# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**
**2015: No. 291**

**BETWEEN:-**

**ACE BERMUDA INSURANCE LTD**

**Plaintiff**

**-v-**

**FORD MOTOR COMPANY**

**Defendant**

## RULING

Date of hearing: 9th December 2015
Date of ruling: 6th January 2016

Mr Alexander Potts, Sedgwick Chudleigh Ltd, for the Plaintiff
Mr Nathaniel Turner, ASW Law Limited, for the Defendant

### Relief sought

1. By summons dated 21st September 2015 the Plaintiff seeks an order that:

(1) the originating summons in these proceedings and a summons issued by the Defendant on 25th August 2015 be conducted in camera and the Court file sealed; and

(2) any judgment or ruling be published in anonymised form on grounds of confidentiality.

**Background**

2. The Plaintiff is an exempted insurance company incorporated in Bermuda. The Defendant is a motor vehicle manufacturer headquartered in the United States.

3. By an originating summons dated 14th July 2015 the Plaintiff seeks:

(1) a permanent injunction restraining the Defendant from litigating against the Plaintiff in the United States in relation to an insurance policy which the Plaintiff issued to the Defendant. It is alleged that such litigation would breach a valid and binding Bermuda arbitration agreement between the parties which is contained in the policy ("an anti-suit injunction"); and

(2) a permanent injunction restraining the Defendant from seeking injunctive relief restraining the Plaintiff from pursuing or enforcing the said Bermuda arbitration agreement ("an anti-anti-suit injunction").

4. By two ex parte summonses dated 10th July 2015 the Plaintiff sought:

(1) leave to issue and serve on the Defendant the originating summons out of the jurisdiction ; and

(2) interim anti-suit and anti-anti-suit injunctions.

5. On 13th July 2015 the Court granted the Plaintiff the ex parte relief sought.

6. On 7th August 2015, with leave of the Court, the Defendant entered a conditional appearance. On 25th August 2015 the Defendant issued a

summons for an order that the originating summons and ex parte injunctions be set aside on the ground that they had not been duly served.

**Confidential material**

7. The Plaintiff alleges that material filed by the Defendant includes confidential details of a previous arbitration including the settlement agreement. The paragraphs to which I was referred dealing with this point in the affidavits filed by both parties are identified in a confidential appendix to this ruling ("the Confidential Appendix"). The Plaintiff has also drawn my attention to a confidentiality agreement relating to that arbitration, signed by both parties, which provided:

> "*ACE and Ford agree that all awards and rulings issued or made in the Arbitration are and shall remain strictly confidential, and shall instruct their advisers to maintain such confidentiality.*"

8. The Plaintiff further alleges that the correspondence which it has exhibited in support of its *ex parte* application for injunctive relief included details of the current dispute between the parties which, they both appear to agree, should be arbitrated. The exchange of correspondence mentioned in the Confidential Appendix is of particular relevance to the Plaintiff's concerns.

9. For ease of reference I shall refer to the aforesaid material for which the Plaintiff claims confidentiality as "*the confidential material*".

10. The Defendant, in its affidavit evidence, asserted that the Plaintiff, by exhibiting a particular letter from the above-mentioned exchange of correspondence to an affidavit filed in support of its *ex parte* application, has waived any right to claim that either the previous arbitration or the parties' current dispute are confidential.

**Discussion**

11. This application involves a clash of the competing principles that on the one hand courts generally sit in public and give public judgments – what is often

referred to as "open justice" – and that on the other arbitration proceedings are generally private and confidential. The present proceedings are not of course an arbitration, but they involve reference to a previous arbitration and to an ongoing dispute which the parties have agreed to arbitrate.

***Open justice***

12. Under the Constitution of Bermuda the presumption is that all civil proceedings in court, including the announcement of the court's decision, shall be held in public. However in certain circumstances the court can exclude persons other than the parties and their legal representatives. Such hearings are described as being held "*in camera*".

