In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 307

IN THE MATTER OF ORDER 58(1) OF THE RULES OF THE SUPREME COURT OF BERMUDA 1985

IN THE MATTER OF THE SUPREME COURT (RECORDS) ACT 1955

BETWEEN:-

BERMUDA PRESS (HOLDINGS) LTD

Appellant

-v-

REGISTRAR OF THE SUPREME COURT

Respondent

JUDGMENT

(in Chambers)

Date of hearing: July 21, 2015

Date of Judgment: July 24, 2015

Mr. Timothy Z. Marshall, & Ms. Katie Tornari, Marshall Diel & Myers Limited, for the Appellant

Mr. Gregory Howard & Mr. Richard Ambrosio, Attorney-General's Chambers, for the Attorney-General

Mr. Eugene Johnston, J2 Chambers, for the Applicants in Supreme Court Civil Jurisdiction 2015: No. 55 (the "Related Proceedings")

Introductory

1. The Appellant applied to the Registrar pursuant section 3(1) (c) of the Supreme Court (Records) Act 1955 ("the 1955 Act) to obtain copies of Affidavits filed in the Related Proceedings and was refused on July 20, 2015. The Related Proceedings are constitutional proceedings brought by a local company and a local trust, the Allied Trust and Allied Development Partners Ltd. ("the Allied Parties"), to challenge the voiding of substantial contracts entered into between the Allied Parties and the Corporation of Hamilton for the development of the Hamilton Waterfront. The proceedings have excited considerable public attention, not least because an Affidavit sworn in the Related Proceedings which makes serious allegations of corrupt conduct against Government Ministers is already in the public domain and has been discussed in Parliament.

2. A strike-out application in those proceedings was heard on July 20-21, 2015 with various press representatives present. In the course of argument, Leading Counsel for the Government parties to the Related Action made oral reference to various Affidavits filed refuting the allegations made in the Allied Parties' Affidavit which is already (in circumstances that are unclear but unimportant for present purposes) in the public domain. Against this background Mr. Marshall sought to challenge the orthodox legal view that the documents which he sought access to were not open to public inspection, even in the absence of opposition from the parties to the Related Proceedings, by virtue of the following provisions of the Supreme Court (Records) Act 1955:

> "*3. (1)…*
>
> *(2)Nothing in the foregoing provisions of this section shall be construed so as to require or authorize the Registrar, on the application of any person not entitled by any provision of law, and not duly authorized in that behalf, to allow the inspection or examination, or to prepare and furnish copies, of any of the following documents, that it to say, —*
>
> *(a) <u>any pleadings or other documents relating to any civil proceedings then pending in the Supreme Court</u>;…*" [emphasis added]

3. It was essentially argued that the press had a duty to inform the public as fully and fairly as possible about court hearings of public interest. That required access to written evidence as much as oral evidence rather than being limited to reporting on such selective extracts which counsel chose to emphasise. This was primarily an incident of the common law and/or constitutional requirements of open justice.

4. The appeal was listed on an urgent basis and notice given to the Attorney-General, who was in any event represented in Court as a Respondent to the Related Proceedings because:

    (a) constitutional arguments were raised; and

    (b) it was self-evident that the appeal could be rendered nugatory if not adjudicated during the short 'shelf-life' that 'hot' news items typically enjoy.

5. Prior to the hearing I caused to be supplied to the Appellant's counsel various documents which (as a result of the Public Access to Information Act 2010-"PATI") are a matter of public administrative record in the Judicial Department and requested that he serve them on the Attorney-General for consideration at the appeal hearing. Most significantly, these documents included my own September 12, 2014 proposals for broadening access to Court records.

6. These proposals were prompted by complaints from the Miami-based Offshore Alert organization (which provides information about court filings in offshore jurisdictions to its clients) that Bermuda's access to court records regime was outdated and inconsistent with that which appertained in both the British Virgin Islands ("BVI") and the Cayman Islands ("Cayman"). My own proposals to the Bermuda Bar Council (which were promptly assented by that body) set out examples of how the courts in various jurisdictions (BVI, Cayman, England and Wales and Hong Kong) regulated access to Court documents in essentially the same way:

    (a) by Rules of Court enacted by the Judiciary rather than by primary legislation proposed by the Executive and enacted by Parliament;

    (b) by permitting general automatic public access to originating process (e.g. writs, originating summonses or petitions);

    (c) by permitting discretionary access to other documents (e.g. pleadings or affidavits or witness statements in active cases).

7. I also supplied to counsel a copy my proposed amendment to the Rules of the Supreme Court to adopt just such an approach which, it also a matter of public administrative record, was supplied to the Attorney-General's Chambers in late October with a request that the amendment be gazetted for entry into force on December 1, 2014. On April 14, 2015, almost six months' later, I was informed (as I noted in the course of the hearing of the appeal) that Chambers took the view that a legislative change was required. My response, it is also a matter of administrative record, was to dissent from their legal view but welcome the Attorney-General's

support for the principle of the change sought. I did not, it must be conceded, apply my mind in this administrative context to the constitutional propriety of the Executive and/or Legislative branches of Government regulating by primary legislation matters falling within the proper domain of the Judiciary.

