CAYMAN ISLANDS LAW BULLETIN

NO 5

SEPTEMBER 1991

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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.

Citation

Cases appearing in this volume should be cited as 5 Law Bulletin with the year in which the action was commenced preceding and in round brackets.

Abbreviations

Abbreviations where used in the Law Bulletin are based on those used in The Digest (formerly The English and Empire Digest). The exception is "SCA" which stands for Summary Court of Appeal (Grand Court, Cayman Islands).

Contributions

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 Extension 3540.

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"England's Five Year Plan
for Alternative Dispute Resolution"
John Arnold Epp
Law Lecturer, Cayman Islands Law School

LAW SCHOOL REPORT 41

ERRATA

On page 9-10 of 4 Law Bulletin, the second sentence of paragraph 5 should read as follows:

5. Kuwait Asia Bank v National Mutual Life affirms that in performance of their duties, directors are bound to ignore the interests and wishes of their employer and that a shareholder does not, by reason of his position as shareholder, owe a duty to anyone.

EDITORIAL NOTE

This is the fifth 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.

The first and foremost purpose is 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 three bound volumes (1980-83, 1984-85 and 1986-87). 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 case notes of the majority of judgments of the Grand Court and Court of Appeal delivered in chambers and in open court during the period June 1 1991 to September 30 1991. Certain judgments contained insufficient information to be usefully summarized and were therefore omitted. In chambers and other appropriate matters, 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. This edition features an article by Law School Lecturer John Arnold Epp dealing with Alternative Dispute Resolution.

We would like to welcome to our editorial staff Attorney-at Law Myrna Gregson of the Myers & Alberga firm. Ms Gregson has assisted with proofreading past editions of the Law Bulletin and it is our great pleasure that her involvement has now been formalized.

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. Any remaining errors are the responsibility of the Editor.

Your comments and suggestions are most welcome.

Richard Finlay
Editor

CASE NOTES

SUMMARIES OF JUDGMENTS OF THE GRAND COURT, THE COURT OF APPEAL AND THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

June 1 1991 to September 30 1991

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ADMINISTRATIVE LAW

Judicial Review - Bias - Certiorari - Dismissal from police force - Allegation of bias against Disciplinary Authority

Prendergast v Commissioner of Police, Attorney General

Court of Appeal (8/90)
Zacca, Georges and Henry JJA
Undated

Case Referred to:
R v Liverpool City Justices ex p Topping (1983) 1 WLR 119

Mr N Hill QC and Mr G Hampson for the appellant
Mr A Smellie for the respondent

The appellant was a constable in the Royal Cayman Islands Police Force until his dismissal in January 1990. Allegations of corruption were made against him which resulted in his prosecution. At the trial the prosecution offered no evidence. The appellant was nevertheless suspended from the police force by the Commissioner of Police pending disciplinary hearing for three offences under the Police Regulations of 1976.

The Commissioner who took the decision to suspend the appellant was also a member of the Disciplinary Authority. The appellant was dismissed from the force following the disciplinary hearing.

He alleged bias against the Authority (Tribunal) and applied to the Grand Court for an order of certiorari to quash the decision of the Authority. The application was dismissed on November 8 1990. He appealed to the Court of Appeal.

At the Grand Court, the appellant had argued that there had been breaches of Order 31 of the Royal Cayman Islands Police Force standing orders and the rules of natural justice. Order 31 did not permit members of the Disciplinary Authority to see the content of the appellant's (person appearing before the Authority) file relating to the proceedings before the hearing. It was apparent from a memorandum that the Commissioner had read the file. The 'bias' aspect stemmed from the fact that the Commissioner who had suspended the appellant was also a member of the Disciplinary Authority.

The Chief Justice at the Grand court found no reasonable suspicion of bias nor real likelihood of bias.

Held: (allowing the appeal)

(1) The learned Chief Justice erred in failing to recognise the implication of the Commissioner of Police having seen the content of the appellant's (applicant's) file relating to the investigation before the disciplinary hearing. He also failed to attach sufficient importance to the fact that the appellant's only witness in the proceedings had, at an inquiry into the Commissioner's conduct (relating to the present matter), given evidence adverse to that Commissioner.

(2) It was not necessary for the appellant to show actual bias. The Grand Court decision was set aside and an order of certiorari to quash the decision of the Disciplinary Authority granted.

AD

Natural Justice - Right to be heard (See Confidential Relationships)

CIVIL PROCEDURE

Joinder - Scope of Rule 26 Grand Court (Civil Procedure) Rules

A Ltd v B,C,D Ltd, E Co and proposed defendants F and G Ltd

Grand Court (170/91)
Harre J
September 13 1991

Cases referred to:
Executive Air Services Ltd and ors v James E MacDonald (1989) 2 Law Bulletin 11
Edward v Lowther (1876) 45 LJPC 471
Vandervell Trustees Ltd v White et al [1970] 3 All ER 16
Amon v Raphael Tuck & Sons Ltd [1956] 1 All ER 273
Ashley v Taylor [1878] Ch 768

Legislation:
Grand Court (Civil Procedure) Rules, Rule 26

Mr A Jones for the plaintiff
Mr R Mahfood QC and Mr T Shea for B and C
Mr P Lamontagne QC and Mr A McLaughlin for D Ltd and E Co

The plaintiff sought an order pursuant to Rule 26 to add two defendants to this action which is based on fraud and breach of fiduciary duty. It also sought leave to amend the writ and statement of claim.

The first proposed defendant was a former President and CEO of the parent company of the plaintiff and a former President of the plaintiff. The second proposed defendant was a company registered in a foreign jurisdiction.

Held: (application granted)

(1) Rule 26 allows the court to order "the names of any parties added who ought to have been joined whether as plaintiff or defendants".

(2) The first proposed defendant, it was alleged, dishonestly assisted with the fraud of B and C.

(3) The second proposed defendant, it was alleged, was a vehicle through which misappropriated funds travelled. It was alleged that the second proposed defendant was beneficially owned and controlled by B and C at all material times.

(4) The court must look at the factual allegations, including those discovered since the original claim, to decide a Rule 26 application.

(5) B and C argued that the allegations against the proposed defendants are wholly new and that they have nothing to do with the action as originally filed. Further they argued the words "ought to have been joined" cannot be construed as having the same meaning as "could have been joined".

(6) "In considering ...the meaning of the words 'may...order the names...of any parties added who ought to have been joined' it is necessary to consider who are the parties who ought to be joined when the action is brought. It is necessary also to bear in mind the object of Rule 26.... It follows therefore that a plaintiff ought to join as defendants in one action all persons from whom he wishes to claim relief jointly, severally or in the alternative." (Executive Air Services Ltd and ors v James E MacDonald)

(7) Ashley v Taylor provides a striking illustration of the wide jurisdiction which is now embodied in Rule 26.

(8) Both proposed defendants ought to have been joined as defendants as their presence before the court is necessary to effectively adjudicate and settle all questions involved in the matter.

JE

Limitation of Actions - Laches and Acquiescence
(See Companies - Directors' Duties at para 10)

Stay pending appeal - Security for costs

A Ltd v B, C, D Ltd and E Co

Grand Court (170/91)
Harre J
July 23 1991

Mr A Jones for the plaintiff
Mr T Shea for the first and second defendants

A Mareva injunction was in place against the defendants. By order dated July 10 1991 Schofield J confirmed his finding of a good arguable case of fraud against the first and second defendants. He ordered that the defendants provide certain information. The defendants said that they could not provide this information as to do so would be a breach of the laws of the jurisdiction in which their companies are incorporated. The defendants sought a declaratory judgment from that jurisdiction to confirm their position.

The defendants sought a stay of the discovery order pending the appeal of the order of Schofield J.

Held: (application dismissed)

(1) As in all applications for a stay pending appeal, a balance has to be reached between the objective of not depriving a successful litigant of the fruit of his litigation and the duty of the court to see to it that when a party is exercising his right of appeal that that appeal, if successful, is not rendered nugatory. A court can grant a stay pending appeal where the special circumstances of the cases so require.

(2) A stay would be demonstrably prejudicial to the plaintiff. The first and second defendants are not acting in good faith. Their conduct is evasive as evidenced by the nature of the information disclosed. Therefore a stay pending appeal is not granted.

(3) Security for the costs of the appeal are fixed at CI$750.

(4) Costs of the application to the plaintiff in any event.

JE

Summary Judgement/Order - Availability of remedy

Z v Z

Grand Court (160/91)
Harre J
Undated

Cases referred to:
Rawson Trust v GCTC Ltd
1980 CILR 214
Cayman Islands News Bureau Ltd v Cohen
(1988) 2 Law Bulletin 78
Re Aramco Ltd 1980-83 CILR 202

Legislation:
Rule 23 Grand Court (Civil Procedure) Rules
Orders 14 and 27 Supreme Court Rules (UK)

Mr A Jones for the plaintiff
Mr S Barrie for the defendant

The plaintiff applied for a summary order in the form of a mandatory injunction pursuant to a shareholder claim alleging breach of the articles of the defendant.

