CAYMAN ISLANDS LAW BULLETIN
NO.2
SEPTEMBER, 1990

Cayman Islands Government

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The Cayman Islands Law Bulletin is intended to provide an information and reporting service for attorneys and others who may need to be aware of developments in the law of the Cayman Islands.

The material entered in the Law Bulletin is not intended to be exhaustive or authoritative but should be regarded as an index and a record of material which may be of some use in legal work.

While reasonable care is taken in the preparation of material for publication in the Law Bulletin, neither the Cayman Islands Law School nor the Cayman Islands Government accepts responsibility in law for the accuracy of the contents of this issue, nor do the views expressed necessarily reflect the opinion of the Cayman Islands Government.

Contributions

The Editors would like to express their thanks to the Wm Reece Smith, Jr., President, International Bar Association, for his contribution to this edition.

An open invitation is extended for the submission of manuscripts on topics of interest to the legal community. If you would like more information please contact the Director of Legal Studies, Cayman Islands Law School, Tower Building, George Town 97999 Ext. 3540.

Edited by the Director of Legal Studies and Law Lecturers, Cayman Islands Law School.

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INDEX

EDITORIAL NOTE

This is the second edition of the Cayman Islands Law Bulletin which will continue to be published three times a year - January, May and September.

The Law Bulletin is edited and published by the Cayman Islands Law School. The publication, which was approved by the Legal Advisory Council in October 1989, is intended to have two purposes.

First and foremost, to bridge a gap which exists in the law reporting system in use in the Cayman Islands. The need for a timely and accessible system of law reporting has long been recognised. The matter was put succinctly by Professor Peter Rowe, the first Director of Legal Studies, in a paper entitled "A Proposal for Reporting of Judgments of the Courts of the Cayman Islands" (December, 1983).

"The establishment of an efficient system of law reporting on the Islands would now appear to be imperative. Not only has the volume of criminal cases and commercial litigation increased, generating the need for an awareness of the actual decisions of the courts by legal practitioners but with the establishment of the Law School in 1982 the reporting of decisions would assist in the teaching of Cayman Law to students of the School".

The lack of law reporting was addressed with the publication in 1984 of the Cayman Islands Law Reports by Law Reports International under the editorship of Dr. Alan Milner M.A., LL.M., PH.D, Fellow of Trinity College, Oxford. That series now comprises two bound volumes (1984-85 and 1986-87). A further volume, 1988-89, is expected by the end of the current year.

Despite the presence of this excellent reporting series, it was felt that there was scope for an additional series of reports in the form of a Law Bulletin, produced locally and with a minimum of delay between the date of judgment and the report. Discussions were held with Dr. Milner who wholeheartedly endorsed the concept.

The current edition contains summaries of the majority of judgments of the Grand Court and Court of Appeal delivered in open court during the period January 1, 1990 to September 30, 1990. Certain judgments contained insufficient information to be usefully summarized and were therefore omitted. In addition, a number of matters which were heard in Chambers during 1989 and 1990 are reported. In these cases, an attempt has been made to protect the identity of the parties.

The case notes are presented as summaries. The purpose of the Law Bulletin is not to achieve a full reporting of the case but rather to provide sufficient information about the case to allow practitioners and students to determine whether the case is of use to them and allow them to locate the full text.

The second purpose of the Law Bulletin is to provide a forum in which judges, legal practitioners, lecturers and law students can express

themselves on topics of interest to the legal community. In this regard, we are fortunate to have received an article by the President of the Internation Bar Association, Mr. Wm Reece Smith, Jr. which is included in this edition. The article, entitled "Professionalism and Commercialism in the Practice of Law" was felt to be an appropriate follow up to the Professional Practice and Ethics Course which was introduced at the Law School earlier this year. Contributions for future editions would be welcomed on any topic.

We would like to thank the officers of the Judicial Department who compiled and submitted the judgments, thus enabling the summarization process to take place, and the Computer Services Department who provided assistance in the publication and binding process.

Your comments and suggestions are most welcome.

Richard Finlay
Director of Legal Studies

INDEX TO CASES REPORTED

Fiduciary	- Duty of top management - Duty to account - Liability to account
Rectification	- Alternative remedy - Perpetuities

CASE NOTES

SUMMARIES OF JUDGMENTS OF THE GRAND COURT
AND COURT OF APPEAL
January 1, 1990-September 30, 1990

ADMINISTRATIVE LAW

Certiorari - Mandamus - Declaration - Leave to apply out of time.

Court:	Grand Court (165/89)
Cor:	Harre, J.
Date:	16th June 1990
Legislation:	Grand Court (Application for Orders of Mandamus, Prohibition, Certiorari, and Habeas Corpus) Rules
Cases Referred to:	Ailean Dilbert v. The Public Service Commission and The Attorney General (157/87). R v. Ashford J. ex.p Rickley (1955) 1 WLR 562
Counsel:	Mr. A. Turner for the applicant

The applicant applied ex parte for leave to apply for orders of certiorari, mandamus and a declaration in respect of a decision of the Caymanian Protection Board dated 17th October 1988 and a decision of His Excellency the Governor of the Cayman Islands dated 20th March 1989 refusing his application for a Trade and Business licence.

Held

(1) Rule 2(4) of the Grand Court (Application for Orders of Mandamus, Prohibition, Certiorari, and Habeas Corpus) Rules ("the Rules") gives the judge a discretion to extend the six month time limit prescribed by rule 3 on applications for certiorari (Ailean Dilbert v. the Public Service Commission and the Attorney General)

(2) Where a person applies for an extension of time, he should give notice to the person whom he would serve in the ordinary way as one who would be effected if the order challenged were quashed, because the person affected has a right to be heard and object to the extension (R v. Ashford J. ex.p Rickley).

(3) In this case, notice of the application for leave to extend time should be served on the Caymanian Protection Board and the Attorney General.

(4) No such problem applies in relation to orders of mandamus (since it is not covered by rule 3), and leave to apply for this order is therefore granted.

(5) No leave was granted with respect to the declaration.

(P.H.)

Judicial review - Extension of time - Special circumstances

Court: Grand Court (165/1989)

Cor: Collett, C.J.

Date: 22nd August 1989

Legislation: Grand Court (Application for Orders of Mandamus, Prohibition, Certiorari and Habeas Corpus) Rules 1977

Counsel: Mr. A. Turner for the applicant
Mr. A. Smellie for the respondent

The applicant sought judicial review of a decision of the first respondent. There was some delay in the application for leave. The delay was caused in part by the length of correspondence which followed the making of a decision by the first respondent as to whether a right of appeal lay to the Governor and in part by the fact that the refusal of Harre, J. to grant leave to apply for certiorari in the original application was coupled with a grant of leave to apply for mandamus in respect of the same subject matter. That application was due to be heard on 3rd October 1989.

Held: (application allowed)

(1) A beneficial construction ought to be given to rule 3 when read together with rule 2(4) of the Grand Court (Application for Orders of Mandamus, Prohibition Certiorari and Habeas Corpus) Rules. Although the specific exception to the requirement that applications for certiorari must be begun within 6 months (which appeared in the English rule on which rule 3 was modelled) are not repeated in the Cayman rule, this omission seems naturally to follow the inclusion of rule 2 (4) which gives a general discretion to a judge to extend time generally under the Rules. In view of that provision the specific exception would have been tautologous.

(2) The court may extend time to apply if the circumstances are such that it is reasonable to do so. In this case, such special circumstances do exist. (P.H.)

AGENCY

Agency - Ability of agent to sue in his own name for undisclosed principal.
(SEE ALSO Constitutional Law)

Court: Grand Court (110/89)

Cor: Collett, C.J.

Date: May 11, 1989

Cases Referred to: Short v Spackman (1831) 109 ER

Simms v Bond (1833) 110 ER
Fisher & Marsh (1865) 123 L.R.
Allen and others v. O'Hearn (1937) AC 213

Counsel: Mr. A. Foster for the plaintiff
Mr. P. Lamontagne Q.C. for the defendants

Equipment owned by a corporation was leased by the plaintiff ostensibly on his own account to the corporate defendant. The individual defendants guaranteed the obligations of the corporate defendant to the plaintiff under that agreement.

The issue of the ability of an agent to sue or be sued on a contract with a third party entered into on behalf of an undisclosed principal arose in the context of an application to discharge an ex parte order on the basis the plaintiff had failed disclose, inter alia, the fact of the agency.

Held: (application dismissed)

(1) The authorities support the principle that if an undisclosed principal elects not to sue himself on a contract made by his agent, in general the agent may himself do so. (Short v Spackman, Simms v. Bond, Fisher v Marsh, Allan and others v. O'hearn.)

(2) The origins and the reasons for the existence of this doctrine may be obscure and apparently illogical but there is no modern authority to the contrary and the doctrine is too well established for the court to do other than apply it.

(R.F.)

CIVIL PROCEDURE

Action - Dismissal for want of prosecution - Failure to prosecute proceedings with dispatch - Relevant principles.

Court: Grand Court (103/86)

Cor: Harre, J.

Date: 10th April 1990

Cases referred to: Allen v McAlpine and Sons Ltd. [1968] 2 Q.B. 229
Birkett v James [1978] AC 297

Rules of Court : Rule 57 of the Grand Court (Civil Procedure) Rules; Notes on Supreme Court Practice on O.25 of the R.S.C.; O.28 r.10

Counsel: Mr. Charles Adams for the applicant
Mr. Enos Grant instructed by Keith Collins for the respondent

In 1979 the court ordered the appointment of the responent as the

administrator of the estate of the deceased who had died in 1909, but part of whose estate had remained unadministered in 1925 when the executor to whom probate of the will had been granted died. The applicants brought the present proceedings as administrator and executrix respectively of the estates of two of the children of the testator who had died in 1973 and 1983 respectively leaving issue. Relief was sought in 1986 by originating summonsagainst the respondent: (a) that the respondent furnish an account of the unadministered assets of the estate as at his appointment as administrator; and (b) that the respondent be restrained and directed to abstain from dealing with the remaining real estate of the testator without the prior approval of the court.

In addition to the relief sought in the originating summons, the applicants sought an injunction ex parte in the same terms as that sought in the originating summons. The ex parte injunction was granted and the respondent entered memoranda of appearance by different attorneys in April and July 1986 respectively. No further action occurred until February 1990 when each side took a new step: the applicants lodged a notice of intention to proceed pursuant to r.57 of the Grand Court (Civil Procedure) Rules and the respondent lodged summons to dismiss the action for want of prosecution of the originating summons with dispatch.

Held: - (dismissing the respondent's summons)

(1) The same principles are applied whether the court is acting under an express power or under its inherent jurisdiction to dismiss an action for want of prosecution if there has been default in complying with the rules or for excessive delay.

(2) The power to dismiss should be exercised only where the court is satisfied that the default is intentional and contumelious ; or (a) there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is likely to cause or have caused serious prejudice to the defendant.

(3) On the facts, even though the applicant's delay was inordinate, it was nevertheless excusable in the circumstances. The respondent made no effort to have the ex parte injunction removed. That indicated that the respondent had suffered no prejudice by reason of the delay to proceed on the originating summons. The applicants had "bolted the stable door" by means of the ex parte injunction which it was always open to the respondent to seek to lift.

(4) There was no reason to believe that the issues in the matter could not be determined just as satisfactorily in 1990 as in 1986. These were matters which did not turn on the availability of particular witnesses or the clarity of their recollections. They depended on matters of record. Great injustice might follow from the dismissal of the action.

(B.B.)

Action - Whether a body corporate can carry on proceedings otherwise than by way of a solicitor.

Court: Grand Court (302/86)

Cor: Harre, J.

Date: 10th April 1989

Legislation: Grand Court (Civil Procedure), rule 62(2)
Rules of the Supreme Court Rules, O.5, r.6

The corporate plaintiff commenced proceedings against the defendant without a solicitor of record.

Held: (for the defendant)

(1) In the absence of any provision in Cayman Law, and in applying rule 62(2) of the Grand Court (Civil Procedure) Rules, the relevant provision regarding persons who are entitled to begin proceedings in the Grand Court is Order 5, rule 6 of the English Rules of the Supreme Court. Rule 6 says that a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor.

(2) Although rule 6 is not concerned with the powers of the court in appeal matters, there is no reason to depart from the well established and sensible English practice.

(P.H.)

Affidavit - Amendment - Opinion on matter of law - Affidavit oppressive.

Court: Grand Court (320/88)

Cor: Harre, J.

Date: 19th April 1989

Cases referred to: Rossage v. Rossage [1960] 1 All ER 601
Gleason v. Wippell& Co. Ltd [1977] 3 All ER 63

Legislation: Order 41, rule 6 Rules of the Supreme Court
Rule 41 Grand Court (Civil Procedure) Rules

Counsel: Mr. A. Foster for the Plaintiff
Mr. N. Clifford for the first defendant
Mr. N. Hill Q.C. and Mr. J. Jenkins for the second defendant

Held:

(1) The correct procedure for an application to amend an affidavit is that prescribed by order 41, rule 6 of the English Rules of the Supreme Court.

(2) The English Court does not hear evidence of what the law of the

Cayman Islands is, but it does hear expert evidence on what foreign law is. The extent to which such evidence can be presented in affidavit form and the suitability of the particular expert witness are matters that can most appropriately be dealt with by an order for directions. In the meantime, it is oppressive for the plaintiff to have to deal with more than is necessary to accomplish the purpose of the affidavit.

(P.H.)

Appearance - Conditional appearance
(See Courts - Appearance)

Consent Order - Power of court to extend time limited by consent order
(See Courts - Consent Order)

Default judgment - Application of English Rules of the Supreme Court - Burden of proof on defendant

Court: Grand Court (163/1988)

Cor: Collett, C.J.

Date: 9th January 1989

Legislation: Grand Court Law
Grand Court (Civil Proceedings) Rules
Rules of the Supreme Court of England and Wales

Cases Referred to: Cayman Islands News Bureau v. Robert Cohen (64/1987)
Evans v Bartlam [1937] 2 All ER 646
Vann v. Awford (1986) Times 23 April
Burns v Kondel [1971] Lloyd's Rep. 554
Seibe and Gorman & Co. v Pneupac [1982] 1 All ER 377

Counsel: P. Polack for the plaintiff
T. Shea for the defendant

The plaintiff issued a specially endorsed writ against the defendant which was later served. Owing to the fact that the defendant's attorneys had been under pressure to withdraw from the record and the difficulty which the defendant had in consulting new attorneys, no defence was served. The plaintiffs then took out a summons for judgment in default. The defendant sought an adjournment of the hearing on the basis that he intended to seek an indemnity against a third party. There was no suggestion that the defendant would seek to defend himself by pleading that he had not contracted personally with the plaintiff. This omission was due to the shortness of time that the new attorney had to consult on this complicated matter. The court gave leave to sign judgment on the ground that no defence to the plaintiff's claim had been fore-shadowed. The defendant seeks an

order setting aside that judgment.

Held: (for the defendant)

(1) By virtue of section 20 of the Grand Court Law and in the absence of provisions in the Grand Court (Civil Procedure) Rules for the setting aside of judgments in default of pleadings, order 19, rule 9 of the English Rules of the Supreme Court applies. There is nothing inconsistent between this proposition and the conclusion in Cayman Islands News Bureau v. Robert Cohen to the effect that Order 27, rule 3 of the RSC is not in force in the Cayman Islands.

(2) The court has a wide discretion under order 19 rule 9 to set aside a judgment entered in default of defence where the justice of the case requires it.

(3) The onus lies on the defendant to show that there is some triable issue of law or fact on which to found his defence (Evans v Barlam). That is the most important element in the consideration of the of the discretion of the court (Vann v. Awford).

(4) The defendant does not have to show a good defence, but merely one that is fairly arguable in order to demonstrate that a triable issue exists (Burns v Kondel).

(5) On the facts, it appears that a triable issue does exist as to whether the plaintiff entered the contract personally or as an agent for a third party.

(6) In exercising its discretion, the court must consider the circumstances in which the default judgment came to be signed in the first place against the defendant.

(P.H.)

Evidence - Disclosure of Expert reports
(See Evidence)

Ex parte applications - Duty on applicant to make full and frank disclosure.
(See Civil Procedure - Pleadings - Abuse of Process of Court)

Ex parte order - Discharge - Principles
(See also Agency, Constitutional Law and Company Law-Receivership)

Court: Grand Court (24/85, 110/89)

Cor: Collett, C.J.

Date: May 1, 1989

Cases Referred to: Lloyds Bowmaker Ltd. v Brittania Arrow Holdings plc [1988] 3 All ER 178

Brinks MAT Ltd. v. Elcombe [1988] 3 All ER 188

Counsel: Mr. A. Foster for the plaintiff
Mr. P. Lamontagne Q.C. for the defendant

Certain of the defendants applied to discharge an order of the court made on ex parte application whereby certain of the defendants were prohibited from transferring, selling or otherwise disposing of assets within the jurisdiction of the court and appointing a receiver and manager of the assets of the defendants.

The proceedings originated from an agreement whereby the plaintiff leased equipment to the corporate defendant. The individual defendants, E and B, guaranteed the obligations of the corporate defendant to the plaintiff under that agreement. The defendants defaulted in their obligations under the agreement and guarantees respectfully and an action was commenced claiming, inter alia, damages and conversion. The action languished for a period of years until September 1988 when notice of intention to proceed was filed by the plaintiff. The plaintiff received leave to file a statement of claim out of time on February 1989 and in March obtained an ex parte order appointing a receiver and manager of the business and undertaking of the corporate defendant and of the interest of Mr. B in certain commercial realty. The receivership of the corporate defendant was subsequently discharged by consent.

The plaintiff later discovered that the interests of E and B in the commercial realty had been transferred to M prior to the receivership order. The plaintiff then commenced a new action against M and B to set aside the transfer as an intent to defraud creditors. An ex parte application was made in that action and the receivership order extended to include the whole of M's interest in the commercial realty. A mareva type order was also made to prevent any further disposition by B of his assets in the Cayman Islands. The defendants applied to discharge all the ex parte orders on the basis of the alleged failure of the plaintiff to make full and frank disclosure of all material facts to the courts in the affidavit placed in support of the ex parte applications including;

a) the fact that the plaintiff did not own the equipment but was acting as agent for its lawful owner in entering into the agreement and guarantees.

b) the fact that the plaintiff had filed for bankruptcy in the USA.

Held: (application dismissed)

(1) The obligation of a party seeking an ex parte application is to make full and frank disclosure and extends to all facts which the party concerned could have discovered had he made proper enquiries.

(Lloyds Boumaker v Brittania Arrow Holdings plc, Brinks MAT Ltd. v Elcombe)

(2) Failure to make disclosure will result in the discharge of an

order made ex parte unless the court considers that non disclosure was innocent and that the orders should continue in its discretion on the footing that they could be properly granted even had the full facts been disclosed.

(3) The matters which were not disclosed had little or no materiality in the context of the ex parte orders.

(R.F.)

Interest - Judgement interest - Judicature Law s.62
(See Conflicts of Law - Foreign judgement)

Judgement - Foreign judgement
(See Conflicts of Law - Foreign judgement)

Limitation of actions - Action for recovery of a debt - Statute barred - Acknowledgment of a debt - Whether acknowledgment modified

Court:	Grand Court (336/89)
Judge:	Collet, C. J.
Date:	10 April 1990
Legislation:	Limitation of Actions Law Ch. 86
Cases cited:	Spencer v. Hemmerde (1922) 2 A.C. 507
Counsel:	Mr. Turner for the plaintiff Mr. Heriques Q.C. and Mr. MacDonald for the defendant

On 28th August 1983 the plaintiff requested of the defendant payment of a debt due to him from the defendant. As there had been more than six years from the date of the request it would be statute barred unless there has been an acknowledgment.

In response to a letter from the plaintiff's solicitor the defendants wrote on 26th June 1985:-

"Our records show that the account stands at U.S.$ 314 832.70 as of 1st June 1984. We have used this date because we stopped

accruing interest into all deposits as of that date as a useless and expensive exercise and expense. Should the bank be successful in acquiring additional substantial funds under certain actions now in progress we shall of course commence calculating interest again as of that date so as to maximize the recovery of all deposits"

Held: (dismissing the preliminary issue)

(1) An acknowledgment must not exclude or modify the promise which, in

the absence of anything to the contrary, the law implies from the acknowledgment (per Lord Wrenbury in Spencer v. Hemmerde.

(2) The promise to pay was made subject to a condition which has not been satisfied. Consequently, the acknowledgment has been modified and the plaintiff's action is statute barred.

(R.O.)

Limitation of actions - English Limitations Act 1939 s19 - Whether applicable by analogy in Cayman Islands
(See Civil Procedure - Pleadings - Abuse of Process of Court)

Parties - Leave to join fourth party as fourth defendant - Legal personality of a company - Meaning of "ought to have joined"

Court: Grand Court (24/85)

Cor: Malone, C.J.

