IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD: 16 of 2009 (ASCJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF THE SPHINX GROUP OF COMPANIES (IN OFFICIAL LIQUIDATION) AS CONSOLIDATED BY ORDER OF THE GRAND COURT DATED 6 JUNE 2007.

BEFORE THE HON. CHIEF JUSTICE
THE 6TH AND 19 JULY 2016 AND 20TH DAY OF JANUARY 2017

APPEARANCES: Caroline Moran of Maples and Calder for the Scheme Supervisors. Cherry Bridges of Ritch and Conolly for the Liquidator (by agreement not appearing).

REASONS FOR JUDGMENT

Principle of "open justice"- applicability to sanction applications in the context of liquidation proceedings- circumstances under which confidential information filed in support of sanction applications will be sealed by the court.

1. This is the adjourned application ("**the Sanction Application**") of the Scheme Supervisors of the SPhinX Group of Companies (in official liquidation) ("**SPhinX**") by their Summons dated 2 June 2016 seeking the following orders:

   1.1 an order pursuant to clause 15.2.1(iii) of the Scheme[1] authorising the Scheme Supervisors to complete a confidential settlement agreement ("**Settlement Agreement**") with a local law firm ("**the Firm**") ; and

[1] References herein to the "Scheme" are references to the Scheme of Arrangement sanctioned by this Court on 8 November 2013 as amended by the Amendment Scheme sanctioned by the Court on 10 June 2014.

1.2 an order that the Fifth Affidavit of Kris Beighton (one of the Scheme Supervisors) sworn in support of the Summons ("**Fifth Affidavit**")[2] be sealed and kept confidential on the Court file ("**Sealing Application**").

2. The Settlement Agreement is (pursuant to clauses 2 and 5) conditional upon a sealing order being made and contains provisions requiring the parties to keep the terms of the Settlement Agreement confidential.

3. At the first hearing of the Summons on 6 July 2016, I indicated that while I was satisfied with the commercial terms of the Settlement Agreement, I was not prepared to make a sealing order at that time. I did not consider that counsel for the Scheme Supervisors had sufficiently addressed the legal principles relating to sealing orders in light of the fundamental principle that justice should be done in public.

4. The Summons was therefore adjourned to allow the Scheme Supervisors an opportunity to ask the Firm to waive the requirement for a sealing order and/or to prepare more detailed submissions concerning the principles applicable to the Sealing Application.

5. The Firm confirmed as explained to me by letter from Ms. Moran of 19th July 2016, that it will not waive the requirement for a sealing order. Accordingly, she also explained that if I am not minded to grant a sealing order, the Settlement Agreement could not proceed.

6. On behalf of the Scheme Supervisors, Ms. Moran also conveyed by her letter of 19th July 2016 her full written submissions on behalf of the Scheme Supervisors as to the applicable legal principles, requesting that I sanction the Settlement Agreement and make the sealing order. Having had the benefit of her detailed and full submissions, I

am satisfied that the sanction of the Court should be granted and that the sealing order should be made.

Open justice and limitations to the principle

7. Open justice is a fundamental principle of the common law and is enshrined in section 7 of the Constitution[3] as follows:

> *(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.*
>
> *(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including announcements of the decision of the court, shall be held in public".*

8. Sanction applications differ from typical partisan litigation (in respect of which section 7 of the Constitution will be engaged) in an important respect to be noted in this context. This is that sanction applications do not engage section 7 of the Constitution because they do not require the Court to determine rights and obligations of the parties in adversarial legal proceedings. Rather, they require the Court to consider what is in the best interests of the estate and whether the decision of the liquidators for which sanction is sought, is one which the liquidators have taken reasonably in the circumstances[4].

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[3] The Cayman Islands Constitution Order 2009 Schedule 2, Section 7

[4] See for instance: In Re DD Growth Premium Fund 2013 (2) CILR 361 where this principle is explained more fully and applied.

9. Given that the principle of open justice is however one of common law, it does not depend exclusively on section 7 of the Constitution being engaged.[5] Rather, the principle requires that in general, the public should have access to court proceedings and access to information about what occurs in such proceedings.[6]

10. This is the right to freedom of information about all aspects of the democratic process that enables members of the public to exercise the right to freedom of expression and participation in good governance. Furthermore, section 11 of the Constitution[7] enshrines the principle of open justice more generally in that all persons should be free to "*receive...information without interference*". The right to receive information would therefore apply to all Court proceedings, even those where the rights and obligations of adverse parties are not being determined. The principle of open justice would ordinarily therefore apply to all Court proceedings, including such as the present for sanction of liquidators' decisions and whether partisan or otherwise.

