[2022 Gib LR 19]

AB v. LINE TRUST CORPORATION LIMITED, WHITE, FINSBURY TRUST LIMITED, LEVY and BB

IN THE MATTER OF THE [13 TRUSTS OR SETTLEMENTS] TOGETHER THE [B] FAMILY TRUSTS

LINE TRUST CORPORATION LIMITED (as trustee of the B FAMILY TRUSTS) v. BB and SEVEN OTHERS

SUPREME COURT (Dudley, C.J.): January 14th, 2022

2022/GSC/02

Human Rights—right to fair trial—public hearing—s.8 of Constitution secures fundamental right that adjudicative procedures provided by state to be fair—exception to open justice in s.8(9) ("except with agreement of all the parties thereto, all proceedings . . . shall be held in public") does not create absolute right to hearing in private where parties agree—court has discretion—privacy order granted in formerly contentious trust proceedings which had been settled

The parties sought an order that proceedings be conducted in private.

A trustee sought the court's approval of its decision to enter into a settlement agreement and its decision to execute certain deeds of variation to give effect to provisions of the settlement agreement relating to the trusts, the trusteeship and protectorship of the trusts. The beneficiaries of the trusts and counsel for the unborn descendants supported the trustee's application. The court granted that relief.

The court also heard a privacy application which relief was sought by all the parties.

Section 8(9) of the Constitution provided:

> "(9) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public."

It was submitted in respect of s.8(9) that, in circumstances where the parties so agreed, the principle of open justice was disapplied. Alternatively, if the exception in s.8(9) did not deprive the court of its powers to conduct the proceedings in public, when exercising its discretion the traditional

starting position established by the principle of open justice did not apply. When exercising its discretion, the court should take into account the following factors: (i) the court was often willing to respect the privacy of non-contentious matters relating to trusts and that, in view of the settlement agreement, these actions had in effect become non-contentious in that what was being sought was the blessing of the reorganization of private discretionary trusts; (ii) if the details were to be made public the commercial repercussions in relation to the underlying trust assets could jeopardize the successful implementation of the settlement agreement; (iii) only two of the parties had been involved in the previously contentious litigation and absent privacy orders all the beneficiaries of the trusts would be adversely affected; and (iv) no details had yet entered the public domain.

Held, granting the relief sought:

The overarching purpose of s.8 was to secure the fundamental right that adjudicative procedures provided by the state should be fair. The principle of open justice was an internationally recognized feature in maintaining and promoting the rule of law. The language in the exception to s.8(9) was not mandatory in that it did not create an absolute right to a hearing in private if the parties agreed. Rather it was a limitation on a right of fundamental importance at common law and in international human rights law that proceedings should (subject to exceptions) be heard in public. The exception merely displaced the presumption that proceedings should be heard in public. The court was not bound to make a privacy order, rather, as a matter of discretion, it must evaluate, albeit starting from a neutral position, whether the proceedings should be heard in public or in private. In the present case, weighing the inherent value of open justice against factors including the fact that the formerly contentious proceedings had been settled, that publicity could jeopardize the settlement and the value of the trusts, and that beneficiaries who were not involved in the contentious litigation could be adversely affected by publicity, militated in favour of the exercise of discretion. The court therefore granted the relief sought, subject to this and an earlier judgment being handed down in public in anonymized form, thereby to that limited extent seeking to reconcile privacy and open justice (paras. 19–21).

Cases cited:

(1) *B* v. *United Kingdom*, [2001] ECHR 298; [2001] 2 FLR 261; [2001] 2 F.C.R. 221; (2002), 34 E.H.R.R. 19; [2001] Fam. Law 506; 11 BHRC 667, considered.

(2) *Cape Intermediate Holdings Ltd.* v. *Dring (Asbestos Victims Support Groups Forum UK)*, [2019] UKSC 38; [2020] 1 A.C. 629; [2019] 3 W.L.R. 429; [2019] 4 All E.R. 1071; [2019] EMLR 24; [2019] HRLR 15, considered.