Date: 26 March 1990

Legislation: Grand Court (Civil Procedure) Rules

Cases cited: Salomon v. Salomon (1897) A.C. 22
Edward v. Lowther (1876) 45 L.J. C.P.
Bank of Nova Scotia C.I.C.A. 7 of 1987

Counsel: Mr. Foster for the plaintiff
Mr. Lamontagne for the defendants

The plaintiff applied to join M as a fourth defendant to the proceedings on the grounds that she was one of three shareholders, directors and officers of the first defendant the other two being the second and third defendants. That the business was effectively carried on by the second and third defendants and M as a family partnership. The plaintiff alleged that M did participate in the acts and default set out in the pleadings.

The defendants submitted that to join the fourth party as a fourth defendant would be contrary to the provisions of rule 26 of the Grand Court (Civil Procedure) Rules which allows joinder of a party that "ought to have been joined."

The defendants further submitted that the joinder of a fourth party would be contary to the principle of separate legal personality of a company established in Salomon v. Salomon.

Held: (allowing the application)

1. The fourth party is a person against whom, if the plaintiff's case is right, relief may be sought and who might have been made a defendant in the first instance so may be joined (per Lord Coleridge C. J. in Edward v. Lowther.)

2. In tort, the actual tortfeasor is liable so that an agent who is a tortfeasor can be added as a defendant without offending the principle recognised in Salomon v. Salomon.

(R.O.)

Pleadings - Abuse of Process of Court - Res Judicata - Whether acquittal in criminal proceedings determinative of issues in civil proceedings

Court: Grand Court (276/89)

Cor: Harre, J

Date: 25th May 1990

Legislation: ss 166 and 168 Companies Law

Cases Referred to:
Hunter v Chief Constable West Midlands Police (1982) AC 529
Helton v Allen 63 CLR 691
Mraz v R. 96 CLR 62
Greenlagh v Arderne Cinemas (1950) 2 All ER 1120
Re Palmer and Carling O'Keefe Breweries of Canada Ltd. et al (1989) 670 (O.R.(2nd (161)
Yat Tung Investment Co. Ltd. v Dao Heng Bank (1975) AC 581
Henderson v Henderson (1843) 3 Hare 100
Greenhalgh v Mallard (1947) 2 All ER 355
Riches v D.P.P. (1973) 1 W.L.R. 1019
Tito v Waddell (1977) 1 Ch 106
Knox v Gye (1872) L.R. 5 H.L. 656
The King v Tax Commissions ex parte Princess Edmond de Polignac (1917) 1 KB 486
Brink's-MAT Ltd v Elcombe 1988 3 All ER 188

Counsel: Mr. A. Turner for the plaintiff (by its Liquidator)
Mr. E. Grant and Mr. Collins for the 2nd defendant

The plaintiff, by its liquidator, obtained leave to commence actions against the defendants alleging impropriety on their part in their capacity as directors of the plaintiff. The 2nd defendant had also been the subject of criminal proceedings in theft, fraudulent false accounting and obtaining property by deception in relation to certain of the transactions and had been acquitted of those charges.

The liquidator, prior to obtaining leave, had obtained summons under s166 and 168 of the Companies law requiring the 2nd defendant and others to pay substantial sums to the liquidator based on his conduct while a director of the plaintiff. That summons was set aside on application by the 2nd defendant based on procedural irregularities.

The 2nd defendant applied to dismiss the plaintiffs action as a abuse of process of the court. He also alleged the claim disclosed no

reasonable cause of action as it was time barred and applied to have the leave given to the liquidator to commence the action set aside on the grounds of failure to provide full and frank disclosure.

Held: (Application dismissed)

(1) The civil action is not an abuse of process of the court as a collateral attack on the findings of the criminal court which acquitted the second defendant. That case dealt with the issue whether the prosecution had satisfied the burden and standard of proof to the charges before the court. The civil case is concerned principally with the validity of transactions to which the second defendant was a party and whether he was in breach of his fiduciary duties.

(2) Further even if this were not the case, a decision in a criminal case upon a particular question in favour of a defendant is not inconsistent with the fact that the decision would have been against him if all that were required were the civil standard of proof on the balance of probabilities (Hunter v Chief Constable West Midlands Police)

(3) The existence of the previous summons filed by the liquidator under s.166 of the Companies Law (which was subsequently set aside for procedural irregularity) does not preclude the liquidator from later seeking leave to issue writs complaining of the same matters referred to in the summons. The doctrine of res judicata does not assist the defendant even under the broader view of that doctrine. (Greehalgh v Arderne Cinemas, Re Palmer and Carling O'Keefe Breweries of Canada ltd et al, Yat Hung Investment Co. Ltd. v. Dao Heng Bank Ltd., Henderson v Henderson)

(4) On the issue of whether the plaintiff's claim is time barred, where a statement of claim discloses that the cause of action arose outside the period of limitation, that the defendant intends to rely on the limitation and that there is nothing to suggest the plaintiff would escape from the defence, the claim may be struck. (Riches v D.P.P.)

(5) The English Limitation Act 1939 s19 does not apply either directly or by analogy in the Cayman Islands. That provision was derived from s8 Trustee Act 1888 and reproduced in s46 of the Jamaican Trustee Act 1897. s46 of the Jamaican Law did not survive in the Law of the Cayman Islands following the 1963 Law Revision. The Limitation Law and Imperial Statute 21 James 1 Cap 16/1623 is received law and entitles the plaintiff to argue there is no statutory limitation period applicable to these issues.

In addition, the equitable doctrine of laches does not require the claim be struck out, either as an analogy to a statutory bar or as pure laches. This matter is not being tried as a preliminary issue so the plaintiff need only show a reasonable issue of action which it has done. (Knox v Gye)

(6) The second defendant's application to have the liquidator's leave to commence set aside is dismissed. The obligation to make full and frank disclosure of all material facts by a liquidator in cases like this may be equated with the duty of utmost good faith and is akin to

that which applies to an applicant for an ex parte injunction (The King v Tax Commissioners exparte Princes Edmond De Polignac). The question whether a fact not disclosed is of sufficient materiality to justify or require immediate discharge of an order without examination of the merits depends on the importance of the fact to the issue to be decided on the application. The court has a discretion, notwithstanding nondisclosure which would justify discharge of an ex parte order, to continue the order or make a new order. (Brink's MAT Ltd v Elcombe). The information provided by the liquidator included a wealth of pertinent information. While some of the information was contained in reports not strictly evidence supported by affidavit that ommission, if it constituted such, was not important.

(R.F.)

Pleadings - Application to strike out - Oppressive interrogatories

Court: Grand Court (234/1988)

Cor: Collett, C.J.

Date: 18th January 1989

Legislation: The Banks and Trust Companies Regulations Law
The Banks and Trust Companies (Licence Applications) Regulations

Cases Referred to: Belmont Finance Corporation Ltd. v. Williams [1979] Ch 250
Attorney General's Reference No. 2 of 1982 [1984] 1 QB 624

Counsel: Mr. R. Green Q.C and Mr. R. Nelson for the plaintiff
Mr. A. Jones for the defendant

Application to strike out.

The plaintiff seeks to strike out a portion of the re-amended defence and counterclaim. The portions allege that fraud two individuals is to be imputed to the plaintiff company so that regardless of any other circumstances, the plaintiff company cannot succeed in their negligence action against the defendant.

Held:

Striking Out

(1) The court should only strike out such a contention of law if satisfied that it is almost incontestably bad in law.

(2) The principles on which the defendant relies are fundamentally bad in law. Belmont Finance Corporation Ltd. v. Williams Furniture Ltd. [1979] Ch 250 and Attorney General's Reference No.2 of 1982 [1984] 1 QB 624 point convincingly to this conclusion.

(3) Accordingly the application to strike out is allowed.

Interrogatories

(1) The court has a wide discretion to be exercised judicially in the light of principles which are fully discussed in the 1988 White Book at pp 450-453.

(2) Certain of the interrogatories applied for are oppressive having regard to their wide ranging scope, the passage of time (10-13 years) and the inherent unlikelihood that the witness would be able to give any realistic reply according to his recollection of oral conversations so long ago. They will therefore be disallowed.

Amendment of Defence and Counterclaim

The plaintiff claims that the plea in the proposed amendment could not succeed as the plaintiff's articles of association, as sought to be relied on, are contrary to Cayman Law and void so that this plea cannot in any event succeed. The Banks and Trust Companies Regulations and in particular Schedule 1 to the Banks and Trust Companies (Licence Applications) Regulations cannot bear the construction for which counsel for the plaintiff contends. Accordingly, the amendment for which leave is sought raises a relevant issue of law which the defendant ought not to be prevented from developing at the trial and the amendment is allowed.

(P.H.)

Pleadings - Time for service and filing - Extension of time in which to file reply and defence to counterclaim

Court: Grand Court(134/86)

Cor: Malone, C.J.

Date: 14 February 1990

Legislation: Grand Court Law No.8 of 1975
Grand Court (Civil Procedure) Rules
Supreme Court Practice Rules

Cases referred to: Tidesley v. Harper (1878) 10 ChD 393

Counsel: Mr. G. Ritchie for the plaintiff
Mr. N. Hill Q.C. instructed by Mr. D. Ritch for the defendant

The plaintiff applied for an extension of time in which to file and serve his re-amended reply and defence to counterclaim.

The defendant objected on the grounds firstly, that an application brought under rule 42(3) of the Grand Court (Civil Procedure) Rules is misconceived; secondly, the application is out of order as it is not

supported by an affidavit, thirdly that there has been inordinate delay in bringing the application by the plaintiff and fourthly that the amendments are not needed.

Held: (application allowed)

1. Rule 42 in fixing times does so only for the delivery for a statement of claim and of a defence. It does not refer to a defence to a counterclaim or to a reply.

2. As there is a lacuna in the rules it can be filled by the combined effect of s.20 Grand Court Law and rule 62 of the Rules and recourse can be made to the practice and procedure of the High Court of England and Wales. The Supreme Court Practice Rules state that an application for an extension of time should be made generally to a Master. The application can be made on a two day summons without a supporting affidavit.

3. The Court of Appeal permitted the defendant to rely on breach of warranty or authority, breach of duty of care and the Statute of Frauds. It must follow that the plaintiff is entitled to join issue on those aspects of the defence and counterclaim. The re-amended reply and defence to counterclaim are therefore needed.

(R.O.)

Service - Service of writ out of jurisdiction - Whether English rules apply

Case:	Lake v Cordoba Limited
Court:	Cayman Islands Court of Appeal (20/89)
Cor:	Zacca, President; Georges and Kerr, JJA.
Date:	28th March 1990
Cases Referred to:	Rawson Trust Company Limited (355/81) Spiliada Maritime Corp v Cansulex Ltd [1986] 3 All ER 843
Legislation:	Order 11, rule 1 Rules of the Supreme Court Section 20 Grand Court Law Rule 13 Grand Court (Civil Procedure) Rules Rule 62(2) Grand Court (Civil Procedure) Rules
Counsel:	R. Alberga Q.C. and N. Clifford for the Appellant N. Hill and G. Hampson for the Respondent

Held:

(1) On an application for leave to serve a writ out of the jurisdiction, the English rule (Order 11, rule 1 Rules of the Supreme Court) did not apply. Rule 62(2) of the Grand Court (Civil Procedure) Rules, which empowers the importation of the English practice and procedure where there is no provision here, does not

apply to Order 11, rule 1 because that rule was jurisdictional in nature as it defined the cases in which process of a certain kind is permissible (Per Lord Summerfield in Rawson Trust Company Limited.

(2) As regards jurisdiction in the light of section 20 of the Grand Court Law, and rule 13 of the Grand Court (Civil Procedure) Rules, there is adequate provision for dealing with the question of both jurisdiction and procedure.

(3) The Court would take account of Order 11, rule 1 without feeling bound by it. The simplicity and generality of the local provisions render the guiding principles as enunciated in the English cases and comprehensively reviewed in Spiliada Maritime Corp v Cansulex Ltd all the more helpful in determining whether the Cayman Court was the more appropriate forum and leave for service abroad was properly granted in the instant case.

(P.H.)

Summary Judgment - Originating summons - Nature of the Application - Courts power in dealing with
(SEE also Company Law - Receiver)

Court:	Grand Court (137/88)
Cor:	Harre, J
Date:	6th December 1988
Legislation:	Order 28, Rule 4, English Rules of The Supreme Court 1965
Cases Referred to:	Kilderkin Investment v. Player 1984 CICR
Counsel:	Robin Potts Q.C. and Mr. Quin for the plaintiff Mr. Jones for the defendant

The plaintiff applied by originating summons pursuant to Order 28, Rule 4 of the Rules of the Supreme Court to enforce an Arbitral Award made by the International Chamber of Commerce Court of Arbitration. The Arbitral Tribunal had found for the plaintiff in the amount of US$6,000,000 and had also awarded compensation to the defendant against the plaintiff in relation to its counterclaim in excess of that sum. On the application, the defendant sought to set up the award on the counterclaim as a defence to the arbitral award in favour of the plaintiff.

Held: (Application dismissed)

(1) The nature of a hearing under Order 28 Rule 4 is for summary judgment in favour of the plaintiff where the liability of the defendant is established. Where liability is not so established, the court is to give directions as to the further conduct of the proceedings as it thinks best adapted to secure the most expeditious and economical disposal thereof.

(2) The Court, on such application, has no power to dismiss the originating summons thus turning the plaintiff's own weapon against them in the form of an summary judgment.

(3) On the evidence, the plaintiff had not established that the defendant had no arguable defence to the claim. The question of whether set off is available is an arguable proposition depending on which law governs the question of whether there is an award to enforce.

(4) The application for final judgment was dismissed with directions as to future conduct of the proceedings to follow on counsel's submission.

(5) A further application to vary the terms of an appointment of a receiver over the liabilities of the plaintiff to the defendant was also dismissed. The plaintiff had sought to restrain the defendant from proceedings to wind up the plaintiff. The court held there was nothing incompatible with the appointment of a receiver over specific property of a company which was the subject of winding up proceedings under the control of a liquidator. (Kilderkin Investment v Player).

(R.F.)

Third party proceedings - Failure to apply for third party directions after service of notice and entry of appearance - Refusal of court to entertain claim raised by notice

Court:	Grand Court (20/89)
Judge:	Malone, C.J.
Date:	April 26, 1990
Legislation:	r.28(2) & r.30(1) Grand Court (Civil Procedure) Rules Supreme Court Practice vol.1 note 16/4/2
Counsel:	Mr. N. Levy for the plaintiff Mr. D. Murray for the defendant

The defendant had been sued for breach of contract in respect of a van which he had agreed to convert to a pick-up. The vehicle had never been returned to the plaintiff and the defendant in his defence alleged that the van was destroyed by a third party, her servants and/or agents.

The third party was joined as a defendant and an appearance was entered. Thereafter, however, the defendant made no application for directions.

Held: (giving judgment against the defendant)

(1) Where a third party, having been served with a third party notice, entered an appearance, which by virtue of r.28(2) GC(CP) Rules, indicated an intention to dispute the defendant's claim to be

indemnified against the plaintiff's claim, it was then incumbent on the defendant to apply for third party directions pursuant to r.30(1) in order for the issue between the defendant and the third party to be heard. In the absence of such an application, the court would not entertain the claim raised by the Notice. (The position was analogous to that under the English rule in Supreme Court Practice 1988 vol.1 note 16/4/2 at p.241)

(G.F.)

Third party proceedings - Whether nature of claim against third party is by way of indemnity or damages

Court:	Grand Court(254/88)
Cor:	Schofield, J.
Date:	4th June 1990
Legislation:	Grand Court (Civil Procedure) Rules, rule 28
Cases Referred to:	Eastern Shipping Co. v. Quah Beng Kee [1924] AC 177 Catton v. Bennett 26 Ch.D 161
Counsel:	N. Clifford for the plaintiff A. Foster for the defendant

The plaintiff claims specific performance and/or damages against the defendant arising out of the purchase from the defendant of certain land. The defendant alleges that H., who purported to be her agent in the sale, had agreed with the plaintiff to receive a secret commission in respect of the sale. The defendant therefore seeks leave to issue third party proceedings against H. for an indemnity in respect of any liability that she incurs with respect to the plaintiff. The problem arose because of the narrow scope of the third party procedure in Cayman. Instead of permitting a third party notice to issue in the wider circumstances set out in order 16, rule 1 of the English rules, the local provision is restricted by rule 28 of the Grand Court (Civil Procedure) Rules to cases where the defendant claims to be entitled to contribution or indemnity by a third party. Where what is claimed against the intended third party is damages, these could not be awarded under the third party proceedings.

Held:

(1) Where a person (the trustee) stands in a fiduciary relationship toward another (the cestui que trust), the cestui que trust may claim an indemnity against the trustee in respect of a claim against him. (Eastern Shipping Company v Quah Beng Kee).

(2) The present case is sufficiently similar to Eastern Shipping for the defendant to be granted leave to issue third party proceedings on H.

Per curiam - His Lordship was not bound by the decision in the case of Catton v Bennett since the allegation in that case was that the intended third party was the plaintiff's agent, whereas in the present case, the intended third party is alleged to be the agent of the defendant.

(P.H.)

COMPANIES

Action - Right of audience without representation by a solicitor
(See Civil Procedure - Action)

Corporate legal personality
(See Civil Procedure - Parties)

Liquidator - Duty to make full and frank disclosure when applying for leave to commence proceedings
(See Civil Procedure - Pleadings - Abuse Process of Court)

Liquidator - Power to restrain dealings in assets of corporate contributories and others
(See Injunction)

Receiver - Court Appointed - Right to indemnity

Court: Grand Court (29/85)

Cor: Collett, C.J.

Date: 26th June 1989

Cases referred to: Levi v Davis (1900) W.N. 174
Bertrand v. David (1862) 31 Beau 429
Evans v Clayhope Properties Ltd. (1988) BCLC 238

A receiver and manager was appointed by order of the court in relation to all the undertaking assets and property of the corporate defendant. The order contained powers including, inter alia, the power to pay all expenses relating to management and for remuneration and disbursements for himself and his staff out of monies coming into the receiver's hands.

That order was discharged by consent of the plaintiff and all defendants. The receiver seeks to be indemnified by the corporate defendant in respect of all expenses and liabilities properly incurred by him during the period of receivership and claims a lien on the business files and property of the company in his possession. He also claims a direction that sums due by the third defendant to the corporate defendant for services rendered during the receivership be

paid directly by the third defendant to the receiver. The defendants dispute all the receiver's claims and cross-claim for return of the property held under the lien.

Held: (for the receiver)

(1) As a general proposition of law, a court appointed receiver and manager of any undertaking is entitled, in the absence of an express direction in the court order itself, to be indemnified against all liabilities which he properly incurs in carrying on the business concerned. A receiver does not lose this indemnity simply because his office comes to an end.

(2) In addition to the indemnity, he has a lien over the receivership property against all those interested in it.

(3) The wording of the order does not amount to an express direction that the usual indemnity shall not be available to the receiver. The purpose of the specification of particular powers in the order appears to be the desirability of spelling out the authority of the receiver and manager to pay the day to day running expenses of the business without the need for repeated application to the court for directions.

(4) There is no weight to the distinction sought to be made by the defendant as to the extent of the receiver's lien. The lien extends to saleable assets of the company and property and equally to property unlikely to be saleable, such as documents. As to the power of sale pursuant to the lien, that is a matter for the court's discretion. It would be open to the judge who heard it to exclude, if he thought fit, the files and documents, from any order for sale.

(R.F.)

Receiver - Effect of winding up proceedings on appointment
(See Courts - Judgement)

Winding up order against company - Application to set aside judgment - Winding up had commenced at the date of judgment - Interest accruing under judgment and costs

Court: Grand Court (223/89)

Cor: Harre, J.

Date: 28 September 1989

Cases cited: In re Dynamics Corporation of America [1973] 1 WLR 66
Evans v. Bartlam [1937] AC 480
Re Theo Garvin Ltd. [1969] 1 Ch 624
Re Humber Ironworks and Shipbuilding Co. (1869) 4 Ch App 643

Legislation: Companies Law
Grand Court (Civil Procedure) Rules

Counsel: Mr. Hill Q.C. and Mr. Hampson for the liquidator
Miss Bridges for the plaintiff

The defendant company applied for judgment against it dated 13 July 1989 to be set aside or varied on the grounds that winding up proceedings had already begun at the time it was made. The provisional liquidator was appointed on 30 June 1989 but did not enter an appearance in this matter until 17 July. On 12 July the summons and affidavits in respect of the plaintiffs' application for judgment, execution, interest and costs were served on the company at his office. The liquidator and his attorney went before the court at 9.30 a.m. on 13 July when the matter was adjourned until the afternoon. The liquidator entered an appearance and asked for a stay under s.96 of the Companies Law.

It was submitted by the liquidator that as winding up by the court had already commenced by the date of judgment, the terms of the judgment are inconsistent with the general principle that when a winding up petition has been presented creditors should be restrained from pursuing their remedies in order to avoid getting an unfair advantage over other creditors.

The plaintiffs resisted the application on the grounds that at the time it was made no application under s.96 Companies Law had been made and any application to set aside a judgment in default of appearance must be made in accordance with the principles set out in the Grand Court (Civil Procedure) Rules.

Held: (dismissing the application)

(1) Where an application to set aside is not supported by an affidavit stating facts showing a defence it should not be granted unless for some very sufficient reason. The prospect that the provisional liquidator would apply to restrain further proceedings under s.96 is not a sufficient reason for setting aside the judgment.