The issue was whether the order requested could be properly made under Order 14 (UK) given the provisions of Rule 23 of the Grand Court (Civil Procedure) Rules.

Held: (application dismissed)

(1) Rule 23 of the Grand Court (Civil Procedure) Rules lays down a set of procedures analogous in its terminology but more restricted in scope than Order 14 of the English Rules for obtaining summary judgment without trial. It is limited to actions commenced by specially endorsed writ claiming a liquidated amount (Cayman Islands News Bureau v Cohen).

(2) There is no distinction between the nature of judgments which may be obtained under Order 14 and under Order 27 Rule 3. Both offer to the plaintiff a ready means of obtaining a judgment by a summary process in a case in which the merits of his claim freed from any possibility of effective rebuttal can clearly be perceived at an early stage of the proceedings.

(3) While it may be argued that the scope of Rule 23 is inadequate when compared to the English Rules, it cannot be argued there is no provision at all for obtaining judgment by that kind of process (Re Aramco).

RF

Summary Judgement - Rule 23 Grand Court (Civil Procedure) Rules - Disclosure of good defence on the merits - Judgment entered in the absence of good defence - Multiple adjournments.

Z v Z

Grand Court
Harre, J
July 31 1991

Legislation:
Rule 23 Grand Court (Civil Procedure) Rules

Mr R Alberga QC and Mr O Merren for the plaintiff
Mr T Shea for the defendant

On March 7 1991 the plaintiff obtained an ex parte Mareva injunction and order for discovery against the defendant in related proceedings. Having missed two opportunities to appear or be represented in court in inter party proceedings, the defendant issued an appearance on March 23 indicating his intention to contest the injunction and order for discovery.

On March 27 1991 these proceedings were begun by way of specially endorsed writ pursuant to the Rule 23 procedure by which the plaintiff sought summary judgment against the defendant in the sum of CI$1.6 million. On the following day the plaintiff again failed to attend court or be represented and these proceedings and the related proceedings were set down to be heard together on April 8 1991.

Between April 8 1991 and May 23 1991 having already been adjourned on three occasions, these and the related proceedings were adjourned on a further five occasions at the behest of the defendant. Up until May 23 1991 the defendant did not comply with the order for discovery nor did he furnish grounds for a defence to the action in these proceedings.

Held: (application allowed)

(1) By May 23 1991 the defendant was clearly in wilful breach of the order for discovery. The defendant had failed to show a good defence on the merits or disclose such facts as were deemed sufficient to entitle him to defend the action.

(2) In accordance with Rule 23 judgment was given for the plaintiff.

PO'H

COMPANIES

Directors' duties

Pedro Developments Ltd v Zuiderent et al

Grand Court (212/1989)
Schofield, J
Undated

Cases referred to:
Twycross v Grant (1877) 2 CPD 469
Gluckstein v Barnes [1900] AC 240
Aberdeen Ry v Blaikie (1854) 1 Macq HL 461
Flintcroft's Case 21 Ch D 519
Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378
Re City Equitable Fire Insurance Co [1925] 1 Ch 407
Prospect Properties Ltd (In Liquidation) v McNeill et al (1989) 3 Law Bulletin 12
Wallersteiner v Moir (No 2) [1975] 1 All ER 899 at 863

Mr R Alberga QC and Ms C Bridges for the plaintiff
Mr N Hill QC and Mr D Bannon for the defendant

The plaintiff was incorporated in 1979 for the purpose of land development of an area known as Pedro's Bluff. At times material, the shareholding of the company were as follows:

Fincham	50%
Retsill (a corporation)	25%
Zuiderent (the defendant)	12 1/2%
Bodden	12 1/2%

The defendant was a director of the plaintiff from June 25 1980 to July 21 1985 and from April 1 1987 to July 4 1987.

In 1987 Fincham purchased all shares held by the other shareholders. The plaintiff later brought an action against the defendant claiming that the defendant never paid for the shares he initially held, that he was in breach of fiduciary duties owed by him as a promoter and director and that he misapplied or diverted corporate funds and was negligent in the management of the plaintiff's affairs.

Some of the particulars of the plaintiff's allegations were as follows:

(a) It was alleged that Pedro acquired land from a company which was owned or controlled by the defendant and which resulted in profit to the defendant. This secret profit was not disclosed to Pedro and the defendant is accordingly liable to account.

The proceeds of this sale were allegedly used by the defendant to acquire his shares in Pedro.

(b) It is alleged that Fincham paid for his shares and that a portion of these funds was paid by Pedro without consideration to a company in which the defendant held shares. The plaintiff claims the defendant is liable to account for that payment.

(c) It is further alleged that monies representing Pedro's profit in the sale of land were paid to defendant companies controlled or owned by the defendant or at his direction and for his benefit. The plaintiff claims the defendant is liable to account for these payments.

In his defence, the defendant relied (inter alia) upon releases entered into in 1987 between the original four shareholders. The release provided that for certain consideration, Fincham would release his claims against the remaining shareholders and others.

Further, by later releases Fincham released Bodden and others from all claims arising out of their involvement in Pedro and, on behalf of himself and Pedro, gave a full discharge and release to Retsil, its officer/director and others (including former directors of Pedro).

The defendant argued the effect of these releases was to release him from liability since a release given to one of a number of persons who is jointly or jointly and severally liable discharges the others.

The defendant also said he was not a party to a number of the transactions in question which were carried out by other directors of Pedro without his participation and, in some cases, while he was off the Island.

The defendant also relied on the Limitation of Actions Law (Cap. 86), laches and acquiescence.

Finally, he relied on Article 127 of the Articles of Association of Pedro which provides for an indemnity out of the assets of the company for loss incurred through the acts of the directors acting in relation to the affairs of the company "except such (if any) as they shall incur or sustain by or through their own wilful neglect or default."

Held: (for the plaintiff)

(1) Whether or not the defendant is a promoter is a question of fact. A promoter has been defined as any person who "...undertakes to form a company with reference to a given project and to set it going and...takes the necessary steps to achieve that purpose" (Twycross v Grant).

(2) A promoter stands in a fiduciary position towards the company and must not profit out of the promotion without disclosing it to the company. Disclosure to the directors is not always sufficient (Gluckenstein v Barnes). Promoters are jointly and severally liable to account for any secret profit.

(3) As a director, the defendant was a fiduciary to the company and had a duty to act honestly and in good faith, in the best interests of the company and not for a collateral purpose (Aberdeen Ry v Blaikie).

(4) Directors are jointly and severally liable to replace funds of a company misapplied or misappropriated (Flintcrofts Case). They owe a duty to apply the company's assets only for the purposes of the company.

(5) A director of a company is not allowed to make a profit by using his position without the sanction of the company, which in this case would include the shareholders (Regal (Hastings) Ltd v Gulliver).

(6) The general propositions regarding the skill and diligence required of a director are stated in Re City Equitable Fire Insurance Co. An examination of the conduct of the defendant against this test is not necessary due to the result on the question of breach of fiduciary duty.

(7) In order for a director to be liable for breach of common law duty of care or of fiduciary duty, it is not sufficient that it be shown he was a director at the relevant time; it must be shown he was a participant, either actively by breach or passively by negligence or default.

(8) The release given by Fincham and Pedro of Retsil and of its officer/director (who was also a director of Pedro) does not assist the defendant. While a release given to one of a number of persons who is jointly and severally liable discharges the others, in this case the release against the officer/director of Retsil related to him in the capacity as such and not in his capacity as director of Pedro.

(9) The release given by Fincham of Bodden flows from the former directly, does not include Pedro and therefore offers no defence to the defendant. "The company is a separate entity with rights and liabilities distinguishable from those of its shareholders" (Prospect Properties Ltd (In Liquidation) v McNeill et al).

(10) None of the limitation period, laches or acquiescence was available on these facts to the defendant. The proper limitation period was that which existed in England prior to the Trustee Act 1888 (Prospect Properties supra).

(11) Article 127 of the Articles of Association indemnifies a director (including the defendant) from liability from certain acts he takes as director other than "wilful neglect or default". The meaning of this phrase was defined in Re City Equitable Fire Insurance Co as follows:

"It is that an act, or an omission to do an act is wilful where the person who acts, or omits to act, knows what he is doing, and intends to do what he is doing, but if that act or omission amounts to a breach of that person's duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing and intends to commit a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty."

(12) The defendant is in breach of his duties as promoter and director and is liable to account to the plaintiff. The defendant did not bring to his duties as director the degree of probity and

care he ought and the terms of the indemnity offer him no assistance in those cases where his duty was breached.

(13) Interest is awarded on basis that a fiduciary, like a trustee, must not only replace misapplied trust funds but also pay interest (Wallersteiner v Moir).

