COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. 95 of 2020

B E T W E E N

HOT PANCAKES LIMITED

AND

CS & P S.A

Applicants/ Respondents

AND

AMBER LOUISE MURPHY

Respondent/Appellant

AND

ANSBACHER (BAHAMAS) LTD.

Second Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Mrs. Sophia Rolle-Kapousouzoglou with Mr. Valdere Murphy, Counsel for the Applicant/ Respondents**

Mr. John Wilson, QC with Ms. Berchel Wilson and Ms. Michelle Deveaux, Counsel for the Respondent/ Appellant

Mr. Luther McDonald with Ms. Keri Sherman, Counsel for the Second Respondent

DATES: **21 January 2021, 11 February 2021**

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Civil Appeal- Anonymization-Confidentiality-Judicial Discretion- Open Justice- Section 10 of the Court of Appeal Act- Section 77 (3) of the Bank and Trust Companies Regulations

On 20 August 2020, an ex parte Order was granted against Amber Murphy, preventing her, inter alia, from having access to monies in a bank account at Ansbacher in the name of Hot Pancakes Ltd (HPL). Murphy sought to vary the Order and her request was denied. She then applied to the Court of Appeal to vary the Order and give her access to pay her legal fees and living expenses. On 1 October 2020, this Court allowed the appeal and varied the Order. HPL and CS & P S.A(CSP), then sought leave to appeal to the Privy Council and on 10 November 2020 the application was refused. HPL and CSP now seek by motion an Order to anonymize and/or redact any judgments pertaining to this matter to protect the identities of the parties and Mr. Carlo Scevola, and to prevent the disclosure of any information relative to the account held with Ansbacher.

HELD: Application denied. I will hear the parties on costs and request written submissions to be filed on or before 3 March 2021.

It is a fundamental common law principle that cases are heard in public and full, fair and accurate reports naming those involved can and should be published. It is known as the principle of “Open Justice”.

The mere fact that the action discloses information about the financial affairs of a party is not 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.

At no stage during the hearing of the appeal by Murphy or the application by HPL and CSP for leave to appeal to the Privy Council was there any application made that the matters in the appeal court be heard in private nor that the judgments handed down be anonymized.

The judgments are already in the public domain. The hearings in the Court of Appeal were public hearings and the judgments were delivered in public. There is no compelling reason to now exercise our discretion to depart from the fundamental principle of open justice and anonymize the judgments or restrict their publication.

Adams v Secretary of State & Green [2017] UKUT 9 considered

Attorney-General v Leveller Magazine [1979] QB 31 mentioned

Julius Baer Trust Company (Channel Islands) Limited v AB, CD and EF [2018] 2 CILR 1 distinguished

R v Legal Aid Board, ex parte Kaim Todner [1998] 3 WLR 925 considered

Scott v Scott [1913] AC 417 mentioned

Standard Chartered v UBS [2011] 2 BHS J. No. 24 considered

V v T and Another [2014] EWHC p. 3432 (Ch) considered

JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an application by motion whereby the applicants, Hot Pancakes Limited (HPL) and CS & P S.A (CSP), the respondents to an appeal, and Plaintiffs in the action in the Supreme Court seek the following order:

> **"pursuant to Section 10 of the Court of Appeal Act, 1965 AND Section 77 (3) of the Bank and Trust Companies Regulation, Act 2020 on an application for the following Order:**
>
> **That the Judgments of the Court dated October 1st , 2020 and November 10th, 2020 respectively and any further judgments of the Court; and the title of this Action shall be anonymized and/or redacted to protect the identities of the parties hereto and Mr. Carlo Scevola, and to prevent the disclosure of information relative to the deposit and investment account ("the Account") held with Ansbacher (Bahamas) Ltd., the Third Respondent herein in the name of the Company."**

2. The background to this application can be placed in short compass. HPL and CSP brought an action in the Supreme Court against Ansbacher Bahamas Limited (Ansbacher) and Amber Murphy (Murphy) seeking the following relief:

> **1. An Order in the nature of a mandatory injunction that the First Defendant, its employees, servants or agents or**

otherwise howsoever do forthwith allow Mr. Carlo Scevola, the ultimate beneficial owner and sole Director of Hot Pancakes Limited ("HP Ltd"), the First Plaintiff herein unrestricted access to Bank Account No. 2001287 ("the Account") held at the First Defendant in the name of HP Ltd to facilitate the payment of legal and business expenses on behalf of HP Limited.