8. A further document which I drew to counsel's attention was a June 12, 2015 'Offshore Alert' online article entitled '*Bermuda's Secretive Court System: Time to Emerge from the Dark Ages*' by David Marchant, which stated in part as follows:

> "*Bermuda prides itself on being one of the most advanced, best-run offshore jurisdictions in the world. In many respects, that boast is deserved.*
>
> *However, in one key area, Bermuda is so far behind the times, it's embarrassing, with the jurisdiction long overtaken not only by all of its major offshore rivals but even unsophisticated jurisdictions that Bermuda looks down on, such as Grenada and Antigua.*
>
> *That area is Litigation Transparency or, in Bermuda's case, lack thereof.*
>
> *Members of the public are entitled to no documentation whatsoever when a civil lawsuit is filed at Bermuda Supreme Court, not even a copy of the writ of summons, which provides basic details of a case, such as the names and addresses of the plaintiffs and defendants and the nature of the dispute….*
>
> *That's not to say that no information about lawsuits is available. It is … but the system that has been in place since, apparently, the 1950s is ridiculously crude….It's a disgraceful system for such an important international financial center…*"

9. This article is a very serious critique of the failure of the Judicial branch of Government in Bermuda to manage its processes in an efficient and modern way in terms of public access to Court records. It was precisely to forestall this sort of criticism that draft amendments to the Rules of the Supreme Court approved by the Bermuda Bar Council were forwarded to the Attorney-General's Chambers for publication in late October 2014.

10. Finally, I drew to counsel's attention an authority which demonstrates how existing laws enacted prior to the Bermuda Constitution may be construed by the courts

without granting declarations of invalidity under section 5(1) of the Bermuda Constitution Order: *Attride-Stirling-v-Attorney-General* [1995] Bda LR 6.

11. These materials were shared with counsel in the interests of transparency as they formed a significant part of the provisional thinking which I would bring to bear in the hearing of the present appeal and both contained relevant legislative and/or judicial precedents and shed light on the wider policy implications of the existing statutory framework. For the same reason this background is recorded here. In the event, the arguments presented on both sides in the course of the hearing of the appeal (including the submissions received later) succeeded in displacing most of my initial provisional views on the legal basis on which the appeal ought to be determined. But the history of these frustrated efforts on my part to modernise the access to Court records rules is relevant in a general way in explaining in part why the Appellant in this case had to prepare such comprehensive arguments in support of its appeal.

Legal Findings: interpreting section 3(2)(a) of the Supreme Court (Records) Act 1955

12. Mr. Marshall first made the initially interesting argument that the word "*pending*" in the phrase "*proceedings then pending in the Supreme Court*" was meant to exclude access to documents in cases which were awaiting hearing-as opposed to in active cases. If the position was at least ambiguous, that ambiguity could be resolved in favour of a construction which gave effect to constitutional public hearing and access to information rights. I accept that rule of statutory construction but I am unable to accept the proposition that "pending" means or potentially means "pending trial" rather than "pending final judgment" or "active" or "open".

13. In their 'Preliminary Submissions of the Attorney-General', Mr. Howard and Mr. Ambrosio submit as follows:

> "*22. The definition of pending does not admit of any serious disagreement: 'A legal proceeding is 'pending' as soon as it is commenced…and until it is concluded, i.e. so long as the court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein' (see Stroud's Judicial Dictionary of Words and Phrases, Seventh Ed.. 2006)*…."

14. I accept this submission. I find that the natural and ordinary meaning generally of the word "pending" is active or open in the sense of awaiting a final decision. Is there anything the statutory context of section 3(2)(a) of the 1955 Act to suggest some different special meaning was intended by Parliament? I can find nothing which undermines the starting assumption that the word "pending" was intended to have its natural and ordinary meaning of awaiting final judgment.

15. There is no automatic public right of access to Court records of any type in pending proceedings. As the complex construction arguments which I accept below were not advanced before the Registrar, the decision she reached to reject the application was an unsurprising one. Indeed, it was based on a reading of the Act which has seemingly not been challenged in 60 years.

Findings: can the Appellant obtain access to the records by virtue of "any provision of law"?

16. Alternatively, and most importantly, Mr. Marshall invited the Court to have regard to the opening words of section 3(2) with emphasis given to the words underlined below. Having considered the crucial statutory wording, the key legal questions arising from the Appellant's submissions will then be considered:

> "(2) *Nothing in the foregoing provisions of this section shall be construed so as to require or authorize the Registrar, on the application of any person not entitled by any provision of law, and not duly authorized in that behalf, to allow the inspection or examination, or to prepare and furnish copies, of any of the following documents…*" [emphasis added]

What categories of "*provision of law*" can clothe an applicant for access to Court records in a pending case with authority to obtain them?