RF

CONFIDENTIAL RELATIONSHIPS

Confidential Relationships - Mutual Legal Assistance

Bertoli et al v Cayman Legal Assistance Authority

Judicial Committee of the Privy Council (50/90)
Lord Bridge, Lord Oliver, Lord Goff, Lord Jauncey and Lord Lowry
April 22 1991

Cases Referred to:
Yew Bon Tew v Kenderaan Bas Mara [1983] AC 553

Legislation:
Mutual Legal Assistance (United States of America) Law 1986

Mr R Potts QC and Mr A Smith for the appellants
Mr C Clarke QC and Mr R Finlay for the respondent

This is an appeal from a judgment of the Court of Appeal of the Cayman Islands (Zacca, Pres., Georges and Kerr JJA) of November 28 1990 dismissing with costs an appeal from a judgment of Schofield J in the Grand Court of the Cayman Islands whereby he dismissed the appellants' claim for declaratory relief and an injunction against the respondent.

The respondent is the Chief Justice and is sued in the capacity of the Cayman Mutual Legal Assistance Authority constituted pursuant to section 4 of the Mutual Legal Assistance (United States of America) Law 1986 (the MLAT). The MLAT was enacted in order to give effect to a Treaty of Mutual Legal Assistance between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the Cayman Islands. The purpose of the Treaty was to enable each of the High Contracting Parties to obtain on request, assistance from the other in the investigation, prosecution and suppression of criminal offences by (inter alia) taking testimony from witnesses and providing documents, records and articles of evidence.

The appellants are United States citizens and are the defendants to an indictment pending before the United States District Court, District of New Jersey, where they are charged with having conducted the affairs of a brokerage firm through a pattern of criminal activity which is described as "racketeering" a term of art in the United States denoting specific criminal conduct. In the course of the conduct of those proceedings, the United States Attorney for the District of New Jersey found it necessary to obtain evidence from persons and entities in the Cayman Islands.

A request was originally made pursuant to the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 which was later withdrawn and reinstituted under the MLAT.

The appellants commenced these proceedings claiming the following declarations:

"(1) That in any application or request to the Cayman Authority being made...under the Mutual Legal Assistance (United States of America) Law 1986 by or pursuant to a request from the Central Authority of the United States the appellants are entitled to have a legal right to be heard and oppose the application; and

(2) That any steps taken or hereafter taken by the respondent to execute a Request dated April 4 1990 by the United States Authority are and will be ultra vires of the Authority and void and of no effect."

In relation to the first issue, counsel for the respondent throughout the proceedings maintained that, on the true construction of the MLAT, no hearing need be accorded nor was the Authority obliged even to consider whether a hearing should be given. The respondent through counsel expressed a willingness to receive and consider any written representation which the appellants sought fit to make and such representations were in fact received and considered.

Before the Privy Council, counsel for the appellants conceded that the appellants had no right to a hearing but rather claimed that, in as much as they had made a request for an oral hearing, the respondent was bound to consider whether he should exercise a discretion in favour of or against according them such a hearing.

The first issue was, therefore, restated thus:-

"It being conceded that, contrary to the claim in the amended writ, the appellants have no right to demand a hearing, is the respondent bound, before executing a request, to consider whether, as a matter of discretion, he should give the appellants an opportunity to make oral representations?"

In relation to the second issue, the appellants argued that information concerning their affairs within the possession or knowledge of a person in the Cayman Islands prior to the MLAT coming into force would not be subject to disclosure under the MLAT since that would give the Law retrospective effect.

The appellants were unsuccessful both at trial and at the Court of Appeal.

Held: (appeal dismissed)
(Judgment per Lord Oliver)

(1) "As regards the issue of fairness and the right to seek an oral hearing, the authorities have been so fully and so meticulously rehearsed in the careful and instructive judgment of the Court of Appeal delivered by Georges JA that it would be a work of supererogation for their Lordships to repeat what was there said in different and probably less felicitous language. They are content to accept and adopt the reasoning of Georges JA in toto."

(2) "The same applies to the second issue. In relation to this, the argument was two-fold and of a transparency that scarcely merits a point-by-point refutation. First, it is said that since the Law is one for the suppression of "criminal offences of the nature...provided in the Treaty" and since "criminal offence" is defined in the Treaty to include (inter alia) certain enumerated courses of conduct (such as "racketeering") which were not previously , at least in name, offences under the law of the Cayman Islands, it is demonstrable that the request referred to in both the Law and the Treaty can have reference only to evidence required in connection with "criminal offences" committed after the Law came into force. Secondly, it is submitted that in relation to any information imparted before the Law came into operation, the appellants enjoyed a vested right to have its confidentiality preserved. That was, it is conceded, subject always to the qualification that the information might have to be disclosed under the compulsion of law but it is argued that, because this particular procedure for compelling disclosure was not capable of exercise until 30th March 1990, the application of the procedure to pre-existing information would constitute a retrospective impairment of vested rights which could not have been contemplated by the legislature. Reliance in this context is placed upon the judgment of the Board in Yew Bon Tew v Kenderaan Bas Mara.

The fallacies which underlie both these arguments and the absurd results to which they lead have been convincingly demonstrated in the judgment of Georges JA and no useful purpose is served by repetition or addition. For the reasons which he so lucidly deployed both must be rejected."

Editor's Note: For a report of the Court of Appeal decision, see (1990) 3 Law Bulletin 6.

RF

COSTS

Security for Costs
(See Civil Procedure - Stay)

CRIMINAL LAW

Assault police officer - Knowledge victim police officer irrelevant - Meaning of "carrying" offensive weapon - Right of silence.

Regina v Silburn

Grand Court (SCA 60/91)
Schofield J
September 13 1991

Cases referred to:
R v Maxwell and Clanchy
(1909) 2 Cr App R 26

Legislation:
s63 Police Law
s69 Penal Code
s4(2) Misuse of Drugs Law

Appellant in person
Ms L Dilbert for the Crown

The appellant had been convicted of assaulting a police officer contrary to s63 Police Law, of carrying an offensive weapon contrary to s69 Penal Code and of failing to provide a urine specimen contrary to s4(2) Misuse of Drugs Law. The appellant appealed against sentence and conviction.

The appellant was observed to be acting suspiciously by police officers in the early hours of the morning. They gave chase and after he had thrown various objects at them, including a piece of concrete and a milk crate, he was eventually apprehended and arrested. A substance resembling ganja was recovered from him and he was requested to provide a urine sample. He made no reply despite officers having made three requests.

In response to the charge of assaulting the police officers the appellant argued, inter alia, that he was not aware that they were police officers. The appellant further argued that he had failed to respond when asked to provide a specimen of urine because he believed such to be his entitlement due to his right to remain silent.

Held: (allowing the appeal in part)

(1) The offence of assaulting a police officer does not require proof that the accused knows the victim to be an officer (R v Maxwell and Clanchy).

(2) The mere act of picking up objects and throwing them did not come within the definition of "carries" within s69 Penal Code. The conviction in this regard would be quashed.

(3) The offence under s 4(2) Misuse of Drugs Law had been proved; the appellant could have signified his assent to the request to provide a urine sample without jeopardising his right to remain silent.

(4) The sentence of imprisonment would be reduced from 15 to 12 months.

MD

Drugs - Burden of proof - Presumption of possession

Robinson and Hart v Regina

Grand Court (SCA 161/90)
Harre J
August 30 1991

Case Referred to:
R v McLean and Foster

(SCA 160/90)

Legislation:
s7(1)(d) Misuse of Drugs Law

Ms L Dilbert for the Crown
Mr K Collins for Robinson
Mr J Furniss for Hart

The appellant, Robinson, was convicted of the possession of cocaine with intent to supply and was sentenced to 7 years imprisonment and fined $5,000. Hart was convicted of being concerned in the possession of cocaine with intent to supply and sentenced to 2 years imprisonment. A sum of money totalling CI$500 found in her possession was ordered forfeited. Both were appealing against convictions and sentences.

Two men were seen calling at Robinson's house. Police officers had been in surveillance at the time. Hart was the maid of Robinson. Robinson was seen instructing Hart to go over a fence to retrieve something. Hart discovered the presence of the police and raised an alarm. The police discovered 34.5 grams of cocaine buried in a bottle at the spot where Robinson had directed Hart. At the trial Robinson denied knowledge or possession of the cocaine. Hart failed to give evidence.

The prosecution submitted that the evidence against the two accused (appellants) was quite clear and that the presumptions under the Misuse of Drugs Law need not be resorted to to prove 'possession' and being 'concerned' beyond a reasonable doubt.

Section 7(1)(d) provides:

"Where it is proved beyond reasonable doubt that a person had in his possession or custody or under his control anything containing a controlled drug, it shall be presumed until the contrary is proved that such person was in possession of such drug".

Robinson's grounds of appeal were inter alia that Hart was in possession of the drug and that the learned magistrate erred in his finding that she was in possession of the controlled drug.

