence that the minors had been diagnosed with mental health conditions which posed a specific risk to their development, none of which he submitted, is present in the instant case.

[38] Mr. Wilson QC urged the Court to have regard to the evidence of Adam that he includes his children in advertising the business to "humanize" the brand.

[39] Mr. North submitted that, with respect to the security and safety of the Jamaican family and their immediate family, if information linking their respective families to the value of their assets is leaked out, that they and their immediate family would be at risk of any such threat, is not borne out by any credible and specific evidence. According to him, the principles of open justice cannot be calibrated upon the potential risk or belief of irrational actions of a handful of people engaging in what could likely amount to criminal behaviour without clear or cogent evidence to substantiate the same. The Jamaican family and their immediate family already have adequate protection in place.

[40] 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.

[41] With respect to the safety risk to the minor beneficiaries, I am not convinced that their safety can only be ensured by moving out of Jamaica. They already have bodyguards. Mr. Delaney QC stated that the bodyguards do not eliminate the risk of kidnapping or other extortionate crime, but there is no way of completely eliminating that risk. The best that can be done is to minimize the risk. If additional security is required, I am satisfied that the Jamaican family has adequate resources to enhance it. It is already widely known in Jamaica that the minor children are the grandchildren of Mr. Stewart and that they are in possession of (or entitled to) considerable wealth. They are already perceived to be very wealthy. Accordingly, the effect of publicity of the details would not, in my judgment, add to their safety risk. However much danger they would be in by the publicity of the details of their wealth already exists in the absence of the publicity of the details.

Effect on the business of Sandals Group and Trusts

[42] Both Mr. Simms QC and Mr. McWeeney QC emphasized that Mr. Stewart was committed to ensuring that sensitive commercial information relating to the Sandals Group ("Sandals") remained private. They say those wishes ought to be given effect.

[43] They both submitted that although Sandals is well-known, because it is not a publicly traded company, its financial information is not public. Because of the nature of this action, they say, Cheryl and the Trustee will have to disclose highly sensitive financial information concerning the financial affairs of the Trusts. Mr. Simms QC submitted that the Court should keep confidential the financial affairs of Sandals, which is part of the Trusts' structure to avoid negative impact on the Trusts and to Sandals' business.

[44] They contended that a hearing in open court would lead to Sandals' customers and competitors becoming aware of the levels of profit made by Sandals, which

would in turn lead to those customers effectively squeezing the profit margins of Sandals, damaging the value of the trust assets. With respect to the Trusts, Mr. Simms QC said that the fact that Sandals had authorized the disclosure of some historical information does not detract from this rationale and could not conceivably justify the wholesale loss of confidentiality which would flow from the hearing of the whole Action in public. The risk of damage to the business would be particularly objectionable if Cheryl, as she suggests she might, does not in fact proceed with the action following the determination of the preliminary issue.

[45] Mr. McWeeney QC urged the Court to have regard to the fact that the Jamaican family did not commence these proceedings; that they have been forced to defend claims. A defendant beneficiary, says Mr. McWeeney QC, should not be forced to choose between defending himself against an unmeritorious claim and protecting the major assets of the trusts from irreversible harm.

[46] In my judgment, the effects on the trusts and businesses asserted by the Trustee and the Jamaican family are no more than inconveniences. If the risk of customers and competitors becoming aware of profit margins of companies 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.

[47] 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. Every individual and corporation is exposed to this risk. An exception cannot be made for Sandals merely because it is a large corporation. The fact that the interest in the business 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.

[48] I do not consider that the Jamaican 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 Jamaican family have failed to explain how the publicity of the proceedings would negatively affect the trusts.

[49] Mr. Wilson QC submitted that the Trustee's acquiescence to the recent disclosure of financial information of Sandals demonstrates that the sealing/privacy order is not necessary. Further, said Mr. Wilson QC, the Writ, Statement of Claim and the First Affidavit of Cheryl are all filed documents and have been openly on the Registry's records for some seven months with none of the apparent consequences alleged by the Trustee, Adam or Jaime presenting themselves.

Whether the circumstances warrant a sealing order

[50] 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.

[51] As Mr. Wilson QC correctly stated, objectionable evidence or details that would affect sensitive feelings and the pain and humiliation caused to parties by public hearings is not enough to justify proceedings being held in camera and/or the file being sealed.

[52] 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 Jamaican 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.

[53] 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.

[54] I accept Mr. Simms QC's submission that the public policy in The Bahamas has been to protect financial information. He submitted that this makes the Court's discretion under section 77(3) wider, citing several relevant cases from other offshore financial jurisdictions. I agree that public policy is a consideration for the Court that tends to be in favour of privacy. This was taken into account by Barnett P in **Hot Pancakes Limited** where he stated at para 31:

> **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 both at common law as well as under the statute."**

[55] Notwithstanding public policy, however, in the circumstances, it is not sufficient to justify the derogation from open justice, especially where the persons whose financial information is in issue are parties to the proceedings as opposed to mere account holders at a financial institution which is a party. I am reminded of the speech of Barnett P in **Hot Pancakes Limited**:

> **"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."