13. Section 6 of the Constitution, which is headed "*Provisions to secure protection of law*", provides in material part:

> "*(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 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 …*"

14. As to the announcement of the decision of the court, the principle of open justice entails that nothing should be done to discourage the publication to a wider public of fair and accurate reports of proceedings that have taken place in court. See Attorney General v Leveller Magazine Ltd [1979] AC 440 HL *per* Lord Diplock at 450 B. The court has, incidentally, no common law power to order that the publication of a report of proceedings conducted in open court be postponed. See Independent Publishing Co Ltd v AG of

Trinidad and Tobago [2005] 1 AC 190 *per* Lord Brown, giving the judgment of the Board, at paras 20 and 67.

15. Thus a Practice Direction on Publication of Judgments and Rulings given in Chambers dated 15th May 2006 (Circular No 7 of 2006), issued by Ground CJ, stated in material part:

"*2. Subject to the following provisions of this practice direction, copies of Judgments and Rulings given in Chambers may go in the books of considered Judgments maintained in the Supreme Court, and accurate texts of such Judgments and rulings may be published, notwithstanding that the matter was held in Chambers.*

*3. The court may, in particular cases, prohibit the publication of such a report, or order it to be edited, when it considers it necessary and expedient to do so in the interests of:*

*(i) justice;*

. . . . .

*(iii) commercial confidentiality;*

. . . . .

*4. Save in the circumstances referred to in paragraph 5 [which relate to various types of proceedings involving young or vulnerable persons], an order under paragraph 3 will normally require a specific application in that regard by the party concerned. For the limited power of the Court to make such orders, see Hodgson v Imperial Tobacco [1998] 1 WLR 1056 CA, per Lord Woolf.*"

16. The rationale for the principle of open justice was explained by Sir Jack Jacob in his Hamlyn Lecture, The Fabric of English Civil Justice, in a passage which was cited with approval by Lord Woolf MR, giving the judgment of the Court in Hodgson v Imperial Tobacco Ltd [1998] 1 WLR 1056 EWCA at 1069 G – H (as to the Court's approval, see 1071 G):

"*The need for public justice, which has now been statutorily recognised, is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of 'judging the judges:' by sitting in public, the judges are themselves accountable and on trial. This was powerfully expressed in the great aphorism that, 'It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.' The opposite of public justice is of course the administration of justice*

*in private and in secret, behind closed doors, hidden from the view of the public and the press and sheltered from public accountability.*"

17. The importance of the principle is such that any departure from it must be to the extent and no more than the extent than the court reasonably believes to be necessary in order to serve the ends of justice. See Attorney General v Leveller Magazine Ltd *per* Lord Diplock at 450 C – D.

18. As noted above, under section 10(2) of the Constitution one circumstance in which the court is permitted to exclude persons other than the parties and their legal representatives from a hearing is where that hearing is interlocutory. In Bermuda, interlocutory hearings often take place in Chambers. As Jacob J noted in Forbes v Smith [1998] 1 All ER 973 Ch D at 974: "*Courts sit in chambers or in open court generally as a matter of administrative convenience.*" However at common law a decision to sit in chambers carries an important consequence. For as Jacob J stated in the preceding sentence: "*A chambers hearing is in private, in the sense that members of the public are not given admission as of right to the courtroom*".

19. Lord Woolf MR expanded on the point in Hodgson v Imperial Tobacco Ltd at 1070 G:

"*Proceedings in chambers however are always correctly described as being conducted in private. The word "chambers" is used because of its association with the judge's room so as to distinguish a hearing in chambers from a hearing in open court. While the public in general are normally free to come into and go from a court (as long as there is capacity for them to do so) during court hearings the same is not true of chambers hearings. Other than the parties and their representatives the public need the permission of the judge to attend.*"

20. However the situation is different in Bermuda in that under sections 6(9) and (10) of the Constitution a hearing, including an interlocutory hearing, must be held in public unless the court decides otherwise. Such a decision must in my judgment be a judicial determination and not, as is usually the case when hearings are allocated to chambers or open court, an administrative one by the Registry.

21. There are, though, certain types of chambers hearings from which by convention the press and public are habitually excluded. Eg family proceedings for ancillary relief or the custody, care and control of children. In such cases, the court will be deemed to have decided that the hearing should take place in camera unless it expressly provides otherwise.

