In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 314

BETWEEN:

X Ltd — **Plaintiff**

v

B — **Defendants**

2024: Nos. 270 and 288

BETWEEN:

XX and OTHERS[1] — **Plaintiffs**

v

B — **Defendants**

RULING

(In Chambers)

Date of Hearing: 27 November 2024
Date of Ruling: 19 December 2024

---

[1] The names of the Plaintiffs in these proceedings have been anonymized for the purpose of the Ruling.

Appearances: ***Hannah Tildesley*** **and** ***Trevor Goulet*** **of Walkers Bermuda Limited for the Applicants in Action 2024 No 314**

Kyle Masters **of Carey Olsen Bermuda Limited for the Applicants in Actions 2024 Nos 270 and 288**

Ben Adamson **of Conyers Dill & Pearman Limited for the Bermuda Monetary Authority**

Shakira Dill-Francois**, Solicitor General of the Attorney General's Chambers for the Minster of Finance**

RULING of Martin J

Ruling on application for confidentiality orders in respect of proceedings

Introduction

1. This application comes before the court in 3 related sets of proceedings in which the applicants seeks relief by way of orders[2] (i) to anonymize (a) the names of the parties to the action that are recorded in the public Cause Book and (b) the names used in the Court Record in each of those proceedings (ii) to direct that the proceedings shall be heard in private so that the public may not attend and the press cannot report what is said in Court or publish the details of the documents that are referred to in the course of the hearing and (iii) to seal the Court Record of the proceedings so that the public cannot gain access to the pleadings and other documents filed on the public file after the conclusion of the trial of the application

2. This is an important matter because it engages the Court's detailed consideration of the principle of open justice, and what restrictions are appropriate where the rights of the public to see and hear the process of administration of justice come into conflict with the countervailing public interest in administering regulatory and enforcement powers under regulatory statutes in private. The policy that lies behind the conduct of regulatory proceedings in private is said to encourage compliance and fulsome disclosure by regulated persons to the regulatory authority, without fear that the information will become public before any fault has been found, and thereby (unfairly) damage the commercial reputation and business interests of the regulated entity.

Background

3. The applications arise in the context of the appeal regime under the Digital Asset Business Act 2018 (referred to as "DABA") which regulates the operation of digital

[2] The relief in the summons has the effect that I have broken down into these categories.

asset businesses (sometimes colloquially referred to as "crypto" business) by undertakings that are registered and licensed in Bermuda under that legislation[2].

4. The Bermuda Monetary Authority (the BMA) is the regulatory authority under DABA. As part of its ordinary regulatory functions the BMA conducts periodic reviews of the businesses it regulates and often makes recommendations to improve compliance with the requirements of the regulatory regime. The BMA can also appoint an independent agency to carry out an investigation into the operations of any regulated business.

5. When this happens, the agency appointed will usually conduct on-site inspections and interview staff and management in respect of operational matters. This will normally lead to a report that will be submitted to the BMA to consider what remedial action (if any) needs to be taken.

6. If the BMA finds that there has been a serious departure from the ordinary regulatory standards expected and required under DABA by the regulated entity, the BMA is empowered to issue instructions for remedial action, and may also impose civil penalties on the regulated entity (a) to punish the regulated entity for its breaches and (b) to encourage the regulated entity to ensure compliance standards are met in the future.

7. Where the BMA decides to impose a civil penalty, it will issue a "Decision Notice" informing the regulated entity of its decision. The DABA regime provides that a regulated entity that is dissatisfied with the Decision Notice may appeal to an appeal tribunal. After the determination of an appeal, a summary of the regulatory breach and the civil penalty imposed is published in the Official Gazette unless the appeal is successful, and if so, nothing is published.

8. The central issue before the Court on this application is whether it is in the interests of the proper administration of justice in this case to exercise the Court's inherent powers to shield the identities of the Applicants and ensure that there is no disclosure of information concerning the underlying facts of the case (except as between the parties) pending the outcome of the trial of the application to set aside a Decision Notice issued by the BMA under the DABA regime briefly described above.

The Applicants

9. The Applicants are (i) the Plaintiff in proceedings 2024 No 314 ("Action 314") and (ii) the Plaintiffs in proceedings 2024 Nos 270 and 288 ("Actions 270 and 288)" that have been issued with the intention of challenging the legality of the framework of the appeal regime under DABA. Their positions differ in that the Plaintiff is a company regulated

[2] The description of the DABA regime is taken from the provisions of DABA but is intended only to illustrate the features of it that are relevant to this case to show the context in which the application comes before the Court. It is not exhaustive, and the Court has avoided lengthy descriptions which are unnecessary to explain what is at issue at this stage of the proceedings.

under DABA and the Plaintiffs in Actions 270 and 288 are the officers and beneficial owners of the Plaintiff in Action 317.

10. The Plaintiff in Action 314 wishes to argue that no lawfully constituted tribunal has been appointed to consider the Plaintiff's appeal from a decision of the Bermuda Monetary Authority, and that this means that the Plaintiff has been (and is being) denied its constitutional right to a fair hearing within a reasonable time.

11. The Plaintiff in Action 314 intends to argue that no fixed body of persons has been appointed by the Minister of Finance to serve as an appeal tribunal under DABA, and that no regulations have been issued by the Minister of Finance to provide the framework that of how those appeals are to be conducted (unlike in respect of other regulated sectors). The Plaintiff in Action 314 says that the absence of these features of the regime under DABA mean that a regulated entity has no means of legal redress under DABA despite having a statutory right of appeal to an appeal tribunal. Therefore, the Plaintiff says (i) the Decision Notice should be quashed and/or (ii) the Decision Notice is unconstitutional because (in the absence of a properly constituted appeal tribunal) the regulated entity cannot get a fair trial of an appeal within reasonable time in breach of the rights guaranteed under clause 6 (9) of the Bermuda Constitution[3].

