



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO GC 20 OF 2021 (IKJ)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION FOR A CONFIDENTIALITY ORDER

Appearances: Mr Paul Bowen QC instructed by Mr Adam Huckle of Maples and Calder on behalf of the Applicants

Before: **The Hon. Justice Kawaley (in Chambers)**

Heard: **On the papers**

**Draft Judgment
circulated:** **22 March, 2021**

Judgment Delivered: **24 March 2021**

HEADNOTE

Application for leave to seek judicial review- application filed for protective purposes-application for confidentiality order to protect commercial confidence and prevent commercial damage due to loss of reputation pending possible settlement of underlying public law dispute.

Introduction and summary

1. By an Ex Parte Summons dated January 29, 2021 (the “Confidentiality Summons”), the Applicants seek a Confidentiality Order providing most significantly as follows:

“1. Upon the Application for Leave to Apply for Judicial Review (the ‘Leave Application’) being issued in this proceeding, the Clerk of the Court not place a copy thereof (and if that application is granted, the resulting Notice of Originating Motion) on the Register of Writs and Other Originating Processes...”



2. The Applicants advanced a compelling case for granting a Confidentiality Order as regards the Leave Application. However, the public interest in open justice if leave were to be granted appears to me to be too strong to justify deciding both ex parte and on the papers that a ‘full blown’ Confidentiality Order should apply to a substantive judicial review application, should one be heard.
3. The present application was made, in substance at least, on notice to the relevant public authority. While they have not positively objected, they have not positively consented in express terms.
4. The Applicants have also filed the Leave Application and seek to have it heard, after the present application is determined. However, they have made it clear that they are currently pursuing an alternative remedy which might make it unnecessary for the substantive application to be determined at all, should the Leave Application be granted. They foreshadow seeking a stay of the judicial review proceedings in that event. The main reason for filing the leave application at this stage is to avoid falling foul of the rules requiring judicial review applications to be made without delay (GCR Order 53 rule 5).
5. In my judgment there is no need for the Court to formally adjudicate the Leave Application, which has been timely filed, in circumstances where it is possible that no practical need for granting leave and pursuing a substantive application (if leave is granted) will arise. The principles of open justice are not materially engaged in relation to an application for leave to seek judicial review which has not yet been granted.
6. It is accordingly more straightforward to grant a Confidentiality Order in relation to the Leave Application before it is heard, particularly in circumstances where it appears on even a superficial view that a case for granting leave will be made out, because the application potentially raises questions of statutory construction of public importance. As Richard Williams J recently held in *Anglin-v-Governor of the Cayman Islands*, Cause No. G 169 of 2020, Judgment dated November 20, 2020 (unreported):

“2... The purpose of the requirement for leave... is to eliminate at an early stage any applications which are frivolous or hopeless and to ensure that the matter only proceeds to a substantive hearing if there is a case fit for consideration. I bear in mind that leave should be granted if the Court thinks, on the material available and without going into the matter in depth, that there is an arguable case for granting relief.”

7. Of the Court’s own motion, pursuant to the Preamble to the Grand Court Rules (paragraphs 4.2 (e) and (f) and 4.3), and subject to hearing counsel if required, I would grant the following relief in respect of the Confidentiality Summons and the Leave Application respectively:



- (a) a Confidentiality Order substantially in terms of the draft order submitted to the Court save that paragraph 1 would be modified to remove the underlined words in brackets below:

“1. Upon the Application for Leave to Apply for Judicial Review (the ‘Leave Application’) being issued in this proceeding, the Clerk of the Court not place a copy thereof [(and if that application is granted, the resulting Notice of Originating Motion)] on the Register of Writs and Other Originating Processes...” ; and

- (b) the Leave Application is adjourned until further Order of the Court with general liberty to apply.

The jurisdiction to seal the Court file and the open justice principle

8. Although GCR Order 63 rule 3(4) appears to confer an unfettered discretion on the Court to deny the public the usual right to inspect the Court file, the Applicants accepted that this discretion is circumscribed by the open justice principle. They referred the Court to *Project Panther-v-Comerica Bank & Trust N.A.* [2018 (2) CILR 543] where, in a broadly analogous context, Anthony Smellie CJ opined as follows:

“34 Whenever it is called upon to grant orders of this kind protective of the confidentiality of material filed in aid of proceedings, this court must conduct an assessment of the conflicting imperatives of the public rights to open justice and the receipt of information on the one side and the rights to privacy which are to be impacted by disclosure, on the other side.

35 Even while inevitably juxtaposed in that way, these are rights to which the Constitution accords equal recognition and protection.”