Legislation construed:

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), s.8: The relevant terms of this section are set out at para. 6.

Civil Procedure Rules (S.I. 1998/3132), r.3.1(7): The relevant terms of this provision are set out at para. 13.

Jamaica (Constitution) Order in Council 1962, s.20(3): The relevant terms of this subsection are set out at para. 7.

Kenya Independence Order in Council 1963, Schedule 2, s.21(10): The relevant terms of this subsection are set out at para. 7.

A. Holden with *M. Levy* (instructed by Hassans) for Line Trust Corp. Ltd.;
K. Azopardi, *Q.C.* with *B. Jaffey*, *Q.C.*, *K. Power* and *P. Grant* (instructed by TSN) for BB;
A. Steinfeld, *Q.C.* with *E. Phillips* and *S. Everington* (instructed by Signature Litigation) for AB;
G. Stagnetto, *Q.C.* with *T. Hillman* (instructed by Hillmans Law) for X and Y;
F. Tregear, *Q.C.* with *S. Triay* (instructed by Triay) for P, Q and R;
Sir Peter Caruana, *KCMG*, *Q.C.* with *C. Allan* (instructed by Peter Caruana & Co) for Levy.

1 **DUDLEY, C.J.:** In some measure the entitlement to this judgment gives some indication of the procedural complexities of these related and interwoven actions.

2 On July 7th and 8th, 2021, I heard two applications. The application heard on July 8th, 2021 related to the approval of certain matters that arose from a settlement agreement dated October 27th, 2020 ("the settlement agreement"). At the hearing of that application, in addition to the representation of parties set out above, the BB unborn descendants were represented by Ms. H. Murphy and the AB unborn descendants were represented by Mr. O. Curry. The approval application was a "Category 2 *Public Trustee* v. *Cooper* Application" by which Line Trust Corp. Ltd. ("the trustee") in its capacity as trustee of the B Family Trusts ("the trusts") sought the court's approval of its decision to enter into the terms of the settlement agreement and its decision to execute certain deeds of variation to give effect to provisions of the settlement agreement relating to the trusts, the trusteeship and protectorship of the trusts. The first to seventh defendants in claim 2019/Ord/118 are beneficiaries of the trusts, they together with counsel for both sets of unborn descendants supported the trustee's approval application, and by an extempore ruling I granted the relief sought.

3 This judgment relates to the privacy application I heard on the first day and which relief was sought by all the parties, and in respect of which on July 8th, 2021 I ordered that the hearings and proceedings in the three

actions be conducted in private and that access to court documents be restricted. As s.8(9) of the Constitution was engaged, and the exception therein to the principle of open justice which had been relied upon has not been the subject of judicial comment, either in this jurisdiction or it appears other jurisdictions with a similar provision, I indicated I would give my reasons in an anonymized reserved judgment. These are they.

Background

4 AB's agreement to a privacy regime is a relatively new feature in these actions and evidently one that has arisen as a consequence of the settlement agreement. At an earlier stage BB applied for privacy orders in actions 2016/Ord/100 and 2018/Ord/048 and on August 30th, 2019 I handed down a judgment ("the August 2019 judgment") in which I dismissed the applications. Subject to the redaction of various paragraphs which dealt with certain evidence touching upon X and Y that had been relied upon by BB, and subject to affording BB liberty to apply to seek further redactions, that judgment was handed down in public. However, permission to appeal having been granted and so as not to make any such appeal nugatory, the privacy regime remained in place and consequently the judgment was not made public pending determination of the appeal. In the event the appeal, at least in part because of the Covid-19 pandemic, did not progress to a hearing and was overtaken by the settlement agreement and the change of position adopted by AB. This brought into play an aspect of s.8(9) of the Constitution which was previously irrelevant. Consequent upon my order of July 8th, 2021, an anonymized and further redacted version of the August 2019 judgment will be made public at the same time as this judgment. The essential background is to be found in the earlier judgment.