12. The Plaintiff in Action 314 also intends to argue that the Minister is in breach of duty in not promulgating the regulations under DABA, so that there is no mechanism or procedure by which the appeal can be lawfully conducted. Furthermore, it says that no panel has been appointed in accordance with section 49 of DABA, which they say is required by DABA, so that the recent purported appointments of members of a tribunal to hear the Applicants' appeal is of no avail. In addition the Plaintiff takes issue with particular appointees as not having the requisite qualifications to sit on the tribunal in accordance with the criteria specified in DABA.

13. The Plaintiffs in Action 270 intend to argue that the appeal regime under DABA is unconstitutional because no right of appeal is given to them under DABA and their actions are the subject of the regulatory regime, which makes the regime unfair and unconstitutional. The Plaintiffs in Actions 270 also say that the lack of a properly constituted appeal tribunal under DABA makes the process unconstitutional, and they say they wish to obtain relief from the court to strike down the Decision Notice and the relevant provisions of the Act itself as being unconstitutional. They are proposing to make similar arguments to the Plaintiff in Action 314, so these are not repeated.

14. The Plaintiffs in Action 280 (who are the same as the Plaintiffs in Action 270) intend to seek judicial review of the Decision Notice and seek relief from the Court to quash the Decision Notice on the grounds that no reasonable regulator would have made the

[3] The Bermuda Constitution derives its legal existence from the Bermuda Constitution Order 1968 which is an Order in Council of the Privy Council, not an act of the Bermuda Legislature.

decision that the BMA did in this case. These arguments will engage a different analysis the legal tests but will seek the same effective relief.

15. The Court makes clear that the merits of these arguments as a matter of law is not before the Court on this application. Those are matters which will ultimately be determined after a trial, and may involve other arguments, and will be based on evidence which is not before the Court at the present time. The Court expresses no views on the merits of the arguments but has set out the main points in summary form to illustrate the context of the present application. The nature and scope of the proceedings is highly relevant to the Court's assessment of the public policy arguments that have been advanced, and whether issues of the kind the Plaintiffs collectively intend to argue are appropriate to an 'open' or a 'closed' hearing.

16. For ease of reference and economy of expression, I shall refer to the Plaintiffs in each of the proceedings taken together as the "Applicants" for the purposes of the present applications. They each make substantially similar arguments, even though their respective positions under DABA differ. This may mean the Court will decide that different considerations apply to their respective positions at the trial, but they can conveniently be taken together for the purposes of the present application.

Disposition

17. For the reasons explained below, the Court has decided that it is not appropriate to impose any special restrictions on public access to the documents filed in these proceedings, nor to anonymize the proceedings, nor to conduct the proceedings in private. To the extent that there are (or may be) materials that relate to proprietary information which is a trade secret or other information in respect of which there is a significant justification to keep it confidential, an application can be made to the Court to seal that information or give appropriate directions to restrict access to it by non-parties in the conventional way. Subject to the provisos set out in paragraphs 20-22 below, the ordinary rules that apply under the Supreme Court Records Act 1955 and the Practice Direction A/50 (No 23 of 2015) will apply to the proceedings in each of the respective Actions.

Anonymisation and sealing the Record of this Ruling

18. The names of the Applicants have been anonymized in this judgment. This is because it is in the interests of the public administration of justice that an application to anonymize or seal the court record can be made without the party applying risking public disclosure of the very information that the application is intended to protect[4]. Once an application for anonymization has been decided, then the applicant can proceed either with the benefit of the protection that the court has granted, or the applicant can decide not to proceed if no protection is granted. It would undermine public confidence

[4] This is in line with the approach taken by Kawaley CJ in **Bermuda Gaming Commission v Schuetz** at paragraphs 4-6 of the judgment referred to at paragraph 67 below.

in the judicial system if the court could not entertain an application for anonymization if the applicant had to gamble that the outcome would be favourable.

19. In this case, if the Applicants decide not to proceed then the Court Record will remain sealed, and no one shall have access to it except upon application to the Court, and the entry on the Court Record and in the Cause Book will remain anonymized. However, if the Applicants choose to proceed with their respective claims they will (obviously) lose the protection of the anonymization of this application, and all information on the Court Record will become subject to the normal rules as to public access that would apply under the Supreme Court Records Act 1955 and the Court's Practice Direction No A/50 (23/2015).

20. In the event that the Applicants wish to appeal to the Court of Appeal against this decision, the Court will entertain an application to anonymize the application for leave to appeal and (if leave is granted) the appeal proceedings themselves on the same principle set out in paragraph 18 above.

21. The names of the Ministry of Finance and the Bermuda Monetary Authority have not been anonymized in this Ruling because, in the context of DABA, those are the relevant public bodies, and it would be pointless and confusing to anonymize their names.

The Application

22. The essence of the present application is to seek an order to maintain the privacy of the proceedings that it is said would normally apply on an appeal from a decision of the BMA to an appeal tribunal under section 48 of DABA (the "Tribunal"). Although there are no regulations under DABA at present, it is said that the BMA has publicly confirmed that appeals made to an appeal tribunal from a Decision Notice are to be heard in private.

23. While counsel for the BMA was prepared to accept the proposition that the proceedings before an appeal tribunal under DABA will be heard in private, the Solicitor General speaking on behalf of the Minister of Finance has not conceded that the privacy of those appeal proceedings would be guaranteed. This is because no regulations under DABA have (yet) been issued, and she says that it cannot be assumed that those regulations would include a right of privacy in relation to an appeal against a Decision Notice to the Tribunal.

24. The Applicants say that it is essential for the maintenance of public confidence in the DABA regime to preserve the right of confidentiality in relation to the substantive applications that the Applicants intend to make to the Court. This is said to be necessary

    i. to ensure that confidentiality of information that was supplied to the regulatory authority under DABA is maintained (the 'Confidentiality argument'); and

ii. to avoid the risk that anyone disclosing information that is covered by DBA or even by referring to it, might be containing the criminal sanctions in section 67 of DABA that prohibit disclosure unless consent to the relevant parties has been obtained (the 'criminal jeopardy' argument).