2. A Declaration that the Second Plaintiff is the ultimate beneficial owner of HP Ltd.

3. A Declaration that all Powers of Attorneys issued in the name of the Second Defendant were validly revoked on July 15th, 2020.

4. A Declaration that the Second Defendant's signatory rights in relation to the Account were validly revoked on July 15th , 2020.

5. A Declaration that the Second Defendant's conduct in seeking to hold herself out as the ultimate beneficial owner of HP Ltd amounts to fraudulent misconduct.

6. A Declaration that the following documents are forgeries and as a result are invalid and have no binding and legal effect:

(i) the purported Declaration of Trust dated June 10th , 2020 relative to the Second Defendant's purported shareholding in the First Defendant;

(ii) the purported Fiduciary Agreement and Indemnity dated July 25th, 2012 purportedly between the Second Defendant and CS& P Fiduciaire S.A.; and

(iii) the purported Agreement for Services dated July 25th , 2012, purportedly between the Second Defendant and CS&P Fiduciaire S.A.

7. An Order in the nature of a prohibitory injunction that the Second Defendant whether by herself or by her servants or agents or otherwise however be restrained, from committing or continuing to hold herself out to be the ultimate beneficial owner of HP Ltd and/or having any interest in HP Ltd at all.

8. An Order in the nature of a prohibitory injunction that the Second Defendant whether by herself or by her servants or agents or otherwise however be restrained, from accessing and/or attempting to access at the Account.

9. Damages as against the Second Defendant for tortious interference with the business of HP Ltd.

10. Damages as against the Second Defendant for economic loss.

11. Damages as against the First Defendant for wrongfully and/or negligently restraining the First Plaintiff' and/or its ultimate beneficial owner Mr. Carlo Scevola from being granted access to the Account.

12. Damages as against the First Defendant for breach of fiduciary duty and confidence.

13. Damages as against the First Defendant for loss of investment opportunity.

14. Interest pursuant to the Civil Procedure (Award of Interest) Act at such rate and for such period as the Court considers appropriate.

15. Costs."

3. HPL and CSP sought and obtained an ex parte order against Ansbacher and Murphy granting interlocutory relief. Among other things, it restrained Murphy from having access to certain monies in a bank account at Ansbacher in the name of HPL.

4. The ex parte order also contained the following provision:

> **"SEALING AND GAGGING ORDER**
>
> **4. [Ansbacher] shall be precluded from disclosing to anyone other than its legal representative that this application has been brought against it or from disclosing anything concerning this application to anyone, including [Amber Louise Murphy] until the return date. The gag mentioned herein shall apply to [Ansbacher's] legal representative.**
>
> **5. The Court file shall be and is hereby sealed and shall be kept in such a secure manner so as to ensure the existence or content of these proceedings, the existence or content of this Order, any material, documents and evidence delivered to the Court in, or in connection with these proceedings remains confidential."**

5. Murphy applied to the court to vary the ex parte order to enable her to have access to the monies in the account to pay legal fees and living expenses. That application was refused by the judge who granted the ex parte order and Murphy appealed that refusal to this Court. On the 1 October 2020, this Court allowed the appeal and varied the ex parte order to give

Murphy access to the monies to pay her legal fees and remitted the matter back to the Court to determine a reasonable amount for living expenses.

6. The Court gave a written judgment on the matter on the 1 October, 2020.

7. HPL and CSP then applied for leave to appeal this Court's decision varying the ex parte Order. That application was heard, and the application was refused. On 10 November 2020 the Court, again, delivered a written judgment.

8. The appeal by Murphy and the application by HPL and CSP for leave to appeal to the Privy Council were heard in open court and the judgments of the court were also delivered in open court.

9. In the course of the appeal and in the written judgments, references were made to the affidavit evidence filed on behalf of HPL and CSP which referred to information in the bank account of HPL at Ansbacher and to the investments plans which HPL had as to the investments of its monies.

10. It is to be noted that at no stage during the hearing of the appeal by Murphy or the application by HPL and CSP for leave to appeal to the Privy Council was there any application that the matters in the appeal court be heard in private nor that the judgments handed down be anonymized.