5 The trustee and Mr. Levy, who is the protector of the trusts, have never sought their own anonymization. Mr. White was until his resignation in early 2020 a co-trustee of all of the trusts; whilst Finsbury Trust Ltd., which until its resignation in May 2019 was co-trustee of one of the trusts and is no longer a party to these proceedings, similarly has never sought its own anonymization. They are therefore identified in the entitlements and as necessary in the judgments. The August 30th, 2019 judgment was one which was handed down in actions 2016/Ord/100 and 2018/Ord/048. There are additional parties in 2019/Ord/118 and therefore for ease I briefly describe the essential familial links between the anonymized parties. BB and AB are close relatives. X and Y are BB's children, one of whom is a minor and represented by a litigation friend. P, Q and R are AB's adult children.

The constitutional provision

6 Section 8 of the Constitution which has the entitlement "Provisions to secure protection of law" at s.8(8) establishes the civil limb of a right to a

fair hearing within a reasonable time. Thereafter, s.8(9) and s.8(10) make provision for the applicability of the principle of open justice on the following terms:

> "(9) *Except with the agreement of all the parties* thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.
>
> (10) Nothing in subsection (9) shall prevent the court or other authority from excluding from the proceedings (except the announcement of the decision of the court or other authority) persons other than the parties thereto and their legal representatives to such extent as the court or other authority—
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> (a) may by law be empowered to do so and may consider necessary or expedient either in circumstances where publicity would prejudice the interest of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors as prescribed by law or the protection of the private lives of persons concerned in the proceedings; or
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> (b) may by law be empowered or required to do so in the interests of defence, public safety or public order." [Emphasis added.]

It is the exception to the principle of open justice "[e]xcept with the agreement of all the parties thereto" which now falls for consideration.

7 The skeleton argument filed on behalf of BB provides a useful survey of the use of this or similar provisions in the constitutions of Commonwealth countries and territories. Starting with Orders in Council amending the constitutions of Nigeria and Kenya in 1959 and 1960 respectively, the principle of open justice was enshrined as these nations transitioned from colonial rule towards independence. After 1962 two distinct approaches emerged, that found in the Jamaica (Constitution) Order in Council 1962, which provided:

> "(3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public."

And that found in Schedule 2 to the Kenya Independence Order in Council 1963, s.20(10):

> "(10) *Except with the agreement of all the parties thereto*, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other

adjudicating authority, including the announcement of the decision of the court or other, authority, shall be held in public."

The former was adopted in the constitutional arrangements of countries or overseas territories such as Antigua (1976), Bermuda (1968) and more recently, the Cayman Islands (2009). The latter saw wider adoption throughout the Commonwealth, being adopted in Malta (1964), Gambia (1965), Guyana (1966), Barbados (1966), Mauritius (1968), Gibraltar (1969), Fiji (1970), Grenada (1973), Dominica (1978), Seychelles (1976), Solomon Islands (1978) and Belize (1981), this list not being exhaustive. It is the model which was again adopted for Gibraltar in its 2006 Constitution.

8 Although absent from that review is an exploration of the competing policy considerations between the two models which the framers had in mind, it is submitted and I accept, that the addition of the words "Except with the agreement of all the parties thereto" before the general principle that proceedings should be heard in public cannot have been accidental. Rather it must have been a deliberate decision by the framers of the constitutions of some (but not all) Commonwealth and Overseas Territories.

Open justice—the English constitutional dimension

9 In the August 2019 judgment I explored the application of the principle of open justice in Gibraltar from a common law perspective. In England, with its unwritten constitution, there is no fundamental constitutional text which enshrines rights, but although a creature of the common law, open justice is nonetheless a recognized constitutional principle. Since I handed down that judgment, the United Kingdom Supreme Court in *Cape Intermediate Holdings Ltd.* v. *Dring (Asbestos Victims Support Groups Forum UK)* (2) considered the principle of open justice in relation to access to documents or other information placed before a court. Baroness Hale of Richmond, P.S.C. summarized the open justice principle and its principal purposes as follows ([2019] UKSC 38, at paras. 41–43):

"41. The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case.