Hart's grounds of appeal were inter alia that the prosecution had failed to prove her knowledge as to the conten. of the bottle and further, that the 2 year prison sentence was excessive in the circumstances.

Held: (dismissing both appeals)

(1) The learned magistrate had been correct in concluding that Robinson had control over the bottle which contained the drug.

(2) The prosecution, to prove that Hart was 'concerned' in possession of the drug, had to show possession by Robinson and participation in the enterprise with the necessary knowledge by Hart. Even without invoking the presumption under Section 7(1)(d), the prosecution had been able to satisfy the magistrate beyond reasonable doubt of the accused's guilt.

(3) The sentences were affirmed but the forfeiture order relating to the money found in Hart's possession was set aside.

AD

Drugs - Burden of proof - Presumption of possession

Regina v Logan

Grand Court (SCA 109/90)
Harre J
July 15 1991

Cases referred to:
R v Bramblevale [1970] 1 Ch 128
Woolmington v DPP [1935] AC 462
Douglas Gibson v R (30/88)
R v Price(1961) CCC 179
R v Cappello (1959) CCC 122
R v Sharpe (1961) CCC 131
R v Hunt [1987] AC 352
R v Edwards [1975] QB 27
R v Carr-Briant [1943] KB 607

Legislation:
s7(1) Misuse of Drugs Law

Mr N Hill QC for the appellant
Mr R Sheehan for the Crown

Appeal against conviction for possession of 346 grams of cocaine on the grounds that:

(1) The Crown had failed to prove beyond reasonable doubt that the appellant had possession of controlled drug contained in aerosol containers.

(2) That the Crown failed to prove beyond reasonable doubt that the appellant was concerned with the possession of controlled drug concealed in aerosol containers.

The appellant had driven to the Owen Roberts Airport to pick up G. The police had followed the appellant to the airport and stopped the appellant after he had picked up G who was found to be carrying a travelling bag containing two aerosol cans filled with 346 grams of cocaine.

The appellant's story during the trial as to his association with G was inconsistent with what he stated during interview. He was charged under s7(1) of the Misuse of Drugs Law.

It was argued on the appellant's behalf that the learned magistrate had erred in the interpretation of the presumption and in his analysis of the evidence. It was further argued that the ultimate or legal burden of proving the case lay on the prosecution and that the presumption only assisted the prosecution with the evidential burden.

Held (dismissing the appeal);

(1) Once the prosecution had proved the primary fact contained in s7 (1) Misuse of Drugs Law beyond reasonable doubt, the onus was shifted onto the defendant (appellant) to discharge the persuasive (legal) burden placed on him by statute on the balance of probabilities.

(2) Section 7 (1) Misuse of Drugs Law fell outside the formulation used in R v Edwards and the sphere of exceptions, exemptions, provisos, excuses or qualifications which were further considered in R v Hunt. The accused is put by the statute in the position of having to disprove the entire offence, not just a particular element or exception on the balance of probabilities. The presumption of possession included a presumption of knowledge which the appellant had failed to disprove.

AD

Drugs - s3(1) Misuse of Drugs Law - Evidence - Strength of prosecution case in absence of evidence of co-accused.

Spencer v Regina

Cayman Islands Court of Appeal (13/91)
Georges, Kerr, Henry JJA
August 2 1991

Legislation:
s3(1) Misuse of Drugs Law

Appellant in person
Ms L Dilbert for the Crown

The appellant had been convicted with two others of the offence of importing ganja contrary to s3(1) Misuse of Drugs Law. The charge alleged that over one pound of the drug had been imported by boat into East End, Grand Cayman. The two other men had pleaded guilty to the charges. The appellant's involvement in the illegal enterprise had been alleged by the two in police statements made in his absence. However, when called upon to give evidence to the court both men, in contradiction of their police statements, denied any involvement on the part of the appellant. Both men claimed that they had been induced to make the statements by promises that they would be allowed to return to Jamaica if they involved the appellant.

The Grand Court had nevertheless confirmed the conviction of the appellant, concluding that there existed sufficient independent evidence to justify the conviction, namely that one of the men who had travelled to Grand Cayman in the same boat as the appellant had taken the police to the spot where the ganja was found.

Held: (allowing the appeal):

(1) Whilst the appellant's version of events may well have been a "tissue of lies", the outcome necessarily turned on the need for a strong case to be brought by the prosecution, and the transparency of the appellant's claim could not assist the prosecution in the absence of the crucial evidence of the other two men.

(2) Whilst the evidence showed that the three men had arrived in the boat together, there was nothing which established that this was the time when the ganja was brought into the Island.

MD

Drugs - Failure to supply specimen - Right of silence
(See Assault police officer)

Drugs - ss4(2) and 3(1) Misuse of Drugs Law - Failure to supply specimen - Reasonable grounds for suspicion of an offence - Inferences from facts which court may draw - Sentencing principles

McLean v Regina

Cayman Islands Court of Appeal (12/91)
Georges, Kerr, Henry JJA
August 1 1991

Legislation:
ss 3(1) and 4 (2) Misuse of Drugs Law

Mr G Hampson for the appellant
Mr I Archie for the Crown

The appellant had been charged (inter alia) with two offences unde. the Misuse of Drugs Law. The first charge, contained in s4(2) of the Law, was that he had failed to supply a specimen of urine when asked to do so by the police. The apartment resided in by the appellant had been the subject of covert surveillance operations by the Cayman Islands Drug Squad. Subsequently, the police entered the premises for the purpose of exercising a search. Once inside, police officers discovered traces of a white substance resembling cocaine in the bedroom and bathroom. A "field test" on the substance was carried out which proved negative. (This result was later confirmed by scientific tests.) Believing the "field test" results to be inconclusive, the police officers arrested the appellant. At the police station the appellant was requested to provide a urine sample; this he declined to do, and he was charged with the offence under s 4(2) of the Law.

The second charge, being in possession of cocaine contrary to s3(1) of the Law arose from facts occurring after the appellant's release from prison on bail. The police, continuing their operations, observed the appellant whilst at another man's apartment throw a plastic bag onto a fire heap. The contents of the bag were not examined by the police. Later that day the appellant returned to the premises and was observed whilst in conversation with others, to point towards the fire heap. Thereupon one of the group picked up something from the fire heap and later threw it into some bushes at the side of the road. This bag was later found to contain traces of cocaine.

The appellant was convicted of both the offences.

Held: (dismissing the appeal)

(1) In relation to the first offence, all turned upon whether the arresting police officer had, at the time the request was made, reasonable grounds to suspect that an offence had been committed. Even in the light of the "field test" proving negative, in all the circumstances, there existed reasonable grounds for suspecting the commission of an offence and therefore the request for a urine sample was justified.

(2) In relation to the second charge, the question for the court was whether the magistrate was at liberty to make the inference that the plastic bag found at the side of the road was the same bag as that thrown earlier by the appellant onto the fire heap. Even though the police officer stated that he could not be positive that the bag was one and the same as that earlier discarded by the appellant, this was an inference which was justified and which could be properly made by the court.

(3) Whilst the convictions would stand, the sentence should reflect that the appellant, as a user and not a supplier, was himself a victim. Accordingly the sentence should be reduced

to 18 months imprisonment, 6 months of which to be suspended. The sentence of 6 months imprisonment imposed in relation to the conviction under s4(2) was to run concurrently.

MD

Evidence - Application of no case to answer - Factors for trial judge to consider

Regina v Pearson

Grand Court (20/90, 19/91)
Malone CJ
July 29 1991

Cases referred to:
R v Galbraith [1981] 1 WLR 1039
R v Barker (1975) 65 Cr App R 287

Mr D Murray for the defendant
Mr R Sheehan for the Crown

In the course of a trial for rape, the defendant, one of several co-accused, made a submission of no case to answer. Evidence of involvement in the rape had been given against the defendant by two co-accused. However, conflicts in evidence arose during cross-examination of the alleged accomplices and evidence described by the trial judge as being of "an inherently weak nature" was given against the defendant by the victim.

Held: (application dismissed)

(1) In a case in which there is some evidence against a defendant, it is not the role of the trial judge to weigh the evidence and decide who is telling the truth because to do so would usurp the function of the jury. The trial judge, however, can stop a case if the evidence is so inherently weak or vague or so conflicting as to be unreliable.

(2) In the present case, whilst the evidence of the victim is inherently weak a determination of whether the conflicting accomplice evidence of the co-accused could be resolved should be left to the jury.

PO'H

Plea - Duty of the court following a plea of guilty - Appeal against conviction

Rankine v Regina

Grand Court (SCA 18/91)
Schofield J
July 5 1991

Legislation:
s63 Criminal Procedure Code

Mr J Furniss for the appellant
Mr I Archie for the Crown

The appellant, following his plea of "guilty" to a charge of common assault, was convicted of the offence in the summary court. The charge arose following an altercation which had taken place between the appellant and the alleged victim. The appellant pleaded "guilty" to the common assault charge but by way of mitigation stated that the alleged victim had started the argument by punching the appellant.

