In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 58

BETWEEN:-

BERMUDA CASINO GAMING COMMISSION

Plaintiff

-v-

RICHARD SCHUETZ

Defendant

REASONS FOR DECISION

(in Chambers)

Open justice – principals governing private Chambers hearings

Date of Decision: March 7, 2018

Date of Reasons: March 12, 2018

Mr Richard Horseman, Wakefield Quin Limited, for the Plaintiff

Mr. Timothy Z. Marshall and Mr Jonathan White, Marshall Diel & Myers Limited, for Bermuda Press (Holdings) Ltd

Mr Jordan Knight, MJM Limited, an Interested Party

Introductory

1. The Plaintiff applied by Ex Parte Summons dated March 6, 2018 for, *inter alia*, an interim injunction restraining the Defendant from breaching covenants in his contract of employment obliging him (a) to keep certain information confidential, and (b) not

to disparage the Plaintiff or public and private entities with which the Commission works.

2. The matter was listed for hearing, an administrative decision being made on my part that there was no reason why the title of the action should not appear in the Court List. On the face of the Summons, it was not obvious that the relief being sought would be defeated if the fact of an application being made came to the Defendant's attention; this was not an application seeking to prevent the dissipation or removal of assets, for instance.

3. Mr Marshall appeared for Bermuda Press (Holdings) Ltd. and sought permission to be present at the hearing of the application on the grounds that the proceedings clearly concerned matters of public interest. Mr Knight, brandishing a copy of the Specially Endorsed Writ he had obtained as a member of the public from the open Court file, supported this application.

4. The Plaintiff's position was that the efficacy of the injunctive relief it sought would be defeated if the Defendant became aware of the application before the injunction was granted. Justice accordingly required one very obvious course. The Plaintiff had to be afforded an opportunity to privately persuade the Court that a private hearing was appropriate, after which the Court would either decide to hear the application in an open or closed hearing, as the case may be.

5. Having made this decision Mr Marshall requested me, in the interests of open justice to give reasons for it. These are those reasons.

6. I should add that Mr Horseman also persuaded me that it was appropriate to hear the substance of his application for an interim injunction in private. After hearing the application, I granted the injunction sought.

Section 6 (9)-(10) of the Bermuda Constitution and the right to a public hearing

7. Fundamental rights and freedoms under the Bermuda Constitution are not framed in absolute terms. They are subject to qualifications. The principle of open justice is no exception to this general rule. The broad principle is found in section 6(9) which states:

> "*(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.*"

8. The qualification to the general rule that hearings for most civil cases should take place in public is found in section 6(10) which states:

> "*(10) Nothing in subsection (9) of this section 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; or*
> >
> > *(b) may be empowered or required by law to do so in the interests of defence, public safety or public order.*" [Emphasis added]

9. Section 6(10) imposes the following constraints on the Court if it wishes to dilute the umbrella principle of open justice:

    (1) the Court must be empowered by law to conduct a hearing in private;

    (2) a private hearing must be "*necessary or expedient*";

    (3) the justification for the private hearing must fall within one of the limited categories specified in section 6(10). The most relevant categories for present purposes were:

        (a) prejudice to the interests of justice; and

        (b) interlocutory proceedings.

10. The modern practice of this Court is not to treat the fact that an application is interlocutory in nature (that is to say, an application before the final hearing or trial) as sufficient, without more, to justify excluding the public.

11. So the only potential gateway through which the Plaintiff could pass to secure a private hearing in the present case was prejudice to "*the interests of justice*".

12. It bears recalling that that section 6(10) of the Bermuda Constitution is substantially similar to the following provisions of article 6 of the European Convention on Human Rights:

"*(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*" [Emphasis added]

Was the Court empowered by law to exclude non-parties from the hearing?

13. I found that the Court was "*empowered by law*" to exclude non-parties or the public from the hearing of the preliminary issue of whether or not the substantive application should be heard in private. The legal power derived from section 6(1) itself. It was obvious that the interests of justice would be prejudiced if the Plaintiff was deprived of the opportunity to justify a private hearing without extinguishing the right to a private hearing altogether. The justification for the application was that the object of the injunction being sought would be defeated if the nature of the relief being sought entered the public domain and reached the Defendant before the relief had been granted. A primary function of the courts is to grant effective remedies for valid legal claims. The fundamental right to a fair hearing (section 6(8) of the Bermuda Constitution) includes the right to an effective remedy. A well-recognised legal justification for conducting ex parte injunction applications in private without notice is where "*the very fact of giving notice may precipitate the action which the application is designed to prevent*": *Supreme Court Practice 1999*, paragraph 29/1A/21.