11. It is recognized however, that the principle of open justice is not unlimited. Rather, open justice forms part of the overriding principle that justice must be done. As such, at common law, the general rule as to publicity must yield to this overriding principle and limitations can be placed upon the access to information by the public.

12. But these limitations are not left to the individual discretion of the judge based simply on what is convenient or desirable in the circumstances. Limitations can only be placed on the principle where the interests of justice so require. The Court is therefore required to balance the general rule as to publicity, against any requirements

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[5] *V v T* [2014] EWHC 3432 in the context of the Human Rights Act 1998 as it applies Articles 6, 8 and 10 of the European Convention on Human Rights.

[6] *Hodgson v Imperial Tobacco Ltd.* [1998] W.L.R. 1056,H.L. at page 1071.

for confidentiality or privacy in the interests of justice that may arise in a particular case. In *Scott v Scott*[8] Viscount Haldane LC stated as follows:

> *"If there is any exception to the broad principle which requires the administration of justice to take place in open court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge...*
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> *....the exceptions* [to the principle of open justice] *are themselves the outcome of a yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice is done...As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration."*

13. That there can be exceptions or limitations to the principle of open justice, to ensure that justice is done, both in the context of conducting hearings in camera or in private (i.e. in Chambers) and in the context of keeping documents or information relating to those Court hearings confidential, is also expressly recognised by legislation and Court procedure in the Cayman Islands.[9] This is the case both in civil proceedings generally and in liquidation proceedings more specifically. In particular, section

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[8] [1913] AC 417 at 435 and 437-438. This statement was cited with approval by this Court in *Ahmad Hamad Algosaibi and Brothers Company v SAAD Investments Company Limited* [2011] 1 CILR 326 at para. 14 and 15.

[9] Examples include section 7(10) of the Constitution; Grand Court Rules ("**GCR**") O. 63, r.3(4); Companies Winding Up Rules (**" CWR")** O.24, r.6(1); Practice Direction No. 3/1997 and Practice Direction No. 1 of 2015. See also section 35(a) of the Freedom of Information Law which exempts from the general application of that Law, the judicial function of a Court and of a judicial officer or officer connected with a Court; in effect allowing the Constitutional and common law principles discussed in these reasons to remain applicable to the situation.

11(2) (b) of the Constitution provides, among other things, that the principle of open justice can be limited "*for the purpose of protecting the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts..*". Further, both the GCR and the CWR expressly permit for documents to be sealed on the Court file (see F.N. 8 above and further below).

14. In respect of hearings in Chambers, it is relevant to note that such hearings are not automatically to be regarded as *in camera*. Members of the public can be permitted to attend hearings in Chambers with the permission of the judge. As was stated earlier by this Court, the fact that the public does not have an automatic right to attend hearings in Chambers does not however "*automatically cloak them in secrecy*[10]." Nor is there any automatic restriction on the disclosure of what occurred in Chambers.[11]

15. Hearings in Chambers however often deal with sensitive or commercial matters and it is equally established that it may be appropriate for the Court to make orders sealing the Court file or limiting publication. This is expressly recognised in Practice Direction No. 3/1997 which provides:

> "*In view of the sensitivity of many proceedings now routinely being brought in the commercial or civil jurisdiction of the Grand Court, the parties involved in any matters taken in chambers about which information might be published but for an express prohibition, are to be at liberty to apply for an order against or delimiting publication.*"

[10] *AHAB v SAAD* above, at para. 17.

[11] Practice Direction No. 3/1997.

The Court file in liquidation proceedings

16. CWR O.24, r. 4(1) requires that a Court file shall be established in respect of each winding up proceeding in accordance with GCR O. 63, r. 2[12].

17. CWR O. 26, r. 4(1) reads as follows:

> *"The following persons shall have the right to inspect the Court file in respect of a liquidation proceeding and take copies of filed documents –*
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> *(a) the liquidator;*
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> *(b) any former liquidator or controller of the company;*
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> *(c) any person who was a director or professional service provider of the company immediately before the commencement of the liquidation;*
>
> *(d) the* [Cayman Islands Monetary] *Authority, in the case of a company which carried on a regulated business; and*
>
> *(e) any person stating himself in writing to be a creditor or contributory of the company".*

18. Pursuant to CWR O. 26 r. 4(5), if the Registrar is not satisfied as to the propriety of the application, he may refuse to allow it, in which case such person may apply ex parte to a judge who may refuse the inspection, allow it or allow it on such terms as thought fit.