(R.O.)

CONFIDENTIAL RELATIONSHIPS

Confidential Relationships - Application for permission to use information disclosed pursuant to court order otherwise than in proceedings mentioned in the order - Whether capacity of applicant relevant to application

Case:	In the matter of an Application pursuant to s.3A of the Confidential Relationships (Preservation) Law 1976 (as amended)
Court:	Grand Court (26/87)
Cor:	Collett, C.J.
Date:	January 19, 1989
Legislation:	Confidential Relationships (Preservation) Law 1976
Counsel:	Mr. J. Goudie Q.C., Mr. Hochauser and Miss Bridges for the applicants

Miss S. Brooks for the Attorney General
Mr. M. Alberga for defendants in 397/86

The applicants were trustees of the bankrupt estate of the late H. In that capacity they obtained an order of Hull J, in 1987 for disclosure of certain information in cause No.397 of 1986, in which they were plaintiffs, and G defendants.

The applicants were also trustees of the closely related but separate bankrupt estate of J. In that capacity, they sought leave to use information disclosed to them in cause 397 of 1986 in other proceedings, namely proceedings which are pending or contemplated in the state of New York.

It was conceded that if the two sets of trustees were different persona, the present application would of necessity have to have two stages: first, an application by H's trustees for permission to disclose to J's trustees the information in question and second, an application by J's trustees for permission to use that information in the proceedings pending or contemplated in the state of New York.

The question arose as to the relevance of the capacity in which the applicants made the application in question.

Held: (application allowed)

(1) Procedurally, the fortuitous coincidence of identity of the applicant has permitted the two step procedure to be telescoped to one step.

(2) However, if the substantive rights of third parties and the public interest in their preservation are to be properly protected, the applicants should not be placed in a position to obtain leave to use the disclosed information by reason of the fortuitous procedural advantage they enjoy in circumstances in which, if they did not enjoy it, they would not have been entitled to obtain that leave.

(3) The court considered the question in the context of whether a refusal of the permission now sought would operate as a denial of the right of the trustees of J's estate to enforce a just claim irrespective of the previous decision of the court in favour of disclosure of the information in the first place to the applicant in their capacity as trustees of H's estate.

(4) The court was satisfied that the evidence established a strong prima facie case of the trustees of J's estate to a just claim and that enforcement of that claim would clearly be impeded if the applicants were denied use of the disclosed information in the contemplated New York proceedings.

(5) The court made certain directions regarding the form and scope of the order for disclosure.

(R.F.)

CONFLICT OF LAWS

Foreign Judgment - Enforcement - Separation and property after dissolution of marriage - Settlement - Sum ordered to be paid - Discretion to award compound interest under s.62 (2) Judicature Law - Doctrine of obligation

Court: Grand Court (8/88)

Cor: Schofield, J.

Date: 24th October 1989

Legislation: R.23 Grand Court (Civil Procedure) Rules
S.62(2) Judicature Law

Cases referred to: Schibsby v. Westenholz (1870) L.R. 6 Q.B. 155-9

Counsel: Mr. Timms for the plaintiff
Mr. McDonald for the defendant

An application was made to the court by the plaintiff for judgment against the defendant pursuant to Rule 23 of the Grand Court (Civil Procedure) Rules. The marriage had been dissolved by an order the Circuit Court of the 5th Judicial Circuit in and for Marion County, Florida, U.S.A. on 9th June 1987. A separation and property settlement was incorporated into the final judgment of the court and the defendant was further ordered to pay the plaintiff US$800 per month as maintenance for the child of the marriage. Judgment had already been issued against the defendant in respect of maintenance payment in the court but the amount of US$5369.25 was now the subject of this application: judgment for this sum was not contested but the claim for compound interest on it of 10% was. Counsel for the defendant alleged this would not be available in the Florida proceedings and a "new judgment" could not be made through enforcement proceedings.

Held: (for the plaintiff)

(1) These were not enforcement proceedings and enforcement at common law cannot be by direct execution of the judgment. The basis of enforcement of foreign judgments is the doctrine of obligation. The judgment creditor must bring an action on the foreign judgment which enforces a duty or obligation on the defendant to pay the sum for which judgment is given. The doctrine of comity requiring the courts of one country to assist those of another was not relevant.

(2) The application was a "civil suit" within s.62(2) of the Judicature Law.

(3) The plaintiff was therefore entitled to interest on the amount ordered to be paid. The exercise of the jurisdiction of the Grand Court to give effect to an obligation under a judgment of a foreign court required that the plaintiff should be in no worse position than a party holding a simple contract. The discretion was therefore to be exercised to award compound interest at 10% from 21st April 1989.

(G.F.)

Forum non conveniens - Staying proceedings - Child custody and access application - Residence of children most appropriate forum

Court: Grand Court

Judge: Harre, J.

Date: November 2, 1989

Cases cited: Re S (M) An Infant (1971) 1 ALL ER 459
Re P (Infants) 1967 2 ALL ER 229
Spiliada Maritime Corpn. v. Cansulex Ltd (1986) AC 460
de Dampierre v. de Dampierre (1987) 2 ALL ER 1
Re Kernot (An Infant) 1964 3 ALL ER 339
Re P (GE) (An Infant) 1964 3 ALL ER 977

Counsel: Ramon Alberga Q.C.(with Mr. Quin) for Petitioner
Respondent in person

The petitioner, the mother of 2 children, applied for an order to stay proceeding in the Grand Court in relation to custody and access of the children of the marriage between petitioner and respondent.

The parties had married in the U.S.A. in 1979 and had lived in Costa Rica until 1982 where both children were born. They settled in the Cayman Islands in 1983 but the mother left in 1986 taking the 2 children.

The parties had separated in 1986 and had been divorced in the Cayman Islands in 1989. A separation agreement of 1986 provided that the mother would have sole custody, care and control of the children but the father would have reasonable access. The mother settled in the U.S.A. where the children go to school and are part of the local community. The order for dissolution of the marriage confirmed the mother's custody. The children were brought to Cayman in 1989 in accordance with the agreement but the mother later took them away before the end of the visitation period. The father reacted by applying for custody of the children alleging kidnapping and mental disorder on the part of the mother.

Proceedings in the Grand Court were to commence on November 14, 1989.

Held: (granting the stay)

(1) Both the Grand Court and the court in the U.S.A. had jurisdiction over the matter.

(2) The question of forum non conveniens was to be decided as a preliminary issue.(Re S(M)(An Infant) and Re P (Infants)).

(3) The fundamental principle set out in Spiliada in relation to the discretion to stay was that the appropriate forum was where the case could be tried more suitably for the interests of all the parties. The burden of proving that another forum was clearly more

appropriate lay on the applicant. The court would consider such matters as convenience and expense, the availability of witnesses, the governing law and the residence of the parties; the court would then normally grant a stay unless the plaintiff would thereby be disadvantaged. This " balance of convenience " test was equally applicable to matrimonial proceedings. (de Dampierre v. de Dampierre (1987).

(4) Special considerations applied to cases involving children. The court would be reluctant to exercise its jurisdiction where the children were no longer resident within it. The home of the children was in the U.S.A. since 1986. Prima facie a child's place of habitual residency is the best jurisdiction for a custody determination; that the State in which they resided was in fact the most appropriate forum was confirmed by the evidence of state law in relation to child care cases which made the happiness and welfare of the child paramount. Proceedings in Cayman would disrupt the lives of the children.

(G.F.)

CONSTITUTIONAL LAW

Constitutional Law - Whether statute of 13 Elizabeth I Ch 5 in force in Cayman Islands - Transfer of realty void as intent to defraud creditors.
(SEE ALSO Civil Procedure - Ex parte Order and Agency)

Court:	Grand Court (110/89)
Cor:	Collett, C.J.
Date:	May 11 1989
Cases referred to:	Magnus v Sullivan (1866) Stephens Reports 862 Cooper v Stuart (1887) 14 App. Cases 268 13 Elizabeth I Ch. 5
Legislation:	s.40 Interpretation Act
Counsel:	Mr. A. Foster for the plaintiff P. Lamontagne Q.C. for the defendant

After commencement of an action by the plaintiff against the corporate defendant and B claiming, inter alia, damages and conversion arising from a lease agreement, B transferred an interest in certain commercial realty to his wife. The plaintiff commenced a fresh action maintaining the transfer was made with an intent to defraud creditors and obtained an ex parte order appointing a receiver and manager of the property and for a mareva type order in relation to B's assets. In an application to discharge the ex parte order, the issue arose whether the relevant English statute is or has ever been in force in the Cayman Islands.

Held: (application dismissed)

(1) In settled colonies, such as the Cayman Islands, settlers from the mother country carried with them such portions of English statute and common law as were applicable to their new situation provided only that the terms of the statute were perceived as suitable to the infant colony.

(2) The date of settlement of the Cayman Islands cannot have been prior to the enactment of the statute in question.

(3) s40 of the Interpretation Act provides "All such laws and Statutes of England as were, prior to the commencement of 1 George II cap. 1, esteemed, introduced, used, accepted, or received, as laws in the Islands shall be continued to be laws in the Islands save in so far as any such laws or Statutes have been, or may be, repealed or amended by any Law of the Islands"

(4) Despite the absence of any evidence of actual enforcement of the statute in Cayman prior to 1727, there is a presumption arising from the date of settlement post dating the enactment of the statute that it was esteemed, used or accepted here from the earliest times.

(5) Having regard to instances of other statutes perceived as suitable or unsuitable, the decision of the Privy Council in Cooper v. Stuart and the universal nature of the mischief of the statute, there is a strong argument for deciding the statute applies locally.

(6) That finding was sufficient to dispose of the point in the context of the application to discharge the ex parte order.

(R.F.)

CONTRACT

Contract - Charter of vessel - Claim for repayment of funds advanced - claim for wages.

Case: Ebanks v Bowen; Bowen v Thetis (Cayman) Ltd.

Court: Grand Court (51/88 and 43/90)

Cor: Schofield, J.

Date: 6th April 1990

L and M were shareholders and directors of T.Ltd (the company). The company contracted with Treasure Islands Resort (the resort) to provide tourist cruises from the resort and for that purpose required a suitable vessel. B owned the "Elsi" which it was considered was suitable for such purpose. Negotiations were undertaken and draft agreements prepared between the company and B in relation to a charter arrangement but were not finalized. The Elsi needed work in order to put her into a seaworthy and suitable condition. L and M advanced

monies to B for this purpose and L expended services to this end. The repair work took longer to complete than anticipated and the company came under pressure from the resort to commence its contractual obligations. The work was eventually completed and cruises commenced for a two month period. During this period B was paid a salary by the company and 30% of gross receipts were paid to charter the Elsie pursuant to a week to week charter arrangement. Relations deteriorated in January 1988. The cruises ceased to operate and the resort terminated its agreement with the company. A number of actions were commenced between the parties as follows:

(1) L and M claimed 19873.20 US for service and materials which they paid for on behalf of B for repairs to the Elsi and 10.360 for services expended by L.

(2) B claimed for charter payments 15,500 US per month in relation to the Elsi and a salary of 2,500 per month in relation to his own services.

(3) The company claimed 13,430 for monies loaned to B. incidental and 1,744,350 damages for loss of its contract with the resort which it alleged was caused by B.

Held:

(1) L and M had no claim against B. All dealings were between B and the company. Any sums expended or services provided by L and M were done in their personal capacity and were for the purpose of capitalizing the company. There was no agreement that L would be remunerated for his services.

(2) The monies expended by the company in relation to repairs to the vessel was a loan to B and not to enable it to undertake its contractual obligations to the resort.

(3) Non payment of the loans by B did not materially affect the company's ability to perform its contractual obligations with the resort. This was caused by the inability of both the company and B to raise sufficient capital to fund the venture.

(4) While there were negotiations held in relation to a charter arrangement, no agreement was finalized as B contends. B is entitled to charter fees for the period the cruises actually operated based on the week to week arrangement which had been agreed.

(R.F.)

Mitigation of damages - Duty of care owed by telephone company implied term - Estoppel - Summary judgment.

Court: Grand Court (156/88)

Cor: Harre, J.

Date: 20th February 1989

Cases Referred to: A.G. of Hong Kong v. Humphreys Estates Ltd [1987] 2 All ER 387

Taylor Fashions Ltd v. Liverpool Victoria Trustees Co Ltd [1981] 1 All ER 897, [1982] QB 133

Counsel: Mr. A Turner Q.C. for the plaintiff
Mr. La Montagne Q.C. and Mr. Merren for the defendent

The plaintiff is the suypplier of telephone service to the defendant. Sometime in 1986, the defendent leased his home to another person who was permitted to use the telephone at her own expense. A bill for $10.44 dated 15th December 1986 was not settled until 3rd February 1987. By that time, a further bill showing the amount being in arrears had been prepared. It was dated 23rd January 1987 and amounted to $4,231.31. That amount, less the $10.44 remained unpaid and the plaintiff sent out a disconnection notice in respect of it on 24th February. The tenant went on making calls until 12th March, by which time the amount outstanding was $13,367.92.

The defendant claims that he is not liable to pay the full amount owing on the bill because the plaintiff was in breach of its duty of care to its customers in not disconnecting the line at an earlier date. The defendant furthermore relies on the company's standard practice of serving a disconnection notice to a subscriber whose account is unpaid after 21 days and of disconnecting the line where the account is not settled within seven days of the notice. The defendant contends that it was an implied term of the contract between himself and the telephone company that this standard practice would be followed; alternatively, he claims that he relied on the belief that the plaintiffs would follow this practice when he leased his house. Finally, the defendant contends that the plaintiff had a duty to mitigate their damages which included a duty to disconnect the line at an earlier date.

Held: (summary judgement for the plaintiff)

(1) The written contract between the defendant and the plaintiff gave the plaintiff a right to disconnect the telephone line after 21 days arrears, it could not be read as imposing a duty on the plaintiff to disconnect.

(2) The effect of the modern cases on estoppel is succinctly described in the judgement of Lord Templeman in A.G. of Hong Kong v Humphreys Estate Ltd . The essence of the modern rule is in ascertaining whether it would be unconscionable, where the parties have proceeded on the basis of an underlying assumption, for one party to deny that which he has allowed or encouraged the other to assume to his detriment.

(3) The "underlying assumption" on which the defendant's argument on estoppel, and indeed on an express and implied contractual term, is based is that in all the circumstances the plaintiffs were under a duty to exercise their rights of disconnection to the fullest extent even for the most trivial arrears and that if they did not do so the subscriber could allow further charges to be incurred on the telephone account with impunity. On the evidence, this argument is unsustainable.

COURTS

Appeal - Interlocutory injunction pending hearing at appeal

Court: Cayman Islands Court of Appeal (In Chambers) (8/89)

Cor: Kerr, J.A.

Date: April 19, 1989

Cases Referred to: American Cyanmid Co. v. Ethicon Ltd. [1975] AC 396
Erinford Properties Ltd. v. Cheshire County Council [1974] 2 All ER 448
Wilson v Church (No.2) (1879) 12 Ch. 454
Doherty v. Allman (1878) 3 H.L. 719

Counsel: Mr. Robin Potts Q.C. and Mr. Quinn for the plaintiff/appellant
Mr. A. Jones for the defendant/respondent

The appellant applied for an injunction to restrain the respondent from proceeding with winding-up proceedings against S Corporation pending the determination of an originating summons brought by the appellant against the respondent.

The Chief Justice dismissed the application and the appellant indicated their intention to appeal and sought, unsuccessfully, for an injunction pending the hearing of the appeal. In the interim, the originating summons was heard and determined in favour of the appellants. Notwithstanding, the appellant pursued this application on the basis that the claim for interlocutory injunction rested upon an alleged agreement between the attorneys on either side not to proceed with the winding up proceedings against S Corporation until a final determination of the originating summons against the respondent. "Final determination" it was argued meant determination by or in appellate proceedings.

Held: (dismissing the application)

(1) It is well settled that it is competent for a judge who has refused an interlocutory injunction to grant an injunction pending appeal from his refusal. This jurisdiction was acknowledged by Megarry J. in Erinford Properties Ltd. v. Cheshire County Council [1974] 2 All E.R. 448, 454 where he referred with approval to Wilson v. Church (No.2) [1879] 12 Ch.D. 454. Megarry J observed:

"There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid and so on."

In the instant case, the Chief Justice was aware of the jurisdiction when he said:

"Accepting the jurisdiction to grant a temporary injunction pending appeal, I am satisfied that this is not a case in which the court's discretion ought to be exercised in that direction for reasons that the balance of convenience is heavily in favour of the defendant..."

The Chief Justice found that (a) there would be no detriment to the appellant if the winding up proceeded, (b) the respondent would be seriously prejudiced if the winding-up were deferred and the application rather than being genuine was an oblique method of impeding the respondent in pursuing his remedy against the defaulting S Corporation (c) the collateral action if successful could be adequately remedied. Those were exceptional circumstances which moved the Chief Justice to refuse an injunction pending appeal from his dismissal of the appellant's application. He was au fait with all the relevant proceedings collateral and incidental. In this regard, the following observations of Megarry J., in Erinford's case were appropriate: (P.454)

"I accept that convenience is not everything, but I think that considerable weight should be given to the consideration that any stay of execution must be made initially to the trial judge. He....knows all about the case and can deal promptly with the application."

(2) In a letter to the respondent's attorneys, the appellant's attorneys interpreted the words "final determination" in the alleged agreement to include determination by all appeals brought by the respondent. The respondent's attorneys denied the possibility of such interpretation. Thus the existence of any agreement and its terms were contentious issues. Counsel for the appellant gave no assurance that if the respondent were successful on appeal against the originating summons that the appellant would go no further. In those circumstances, the winding-up proceedings could be deferred indefinitely and until all appellate proceedings are abandoned or exhausted. It would be indefensibly imprudent and a lack of diligence were the attorneys for the respondents to agree that the winding-up proceedings against the corporation be so postponed.

(B.B.)

Appeal - Security for costs - Relevance of impecuniosity of appellant in setting costs.

Court:	Grand Court (321/89)
Cor:	Malone, C.J.
Date:	15th March 1990
Legislation:	s16(2) Court of Appeal Law 1975 Poor Person s (Legal Aid) Law 1975
Case Referred to:	Conway v George Wimpey & Co. (1951) 1 All E.R. 56 Willé v St. John (1910) Ch 701

Daley v Diggers Ltd. (1951) 1 All E.R. 116

Counsel: Mrs. Maierhofer for the appellant
Ms. Bridges for the respondent

The appellant, a legal aided litigant, sued in Grand Court and lost. She appealed and was refused a certificate justifying two counsel on the appeal. On an application to set security for costs under s.16(2)of the Court of Appeal Law, the appellant maintained her impecuniosity warranted a nominal sum of 50.00

Held: (for the appellant)

(1) The respondent's objection that the appellant was not legally aided and that the appeal was without merit were themselves without merit.

(2) There is a distinction between Cayman and English law arising from the absence in Cayman of a provision similar to s.7(6)(b) of the English Legal Aid Law 1974 which provides that the rights conferred by Legal Aid "....shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised..."

3. The impecuniosity of the appellant must therefore be a relevant factor in fixing as security cost of appeal (Conway & George Wimpey & Co. Wllie v St. John, Daley v Diggers and another)

4. Security for costs set at 50.00.

(R.F.)

Appeal - Stay of execution pending appeal - Intermediate orders - Powers of court of appeal - Hardship to respondent

Case: English Shoppe Ltd. v Cayman Arms Ltd.

Court: Cayman Islands Court of Appeal (16/89)

Cor: Collett, C.J.

Date: 14th July 1989

Legislation: Court of Appeal Law (Law 9 of 1975)
The Court of Appeal Rules 1987

Counsel: Mr. N. Hill Q.C. for the appellant
Mr. Lamontagne for the respondent

On 23rd June 1989, Harre J. ordered the appellants to surrender to the respondent possession of certain George Town commercial premises. The appellants claim that unless a stay of execution is ordered the appeal to the Court of Appeal is rendered nugatory. They rely on rule 20(1) of the rules which are in similar terms to O.59 r.3 of the English

Rules of the Supreme Court. The rules say as follows:

> 20(1) Except so far as the court below or the Court may otherwise direct, -
>
> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;
>
> (b) no intermediate act or proceeding shall be invalidated by an appeal.

Held: (application dismissed)

(1) The intention of rule 20 is not to circumscribe the powers of the Court of Appeal at all. Indeed these powers are expressly reserved by the wording of the rule. The intention is rather to prevent the automatic invalidation of intermediate acts or proceedings by reason only of the filing of an appeal.

(2) There is no substance in the contention that the Court of Appeal would not be able to order redelivery up of possession to the appellants if their appeal were to succeed.

(3) The stay of execution cannot be said to be necessary to prevent the present appeal from being rendered nugatory.

(4) Against these considerations must be weighed the hardship caused to the respondent in not being permitted to take possession of the premises immediately.

(P.H.)

Appearance - Conditional appearance - Jurisdiction of the court

Court: Grand Court (316/88)

Cor Harre, J.