22. The distinction between the position under the Constitution and the position at common law is, however, more theoretical than practical. I adopt *mutatis mutandis* the approach to chambers hearings set out by Lord Woolf in Hodgson v Imperial Tobacco Ltd at 1071 C – F:

> "*However it remains a principle of the greatest importance that, unless there are compelling reasons for doing otherwise, which will not exist in the generality of cases, there should be public access to hearings in chambers and information available as to what occurred at such hearings. The fact that [in England and Wales, but not in Bermuda] the public do not have the same right to attend hearings in chambers as those in open court and there can be in addition practical difficulties in arranging physical access does not mean that such access as is practical should not be granted. Depending on the nature of the request reasonable arrangements will normally be able to be made by a judge (of course we use this term to include masters) to ensure that the fact that the hearing takes place in chambers does not materially interfere with the right of the public, including the media, to know and observe what happens in chambers. Sometimes the solution may be to allow one representative of the press to attend. Another solution may be to give judgment in open court so that the judge is not only able to announce the order which he is making, but is also able to give an account of the proceedings in chambers. The decision as to what to do in any particular situation to provide information for the public will be for the discretion of the judge conducting the hearing.*"

23. The passage indicates that access to information about what happens in court – whether in open court or in Chambers – is a more fundamental aspect of open justice than being present at the hearing at which it happens, and that sometimes the principle of open justice can be satisfied if the former but not the latter aspect of the principle is given effect. As stated by Sir Andrew Morritt V-C in Economic Dept of City of Moscow v Bankers Trust Co [2005] QB 207 EWCA ("the Bankers Trust Co case"):

> "*That there is a distinction between the hearing and the judgment is recognised by the terms of article 6 of the Convention for the Protection of Human Rights and Fundamental*

*Freedoms … The apparently absolute requirement to pronounce the judgment publicly has been recognised by the European Court of Human Rights to be subject to some qualification to be assessed in the light of the special features of the proceedings in question. B v United Kingdom (2001) 34 EHHR 529 . But, as Judge Bratza recognised, at p 545, para O-17, stricter standards have to be imposed in relation to the public pronouncement of the judgment than to the public hearing of the underlying proceedings: see also In re Trusts of X Charity [2003] 1 WLR 2751 , 2755, para 11.*"

24. Article 6 of the European Convention on Human Rights ("the Convention") is analogous (but not identical) to Section 6 of the Constitution. While the Convention does not form part of the domestic law of Bermuda it has been extended to this jurisdiction and carries persuasive authority. See British Overseas Territories Law, Ian Hendry and Susan Dickson, Hart Publishing, 2011, at page 173. Thus Sir Andrew Morritt's observations are as applicable to Bermuda as they are to England and Wales.

***Confidentiality of arbitration proceedings***

25. Arbitration proceedings in Bermuda are both private and confidential. In the Bankers Trust Co case, Mance LJ (as he then was), who gave the leading judgment, stated at para 2:

"*Among features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality. The Act's silence does not detract from this.*"

26. The Act to which he referred was an English statute: the Arbitration Act 1996 ("the 1996 Act"). The Arbitration Act 1986, the Bermudian statute which governs the instant arbitration, is also silent as to the privacy and confidentiality of arbitration proceedings, but in Bermuda, as in England, they are assumed to be private and confidential.

27. As to privacy, see AEGIS Ltd v European Re [2003] 1 WLR 1041 PC, in which Lord Hobhouse, giving the judgment of the Board on an appeal from Bermuda, accepted at para 6:

"*the general principle of privacy in arbitration proceedings: Dolling-Baker v Merrett [1990] 1 WLR 1205, analogous to the duty of secrecy as between banker and customer*".

