THOMSON REUTERS
WESTLAW TODAY

The balance between open justice and confidentiality in offshore trust proceedings

By Peter Ferrer, Claire Goldstein, and Tyrone Bailey, Harneys
Practitioner Insights Commentaries

July 8, 2021

(July 8, 2021) - Peter Ferrer, Claire Goldstein, and Tyrone Bailey, of Harneys, discuss considerations for conducting trust proceedings in private in offshore jurisdictions that are territories of the UK.

United States lawyers may need to litigate trust proceedings involving businesses or family assets in offshore jurisdictions if the trust in question is domiciled in one of those jurisdictions. Disputes occur in a number of situations through the life of the trust.

This article addresses disputes that may arise in territories of the UK. These jurisdictions include the British Virgin Islands, the Cayman Islands, Bermuda, Jersey, Guernsey and the Isle of Man. Each jurisdiction has a separate jurisprudence but to a large extent it is based on the English common law especially in the British Virgin Islands, the Cayman Islands and Bermuda. As such each jurisdiction is not bound by, but will take into consideration, judicial decisions in the other jurisdictions.
As trusts often concern private family assets there is generally a strong desire for trust litigation to be conducted in private. This desire for discretion can be seen, however, to be in conflict with the well-established two dimensional principle of open justice, that the (a) public is entitled to attend court proceedings and (b) media should not be discouraged from publishing fair and accurate reports of court proceedings. (UK High Court 2014 case of *V v T*).

The principle of open justice is clearly 'fundamental to the dispensation of justice in a modern democratic society' (UK Supreme Court 2013 case of *Bank Mellat v HM Treasury(No2)*). As a matter of public policy open justice deters inappropriate behavior by the court, maintains public confidence in the administration of justice, fosters the perception of judicial impartiality and reduces the likelihood of misinformation about court proceedings. Courts therefore exercise great caution when 'asked to make incremental incursions into the general principle of open justice' (UK Supreme Court 2019 decision of *MN v OP*).

Trust proceedings are, however, of a slightly different nature and one may ask in many cases whether there is really such a need for open justice in proceedings that very often concern private family matters. The essential question in sensitive trust proceedings will therefore always be whether the need for a private hearing outweighs

the need for open justice. This decision can, however, be considered against the backdrop of whether open justice is quite so necessary in this context.
This does not mean that it is still not an important principle but the balance may tip in a different direction in the trust context rather than, for example, the criminal context where it would be very difficult to argue that open justice should not be paramount.

As noted above, offshore jurisdictions look for precedent in other offshore jurisdictions as well as from the English courts. For example, while there is no published judgment on the issue of confidentiality in trust proceedings in the BVI, the BVI court is generally willing to hear sensitive trusts cases in private especially blessing applications where the court is asked to sanction momentous decisions made by trustees.

The BVI court will also be guided by the jurisprudence in both the UK and in other offshore jurisdictions between which there has been a difference in emphasis when it comes to the approach to privacy in trusts cases. As will be discussed further below, in the jurisprudence of the offshore jurisdictions there appears to be greater acceptance that in appropriate cases it may be necessary and in the interests of justice for the matter to be heard in private although having regard to the competing fundamental rights of the parties and the interest of the public *(V v T* case; The Bermudan High Court 2017 case of *Re G Trusts*; the Cayman High Court 2018 case of *Julius Baer Trust Company Ltd*; and the Jersey Royal Court 2018 case of *HSBC Trustees v Kwong*).

UK approach

The threshold for obtaining a private hearing in the UK is governed by Rule 39.2 of the Civil Procedure Rules. That threshold is a high one, as demonstrated by the restrictive approach adopted in the leading decision of *V v* T, which concerned an application for the variation of a trust under section 1 of the UK 1958 Trust Variation Act. In that case, the parties consented to a private hearing, submitting that an open hearing would risk the value of the trust's assets and the personal security of the beneficiaries. Mr. Justice Morgan, however, found that it was settled practice under the Act for applications to ordinarily be heard in open court, and that the concerns of the parties in that case did not constitute 'clear and cogent evidence' that a private hearing was necessary in the circumstances.

Nevertheless, Morgan J recognized the special position of minor beneficiaries under the trust and therefore agreed to implement partial privacy through anonymizing the judgment. The English Court of Appeal, the UK's intermediate appellate court, recently reiterated this approach, but was quick to reject the proposition that anonymity in trust cases should be considered a default position or the norm (2019 decision in *MN v OP and others)*. The court stressed that there was no general exception to open justice in trusts matters and that the issue of whether or not the matter should be determined in private should be decided on a case by case basis.