17. It is well known that section 2 of the Interpretation Act 1951 provides as follows:

> "*'provision of law' means any provision of law which has effect for the time being in Bermuda, including any statutory provision, any provision of the common law, any provision of the Constitution, and any right or power which may be exercised by virtue of the Royal Prerogative…*"

18. Accordingly, at first blush there appears to be considerable merit in the proposition that the strictures of the various restrictions on access imposed by section 3(2), under paragraph (a) and otherwise, do not apply to any person who can claim authority to inspect the documents on the basis of, *inter alia*:

    (a) a statutory provision (a term which, under section 2 of the Interpretation Act, includes a statute and a statutory instrument);

    (b) a common law rule; or

    (c) a provision of the Constitution.

19. The limits on inspection of Court records imposed by subsection (2) of section 3 ought properly to be viewed as subsidiary to the general rule enunciated in subsection (1):

> "*(1)Subject to any Rules of Court made under this Act, the Registrar, upon the application of any person and upon the payment of the appropriate fee prescribed under the Court Fees and Expenses Act 1971 [title 8 item 7]—*
>
> *(a) shall allow that person to inspect and examine any of the records of the Supreme Court; and*
>
> *(b) shall allow that person to copy or make extracts from any of the records of the Supreme Court; and*
>
> *(c) shall cause to be prepared and furnished to that person a certified copy of any of the records of the Supreme Court.*"

20. The starting legislative assumption is a public right of access to Court records under section 3(1) of the 1955 Act. These same provisions expressly empower modifications to the general rule to be made by Rules of Court, a form of subsidiary legislation. The power to regulate access to Court records by subsidiary (as well as primary legislation, common law rules and constitutional law rules), to avoid any doubt, is in subsection (2) of section 3. So even in regard to those cases where, under section 3(2)(a), the starting assumption is that no access is possible (e.g. because, under section 3(2)(a), the records relate to a pending case), Parliament has expressly provided that this starting assumption may be displaced by applicants claiming authority conferred in a wide variety of ways, <u>including</u> Rules of Court made under the 1955 Act. And section 4 of the Act provides:

> "*4. The Supreme Court may make Rules for carrying the foregoing provisions of this Act into effect; and, without prejudice to the generality of the foregoing provision, Rules of Court made as aforesaid may provide —*
>
> *...*
>
> *(c) for specifying the conditions under which any of the records of the Supreme Court may be inspected, examined or copied;…*"

21. On what rational legal basis, one cannot avoid rhetorically asking, can it be suggested that the existing access to records rules can only be changed by way of amendment to the Act and not by way of Rules of Court? No Rules of Court have ever seemingly been made under the 1955 Act but the Supreme Court using its inherent jurisdiction (and applying perhaps both common law and common sense rules) has always given parties access to Court records in pending cases. The only remotely relevant rule

under the Rules of the Supreme Court 1985, made under section 62 of the Supreme Court Act 1905, is Order 63, which provides (in negative terms) as follows:

> "*9. No document filed in or in the custody of the Registry of the Court shall be taken out of the Registry without the leave of the Court.*"

22. This is a "provision of law" in the form of a statutory instrument which gives the Court a broad discretion to decide what documents the parties to proceedings and the public can obtain from the Registrar.

23. There is another more specific example of express authority to access Court records being conferred by a provision of law which is outside the 1955 Act itself. This is also a rule of court made under a statutory rule-making power which is itself outside the 1955 Act. However it makes provision for accessing Court records to which section 3(2)(a) of the 1955 Act applies. The Companies (Winding-Up) Rules 1982[1] provide in salient part as follows:

> "***Inspection of file***
> *12 Every person who has been an officer of a company which is being wound up and the Registrar of Companies shall be entitled, free of charge, and every contributory and every creditor whose claim or proof has been admitted, shall be entitled on payment of the prescribed fee, at all reasonable times, to inspect the file of proceedings and to take copies or extracts from any document therein, or be furnished with such copies or extracts on payment of the prescribed fee.*"

24. This rule is clearly designed to apply to pending winding-up cases. In summary, despite the rather restrictive terms in which section 3(2) of the 1955 Act are couched, it is potentially possible to deploy a wide array of legal rules to relax the starting assumption that public access should be denied.

25. I reject the very wooden interpretation contended for by the Attorney-General. It is not a sensible construction of section 3(2) to suggest, in effect, that the prefatory words of the subsection have no effect at all and the provisions can only be read as imposing an immutable statutory bar on public access to Court records in pending cases. It is clearly the right of the parties to the Related Proceedings (and litigation generally) to decide whether or not they wish to object to disclosure of the relevant Court records. That clearly forms part their basket of fundamental fair trial rights. (It is only fair to acknowledge that the Attorney-General was given a very short time to prepare submissions in response and that his counsel's main brief was seemingly to defend the constitutionality of section 3(2), an aim which -as will be seen- they achieved.

[1] This rule was made under section 62 of the Supreme Court Act, section 288 of the Companies Act 1981 and section 34 of the Interpretation Act 1951.

26. However, to the extent that it is suggested that the dominant philosophy of the 1955 Act is to ensure that Court filings are kept secret, such contention is wholly unjustified and contradicted by a straightforward reading of the plain words of the Act.

