

BERMUDA SUPREME COURT

BERMUDA CASINO GAMING -v- R SCHUETZ ***[2018] SC (Bda) 24 Civ (12 March 2018)***

REASONS FOR DECISION – OPEN JUSTICE – PRINCIPLES GOVERNING PRIVATE CHAMBER HEARINGS

The Supreme Court of Bermuda (Kawaley CJ) handed down Reasons for Decision to hold a private hearing in the matter of *Bermuda Casino Gaming Commission -v- Richard Schuetz*, which discusses the principles governing private Chambers hearings.

The Chief Justice had barred the media and the public from a hearing on the matter on 7 March, being the hearing of the application to have the substantive injunction application held in private, despite a request for the proceedings to be held openly. However, the Chief Justice found there was no reason why the title of the action should not appear in the Court List for 7 March.

Background

The plaintiff, Bermuda Casino Gaming Commission, applied by an *ex parte* summons for an interim injunction restraining Richard Schuetz, the Commission's former executive director, from breaching covenants in his contract of employment obliging him to keep certain information confidential and not to disparage the plaintiff or public and private entities with which the Commission works.

The matter was listed for hearing and Bermuda Press (Holdings) Ltd. sought permission to be present at the hearing on the grounds that it was a civil proceeding which concerned matters of public interest.

The Chief Justice decided to allow a private hearing of the preliminary issue of whether or not the substantive application should be heard in private. The plaintiff successfully argued that the efficacy of the injunctive relief it sought would be defeated if Mr Schuetz became aware of the application before the injunction was granted.

The substantive application was later heard in private and a temporary injunction was granted barring Mr. Schuetz from talking about his time at the Commission on the grounds that he breaches his contract by doing so.

Reasons for Decision

The Chief Justice found that the court was empowered to exclude non-parties and the public from the hearing. His decision involved striking a balance between Section 6 (9) Bermuda

Constitution (the right to have hearings in public) and Section 6 (10) Bermuda Constitution (being the permissible qualification to Section 6 (9)).

The Chief Justice articulated the plaintiff's objection to the substantive hearing being held in public as follows:

"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."

The Chief Justice said that he was persuaded by the plaintiff's counsel that a public hearing would prejudice the interests of justice in this case. There was "*credible and cogent evidence*" that Mr Schuetz had breached his contractual obligation of confidentiality and had "*embarked upon a concerted campaign to undermine the Plaintiff's operations.*" He was persuaded that there was "*sufficient risk of damage to the Plaintiff flowing from further disclosures and/or disparaging remarks.*"

Summing up

Summing up his decision to allow a private hearing, the Chief Justice said: "*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.*"

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.” He cited Tugendhat J in *Terry -v- Person Unknown* [2010] EWHC 119 to support his decision.

The Chief Justice concluded his decision by saying: *“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.”*

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.