Held: (appeal allowed)

(1) Before accepting a plea of "guilty" by the accused the court must be satisfied that he/she understands and admits every ingredient of the offence charged. On the present facts the statement of the accused could have amounted to the defence of self-defence. The learned magistrate accordingly should have explored this issue to ascertain whether the plea of the accused was in law a denial of the charge.

(2) Re-trial ordered.

MD

Robbery - Aiding and abetting - Counselling or procuring offence

Bonner and Walton v Regina

Court of Appeal (16 & 17/90)
Georges, Kerr, Henry, JJA
Undated

Cases Referred to:
R v Durante (1972) 56 Cr App R 708
R v Taylor (1977) 25 WIR 586
R v Sharp [1988] 1 All ER 65
DPP v Meriman (1972) 56 Cr App R 776
R v Drum (1972) 56 Cr App R 105
Beckford v R [1987] 3 All ER 425
R v Duncan (1981) 73 Cr App R 365

Mr Hamilton for the appellant Walton
Mr Harrison for the appellant Bonner

The two appellants were jointly charged and tried with others before the Grand Court on an indictment containing three counts in relation to robbery of the Cayman National Bank, George Town.

The appellants, together with Faulkner and Burton, were charged with conspiracy to commit robbery. Bonner, Faulkner and Burton were charged with robbery of the Bank on August 23 1989 of CI$175,106.00 and US$14,492.00. Walton and Smith were charged with aiding and abetting, counselling or procuring the commission of the offence. Bonner at the time of the robbery was in possession of a firearm with intent to rob contrary to s18(b) Firearms Law.

Smith was acquitted on all the counts. Walton was found guilty of conspiracy to rob but acquitted on the robbery charge. Bonner was found guilty on all three counts. Faulkner and Burton had already pleaded guilty, been sentenced and were testifying for the prosecution. Faulkner was the principal prosecution witness. The two appellants failed to give evidence at the trial.

Walton was sentenced to 5 years imprisonment. Bonner was sentenced to 5 years for the conspiracy, 11 years for the robbery and 3 years for the possession of a firearm with intent to rob.

From Faulkner's evidence, it appeared Walton and Smith were both employees of the bank. Walton came up with the idea of robbery. Smith provided information regarding the layout of the bank. Faulkner hired the getaway vehicle. Faulkner had with him a loaded firearm during the robbery whilst Bonner had an unloaded one. Smith did not take part in the robbery. The total amount stolen less one hundred dollars was later recovered.

The two appellants were appealing against both convictions and sentences. At the appeal hearing, it was argued on behalf of Walton that his defence was the same as Smith's and since Smith had been acquitted, Walton's conviction could not stand. It was further argued that the jury's verdict was inconsistent and unreasonable with regard to the degree of involvement of Walton and Smith.

On behalf of Bonner, it was argued that the judge's presentation of the defence case to the jury was inadequate and he was thus denied a fair trial. It was further argued that the evidence of the principal prosecution witness, Faulkner, contained inaccuracies and inconsistencies.

Held: (appeal allowed in part)

(1) As against Walton, there were no inconsistencies in the verdicts. Whereas Smith had made no admission as to expectation to share in the proceeds of the robbery, Walton had such expectations and was in fact at the scene of the robbery making the firearms and paraphernalia available and providing information about the staircase of the bank building. The appeal against Walton's conviction was dismissed but the sentence was reduced from 5 years to 3 years.

(2) As regards Bonner, there was no error with the judge's direction to the jury. Bonner's appeal was dismissed and the convictions affirmed.

AD

Rogue and Vagabond

Regina v Tatum and Whittaker

Grand Court (SCA 22/91)
Harre J
July 15th 1991

Appellants in person
Mr R Sheehan for the Crown

The accused were charged and convicted of being rogues and vagabonds. The appellant, Tatum, was appealing against conviction and sentence.

The appellant and his companion had being seen early one morning roaming about in a vehicle service and repair shop. The proprietor disturbed them and both men left the premises.

Held: (dismissing the appeal)

(1) The appellant had no credible explanation for his presence in the premises in the early morning hours.

(2) As to the appeal against a sentence of 9 months imprisonment, the appellant had admitted nine previous convictions involving burglary, theft and drug offences. The appeal against sentence would also be dismissed.

AD

Weapons - Meaning of "carrying"
(See Assault of police officer)

CRIMINAL LAW (SENTENCING)

COURT OF APPEAL JUDGMENTS

Case No	Crim App No		
2720/90	6/91	Obtaining property by deception	9 months consecutive
2727/90	6/91	Obtaining property by deception	12 Months consecutive
2909/90	6/91	Obtaining property by deception	6 Months
2937/90	6/91	Forgery	6 Months consecutive
629/90	20/90	Burglary	4 Months
3371/89	5/91	Possession of ganja	$500 or 2 Months
4476/89	5/91	Possession of cocaine	18 Months & $2,000 or 2 Months
2797/90	17/91	Theft	9 Months
4527/90	17/91	Theft	6 Months consecutive
4528/90	17/91	Handling Stolen Goods	3 Months consecutive
2243/91	110/91	Consuming Cocaine	6 Months
2244/91	110/91	Consuming ganja	3 Months concurrent
	110/91	Possession of cocaine	4 1/2 Years
2245/91	110/91	Assault (oabh)	3 Months consecutive
144/90	12/91	Possession of Cocaine	18 Months (6 Months suspended)
2665/90	12/91	Being Concerned in Possession of Cocaine	9 Months concurrent
2666/90	12/91	Failing to give urine specimen	6 Months consecutive
2010/90	11/91	Rape	3 years
2541/90	17/91	Theft	3 Months

			concurrent
2548/90	17/91	Personating Public Officer	6 weeks concurrent
2468/90	16/91	Consuming ganja	6 Months
2469/90	16/91	Consuming cocaine	6 Months concurrent
2470/90	16/91	Poss of cocaine with intent to supply	2 years & $100 or 30 Days
2958/90	15/91	Burglary	18 Months & 9 Months of suspended Sentence (11/91) Activated
3024/90	15/91	Threatening violence	3 Months
4159/90	15/91	Burglary	6 Months (All the above to run consecutively)
4322/90	15/91	Burglary	6 Months concurrent
4323/90	15/91	Burglary	6 Months concurrent

MD

Concurrent or consecutive sentences - Error on the record resolved in favour of accused - Robbery 4.5 years imprisonment - Assault occasioning actual bodily harm 3 months imprisonment.

Ebanks v Regina

Grand Court (SCA 110/91)
Schofield J
October 4 1991

Cases referred to:
Regina v Kastercum (1972) 56 Cr App R 298

Mr G Hampson for the appellant
Mrs Hernandez for the Crown

The appellant committed a robbery in West Bay with quantities of cocaine and ganja in his system. Approximately eight hours later he committed an assault occasioning actual bodily harm.

The appellant was apprehended and charged with the appropriate offences relating to consumption of drugs, robbery and assault occasioning actual bodily harm.

He was convicted of the first and last charge in Summary Court and of the robbery charges in Grand Court. The Grand Court sentenced him to 4.5 years imprisonment while the Summary Court sentenced him as follows: (1) consuming cocaine - 6 months imprisonment; (2) consuming ganja - 3 months imprisonment concurrent; and (3) assault occasioning bodily harm - 3 months concurrent.

However, the magistrate's notes and the commitment warrant stated a total term of imprisonment of 9 months.

Held: (allowing the appeal in part)

(1) An error on the record endorsed by the magistrate must be resolved in favour of the accused. Therefore the Summary Court sentence under appeal is 6 months.

(2) Subject to the exceptions of use of a firearm and assault in an endeavour to escape arrest, a good working rule is that consecutive sentences should not be passed for offences arising out of the same transaction. The gravity of the matter can be reflected by increasing the sentence for the primary offence (R v Kastercum).

(3) The summary offences relating to the consumption of drugs are part and parcel of the robbery as it was the appellant's motive for the robbery.

(4) The assault, as indicated by the time lapse, was a separate incident. Therefore the learned magistrate could order a consecutive sentence on that offence.

(5) Having regard to the above stated principles and the circumstances of this case, the sentence is varied so that the sentence for the drug offences run concurrent with the robbery offences and the 3 month sentence for the assault will run consecutive to the robbery sentence.

JE

Drugs - Possession of cocaine with intent to supply - When a forfeiture order may be made

Blair v Regina

Grand Court (SCA 61/91)
Malone CJ
August 7 1991

Legislation:
s16 Misuse of Drugs Law
s27 Misuse of Drugs Act 1971 (UK)

Mr J Furniss for the appellant
Mr I Archie for the respondent

The appellant was convicted in respect of two offences of possession of cocaine with intent to supply. He had received two prison terms of 4 and 6 years running concurrently.