Common law rules supporting a right of access to the documents sought by the Appellant

27. Somewhat surprisingly, to my mind at least, the clearest support for access to the Affidavits in the Related Proceedings was provided by common law persuasive authority. However it is logical to start with the approach of the common law because it helps to demonstrate that the concept of open justice has deep legal roots. The House of Lords emphasised the importance of these principles over 100 years ago in *Scott-v-Scott* [1913] AC 417. However, Mr. Marshall relied on more modern persuasive English authority to pivotally support his application. One case merits detailed consideration because the facts are broadly similar: *R (on the application of Guardian News and Media Ltd.)-v-City of Westminster Magistrates' Court* [2012] EWCA Civ 420. This was an extradition case followed by the media where reference was made in the course of the hearing to certain documents which the journalists sought from the District Judge by way of a written request. She gave a written ruling refusing the newspaper's application on the grounds that the court had no power to produce the documents. At the time of the Magistrates' Court judgment, there was no rule of court permitting access to the documents although it appears that a general rule more supportive of access was subsequently brought into effect[2]. The High Court dismissed the newspaper's appeal. These two decisions were overturned by the Court of Appeal (unanimously) on the basis of "*common law principles of open justice*" (per Toulson LJ, as he then was at paragraph 88). The following illuminating passages of the leading judgment were rightly drawn to my attention by Mr. Marshall:

> "*1. Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes - who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in Scott v Scott [1913] AC 407, 477:*
>
> > *'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all*

[2] See Hooper LJ at paragraphs [93] to [98].

> *guards against improbity. It keeps the judge himself while trying under trial.'*

2.This is a constitutional principle which has been recognised by the common law since the fall of the Stuart dynasty, as Lord Shaw explained. It is not only the individual judge who is open to scrutiny but the process of justice. In a valuable report by the Law Commission of New Zealand on Access to Court Records, 2006, Report 93, the Commission summarised the principle at paragraph 2.2:

> *'Open justice is a fundamental tenet of New Zealand's justice system. It requires, as a general rule, that the courts must conduct their business publicly unless this would result in injustice. Open justice is an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties. It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny, and that "Justice should not only be done, but should manifestly and undoubtedly be seen to be done.'...*

> *85. In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others…*"

28. The primary finding in this case was that in the absence of any statutory power to provide access to the press of documents referred to in the course of the hearing in a case of public interest, there was a common law power to order disclosure assuming there were no countervailing interests to be protected. The reason why this approach has become necessary is the increasing use by civil courts of written materials. The Appellant's counsel in this respect drew the Court's attention to the following

observations of Park J in *Chan U Seek-v-Alvis Vehicles Ltd. and Guardian Newspapers* [2004] EWHC 3092(Ch):

> "*[23] A particular development in our system of civil trials, which has had to be considered in the context of open justice and of informed publicity for court proceedings, is the trend for a lot of material which the judge considers to be placed before him in written form, for him to read it all and take it all into account, but for much of it not to be read out aloud in court. So far as the present case is concerned, this applies with particular force to witness statements which stand as evidence in chief. The six witness statements which The Guardian wishes to see were not read out in court, but I read them. In the usual way the witnesses who gave their evidence in person confirmed that the contents of their statements were true. Two of the witness statements were tendered under the Civil Evidence Act so the witnesses did not attend in person. Nevertheless the contents of their statements were evidence in the case and I read them.*
>
> *[24] Several of the recent cases which have considered issues similar to the issues in this case have made the point that members of the public should not, by reason of the modern practice, lose the ability to know the contents of a witness's evidence in chief, which they would have known under the earlier practice when the evidence in chief was given orally: see Lord Bingham CJ in SmithKline Beecham Biologicals SA v. Connaught Laboratories Inc. [1999] 4 All ER 498 at 511-512, and Lord Woolf, MR in Barings Plc v. Coopers & Lybrand [2000] 1 WLR 2353 at 2364-5. I quote one paragraph from the latter case:*
>
> > *'As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings.'*"

29. As section 3(2) of the Supreme Court (Records) Act 1955 expressly contemplates that the starting assumption of the relevant categories of documents not being accessible may be displaced by applicants claiming authority under, *inter alia*, provisions of the common law, no question of the common law open justice rules recognised by the English courts being unavailable to the Bermudian court because of inconsistent local statutory provisions arises. As Toulson LJ noted in *R (on the application of Guardian News and Media Ltd.)-v-City of Westminster Magistrates' Court* [2012] EWCA Civ 420 *R (on the application of Guardian News and Media Ltd.)-v-City of Westminster Magistrates' Court* [2012] EWCA Civ 420:

> "*73.More fundamentally, although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice*

principle may be affected by an Act of Parliament, Parliament should not be taken to have legislated so as to limit or control the way in which the court decides such a question unless the language of the statute makes it plain beyond possible doubt that this was Parliament's intention."