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[12] Sub rule (1) of which provides that:

> "The Clerk of the Court shall create a file in respect of every proceeding immediately prior to issuing the writ, originating summons, originating motion or petition by which such proceeding is commenced. Of note here however, CWR Order 3 rule 5 lays down a special procedure for the filing of a creditor's petition for winding up a company, such that to prevent the unwarranted harm to a company's business that could result from an unjustified petition, the leave of a judge must be obtained before the petition can be put on the public Register of Writs and Actions or advertised.

19. CWR O. 26, r. 4(3) provides that any other person can inspect the Court file by special leave of the Court.

20. A person who obtains access to the Court file is ordinarily under no obligation of confidentiality to the liquidation estate and can disclose any documentation obtained more widely should he wish to do so. It is also important to note that any creditor or contributory of the estate can obtain access to documents on the Court file, here without notice to the Scheme Supervisors. It is for these reasons that the Court makes the assumption that any disclosure of documents on the Court file pursuant to CWR O. 26, r. 4 will result in the documentation being put into the public domain[13].

Jurisdiction and discretion to make sealing orders

21. CWR O.24, r. 6 expresses the Court's jurisdiction to make a sealing order where:

> *"(a) the information in question is of a confidential nature and will not come into the public domain unless and until the document containing such information is filed in Court; and*
>
> *(a) the publication or immediate publication of the information contained in the document will harm the economic interests of the creditors or contributories of the company."*

22. Accordingly, the Court has jurisdiction to make a sealing order under CWR O. 24, r. 6, where the Court is satisfied that the information in question is confidential and that sealing is necessary to protect the economic interests of the general body of stakeholders.[14] Thus, both limbs of the test must be satisfied.

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[13] *ICP Strategic Credit Income Master Fund Ltd (in liquidation)*, Grand Court unrep. 1 September 2011, at para. 8.

[14] The Court also has jurisdiction to seal documents on the Court file, as part of its inherent jurisdiction to control its own process, to the extent necessary to supplement (but not contradict) O. 24, r. 6: *HSH Cayman I GP Limited v ABN AMRO Bank NV London Branch* [2010] 1 CILR 114.

23. In *Re Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage (Overseas) Limited & Anor*[15], Justice Jones suggested that once jurisdiction was established, the Court could only exercise its discretion to make a sealing order for the purpose of protecting the economic interests of the general body of stakeholders and that the Court's power cannot be exercised for the benefit of third parties.

24. While this will be an acceptable pronouncement of principle for the typical case of corporate insolvency, in others it may be an overly narrow statement of the position. When exercising its discretion to make a sealing order the Court must have regard to the "overriding principle" that justice should be done.[16] Of course, in a liquidation context, the protection of the economic rights of stakeholders and the interests of justice will often be one and the same. Nonetheless, depending on the circumstances of the case, protection of these rights may be only one of many criteria that the Court should take into account when considering whether the interests of justice require a sealing order to be made. For example, other criteria to be considered could include those set out in section 11(2) of the Constitution.[17] Indeed, it is already established that the Court often has regard to other criteria when making sealing orders or orders for anonymization in a liquidation context.[18]

25. The nature of the Court proceedings themselves is also relevant when the Court is considering whether limitations should be placed on the principle of open justice. In

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[15] [2011] 1 CILR 121 at para. 2; see also *Re Harley International (Cayman) Limited* [2012] 1 CILR 178 at para. 2.

[16] *AHAB v SAAD Investments Company Limited* at para. 14 – 16, ibid.

[17] That which recognizes and protects the freedom of expression and the related right to freedom of information.

[18] See for example *ABC Company (SPC) v J & Company Limited,* CICA, unrep. 25 May 2012 (reported at [2012] 1 CILR 300) where the Court of Appeal anonymized its ruling and sealed the Court file because of the risk of detriment to the business of the company if a winding up petition (which had been struck out) was to become public knowledge. Also *Trident Microsystems (Far East) Ltd (in provisional liquidation)* [2012] 1 CILR 424 where the Court sealed information relating to an asset sale agreement because it contained confidential commercial information that would give the competitors of the purchaser (not the company in liquidation) an unfair competitive advantage.