> 42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases—to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In *A v British Broadcasting Corpn* [[2015] 1 A.C. 58], Lord Reed reminded us of the comment of Lord Shaw of Dunfermline, in *Scott v Scott* [1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard 'with open doors', 'bore testimony to a determination to secure civil liberties against the judges as well as against the Crown' (para 24).
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> 43. But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material."

The European Court of Human Rights perspective

10 Although not incorporated into our domestic law, the United Kingdom extended the protection of the ECHR to Gibraltar by declaration of October 23rd, 1953. Moreover, by virtue of s.18(8) of the Constitution, this court is enjoined *inter alia* to take account of decisions of the European Commission of Human Rights and of the European Court of Human Rights when dealing with any question which has arisen in connection with the rights and freedoms protected by Chapter I of the Constitution.

11 Albeit subject to certain exceptions, the protection of the right to a public hearing in the determination by a court of disputes over civil rights and obligations is protected by art. 6 of the Convention. In *B* v. *United Kingdom* (1), the court considered whether the presumption in favour of a private hearing in cases under the Children Act should be reversed, and said ([2001] ECHR 298, at para. 39):

> "39. The applicants submit that the presumption in favour of a private hearing in cases under the Children Act 1989 should be reversed. However, while the Court agrees that Art 6(1) states a general rule that civil proceedings, inter alia, should take place in public, it does not find it inconsistent with this provision for a State to designate an

> entire class of case as an exception to the general rule where considered necessary in the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of the parties (see *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, paras 86–87), *although the need for such a measure must always be subject to the Court's control* (see, for example, *Riepan v Austria* (Case 35115/97) (unreported) 14 November 2000). The English procedural law can therefore be seen as a specific reflection of the general exceptions provided for by Art 6(1)." [Emphasis added.]

Submissions

12 Although strictly there are distinct applications in each of the actions, the principal submissions in support of the privacy orders were advanced by Mr. Jaffey. Subject to some nuances these were adopted by Mr. Holden, Mr. Steinfeld and Sir Peter Caruana.

13 On the preliminary issue of whether renewed privacy applications could properly be made in claims 2016/Ord/100 and 2018/Ord/048, Mr. Jaffey advanced the following cogent submissions, which I accept. That privacy is not a once and for all issue, that this proposition can be tested by looking at the issue contrariwise, such that if a privacy order is granted in what at the outset appears to be non-contentious trust litigation, this can be revisited if those proceedings evolve into hostile litigation. Further, that from a procedural perspective, because they were interlocutory orders, the fresh applications can be made both by dint of the liberty to apply provisions in the orders made consequent upon the August 2019 judgment, and by virtue of CPR r.3.1(7) which provides: "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

14 It was accepted that if any party were advancing submissions inconsistent with the August 2019 judgment, then the proper approach would have been an appeal. But no party seeks to depart from the reasoning or analysis in the August 2019 judgment, rather reliance is placed upon the changed factual circumstances whereby the s.8(9) exception is engaged.

15 Mr. Jaffey's primary submission on the textual effect of s.8(9) of the Constitution was that, in circumstances in which the parties so agree, the principle of open justice is disapplied. That in effect it is in the nature of arbitration proceedings conducted by the court.

16 His alternative submission (and the one which garnered greater support from the other parties) was that if the exception does not deprive the court of its powers to conduct the proceedings in public, then when exercising its discretion, the traditional starting position established by the principle of open justice does not apply. In respect of the alternative argument, the factors which it was said should be taken into account by the

court when exercising its discretion, can broadly be summarized as follows:

(i) that as was noted in the August 2019 judgment the court is often willing to respect the privacy of non-contentious matters relating to trusts. That in view of the settlement agreement, these various actions have in effect now become non-contentious in that what is being sought is the blessing of the reorganization of private discretionary trusts;