28. Dolling-Baker v Merrett concerned a successful appeal by the first defendant to obtain an injunction prohibiting the second defendant from disclosing on discovery to the plaintiff documents relating to an arbitration to which both defendants but not the plaintiff had been party. Lord Hobhouse was referring to a passage from Parker LJ, who gave the judgment of the Court, at 1213 D – G:

> "*We were invited, therefore, to consider whether this was a case where there ought to be production. It is not contended on behalf of the first defendant that the fact that the documents were prepared for or used in an arbitration, or consist of transcripts or notes of evidence given, or the award, confers immunity. It could not, in my judgment, successfully be so contended. Nor is it contended that the documents constitute confidential documents in the sense that 'confidentiality' and 'confidential' documents have been used in the court. What is relied upon is, in effect, the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained. As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.*"

29. It is in this sense that arbitration proceedings are confidential.

30. That passage was cited at 326 B – C by Potter LJ in Ali Shipping Corpn v Shipyard Trogir [1999] 1 WLR 314 EWCA. At 326 C – D he analysed the juridical basis for the implied obligation of non-disclosure thus:

> "*I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality, whatever its precise limits, arises as an essential corollary of the privacy of arbitration proceedings, the court is propounding a term which arises 'as the nature of the contract itself implicitly requires:' see* per *Lord Wilberforce in Liverpool City Council v. Irwin [1977] A.C. 239, 254F and Lister v. Romford Ice and Cold Storage Co.*

*Ltd. [1957] A.C. 555, 576–577, per Viscount Simonds. … While acknowledging that the boundaries of the obligation of confidence which thereby arise have yet to be delineated (cf. Hyundai Engineering & Construction Co. Ltd. v. Active Building & Civil Construction Co. Ltd. (unreported), 9 March 1994, per Phillips J.), the manner in which that may best be achieved is by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in the light of the particular circumstances and presumed intentions of the parties at the time of their original agreement.*"

31. Potter LJ's analysis was adopted by the Court of Appeal in AEGIS Ltd v European Re. (See ABC Insurance Company v XYZ Insurance Company [2006] Bda LR 8 *per* Bell J (as he then was) at para 20.) However it was expressly not adopted by the Privy Council. Lord Hobhouse stated at 1059 D – E:

"*However Potter LJ, who delivered the leading judgment, having followed Dolling-Baker v Merrett [1990] 1 WLR 1205 affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term and then to formulate exceptions to which it would be subject:* [*1999] 1 WLR 314, 326–327. Their Lordships have reservations about the desirability or merit of adopting this approach.*"

32. Thus Lord Hobhouse did not question the existence of an implied obligation of non-disclosure (or confidentiality) as identified by Parker LJ. As stated by Bell J in ABC Insurance Company v XYZ Insurance Company at para 20:

"*… all that was called into question in Lord Hobhouse's judgment was the juridical basis for the existence of the duty of confidentiality.*"

33. Arbitration proceedings sometimes give rise to disputes which come before the courts. Those disputes are not themselves arbitration proceedings. How then are the courts to balance the privacy and confidentiality of the underlying arbitration proceedings with the principle of open justice?

34. This question arose in concrete terms in the Bankers Trust Co case. Two parties to an arbitration hearing brought proceedings in the High Court challenging an arbitral award on grounds of serious irregularity. Both the arbitration and the hearing before the High Court took place in private. The High Court determined that neither the judgment nor the summary of it

prepared by Lawtel, a publisher of electronic reports (which had received a copy of the judgment and had published it in good faith on its website) should be available for publication. On appeal by one of the parties to the arbitration, the Court of Appeal held that, although the judgment should not be published, the appellant should be permitted to publish the summary as it did not disclose any sensitive or confidential information.

35. The proceedings in the Bankers Trust Co case were governed by rule 62.10 of the Civil Procedure Rules ("CPR"). Rule 62.10(1) provided that the court might order that an arbitration claim, ie any application to the court under the 1996 Act, could be heard either in public or in private. Rule 62.10(3) and (4) made provision as to whether an arbitration claim should be heard in public or in private in the absence of any such order. Mance LJ referred to these provisions as "*starting points*". Order 73 of the Rules of the Supreme Court 1985 ("RSC") in Bermuda does not contain an equivalent provision to CPR rule 62.10(1), although RSC Order 73 rules 2 and 3 state which applications under the Arbitration Act 1986 ("the 1986 Act") should be in court and which in chambers.

36. Section 45 of the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act") provides that, subject to the Constitution, proceedings in any court under that Act shall on the application of any party to the proceedings be heard otherwise than in open court. But, should it proceed to arbitration, the current dispute between the parties, like the previous arbitration between them mentioned above, would be governed by the 1986 Act, which does not contain any such provision. Besides, the application currently before the Court is not covered by either Act as neither party has notified the other of its desire to arbitrate the matter in dispute.