Monies found on the appellant (totalling CI$800 and US$246) had been the subject of a forfeiture order.

The appeal was against sentence.

Held: (allowing the appeal)

(1) In the absence of evidence showing that the money was acquired as a result of the offence for which the appellant was arrested, s16 Misuse of Drugs Law provided no authority for the forfeiture order which would accordingly be quashed.

(2) Paying particular regard to the fact that this was the appellant's first conviction for a drug offence and that the amount of the drug involved was small, the sentences were excessive. The sentences would therefore be reduced to 3 and 4 years to run concurrently.

MD

Drugs - User v Supplier
(See Criminal Law - Drugs)

Suspended Sentence - Principles to be applied when activating

Regina v Rankine

Grand Court (SCA31/91)
Harre J
July 15 1991

Mr G Hampson for the appellant
Mr R Sheehan for the Crown

The appellant had been convicted and sentenced to 6 months imprisonment in respect of an offence of burglary. In addition, 9 months of a recently imposed suspended sentence in respect of a theft offence was activated to run consecutively. The appeal was against sentence.

Held: (dismissing the appeal)

(1) The fact that the previously suspended sentence was to exceed the substantive sentence imposed in relation to the burglary offence did not of itself offend principle. Having regard to the previous convictions of the appellant (which all involved offences of dishonesty) the total sentence was not excessive.

(2) Whilst, when activating a suspended sentence, the court should normally state its reasons if it departs from the original term, the appropriateness of so doing on the present facts could be deduced from the record.

MD

Unlawful wounding and damage to property - Common design

Regina v Walton

Grand Court (SCA 35/91)
Harre J
July 19 1991

Legislation:
s18(1)(c) Penal Code

Mr G Hampson for the appellant
Mr R Sheehan for the Crown

The appellant was convicted of unlawful wounding and damage to property. The victim had been injured and his van damaged after a group of persons, including the appellant, attacked him. There was no evidence that the appellant had himself caused any of the victim's injuries.

Held: (dismissing the appeal)

(1) There was ample evidence of presence, participation and common design with the others on the part of the appellant in relation to both charges to justify his conviction.

(2) In the light of the appellant's criminal record, it was quite proper to pass a sentence of immediate imprisonment on him whilst the individual who had started the disturbance (it being his first offence) was given a suspended sentence only.

MD

FAMILY LAW

Ancillary relief - Application for transfer of property - Beneficial interest of husband

R v R

Grand Court
Harre J
June 27 1991

Mr N Levy for the petitioner
Mrs K Thompson for the respondent

On the wife's initiative, a plot of land was purchased in the joint names of husband and wife for $9,000. The deposit was paid by the wife out of savings and the balance raised by way of mortgage. At the time of purchase the plot had a small wooden house on it. Later, work began on a house of block construction. Neither premises had been used as a matrimonial home although the wife and the three children of the marriage were living on the premises at the time of these proceedings. The land had been valued at $43,000 with an additional $13,500 for the uncompleted house of block construction. Upon application to have the property transferred into her sole name, the wife claimed that the property had initially been transferred into joint names to facilitate a loan from the bank and that it was she who had signed her husband's signature on the loan application form. The husband claimed that he had made both direct and indirect contributions in respect of discharging mortgage payments and towards construction work. The wife disputed the extent of the husband's contribution.

Held: (application allowed with conditions)

(1) If the wife did manufacture the husband's signature on the documentation she must now bear the consequences of that.

(2) The husband's total contribution, direct and indirect, towards purchase of the site and construction of the house was in the sum of $8,200. The wife was ordered to pay this sum to the husband and the husband was ordered to transfer his interest in the property to the wife. It was considered that the wife would be able to discharge the above sum by way of a further loan secured upon the premises.

PO'H

Divorce - Ancillary relief - Matrimonial home - Restraint of sale with trust - Maintenance of children and wife

Z v Z

Grand Court
Malone CJ
September 23 1991

Cases referred to:
Chamberlain v Chamberlain *[1974] 1 All ER 33*

Mrs E Maierhofer for the petitioner
Mr D Murray for the respondent

The petitioner has custody of the three children of the marriage. Even though the parties' incomes are almost equal the petitioner's income is exceeded by her expenses by $662 while the respondent's income exceeds his expenses by at least $238 (more if he works overtime) and as much as $678 (if a payment relating to a land purchase during the marriage is disallowed).

Two of the three children attend a private school to which the petitioner pays $287.50 per month in school fees. School lunch fees have increased by $155 per month.

The petitioner lives with the children in the matrimonial home, which has a value of $185,000. The parties made a down payment out of joint funds and registered the house in joint names. The mortgage payments have always been made by the petitioner but while he lived in the matrimonial home the respondent contributed to its upkeep and made additions to it.

Since he left the home, the entire burden of maintenance and mortgage installments fell on the petitioner.

Held: (for the petitioner)

(1) On the facts of this case the "one-third guideline" is not applicable.

(2) It is appropriate to divide the interest in the home between the petitioner and the respondent and to restrain sale of the property until the completion of the children's full time education (Chamberlain v Chamberlain). The beneficial interest in the matrimonial home shall be divided as two-thirds to the petitioner and one-third to the respondent.

(3) The petitioner, as agreed by the parties, is granted custody, care and control of the three children with reasonable access to the respondent.

(4) The respondent shall pay one-half of the school fees of the three children and, beginning October 31 1991, $100 monthly towards the costs incidental to schooling.

(5) The respondent, as agreed by the parties, shall pay one-half of the medical and dental expenses of the three children.

(6) The respondent shall pay on or before October 31 1991 and each month thereafter $480 per month towards the maintenance of the three children and $420 per month maintenance to the petitioner.

JE

Divorce - s10 Matrimonial Causes Law - Unreasonable behaviour - Petitioner cannot reasonably be expected to live with the respondent - Irretrievable breakdown

Z v Z

Grand Court (4/91)
Schofield J
July 10 1991

Mrs S Pierson for the petitioner

Respondent in person

The husband asks for a determination that the wife has behaved in such a way that he cannot reasonably be expected to live with her and that the marriage has broken down irretrievably.

The parties were married in 1971, had three children and lived in Cayman for 16 years. For years the marriage was a good one, with the usual "ups and downs" until July 1989 when the wife suddenly resigned her job and relocated off Island in order to involve herself in the affairs of a religious group.

When the wife decided not to return as scheduled, the parties agreed that the husband would go to a retreat with the wife to resolve their problems. As a result of the retreat, the husband agreed to resign his executive position, sell their home in Cayman and move to join his wife. The husband returned to Cayman to give his employer notice, sell the house and organize their affairs. He rejoined his wife in November 1989 and he received a cool and unloving welcome. The wife later instigated another relocation. The wife continued to be cool towards him, refused to discuss their problems, arranged separate bedrooms and shunned the slightest physical contact.

In April 1991 the husband left. The wife gave him no hope of reconciliation at that time. The husband returned to Cayman, took a new job and eventually started a new relationship. In June 1991 the wife telephoned for a reconciliation. The husband did not want reconciliation regardless of his new relationship. To further the reconciliation attempt the wife returned to Cayman, but the husband refused to reconcile.

Held: (petition proved)

(1) Given the nature of their relationship prior to July 1989 the wife's behaviour to her husband was totally unreasonable. Her refusal to discuss their problems and to display the slightest degree of warmth to him was cruel in the context of this marriage and therefore it was unreasonable behaviour. At the critical time she encouraged a permanent separation. The husband then reordered his life again. Her efforts at reconciliation came too late as all his emotion and energy for marriage was spent.

(2) It is not in society's interest for the court to lightly set aside a marriage but the wife created too large a gap for the parties now to bridge. The husband cannot reasonably be expected to live with the wife because of her behaviour towards him.

(3) The husband has been firm throughout that he wanted no reconciliation. Although the courts are under a duty to

encourage parties to reconcile. the Courts are not in a position to thrust a reconciliation on a determined party. The marriage has broken down irretrievably.

JE

LAND LAW

Registration of inhibition - s124(1) Registered Land Law (Revised) - Exercise of courts discretion - Public policy

The Attorney General v Denbo, Anderson, Davidson and the Bank of Nova Scotia

Grand Court (321/90)
Schofield J
July 9 1991

Legislation:
ss 124(1) Registered Land Law (Revised)

Mr M Marsden for the plaintiff
Mrs C Reid for the first, second and third defendants
Mr T Shea for the fourth defendant

The plaintiff had obtained judgment against the first three defendants in April 1990 for $CI586.725.97 in respect of unpaid Tourist Accommodation Tax which had been collected at the first three defendants' hotel complex. In these proceedings the plaintiff sought an inhibition on dealings with the latter hotel property pursuant to the court's discretionary power under s124(1) Registered Land Law (Revised). The fourth defendant, holder of the first charges against the hotel premises, objected to the inhibition on the grounds that the plaintiff as an ordinary judgment creditor sought, in effect, an injunction in rem to restrain dealing with the property without complying with the onerous evidential requirements necessary to obtain such an injunction. Furthermore, the fourth defendant contended that registration of an inhibition could deter potential purchasers should the fourth defendant exercise its chargee's power of sale.