Criminal jeopardy

25. As a matter of logic and convenience the Court will address the criminal jeopardy point first before turning to the Confidentiality arguments in the context of the principles of Open Justice.

26. In support of the criminal jeopardy argument, the Applicants say that they face liability to criminal prosecution if they disclose any information that relates to the appeal from the decision of the BMA in the course of making a challenge to the constitutionality of the DABA appeal regime in open court. They say that this is because section 67 of DABA provides:

*"**Restricted information***

*67. "(1) Except as provided by sections 68, 69 and 70, **no person** who—*

*(a) under or for the purposes of this Act, **receives information relating to the business or other affairs of any person**; and*

*(b) **obtains information directly or indirectly from a person who has received it** as provided under paragraph (a),*

***shall disclose** the information **without the consent of the person to whom it relates and** (if different) **the person from whom it was received as aforesaid.**"*[5]

27. It is said that the exceptions set out in sections 68, 69 and 70 do not apply to applications to the Court, and therefore the Applicants would be in jeopardy of serious criminal sanction[6] if they disclosed information about the Decision Notice (or other non-public information relating to the case) in the constitutional challenge proposed to be made in these proceedings. The Applicants say they would have to get the consent of anyone to whom the information related, and this would be burdensome, if not impracticable. They say that if any of the relevant persons refused their consent, (including the BMA) then it would frustrate the Applicants' ability to get a fair hearing. The Applicants relied on the fact that the BMA had raised this very objection to the Applicants' use of a certain document in these proceedings to illustrate their point[7].

28. The Applicants say that whatever the purpose of the provision in section 67 of DABA is, it has to be interpreted literally and on a literal interpretation the prohibition that

[5] Emphasis has been added to show how a literal interpretation of these words may lead to the very wide scope of its application contended for by the Applicants.

[6] The penalties are on summary conviction a fine of up to BD$50,000 or imprisonment for up to two years or both and on indictment a fine of BD$100,000 or imprisonment for up to 5 years or both.

[7] Details have not been given to preserve the confidentiality of the contents of the document for the purposes of this application.

begins "no person" extends to the Applicants disclosing information about themselves, or the information provided to the BMA by third parties to which they have become privy in the course of an investigation by the BMA and the information provided to the BMA's agent, and any report given to the BMA by the agent about the investigation, or any employees of the Applicants who provided information to the BMA directly or indirectly.

29. In my view an examination of the exceptions in sections 68 to 70 of DABA sheds light on the proper interpretation of section 67 and its scope. These sections provide:

"***Disclosure for facilitating the discharge of functions of the Authority***

68. (1) Section 67 does not preclude the disclosure of information in any case in which disclosure is for the purpose of enabling or assisting the Authority to discharge—

(a) its functions under this Act; and

(b) its functions under the Bermuda Monetary Authority Act 1969.

(2) Without prejudice to the generality of subsection (1), section 67 does not preclude the disclosure of information by the Authority to the auditor or accountant of a licensed undertaking, or to the person appointed to make a report under section 59 (1) (b) if it appears to the Authority that disclosing the information would enable or assist the Authority to discharge the functions mentioned in that section or would otherwise be in the interests of clients or potential clients of a licensed undertaking.

Disclosure for facilitation the discharge of functions by other authorities

69. (1) Section 67 does not preclude the disclosure of information to the Minister or other authority in Bermuda in any case in which disclosure is for the purpose of enabling or assisting him or it to discharge his or its regulatory functions.

(2) Section 67 does not preclude the disclosure of information for the purpose of enabling or assisting an authority in a country or territory outside Bermuda to exercise functions corresponding to the functions of the Authority under this Act.

(3) Subsection (2) does not apply in relation to disclosures to an authority unless the Authority is satisfied that the authority is subject to restrictions on further disclosure at least equivalent to those imposed by sections 67 and 70 and this section.

(4) Section 70 does not preclude the disclosure of information—

(a) for the purpose of enabling or assisting a person to do anything which he is required to do in pursuance of a requirement imposed under section 59(1)(b);

(b) with a view to the undertaking of, or otherwise for the purposes of, any criminal proceedings, whether under this Act or any other Act;

(c) in connection with any other proceedings arising out of this Act.

(5) Section 67 does not preclude the disclosure by the Authority to the Director of Public Prosecutions or a police officer not below the rank of inspector of information obtained pursuant to section 62, 63 or 64 or of information in the possession of the Authority as to any suspected contravention in relation to which the powers conferred by those sections are exercisable.

(6) Information which is disclosed to a person in pursuance of this section shall not be used otherwise than for the purposes mentioned in this section.

Information supplied to the Authority by relevant overseas authority

70. (1) Section 67 applies to information which has been supplied to the Authority for the purposes of any relevant functions by the relevant supervisory authority in a country or territory outside Bermuda.

(2) Information supplied to the Authority as mentioned in subsection (1) shall not be disclosed except as provided by section 67 or—

(a) for the purpose of enabling or assisting the Authority to discharge its functions under this Act; or with a view to the undertaking of, or

(b) otherwise for the purpose of, criminal proceedings, whether under this Act or any other Act.

(3) In this section—
"relevant functions", in relation to the Authority, means its functions under this Act;
"relevant supervisory authority" means the authority discharging in a country or territory outside Bermuda functions corresponding to those of the Authority under this Act.

30. It is immediately apparent that sections 68 to 70 each relate to the disclosure of information *by the Authority* for the purposes of (i) performing its own functions or providing information to the licensed undertaking or its auditors and accountants (ii) discharging the regulatory functions of the Minister of Finance domestically or internationally (iii) instituting (or providing it for use in) criminal proceedings and (iv) any other proceedings arising out of DABA.