30. The presumption that Parliament has not legislated so as to limit the ability of Bermuda's Judiciary to regulate its own processes relating to access to Court records and generally is far stronger in Bermuda. The English doctrine of Parliamentary sovereignty has been significantly tempered through our written Constitution, which limits Parliamentary sovereignty through both the separation of powers and by way of guaranteeing as fundamental rights public trials as well as freedom to receive and impart ideas. The drafters of the 1955 Act appear to have anticipated these principles by leaving far more scope than is apparent on superficial analysis for the Supreme Court to depart from the presumption that pending Court records are not under any circumstances available to the public under section 3(2)(a) of the 1955 Act.

31. In the course of argument Mr. Howard submitted that the Bermudian statutory framework was entirely different from the English position where the discretion to afford access to such documents existed under Rules of Court. Properly analysed, there is in substance no material distinction. Section 3(2) of the 1955 Act opens the door to common law, statutory and constitutional provisions of law which permit access to, *inter alia*, Court records in pending cases. The Appellant's counsel explicitly relied upon highly persuasive English case law on the open justice principle as applied to facts almost indistinguishable from the facts of the present case. Those principles need to be viewed in conjunction with the provisions of Order 63 rule 9, which confers an overarching statutory discretion on the Court to regulate access to Court records.

32. Accordingly, I find that the Registrar has the discretionary power under section 3(2)(a) of the Act and read with the common law rules on open justice and/or Order 63 rule 9 of this Court's Rules, in an appropriate case, to provide a member of the public with copies of written evidence filed in court and referred to by either the parties or the Court in the course of a public hearing. This discretionary power is engaged *par excellence* in relation to constitutional proceedings involving significant public contracts where the conduct of senior Government figures has been called into question. It will rarely if ever be engaged in relation to *in camera* hearings and/or the vast majority of civil and commercial cases where predominantly private interests are in play.

Statutory provisions empowering the Appellant to seek access under section 3(2)(a)

33. For the reasons set out above, Order 63 rule 9 is a statutory provision, albeit articulated in exclusionary terms, which confers a broad discretion on the Court to regulate access to all Court records.

Constitutional provisions empowering the Appellant to seek access under section 3(2)(a)

34. The Attorney-General objected to the Court abridging the usual time limits and, in effect, allowing the Appellant to bypass the requirements of Order 114 with a view to obtaining constitutional relief. It is suggested that the philosophy of the CPR of adhering more strictly to time limits should be adhered to by this Court. The *leitmotif* of the CPR is efficiency and expedition, not procrastination and delay. Seeking to expedite a hearing and abridging time limits is wholly consistent with the overriding objective, and entirely consistent with the approach of discouraging extensions of time.

35. This is particularly the case when adhering to the usual time-limits would potentially extinguish altogether the fundamental rights being enforced. If an application was made to enforce the constitutional right to life on behalf of child who needed a life-saving operation opposed by its parents within 48 hours, the Court would not require the usual procedural formalities to be complied with and only entertain the application after the child had died. Here the Appellant's open justice case would potentially be defeated by virtue of the lapse of time if it could not advance its constitutional arguments within an abbreviated period of time.

36. Mr. Johnston for the Applicants in the Related Proceedings in a somewhat more nuanced way also cautioned the Court about adopting an inconsistent approach to requiring constitutional litigants to follow the section 15/Order 114 route of filing an Originating Summons. These cautionary submissions were generally sound. There should be clarity in how constitutional points are taken, but not excessive rigidity. Procedural niceties cannot be allowed to potentially extinguish fundamental rights altogether.

37. In recent years this Court has adopted a more flexible approach to entertaining applications for constitutional relief where points genuinely arise in non-constitutional proceedings and no useful purpose will be served by requiring a whole new proceeding to be commenced. Such an approach is easier in the context of public law proceedings where the Crown is already involved and familiar with the issues involved: see e.g. *Fay-v-Dental Board and The Governor* [2006] Bda LR 66. In that case I adopted the following approach:

"*5. As (a) the Applicants had already exhausted their alternative appeal remedies, (b) the Governor had expressed concerns about his appellate role in making his decision, and (c) the constitutional point was clearly arguable and had been raised on appeal, it seemed to me to be undesirable to leave this short point to be resolved in future proceedings.*"

38. The present case is somewhat analogous. The Appellant is seeking access to documents filed by the Attorney-General and the Allied Parties in proceedings to which the Attorney-General and another Minister are parties. A constitutional point has arisen, which does not (unlike in the *Fay* case) require 'full-blown' constitutional relief. It is primarily a question of statutory interpretation. The point has two potential strands:

    (a) firstly, the provisions of section 6(9) and/or section 9 of the Constitution can be viewed as containing provisions of law which directly authorise the Appellant being given access to the records sought, should the requirements of proportionality and balancing other competing interests so require; alternatively,

    (b) the same constitutional provisions can be viewed as modifying the provisions of section 3(2) so as to bring them into conformity with the fundamental constitutional provisions guaranteeing the Appellant's open justice rights. This by virtue of the fact that the 1955 Act is an existing law, and section 5 of the Bermuda Constitution Order provides as follows:

        "*(1) Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

39. Section 5(1) of the Constitution Order is a very powerful judicial tool which perhaps excites anxiety on the part of the Executive and Legislative branches of Government. It effectively permits the Court to "rewrite" parts of pre-1968 legislation which are found to be inconsistent with the Bermuda Constitution as a whole, not simply the fundamental rights and freedoms protected by Chapter I. Because of the extent to which this judicial tool intrudes into what is primarily the legislative domain, it ought to be deployed with circumspection, affording the Attorney-General (on behalf of the Executive and Legislative branches of Government), so far as is possible, time to adequately meet any constitutional arguments raised.