Held: (allowing the application)

(1) Each application must be dealt with on its merits and whilst the court would carefully exercise its discretion under s 124, in the present case the inhibition would be granted as an adverse effect on the Cayman tourist industry could arise were the plaintiff to utilize another means of enforcement.

(2) Should the plaintiff unreasonably exercise its inhibition to prevent sale by the fourth defendant, the latter would be at liberty to re-apply to the court to remove the inhibition.

PO'H

Easements - Right of way - s96 Registered Land Law (Revised) - Application for modification of easement

Cayman Inn Ltd v The Proprietors, Strata Plan No 41 and Universal Securities Ltd

Grand Court (445/90)
Harre J
August 26 1991

Legislation:
s96 Registered Land Law (Revised)

Mr A Jones for the plaintiff
Mr A Turner for the defendant

The plaintiff, owner of land subject to the burden of the second defendant's easement of right of way, sought modification of the easement pursuant to s96 Registered Land Law (Revised). The second defendant's right of way ran along the southern boundry of the plaintiff's land and was 20 feet wide. The plaintiff sought to modify the easement in order to comply with

planning approval for a hotel which required construction of a carpark where the second defendant's right of way was situated. The plaintiff proposed that after construction of the hotel and carpark the second defendant's right of way should be altered and should in future run along the proposed access road to the hotel which road would be crossed by hotel guests en route to and from the proposed car park.

Held: (dismissing application)

(1) The plaintiff had not proved that the existing right of way impeded the plaintiff's reasonable user of the land as required by s96(b). It was not relevant that the plaintiff had obtained planning approval subject to construction of a carpark in the area where the second defendant's right of way lay as there was no evidence that a modification could not be made which would allow the plaintiff reasonable unimpeded use of the land.

Furthermore, the plaintiff did not satisfy the court that the existing covenant did not secure practical benefits for the second defendant pursuant to the requirements of s96(b) nor that the second defendant would not be injured were the covenant modified as proposed pursuant to the requirements of s96(c).

PO'H

TRUSTS

Fiduciary Duties
(See Companies - Directors' duties)

Variation of trusts - Inherent compromise jurisdiction of court - Defeat of settlor's intention - Meaning of "benefit"

In the matter of the S Trust

Grand Court (118/91)
Schofield J
October 7 1991

Cases referred to:
Chapman v Chapman [1954] AC 429
In Re: H (GC 288/90)
Re Remnant's Settlement Trust [1970] 2 All ER 544

Legislation:
RSC Order 15, R13(4) (UK)
s13 Grand Court Law

Mr Walker QC and Mr A Foster for the plaintiff
Mr R Alberga QC and Mr C Quin for the guardian ad litem
Mr A Jones for the Trustee

The "S" Trust was established by the plaintiff's husband, the living beneficiaries, of four separate funds, at the date of the application to the court being the wife and her three infant children. Upon the death of the husband, the trust required the trustees to convert into cash all the trust's assets except for real property.

The present application was brought requesting the court, by use of its inherent compromise jurisdiction, to sanction the following variations to the trust's provisions:

(1) That the plaintiff be enabled to continue to operate two companies owned by the trust as yet unsold as she had been doing since the settlor's death. The associated danger of this proposal was that the plaintiff may have cause to use funds for the expansion of the companies which would otherwise be available for the maintenance of the children.

(2) By approving the terms of a compromise negotiated between the plaintiff and the guardian ad litem, acting for the infant beneficiaries, in relation to various ambiguities contained within the trust deed.

Held: (allowing the application)

(1) The Trusts Law does not confer upon the Grand Court any jurisdiction to approve such a compromise. The jurisdiction exercisable by the Grand Court was instead an inherent one owing its genesis to that vested in the High Court of England applicable to Cayman by virtue of s13 Grand Court Law. In order to exercise its jurisdiction the court must be satisfied that two conditions have been met:

(a) There must exist a real dispute as to the parties' rights. It was necessary but not sufficient to show that the agreement would secure an advantage for the beneficiaries (Chapman v Chapman).

(b) The court must be satisfied that the compromise would be generally for the benefit, in a broad sense, of those whom the court is charged with the duty of protecting, and that the court considers it expedient so to act (RSC O15 R13(4)).

(2) Applying these considerations both applications would be granted. There was no doubt that as to the terms of the "S" Trust, real disputes had arisen due to ambiguities of language.

(3) The defeat of the testator's intention was "a serious but by no means conclusive consideration" (In Re: H and Re Remnant's Settlement Trust).

(4) The two companies were to be appropriated to the

plaintiff's fund. The size of the children's settlements ensured that they would not be seriously depleted if it became necessary for them to be used for their own maintenance due to the plaintiff's inability to do so. It was to be considered a benefit to the children that their mother would derive fulfilment from continuing her husband's businesses.

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ARTICLES AND CASE COMMENTS

ENGLAND'S FIVE YEAR PLAN FOR ATERNATIVE DISPUTE RESOLUTION

John Arnold Epp [1]

Lawyers are in a bind when it comes to managing their clients' disputes if they are locked into the courts. Litigation has not kept up with modern, fast-moving society....There have been revolutionary changes in business practices since the basic court structure was adopted from English common law....Compared to modern business, civil courts have changed very little....Alternative dispute resolution gives lawyers an opportunity to use new processes, encourages a problem-solving attitude (and) an openness to compromise.[2]

The success of arbitration and mediation in certain specialized fields (particularly commerce, labour and family law) has drawn attention to the possibility of expanding the use of alternate methods of dispute resolution in England and Wales. The Courts and Legal Services Committee of the Law Society of England in ackowledging the call[3] for further expansion of Alternative Dispute Resolution (ADR) set up a Working Group of practitioners in January 1991 to assist in the preparation of a report on the following:

> 1. to review the alternative forms of dispute resolution currently or potentially available for use in England and Wales;
>
> 2.to examine the development of these ADR processes, the purposes they serve and the situations for which they may be suitable and appropriate;
>
> 3.to consider training, ethical, practice and other implications;
>
> 4.to raise questions and make proposals with regard to the incorporation of ADR into legal practice.[4]

The report, which is entitled simply "Alternative Dispute Resolution", was published in July, 1991.[5] In this article I will provide a summary of the Working Group's observations and conclusions. I will then review the basic forms of ADR and compare their relative merits.

The basic types of dispute resolution processes are negotiation, mediation and adjudication. For our

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[2] Robert Coulson, quoted in H. Brown, Alternative Dispute Resolution (London:The Law Society, 1991) at

[3] Lord Chancellor Mackay, quoted in H.Brown, Ibid. at 1; J. Effron, "Alternatives to Litigation: Factors in Choosing" (1989) 52 M.L.R. 480.

[4] Brown, supra, note 2 at 1.

[5] Ibid.

purposes adjudication must be sub-divided into arbitration and litigation. These methods of dispute resolution can be defined in the following manner:

Negotiation: a voluntary discussion between the parties to a dispute on the issues and possible solutions usually taken as the first step towards the settlement of a dispute;

Mediation: a voluntary process in which a neutral third party, without the power to impose his view or to make any determination, assists the parties to a dispute in communicating their positions on the issues and exploring possible solutions to the dispute;

Arbitration: a voluntary process outside the court system in which a neutral third party considers evidence presented by the parties to a dispute in compliance with the principles of natural justice and adjudicates upon the dispute;

Litigation: The process of adjudicating a dispute between parties by a neutral third party within the rules and formalities of the state's court system.

Observations and Conclusions

The Working Group's review of the alternate forms of dispute resolution currently or potentially available for use in England and Wales found that "ADR is an evolving field of activity."[6] Alternate forms of dispute resolution are used in a wide array of countries[7] for the resolution of a wide range of disputes including, but not limited to, commercial and civil issues, labour, family, environmental, public policy and neighbourhood disputes.[8] In England and Wales, arbitration and mediation already provide an alternative in certain conflicts areas, and the list continues to expand through the promulgation of dispute resolution organizations.[9]

In trying to determine the situations for which various ADR options may be suitable, the Working Group examined the fundamental characteristics of the basic processes as well as some of the hybrids that could be formed through minor format adjustments. After completing their study the Working Group concluded "[t]here are no definite rules governing which ADR process is appropriate for any particular situation".[10] The choice of a conflict resolution process depends on the specific needs of the parties.

The examination of the development of ADR processes and the purposes they serve produced an interesting inventory. Even though dispute resolution processes can be placed in the general categories of negotiation, adjudication and mediation, the flexibility and adaptability of ADR (in the general sense) allow elements of each category to be used to tailor a "hybrid" process to meet the exact requirements of each dispute. Some of the hybrid processes which have been developed include the mini-trial,[11] court-annexed arbitration,[12] med-arb,[13] the neutral fact-finding expert[14] and moderated settlement conferences.[15]

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[6] Ibid.