ABC Ltd v Y,[19] a non-party to proceedings was seeking to obtain copies of documents from a Court file. Lewison J (as he then was) explained that different considerations apply depending on whether the documents in question have been used at a public or a private hearing and on whether civil rights and obligations have been determined by the Court. The learned judge stated as follows, in summary:

25.1 Where documents have formed part of the Court's decision-making process at a public hearing, the principle of open justice has a part to play. In those cases, if the applicant can show a legitimate interest in having access to the documents, the Court should lean in favour of allowing access to the documents in accordance with the principle of open justice (para. 42).

25.2 Where documents have not been read by the court as part of the decision making process, the Court should only permit access if there are *"strong grounds for thinking that it is necessary in the interests of justice to do so"* (para. 42).

25.3 In a case where after due consideration the court has decided that a hearing should take place in private and an applicant seeks access, the Court must consider whether there are strong grounds for thinking that it is necessary in the interests of justice that the applicant should have access to the documents he seeks in so far as they were deployed at hearings held in private (para. 43).

26. It should also be noted that as a matter of Cayman Islands law, an order for closure of the Court file can be made at the request of a party or parties to a proceeding without them needing to identify "a clear and present danger" of a move to inspect by other

[19] [2012] 1 WLR 53.

That which recognises and protects the freedom of information and the related right to freedom of information.

identifiable parties.[20] In *Sasken*, the Court of Appeal made an order sealing an affidavit under GCR 0.63, which affidavit contained confidential information relating to an arbitration. The Court of Appeal found that the contract between the parties contained a requirement of confidentiality which would have been upset if the particular documents on the Court file in question were disclosed. As such, the interests of justice "*permitted and required*" the sealing of the documents in question.

27. The Court of Appeal in *Sasken* also noted that the purpose of the rule permitting the Court file to be sealed was to ensure that if any third party wished to inspect the Court file, they would need to apply and so would be unable to do so without the enjoined parties being put on notice.

Why it is said that sealing is appropriate in this case

28. The Fifth Affidavit and exhibit KB-4 reveal the following type of information that is not in the public domain ("**Confidential Information**"):

28.1 the possible quantum of the potential claim against the Firm;

28.2 the content of the legal advice received by the Scheme Supervisors, including as to the merits of SPhinX's claims; and

28.3 the terms on which the Scheme Supervisors and the Firm have reached a settlement and a copy of that settlement agreement.

29. It is therefore said that the publication of the Confidential Information will harm the economic interests of the stakeholders (both those interested in SPhinX and the Firm themselves) for the following reasons:

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[20] *Sasken Communication Technologies Limited v Spreadtrum Communications Inc.* CICA unrep., 1 May 2015.

29.1 The settlement agreement is conditional upon the papers relating to the Sanction Application being kept confidential by way of a sealing order (clause 2.3). The Firm has confirmed that it is not prepared to waive this provision. Accordingly, if the Fifth Affidavit is available for inspection on the Court file, the estate loses the benefit of the Settlement Agreement.

29.2 This means that the estate would not receive the benefit of the sum of the settlement payment from the Firm. Nor would it receive the benefit of the Firm withdrawing their proof of debt for tens of thousands of dollars filed in the liquidation.

29.3 Furthermore, the SPhinX scheme participants will not receive the benefit of the immediate distribution of the sum of US$14,624,740 held on reserve for the purpose of litigating against the Firm (and other potential claimants whose claims have recently either been settled or otherwise resolved).

29.4 In the absence of a settlement agreement, the Scheme Supervisors will need to consider continuing to pursue the claim against the Firm. The Firm will also remain a creditor of the estate and therefore will be *prima facie* entitled to access the Court file. This could afford the Firm the ability to access the Confidential Information which contains details on litigation strategy, privileged legal advice and the merits of the claims. This would obviously be highly prejudicial to the stakeholders and damaging to SPhinX's claims in any litigation against the Firm.[21]

[21] In *Re Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage (Overseas) Limited & Anor,(above)*. at para 11 Jones J accepted that where a document contained legal analysis on the merits of the case in this manner, it would be damaging to stakeholders if it was disclosed to a wider audience including the opposing parties.

It must be acknowledged, however that on application, the Court could narrow the Firm's right of access for these reasons and on grounds of proportionality, given the small size of its claim as creditor.

30. Nonetheless, I accept that the two limbs of the test set out in CWR O. 24, r. 6 (above) are satisfied and that the Court therefore has jurisdiction to make a sealing order. I also accept that it is in the interests of justice that the Court should exercise its discretion to do so for the following reasons:

30.1 For the reasons set out above, a sealing order is necessary to protect the economic interests of the stakeholders in the SPhinX estate.