11. It is against that background that this application is being made.

12. The relevant statutory provisions referred to in the Notice of Motion are in the following terms:

> **"Court of Appeal Act**
>
> **10. Subject to the provisions of this Part of this Act and to the rules of court, the court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court given or made in civil proceedings, and for all purposes of and incidental to the hearing and determination of any such appeal and the amendment, execution and enforcement of any judgment or order made thereon, the court shall, subject as aforesaid, have all the powers authority and jurisdiction of the Supreme Court."**
>
> **Bank and Trust Companies Regulation Act 2020**
>
> **77. Preservation of confidentiality.**

> **(3) 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.**
>
> **(4) No person shall publish the name, address or photograph of any parties to those civil proceedings as are referred to in subsection (3) or any information likely to lead to the identification of the parties thereto either during the currency of the proceedings or after they have been terminated."**

13. HPL's and CSP's justification for the order now being sought is found in the affidavit of Darzhon Rolle. They say that the orders are necessary because:

> **"the fact that the aforesaid judgments are readily accessible on Google search engine will create problems from (sic) the Company when dealing with banks and could create a situation where banks are hesitant to maintain accounts on behalf of the Company"**. He further said that **"the HPL and CSP and Mr. Scevola will face harm if the COA Judgments are not anonymized and /or redacted"**. He also said that **"if the COA judgments are not anonymized and/or redacted this would be prejudicial to the interest of [HPL and CSP] and Mr. Scevola who are entitled to have their financial affairs remain confidential and not placed in the public domain".**

14. Murphy opposes this application and Ansbacher has adopted a neutral position on the application.

15. It is a fundamental common law principle that cases are heard in public and full, fair and accurate reports naming those involved can and should be published. It is known as the principle of "open Justice". The principle at common law was enunciated by the House of Lords in **Scott v Scott** [1913] AC 417 and referred to in **Attorney-General v Leveller Magazine** [1979] QB 31 and many other cases.

16. It has been enshrined in our constitution as one of the fundamental rights of persons before the court.

17. Article 20 provides:

> **"(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.**
>
> **(10) Nothing in paragraph (9) of this Article shall prevent the court from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court —**
>
> > **(a) may be empowered by law so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings;**
> >
> > **(b) may be empowered or required by law to do so in the interests of defence, public safety or public order; or**
> >
> > **(c) may be empowered or required to do so by rules of court and practice existing immediately before 10th July 1973 or by any law made subsequently to the extent that it makes provision substantially to the same effect as provision contained in any such rules."**

18. The principle of open justice has never been an absolute right. The Court has always retained a discretion to hear matters in private and limit the publication of its decisions. As pointed out by the Upper Tribunal of Scotland in **Adams v Secretary of State & Green** [2017] UKUT 9:

> **"...the fundamental common law principle is applied to promote and so is qualified by the promotion of public interest on which was founded and so it has always been recognized that in some limited circumstances the interest of justice would be better served by a private hearing or anonymization (with or without a reporting restriction order) and so a litigant cannot insist on a public hearing and unanonymized publication." Adams v SSWP (op cit)**

19. This discretion is also recognized in Article 20.

20. For example, the court has often exercised its discretion to hear matters in private involving the welfare of infants.

21. However, **"the anonymization of a report of a hearing in open court or of a judgment 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 **Adams v SSWO** (op cit).

22. So, the burden is on HPL and CSP to show why the court should exercise its discretion to depart from the open justice principle and grant the orders that it seeks.

23. As pointed out earlier the justification given is the protection of the financial information of HPL and CSP as contained in the bank accounts at Ansbacher.

24. In this regard HPL and CSP rely on the provisions of Section 77 of the Bank and Trust Companies Regulation Act referred to earlier.

25. In my judgment, this is misplaced. Firstly, no application was even made by HPL and/or CSP to hear the appeals or applications which gave rise to the judgments in question *in camera*. The section simply does not arise.