31. As these are *exceptions* to the embargo on disclosure of information in section 67, the necessary implication and, in my judgment, the only proper interpretation of the provision is that the words "no person shall disclose" mean that no person in the BMA to whom information has been supplied under DABA shall disclose that information unless it falls within one of the categories of exception created by sections 68-70. It does not mean 'no person in the world', as contended for by the Applicants. The over-literal meaning advanced by the Applicants would prevent a licensed undertaking disclosing information about itself, or information provided by the employees of a licensed undertaking to the BMA in the course of complying with reporting functions

to the BMA, or that relates to any other person referred to in it, without getting the prior consent of the person to whom the information relates. Such an interpretation would quickly lead to absurdity. It would make the whole regime practically unworkable.

32. It is a well-established principle of statutory interpretation that the Court will not construe a statutory provision (especially one that imposes criminal sanction for its breach) in a manner which would lead to absurd results. Parliament is presumed not to have intended to pass a law which is unworkable, and the Court will not so construe a provision unless constrained by clear language that is incapable of any other interpretation[8].

33. In relation to contractual and statutory interpretation the Privy Council has explained that there is really ever only one question: is that what the provision in the relevant instrument, read as whole against the relevant background, would reasonably be understood to mean?[9]

34. Here, the Court considers that the only interpretation of the provision that can reasonably be derived is that it is to prevent unauthorised disclosure of information relating to the licensed undertaking by the BMA. The clear purpose is to protect the licensed undertaking from the risk of disclosure by the BMA (through its officers, employees or agents) of private and commercially sensitive information about the licensed undertaking's business affairs where that information has been supplied to the BMA in the exercise of its regulatory functions. In my judgment that is the meaning that is to be reasonably understood from the provision, both in its specific context in the Part 10 of DABA, which deals with "Restriction on Disclosure of Information", and in the context of DABA when read as a whole.

35. The Court is fortified in its interpretation of section 67 of DABA in this way by a cross reference to the provisions of sections 20 I and 31 of the Bermuda Monetary Authority Act 1969 which enact similar provisions imposing a duty of secrecy upon the officers, employees and advisers engaged by the BMA and imposing the same range of penalties for breach of those provisions, along with a similar range of exceptions.

36. Therefore, the Court rejects the submission that the Applicants will face criminal jeopardy if they disclose information relating to the Decision Notice (or the details that gave rise to the Decision Notice) in their respective applications for relief if they refer to that information at an open hearing or if documents are referred to in open court which will become available for inspection by the public after the case has been determined.

---

[8] The so called 'golden rule'. See *Bennion on Statutory Interpretation* (6th Edition 2013) Rules 312-3.
[9] **Attorney-General of Belize et al v Belize Telecom et al** [2009] UKPC 10 at paragraph 21per Lord Hoffman.

37. The Court wishes to make it clear that if the Court had been satisfied that the Applicants could not make their application to the Court for relief under a constitutional challenge to DABA without being liable to criminal prosecution, then the Court would have engaged in a different analysis.

38. If the Court were to have reached the conclusion that the Applicants were truly exposed to liability to criminal sanction by referring to the information that was supplied to the BMA, the Court would have granted some of the relief sought in this application. The Court would not have directed that the proceedings proceed *in camera* but would have given directions (i) to conduct part of the proceedings in private to prevent the confidential information being disclosed in public and (ii) to seal part of the Record which contained the relevant information. The Court would not have anonymised the proceedings because of the view the Court has taken in respect of the conduct of this case in public under the principles of Open Justice which are discussed below.

Confidentiality

39. In support of their application the Applicants rely upon the Consultation Paper on the Appeal Tribunal Framework[10] issued by the Ministry of Finance and the BMA dated 2 June 2021 which states[11]

> *"7.5 In addition, an additional challenge has resulted from the need to find an appropriate location for the proceedings given the* ***sensitive and highly confidential nature of the proceedings****.*
>
> *12. As the prudential regulator for ten (10) different kinds of financial institutions[12], the Authority's appeal framework has been adjusted to accommodate the particular characteristics and risks of each sector. Accordingly, some Acts include additional rights to appeal; other Acts have a more limited scope. However, all the tribunals have common features:*
>
> *a. Appeals are heard,* ***in private****, as and when they arise.*
>
> *b. Each tribunal consists of a chairman, who is legally qualified and two other members from the panel members who have knowledge and experience relevant to assist in their consideration of a particular case.*
>
> *c. The Chairman is responsible for the management of the Tribunal and provides guidance on practice and procedure. The Chairman's responsibilities are set out under the relevant Regulations that set out the*

[10] The Consultation Paper was seeking public participation in the proposed amendments to the appeal framework to replace the appeals to the Tribunal by an appeal directly to the Court.
[11] The elements that the Applicants rely on to show that the policy of confidentiality and privacy across the regulatory regime across all sectors have been highlighted in bold.
[12] These are Banks, Credit Unions, Money Service Businesses, Fund Administrators, Insurers, Investment Funds, Licensed Trustees, Corporate Service Providers, Investment Advisers and Digital Asset Businesses.

procedures of the Tribunal. It is the Chairman's job to consider each appeal and to make any decisions or directions about the appeal before it comes to a hearing.

d. *There is a right to appeal to the Court on a question of law arising from a decision of a Tribunal, and a further appeal from the Court tot he Court of Appeal, with leave.*

e. *Tribunal decisions are published in the Official Gazette.*

f. *Notwithstanding the above, a Tribunal is required to* ***protect commercially sensitive information*** *or information given to the appellant or the Authority* ***in confidence*** *and for that purpose may make any necessary amendments to the text of the decision to* ***conceal the identity of the appellant*** *or the source of any such information.*

g. *A tribunal may give such directions as it thinks fit for the payment of costs or expenses by any party to the appeal."*

40. Although the Minister of Finance has not (yet) promulgated any regulations under DABA (which is an independent ground of complaint), the Applicants say that it is clear that the general policy of the Minister and the BMA is that all regulatory tribunals are conducted in private[13]. They say that therefore, any court proceedings directed at challenging the legality of the appeal process under DABA should also be conducted in private, and there should be restrictions on the disclosure of any information that is produced in support of the challenge. It is said that it is (in effect) the public policy of the Bermuda government that all such matters shall be kept confidential, and that this policy justifies a departure from the general rule that all court proceedings are conducted in public (the "Open Justice" principle).