9. The Chief Justice critically decided in that case that:

- (a) *“s.7 (10) of the Constitution is the most reliable guide as to the basic grounds upon which the open justice principle may be limited, taking into account the allied rights to receive information under s.11 of the Constitution and of privacy under s.9, because these grounds are formulated as exceptions to the general rule that civil hearings should be heard in public. Embedded, implicitly, in s.7(10) is an acknowledgement of the fact that a judicial assessment must be made of the conflicting elements of open justice (s.11(1)) and privacy rights (s.8(1))” (citing *Julius Baer Trust Co. (C.I.) Ltd-v- AB* [2018 (2) CILR 1]);*
- (b) section 7 (10) (e) of the Constitution (“the protection of commercial confidence”) was the ground which he *“regarded as being of the obvious application here”;*
- (c) *“38. Nonetheless, it is in recognition of the public interest in open justice that the material filed in this case, suitably redacted will be available to the public in keeping with the Rules of Court.”*



10. These judicial pronouncements demonstrate that it is a far from straightforward judicial exercise to decide, as the Applicants invite the Court to do on the papers, without hearing from a public authority Respondent that all the main documents filed in relation to a judicial review application after leave has been granted should be sealed. The position is entirely different at the pre-leave stage, however.

In the Matter of an Application for Judicial Review And in the Matter of an Application for a Confidentiality Order [2019] (1) CILR 690 concerned an application to seal a file where:

- (a) an application for leave to seek judicial review was filed, as here for protective purposes, but the proceedings were effectively stayed while settlement negotiations were pursued; and
- (b) the parties made a joint application for the Court file to be sealed after a settlement was reached and before the application for leave had been adjudicated, and extensively addressed the Court on the relevant law.

11. In that case, I held:

“43. In my judgment the quoted judicial statements make it relatively clear that the open justice principle is not engaged at all in relation to an application for leave to seek judicial review which has not even been considered by the judge. The primary parallel finding was that such an application was not a fully-fledged application for a judicial determination at all and unless leave was granted, so that no public record need even be made of the filing of the application. Where no decision has even been made on the merits of the leave application, no question arises of the need to keep ‘the judge himself while trying under trial.’ The position may well be different as regards a leave application which has been considered by a judge and refused, and the position is obviously quite different where leave has been granted and a substantive proceeding has been commenced. No need arose to consider the legal position in those different scenarios in the present case.”

12. In my judgment the starting legal assumption ought to be that applications for leave to obtain judicial review are not documents which ought properly to be placed on the public file unless and until leave has been granted¹.

¹ This apparently simple legal proposition is not entirely straightforward to implement at the administrative level. It is one thing to ensure that leave applications are not entered in the public register immediately after they have been filed. It is another to ensure that, weeks or months later if leave has been granted, the relevant documents are at that stage placed on the public register.



The Court's case management powers

13. In relation to applications in Chambers by summons, the Court has a broad discretion to grant adjournments (GCR Order 32 rule 4). The Court has broader and overarching case management powers under the Preamble to the Grand Court Rules. Those powers include deciding the order in which issues are determined and generally controlling the progress of the case (Paragraph 4(2) (e), (f)). Paragraph 4(3) also provides:

“(3) Whenever a proceeding comes before the Court, whether on a summons for directions or otherwise, the Court will consider making orders on its own motion for the purpose of giving effect to the overriding objectives of the rules.”

Provisional Findings

14. Applying the above principles to the facts of the present case where the Leave Application has really been filed for protective purposes only at this stage, I find that:
- (a) a Confidentiality Order ought to be granted in relation to the Leave Application, because the open justice principle is not engaged; and
 - (b) the Leave Application should be adjourned generally with liberty to apply, while the Applicants pursue an alternative remedy and put themselves in a position to decide whether they need to actively pursue judicial proceedings at all.
15. Of course, I will hear counsel if required through further written or oral submissions in relation to any matters arising from this proposed form of relief.

[After receiving supplementary submissions]

Findings

16. The Applicant's counsel took up the invitation to make supplementary submissions when a draft of this Judgment was circulated. The Court was informed that the parties were in the process of agreeing a narrower form of confidentiality order than that which the Applicant initially sought. My attention was also very properly drawn to the fact that the Respondent had expressly contested the proposition that the alternative remedy the Applicant wished to pursue was an available one and opposed the application for the judicial review proceedings to be stayed.
17. This further strengthened the case for granting the Applicant's leave application, which in my provisional view may properly be granted on a summary ex parte basis based on the material before the Court. It seems likely that once a Confidentiality Order in respect of the substantive

judicial review proceedings is agreed, the Applicant will wish to proceed promptly with its application for leave. Accordingly:

- (a) if required, I will grant a Confidentiality Order in respect of the leave application at this stage;
- (b) I will adjourn the Applicant's leave application generally with liberty to restore to enable the parties to agree a substantive Confidentiality Order and/or to have any disputes resolved by the Court in early course; and
- (c) in due course, I will formally adjudicate the application for leave to seek judicial review on the papers when invited to do so by the Applicant's counsel.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT