Alert

There is a Right to Privacy – Even in the Offshore World

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The Supreme Court of Bermuda (Kawaley CJ) handed down a decision revisiting the existing practice of hearing applications to restructure Bermuda law trusts in private when appropriate.

In the Matter of the G Trusts [2017] SC (Bda) (15 November 2017) discussed and determined three substantive trust law issues (which are each addressed in separate 'Conyers Alerts'), but the Court also engaged with recent media critiques of offshore 'secrecy' after the publication of stolen material.

In a robust defence of the fundamental right to privacy, the Court upheld the right of applicants to restructure trusts in camera where the circumstances justified confidentiality for private matters:

"The present proceedings concern the internal administration of a private trust into which the general public have no right to pry. Persons administering, interested in or settling Bermuda trusts should rest assured that this Court's firmly established practise of making confidentiality orders in appropriate cases, which is merely designed to enable law-abiding citizens to peaceably enjoy their actual and contingent property rights, has a venerable legal basis. The existing practice will continue to be applied in appropriate cases such as the present."

By confirming the *"existing practice"* in Bermuda – which allows for trust applications to be heard in private in appropriate circumstances – the Chief Justice reinforced the reasoning in the earlier decision of *Re BCD Trust* (Confidentiality Order) [2015] Bda LR 108 ("Re BCD Trust"). In *Re BCD Trust*, the Applicant (represented by Conyers) obtained an order that the application to restructure the trust be dealt with in private. In that case, the Court held:

"[T]he history of what is essentially Chambers hearings is that they were traditionally private hearings. The notion of a more open approach to Chambers hearings has developed in the public interest within a constitutional framework which specifically blesses the idea of the Court departing from the public hearing principle in the interest of privacy and other countervailing public interests. …it is inherently consistent with the public interest and the administration of justice generally that applications such as these be anonymised and dealt with as private applications, where there is no obvious public interest in knowing about an internal trust administration matter."

Re BCD Trust also recognised the constitutional underpinning allowing for privacy when appropriate, namely the interaction of Sections 6(9) and 6(10) of the *Bermuda Constitution Order, 1968*. The Court in *G Trusts* then traced the inspiration for the Bermuda Sections to Article 6 of the European Convention on Human Rights. The Chief Justice then acknowledged that the current climate justified revisiting the existing practice to test again the solidity of its foundation:

"In the course of the hearing I did very much have in mind whether the popular onshore attacks on offshore 'secrecy' undermined in any way the validity of this Court's previous practice in this regard. Writing the present judgment over the Remembrance Day weekend seems an appropriate occasion to revisit this issue."

The Court's remembrance followed:

"Bermuda's offshore sector began in the mid-1930's and the concept of offshore companies and offshore trusts were commercially driven, at least in part, by anxieties on the part of far-sighted members of the European moneyed classes about a looming war and the risk of confiscation of their assets (or worse) by populist governments envious of their wealth in recessionary times. The confiscation of assets and worse did in fact occur, and Bermuda fought on the victorious side which introduced the notion of fundamental human rights designed to ensure that untrammeled democracy would not trample on personal and property rights again."

Having (re)established Bermuda's existing practice upon the cornerstone of the right to privacy, the Court then illustrated when privacy orders might be appropriate, citing, *inter alia*, how unnecessary publicity of private wealth may subject trust beneficiaries to unjustified public attention, including in the case of beneficiaries who are minors, where the disclosure of wealth may impair their ability to enjoy a healthy and normal childhood.

The Chief Justice also offered this practical observation for those who have yet to appreciate that 'secrecy' exists because citizens have a right to 'privacy' in their financial affairs: *"The ordinary citizen who consults his solicitor about revising his will is not required to disclose the content of his will and his discussions with his solicitor to the general public".* So too of trusts, even when the trust is governed by the law of an offshore jurisdiction. Privacy has a venerable legal basis.

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