

Open Book or Locked Vault? Access to Court Documents in the Cayman Islands

Author:
Bernadette Carey, Counsel

Obtaining authorised access to confidential documents in offshore jurisdictions is, in some circles at least, the holy grail of information gathering. This is particularly so if the documentation has originated directly from the dusty shelves of the local court house, and relates to contentious matters whether past or present. The value of that information may well increase exponentially if it concerns, for example, high profile organisations or might otherwise be seen to greatly assist the pursuit of legal actions in other jurisdictions. It is not uncommon, then, for the content of court files in jurisdictions such as the Cayman Islands (“Cayman”) to be considered particularly alluring and the subject both of pre-emptive applications for sealing and subsequent applications – even by those unconnected with the litigation to which the file relates – for general access.

Whether or not members of the public, be they living locally or enquiring from abroad, should have rights of access to documentation filed with the Grand Court of the Cayman Islands (“Grand Court”) is an issue which requires close consideration. The careful balancing exercise required to be undertaken by the courts when determining issues of access was recently analysed in detail by the Honourable Chief Justice Anthony Smellie QC in the context of liquidation proceedings. As the Chief Justice noted in the judgment concerning *In the matter of the Sphinx Group of Companies (In Official Liquidation)* unreported, 30 January 2017 (“SPhinX”), determining whether documents kept on file by the Grand Court should be kept confidential requires a careful assessment of the particular circumstances in which access is sought, and the wider consequences of the publication of the information in question.

Open Justice

In Cayman, the starting point for consideration of a party’s rights of access to information on Court files, can be found in the Cayman Islands Constitution Order (the “Constitution”) and reflects the common law principle of open justice. Section 7 of Schedule 2 of the Constitution provides that 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. This requires in general that the public should have access to court proceedings and access to information about what occurs in those proceedings, even where the rights and obligations of adverse parties are not being determined.

However, the principle of open justice is not unlimited and forms part of the overriding principle that justice must be done. The general rule, as to publicity, must therefore yield to this overriding principle, and limitations can be - and are - placed upon the access to information by the public where the interests of justice so require.

The Grand Court Rules

The first of these limitations can be found in the Grand Court Rules (“GCR”). Order 63 of GCR provides for the creation of a Court file in respect of every proceeding commenced in the Grand Court, on which every document filed in the proceeding must be placed. While all originating process and judgments pertaining to proceedings are available for public inspection, on payment of a fee, Order 63 rule 3 provides that the balance of the Court file shall be open to inspection only by the parties to the proceeding. Further, where any matters arising in the proceedings are particularly sensitive or confidential, it is open to the Court to make an order that the Court file shall not be open to inspection either by a party or by any other person except with the prior leave of the Court. In those cases, the Court file will be marked as sealed and access restricted accordingly.

A non-party with sufficient interest in the proceedings may nonetheless apply to the Court for leave to inspect the Court file. Pursuant to *Practice Direction 1 of 2015* issued by the Grand Court, the applicant must write to the Clerk of the Court specifying the identity of the person seeking leave to inspect, the reason for the request to inspect, and a description of the part of the Court file that the applicant wishes to view. This application is determined either administratively by the Clerk of the Court or, if the application warrants it, by a Judge.

The Companies Winding Up Rules

More specific access limitations apply in relation to Court files pertaining to the liquidation of a Cayman company, and these are set out in the Companies Winding Up Rules (“CWR”).

CWR Order 26 rule 4 deals expressly with rights of access to the Court file in respect of liquidation proceedings. It provides that only certain persons are authorised to inspect the Court file: the liquidator (or any former liquidator or controller of the company), any person who was a director or professional service provider of the company immediately before the commencement of the liquidation, the Cayman Islands Monetary Authority (“CIMA”) (in the case of a company that has carried on a business regulated by CIMA), and any person stating himself in writing to be a creditor or contributory of the company.

Any person not falling in one of these categories may apply to the Court for special leave to inspect the Court file. However, if the Registrar of the Financial Services Division of the Grand Court, in which all liquidation proceedings are filed, is not satisfied as to the propriety of the application, he or she may refuse to allow it. It will then be up to the applicant to apply *ex parte* to a Judge of the Grand Court, who may refuse the inspection or allow it on such terms as thought fit in the particular circumstances.