Date: 19th April 1989

Cases cited: Keymer v. Reddy [1912] 1 K.B. 219

Legislation : Grand Court (Civil Procedure) Rules

The first, fourth, fifth and sixth defendants all entered appearances which were expressed to be conditional and without prejudice to an application to set aside the writ of summons and/or the service of the writ of summons out of the jurisdiction. The defendants had failed to obtain the leave of the court to enter a conditional appearance. Failure to do so was a procedural irregularity. The plaintiff contended that the defendants were precluded from making such an application because their respective unconditional appearances constituted a first step in the action.

Held: (dismissing the application)

(1) If the defendant has made an appearance under protest and the time for applying to have the writ set aside has elapsed and the court is of the opinion that the delay did not show an intention to abandon the protest or impede the administration of justice, the court has the fullest power to give effect to that protest and set aside the writ. (Keymer v. Reddy)

(2) The power to make an order under rule 16(6) Civil Procedure Rules is a wide one and should be exercised in accordance with the principles in Keymer v. Reddy. The defendant's failure to apply for leave to enter a conditional appearance is an irregularity which does not nullify the entry of an appearance as a conditional appearance and can be dispensed with.

(R.O.)

Consent Order - Extension of time for provision of security for costs - Power of court to extend time limited by consent order.

Court: Grand Court (1972/88)

Cor: Malone, C.J.

Date: June 20 1990

Legislation: Order 3, Rule 5 Rules of the Supreme Court

Cases referred to: Siebe Gorman & Co. Ltd v Preupa Ltd. (1982) 1 All E.R. 377

Counsel: Mr. McLaughlin for the plaintiff
Mr. Shea for the 1st and 3rd defendant
Mr. Foster for the 2nd defendant

The plaintiff undertook to provide security for costs to the first and third defendants within 60 days of an order made by consent. The plaintiff later undertook to provide security to the second defendant within 90 days of an order made by consent. The plaintiff defaulted under the first order and applied to extend the time for compliance. Counsel for the second defendant appeared by agreement to oppose the application. The first and third defendant also applied to dismiss the plaintiff's action on account of failure to comply with the consent order.

Held: (application to extend order allowed)

(1) A consent order may in appropriate circumstances have binding contractual effect between the parties. A court cannot vary the same except where it would be justified in interfering with a contract. Alternatively, consent orders may not constitute a contract but arrangements which the parties are not objecting to. In that case, the court has power to extend time limited under it. (Order 3 rule 5, Siebe Gorman Co. Ltd. v Prenpac Ltd. per Denning M.R. and Templeman L.J.

(2) In addition, even where the consent order constitutes a contract, it may be a contract which does not exclude the discretion of the

court to extend time. (Sieba Gorman Co. Ltd. v Preupac Ltd. per Everleigh, L.J.).

(3) There is no evidence here that the time limited by the consent order was intended to exclude the court's discretion. There is, therefore, no need to determine if the consent order in this case is of the contractual kind.

(4) The application for extension of time for compliance by twenty four hours is granted and the defendant's application dismissed.

(R.F.)

Judgement - Discretion to award interest under s.62 (2) Judicature Law
(See Conflict of Laws - Foreign Judgement)

Judgement - Sufficiency of judgement
(See Criminal Law - Driving under the influence of alcohol)

Jury - Courts discretion to order that a matter be set down before a judge sitting with a jury - Familiarity of a jury with local sea customs - Function of a jury

Court: Grand Court (294/1988)

Cor: Harre, J.

Date: 1st November 1988

Cases referred to: Williams v. Beesley [1973] 3 All E.R. 144

Legislation: Judicature Law

Counsel: Mr. Jenkins for the Plaintiff
Mr. Rose for the Defendants

The Plaintiff applied for an order pursuant to s.25 Judicature Law for an order that the matter be set down before a judge sitting with a jury. The case concerned the construction of an agreement for the hire of a seagoing vessel. The Plaintiff's attorney argued that owing to its long affinity to the sea, Cayman's inhabitants would be uniquely well qualified to have regard to what was going through the parties' minds when they made the contract and have experience of local sea customs and local customs with regard to the hiring and chartering of sea going vessels. The Defendants opposed the application.

Held: (dismissing the application)

(1) It is the duty of the court in deciding whether an action can be properly tried by a jury to act fairly to all parties to the action. (Williams v. Beesley). The length and expense of a trial is one matter to be taken into account. It would be improper to impose the risk of additional costs on civil litigants unless a specific and cogent reason for jury trial is shown.

(2) It is the function of the jury to reach its conclusions on the evidence, including expert evidence, and not on the basis of special expertise or affinities which any of its members may have.

(R.O.)

CRIMINAL LAW

Accomplice evidence - Requirement of corroboration
(See Criminal Law(Sentence) - Effect of not guilty plea on sentence)

Deportation - Appeal against recommendation for deportation - Jurisdiction or the court to entertain such appeal

Case: Powers v Regina

Court: Grand Court (63/90)

Cor: Schofield, J.

Date: 24th August 1990

Counsel: Mr.Archie for the Crown
Mr.Furniss for tne appellant

Case Referred to: Tatum v Regina (1986) CILR 38

The appellant was convicted, after entering a ples of guilty, to offences of damaging property and handling stolen goods contrary to s.244 and 230(1) of the Penal Code respectively. The appellant had been in Cayman for six months where he had been working. His entry permit was due to expire three weeks after his court appearance.

The magistrate had imposed a fine of $100 on the appellant in respect of the property damage and had also recommended that he be deported. The substance of the appeal was that the recommendation for deportation should be set aside. The powers to make a deportation order lies with the Governor pursuant to s.9(1) Caymanian Protection Law 1984. The decision of Summerfield, C.J. in Tatum v Regina was cited to the effect that a recommendation for deportation was not a judgement, sentence or order for the purpose of s.156(1) of the Criminal Procedure Code which prevented the appealate from entertaining any appeal.

Held: (appeal dismissed)

(1) Whilst the Grand Court was not at liberty to set aside any recommendation, this fact should not deter the court, in an appropriate case, (such as this) from forming an opinion as to whether the recommendation was correct in law and principle. The final decision always rested with the Governor.

(2) On these facts, the recommendation was wrong in principle because.

a. The offences of which the appellant, a first offender, was convicted were not serious offences of this kind;

b. The magistrate had failed to warn the appellant that he intended to make such a recommendation and this deprived the appellant of any enquiry into the propriety of the recommendation.

(M.D.)

Drugs - Certificate of analysis - Presumption of regularity.

Case: R v. Nicholetta

Court: Grand Court (Summary Court of Appeal)(24/90)

Cor: Harre, J.

Date: 14th August 1990

Cases referred to: R. v. Braithwaite (Can.) 6 C.C.C. 257
R. v. Tunke (1975) 25 C.C.C. 518
R. v Bowles (1974) 25 C.C.C. 424
R. v Banks [1972] 1 All ER 1041

Legislation: Section 6 of the Misuse of Drugs Law (Revised)

Counsel: Mr N. Hill QC for the Appellant
Miss J. Conolly for the Crown

The appealant was convicted of possession of cocaine and possession of a utensil used in the preparation of a controlled drug. The appeal was on the ground, inter alia, that the magistrate erred in law in admitting a certificate of analysis in the absence of a proper hearing.

Held: (appeal allowed)

(1) Where the prosecution is required to serve a certificate in compliance with section 6 of the Misuse of Drugs Law (Revised) before certain documents can be admitted into evidence, that requirement is not met if defence counsel who alleges lack of proper service is denied the opportunity to test the evidence for service by cross-examination before the documents are admitted into evidence.

(2) The accused must also at this stage be given the opportunity to give evidence limited to the admissibility of the certificate and, if he does, submit to cross-examination on that issue.

(3) Compliance with the statutory requirement in section 6 of the [Misuse of Drugs Law (Revised) must be strictly proved by the prosecution. There is no presumption of compliance with the provision.

(G.F.)

Drugs - Failure to provide a specimen - Whether mere non-compliance

enough without actual refusal.

Case: Regina v. Barnett

Court: Grand Court (200/89)

Cor: Schofield, J

Date: 7th May 1990

Legislation: Misuse of Drugs Law

Counsel: J Furniss for the Appellant
Ivor Archie for the Crown

The appellant was taken to a hospital where he was requested to give a specimen of urine. He did not reply to the request but the evidence was that he was thinking about it. Approximately twenty five minutes after the request was made, the appellant was charged with failing to provide a specimen.

Held: (conviction entered)

(1) Where a person is requested to give a specimen of urine and he fails to provide one, he is guilty of an offence under section 4(2) of the Misuse of Drugs Law notwithstanding that he does not actually refuse to the request.

(2) In initially failing to respond to the officer's request for a specimen of urine and in then saying he would think about it the appellant was, at that point in time, failing to comply with the requirements of section 4(2). The police officer was being indulgent in allowing the appellant time to think it over. There was no requirement to repeat the request having given the appellant time to comply with it. Once the request was made, the onus was on the appellant to comply with it.

(P.H.)

Juveniles - Interview not in Presence of Parent or Guardian - Reference in Subsequent Statement to show Inconsistency - Admissibility
(See Criminal Law - Manslaughter)

Manslaughter - Joint enterprise - Use of firearm - Conflict in statements of accused and witnesses - Election by accused not to give evidence on oath - Inculpatory and exculpatory parts - Judge's comment

Case: Regina v. Anglin & Ebanks

Court: Grand Court (IND. 40/88)

Judge: Malone, C.J.

Date: 17th January 1990

Cases cited: R. v. Sharp (1988) 1 WLR 7
R. v. Duncan (1981) 73 Cr App R 359

Counsel: Mr. A. Smellie for the Crown
Mr. J. Jenkins for the accused

The first accused was interviewed, as a suspect, on September 17, 1990 when he stated that an earlier statement made, as a potential witness, on December 22, 1982 was untrue. The defence objected to this reference to the earlier statement on the submission that a statement taken from a juvenile as a potential witness cannot subsequently be used to show inconsistency on his part when later he becomes a suspect if at the time when the statement was made neither a parent, guardian nor other suitable person was present.

Both accused had been charged with manslaughter based on their participation in a violent burglary. It was not in dispute that both had participated in a joint enterprise with the man who had murdered the deceased householder.

But at the end of the prosecution case a no case submission was accepted in respect of the first accused because there was no evidence that he knew the murderer had a gun; there was, however, evidence of such knowledge on the part of the second accused in the statements of three witnesses and in the record of his own caution statement and interview. There was however considerable conflict in these statements.

The judgement therefore related only to the case against the second accused.

Held:

(1) Juveniles, whether suspects or not, should, as far as practicable be interviewed by the police in the presence of a parent, guardian or other suitable person. (Archbold 42nd edn. 15-14 at p.1114 Appendix B direction 4.) Although that direction was not followed in the interview of December 22, 1982, nevertheless this defect was not relevant to the admissibility of the statement of September 17, 1983 or any portion thereof as it was obtained in accordance with the Judges' Rules.

(2) Where a statement contained both inculpatory and exculpatory parts, the jury must be told to consider the whole. It was not helpful to try to explain to the jury that the exculpatory parts are something less than evidence of the facts they state. Where appropriate the judge should state that the incriminating parts are likely to be true whereas excuses do not have the same weight. The judge may also comment in relation to the exculpatory remarks on the election of the accused not to give evidence on oath (R. v. Duncan approved in R. v. Sharp) Applying these principles to the conduct of the Crown case here the evidence had been properly presented to and considered by the court.

(3) The statement of the first witness against the accused could not be relied on because of inconsistencies and his doubtful character.

The evidence of the second witness also conflicted with that of another person and must be doubted despite his good character. Because the accused voluntarily submitted himself to interview by detectives and voluntarily made a caution statement, and presented a witness in support of his story, his election not to give evidence on oath was understandable and was not therefore cause to question his credibility.

(4) The resulting reasonable doubt required a not guilty verdict.

(G.F.)

Motor Vehicles - Driving under the influence of alcohol - Defective charge sheet -Failure to invite plea to amended charge - Defective certificate still admissible - Whether evidence of alcohol level unreliable - Interruption of defence cross-examination - Insufficient judgment - No substantial miscarriage of justice

Case:	Cunningham v. Regina
Court:	Grand Court
Judge:	Schofield, J.
Date:	23rd July 1990
Legislation:	s.61(b) Traffic Law ss.52 , 72 Criminal Procedure Code(CPC) s.70 CPC
Cases cited:	De Witt v. R. 1987 CILR 49 Ann Eliz. Smith & Ian Martin Ebanks v. Regina (SCAs 47 & 61/88)

The appellant was convicted of driving whilst under the influence of alcohol contrary to s.61(b) Traffic Law at about 1.50 am on February 18, 1989. Two police officers testified that a breath test showed the appellant to have 120mg alcohol in 100ml blood which is above the prescribed limit.

The original charge sheet was defective because:-

(a) it showed a reading of 190mg (instead of 120mg)
(b) the licence number of the vehicle was wrong
(c) no date was stated

There had also been a number of irregularities in procedure. When the charge was amended in respect of (a), the accused was asked to plead, but he was not asked to do so when it was amended in respect of (b) and (c).

The breath test certificate was also defective and it was never proven that it was taken with an approved machine and a police officer had referred to it by an identification number never mentioned in the Gazette. The certificate showed the alcohol level as "B12".

The amendments to the charge had been made by the prosecution interrupting at a crucial stage in the defence counsel's cross-examination of a witness.

The magistrate's judgment did not expressly deal with the arguments submitted by the defence.

The grounds of appeal were therefore:-

1. Contrary to s.70(1) CPC the appellant had not been asked to plead to the second amendment to the charge.

2. The defective certificate was inadmissible.

3. The verdict was unreasonable/unsafe because there was no reliable evidence of the alcohol level.

4. The interruption of defence counsel's cross-examination rendered the verdict unsafe.

5. The failure of the magistrate to give any or adequate consideration to defence counsel's submissions rendered the verdict unsafe.

Held:- (dismissing appeal)

In respect of ground -

(1) To comply with s.70(1) it was only necessary that a plea be either vicariously offered or tacitly conveyed on behalf of an accused before he could be tried on a charge: De Witt v. R. 1987 (a case dealing with the primary requirement in s.62(1) CPC.) Here there was only one charge before the court and the accused was made fully aware of both the charge and subsequent amendments; a plea of " not guilty " was therefore tacitly conveyed by the appellant and his counsel in respect of the second amendment.

(2) It was not in dispute that the certificate was made to record the breath test taken on February 18, 1989 and the existence of any defect could not render the certificate inadmissible but could only affect the value or quality of the evidence. The certificate was therefore properly admitted.

(3) Despite the fact that the certificate appeared to state a reading of 12 rather than .12, the actual reading was not a matter of admissibility and the court was satisfied on the evidence of both police officers, and from percentage points also visible on the certificate, that the reading recorded in fact represented 120mg alcohol in 100ml blood and was therefore not inaccurate or in any way defective.

(4) When applying for an amendment the correct course for the prosecutor was to wait until the end of the cross-examination of his witness instead of appearing to come to his rescue. Nevertheless, because the police officer had already stated the correct reading in his evidence-in-chief and because the witness' difficulty arose from the defective charge sheet rather than from his

own evidence or the certificate, the appellant's defence had not been prejudiced.

(5) The judgment of the magistrate did not in fact comply with s.52 CPC because it failed to specify the offence and the section of the law under which the appellant was convicted, nor did it comply with the requirements for an adequate judgment set out in Ann Elizabeth Smith and Ian Martin Ebanks v. Regina (1988), i.e. that the judgment should state -

(i) the point or points for determination

(ii) the decision thereon
(iii) the reasons for the decision.

An insufficient judgment is fatal to the conviction unless the appeal court is satisfied that no substantial miscarriage of justice could have resulted: s.72 CPC. On the totality of the evidence the court was satisfied that the case against the appellant was overwhelming and the conviction should stand.

(G.F.)

Wounding - Self Defence not available where there is an opportunity of escape from aggressor.

Case:	Regina v Dixon
Court:	Grand Court (Summary Court Appeal)
Cor:	Schofield, J.
Date:	April 11, 1990
Counsel:	Mrs. Escalante for the Crown Miss Bodden for the Appellant
Legislaiton:	ss.69, 151(b), 35 and 194 of the Penal Code

Appeals against conviction and sentence on the following charges

(1) wounding contrary to section 194 of the Penal Code;
(2) Carrying an offensive weapon contrary to section 69 of the Penal Code, and
(3) Disorderly conduct, contrary to section 151(b) of the Penal Code.

The sentences appealed against were as follows:

(1) Wounding - 4 months imprisonment.
(2) Carrying an offensive weapon - fined $300.00 or one month imprisonment
(3) Disorderly conduct - fined $100.00 or 2 weeks imprisonment.

The fines were to be paid within 2 weeks of the appellant's release from prison. The offences were committed as part and parcel of the

same incident. The appellant was alleged to have hit the complainant, with whom he had had some altercation before with a lug wrench thereby inflicting personal injuries to the complainant. It was alleged that the attack was unprovoked.

The appellant did not deny that he hit the complainant as alleged, but explained that he had only done so by way of self defence as the complainant had sworn at and struck him twice as he (the appellant) was sat in his van. As the complainant suddenly made for the appellant with a knife, the apellant got out of his van armed with the wrench with which he struck at the complainant by way of self defence. Both the complainant and the appellant called witnesses to corroborate their respective evidence. Counsel for the appellant argued that the decision of the court below had been based on credibility and that the issue of self defence had not been addressed.

Held: (appeal dismissed on conviction; allowed in part on sentence)

(1) The judgment of the learned magistrate showed that he addressed his mind to the issue of self defence because there was a specific finding that the complainant did not have a knife and that the appellant acted out of anger; the inference being that the appellant did not act out of necessity to save himself from violence.

(2) The learned magistrate saw the witnesses and had the opportunity of assessing their credibility. He preferred the evidence of prosecution witnesses to that of the appellant and his witness. In any event, it was incumbent upon the appellant, in the circumstances alleged by him, to escape his aggressor. There was no need for him to get out of vehicle armed to defend himself.

(3) The period of imprisonment was appropriate on the wounding offence and 4 months was a proper term. As the lesser offences were committed as part and parcel of the same incident, the learned magistrate therefore erred in principle in imposing fines payable on the appellant's release from prison. In the present case it would have been appropriate to pass a very short concurrent sentence of imprisonment for the offence of carrying an offensive weapon. For the offence of disorderly conduct, which does not attract imprisonment, a dismissal of the charge under section 35 of the Penal Code would have been appropriate.

(4) The appeal against sentence as to the lesser offences was allowed as follows:

Carrying offensive weapon - fine set aside and charge dismissed under section 35 of the Penal Code.
Disorderly conduct - fine set aside and charge dismissed under s.35 of the Penal Code.

(B.B.)

CRIMINAL LAW (SENTENCE)

COURT OF APPEAL JUDGEMENTS

INDICTMENT NO.		OFFENCE	SENTENCE
	26/88	ROBBERY (NO WEAPON)	3 YEARS RECMDN. DEPORT

CRIMINAL APPEALS

CASE NO.	CRIM. APP. NO.	OFFENCE	SENTENCE
3598-601/88	39/89	1. DEFILEMENT OF GIRL	4 YEARS
		2. INDECENT ASSAULT	FILE
		3. INDECENT ASSAULT	2 1/2 YEARS IMPRISONMENT CONCURRENT TO COUNT 1
3976/88	60/89	CAUSING DEATH BY DANGEROUS DRIVING	15 MONTHS IMPRISONMENT DISQUALIFIED 5 YEARS CONSEC.
1415-16/89	63/89	1. POSSESSION OF COCAINE WITH INTENT TO SUPPLY	2 1/2 YEARS IMPRISONMENT MONEY FORFEITED RECMDN. DEPORT
		2. POSSESSION OF COCAINE	FILE
2323/89,2701-5/89	66/89	OBTAINING PROPERTY BY DECEPTION - 6 COUNTS	3 YEARS IMPRISONMENT ON EACH TO RUN CONCURRENTLY
3846/89,4270/89	1/90	1. THEFT	12 MONTHS IMPRISONMENT
		2. ATTEMPTED BURGLARY	6 MONTHS CONSECUTIVE
1836/89	2/90	THEFT	9 MONTHS IMPRISONMENT
3717/89,3719-21/89	4/90	1. WOUNDING	12 MONTHS IMPRISONMENT

		2. THREATENING VIOLENCE	9 MONTHS CONCURRENT
		3. CARRYING OFFENSIVE WEAPON	$100 FINE
615/90	2/90	GRIEVOUS BODILY HARM	3 1/2 YEARS IMPRISONMENT

(G.F.)

Drugs - Possession of cocaine with intent to supply and consumption

Case: Regina v Williams

Court: Grand Court (Summary Court Appeal)

Cor: Schofield, J.

Date: 1st May 1990

Legislation: ss 3(1)(m) and 3(1)(i) of the Misuse of Drugs Law (Revised)

Cases referred to: Dixon (C.I.C.A. 13/89); Myles (C.I.C.A.) 41/89)

The appeal was against the sentences of 3 years imprisonment and 6 months imprisonment, to run consecutively, imposed respectively on charges of:

(i) possession of cocaine with intent to supply contrary to section 3(1) (m) of the Misuse of Drugs Law (Revised); and

(ii) consumption of controlled drug, namely cocaine, contrary to section 3(1)(i) of the Misuse of Drugs Law (Revised)

The appellant had pleaded guilty to the charges. She had been found by the police in the doorway to her house with a matchbox containing individually wrapped packets of cocaine. The total quantity of cocaine was found to be 1.997 grams . A urine specimen taken from the appellant proved positive for cocaine. She has several previous convictions and of which four were for consuming cocaine. She had also admitted that she intended to sell the cocaine.

