BERMUDA

SUPREME COURT

Ace Bermuda Insurance Ltd -v- Ford Motor [2016] SC (Bda) 1 Civ

CONFIDENTIALITY OF PROCEEDINGS - SECTION 6 OF BERMUDA CONSTITUTION - PRINCIPLE OF OPEN JUSTICE

The Plaintiff sought an order that previously issued summons, requesting permanent injunctions preventing the Defendant from bringing litigation which might breach a valid and binding Bermuda arbitration agreement between the parties, be conducted in camera and the court file sealed, and that any judgment or ruling be published in anonymised form. Hellman J found that the underlying issue in this case was therefore the balance of the privacy and confidentiality of arbitration proceedings with the need to uphold the constitutional principle of "Open Justice" in the instance of disputes arising from arbitration proceedings. While the proceedings were not themselves an arbitration, they involved reference to previous arbitration between the parties and to an ongoing dispute which the parties had agreed to arbitrate.

Hellman J found that the decision whether or not to hold a hearing in public was one for judicial determination on a case-by-case basis. He highlighted the principle enunciated by *Lord Woolf MR in Hodgson -v- Imperial Tobacco Ltd* [1998] 1 WLR 1056 EWCA of the need for justice to be publicly seen to be done, and affirmed that the importance of this principle is such that any departure from it must be to the extent and no more than the extent that the court reasonably believes necessary to serve the ends of justice. He also noted that access to information about what happens in Court was a more fundamental element of the principle of "Open Justice" than the ability to be present at the hearing itself.

In considering the justification, in light of this principle, for the present case to be heard in camera, Hellman J looked to the nature of arbitration itself as an essentially private process coupled with the implied obligation on the parties involved not to discuss or misuse any documents prepared for and used in the arbitration, an obligation analogous to that of secrecy between banker and customer. This relationship, he found, meant that the courts should primarily consider, when conducting this balancing exercise, the interests of the specific parties in the litigation and what their expectations of privacy and confidentiality might have been.

Hellman J then turned to the balancing exercise in this case. He found that as there was only a small amount of confidential material before the Court, the substantive hearing should be held in camera, but the rest should be held in open court. The Plaintiffs had suggested it would be more convenient for the entire proceedings to be held in camera but the Judge found that mere convenience could not justify a departure from the "Open Justice" principle. He further found that as the court files were filed prior to 1 December 2015, they would not be made available to members of the public under the recent Practice Direction on Access to Court Records in Civil Cases (Circular No. 23 of 2015), and it was therefore not necessary to order that they be sealed. While he found that the Judgment for the substantive hearing could be redacted to exclude confidential material for publication, he deferred the question of anonymising the Judgment until after it had been written.