40. But all the Court is doing, at the end of the day, is interpreting the impugned pre-existing legislative provisions in the way that the Bermuda Constitution itself,

Bermuda's supreme legislation[3], requires. And where the Court concludes that modifications to an existing law are required, it does so only because the Executive and Legislative branches of Government have, since 1968, chosen not to modify the impugned existing law themselves. Section 5(2)-(3) of the Bermuda Constitution provides as follows:

> "*(2)The Governor may, by order published in the Gazette, at any time within twelve months after the commencement of this Order make such amendments in any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of the Constitution or otherwise for giving effect, or enabling effect to be given, to those provisions; and any existing law shall have effect accordingly from such date (not being earlier than the appointed day) as may be specified in the order.*
>
> *(3) An order made under this section may be amended or revoked by the Legislature or, in relation to any existing law affected thereby, by any other authority having power to amend, repeal or revoke that existing law.*"

41. Section 5(1) of the Bermuda Constitution Order provides in mandatory terms that existing laws "*shall have effect*" after June 2, 1968 as if they had been made under the Constitution, and "*shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution*". Thus, as a matter of fundamental statutory interpretation, where any potential conflict with the Constitution is raised, the Court cannot properly construe the impugned provisions without ensuring that they are given an effect which is constitutionally compliant. What conflicts are said to exist here? The answer is none. The primary argument is that the constitutional provisions contain legal principles which authorise access to the affidavits referred to in open court within the terms of section 3(2) of the 1955 Act. The Attorney-General's submissions do not appear to be responsive to this elegantly subtle point.

42. Firstly, and primarily, reliance is placed upon section 6(9) of the Bermuda Constitution:

> "*(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.*"

43. Mr. Marshall rightly homed in on this provision because it is the common law open justice principle in constitutional form. The following freedom of expression

[3] This is, to some extent, a rhetorical overstatement. Strictly speaking, the Bermuda Constitution is no more "supreme" than other United Kingdom legislation which extends to Bermuda.

provisions which are more generally relied upon by the media are, I agree, merely complementary and/or supplementary in the context of the present appeal:

> "*9(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*" [emphasis added]

44. Mr. Howard and Mr. Ambrosio rightly point out that these rights are qualified constitutional rights. Section 6(10) provides the following qualifications to the general requirement of public hearings guaranteed by section 6(9):

> "*(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.*"

45. Even broader derogations from the general freedom of expression rights guaranteed by section 9(1) are permitted by section 9(2). So clearly, the Constitution contemplates that open justice does not mean a "one size fits all" approach and may mean different things in different contexts. The Attorney-General's counsel also submitted that when one is considering whether a limitation on a fundamental right is excessive, one must ask whether the limitation achieves a fair balance between the interests of the individual and the interests of the wider community: *Huang-v-Secretary of State for the Home Department* [2007] UKHL 11; *R-v-Oakes* [1986] 1 SCR 103 (Supreme Court of Canada). I agree.

46. However the most substantive riposte to Mr. Marshall's invocation of section 6(9) made by Mr. Howard and Mr. Ambrosio in their submissions was the following argument:

"*53…the rights under section 6 of the Constitution are fair hearing rights which affix to those who find themselves before the Courts, either as criminal defendants or persons seeking to have the existence or extent of a civil right or obligation determined. While a secondary function of contributing to public confidence in the courts, the provisions do not concern what rights a third party to these proceedings may or may not have. This point was made clearly by the European Court of Human Rights …in Malhous v Czech Republic 2001-12, which stated at para 55:*

> *'1. The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, for example, the Diennet v. France judgment of 26 September 1995, Series A no. 325-A, pp. 14–15, § 33).' [emphasis added]*"

47. These findings must be read in the context of the facts of that case as summarised in paragraph 3 of the European Court of Human rights' judgment: "*2. The applicant alleged that his property rights were violated in restitution proceedings and that he did not enjoy a public hearing before an independent and impartial tribunal in these proceedings.*" This was not a case where the media sought to invoke Article 6 of the European Convention on Human Rights (ECHR) and were denied relief on these grounds. Section 6(9) of our Constitution is in any event broader than Article 6 of the ECHR in that it guarantees, over and above the rights of litigants to a fair a hearing, a freestanding general requirement that both hearings and judgments take place in public, detached form the litigants' fair hearing rights. As regards civil proceedings, section 6(8) of the Constitution provides:

> "*(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*" [emphasis added]

48. The requirement of an "*independent and impartial*" tribunal which must afford civil litigants a fair hearing is expressed as an objective requirement linked to, but not inextricably connected to the litigant's fair trial rights. It is conceded that as far as criminal defendants are concerned, section 6(1) only explicitly confers the following core rights on them:

"*(1)If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*"

49. There is, seemingly, no express reference to public hearing rights in relation to criminal trials[4]. Section 6(9), following the articulation of the objective requirement that courts be independent and impartial and that civil litigants be afforded a fair trial in section 6(8), then expresses in purely objective terms a freestanding requirement of public proceedings. This is, in my judgment, the English common law open justice rule in codified constitutional form. By way of contrast, no such freestanding requirements can be found in article 6 of the ECHR:

"*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. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest 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 the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."* [emphasis added]

50. Article 6 of the ECHR contains no freestanding objective requirement for public hearings at all; at least not detached from the litigant's personal fair hearing rights. In my judgment this is a more substantial basis for understanding why under the ECHR, the media have seemingly exclusively relied on freedom of expression rights under article 10 (from which our own section 9 is derived), rather than on article 6. This article 10 reliance is described by Toulson LJ in his review of ECHR cases in *R (on the application of Guardian News and Media Ltd.)-v-City of Westminster Magistrates' Court* [2012] EWCA Civ 420. The article 10 analysis is completely different, involving an assessment of whether or not the State is exercising a monopoly over information in such a way as to amount to censorship. He summarised that case law as follows:

"*85. The Strasbourg jurisprudence may be seen as leading in the same direction, but it is not entirely clear cut because this is not a case in which the court can be said to have had a monopoly of information (as it did in Tarsasag and Kennedi), so as to justify regarding the court's refusal of access as tantamount to censorship. There is significance in the question whether the refusal of access to the Guardian amounted to covert censorship, because there is force in the argument that article 10 is essentially a protection of freedom of speech and not freedom of information (Leander), although in exceptional cases infringement of the latter may be regarded as a covert form of infringement of the former. Some of the observations by the Strasbourg*

[4] Either section 6 contains a startling gap in failing to protect open justice in criminal cases or "civil rights" in section 6(8) connotes rights determined by a civilian as opposed to a military court.

> *court may be said to support the reasoning behind my decision, but I base the decision on the common law and not on article 10.*"

51. Mr. Howard and Mr. Ambrosio's cogent submissions have however persuaded me, contrary to my initial provisional view, that section 9 of the Bermuda Constitution is not engaged by the facts of the present application for information contained in Court records. They rightly argued:

> "*62. The effect of the 1955 Act is not to place limits on what the press may or may not publish. Members of the press are free to publish anything which is stated in open court. In addition, as it cannot be said that section* [9] *incorporates a right to access information, the Appellants cannot complain of an infringement of their freedom of expression.*"

52. On the other hand I find that Mr. Marshall was correct to pin his colours to the section 6(9) mast. These provisions of law do, in a very general sense, provide a broad (and technically indirect) juristic basis upon which an application by journalists for access to documents referred to in the course of civil proceedings of public interest can be grounded. The constitutional provisions do not need to be applied directly by way of granting formal constitutional relief. They may be read in conjunction with the directly operative provisions of section 3(2)(a) of the Supreme Court (Records) Act 1955 and Order 63 rule 9 of the Rules of the Supreme Court Act 1985. The provisions of section 6(9) may, for Bermudian law purposes, be seen as not the source of but rather powerful support for the corresponding open justice rules of the common law.

53. The public hearing principles embedded in section 6(9) of the Constitution carry with them the related provisions of law found in section 6 itself. For these purposes, at least, I accept that the fair hearing rights guaranteed are primarily those of the litigants themselves. The discretion to permit public access to Court records in pending cases cannot be exercised in a way which would prejudice the fair trial rights of the parties in the subject litigation; here, the Related Proceedings. The countervailing interests adumbrated in section 6(10) (most broadly, under subsection 10(a), "*the interests of justice*") are also engaged by any application to access Court records under section 3(2)(a) of the 1955 Act which entails indirectly deploying these constitutional open justice principles.

54. In these circumstances, where section 3(2)(a) of the 1955 Act is construed as sufficiently flexible to incorporate a statutory discretion to afford access to the sort of documents sought in the present case, there is no inconsistency between the statute and the Constitution and no need to deploy section 5(1) of the Constitution arises. Despite much huffing and puffing on my part in the course of the hearing about the

importance of this constitutional power, no question properly arises of 'blowing down' the statutory edifice of section 3(2)(a) of the 1955 Act.

Findings: disposition of the application

55. Based on arguments which were not placed before the Registrar but which were advanced before me by Mr. Marshall both orally and in writing with considerable skill and persuasion, I find that the Registrar does have a statutory discretion under section 3 of the 1955 Act to accede to the Appellant's request by letter dated July 20, 2015 for copies of (a) the Originating Summons, (b) the Strike-out Summons, and (c) Affidavits, all of which documents were referred to in the course of the public hearing of a constitutional strike-out application.