Held: (appeal allowed in part)

(1) After the review of the cases, the court concluded that for this persistent offender in possession of about 2 grams of cocaine with intent to supply, and no doubt, feeding her own habit an overall penalty of 3 years imprisonment was appropriate. Accordingly, the appeal was allowed to the extent of ordering that the sentences of 3 years imprisonment and 6 months imprisonment should run concurrently.

(2) As no fine was imposed by the summary Court on the charges of possession of cocaine with intent to supply, the appellate court could not rectify the omission.

(B.B.)

Drugs - Possession of cocaine with intent to supply - Sentencing principles

Case: Hosang and Burton v. Regina

Court: Grand Court

Judge: Schofield, J.

Date: 1st May 1990

Legislation: Misuse of Drugs Law (R) ss. 3(1)(k),3(1)(m), 13(4)

Cases Cited: Bush v. R. 1986 CICR 62
Blackman v. R. 1984 CICR 55

H and B had been apprehended by the police on August 21, 1989 in possession of 29.1 grams of cocaine hydrochloride and an additional 10.6 grams was found in H's apartment.

H, a Jamaican, admitted selling the cocaine to fund his holiday in Cayman and pleaded guilty to 2 charges of possession with intent to supply contrary to s.3(1)(m) Misuse of Drugs Law (R). B, who had the 29.1 grams on him, had been given the packet immediately beforehand by H so he pleaded guilty to simple possession contrary to s.3(1)(k).

For the charges of possession with intent to supply H was sentenced in respect of the 29.1 grams to 5 years imprisonment and fined $3000 with 6 months imprisonment in default of payment and in respect of the 10.6 grams to 3 years imprisonment to run concurrently and was fined $2000 with 4 months imprisonment in default.

B was sentenced to 3 years imprisonment and was fined $2000 with 4 months imprisonment in default.

The court took account of the general rule that severity of sentences was related to quantity of drugs in drugs offences and reviewed a number of comparable recent drugs cases.

Held: (appeal allowed)

(1) The appropriate sentence for possession with intent to supply was 4 years unless a large quantity was involved. H's sentence in respect of the 29.1grams must therefore be reduced from 5 to 4 years. B's involvement was peripheral and his term of imprisonment should therefore be reduced from 2 years to 15 months.

(2) As regards the fines, although it was usually appropriate in a drug trafficking case to impose a fine in addition to imprisonment in order to get at the profits of such activity (and indeed this was a

requirement of sentence in relation to hard drugs by virtue of s.13(4) MDL(R)), nevertheless where a fine was imposed with imprisonment in default it must be related to the convicted person's ability to pay. (Bush v. R., Blackman v. R.)

(G.F.)

Fine - Imprisonment - Suspended sentence - Fines not to hamper rehabilitation - Suspended sentence cannot run concurrently with sentences of imprisonment

Case: Scott and Gilbert Rankine v. Regina

Court: Grand Court (Summary Court Appeal) (26/90 and 27/90)

Cor: Schofield, J.

Date: 24th May 1990

Cases referred to: Green v. Regina (130 of 1988)

Counsel: Mr. John Furniss for the appellants
Ms. Lorna Dilbert for the Crown

The first appellant was sentenced in the Summary Court as follows :

-Assaulting Police - 4 months imprisonment
-Carrying an offensive weapon - Fined $200.00 or 6 weeks imprisonment in default
-Resisting arrest - Fined $250.00 or 6 weeks imprisonment in default
-Escaping lawful custody - 3 months imprisonment to run concurrently
-Consuming ganja - 3 months imprisonment.

He was also ordered to serve a further 3 months imprisonment of a prison sentence suspended for two years on 9th May 1989.

The second appellant was sentenced in the Summary Court as follows :

-Resisting arrest - Fined $250.00 or 6 weeks imprisonment in default
-Escaping lawful custody - 3 months imprisonment concurrent suspended for 2 years
-Carrying an offensive weapon - 3 months imprisonment to run concurrently
-Assaulting police - 3 months imprisonment consecutive
-Consuming ganja - Fined $500.00 or 2 months imprisonment in default.

The fines were to be paid within two months of release.

Held : (appeal allowed in part)

1. Fines were substituted by absolute discharges for the first and second appellants. As a general rule, it is wrong to sentence an offender to an immediate term of imprisonment and at the same time fine him as on his release from prison he should be unhampered in his efforts to rehabilitate himself and not have the burden of seeking

funds to pay fines.

2. The sentence of imprisonment on the second appellant is lifted and expressed to be an immediate concurrent sentence. Firstly, it is not possible for a suspended sentence to run concurrently with sentences actually being served. Secondly, it is wrong in principle to pass a suspended sentence at the same time as an immediate term of imprisonment.(Green v. Regina).

(R.O.)

Motor Vehicles - Driving without insurance - Period of disqualification - "Special reasons" for not imposing disqualification

Case:	Regina v. Cholette
Court:	Grand Court (Summary Court Appeal) (29/90)
Cor:	Harre, J.
Date:	29th June 1990
Cases cited:	Whittal v. Kirby [1946] 2 All ER 555 Regina v. Newton (1982) 4 Cr. App. 388 Blows v. Chapman [1947] 2 All ER 576
Counsel:	Miss L. Dilbert for the Crown Mr. Murray for the Appellant

The appellant was convicted of driving without insurance, using an unregistered vehicle and driving unsafely loaded. He appealed against the sentence of 12 months disqualification imposed in relation to the offence of driving without insurance claiming there were special reasons for not imposing the disqualification.

The appellant claimed that he had been requested by a supervisor at his employers to take a special machine to a site being worked on by the company. The machine was ordinarily carried by a special vehicle but that vehicle would not start on the day in question. The supervisor then instructed the defendant to move the machine onto the vehicle in question.

Held: (appeal allowed)

(1) A special reason is a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence and one which the court should properly take into account when imposing punishment. (per Lord Goddard CJ in Whittall v. Kirby).

(2) While lack of knowledge is no defence to a charge of driving without insurance it is of relevance when considering the matter of special reasons. The appellant is not under a duty to ask his employer each day if a vehicle is insured (Blows v. Chapman) and could not be said to be reckless in relation to the insurance matter. There are special reasons which justify the removal of the disqualification.

(R.O.)

Plea - Effect of not guilty plea on sentence

Case: Haven v. Regina

Court: Grand Court (Summary Court Appeal) (202/89)

Cor: Schofield, J.

Date: 7th May 1990

Legislation: Misuse of Drugs Law

Counsel: Mr. John Furniss for the appellant
Mr. Ivor Archie for the Crown

The appellant, together with S.A. had been found guilty of possession of cocaine with intent to supply, contrary to section 3(1)(m) Misuse of Drugs Law, both had been sentenced to four years imprisonment. The appellant had pleaded "not guilty" the co-accused had pleaded "guilty". The co-accused had subsequently had his sentence reduced to three years imprisonment on appeal.

Held (appeal allowed in part):

1. The learned Magistrate had given himself the correct warning in respect of accomplice evidence. He had found corroboration in the arresting police officers' evidence. Although there was a discrepancy between S.A.'s and the arresting officers' evidence, it was not such a discrepancy as to detract from the credibility of the officers. Further corroboration of S.A.'s evidence arose from the circumstances of the arrest and the appellant's reaction to the arrival of the police.

2. The co-accused could normally expect a discount on his sentence for his "guilty" plea but the learned Magistrate had made it clear that he was going to treat both offenders equally despite S.A.'s plea. In the circumstances the appellant's appeal should be reduced to three years imprisonment.

(R.O.)

Plea - Effect of plea on sentence - Plea of guilty might go into mitigation of sentence but plea of not guilty never to be held against the accused as he has the basic right to put the prosecution to proof of their case.

Case: Evans v Regina

Court: Grand Court (Summary Court Appeal)

Date: 18th May 1990

Case referred to: R v Skone (1967) 51 Cr App. R. 165

Counsel: Mr. Furniss for the appellant
Ms. Dilbert for the Crown

The appellant was convicted of being concerned in the possession of cocaine. The grounds of appeal were as follows:

(a) The learned magistrate erred in treating the charge as one of being concerned with possession of cocaine with intent to supply.

(b) The fact that the learned magistrate referred in his notes to the entry of a "not guilty" plea and that the appellant had shown no penitence seemed to indicate that he was penalising the appellant for putting the prosecution to proof of the offence. It was inappropriate to penalise an offender for the nature of his defence as the remarks of the learned magistrate seemed to show.

(c) The appellant was not in possession of cocaine and at no time had any control of it. His knowledge of another's possession of cocaine did not make him concerned in its possession.

Held: (dismissing the appeal)

(1) Even though the learned magistrate might have erred in reciting the charge as one of being in possession of cocaine with intent to supply, this did not detract from the validity of the conviction as he did no more than put the prosecution to proof of an extra ingredient ie an intent to supply.

(2) The appellant had a right to put the prosecution to proof of their case and should not be penalised for doing so. If the plea of guilty is tendered then this might go to mitigate the sentence, but offenders must be free to challenge the prosecution case without prejudice. The learned magistrate's comments were therefore unfortunate.

(3) The appellant was not charged with having possession of cocaine. He was charged with being concerned (ie being involved in its possession) and the prosecution did not set out to prove possession or control on the part of the appellant.

(B.B.)

Suspended sentence - Combining suspended sentences with immediate imprisonment

Case: Regina v. Nelson-Moore

Court: Grand Court (Summary Court Appeal) (65/90)

Cor: Harre, J.

Date: 27th April 1990

Cases referred to: Butters and Fitzgerald v. R. (1971) 55 CAR 532

Counsel: Mr. John Furniss for the appellants
Ms. J Conolly for the Crown

It is in general bad sentencing practice to pass sentences of imprisonment with suspended and immediate terms mixed. However, this is a matter of practice and not law.

(P.H.)

Wounding
(See Criminal Law - Wounding)

DAMAGES

Personal Injury - Blow out Fracture of the right eye socket - General Damages of $18,000.00 - Special Damages of $7868.65
(See also Tort- Negligence)

Case: Haddleton v. Hassan and Cayman Agressor Ltd

Court: Grand Court (310/88)

Cor: Schofield, J.

Date: 7ht June 1990

Cases Referred to: Glasgow Corporation v Muir [1943] AC 448

Counsel: Mr. Nigel Clifford for the plaintiff
Mr. Ramon Alberga Q.C. and Mr. A. Panton for the defendants

The plaintiff, a 46 year old male received a blow out fracture of the right eye socket when hit by a hard object, possibly a bottle. The eye lid was lacerated approximately one inch and required stitching under local anesthesia.

The long term prognosis for the injury included a possibility of secondary glaucoma, retinal changes and retinal detachment. The likelihood of this occurring was impossible to determine. The plaintiff also suffered from enopthalnos (sunken eye) and drooping of the lid, both of which could be corrected by cosmetic surgery.

The plaintiff, following the injury, had decided to take an air ambulance to Miami for a second opinion on the extent of his injuries and claimed the expenses as special damages.

Held:

(1) Despite the fact that the air ambulance trip to Miami was not medically necessary, it was reasonable in the circumstances and special damages of 7868.65 were awarded.

(2) General damages were assessed and awarded at $18000.00 and included an unspecified sum for future medical costs.

(3) While damages awards in other jurisdictions are relevant in determining the appropriate measure, they are no more than a guide to

awards appropriate to Cayman. Distinguishing factors include the differences in value of money between jurisdictions and the absence of a contributory National Health scheme.

(R.F.)

EVIDENCE

Corroboration evidence of accomplices
(See Criminal Law(Sentence) - Effect of not guilty plea on sentence)

Corroboration evidence of accomplices - Unsafe conviction

Case: Solomon v. Regina

Court: Grand Court (Summary Court Appeal) 47/90)

Cor: Schofield, J.

Date: 10th August, 1990

Legislation: s69(1) Traffic Law
s3(1) Motor Vehicle Insurance (Third Party Risks Law 1984

The appellant was charged with three counts of taking and riding away a motor scooter which were dismissed. He was convicted of riding whilst disqualified and riding without insurance based on the evidence of two accomplices.

Held: (appeal allowed)

(1) The learned Magistrate, while warning himself he was dealing with accomplice evidence, did not specifically address his mind to corroboration.

(2) The discrepancies in evidence between the appellant and the accomplice made the conviction unsafe.

(R.F.)

Disputed evidence - Conviction resting on complainant's evidence only - Appellant's evidence conflicting in a material particular with two officers - Magistrate right to take a view on the evidence as a whole

Case: Regina v. Terry

Court: Grand Court (Summary Court Appeal) (34/89)

Cor: Harre, J.

Date: 6th July 1990

Counsel: Ms. Conolly for the Crown

Mr Collins for the appellant

The appeal arose from a fight at Owen Roberts airport between the appellant and JR. The appellant was charged with being an idle and disorderly person and with damage to property, in which she damaged without lawful excuse three gold chains and two pendants belonging to JR.

The ground of appeal in both cases was that no jury would be satisfied beyond a reasonable doubt on the basis of the evidence.

With regard to the first offence, each party accused the other of being the attacker. There was a security officer and a police sergeant present but both were looking away at the crucial moment.

With regard to the second offence, it was submitted that the prosecution had not sufficiently established that JR was wearing the chains and pendants at the material time.

Held: (dismissing the appeal)

1. The police officer and the security officer supported each other materially as to the evidence they gave. Both officers referred to a complaint by the appellant that JR had a bottle in her bag and wanted to hit the appellant with it. JR's bag was searched and no bottle was found. On the other hand JR said that the appellant had a bottle containing acid in her bag and a bottle containing a mixture of a cleaning fluid Sani-flush and acid was discovered in her bag.

2. With regard to the second offence, it was submitted that the prosecution had not sufficiently established that JR was wearing the jewellery at the material time. A complaint about the jewellery did not arise until later when JR produced the jewellery at the airport police office. Although the evidence rests on the complainant's evidence alone, the appellant's evidence conflicts materially with the evidence of the two officers and taking the evidence as a whole the magistrate was right to take the view he did.

(R.O.)

Documentary heresay - Admissibility - Exception in s.23 Evidence Law 1978 - Maker of document " beyond the seas " - Appeal against conviction and sentence

Case:	Margeson v. Regina
Court:	Grand Court (SCA 164/89)
Judge:	Malone, C.J.
Date:	11th May 1990
Counsel:	For appellant - Mrs. P. Levers and Mr. Hampson For Attorney-General - Mr. R. Sheehan
Legislation:	Customs Law s.54 Evidence Law 1978 s.23

Criminal Evidence Act 1965 s.1

Cases Cited: R. v. Pettigrew (1980) Cr App R 39
Howey v. Bradley (1970) Cr L R 223
R. v. Jones and Sullivan (1978) 66 Cr App R 246

The appellant was convicted of 2 offences of evading duty by presenting false invoices for goods he was importing under s.54 Customs Law.

To show the true market value of the goods the Crown relied on invoices found at the appellant's apartment which were admitted under s.23 Evidence Law 1978 as " forming part of a record relating to a trade or business ".

The two main grounds of appeal were:-

(1) There had been no proper inquiry as to the identity of the maker of the document and, in particular , there was no evidence that the maker was " beyond the seas ".

(2) The learned judge failed to direct himself properly on the burden and standard of proof falling on prosecution and defendant.

Held: (dismissing appeal)

(1) It was clear from the documents, on the face of them, that their maker was" beyond the seas" and, once that is shown, then none of the other conditions in s.23(1)(b) need be proven by the prosecution: R. v. Jones & Sullivan (1978) (a case involving s.1 Criminal Evidence Act 1965,the parent of s.23 Evidence Law). The cases of R. v. Pettigrew and Howey v. Bradley relied on by the defence were not pertinent.

(2) Despite the provision in s.54 Customs Law that the onus of disproving guilty knowledge shifts to the accused, where there was ample proof of guilty knowledge and the appellant gave no contrary evidence, the magistrate need not direct himself on the matter expressly.

(3) The sentence was appropriate and therefore confirmed.

(G.F.)

Expert Reports - Disclosure of Expert Reports - Application of English R.S.C. O.38 r. 38 - Whether disclosure to be simultaneous or sequential - Consequences of non disclosure - Whether court has discretion to order exchange of statement of all witnesses.

Court: Grand Court (72/84)

Cor: Collett, C.J.

Date: February 16, 1989

Legislation: English R.S.C. O.38, r.38
r 29, Cayman Civil Evidence Rules, 1978
r 47, Grand Court (Civil Procedure) Rules

Cases Referred to: Kirkup v. British Rail Engineering Ltd. [1983] 3 All ER 147

Counsel: Mr. C. Quin for the plaintiffs
Mr. Foster for the defendants

Application for supplementary directions in relation to a trial expected to run 15 weeks.

Held:

(1) Although the English R.S.C. o.38 r.38 does not apply because there is the local equivalent in rule 29 of the Cayman Civil Evidence Rules 1978, there is no practical consequence since the principles upon which the court is to exercise its discretion are the same whichever rule is taken to found the jurisdiction.

(2) In Kirkup v. British Rail Engineering Ltd. [1983] 3 All E.R. 147, the English Court of Appeal approved a general rule whereby expert reports should be ordered to be disclosed simultaneously. In exceptional cases however as where there is a lack of particularity in the plaintiff's pleading which would have caused a difficulty for the defendant's expert in addressing the pertinent issues unless he had first been given sight of the plaintiff's expert's report, an order for sequential disclosure could be made.

(3) The only sanction for failure of a party to serve a particular expert's report is that the party in question will not thereafter be at liberty to call expert testimony at the trial in relation to the particular issue for which no report has been furnished by that party. There is no positive obligation upon any party to furnish any particular expert's report if the party does not propose to call expert witness (i.e) at the trial upon that particular issue.

(4) As Rule 47 of the Grand Court (Civil Procedure) Rules deals with pre-trial discovery, the English R.S.C. o.38 r.2A is excluded. The court therefore has no jurisdiction to make an order for the exchange of the statements of all witnesses of fact before the trial.

(B.B.)

FAMILY LAW

Ancillary relief - Application of "one third rule" and "net effect" rule to wealthy couple - Application of English authorities - Valuation of matrimonial home - Meaning of "matrimonial property".

Court: Grand Court (317/85)

Cor: Harre, J.

Date:

Cases Referred to: Hetley v Hetley 21st April 1988 Grand Court
Dew v Dew (1986) FLR 341
Potter v Potter [1982] 3 All ER 321
Wachtel v Wachtel [1973] 1 All ER 829

Miller v Miller (case no. 68/80).

Legislation: Matrimonial Causes Law, S.21

Counsel: Mr. A Jones and Mrs. S. Pierson for the petitioner
Mr. R. Alberga QC and N. Clifford for the respondent

The present application is for ancillary relief under section 21 of the Matrimonial Causes Law. Both parties have achieved financial success. It is the settlement of their inter-related domestic and business affairs that present the difficulties in the present matter.

There is dispute as to the correct manner of valuing the home which is owned by a company. It is a valuable property on Seven Mile Beach. The husband says that shares in the company are worthless. The company had made numerous loans to the husband which had been written off against the value of the home as its only asset.

Held:

(1) The English authorities that were cited are based on statutory provisions that differ appreciably from the law in Cayman and were superceded by amendments made by virtue of the Matrimonial and Family proceedings Act 1984.

(2) In applying the so called one-third rule, the courts in Cayman are importing a guideline because the guideline, and the principle behind it, are sound. The question is not whether the rule applies only to matrimonial property under section 21(b) [of the Matrimonial Causes Law] or whether it extends to an order under section 21(e), but whether, given the circumstances of this particular case, an application of the rule will bring about a just result (Hetley v Hetley).

(3) The so called rule is not to be regarded as a rigid one, divorced from other considerations to which the Court is to have regard. It is but one approach that the court can apply in arriving at a proper order (Dew v Dew). Another is the so-called "net effect" approach. This involves working out the respective position of the parties on the assumption that a hypothetical order is made and relating the resulting figures to the relevant criteria.

(4) The present situation demonstrates the limitations of the one-third rule at least as strikingly as that described by Ormrod LJ in Potter v Potter . The parties are both people of considerable wealth. There is a sharp disagreement as to the value of the business

which is now being run by the wife and which is her sole source of income. There is also dispute as to the beneficial ownership of another retail business, and as to the manner in which the valuation of the shares in the company owning the matrimonial home should be approached. Therefore, it is necessary to adopt the "net effect" approach in seeking to resolve the present case.

(5) It is not at all improper in terms of accepted commercial accounting principles, that land and buildings should be shown in the accounts at cost. It is, however, quite inappropriate in determining rights as between a husband and wife in a matrimonial home. It is an available resource that can be used or sold.

(6) "Matrimonial property" in section 21(b) of the Matrimonial Causes Law roughly equates with "family assets" in Wachtel v Wachtel. That does not mean that other assets owned by either spouse are left out of consideration or are otherwise immune when making ancillary orders under section 21. Paragraph (e) of that section specifically provides otherwise (Miller v Miller).