37. The Bankers Trust Co case had different facts to the present case and was decided by reference to a different statute and rules of court. It nonetheless provides some helpful guidance by analogy. As Mance LJ stated at para 34, the fact that the parties have agreed to arbitrate a dispute confidentially and privately cannot dictate the position in respect of claims relating to that

agreement which are brought to court. However it is a fact to which the court can attach some weight:

> "*The courts … are acting as a branch of the state, not as a mere extension of the consensual arbitral process. Nevertheless, they are acting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution, and … can take into account the parties' expectations regarding privacy and confidentiality when agreeing to arbitrate.*"

38. Mance LJ stated at paras 40 and 41 that the court must perform a balancing exercise, weighing the factors militating in favour of publicity against the desirability of preserving the confidentiality of the subject matter of the arbitration agreement. There is a spectrum, and some materials relating to an arbitration will have a stronger claim to confidentiality than others. Eg, as the learned judge stated at para 43, the reasoned judgment following the court hearing stands at a different point on the spectrum to the hearing itself, which, one might add, is in turn at a different point to details of the underlying dispute. In conducting this exercise the court must consider primarily the interests of the parties in the litigation before him or in other pending or imminent proceedings.

39. In the present case the Defendant has claimed that by reason of exhibiting and referring to a particular letter at a hearing which was not closed to the public the Plaintiff has lost the right to assert confidentiality with respect to the confidential material. This submission is flawed for a number of reasons.

40. The application, which was made *ex parte* without notice, was not open to the public. It was one of those types of chambers hearing which is habitually held in camera. The purpose of bringing an application *ex parte* without notice is to avoid alerting the adverse party. There is obviously a real risk that such purpose would be defeated if the application were open to the public. Moreover, it was necessary to place the letter in question before the Court in order to establish the existence of the risk which gave rise to the application for injunctive relief. It would be unconscionable if the Defendant could rely upon what was prima facie a threatened breach of the

arbitration agreement to absolve it from its contractual obligations of privacy and confidentiality. In any case, the Plaintiff did not refer the Court to any passages in the letter dealing with details of the present dispute or of any previous arbitration. Even if the Plaintiff had done, the reading out in court at a hearing to which (unlike the *ex parte* hearing in the present case) the public were notionally admitted would not destroy any confidentiality which might accrue to a document. The majority of the House of Lords rejected a submission to the contrary in Home Office v Harman [1983] AC 280. See, eg, the speech of Lord Keith at 308 E – F.

41. I am therefore satisfied that the confidential material remains confidential.

**Conclusion**

42. In the present case, the outcome of the balancing exercise is straightforward. There is only a small amount of confidential material before the Court and its relevance is largely contextual. I direct that the part of the hearing of the originating summons and the Defendant's summons of 25th August 2015 ("the substantive hearing") in which the confidential material is addressed should be held in camera but that the rest of the hearing should be held in open court. I am satisfied that these two parts of the hearing can be readily separated. The Plaintiff submits that it would be more convenient to hold the entire hearing in camera, but mere convenience cannot justify a departure from the principle of open justice.

43. I am not satisfied that it is necessary to order that the court file be sealed in order to preserve the confidentiality of the confidential material, given that the file will not be made available to members of the public. The recent Practice Direction on Access to Court Records in Civil Cases (Circular No 23 of 2015) does not apply to cases filed prior to 1st December 2015 and is therefore inapplicable to the present case. Even if it were applicable, it would not permit the public to obtain copies of affidavit evidence, which is where the confidential material is located. I should, however, be open to an

application that, from an abundance of caution, the documents mentioned in the Confidential Appendix should be sealed.

44. The judgment for the substantive hearing can be redacted for publication to exclude any details of confidential material. This exercise is a familiar one to courts in Bermuda dealing with confidential material and I do not anticipate that it will prove controversial. As is customary, the parties will have the opportunity to address the Court as to proposed redactions before the ruling is published. I do not presently see the need to anonymise the judgment but shall defer a final decision on that point until after the judgment has been written.

45. I shall hear the parties as to costs.

Dated this 6th day of January 2016

Hellman J