30.2 A sanction application is not a proceeding where civil rights and obligations are decided. Rather, it is a hearing where the liquidators (or in this case the Scheme Supervisors) are obliged to obtain the sanction of the Court to exercise a power. It will then be for the liquidators (the Scheme Supervisors) to decide whether to exercise that power or not. In such a case, there is not the same public interest in the subject matter of the proceedings being made public, as there would be in relation to the typical partisan action.

30.3 The nature of sanction applications is such that they should ordinarily be held in Chambers.[22]. This is, I accept, because confidential and privileged information is routinely provided to the liquidation judge. It is essential to the proper conduct of liquidation proceedings that the liquidator is able to communicate freely with the judge in this manner to assist the judge in exercising his supervisory function with full knowledge of the facts.

[22] CWR O. 11, r 3.

30.4 To assist the Court with its consideration of the Sanction Application, and in keeping with the practice that has been adopted with respect to other sanction applications for approval of settlement agreements in this liquidation, the Scheme Supervisors have set out details of the proposed Settlement Agreement between the Firm and SPhinX in the Fifth Affidavit together with an explanation of the merits of the claim and the reasons for settlement. It must be acknowledged that there had been no suggestion from the Court previously that that approach should not have been adopted or that sanction affidavits should be drafted in such a way as to avoid including confidential or privileged information.

30.5 Moreover, it must also be acknowledged that in this liquidation, the Court has previously, and appropriately, made sealing orders in respect of a number of applications seeking sanction of confidential settlement agreements[23].

30.6 As a general matter, I accept therefore, that it will often be appropriate that sanction applications in respect of settlement agreements be kept confidential. The reality is that where (as here) the details of a claim are not yet in the public domain, confidentiality is typically a motivation for prospective defendants to enter into settlement agreements. In keeping the dispute confidential, potential defendants avoid the publicity of litigation and consequently are prepared to make a settlement payment that they may not otherwise have done. In other words, the threat of publicity can sometimes

[23]For example, most recently, in respect of settlements with Beus Gilbert (the JOLs New York Lawyers who claimed for damages for breach of a contingency fee agreement), Bank of America and Credit Suisse.

mean the prospective defendant would settle (or settle for more than they otherwise would) to keep the matter quiet.

30.7 I accept that it is therefore essential that liquidators (or here, the Scheme Supervisors) are able, like any other commercial party, to compromise claims on confidential terms. A liquidator would lose that ability, if the Court were not prepared to seal papers filed in support of a sanction application that the liquidator is required by law to make.

30.8 I also accept that this could have a direct impact on the SPhinX estate which is still involved in other litigation in the United States of America. Refusing to seal sanction applications in respect of confidential settlement agreements, could result in the Scheme Supervisors being unable to broker settlement agreements in the future.

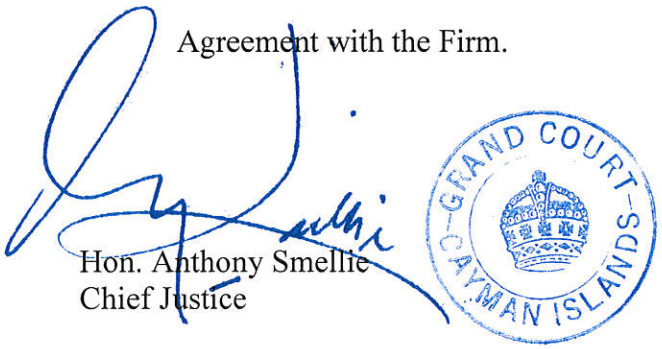
30.9 The Scheme Supervisors will of course, still be required to report to stakeholders on the outcome of the Sanction Application and the settlement with the Firm but will do so in general terms without disclosing the Confidential Information. In this way, the stakeholders will be provided with sufficient information about the actions taken by the Scheme Supervisors in respect of the assets of the estate.

30.10 In keeping with the case law considered above, I also recognize that stakeholders and third parties can still apply to inspect the sealed documents under the CWR. The effect of the sealing order means that the Scheme Supervisors will be put on notice of the application and can seek to put in

place a non-disclosure agreement with such stakeholders, if necessary and appropriate.

Conclusion

For the reasons set out above and as set out in the written submissions on behalf of the Scheme Supervisors, I granted the application for the sealing of the fifth affidavit of Kris Beighton on the Court file as an essential corollary to the Order which I also granted, authorising the Scheme Supervisors to complete the confidential Settlement Agreement with the Firm.



Hon. Anthony Smellie
Chief Justice

January 30 2017