(P.H.)

Ancillary relief - Orders to include all family assets.

Court: Grand Court (D41/89)

Cor: Harre, J.

Date: 29th December 1989

Legislation: Matrimonial Causes Law

Cases Referred to: Miller v. Miller (68/80)
Pettitt v. Pettitt [1970] AC 777
Gissing v. Gissing [1971] AC 886

Counsel: Mr. O.L. Panton for the petitioner
Mr. S. McField for the respondent

Held:

(1) None of the assets or property owned by either spouse should be left out of consideration when making ancillary orders under the Matrimonial Causes Law (Miller v. Miller).

(2) The cases of Pettitt v. Pettitt and Gissing v. Gissing did not lay down the principle that the only property to which the petitioner could be entitled was the matrimonial home.

(P.H.)

Custody - Application by putative father for custody of child - Power of appellate tribunal to interfere with decision of lower court

Case: G v. C

Court: Cayman Islands Court of Appeal (26/89)

Cor: Zacca, President; Henry and Georges, JJA.

Date: 1st August 1990

Cases referred to: Finlayson v. Matthews (1971) 12 JLR 401
Re CT (An Infant) [1956] 3 All ER 500
Galloway v. Galloway [1956] AC 299
Clarke v. Carey (1971) 12 JLR 637
Re Lewis (1970) 15 WIR 520
Minister of Home Affairs v. Fisher [1980] AC 319
R v Inhabitants of Totley (1845) 7 QB 596
Dickenson v NE Railway Co. (1863) 33 LJ Ex 91
Woolwich Union v Fulham Union [1906] 2 KB 240
White v. Springle (1966) 10 WIR 152
White v. Barnett [1973] 3 WWR 293
Charles Osenton & Co. v. Johnstone [1942] AC 130
In Re R (Wardship) [1976] Fam. 238
G v. G [1985] 2 All ER 225

Legislation: Guardianship and Custody of Children Law (Revised)
Caymanian Protection Law 1984
Caymanian Protection (Ammendment) Law 1987
Maintainance Law (Revised)
Guardianship of Minors Act 1971
Child Care Act 1980
Guardianship of Infants Act 1886
Status of Children Act 1976
Infants Act 1958
The Constitution of Bermuda
Matrimonial Causes Law, S.21
Affilliation Law
Adoption of Children Law

Counsel: Mr. N. Hill Q.C. and E. Maierhofer for the appellant
Ms. Cherry Bridges for the respondents

On an appeal from an order under the Guardianship and Custody of Children Law (revised), the issue arose whether the legislation gave the court jurisdiction over illegtimate children.

Held: (Appeal allowed)

(1) Section 7(1) of the Guardianship and Custody of Children Law (Revised) was not intended to embrace illegitimate children and the Court therefore has no jurisdiction to entertain an application by a putative father for the custody of his illegitimate child. (Per Zacca P. and Henry JA, Georges JA dissenting as to lack of jurisdiction but finding on the facts that the appeal should be allowed in any event).

Custody - Forum conveniens
(See Conflicts of Law - Form non conveniens)

Divorce - Ancillary relief - Matrimonial home - Capital payment to husband - Fixed charge over home bearing interest.

Court: Grand Court (D10/88)

Cor: Harre, J

Date: 11th January 1989

Cases referred to: Mesher v Mesher [1980] 1 All ER 126
Hanlon v Hanlon [1978] 2 All ER 889
Dunford v Dunford [1980] 1 All ER 122

Counsel: Mr. P. Boni for the petitioner
Mr. R. Fletcher and N. Levy for the respondent

The parties were married in 1968. The wife's total income is $1,926 per month, with expenses of $1,816. The husband's income of $1,640 is exactly met by his expenses. Their most important financial asset is the matrimonial home, valued in October 1986 at $86,000. There are currently two children of the marriage living in the matrimonial home with the wife, a daughter aged 17 and a son aged 20. The wife has been paying mortgage installments, maintenance on the home and medical expenses for their daughter for which the husband is liable to pay half (a total debt of $6,856.57). She offers to buy out her husband's interest for $30,000, a figure which was unacceptable to him.

Held:

(1) Mesher v Mesher is no longer to be regarded as a "bible" in matters relating to the matrimonial home. It is but one of the possible approaches and to be used only in appropriate cases. Neither party in the present case wanted such an order.

(2) In Hanlon v Hanlon and Dunford v Dunford, orders were made that would not have the effect of forcing the wife to leave the matrimonial home at any time. In Hanlon v Hanlon the whole of the husband's interest in the home was transferred to the wife absolutely. But in that case, the husband was living in rent free police accommodation and was in other respects better off than the wife. In Dunford, the whole of the interest in the home was transferred to the wife, but with a charge to secure payment to the husband of a proportion of the net proceeds of sale when the house was sold or on the death of the wife. However, the disparity between the earning power of the parties in Dunford was greater than in the present case. The husband's prospects of acquiring a home of his own in that case were really quite good. That cannot be said of the husband in the present case unless he acquires significant capital.

(3) With a view, therefore to providing significant capital for the husband, it is ordered that the sum of $30,000 is paid to the husband, and the debt of $6,856.57 in respect of family expenses be waived, making a total payment by the wife of $36,856.57. In return, it is ordered that the husband transfer his interest in the home to the wife. The payment to him is calculated not by reference to the value of the house but to what the wife can afford.

(4) It is not possible to tell what the current market value of the house is until it has been independently valued. Having regard to the mortgage payments made by the husband, his share should be 40% of which he will have received approximately $37,000. Therefore, if the current value of the house is $92,500, he will have received his full share. However, in order to take into account the possibility of a higher valuation, there will be a charge on the property in favour of the husband for 40% of the difference, if any, between $92,500 and the fair current open market value, such amount to bear simple interest accruing until repayment of the principal sum to which it relates at the prime lending rate quoted from time to time by Barclays Bank Plc. The charge may not be enforced until the parties' daughter reaches the age of 21 or until six months after her marriage whichever date occurs the earlier and the wife may pay off the outstanding principal and interest at any time.

(5) The reason for the fixed charge bearing interest as opposed to a fraction of the proceeds of a future sale is this. The amount outstanding under the existing house loan is now quite small and the wife might well be able to refinance such sum as will pay off her husband before the charge becomes enforceable. That would be consistent with the clean break principle. Moreover, the husband will receive a reasonable rate of accrued interest when he is paid off, and he will not be kept waiting for his money for an unknown period to be determined by the wife.

(6) There is an element of flexibility (and, it is to be hoped, an opportunity for the parties to act in the best interests of the family as a whole) in an order of this kind, which was not present in the Mesher type order. (P.H.)

Divorce - Ancilliary relief - Occupation of matrimonial home - "Violent and loutish" husband - Balance of hardship - Order granted for wife's occupation.

Court: Grand Court (D130/89)

Cor: Malone, C.J.

Date:12th March 1990

Counsel: Mr. T. Shea for the petitioner
Mr. J. Furniss for the respondent

See headnote above.

(P.H.)

Divorce - Irretrievable breakdown of marriage - Constructive desertion - Grave and serious conduct - Intention presumed.

Case: C. v. C.

Court: Grand Court (D89/88)

Cor: Harre, J.

Date: 16th November 1989

Cases referred to: Buchler v Buchler [1947] 1 All ER 145

Counsel: Mr. O.L. Panton for the petitioner
Mr. K. Collins for the respondent

The parties were married on 3rd February 1986. The marriage was "not too happy" and in October 1986 the petitioner left the matrimonial home. He claims that his wife expelled him by moving his belongings out of the closets and putting them on the floor, throwing him out and telling him to pack up and go. He says that he was sorry to leave. He petitions on the basis of his wife's constructive desertion which has caused the marriage to break down irretrievably.

Held: (petition refused)

(1) In constructive desertion the respondent must be guilty of conduct of a grave, serious and convincing character, equivalent to turning the other spouse out of doors (Buchler v Buchler). The test is first, was the conduct alleged truly expulsive in nature; and second, was it done with the intention of bringing the matrimonial consortium to an end?

(2) It is not necessary in a case of constructive desertion to bring some definitive evidence of a clear intention to drive the other spouse away for good. The intention can be inferred since a person is presumed, prima facie, to intend the natural and probable consequence of his acts. If words of expulsion are used and the other spouse leaves, the natural conclusion is that the words had their desired effect unless there is some reason to take a different view.

(3) It was not a natural and probable consequence of an exhibition of temperament by the wife in this case, even though accompanied by the words "pack up and go" that the husband would quit the matrimonial home for good. He said that he was sorry to go, but there was no evidence that he sought to stay.

(P.H.)

NOTE: This decision was reversed on appeal

Guardianship - Illegitimate child rights of natural father - Burden of proof on father - Relevance of past associations of parties and father's markedly greater prosperity - Judicial notice taken of "mother factor"- Joint custody

Case: Re A (a minor)

Court: Grand Court (C255/89)

Cor: Collett, C.J.

Date: 29th November 1989

Legislation: Guardianship and Custody of Children Law (Revised)

Counsel: Mr. D. Bannon for the applicant
Mr. D. Murray for the respondent

The child, A, was born out of wedlock on 19th December 1981. The natural father lived with the mother until 1982 when he met the lady who he was eventually to marry. There was one child of this relationship, a boy born in 1984. The parties took it in turns to look after A on no systematic basis until 1987. She grew up, therefore having a home in two places.

The father had a three bedroom house. He was able to provide A with her own room, toys and a pet dog. When she was with the mother, she shared a bedroom with the mother and latterly with the mother's new-born baby. A does not find this arrangement unduly crowded and in any event the mother has plans to move into more spacious accommodation.

An arrangement grew up whereby A spent the nights with her mother on Monday to Wednesday and with her father on Thursday to Sunday. She then lived full time with her father, until his marriage after which she lived full time with her mother.

The father now seeks to be appointed sole legal guardian.

Held: (order of joint custody)

(1) It is an established premise from many centuries of common law which has not been altered in this jurisdiction that the only legally recognised parental authority over an illegitimate child is that of the mother.

(2) The burden of proof lies on the father to show that the court should intervene to exercise its powers to transfer guardianship and custody to him.

(3) The past associations of either party with other individuals of the opposite sex and the markedly greater material prosperity of the applicant are of not much, if any, relevance to the court's decision.

(4) It would be better for the child in the long a well as in the short term if the applicant's present affection and interest in her future well-being were not to be choked off by denying him any real say in her education or upbringing and any real influence upon the building of her character. Both parties have a positive role in their respective ways to play in her education.

(5) The importance of the feminine bond between mother and daughter is so universal a facet of human experience that the court is entitled to take judicial notice of it. This is a major factor. The applicant has not demonstrated that the welfare of the child at this juncture

justifies the removal of parental authority from the respondent.

(6) The welfare of the child is best served by an order for joint custody. Such an order accords with the child's own preference and the modern thinking of the courts of the Commonwealth.

(P.H.)

NOTE: The C.I.C.A. ruled in 26/89 supra that the court has no jurisdiction to entertain an applicaion by a putative father for custody of an illegtimate child.

INJUNCTION

Injunction - Locus Standi - Whether jurisdiction exists to allow liquidator to obtain injunctive relief in relation to assets of corporate contributories and others.

Case:	In the matter of a Petition by the Acting Inspector of Banks for the compulsory winding up of a company
Court:	Grand Court (230/89)
Cor:	Harre, J
Date:	September 28,1989
Cases Referred to:	The Siskina (1977) 3 All ER 821 North Railway Co. v. Great Northern Railway Co. (1883) 11 QBD 30 Third Chandris Shipping Corporation v Unimarine SA (1979) 2 All ER 972 Re Simpkin Marshall Ltd (1959) 3 All ER 611 Chief Constable of Kent v V (1982) 3 All ER 36 Chief Constable of Leicestershire v M 1988 3 All ER 1016 Mediterranean Raffineria Sicilina Petroli S p.a. v. Mabanaft GMB H (unreported 1978) In re Johnson & Co. (Builders) Ltd 1955 1 Ch 634 Lloyds Bowmaker Ltd. v Brittania Arrow Holdings plc (The Times, March 19, 1987 C.A.)
Legislation:	s.37 Supreme Court Act 1981 (U.K.) ss 93, 96, 166 Companies Law
Counsel:	Norman Hill Q.C. and Mr. Hampson for the liquidator Mr. Muirhead Q.C. and Mr. McLaughlin for the respondents.

Upon the making of an order for the compulsory winding up of a company the issue arose whether the court had jurisdiction to grant injunctive relief restraining a director and contributory of the company and his wife from disposing of their assets until further order.

Held: (for the liquidator)

(1) The power to grant injunctive relief exists in the Cayman Islands by virtue of s.37(3) of the Supreme court Act 1981 (U.K.) It is, however, dependent on the existence of a cause of action forming the legal substratum of the claim for relief. (The Siskina, Third Chandris Shipping Corporation v Unimarine)

(2) The limitation is not, however, purely procedural. It applies equally to proceedings commenced by petition as to actions commenced by writ, in all cases where it is just and convenient that relief be granted.

(3) Winding up proceedings are "proceedings" in relation to which injunctive relief may be granted under s.37(3).

(4) The liquidator has a duty to protect the interests of creditors. He is a fiduciary whose office is an amalgam of statutory rules and agency and trust principles. One of his duties, as part of the general duty to collect the assets of the company, is to proceed against deliquient directions when he sees good ground for doing so. As such, the liquidator has a sufficient legal or suitable interest to apply for an injunction (Chief Constable of Kent v V., Chief Constable of Leicestershire v M.)

(R.F.)

Injunction - Locus standi - Whether jurisdiction exists to allow Attorney-General to restrain transfer of funds suspected to be proceeds of criminal activity.

Case:	In the matter of the Banks and Companies Regulation Law (Revised)
Court:	Grand Court (338/88)
Cor:	Harre, J
Date:	19th July 1989
Cases Referred to:	Chief Constable of Kent v V. (1983) 1 Q.B. 37 Chief Constable of Hampshire v A. Ltd. (1985) Q.B. 132
Legislation:	ss 55 and 182 Criminal Procedure Code s28 Penal Code s3 Banks and Trust Companies Regulation Law (Revised) s13 Grand Court Law
Counsel:	Mr. Anthony Smellie, Acting Attorney General for the applicant ex parte

The Attorney General, acting on the request of the Inspector of Banks sought an order restraining G Ltd. from removing from the jurisdiction, transferring, assigning or otherwise disposing of funds deposited in an account in its name in the Cayman Islands. The affidavit evidence indicated the amounts were proceeds obtained by breach of law to wit, that G. Ltd. had been conducting banking

business without a licence. Charges had been filed against G Ltd under s.3 of Banks and Trust Companies Regulation Law (Revised) but no conviction entered, the issue arose whether the court had jurisdiction to grant the relief sought.

Held: (application allowed)

(1) s28 of the Penal Code and s55 and 182 of the Criminal Procedure Code which provides the compensation and restitutionary orders are of no value in the absence of a conviction.

(2) The court has jurisdiction pursuant to s37(1) of the Supreme Court Act 1981 (extended to Cayman pursuant to s13 Grand Court Law), to grant a premptive injunction of the type sought.

(3) The applicant for such an injunction must show a right or an interest, whether legal or equitable, on the basis of which it is just and equitable that an injunction should be made (Chief Constable of Kent v. V., Chief Constable of Hampshire v. A. Ltd.)

(4) The Attorney General, while having no right to have the money actually paid over to him, has locus standi by virtue of his capacity as guardian of the public interest.

Editor's Note: As pointed out by Mr. Justice Harre, The Bank and Trust Companies Law 1989 has extended the powers of the Inspector of Banks, with the approval of the court, to preserve assets where he has reasonable grounds to suspect an offence against that law has been or is being committed.

(R.F.)

LAND LAW

Adverse posssession
(See Land Law - Title)

Right of way - Land adjudication process - Grant - User

Case:	Bodden and Wright v. Wilson
Court:	Cayman Islands Court of Appeal (23/88)
Cor:	Zacca, President; Georges and Kerr, JJ.A.
Date:	28th March 1990
Legislation:	Land Adjudication Law 1971
Counsel:	Mr. P. Lamontagne, Q.C. and Mr. A. McLaughlin for the Appellants
	Mr. N. Hill, Q.C. and Mr. R. Nelson for the Respondent

By a deed of gift dated 22nd August 1969 made between the respondent's brother JW acting as administrator of the estate of RW of the first part and the respondent of the second part, the land comprised in Registration Section George Town Central Block 13E Parcel 88 became vested in the respondent.

The parcel to the east of Parcel 88, George Town Central, Block 13E Parcel 42 was transferred on sale from the estate of RW to the first appellant on 2nd February 1977 and on 30th January 1977 was transferred into the joint names of the first and second appellants.

The deed of gift dated 22nd August 1969 had a plan annexed thereto which stopped short of conveying a strip of land approximately 20 feet wide extending the full length of the northern boundary, labelled on the plan "proposed road".

The respondent submitted the deed together with the annexed plan in support of her application under the Land Adjudication Law 1971 and an absolute title was declared in respect of parcel 88 including the 20 foot strip but subject to an easement described as "a vehicular right of way".

The apellants were appealing from an order of the Grand Court that the right of way over Parcel 88 in Registration Section George Town Central Block 13E is 12 feet and no more. The appellants contended that the learned Chief Justice was wrong to take into account a letter dated 7th January 1983 from the Registrar of Lands in which it was stated that the minimum width of a right of way is 12 feet.

Held: (dismissing the appeal)

(1) The letter was included in a bundle agreed to by both parties. It was therefore open to the learned Chief Justice to conclude on the evidence before him that the right of way was 12 feet in width.

(R.O.)

Severance of joint proprietorship - Matrimonial home owned by joint proprietors - Judgment debt against one of the joint proprietors - Sale of property must be with consent of all joint proprietors

Case:	Mums Incorporated and Thiam - Hong Tan v. Cayman Capital Trust and Barry Randal and Eveleen Randall (Intervener/Respondent)
Court:	Cayman Islands Court of Appeal (25/89)
Cor:	Zacca, President; Georges and Kerr, J.J.A.
Date:	March 28 1990
Legislation.	Registered Land Law Judicature Law
Counsel:	Miss Bridges for the appellant Mr. LaMontagne for the Intervener/Respondent

Mr. McLaughlin for the second defendant

The second defendant and the intervener/ respondent are husband and wife. They are registered as joint proprietors of a parcel of land in Registration Section West Bay South, Block 12C, Parcels No. 162 and 163 which is their matrimonial home.

On 18 July 1989 the appellants obtained final Judgment against Mr. Randall and the First Defendant, Cayman Capital Trust and by summons dated 3rd October 1989 applied for an order that the estate or interest of Mr. Randall in the registered parcels be sold by public auction pursuant to section 42 of the Judicature Law. Mrs. Randall was granted leave to intervene.

Held: (dismissing the appeal)

1. s.99(3) Registered Land Law makes it clear that joint proprietorship can only be severed by the agreement of all the joint proprietors. A unilateral right of severance would be inconsistent with the Registered Land Law and cannot be implied.

(R.O.)

Title - Dispute as to title to land - Adverse Possession

Case:	Ebanks v Bodden
Court:	Privy Council
Cor:	Lord Keith of Kinkel, Lord Brandon of Oakbrook Lord Templeman, Lord Goff of Chieveley Lord Lowry; (delivered by Lord Templeman)
Date:	29th January 1990
Cases Referred to:	Srimati Bibhatti Devi v Kumar Ramendra Narayan Roy [1946] AC 508

The appellant claimed to be entitled in equity to two parcels of land as his share of the residue of the estate of H, or alternatively, that he acquired title to the same by adverse possession. The respondent claims the properties are part of the unadministered estate of the testator.

Held: (appeal dismissed)

1. As the issue turned essentially on questions of fact, in order to be successful the appellant had to show that there was no evidence on which the courts below could arrive at their findings. (Shrimati Biblatti Devi v Kumar Ramendra Narayan Roy)

2. On the issue of title, there was evidence to justify the finding below. On the issue of adverse possession, the evidence showed the appellant went to sea at age twenty-one and returned to Grand Cayman for a month every three or four years. He latterly lived in New York and Miami. The act of possession consisted of marking the boundaries of the land from time to time. The appellant failed to make his case

in the courts below and there was ample evidence to support those conclusions.

(R.F.)

TORT

Tort - Negligence causing Personal Injury - Duty to Supervise Use of Dangerous Device
(See Also Damages - Personal Injury)

Case:	Haddleton v. Hassan and Cayman Agressor Ltd
Court:	Grand Court (310/88)
Cor:	Schofield, J.
Date:	7th June 1990
Cases Referred to:	Glasgow Corporation v Muir [1943] AC 448
Counsel:	Mr. Nigel Clifford for the plaintiff Mr. Ramon Alberga Q.C. and Mr. A. Panton for the defendants

The plaintiff suffered a quite serious eye injury when struck by a hard object allegedly catapulted from the Aggressor III a ship owned by the second defendant while under the charge of the first defendant. The defendants admitted to having a catapult device on board and to using the same to project water balloons at the ship upon which the plaintiff was serving but denied that it was used to project hand objects and denied liability.