56. The factors which support the further finding that the relevant discretion should be exercised in favour of the Appellant on the facts of the present case are that:

    (a) the documents were referred to in the course of the public hearing of an application in constitutional proceedings in a case which has raised considerable public interest;

    (b) an Affidavit filed by the Applicants which makes damaging accusations about the conduct of Government Ministers has already been leaked to the media and discussed in Parliament;

    (c) the Affidavits sought include Affirmations containing rebuttal statements which were mentioned in passing by counsel during the hearing, but which journalists were unable to fully review or report on; and

    (d) neither party positively objects to the Court granting the Appellant the access sought.

57. However, the Attorney-General has qualified his position in his written submissions, noting that the Minister has not formally participated in the present appeal. He has sought an opportunity for both Respondents to address the issue of redaction in particular of confidential material exhibited to one of the Applicant's Affidavits. These are quintessentially the sort of countervailing litigation party interests which the Court must take into account in directing the course of the otherwise untrammelled flow of the stream of open justice.

58. I would accordingly direct that, subject to hearing counsel if required, the Registrar should disclose in the first instance the documents sought, subject to such reasonable redactions of obviously confidential matter as may be requested by the Attorney-

General on behalf of both Respondents in the Related Proceedings. The relevant redactions should be notified to Mr. Johnston, and best endeavours made to agree any further redactions which he may reasonably require on behalf of his clients, the Allied Parties. Obviously, the redactions should be made with due dispatch.

Conclusion

59. Properly analysed, section 3 of the Supreme Court (Records) Act 1955 does not, in accordance with conventional wisdom and my own contrary previous view, contain an absolute prohibition on public access to Court records in, *inter alia*, pending cases. Section 3(2) articulates merely a starting assumption that access should be denied, subject to an important caveat. Any person authorised by any provision of law (which includes constitutional, statutory and even common law rules) can be afforded access to such documents were justice so requires. The common law and constitutional rules upon which Mr. Marshall relied for the first time on appeal clearly establish that the Appellant ought, in all the circumstances of the present case, be afforded access to the documents sought. The conventional interpretative view of this legislative scheme, which I myself have always unquestioningly adopted, is a manifestly flawed and untenable one. This does not remove the need for straightforward amendments to Order 63 of this Court's Rules to be implemented to give effect to a more modern approach user-friendly approach, based on similar rules that have been in place in other respected jurisdictions for many years. Such new Rules would also reduce the need for burdensome contested hearings about what the access to documents legal rules really mean.

60. The Attorney-General has confirmed through his submissions an intention to reform the existing access to Court documents rules through primary legislation. Wearing an administrative pragmatic hat, I have admittedly supported such legislative reforms. However the adjudicative function, combined with adversarial argument, stimulate legal clarity in a way that other processes can rarely beat. It now seems clear beyond sensible argument that section 3(2) contemplates that access to Court document rules can be formulated by Rules of Court. The function of regulating access to Court records is controlled by the Judiciary in the United Kingdom; it is controlled by the Judiciary in Cayman, BVI and Hong Kong. Ought Bermuda's quality of judicial autonomy and independence, in service of the citizen's right to an independent court, be any weaker? There is a need for the different branches of Government to respectfully recognise each other's proper functions and collaborate to achieve common administrative goals. A failure to do so will not augur well for the health of the 'body politic' as a whole. As Desiree Barnard, Chancellor (as she then was) has judicially noted, approving the opinions expressed in Professor Albert Fiadjoe's '*Commonwealth Caribbean Public Law*':

> "*…the doctrine of the separation of powers no longer bears the meaning that the early writers conceived of…in today's world the new meaning of the*

doctrine includes an appreciation of the fact that in the complexities of modern government there can only be shared powers among separate and quasi-autonomous ye interdependent State organs…"[5]

61. Subject to the qualifications set out in paragraph 58, the appeal is allowed and the Appellant is entitled to obtain redacted copies of the Originating Summons, the Strike-out Summons, and the affidavits filed in relation to the latter application, all which documents were referred to in the course of a public hearing. There shall be liberty to apply in relation to the redaction issue, the terms of the Order required to give effect to this Judgment, costs and any other matters arising. Why, in a nutshell, do the media have a right to receive copies of documents on the Court file which have been referred to in a high-profile case in a public hearing? That question is best answered in layman's terms by Bermuda's leading 'Good Governance' commentator, John Barritt, writing in today's Royal Gazette: "*Cats are out of the bag and the public will want to know exactly went down. This is their Government that is being talked about and called into question.*"[6]

Dated this 24th day of July, 2015 _____

IAN RC KAWALEY CJ

[5] *Guyana Electricity Corporation Inc-v-Charles Liburd*, Guyana Court of Appeal, Civil Appeal No. 35 of 2000, Judgment dated October 11, 2002 at page 6.
[6] '*Talking politics and sustainability*', 'The Royal Gazette', July 24, 2015, page 5.