The Court of Appeal's decision further underscored that where any anonymity was being granted, it would only be the minimum *strictly* necessary and to the extent needed to ensure justice in the case. This was the rationale used to support an order that references to minor beneficiaries should be anonymized (but this will expire when they turn 18). But all references to adult beneficiaries were to remain public along with identification of the settlement and the general nature of the trust and its provisions. Recognizing that such a limited order may still expose the identity of the minor beneficiaries, an additional prohibition on the publication of their identities (including on the Internet and social media) was added.

Approach in offshore jurisdictions

In general, the offshore jurisdictions appear to follow a less restrictive approach to applications for matters to be heard in private than in the UK. This does not mean, however, that these jurisdictions do not consider the principle of open justice. They are simply more willing to also consider whether or not this is necessarily of paramount importance in all cases when balanced against competing privacy considerations.

In this regard many of the offshore courts have considered the administrative nature of many trust applications. In this sense applications for variation, directions to trustees and blessings can be viewed as merely legal mechanisms of trust law to rearrange the basis on which the trust is administered. Accordingly, these can be seen as procedures of a more transactional nature and sometimes akin to, for example, the restructuring of a will where no public hearing would be required and the affairs would be regarded as confidential and subject to legal privilege (Bermuda High Court 2018 case of *Re E Trust*, the Royal Court of Jersey 2004 case of *Jersey Evening Post* v *Al- Thani*, Isle of Man case of Re Delphi and *Re G Trusts*).

These 'administrative' trust proceedings have been said to cast a 'quasi-paternal' role upon the courts which must be considered when striking a balance between open justice and the confidential business arrangements of settlors, trustees, and beneficiaries (*Al -Thani*). In *Re G Trusts* it was, for example, considered that there should be a presumption of privacy, as the public has no right to pry into the personal affairs of the trust.

Private hearings also provide certain practical benefits in trust proceedings, including encouraging interested parties to be more candid with the court. In this regard it has been recognized that if a party were to be concerned that sensitive information they were about to divulge could be seen by those with 'hostile eyes', they would be less likely to be candid and this would frustrate the underlying purpose of the court's paternal jurisdiction (*Al -Thani*). The additional anonymization of trust proceedings may also be necessary as full information about a case without names may be more helpful than publications of names with no details. (*HSBC Trustee*s).

Following from the above the accepted practice in Jersey, the Isle of Man and Guernsey appears to be that applications for directions by trustees are often heard in private with the judgment then being published but in anonymized form. This too is the position in the Cayman Islands and Bermuda, with the courts in these jurisdictions additionally being willing to seal the file from the public's view.
(*Re G Trusts, Julius Bear Trust, Re E Trust*).

To date the BVI court appears to have followed the position in the Cayman Islands and Bermuda with regard to hearing directions applications in private and sealing the court file. In the case of directions applications, these are usually filed alongside an application to seal the file and the sealing application will generally be dealt with on paper.

Conclusion

From the above one can see that the offshore jurisdictions tend to approach the question of privacy in trust proceedings with more flexibility than the UK courts. The balancing exercise is still relevant but these courts are perhaps more likely to accord heavier weight to the need for confidentiality in certain proceedings relating to trusts.

It is, however, important to recognize that even following this approach there are still important safeguards in place. Kawaley J, who sat as a judge in both Cayman and Bermuda, makes a strong argument in favor of privacy, opining that since offshore jurisdictions promote the establishments of trusts for the legitimate conservation and protection of wealth, courts in offshore jurisdictions should be at least sympathetic to the need for confidentiality in trust proceedings (*Julius Bear Trust*).

Confidentiality orders will, however, only be made upon the understanding that the trust is genuine on its face, the interested parties are compliant with applicable tax and anti-money laundering obligations and none of them are or become subject to public investigations. There is therefore still a clear recognition in the offshore jurisdictions that whereas there may be some legitimate reasons for privacy in trusts cases this must still be balanced against the need for open proceedings.

By Peter Ferrer, Claire Goldstein, and Tyrone Bailey, Harneys

Peter Ferrer is Co-Head of the Litigation, Insolvency and Restructuring practice of **Harneys**. He can be reached at peter.ferrer@harneys.com. **Claire Goldstein** is a partner at the firm, specializing in trusts litigation, and can be reached at claire.goldstein@harneys.com. **Tyrone Bailey** is an associate at the firm and can be reached at tyrone.bailey@harneys.com. All three authors are located in the British Virgin Islands office.