Held: (for the plaintiff)

(1) On the evidence, the court was satisfied that the plaintiff's injury was caused by an object (possibly a bottle) coming from the catapult of the Aggressor.

(2) There was insufficient evidence to find liability in assault against the defendants.

(3) The court found that the defendants did not authorise or permit the catapult to be used to hurl hard objects which was against their policy that no glass containers should be on deck.

(4) Liability in negligence was based on the failure of the defendants to adequately supervise the use of the catapult by passengers of the Aggressor who it seems, unbeknown to the defendants and against their declared wishes, fired a hard object from the catapult.

(5) The fact that the catapult was an inherently dangerous device and that the consequences of its abuse made it that much more potentially

dangerous imposed a higher standard of care on the defendants to prevent its abuse (Glasgow Corporation v Muir)

(R.F.)

TRUSTS

Fiduciary - Duty of top management - Accountability irrespective of whether plaintiff could not as of right have been entitled to the profit in question.

Court: Grand Court (64/87-No.1)

Cor: Harre, J.

Date: 24th November 1988

Cases referred to:
Regal (Hastings) Ltd. v Gulliver and ors [1942] 1 All E.R. 378
Bray v Ford [1895]-99] Al E.R. 1009
Industrial Development Consultants Ltd. v Cooley [1972] 2 All E.R. 162
Canadian Air Service Ltd. v O'Malley et al (1973) 40 D.L.R. (3RD) 371
Island Export Finance Ltd. v Umunna (1986) BCLC 40
Reading v Attorney General [1951] A.C. 507
Boardman v Phipps [1966] 3 All E.R. 721

The plaintiff sought, as against the first defendant, a declaration that he had been in breach of a fiduciary duty owed to the plaintiff and declarations that the first and second defendants were trustees for the plaintiff of the benefit of all contracts to provide certain services entered into by the defendants with the government of the Cayman Islands and Cayman Airways; orders that the defendants account to the plaintiff for all fees, remuneration and other profits received by and payable to them in respect of any such contracts; an enquiry as to such fees remuneration and other profits; orders that the defendants, in their respective capacities, pay to the plaintiff all monies found to be due to it on the taking of such accounts; and further or consequential relief, costs and interest.

The chairman and principal shareholder of the plaintiff company swore an affidavit in support of the originating summons and also gave oral evidence. The first defendant is the principal shareholder of the second defendant company. He also gave evidence.

The plaintiff provided services to the government of the Cayman Islands and Cayman Airways until the end of 1986. Both contracts were then terminated. The essence of the plaintiff's case against the first defendant was that while he was ostensibly faithfully engaged on behalf of the plaintiff in carrying out his duties as their senior executive, including work related to the submission of that company's 1987 budget to Government, he had in fact been told, in the spring of

1986, that a decision had been taken that no further contract would be awarded to the plaintiff and the first defendant had been requested by government to prepare a proposal of his own and pursuant to which the second defendant company was formed between 8 and 11 September 1986.

The first defendant kept this vital knowledge to himself but surreptitiously prepared and successfully submitted to government on his own behalf a proposal for the provision of services to government in direct competition with those then being provided by the plaintiff.

Held:

(1) It is a well-established rule of equity that those who by the use of a fiduciary position make a profit are liable to account or that profit. This rule in no way depends upon such questions or considerations as to whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether the plaintiff has in fact been damaged or benefited by this action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made.

(2) Fiduciary duties are not limited to trustees and directors. The cases establish that senior executives to whom initiatives and responsibilities are given far in excess of the obedient role of servants are in exactly the same position as directors.

(3) A fiduciary relationship in its generality betokens loyalty, good faith and avoidance of conflict of duty and self interest. "....this ethic disqualifies a director or senior officer from unsurping for himself or diverting to another person or company with whom or with which he is associated, a maturing business opportunity which his company's actively pursuing."

(4) The case of Umunna, upon which counsel for the defendant relied as negativing liability, is distinguishable upon its facts from the present. The case was an application of the established principle to particular facts rather than as an authority for any alteration of that principle.

(5) The defendant owed a fiduciary duty to the plaintiff. He was the chief point of contact between the plaintiff, the government and Cayman Airways in Grand Cayman. The fact that the defendant was subject to some control, particularly in relation to financial and administrative matters did not derogate from his position as "top management", and owed the duty which applied to any official of a company who is authorised to act on its behalf in managerial capacity, no less than to a director. The defendant was in breach of this duty.

(6) Accordingly, the plaintiff is entitled to all the declarations and orders sought against the first defendant and against the second defendant, through which the first defendant acted in breach of his fiduciary duty.

Reporter's note:

There appears to be no definition (judicial or otherwise) of a fiduciary. The cases do show, however, that express and implied

trustees and personal representatives are fiduciaries properly so-called. As for them, once some nexus is established between the receipt of a profit and their position there is an irrebuttable presumption of breach of duty: Keech v Sandford (1558) - 1774) All E.R. Rep 230.

On the other hand, there is a miscellaneous group of persons often called quasi-fiduciaries. What they have in common is that each occupies a position not altogether dissimilar from that occupied by the trustee or personal representative. But unlike the true fiduciary, the quasi fiduciary is at liberty to adduce evidence to rebut the presumption that a particular profit was made in breach of duty; Re Biss [1903] 2 Ch. 40.

It is submitted that not only company directors but also all servants (whether top management or not) do properly belong to this group and are thus accountable for profits made in breach of duty. Umunna's case can be regarded as one in which a quasi-fiduciary (i.e. a company director) was able to show the want of nexus between the profit he made and the position he occupied; whereas in the present case the quasi fiduciary failed to do so.

(B.B.)

Fiduciary - Duty to account - A fiduciary may not be a trustee for all purposes - Where duty to account only relates to the fruit of a transaction the beneficiary has no right to the transaction itself.

Court: Grand Court (43/89-No.2)

Cor: Harre, J.

Date: October 20, 1989

Counsel: Mr. Lamontane Q.C.
with Mr. G. Ritchie for the plaintiff
Mr. Alberga Q.C. with Mr. R. Nelson for the defendants

Cases referred to: Judgment in a cause between the parties delivered on November 24, 1988 hereinafter called Cause No.1
Keech v Sandford (1558-1774) All E.R. Rep. 230
Saunders v Vantier (1835 -42) All E.R. 58
Re Marshall's W.J. [1945] 1 Ch. at 551
Re Scott (1948) S.A.S.R. AT P. 196
Industrial Devlopment Consultants Ltd. v Cooley [1972] 2 Al E.R. 162
Phipps v Boardman [1966] A.C. at p. 123
Lister and Co. v. Stubbs [1890] 45 Ch. D.
Swain v Law Society [1981] 3 All E.R. 797
A-G's Reference (No.1 of 1985) (1986)2 All ER219
Tito v Waddell [1977] 1 Ch. at p226-7

The judgment in cause No. 1 included a declaration that the first defendant had been and was in breach of his fiduciary duty to the plaintiff and that he was a trustee for the plaintiff of all contracts to provide certain services made between him and/or any corporate

entity owned and controlled by him with the Government of the Cayman Islands and Cayman Airways ("CAL"). Also, there was a declaration that the second defendant was trustee for the plaintiff of all contracts to provide public relations and sales promotion services entered into by the second defendant with government and/or CAL. The present issue concerned the meaning and effect of those declarations.

The plaintiff argued that the defendants were trustees of the contracts for all purposes and not merely for the purposes of the orders for accounts to be taken and related matters. Thus the plaintiff claimed that as beneficiary of the trust, it was entitled to terminate the trust at will and in which event the contractual relationship between the defendants, Government and CAL would also end as it formed the subject matter of the trust.

It was also claimed that the plaintiff was entitled to injunctions restraining the defendants from providing the contractual services to government and CAL, or receiving any fees or remuneration or other profits from such services.

Held:

(1) The declarations in Cause No. 1 did not bring a trust into existence as a remedy but merely confirmed that one did exist. On the authorities, the liability of a fiduciary to account rests upon constructive trusteeship save in those exceptional instances of mere personal accountability illustrated by Lister & Co. v. Stubbs. Although the matter is not entirely free from doubt, it would seem anomalous to extend the distinction between the use of a position and the use of property beyond the narrow confines of Lister and other such cases.

(2) A fiduciary may or may not have property vested in him or under his control. Where a fiduciary qua fiduciary does have property vested in him or under his control, such property has the essential characteristic of trust property. In determining the rights and obligations in any particular case, it is not a matter of drawing a distinction between a "true trust" and something less than that, but of determining what it is which is impressed with the trust and what the obligations arising from the trust are. One cannot seize upon the word "trust" and say that this shows that there must therefore be a true trust. The first question is the sense in which that protean word has been used.

(3) In the present case the defendants were not trustees of specific disposable property which they misappropriated and which they were under an obligation to return. They were constructive trustees of the plaintiff but only in respect of the fees, remuneration and other profits which they had made and would make from those contracts. The defendants were trustees of the fruits of the contract. The plaintiff was not therefore entitled to attack the tree which bore the fruits with an axe ie the contracts were not themselves part of the trust and the plaintiff could not therefore determine them as beneficiary under the rule in Saunders v Vautier.

(B.B.)

Fiduciary - Liability to account - Whether expenditure made in pursuit of profit is to be credited in accounts in exception to the general rule against profit sharing with beneficiary.

Court: Grand Court (43/89-No.3)

Cor: Harre, J.

Counsel: Mr. Lamontagne Q.C. with Mr. G. Ritchie for the plaintiff.
Mr. Alberga Q.C. with Mr. R. Nelson for the defendants

Cases referred to: Robinson v Pett (1734) 3 P Wins 1049; Barrett v Hartley (1866) Eq. L.R. 789; Burgess v Vinicome (1966) 34 Ch. D. 77 O'Sullivan v Management Agency and Music Ltd. [1985] 3 All ER 351

The case concerned a set of accounts pursuant to judgment in Cause No. 1 in which the defendants were found to be in breach of their fiduciary duty to the plaintiff. Very comprehensive accounts were produced to show that the second defendant ("the company") had been running at a loss and was insolvent. There were disputes about several items of the accounts, but by far the biggest bone of contention concerned the extent, if at all, of the entitlement of the first defendant and his wife (the controlling shareholders of the company) to remuneration for the work they had done under contracts with Government and Cayman Airways Ltd. The plaintiff's objection to the accounts had been that all of the expense items were erroneous on the ground that, in law, the company was not entitled to charge any expenses whether actually incurred or not and whether deemed necessary or not. In the alternative, the plaintiff objected to specific items or groups of items of expenses. The plaintiff further submitted that as the accounts showed that the company had made a loss during the accounting year ended 31 March 1989, then only when the accounts were rectified to show a notional profit could the court contemplate whether to make an allowance, if at all, for the work done by the first defendant and his wife.

Held:

(1) The general rule, subject to numerous exceptions, is that a trustee has no right to exact anything for his services, even where those services have been of great advantage to the beneficiary of the trust.

(2) This rule cannot, however, be allowed to extend further than the justice of the case demands. If the defendant has done valuable work in making the profit then the court, in its discretion, may allow him a recompense. It depends on the circumstances. On present facts the company must be entitled to an allowance for the expenses it had incurred in conducting its operation provided that they were reasonable. The court is not concerned with punishing the defendants for their behaviour but with seeing that the plaintiff got the profit to which he was entitled

(3) A company must incur expenses to keep going, whether or not it was operating profitably. But the question as to what amounted to a reasonable level of expenditure could not be answered without regard to the financial position of the company.

(B.B.)

Rectification - Convenient alternative remedy - Tax disadvantages (See Law Bulletin No. 1 at p. 88)

Court: Grand Court (252/89)

Judge: Scofield, J.

Date: April 12, 1990

Cases Cited: James Jeremy Bond and Others v. Integritas Trust Management and Others (Causes 40, 41, 58, 59, 66 & 67 of 1988)

The court had adjourned the decision on rectification of a life settlement on October 20 , 1989 because the execution of a deed of appointment appeared to provide a convenient alternative remedy (see Law Bulletin No. 1 at p. 88).

It now appeared that unforeseen tax disadvantages might result form the execution of such a deed and no indemnity could be obtained from the solicitors responsible for the original error.

Held :

(1) Although here the tax disadvantages were only potential, such a consequence would mean that the alternative remedy could not be regarded as convenient. (James Jeremy Bond v. Integritas Trust Management)

(2) Rectification of the life interest settlement in the terms sought in the earlier hearing was therefore ordered.

(G.F.)

Rectification of Deed of Settlement - The Rule Against Perpetuities as applied in the Cayman Islands - Settlor's intentions frustrated by deed.

Court: Grand Court

Coram: Schofield, J.

Date: May 8, 1990

Cases Refered to: Jeremy Bond and Ors v Integritas Trust Management and Ors CC 40, 58,59,66 and 67 of 1988.

Jocelyne v Nissen [1970] 1 All E.R. 1213
Briggs v Integritas etc and Ors cc 252 of 1989
Whiteside v Whiteside [1950] Ch 65

Counsel: Mr. Charles Quinn for the plaintiff
Mr. Angus Foster for the defendant

The plaintiff sought rectification of his deed of settlement, so as to bring its provisions within the rules against perpetuities in the Cayman Islands. Although the deed had been expressed to be subject to the laws of the Cayman Islands, it had in fact been drawn up with the English rules against perpetuities and a Bermudian precedent in mind. Inadvertently, the provisions of the deed offended the perpetuity rules in Cayman.

Held: (application allowed)

(1) As the deed did not give effect to the settlor's intentions, then the fact that the trustees consented to the application enables the court to grant the order for rectification in the exercise of its discretion. This was all the more so compelling as there were no other convenient alternative remedies.

(B.B.)

ARTICLES AND CASE COMMENTS

PROFESSIONALISM AND COMMERCIALISM IN THE PRACTICE OF LAW

Wm Reece Smith Jr
President, International Bar
Association Florida, USA

Wm Reece Smith Jr resides in Tampa, Florida, USA where he is chairman of a law firm of 150 lawyers. He is a former president of the Florida Bar and The American Bar Association and currently serves as president of the International Bar Association. He was awarded the American Bar Association Medal in 1989, principally for his work in improving legal aid for the poor.

During the latter half of this century, the legal profession has undergone profound change in the United States and in most of the developed countries of the world. Necessarily, in the remarks that follow I draw heavily on developments in the United States, because it is the case I know best. These changes have been many and their causes complex. Most disturbingly, they appear to have produced an attenuation of the traditional view of the practice of law as a profession and the development of a profession increasingly in the mould of a commercial enterprise.

The traditional view of the legal profession is perhaps best articulated by Rosecoe Pound's frequently cited definition:

> "A profession is a group...pursuing a learned art as a common calling in the spirit of public service..."

Several traditional propositions about the legal profession flow from this definition. The first is that since lawyers are highly educated in a complex discipline, they are allowed the privilege of self-regulation; those who are initiated in the learning of the law are considered unsuited to regulate the profession. Second, recognition of the "common calling" facet of the definition, members of the legal profession nurture a high degree of collegiality, civility, and mutual trust. And most important of all, because lawyers play a public role as officers of the court and because the practice of law affords a comfortable and relatively affluent life style, a lawyer is obligated to give something back to the community either through civic or pro bono work or a combination of the two.

That the qualities admired and viewed as indications of success in the profession have changed significantly is demonstrated by a recent American Bar Foundation study of lawyers obituaries. Researchers have noticed a dramatic shift in the appraisal of lawyers' lives. From the 1880s through the early decades of this century, lawyers were eulogized as much for their integrity, compassion, public spiritedness, kindness, and generosity as they were for more narrow professional attainments. In recent times, the celebration of moral character has been displaced entirely by intellectual achievements. Gone, it seems is the world where generosity and civic calling counted as much as caveat emptor and firm efficiency., It is obvious that the

measure of lawyerly achievement has narrowed considerably.

One of the main reasons for this narrowing of focus is that society itself has changed from the early days in which the traditional definition of professionalism was first advanced. For one thing, because the practice of law was then, for the most part, a fairly easy and secure way of earning a living, the livelihood aspect of the legal profession did not have to be emphasized. Lawyers had the leisure to concentrate a great amount of their time on the profession as a calling by devoting themselves to public service.

We now are forced to contemplate whether the vast changes that have occurred in society and in the legal profession have altered our traditional definitions of a profession. During the period of the 60s and 70s in my country there was a tremendous increase in the role of law and the legal profession in the lives of ordinary citizens and of society as a whole. The civil rights women's movements produced new rights and new laws and a new emphasis on the individual.

Other movements also had a direct impact on the legal profession. In particular the "consumer" movement has profoundly changed the way in which law is practised today. This movement, which reached its peak in the 70's, collided headlong with the basic traditional tenet of the profession that outsiders cannot truly evaluate a lawyers performance. The notion developed that the consumer has the right to be fully informed and that the well-informed lay person can evaluate the quality of service as competently as those in the profession.

The consumer movement in the United States as it affected the practice of law was given a tremendous impetus with a series of decisions from the United States Supreme Court in the 60s and 70s. Beginning with a case called NAACP v Button and culminating in the case of Bates v State Bar of Arizona, the Supreme Court struck down rules against solicitation of legal business, mandatory fee schedules, and, most important of all, prohibition of lawyer advertising. Many have pointed to the advent of lawyer advertising as the biggest nail in the coffin of professionalism. But many others disagree. While recognizing that advertising is certainly subject to abuses, they assert that it is probably the most important factor in the greater availability of legal services at affordable prices to middle income people.

Advertising is just one example of the changes by the upheaval in society and the legal profession in the 60s and 70s. As we have moved through the 80s, we have seen the effect of these changes on the legal profession. We have experienced as a society a demographic transformation that has been reflected in the legal profession. Partly as a result of the baby boom, the legal profession has grown from less than 300,000 lawyers in 1960 to over 700,000 lawyers in the late 80s. Just as important is the drastic change in the ratio of lawyers to population. In the United States, more than twice as many lawyers were available to serve the general population in 1980 as in 1950. The proportion of younger to older lawyers has swelled enormously. In addition, the profession itself has become much more diverse, reflecting the general diversity in society at large. Almost half of those entering law schools in the United States are women, and racial minorities, although still under-represented are present in greater numbers than ever before.

These developments illustrate a basic fact: change in the legal profession mirrors change in society at large. The traditional definition of profession and the mystique that arose around it were born of a much simpler time. There were fewer lawyers, fewer and simpler legal problems, and the bar itself was a fairly homogeneous group of generally like-minded individuals for whom a greater consensus was usually possible.

The changes in society that we have experienced in the latter part of the twentieth century have been tumultuous; it is certainly no surprise that these changes would be reflected in the legal profession. We have altered basic attitudes, the way we handle relationships, and our hierarchy of values. The 60s and 70s were periods of social progress and upheaval - the creation of new rights and greater emphasis on the individual and significant and deep inquiry into the relationship of the individual to society, to big government, and to big business.

But the 80s have been different. That difference is illustrated by the individuals whose lives best represent the spirit of the last three decades in the United States. The 60s are symbolized by Martin Luther King, the great civil rights leader and Nobel prize laureate and the 70s perhaps by Ralph Nader, the single-minded and selfless consumer advocate. But the emblem of the 80s may well be multi-billionaire and entrepreneur Donald Trump.

The 80s have been a period of acquisitiveness - from the individual "yuppie" emphasis on acquiring the trappings of effluences to giant corporations engaging in gobbling up other giant corporations. The 80s was the period of "merger and takeover mania" in the corporate world. We have witnessed a tremendous increase of the power and role of investment banking firms. We have watched as hostile tender offers and other forms of control for corporations created a great sense of insecurity and uncertainty in the business world. We were told by the likes of Ivan Boesky that "greed is good". Money became the source of a new aristocracy; self-worth was no longer defined by what one was but by what one could acquire.

Naturally, these developments have affected the practice of law. Naturally, these developments have raised the question of whether the legal profession, as a necessary participant in the power and money game has become more like the clients it represents. Because the legal profession mirrors society, some of the same developments that have occurred in the world at large have occurred in the legal profession, and they clearly threaten the most essential features of true professionalism - public service.

Merger mania has become applicable to law firms as well as to big corporations. Competition has increased for business and for talent. One of the most oft-remarked examples of this competition is the tremendous increase in salaries paid to beginning associates. In New York salaries for new attorneys have risen from $9,500 in the late 60s to the low $80,000 in the late 80s. While it is hard to imagine that any lawyer fresh from law school could be worth $80,000 one of the developments fueling the increase in associate salaries is competition from other sectors for these law school graduates. In particular, investment banking firms have been offering very large salaries to people right out of law school.

In addition, competition for client business is just as keen. In a relatively inelastic market for legal services firms are jockeying for all business, especially corporate business. And, now that most corporations use several different law firms for different aspects of their legal needs rather than maintaining loyalty to one firm, the competitive environment has increased substantially.

Greater emphasis on the bottom line has increased pressure to bill hours. Ten years ago the billable hours goal for associates in large firms was from 1600 to 1800 hours a year. Today, it is very often 2000 a year, or more. At the partnership level, the prevailing view is "eat what you kill". Compensation in most firms is tied closely to business development. It is obvious that, with pressure to bill hours and bring in business, associates and partner have little time left over for public service.