41. Further, the Applicants rely on the fact that the DABA regime provides that the Decision Notice must not be published until after the determination of an appeal to the Tribunal. The Applicants say that by making an application to Court to challenge the constitutionality of the regime, it cannot be right that they would lose their right to confidentiality and privacy which would otherwise protect them from making any public disclosure of their identities or the facts surrounding the Decision Notice.

[13] I have noted above that the Minister does not concede that the same would apply under the regulations under DABA because they have not been promulgated and so it is inappropriate to assume that the Minister would be bound to include a similar provision.

The Constitutional Challenge

42. As noted above, the application to challenge the validity of the Decision Notice and the proceedings under DABA is not before the Court on this application, and it is likely that the grounds on which the challenge is to be made may be further refined and developed before it comes on for hearing. However, the scope of the challenge and what it will involve the Court in determining is highly relevant to the exercise of the Court's powers in giving its directions as to whether the proceedings should be conducted in private or whether the names of the parties should be anonymised and what reporting restrictions ought to be placed on the proceedings.

43. The Applicants say that they wish to challenge the Decision Notice on several grounds that they say go to the root of the legality of the whole statutory appeal process under DABA. Put broadly, the grounds are that (i) there are no rules of procedure by which the appeal can be administered, such as to time for filing the appeal or on whom to serve it and what procedural rules will be applied[14] (ii) there is no panel appointed under section 49 of DABA so there is no properly constituted appeal tribunal from which to select members, and no Chairman and Deputy Chairman have been appointed so that the mechanisms contemplated by DABA have not been made effective[15] (iii) the individuals who have been recently been appointed as the members of the Tribunal for the hearing of the Applicants' appeal are either not qualified or experienced (in different ways) to sit as the appeal panel[16].

44. It is obvious that if the criticisms of the appeal regime under DABA are upheld, it will have a very wide impact on the whole of the supervision and enforcement of the digital asset business sector in Bermuda. The challenge therefore engages consideration of the wider public interest in the proceedings, both as to the challenge and the potential outcome. In short, the challenge is one of public importance and general interest across the whole of the financial sector and the wider community.

Open Justice

45. Before examining and assessing the merits of the submissions that were made in support of the application, it is helpful to have in mind the general principles that apply to the conduct of cases, and to set out the considerations the courts take into account when considering whether to grant relief of the type that has been requested in this case.

[14]Section 78 of DABA provides that the Minister "may" make regulations for the implementation of the Act. It is said that in this context "may" should be interpreted as "shall" because otherwise the appeal process is unworkable.

[15] Section 49 of DABA provides that the tribunal shall be constituted in accordance with the section which requires (inter alia) that the Chairman and Deputy Chairman shall be appointed for a term of up to three years and shall be barristers of at least 7 years' standing and that the other members of the tribunal shall be selected from a panel of members appointed by the Minister, and who shall be persons who appear to the Chairman of the panel to have relevant experience (i.e. for the hearing of the particular appeal). The use of the imperative is given emphasis in my summary to explain the basic nature of the argument.

[16] No details are set out here to preserve the confidentiality of the persons involved and the objections which may have to be considered in a different context at a later date.

46. It is basic to the whole system of the administration of justice in a modern democratic society that justice shall be administered in public. The reasons for this are many. The Supreme Court of the United Kingdom has explained that this is so that the public can understand and scrutinise the justice system of which the courts are the administrators, and to understand why decisions are taken[17]. Judges administer justice according to law on behalf of the whole community[18], and the conduct of proceedings in public is the best way to demonstrate that the law treats all subjects alike in the determination of their rights according to law. These attributes of the common law system have been hard won over many centuries, and they can only be guaranteed if the Court conducts its business in the open for all to see. This is what is often called the principle of "Open Justice"[19].

47. The Open Justice principle is embedded into the laws of Bermuda in (i) the Bermuda Constitution[20] and (ii) the Supreme Court Act 1905[21]. Open Justice also requires that all judgments of the Court must be published (although sometimes subject to certain restrictions that will be examined briefly below).

Exceptions to the Open Justice principle

48. Although Open Justice is a fundamental constitutional principle, it is not absolute. Clause 6 (10) of the Bermuda Constitution permits the Court to exclude persons other than the parties 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, or the protection of the private lives of persons concerned in the proceedings.

49. The courts have held that departures from the Open Justice principle may be justified to the extent they are strictly necessary for the attainment of justice, or where the attainment of justice would be rendered "doubtful" or "impracticable"[22] or a "denial of justice"[23].

50. In such cases where the attainment of justice in a particular case will be threatened or undermined, the courts have a wide range of options available to assist in achieving justice and, to the extent necessary, to give protection to parties to protect their identities or to prevent the information that is the subject of the proceedings from being disclosed publicly. These options include exclusion of the public from some part or all of the

---

[17] **Cape Intermediate Holdings Ltd v Dring** (for and on behalf of Asbestos Victims Support Group Forum UK) [2019] UKSC 38 at paragraphs 37, and 41-3.
[18] Per Sir John Donaldson MR in **R v Chief Registrar *Ex parte* New Cross Society** [1984] 1 QB 227 at page235 C
[19] See the explanation given in **Hodgson v Imperial Tobacco Ltd** [1998] 1 WLR 1056, 1069 G to H and 1071 C -F per Lord Woolf MR.
[20] Clause 6 (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."*
[21] See sections 11, 20 and 36 which provide for sitting in public but allowing the Court to deal with interlocutory matters in Chambers and any matters permitted by law to be dealt with in Chambers.
[22] **Scott v Scott** (1913) AC 417, 437-9 and 466 per Lord Haldane LC and Lord Loreburn respectively.
[23] ***ex parte* New Cross** (above) at 235 F per Sir John Donaldson MR.

proceedings, restrictions on reporting proceedings, sealing some or all of the Court Record of the proceedings, anonymising the names of the parties and producing a decision that omits the information that is protected, and giving a public judgment that explains the decision but without explicit reference to the material or information that needs to be kept confidential.