Court files pertaining to liquidations can also be sealed in accordance with the GCR in the usual way, provided that the Court is satisfied of two things: firstly that the information in question is confidential, and secondly that sealing is necessary to protect the economic interests of the general body of stakeholders.

Decision in the SPhinX Liquidation

In *SPhinX*, the Scheme Supervisors (“Scheme Supervisors”) of the SPhinX Group of Companies (In Official Liquidation) had applied for the sanction of the Court to complete a confidential settlement agreement and, flowing from that, for orders that affidavit evidence sworn in support of the sanction application be sealed and kept confidential on the Court file (“Sealing Application”).

In doing so, the Scheme Supervisors had informed the Court that certain categories of information were on the court file, including information regarding the possible quantum of a potential claim against one of the parties, the content of legal advice received by the Scheme Supervisors in relation to that claim and the terms of a settlement of the claim that impacted very significantly on the creditors and the liquidation as a whole. The Scheme Supervisors argued that publication of that specific information would harm the interests of the stakeholders in the liquidation for a number of reasons, including that if the information was made public the settlement would not proceed and the settlement payment would not be passed on as distributions to the stakeholders.

In considering the Sealing Application, the Chief Justice reiterated the principles of open justice outlined above and confirmed that the Court is required to balance the general rule as to publicity against any requirements for confidentiality or privacy in the interests of justice that may arise in a particular case. The Chief Justice also 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 identifiable parties.

Importantly, the Chief Justice confirmed that the nature of the Court proceedings in question will be relevant when the Court is considering whether limitations should be placed on the principle of open justice. Relying on the principles of open justice set out in the English case of *ABC v Y* [2012] 1 WLR 53, the Chief Justice confirmed 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. In doing so, the Chief Justice confirmed:

- Where documents have formed part of the Court’s decision-making process at a public hearing, and provided 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; and
- 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.

The Chief Justice pointed out that information pertaining to a sanction application differs from typical partisan litigation because it does not require the Court to determine rights and obligations of the parties in adversarial legal proceedings. Instead, the Court is being asked to determine what is in the best interests of the estate and its stakeholders and whether the decision of the liquidators for which sanction is sought is one which the liquidators have taken reasonably in the circumstances.

It was the view of the Chief Justice that the fact that a settlement was pending in the matter was highly relevant, noting that it was essential that the Scheme Supervisors were able, like any other commercial party, to compromise claims on confidential terms – and that this ability would be lost if the Court was not prepared to seal papers filed in support of the sanction application that the liquidator was required by law to make. Flowing from this, it was also in the interests of justice for a sealing order to be made so as to protect the economic interests of the stakeholders in SPhinX. In the course of acknowledging that stakeholders and third parties could still apply to inspect the sealed documents under the CWR, the Chief Justice noted that the effect of the sealing order would nonetheless mean that the Scheme Supervisors would be put on notice of any such application and could seek to put in place a non-disclosure agreement with such stakeholders if necessary.

Accessing court files in Cayman

Neither an open book nor a locked vault, the Registry at the Grand Court will provide access to Court files, both to parties and non-parties, provided that the rules laid down in both the GCR and the CWR are carefully adhered to and, if necessary, the authorisation of the judiciary has first been obtained. However, the extent of access and the breadth of information ultimately available for inspection will likely vary widely depending on the circumstances of each particular case. Rightly, the emphasis both of the legislature and the judiciary has been, and continues to be, to protect the interests of those who are party to or affected by the litigation to which the file relates – ensuring always, as is the overarching principle in all such matters, that justice is done.

AUTHOR:

BERNADETTE CAREY
COUNSEL

bernadette.carey@conyersdill.com
+1 345 814 7371

OTHER CONTACT:

PAUL SMITH
PARTNER

paul.smith@conyersdill.com
+1 345 814 7777

GLOBAL CONTACTS:

KERRI L. LEFEBVRE
HEAD OF DUBAI OFFICE

kerri.lefebvre@conyersdill.com
+9714 428 2900

NIGEL K. MEESON QC
PARTNER
HEAD OF ASIA DISPUTES & RESTRUCTURING

nigel.meeson@conyersdill.com
+852 2842 9553

LINDA MARTIN
HEAD OF LONDON OFFICE

linda.martin@conyersdill.com
+44(0)20 7562 0353

ALAN DICKSON
HEAD OF SINGAPORE OFFICE

alan.dickson@conyersdill.com
+65 6603 0712

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