26. Secondly, section 77(3) confers no legal right on HPL and CSP 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.

28. The strength of the common law principle and the need for open justice is illustrated by the recent observations of the English Court in **Justyna Zeromska-Smith v United Lincolnshire Hospitals NHS Trust [2019] EWHC 552** (QB). In that case an adult plaintiff sough anonymity order to protect her identity in a personal injury claim in order to keep confidential intimate details of her personal and family life. The court said:

> **"18. In my judgment, the reasoning in JXMX v Dartford and Gravesham NHS Trust and the practice whereby anonymity orders are routinely made is peculiar to approval hearings in relation to children and protected parties, and Claimants in cases such as the present can derive no support or comfort from that decision where they are adults of full capacity who bring their claims by choice and in respect of whom any publicity which arises in the reporting of the proceedings stems from that choice rather than from the inability to settle the claim without obtaining the court's approval. In cases such as the present, even where the case involves exploration of intimate details of the Claimant's private and family life, her psychiatric condition and her relationship with her two young children, 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, for the reasons already set out in the judgment of Lord Rodger (see paragraph 13 above). In respectful agreement with the reasoning of Lord Rodger, I do not consider that, in a case such as the present, the principle of "open justice" is adequately satisfied by the name of the Defendant being published, but not the name of the Claimant."**

29. In **R v Legal Aid Board, ex parte Kaim Todner** [1998] 3 WLR 925 Lord Woolf M.R. said at 935 D:

> **"A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings."**

30. HPL and CSP, the plaintiffs in this action, have advanced no other reason for the order sought except its right of privacy as regards its customer information. They suggest that in The Bahamas this right as a matter of public policy should be enforced having regard to the confidentiality provision in the Bahamas Bank and Trust Companies Regulation Act.

31. I do not agree. 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 provisions of the statute impose a criminal sanction for its breach as well at the obligations under the law of torts. But the obligation of confidentiality is the same both at common law as well as under the statute.

32. The statute does not impose any greater obligation on a court to exercise its discretion in favour of anonymity and privacy in court proceedings that overrides the common law principle of "open justice".

33. The exercise of the courts discretion is illustrated in the decision of the English High Court in **V v T & another [2014] EWHC 3432 (Ch)**. In that case an application was made for the approval of a variation of a settlement under the English Variation of Trusts Act. All parties wanted the matter heard in private as confidential information about trust assets and the profitability of one of the trust assets was going to be disclosed. The court said:

> **[19] The general rule is that a court hearing is to be in public. That general rule applies to applications under the 1958 Act. When considering whether to depart from the general rule the court must apply the general principles as to open justice. As stated in the Practice Guidance referred to in para 14 above, open justice is a fundamental principle so that derogations from it can only be justified in exceptional circumstances when they are strictly necessary to secure the proper administration of justice. <u>There is no general exception to the principles of open justice where privacy or confidentiality is in issue.</u> The burden of establishing a derogation from the general principle lies on the person seeking it and it must be established by clear and cogent evidence. These principles are principles of the common law. They do not depend on the case coming within art 6 of the Convention. Accordingly, it is not necessary for me to rule upon Mr. Barlow's submissions that art 6 does not apply to an application under the 1958 Act. As the case was argued on one side only, I will not discuss that point further.**
>
> **[20] I suspect that in many applications under the 1958 Act the parties are reluctant to have their cases heard in open court. <u>The subject matter of an application under the 1958 Act may be regarded by the parties as a private family matter involving a discussion of the family's private financial affairs. The parties may take the view that those matters concern no-</u>**

one but themselves and that is a sufficient justification for the hearing to be in private. If that is their view, the law is clear that it is not a sufficient justification for the hearing to be in private. The 1958 Act conferred this jurisdiction upon the court. In 1958, and at all times since, the general principle has been that court hearings are in open court and that has applied to applications under this Act as to other court hearings.