51. From the cases it is clear that the court must give the protection only to the extent that it is strictly necessary and proportionate[24], and only in cases where the circumstances demand the court's intervention. This is to prevent injustice or undermine public confidence in the administration of justice. It is therefore only in cases which justify an exception of this type, which must be shown on the evidence, or be manifest from the circumstances of the case, and "powerful reasons" must be shown before the court will be moved to exercise these powers[25].

The Applicants' position

52. It is accepted by all parties that there are some well recognised exceptions to the Open Justice principle in cases involving the national interest and public safety, public morality, the protection of minors, and the protection of rights of privacy and commercial confidentiality[26].

53. The Applicants agree and accept the application of the principles of Open Justice but seek to bring themselves within the limited range of exceptions to the principle. One of these exceptions arises where information has been communicated under a duty of confidence, where it has been held that the court must give great weight to the public interest in protecting that confidential information[27].

54. It is said that the information that was provided to the BMA was under compulsion of statutory secrecy and that there is a strong public interest in ensuring that the confidential character of that information is respected and protected. It is said that Bermuda's position as a sophisticated international financial centre and the regulation of international businesses attracts a strong public interest in protecting the confidentiality of information supplied to the regulator. It is submitted that this is to encourage open and frank dialogue between the regulated entity and the regulator without which the system will be less effective and lead to a reluctance on the part of regulated entities to be as candid, for fear that information disclosed might eventually end up in the public domain.

---

[24] See **Greystoke v Financial Conduct Authority** [2020] EWHC 1-11 (QB) at paragraphs 32 and 36 per Steyn J
[25] **MJM Limited v Apex Fund Services Ltd** [2020] SC (Bda)17 Com (12 March 2020) at paragraphs 7-9 per Hargun CJ.
[26] See the discussion of the history and development of the exceptions to the open justice principle in **Khuja (formerly PNM) v Times Newspapers Ltd** [2017] UKSC 49 at paragraphs 13-18 per Lord Sumption JSC.
[27] **Brevan Howard Asset Management LLP v Reuters Ltd** [2017] EWCA Civ 950 at paragraphs 62-69 and applied in **Greystoke** (above). *"It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals..."* quoted with approval from paragraph 67 of the Court of Appeal's Judgment in the *Prince of Wales'* case per Lord Phillips CJ.

55. This is said to engage a competing public interest which must be weighed against the Open Justice principle described above, and it was submitted that the competing interests of public policy expressed in the secrecy provisions under DABA justifies a departure from the normal rules. A number of examples were relied upon where it was said that the court has departed from the principle of Open Justice. It was said that these examples show that the court often has to take both practical and common-sense steps to protect the integrity of the court process, and that extending the same protection to the Applicants in this case would not undermine the Open Justice principle to any greater extent.

Practice Directions

56. The Supreme Court has issued a **Practice Direction on the Publication of Judgments and Rulings given in Chambers** (No7 of 2006) which allows the court to prohibit the publication of a ruling or order it to be edited when it considers it necessary and expedient to do so in the interests of justice and commercial confidentiality.

57. The Supreme Court has also issued a **Practice Direction on Access to Court Records in Civil Cases** (No 23 of 2015) which allows the public access to copies of the originating process of proceedings issued in the Court (i.e. the Writ, Originating summons, Petition or Originating Motion) and all judgments and Orders made in civil and commercial matters while they are pending, except for cases where the Court has otherwise ordered and in divorce matters and matters relating to children, arbitrations, trusts, administration of estates, and winding up proceedings. Access to the full Court Record is not permitted until the proceedings have come to a final conclusion.

58. It was said that these **Practice Directions** illustrate the use of the Court's inherent powers to regulate access to information in ordinary cases (i.e. where statutory secrecy duties are not involved) and show that the Court is astute to protect the confidentiality of materials filed in court proceedings until the outcome (except for the originating process and any orders or rulings made—and those rulings may themselves be edited to protect commercial confidentiality).

Case law examples

59. The Applicants point to other examples where the Court has been prepared to apply those protections by way of analogy. The cases are relied upon to illustrate the Court's approach in matters involving the protection of confidential information and the Applicants invited the Court to apply a similar analysis in this case.

60. In **Greystoke v Financial Conduct Authority**[28] the applicant sought disclosure of personal information that the Financial Conduct Authority that the applicant thought the Authority might use when it was determining his application to revoke a Prohibition Order that had been made against him. A witness statement in the proceedings referred

[28] See footnote 24 above

to matters which the Authority is under a legal obligation to keep confidential. Steyn J held that it was strictly necessary to make an order (i) for the conduct of a small part of the trial in private (ii) to impose reporting restrictions on the private hearing and (iii) to seal the record of the hearing to the extent that certain specified documents would not be provided to a non-party without an Order of the court[29].

61. The Applicants drew attention to the similarity of the factual background (including the statutory obligation of secrecy placed upon the regulator) and submitted that the practicality of conducting the constitutional challenge without being able to refer to the relevant information which lies at the heart of the challenge would be extremely burdensome and that it would be preferable to hold the hearing in private altogether.

62. The Applicants referred to **Cape Intermediate Holdings Ltd v Dring**[30] and submitted that the Court should adopt a balancing exercise to weigh the preservation of the statutory right of secrecy that regulated entities would have in other appeal proceedings (and which they submit the court should assume that they would have under DABA if regulations had been promulgated) which it was submitted should prevail over the normal rule of a public hearing. It was submitted that the Court should take into account the practicality of holding a hearing partly in public and partly in private and excluding the public from having access to certain information and the proportionality of making an order in a case of this kind. It was said that the cost and inconvenience of making such orders would impinge on the Applicants' ability to present their arguments appropriately, and the only practical and just way to deal with the case was to direct a closed hearing.