[56] All Counsel with the exception of Mr. Simms QC agreed that the displacement of the open justice principle is even more difficult in contentious proceedings. Mr. Simms QC submitted that because section 77 (3) does not distinguish between contentious and non-contentious litigation, the fact that the proceedings are contentious is not fatal to their application. I agree that it is not fatal to the application but I agree with Mr. North that the distinction is not the most important consideration in determining the application.

[57] Mr. McWeeney QC submitted that the fact that Cheryl resiled from her initial position of not opposing the sealing application is relevant. Mr. Wilson QC, however, offered an explanation for Cheryl's change in position. He said that the publicity of Sandals' confidential financial information in the Jamaica Observer coupled with the Trustee's seeming acquiescence to that breach of confidence resulted in skepticism with respect to the true intentions of the privacy application. Further, says Mr. Wilson QC, the appointment of a further Sandals officer to the board of the Trustee while this action was afoot and the parties were awaiting a hearing and determination on the sealing application has led to suspicions that any privacy order would be used and have the effect of shielding the conduct of the Trustee's directors from scrutiny. In the circumstances, Cheryl has determined that it is best for the proceedings to be heard in public.

[58] I do not accept Mr. McWeeney QC's suggestion that Cheryl's change in position is indicative of an ulterior motive. The reasons advanced by Mr. Wilson QC for Cheryl's opposition to the application are reasonable. In any event, parties may consent to certain issues but that does not bind the Court. 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.

[59] Taking into account the particular facts of this case and even having given special consideration to the minority of the beneficiaries, I am not satisfied by the evidence that the publicity of the litigation poses a real threat to the minor beneficiaries and to their safety. They themselves are aware that they are very wealthy and it is widely known, especially among the Jamaican public, that they are potential shareholders of Sandals and that they are the grandchildren of Mr. Stewart. It is therefore difficult to see how the publicity of the litigation will have any material/substantial additional effect. As stated by Dudley CJ in **AB**, distress caused by litigation with an element of publicity is expected. That alone is not sufficient to displace the open justice principle.

[60] The fact that the litigation would expose that the trusts are involved in the ownership structure of the businesses and could make potential customers skeptical 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**, Lord Atkinson said that notwithstanding that public trials can be humiliating, 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.*" This cannot be displaced merely to avoid publicizing some information that they would prefer not to be publicized in the interest of their business. That said, the open justice principle is embedded in the Constitution and so, it ought not to be easily emasculated.

[61] 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 Jamaican 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 to keep confidential financial information merely because that financial information tends to attract publicity thereby inconveniencing their lives or business(es).

[62] 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: (i) the identities of the children, (ii) the particulars and value of the assets in the Trust or on (iii) commercial information relation to the business of Sandals and other affiliated companies.

[63] 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

[64] The Trustee and the Jamaican family applied for an extension of time to serve their respective Defences. They say that if the no contest issue is determined against Cheryl, the need to file a Defence to dispute allegations of fact arising from the Statement of Claim falls away. As such, they ask that they all be excused from filing their Defences until the determination of the preliminary issues (the sealing application and the "no contest" clause issue).

[65] 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.

[66] 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.

[67] The Jamaican 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

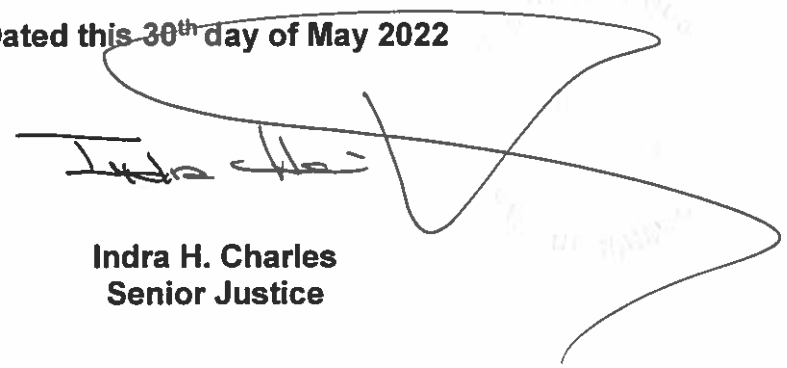
[68] In the circumstances, the evidence does not show that it is necessary for the administration of justice that the proceedings be held in private, or that certain information should be kept confidential. The Trustee and the Jamaican family have merely shown that a sealing order would be more convenient.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

[69] In addition, it is not excusable for the Trustee and the Jamaican 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.

Costs

[70] As the US family are the successful parties in these proceedings, they are entitled to their costs, to be taxed if not agreed. The taxation will be done by the Court.

Dated this 30th day of May 2022



Indra H. Charles
Senior Justice