[21] In the present case, the parties have suggested that there are specific reasons why the court should be persuaded to derogate from the general principle of open justice. The first reason put forward relates to the fact that the trusts directly or indirectly own the shares in a private company. It is said that there is a risk that a hearing in open court would lead to the company's customers becoming aware of the levels of profit made by the company and that would lead to those customers effectively squeezing the profit margins of the company, damaging the value of the trust assets. I have considered the evidence put forward in support of this submission and I do not regard it as particularly strong. It certainly does not come anywhere near satisfying the requirement of clear and cogent evidence justifying a derogation from the open justice principle. If the evidence in this case sufficed for that purpose, I imagine that there would be very few cases in the Companies Court which would be suitable to be heard in open court. [Emphasis Added]

[22] The parties have also submitted that a hearing in open court would lead to disclosure of the high value of the trust assets and of the identity of the beneficiaries and this would lead to a risk to the personal security of those beneficiaries. I have considered the evidence put forward in support of this submission and I regard it as very slender indeed. It does not begin to reach the standard of clear and cogent evidence which is required to justify a derogation from the open justice principle. [Emphasis Added]

[23] As explained earlier, the parties put in further evidence as to the effect of publicity on the wellbeing of the children involved in this case (including any future children). There are five existing children all of whom are under ten. The evidence

> **stressed the concern of the children's parents for their wellbeing. There was detailed evidence that the parents had striven to create as normal a life as possible for the children.**
>
> **A modest and low-key unostentatious lifestyle was a core value of the family. The parents were determined that the children should not know at too young an age of the extent of the family's wealth. It was considered that such knowledge could deter the children from taking full advantage of the educational opportunities open to them. Further, such knowledge at a young age could create a sense of entitlement which might discourage the children from making their own way in life and contributing to society. The evidence also explained in detail the concerns of the parents in relation to the children becoming a magnet for false friends and those who might seek to take advantage of the children's wealth. The evidence also commented on the way in which publicity as to the children's wealth might be disseminated, and even distorted, by social media.**
>
> **[24] In the light of this evidence, I am persuaded that the court should be prepared to take appropriate steps to protect the children from the adverse effect on their upbringing and personal development which might well result from an open court hearing generating publicity as to their potential wealth. The question then is: what are "appropriate steps"?**

The court refused to hear the application in private but directed that information about the identity of the infant beneficiaries be redacted.

34. HPL and CSP also rely on the decision of the Grand Court of Cayman Island in **Julius Baer Trust Company (Channel Islands) Limited v AB, CD and EF** [2018] 2 CILR 1 where the court directed that proceedings with respect to the administration of a trust be held in private.

35. In that case the trustee issued an ex parte summons ("the confidentiality summons") seeking variation protections in the relationship to a proposed substantive summons in which directions were to be sought concerning the administration of a Cayman trust. The trustee sought, in essence, permission to place only an anonymized version of the court documents on the public file and for all applications relating to the substantive directions application to

be heard in private. The principal grounds for seeking the confidentiality order were (a) to protect actual and contingent beneficiaries from the person safety risks of being publicly linked to substantial wealth ; (b) the settlor's grandchildren, who were all minors, had been revocably excluded as beneficiaries and no useful purpose would be served by informing them of a mere expectancy; and (c) the beneficiaries did not want the grandchildren to become aware of their family's link to substantial wealth for fear that it would adversely affect their personal development.

36. The Grand Court acceded to that application. It said:

> **"The confidentiality order was made in the present case on the trustee's ex-parte application because, because, applying the above principles to the material placed before me, I was satisfied that there was no public interest in the open justice which outweighed the countervailing interests of protecting the welfare of minor beneficiaries, protecting the private lives of the adult beneficiaries and generally protecting the trustee's ability to peaceably hold and administer the trust assets."**

37. Those considerations do not apply in this case. This is not an administration action and no trustee is seeking directions from the court as to the administration of a trust. The present case does not involve any minors. Nothing in the affidavit of Darzhon Rolle refers to any "safety risks".

38. I note parenthetically that there is no statutory provision in Cayman Islands law which corresponds to section 77(3) of the Bank and Trust Companies Regulation Act. The court there was exercising a common law jurisdiction.

39. The judgments are already in the public domain. The hearings in the Court of Appeal were public hearings and the judgments were delivered in public.

40. There is no compelling reason to now exercise our discretion to depart from the fundamental principle of open justice and anonymize the judgments or restrict their publication. The reasons advanced by HPL and CSP are found in the Rolle affidavits and referred to in paragraph 13 above. They are insufficient to depart from open justice.

41. I would refuse the application. I will hear the parties on costs and request written submissions to be filed on or before 3 March 2021.

The Honourable Sir Michael Barnett, P

42. I agree.

The Honourable Madam Justice Crane-Scott, JA

43. I also agree.

The Honourable Madam Justice Bethell, JA