63. In addition, the Applicants referred to the criminal jeopardy point (that was addressed above) in support of the claim that the Applicants would suffer liability to serious criminal penalty if they breached the secrecy provisions of section 67 of DABA, and this risk had to be removed in order for them to have a fair and just hearing of their constitutional challenge.

Bermuda Cases

64. All parties referred to a number of Bermuda cases in which the court has exercised its powers in a commercial or privacy setting where it held that some form of protection was appropriate to restrict public access to confidential information.

65. In **Ace Bermuda Insurance Ltd v Ford Motor Company**[31] the court restricted public access to material which had been produced as an exhibit to an affidavit which set out details of a confidential settlement agreement in a previous arbitration and the details of a dispute which the parties agreed were to be the subject of a further arbitration.

[29] See paragraphs 34 to 37 of Steyn J's judgment.
[30] See footnote 17 at paragraphs 48 and 50 of the judgment in that case.
[31] [2016] SC (Bda) 1 Civ (6 January 2016)

66. The court held that the confidential material remained confidential and directed the material to be sealed and for part of the proceedings which required reference to the material to be conducted in private. This was an example of a commercial setting in which privacy rights were respected, stemming from the private nature of arbitration, and the public interest in promoting the private settlement of disputes where the parties have entered into a binding agreement that ensures the confidentiality of their private information.

67. In **Bermuda Gaming Commission v Schuetz** [32] the court was asked to enforce contractual covenants of confidentiality in the contract of employment of a former chief executive by way of injunction. Both the application and the decision were governed by secrecy by direction of the court which made those orders to protect (i) the confidential information and (ii) the authority of the court[33]. In that case, the very confidentiality of the information was the subject-matter of the proceedings.

68. In **Guardian Limited v Bermuda Trust Company Limited**[34] and in **Re G Trusts** [35] the court considered the extent to which anonymisation orders and sealing the records of the proceedings in routine applications by trustees of trusts are appropriate. In **Guardian** Kawaley CJ held that there was no public interest in knowing the identity of the persons involved in the particular case which could outweigh the parties' privacy rights[36]. In **Re G Trusts** Kawaley CJ held that the context of confidentiality orders in trust cases under section 47 of the Trustee Act 1975 required the trustee to make application to the court to authorise the transaction and that it would be contrary to principle that the act of making the application destroyed the confidential nature of the information that had to be disclosed in order to get the relief sought[37].

69. By analogy, the Applicants say that the very act of applying to this Court for relief to challenge the DABA appeal regime should not result in losing the confidentiality which would normally attach to the appeal itself.

Stepping outside the DABA regime

70. The tension between seeking to uphold the principle of Open Justice and providing effective justice has been considered in the context of appeals from statutory tribunals where the proceedings before the tribunal were confidential. In this case, if there had been an appeal to a tribunal (and assuming that it had been conducted in private for the purposes of this point), then the Applicants would have a right of appeal to the Court on a point of law. In that situation, the appeal to the court would normally be conducted in open court.

---

[32] [2018] SC (Bda) 24 Civ (12 March 2018)
[33] Paragraphs 18- 20
[34] [2009] SC (Bda) 54 Civ (1 December 2009)
[35] [2017] Bda LR 134
[36] At paragraph 24
[37] At paragraphs 10-11

71. The Applicants say that they have not reached that stage, they are still at the appeal to tribunal or first stage of the process where their privacy rights are still engaged.

72. In **Willford v Financial Service Authority**[38] Mr Willford sought judicial review of the decision of the Financial Services Authority (the "FSA") on the basis that the decision notice in his case had failed to inform him sufficiently why his submissions had been rejected. Mr Willford did not follow the statutory appeal process. At first instance Silber J held the hearing in private and the decision was published in an anonymised and redacted form on the basis that Mr Willford's appeal would have been held in private. On appeal to the Court of Appeal, the Court declined to grant similar protection once its judgment had been handed down.

73. The Court of Appeal held[39]:

> *"Although the FSA disciplinary proceedings were private, once [Mr. Willford] stepped outside those proceedings, whether by referring the matter to the Upper Tribunal or by making a claim for judicial review, he brought the matter into the public forum where the principle of open justice apples."*

74. The Applicants say that they have not "stepped outside" DABA because there is no regime in place, and they have no choice but to come to court to protect their constitutional rights. Further, they say that even the Court of Appeal in **Willford** accepted that where anonymity is necessary to enable the court to grant effective relief, the position may be different[40]. The Applicants say that **Willford** does not apply because (i) there was no challenge to the right to a fair hearing in that case (ii) that in this case the in interests of justice would be prejudiced.

75. **Willford** was followed by the Court of Appeal in Bermuda in **DPP v Clarke**[41]. The case involved an application for judicial review of the decision by the Director of Public Prosecutions to initiate disciplinary proceedings against her Deputy. The Deputy sought an order for anonymisation of the appeal proceedings to the Court of Appeal on the grounds that the disciplinary proceedings were to be conducted in private, and that the first instance court had made such an order. The Court of Appeal refused the application on the grounds set out in **Willford**, noting that the Director and the Deputy are both in positions of statutory power and where a dispute arises between them the public have a right to know[42].

[38] [2013] EWCA Civ 674
[39] At paragraph 9 of the decision
[40] At paragraphs 5 and 10 of the decision.
[41] [2019] Bda LR 46
[42] At paragraph 11 of the decision.

The position taken by the BMA and the Minister of Finance

76. The position of the BMA and the Minister on these points can be shortly stated. They submit that (i) there is no information that is confidential that is the subject matter of the proceedings, unlike the cases of enforcement of privacy rights as in the **Bermuda Gaming** case or the **Ace Bermuda Insurance Ltd** case (ii) the position is not analogous to the position of trustees applying to the court for relief under the powers of section 47 of the Trustee Act 1975 (iii) there is no balancing exercise: there must be a clear case that the ends of justice would be defeated and personal embarrassment resulting from public disclosure is not relevant (iv) the Applicants have stepped outside DABA and the Court is bound to follow **DPP v Clarke**.