(ii) that once it is accepted that there is a proper reason for confidentiality of the terms of the settlement agreement, that it is difficult to distinguish between the different actions. That having dealt in some detail with the facts of the dispute and the competing contentions of the parties in the August 2019 judgment, if those details were to be made public, the commercial repercussions in relation to the underlying trust assets would likely come about and that this could jeopardize the successful implementation of the settlement agreement. That consequently there is a risk that in the absence of a privacy regime the implementation of the settlement agreement may not be successful;

(iii) that it was only AB and BB who have been involved in the erstwhile contentious litigation and that absent privacy orders all the beneficiaries of the trusts would be adversely affected; and

(iv) that the contentious proceedings have not progressed beyond close of pleadings and the privacy application by BB which led to the August 2019 judgment. That as matters stand given the earlier privacy orders and the stay of orders flowing from the August 2019 judgment pending appeal, nothing has entered the public domain.

17 It is also common ground that the public interest in open justice and the imposition of a privacy regime can in some measure be reconciled by publishing the court's judgments in an anonymized form.

Discussion

18 There is no Gibraltar case law in which the exception has been considered, nor have I been referred to any authority from jurisdictions with a similar provision. In my August 2019 judgment, although not deciding the point and interpreting the provision, I expressed the following view:

> "39. In section 8(9) the following introductory words are to be found: '*[e]xcept with the agreement of all the parties thereto*'. Those words could be interpreted as affording parties who agree the option to have proceedings dealt with in private. However, as I construe them, what is intended is to strengthen the principle of open justice such that other than in circumstances in which the derogations in 8(10) are engaged, a party to litigation can rely upon his constitutional right to open

justice. In any event the point does not have to be decided given that [AB] opposes the imposition of any privacy regime."

With the benefit of the submissions now advanced I accept that was a strained interpretation. The grammatical meaning of "[e]xcept with the agreement of all the parties thereto" is to create a qualification to the general proposition of open justice. The fundamental question which falls to be determined is whether the legislature, that is to say Her Majesty in Council, intended to override the principle of open justice in its totality in circumstances in which parties to litigation so agree, or alternatively create a limited but not absolute exception to the principle of open justice involving the exercise of judicial discretion.

19 In answering that question the primary consideration must be the statutory language used, viewed in the context of s.8(9), the overriding object of which is that court proceedings for the resolution of civil disputes be held in public. It must also be read in the broader context of s.8, the purpose of which is to secure the protection of law and Chapter 1 of the Constitution where it is found, with its provisions protecting fundamental rights and freedoms.

20 To state the obvious, the overarching purpose of s.8 is to secure the fundamental right that adjudicative procedures provided by the State be fair. And it is beyond dispute that the principle of open justice is an internationally recognized feature in maintaining and promoting the rule of law. It is instructive that the language in the exception to s.8(9) is not mandatory in that it does not create an absolute right to a hearing in private if the parties agree. Rather it is a limitation on a right of fundamental importance at common law and in international human rights law, that proceedings should (subject to exceptions) be heard in public. As I construe it, the exception merely displaces the presumption that proceedings should be heard in public. The court is not bound to make a privacy order, rather as a matter of its discretion it must evaluate, albeit starting from a neutral position, whether the proceedings should be heard in public or in private. Such an interpretation has the benefit of according with *B* v. *United Kingdom* (1) that any restriction from the principle of open justice must be subject to the court's control.

21 This is a wholly novel exercise of discretion and possibly in time case law will develop a principled approach so as to minimize the risk of arbitrariness. In what is the first excursion, I undertake the evaluation by weighing the inherent value of open justice (albeit without the presumption) against the factors which I have summarized above. In particular I attach weight to the fact that the erstwhile contentious proceedings have been settled; that publicity could jeopardize the settlement and the value of the trusts; and that beneficiaries who were not involved in the contentious litigation could be adversely affected by publicity. These militate in favour

of the exercise of discretion and I therefore granted the relief sought, subject to this and the August 2019 judgment being handed down in public in anonymized form, thereby to that limited extent seeking to reconcile privacy and open justice.

Judgment accordingly.