Competitive pressure have also forced changes in the organization of the profession which threaten the traditional collegiality of lawyers. Law firms have increased tremendously in size. In 1949, only five firms on Wall Street has more than 50 lawyers; today there are nearly 300. The largest firm in the world, Baker and McKenzie, headquartered in Chicago, has almost 1500 attorneys. Obviously when firms reach this size, the traditional forms of management - consensus among the partners - will not work. These huge firms have become giant bureaucratizes with layers of authority and professional managers who take their cues from the rainmakers running the firm from the top. The implications for the traditional collegiality within the firm are obvious.

Another new development in the profession is the loss of institutional loyalty in the law firm. The 80s have been marked by defecting in individuals, both partners and associates, from firms and even more alarmingly, the defection of whole departments or groups of attorneys from one firm to another. In the past, such "raiding" of other firms would have been considered completely unacceptable behaviour. Today it is the norm.

In addition, the pressure to grow and to maximize profit has tempted individual lawyers and law firms to embark upon business activities, very often with the clients they represent. In some cases, law firms have actually experienced with the idea of forming subsidiaries to engage in these activities. One of the reasons that this development is alarming is that positive public perception of professions tends to be closely tied to the extent that a profession appears not to be involved in business activities. The legal profession already has a different image because of the public's view that lawyers are only interested in making money. The more lawyers actually become business people themselves rather than the advisors of business people, the more likely this perception is to be deepen.

All of these changes are fed to some extent by the information revolution recently experienced by the profession in the form of the new legal press. Reporting on everything from law firm salaries to intra-firm politics, from client profiles to firm revenues, the modern legal press combines aggressive investigative reporting with highly topical stories.

Intense media attention to our profession may not only increase the

pace of legal change, but also may mould the shape that change will take. One prominent scholar argues that the legal press of the United States already purveys a distinct image of legal practice. It paints a portrait of law as a highly competitive business where the aspirations and techniques that once were the preserve of clients have now introduced into legal professionalism. In addition, the very features that make these newspapers viable commercial enterprises - their inside exposes, their celebration of conflict and power, their acclimating of financial success - are inimical to the celebration of virtue. It seems possible that the legal press is stimulating values in the profession that are not conducive to the fullest realization of professionalism.

In addition to the serious threat to the professions fulfilling its public obligation, other serious problems are raised by all of these developments that we have discussed. Increased competition among law firms and lawyers may prompt lawyers to attempt to cut ethical concerns in representing their clients. In fact, there have already been several highly publicized cases involving attacks on the ethics of very prestigious and highly regarded law firms. There appears to be a growing tendency to define the ethical rules for the profession in as narrow a way as possible, to construe the ethical rules of the profession in a vacuum, uninformed by a wider view of personal morality.

Another problem is the increasing use of abusive litigation tactics, in particular the "scorched earth" defence and the abuse of discovery mechanisms. Although the courts are beginning to take stronger stance in imposing sanctions for violations of discovery rules, many abuses go unpunished and the problem continues.

Lastly, one of the most serious problems is that there appears to be a malaise among members of the profession, particularly the young. Coming out of law school with high hopes and high ambitions, associates going into the large firms making the high salaries discover that their lives are nothing but hours on end of tedious nd uninteresting work. Many are dropping out of the profession and find careers that, although less remunerative, are more spiritually rewarding. We have had no trouble attracting the brightest and best to the law schools; keeping them in the profession may be another matter.

We must ask ourselves what steps we can take as a profession to make sure that the worst aspects of the developments of recent years do not completely undermine the profession as we enter a new decade and a new century. The trend toward commercialism has become a major concern of national lawyer organizations in my own country and many others. In the United States, a report of the American Bar Association's Commission on Professionalism has prompted the Association to launch a major counterattack against trends that would convert a learned profession into a purely business enterprise. Scholarly evaluations of cause and effect are being launched. Educational programs for lawyers and the public are being renewed. Ethical conduct is being stressed through the use of our disciplinary processes. Attempts to curb abuses in advertising are being pursued vigorously.

And most important of all, the public service aspect of the profession in the form of pro bono public work in the service of the poor has

gained renewed emphasis.

It is important that we continue to work hard to stem the tide toward rampant commercialism. But it is also important to understand that the changes wrought in the last three decades which have in many ways produced the problems that we face have also produced great positive changes in the legal profession. First of all, the changes have perhaps produced a new candor. The traditional view of the legal profession may in some ways have been an erroneous one. There was always self-interest and, to a certain extent, the self-interest was masked by a hypocritical expousing of public service over self-interest. In fact, much of the resistance in the 60s and 70s to bans on solicitation and advertising came from entrenched interests who were threatened by the potential effects of those changes. Another important fact to remember is that the traditional view of the profession that is oft-remembered by some in the bar with an affectionate yearning for the "good old days" is a vision of a white, male, upper-class and socially elite group.

During the "good old days" the prestigious New York firms did not employ Jews, Italians, and other non WASPs as lawyers. Women were prohibited by law in many states from being members of the bar, and many Law Schools refused to admit women. And participation by blacks and other racial minorities was negligible. The legal profession was a white, male, Anglo-Saxon, protestant group and, although many of them were involved in public service and in helping the poor, most did so out of an idea of noblesse oblige and charity. Today, lawyers come from all backgrounds, all races and both genders, and when they help the poor, they do it because they believe that access to the courts is a right, not a matter of charity, and that it should not be denied people simply because they cannot pay.

I think few of us really want to go back to the "good old days". We want to look to the future, and as we did so, preserve the great strides we have made in social and professional progress. The challenge for us today, however, is to take the not-so positive aspects of the change we have experienced - the move toward commercialism - and restrain it so that it does not undermine the very fabric of our legal institutions. The special position of the legal profession in many countries and the special position of the legal profession in any country that aspires to have a democratic form of government is that the profession must be independent to stand between the individual and government. Independence is based in large part on the unique role that the legal profession plays in the community, and the preservation of that independence depends in large part on public trust. That trust in turn depends primarily on whether the profession is faithfully discharging its obligation to serve society.

As we enter a new decade, many people have already noted the beginning of a reaction to the societal excesses of the 80s. Perhaps good sense will prevail after all. We in the legal profession, and especially those of us who are considered to be its leaders have a special obligation to resist the pressures that threaten to turn our profession into a mere economic enterprise. The stakes are high. We must, while embracing change in society and the profession as inevitable and even desirable, remember that the essential element of Pound's definition that separates us from those in mere commercial enterprise - public responsibility - is even more imperative in the

tumultuous and often troubled times in which we live than it have ever been before.

THE SCOPE OF APPLICATION OF THE HAGUE-VISBY RULES "THE CAPTAIN GREGOS"[1]

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> "As is of course, well known, the (Hague-Visby) rules emerged in an international convention which embodied a compromise between the desires of carriers by sea for maximum freedom to contract out of responsibility for cargo and the desire of cargo owners to subject the carrier to maximum responsibility for the cargo...The rules are accordingly something in the nature of a 'package'..."; The Strathnewton [1983] 1 Lloyd's 219 at 223, per Lord Justice Kerr.

In the "Captain Gregos"[2], the English Queens Bench (Commercial Court) and Court of Appeal were required to consider the scope of the "package" created by the Hague-Visby rules and the consequent application of the time limitation defence incorporated therein.

The action arose by originating summons issued by the plaintiff carrier for a declaration that a claim by the defendant cargo owners in conversion and negligence arising out of an alleged theft on the part of the carrier had been extinguished by Article III rule 6 of the Hague-Visby rules on the ground that suit was not brought within one year of the date when the cargo should have been delivered.

The plaintiff's, by voyage charterparty, chartered The Captain Gregos to a company called Scandports Shipping Ltd. to carry a cargo of crude oil from Egypt to Rotterdam under bills of lading which incorporated the Hague-Visby rules. Scandports Shipping Ltd. sold the cargo on May 25th 1984, after the commencement of the voyage charterparty, and it was subsequently resold to an intermediary and then to the second defendants Phibro Energy. Phibro further resold the cargo to the third defendant B.P. Oil Ltd. The cargo was loaded in Egypt by June 1st 1984 and discharged to B.P. in Rotterdam by June 17th 1984.

On December 5th 1985, solicitors for the defendants, Phibro and B.P. claimed, for the first time, that the plaintiff carrier had stolen a quantity of crude by deliberately omitting to discharge the full cargo at Rotterdam, concealing part of it in hidden recesses aboard the vessel, and using a part of the cargo to bunker the vessel. The plaintiff replied that the claim was void by the one year time limit in Article III rule 6 of the Hague-Visby rules.

During the course of argument, two issues were presented for

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[1]The author is indebted to Dr. M.A. Clarke who inspired this comment during the course of the LL.M. International Trade lectures delivered at the University of Cambridge, 1988-1989.

[2]Compania Portorafti Commerciale S.A. v. Ultramar Panama Inc. and Others (The Captain Gregos) [1989] 2 Lloyd's 63 (Q.B.); unreported decision of the Court of Appeal, December 14, 1989: see Lloyd's List Casebook, February 9, 1990.

consideration by the court. The first was whether the act of theft by the carrier amounted to a breach of the duties imposed by the Hague-Visby rules to which the time limitation defence applied. Secondly, assuming that such action amounted to breach of the carrier's duties under the Hague-Visby rules, did the time limitation defence apply to protect intentional misconduct on the part of the carrier?

A third issue was considered by the Court of Appeal but not the court of first instance namely, whether a carrier can rely on the time limitation defence as against a claimant who is not a party to a contract with the carrier to which those rules applies.

SCOPE OF THE HAGUE-VISBY RULES

The cargo owners submission on this point, at its simplest, was this. The Hague-Visby rules apply to the standards of care of the carrier from the inception of loading through the various intermediate stages up to the discharge of the cargo. Their scope, however, does not relate to possessory or proprietary rights interfered with outside that context. In other words, the package of duties imposed on the carrier by the Hague-Visby rules ended with discharge of the cargo and had no bearing on delivery (or misdelivery). The tortious act and conversion of the carrier fell outside the scope of the Hague-Visby rules and accordingly, the time limitation defence was of no assistance as it could only apply to breaches within the scope of the rules.

The applicable provisions are as follows:

> Article II:
> "Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, storage, carriage, custody, care, and discharge of such goods, which shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.
>
> Article III:
> "Responsibilities and liabilities
> ...Subject to the provisions of Article VI, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried..."
>
> Article I:
> "In these Rules the following [words are employed with the meanings set out below]:
> (a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.
> (e) 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship."

At first instance, Mr. Justice Hirst, of the Queens Bench (Commercial

Court) accepted this argument. At page 69 he said:

> "Article II describes the various stages at which the carrier bears responsibilities and liabilities, and is entitled to rights and immunities; this begins with loading and ends with discharge of goods, with the intermediate stages of handling, stowage, carriage, custody, and care in between. All of these are functions of transportation beginning at the moment when goods start to be put on board, and ending with the moment when they are finally unloaded. The "package" so described thus seems to me inherently inapt to embrace delivery, which imports concepts of possessory or proprietary rights, alien in my judgment to these carefully listed transportation stages."

This view of the scope of the carrier's duties is, it is submitted, unnecessarily narrow. It is possible to envision the carrier, under the contract of carriage, assuming responsibility to "load, handle, stow, carry, keep and care for" goods, either before loading or after discharge. It does not seem to follow logically from the provisions in question that the duties are imposed only if they occur between loading and discharge. This view is supported by two cases not referred to in the court of first instance.

In The New York Star [1980] 2 Lloyd's 317, the Privy Council had occasion to interpret exemption clauses in a bill of lading which provided as follows;

> "5. The carriers responsibility in respect of the good...shall terminate...as soon as the goods leave the ship's tackle at the port of discharge...any responsibility of the carrier in respect of the goods...continuing after leaving the ship's tackle shall not exceed that of an ordinary bailee...
>
> 17. In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered..."

The cargo was discharged from the vessel and placed in a warehouse from which it was stolen as a result of the negligence of the defendants. The plaintiff did not file their claim within the 12 month period specified in clause 17. The defendants relied on that exclusion clause in an action for damages. The Privy Council, allowing an appeal from the New South Wales Court of Appeal, Australia, held that clause 5 taken as a whole recognised that the carrier might continue to have some responsibility for the goods after discharge and that, irrespective of the period of carriage, the immunity of the carrier was not co-extensive with it but extended both before and after it. The time limitation defence contained in the Bill of Lading was therefore effective and could be relied on by the

carrier (and the defendants).

More significantly, in Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Ltd. [1954] 1 Lloyd's 321, Lord Devlin had cause to interpret the scope of the Hague rules in the context of an F.O.B contract where a piece of machinery was damaged while in the process but before being loaded on to the vessel. The defendant sought to rely on the unit limitation contained in Article IV rule 5 of the Hague rules. The defendant argued that such limitation applied only where the loss occurred within the scope of the rules and that the loss in question, occurring before loading, was not so included. This required Lord Devlin to consider the scope of Article II of the Hague rules which is in the same terms as the Article II of the Hague-Visby rules and Article I (e) which defined "carriage of goods" in the same terms as the Hague-Visby rules.

In dismissing the defendants contention and holding the unit limitation applicable, Lord Devlin said, at page 326:

> "In my judgment, this argument is fallacious, the cause of the fallacy perhaps lying in the position inherent in it that the rights and liabilities under the Rules attach to a period of time. I think they attach to a contract or part of a contract."

He held that in determining the application of the rules, it was not necessary to specify a precise moment in time at which point they commenced or terminated. Rather, the limit of their application was determined by the limits of the contract of carriage by sea itself. If the carrier undertook the responsibilities specified in Article III, it was obligated to discharge them regardless of when they arose.

The Court of Appeal in The Captain Gregos overruled Mr. Justice Hirst on this point. Lord Justice Bingham said that the Hague-Visby rules, in particular Article I (e) and Article II did not assign a temporal term to the carriage of goods supporting an argument that the rules did not apply to events occurring before loading or after discharge. They simply defined the scope of the operations to which the responsibilities, liabilities, rights and immunities in the rules applied regardless of whether they occurred before or after loading and discharge.

It would appear, therefore, that the artificial limits imposed on scope of the Hague-Visby rules by the court of first instance in The Captain Gregos have been removed and that the law as stated by the Court of Appeal is in agreement with the interpretation of the contractual provisions in The New York Star and the decision in Pyrene Co. Ltd. v Scindia Steam Navigation Co. Ltd. regarding interpretation of the Hague Rules.

THE TIME LIMITATION

The second issue related to the application of the time limitation in circumstance where the carrier was guilty of intentional or wilful misconduct. This required a consideration of the terms of Article III rule 6, a comparison with Article IV rule 5(e)(the unit

limitation) and a consideration of the Stockholm discussions which resulted in the Hague-Visby rules.

The time limitation defence is found in Article III rule 6:

> ....the carrier and the ship shall in any event, be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered..."(emphasis added)

The unit limitation is located in Article VI rule 5(e):

> "Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability, provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result".

The Hague rule equivalent to Article III rule 6 is in identical terms with the exception of the words "in any event" and "all liability whatsoever".

Mr. Justice Hirst at first instance, despite the change in wording between the Hague and Hague-Visby rules in the time limitation defence and the difference in wording between the time and unit limitation defence within the Hague-Visby rules, concluded that even in the event delivery was within the scope of the rules, the time limitation was not available to a carrier guilty of theft. He reasoned that "very very clear words" would be required to cover such conduct which were not to be found in the rules or in the Stockholm discussions showing that such was the legislative intent.

The Court of Appeal reached the opposite conclusion. They held that there was no provision which deprived the shipowner of his right to rely on the time bar even when he have been guilty of wilful or reckless misconduct. The addition of the words "in any event" "and "all liability whatsoever" in Article III rule 6 of the Hague-Visby rules was a clear indication of the legislative intent to extend the defence to all conduct. This was also supported by the difference in wording between the unit limitation, expressed to exclude wilful or reckless conduct, and the time limitation which omitted any such reference.

The Court of Appeal reasoned that the clear and emphatic language used by the draftsman together with the purpose of Article VI which was intended to achieve finality and to allow carriers to clear their books of potential claims lead to the conclusion that the time limit applied to all claims arising out of the carriage (or miscarriage) of goods by sea under bills of lading subject to the Hague-Visby rules.

THE THIRD ISSUE - PRIVITY OF CONTRACT.

The Court of Appeal, having extended the scope of the Hague-Visby rules and the time limitation defence based on the need for finality, then performed what appears to be an about face.

The defendant cargo owners argued that they should not be treated as parties to the bill of lading with the result that they were not bound by the Hague-Visby rules and the time limitation defence contained therein. They contended that the language of the rules indicated that they were intended to regulate the rights and duties of parties to the bill of lading contract only, not non-parties. The defendants argued that since they had not entered into the bill of lading contract with the carrier but had acquired their rights as subsequent purhasers, there was no privity between themselves and the carrier and consequently the rules (including the time limitation) did not apply.

Lord Justice Bingham accepted this argument. He held that the rules were intended to govern relations only between parties to the bill of lading contract based on the general principle that only a party to the contract might sue on it.

It is submitted that this finding is incongruous to the findings of the Court of Appeal on the first two issues. The shipowners position must be correct. It is submitted that on a proper construction of the rules, the cargo owners are bound regardless of the absence of privity with the carrier. The rules apply whether or not the cargo owners become actual or deemed parties to the bill of lading, wherever bills of lading to which the rules applied are issued. Article X provides for this as follows;

> "The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:
> (a) the bill of lading is issued in a contracting State, or
> (b) the carriage is from a port in a contracting State, or
> (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,..."

The rules are applied , therefore, not by virtue of privity of contract, but rather by consequence of being scheduled to the Carriage of Goods by Sea Act, 1971 and thereby having the effect of directly enacted statute law (The Hollandia 1982 2 W.L.R. 556 C.A.).

It is submitted that this view is also supported by Article IV Bis rule 1;

> "The defences and limits of liabilities provided for in the Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by contract of carriage whether the action be founded in contract or in tort." (emphasis added)

The inclusion of Article IV Bis in the Hague-Visby rules and the reference therein to tort must have been intended to extend the rules outside the doctrine of privity.

It is submitted that the requirement of privity will frustrate the purpose of the rules as an international convention designed to give finality and certainty to parties. It would appear, however, that as a result of this decision, cargo owners will be forced to establish a contractual nexus with the carrier in order to rely on the "package" so

carefully and painstakingly negotiated between the competing interests of carriers and cargo owners. Courts (and arbitrators) on the other hand will be invited to involve themselves in the fictional exercise of finding implied contracts or contracts based on other foundations (i.e. The Bill of Lading Act, 1855) in order to apply the rules.

It may be that the Court of Appeal was anxious to allow the defendant cargo owners a remedy to address the reprehensible conduct of the plaintiff carriers. However, the consequence of doing justice as between these parties may well have resulted in a larger injustice by diminishing the scope of application of the Hague-Visby rules and thereby their practical utility.

LAW SCHOOL REPORT

LAW SCHOOL REPORT

The Cayman Islands Law School was founded in 1982 following the report and recommendations of Professor Paul Fairest of Hull University. Originally housed in the Court House, it has expanded from five students and a staff of one to forty three students, a Director, four Law Lecturers and an Executive Officer and is located in modern facilities in the Tower Building, George Town.

Students study concurrently for the University of Liverpool LL.B. and the Attorney-at-Law qualification over a five year period while serving under articles of clerkship to members of the Legal Profession.

Recent developments at the Law School include the following:

(a) In July the Director of Legal Studies travelled to Liverpool to conduct negotiations with the University of Liverpool toward the implementation of an honours degree at the Law school. Significant progress was made in this regard and a proposal is now being considered by the Legal Advisory Council. It is hoped that details of the proposal can be made public shortly.

(b) Also in July, the report of Professor Fairest, former Dean of Law, Hull University was made public. The report recommends that consideration be given to implementing fundamental changes to the Law School programme. The proposals include changing the five year part time course to a three year full time course followed by a two year period of articles and professional qualification. The proposals are currently being considered by Executive Council and the Legal Advisory Council.

(c) The Law School sponsored an Advocacy Training Course during the week of September 24 in which all students participated. Lectures were offered by practitioners and Law School staff on communication skills, advocacy skills and legal writing. The course culminated in two days of practical exercises and moots involving practitioner judges and police witnesses. The event was judged a success by all involved and the standard of advocacy considered encouraging.

(d) The 1990-1991 term commenced October 1st 1990. The Law School welcomed four new students to the Attorney-at-Law course, one to the Liverpool Degree Course, ten to the diploma Course and eight to the Banking Course. The student enrollment in 1990-91 is forty-three, up from twenty three in 1989-90.

(e) The 4th Law School Graduation Ceremony will be held October 15 at 7.00 p.m. Harquail centre. Three students will receive the University of Liverpool Bachelor of Laws Degree and Attorney-at-Law qualification; namely, John Barron, Myrna Gregson and Carla Foster. Miss Foster received her degree with distinction. Professor Peter Rowe, Head of the Department of Law University of Liverpool will be the guest speaker at the ceremony.

Requests for information about the Law School should be addressed to

the Director of Legal Studies, 4th Floor, Tower Building, George Town, Telephone 97999 Ext. 3540