77. The BMA say that the cases show that where necessary any truly confidential information can be put in a confidential annex to the witness statement or affidavit and the court can adjust the relevant references in the judgment to take account of any concerns of confidentiality and point to the Bermuda cases referred to above where this has been done as a matter of routine. They say that this Court should take the same approach in this case.

78. The Minister supported those submissions and re-iterated that there can be no assumed right to privacy in the appeal proceedings under DABA so that the premise of confidentiality underpinning the application is entirely misconceived.

The Court's assessment of the competing factors

The Constitutional challenge

79. In my judgment, the Court must start the analysis by assuming that all cases must be conducted in public unless the Applicants can show by compelling reasons why their private interests outweigh the fundamental principle of Open Justice. If there is a balancing exercise to be performed, then at the outset the balance of the scales is tipped firmly in favour of an open hearing.

80. The Court considers that the nature of the application (i.e.to challenge the legality of a public statute or decisions made under it in the context of a regulated business) itself demonstrates why the case is not suitable for hearing in private. There is obvious public importance to the conduct of a constitutional challenge in the open that outweighs any possible private interest in protecting confidential information of the parties. On this ground alone I would not have been prepared to grant the relief sought for a private hearing or to impose restrictions on the publication of any documents referred to in Court or in the pleadings.

81. This is partly based on the consideration that the public (and other regulated bodies) have a real legal interest in knowing how the BMA exercises its powers and what matters the BMA takes into account in making its decisions, as well as the process by which a regulated person can exercise his or her or its rights of appeal. Moreover, if the

Court were to come to the conclusion that any of the steps taken by the BMA in this case were unlawful or ought to be quashed, there is an overwhelming public interest in this being disclosed in public and for the proceedings and the materials to be available to the press.

82. As to the anonymisation of the parties' names, the Court cannot see why this protection is needed. This is because the basic details of the Decision Notice (including the parties names) will be published if the Notice is upheld, and the Applicants will be vindicated and validated if it is not. The protection is not intended to protect the identities of parties who would rather not be named; on the contrary, there must be a powerful public interest reason to grant that type of protection which, in my view, does not arise in this case.

Stepping outside DABA

83. The Court considers that in launching these proceedings the Applicants have stepped outside DABA (on the assumption that DABA would guarantee privacy of the hearing which has not been conceded). It seems to me that when the Court is asked to intervene from outside the statutory framework to make a declaration as to its validity or otherwise, it necessarily involves the party stepping outside the regime to make that challenge. I therefore consider that the statements made in **Willford** and **DPP v Clarke** apply and I hold that this Court is bound by the Court of Appeal's decision in **DPP v Clarke**.

Commercial confidentiality

84. Further, I do not consider that the protection of confidentiality in commercial cases arises in this case. The challenge is not seeking to protect the confidential information: it is to set aside or quash the decisions made by the BMA. The information involved is confidential to the Applicants, not to third parties. To the extent that the Applicants need to rely upon information that is a trade secret or proprietary information or relates to a third party (e.g. client lists) then that information can be made the subject of a separate application and can be excluded from the public record if need be. On the premise that the challenge relates primarily to the legality of the appeal process, it is difficult to see how this will arise.

Trust cases

85. Likewise, there is no parallel to be drawn in this case with trust cases or the rules regulating public access to documents set out in the Practice Directions referred to above. Where trustees apply to court under section 47 of the Trustee At 1975, the Court is exercising a separate jurisdiction to grant a special power to a trustee to enter into a transaction which is not granted under the terms of the trust. This does not engage the public interest considerations that apply in litigation between parties to determine a disputed question, and usually involves material which would by their nature attract legal professional privilege and privacy rights as described in **Re G Trusts**.

Public policy

86. The idea that regulated persons will not be as open and frank with regulators if the information provided is not kept secret is one the Court has difficulty in understanding or accepting. The regulatory framework is based upon the notion that all regulated persons are fit and proper and that they will undertake their obligations honestly and in good faith.

87. The requirement to keep the information secret is to protect the regulated party from the risk that the BMA will disclose the information to a third party. In a case when the regulated party seeks to invoke the intervention of the Court to set aside or quash a decision of the BMA, disclosure of the background information is one of the requirements that the regulated party must accept. It is one of the burdens that all members of a free and democratic society must bear, and a price to be paid willingly for the Court's protection of civil and constitutional freedoms.

88. The Plaintiffs in Actions 270 and 288 make an independent point about the position the directors and beneficial owners. They say that information relating to their role in conducting the regulated entity's affairs should be kept confidential because they are not directly subject to the regulatory decision, but their actions form the basis of at least some of the conclusions that the BMA drew from their review. This argument is not persuasive for the reasons already given in paragraph 89 above.

89. In addition to those reasons, the Court also has in mind the position of the appellant in **Khuja v Times Newspapers Limited** who had not been charged with any of the serious offences involved in the underlying criminal case. In that case Tugendhat J refused an injunction to restrain the press from publishing his name on the grounds that (i) the public understand the difference between suspicion and guilt (ii) prohibition of publication could lead to circulation of ill-informed or misleading accounts. On appeal to the Supreme Court Lord Sumption agreed and added that the policy to permit media reporting of judicial proceedings does not depend on the person adversely affected by the publicity being a participant in the proceedings, but rather upon (i) the right of the public to be informed about a significant public act of the state and (ii) the law's recognition that the way in which the story is reported is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration[43]. It seems to me that the same analysis applies in this case.

Conclusions

90. The Court therefore rejects the submissions made by the Applicants and refuses their respective applications. In so doing, the Court acknowledges counsel's very able presentation of the difficult arguments made in support of the application.

[43] See footnote 26 and paragraph 34 (5) of the Judgment. It is to be noted that this was a majority of 3:2. The considerations that were involved in the minority dissenting opinion do not arise on the facts of this case.

91. The Court has set out in paragraphs 18-20 the limited protections that will apply to this application. The Court will hear the parties as to costs.

19 December 2024

THE HON ANDREW MARTIN
PUISNE JUDGE