Would a public hearing prejudice the interests of justice?

14. The Plaintiff sought an ex parte injunction to enforce the Defendant's contractual obligations:

    - not disclose confidential information during or after the termination of the contract;

    - not to make disparaging or derogatory remarks about the Plaintiff and connected entities, including an express acknowledgment that breach of this obligation would entitle the Plaintiff to injunctive relief and damages.

15. The Plaintiff adduced what was on its face credible and cogent evidence that the Defendant had in recent months flagrantly breached these contractual obligations and had embarked upon a concerted campaign to undermine the Plaintiff's operations. In part because of this evidence, it was not obvious to me what further contractual breaches might be triggered by giving the Defendant notice of the injunction application. However, Mr Horseman eventually persuaded me that a sufficient risk of damage to the Plaintiff flowing from further disclosures and/or disparaging remarks was made out to justify proceeding with the merits of the application in private.

Freedom of the press, open justice and private hearings

16. The decision to exclude the Press from the interlocutory injunction application in the present case fell well within the parameters of this Court's routine practice for similar cases and, undoubtedly, was consistent with the way similar applications would have been dealt with in most of the common law world. There is an innate tension between the open justice principle and private hearings, a tension which only manifests itself when there happens to be public interest in a particular matter.

17. While it is understandable for the Press to wish to expand the limits of freedom of expression as far as possible, the Court's task is to do its best to decide what the outer limits of that freedom should be. Freedom of expression is articulated in broad terms as a fundamental right in section 9(1) of the Constitution. But this broad right is in turn subject to express constitutional limitations. Section 9(2) crucially provides:

> "*(2)Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision*—
>
> *(a) that is reasonably required*—
>
> *(i) in the interests of defence, public safety, public order, public morality or public health; or*
>
> (ii) *for the purpose of protecting the rights, reputations and freedom 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, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or*

(b) that imposes restrictions upon public officers or teachers,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society." [Emphasis added]

18. Excluding the Press from the ex parte hearing was in my judgment justifiable on the facts of this particular case. The private hearing was reasonably required both to support a claim designed to protect confidential information and to protect the authority of the Court.

19. Whether the right balance has been struck will not always be a straightforward question and this is *par excellence* the difficult sort of issue upon which reasonable judges and reasonable journalists are likely to differ. In *Terry-v-Person Unknown* [2010] EWHC 119, Tugendhat J stated:

"*[108] There is of course an obvious difficulty in at the same time complying with the principle of open justice and giving an effective remedy for threatened misuse of private information. But as was stated in Re S, there is no presumptive priority between ECHR rights. That applies as much to tensions between Art 6 and Art 8 as it does to tensions between Art 8 and Art 10. Art 8 does not have a presumptive priority over Art 6 and open justice. Each derogation from Art 6 and open justice must be justified on the particular facts of the case, in accordance with the intense scrutiny required. And it is not just open justice that is in issue: it is the right of a person affected by a court order, in particular a respondent, to be heard before the order is made. ...*

[109] Secrecy may be essential in the case of a respondent who, if tipped off, is likely to defeat the purposes of an application by publishing the material before he can be shown to have had notice of the injunction, or before it can be granted. It is less easy to show the need for such secrecy where the person targeted by the application is a national newspaper...."

20. In the present case I was mindful of the fact that, having regard to the fact that the Defendant was said to be resident abroad, the most direct impact of the injunction might be on the local media once it was brought to their attention. However, I was ultimately satisfied that it was appropriate to view the application as in substance targeting the Defendant, and to privilege the Plaintiff's contractual and litigation rights over freedom of the press.

Conclusion

21. For the above reasons, on March 7, 2018 I refused the application by Bermuda Press (Holdings) Ltd for the Plaintiff's ex parte application for interim injunctive relief to be conducted as an open hearing.

Dated this 12th day of March 2018 _____
IAN RC KAWALEY CJ