[7] Australia, Canada, Germany, Holland, Hong Kong, New Zealand, South Africa, Switzerland and the U.S.A., see Ibid. at 2.

[8] Supra, note 2 at 2.

[9] Ibid. at 4-5; For historical information on arbitration see A.H. Manchester, Modern Legal History (London:Butterworths, 1980) 157.

[10] Supra, note 2, at 21.

[11] The mini-trial is a confidential forum where each party presents the highlights of its case on a non-binding basis to an impartial third (or executives of the disputing companies) so that key issues are identified, strengths and weaknesses assessed and settlement discussions fostered.

[12] Court-annexed arbitration, as the name implies, is an arbitration process directed by the court. It is a non-binding hearing before an impartial neutral who uses an informal, summary style. If the parties do not adopt the finding, the court will re-hear the case with cost sanctions if the result is not substantially different.

[13] "Med-arb" as an amalgam which describes a process where first an attempt is made to resolve the dispute by mediation. If that fails the mediator (or another) takes the role of arbitrator and directs a solution.

It is important to acknowledge, as the Working Group did, the potential for hybrid development in ADR. Of course, before practitioners can attempt to assist their clients in this area they must possess a working knowledge of the basic forms of dispute resolution. The Working Group did list many of their characteristics but it may be worthwhile to review the relative merits of the traditional forms of dispute resolution. I will present this comparison in a later section of this article.

The Working Group's consideration of ethical, training, practice and other implications determined that many changes will have to be made to accommodate the expanding use of ADR processes. However, none of these changes are so inordinate or burdensome that they cannot be effected. Questions such as whether to provide accreditation of ADR practitioners, whether to specifically regulate the standards of conduct and ethics of those practitioners and whether to control the quality and standards of the processes being used still have to be addressed.[16]

Progress, however, is being made. The Standards and Guidance Committee is considering the re-drafting of Principle 11.01 of the Guide of the Professional Conduct of Solicitors and Rule 5 of the Solicitors' Practice Rules 1990 to provide guidance for solicitors who are willing to act as neutral third parties.[17] Codes of Practice published by various arbitration and mediation organizations are being reviewed with a view to drawing a code that conforms to the Law Society's changes.[18]

The new compulsory pre-qualification training for solicitors will explore the developments in ADR. According to the report it is proposed that the new legal practice course, which starts in September 1993, will include the requirement "that students should appreciate the range of methods available to resolve disputes and the implications and advantages of them.[19] As well, "as part of the Continuing Education Scheme the Law Society proposes to designate ADR as a priority area for training" possibly as soon as the autumn of 1992.[20]

Of course not all the problems identified in the report have such straight forward solutions. The question of funding ADR procedures is a difficult one especially if the participants are not able to use state funded services or cannot afford the fees involved. However, The Law Society has taken the position that legal aid should be available for alternative forms of dispute resolution. The Lord Chancellor's Department and the Legal Aid Board have recognized "that in the longer term the development of alternative ways of resolving issues may necessitate different approaches to legal aid."[21]

In raising questions and making proposals with regard to the incorporation of ADR into legal practice, the Working Group concluded that even though there have been rapid developments in the ADR field of late "the systematic introduction and development of new processes to complement litigation, the training and adjustment of practitioners, and the recognition and acceptance by the public of the new culture into the mainstream of dispute resolution will probably require a period of ... five years."[22] The immediate steps to be taken include further discussions with the profession, the Lord Chancellor's Department, ADR organizations and other professional bodies. As well, the amendment of the Solicitors' Ethical and Practice Rules must be completed. Further, consideration and implementation of training, regulation and accreditation of solicitors in ADR practice must be a priority while publication to the general public of the concepts involved in ADR was determined to be an obvious follow up step.

In an ideal world, different types of dispute resolution mechanism would compete with each other on price,

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14 The term fact-finding expert describes a person who is appointed by the parties to investigate complex or technical facts which lie at the root of the dispute and are in his area of expertise. The facts gathered allow the parties to narrow the issues, evaluate their case and reconsider settlement options.

15 A moderated settlement conference is a confidential non-binding process that allows the parties to discuss the strengths and weaknesses of their cases before one or more neutrals with the express purpose of attempting settlement.

16 Supra, note 2, at 24.

17 Ibid. at 23.

18 Ibid. at 31.

19 Ibid. at 29.

20 Ibid. at 30.

21 Ibid. at 35.

22 Ibid. at 41.

handling method and the kind of result on offer.[23]

Given the five year plan in England and the ever increasing use of ADR throughout the world it is an appropriate time to review the basic forms of dispute resolution and compare their relative attributes. This can be achieved by briefly discussing each form in terms of common uses, root of the dispute, privacy of the dispute, preservation of relationships, nature of the participant, neutral's role definition, accessibility, confidentiality, cost, and practice, procedure and format.

1. The Common Uses

Negotiation and litigation are used frequently in all types of conflict resolution, subject to the exception that the courts are rarely willing to participate in adjudicating matters within the home.[24] Arbitration and mediation, on the other hand, traditionally have had narrower applications. The former is used extensively in labour and commercial law[25] and regularly in international law disputes, while the latter is prominent in community disputes, public policy and family law and, to a lesser extent, in labour and business conflicts.[26]

2. Root of the Dispute

It is not uncommon for the nature or root of the dispute to lie in the interpretation of a statute or a document, in the perception of the facts or in a break down in communication. If the interpretation of a statute or a document is required litigation and arbitration have the advantage of utilizing trained decision makers. In many cases they provide a published decision which provides guidance for the future. Mediators do not interpret the law or the agreement in a formal manner, but some do state (or even manipulate) their opinions, leaving the parties to "bargain in the shadow of the law."[27] Negotiations, by definition, do not include a third person and therefore the question of interpretation fades into the question of the settlement amount.

Negotiation and mediation cannot solve a dispute rooted in a finding of fact. Both judges and arbitrators are able to complete this function. Where specialized knowledge is required, the power of the parties to select a qualified arbitrator is attractive.

In situations where the public good (the need to either make law, declare rights or minimums,[28] or expose conduct of the offender[29]) is at stake neither mediation nor negotiation are appropriate forums. Both focus on solving a single dispute in private meetings and, therefore, do not contribute to the general body of law.

When the root of the dispute is a breakdown in communication the polarization of the parties in litigation and arbitration militates against the use of these forms. A hallmark of mediation and negotiation, on the other hand, is the re-establishment of communication and informal information exchange.

3. How Private is the Dispute

The rights of third parties are often affected by the decisions of parties in conflict. In theory, the open court

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23 Lord MacKay of Clashfern, "Access to Justice - The Price" (1991) 25(2) J.Assn.L.T. 96 at 104.

24 For example, child-rearing issues, see J.S. Murray, A.S. Rau & E.F. Sherman, Processes of Dispute Resolution (Westbury, N.Y.:The Foundation Press, 1989) at 303.

25 It is estimated by the United States Department of Labor that more than 96% of all collective agreements (involving almost 6.5 million workers) provide for arbitration of grievance disputes. See U.S. Dept. of Labor, Characteristics of Major Collective Bargaining Agreement (1981) at 112 quoted in Murray, Ibid. at 421.

26 But see, J.F. Henry and J.K. Lieberman, The Manager's Guide to Resolving Legal Disputes (New York:Harper Row, 1985).

27 R.H. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.

28 O.M. Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073 at 1073-76.

29 F.N. Galander, "The Day After the Litigation Explosion" (1986) 46 Md.L.Rev. 3 at 32-34.

format of litigation protects the rights of third parties while each of arbitration, mediation and negotiation provide progressively less protection.

Disputes within personal and family relationships are best solved within the facilities of negotiation and mediation. Along with avoiding the costs of litigation and arbitration, each provides informal and private discussions, with mediation providing a sounding board and a vent for frustrations along with a neutral to encourage discussions. Rather than having the conflict reduced to the court's winner or loser determination with the usual monetary award, the solutions are "win-win" and can include behaviour modification, apologies or compensation of any kind.

4. Preservation of the Relationship

When the parties involved in a dispute have a relationship worth preserving, be it personal, formal or business, the attributes of negotiation and mediation provide the best chance for the preservation of the relationship.[30]

Litigation, by contrast, tends to intensify problems. It does not encourage the consideration of long term interests. Arbitration is generally thought of as being less devisive but the research of Bonn opens this to question. The results of his study of textile arbitration cases indicated that after arbitration, over eighty percent of the relationships ceased.[31]

5. Nature of the Participant

Corporations and parties that are made up of many members (e.g. unions or community associations) may find arbitration or negotiation particularly useful in resolving disputes. The diverse interests within one party can be balanced while the resolution process progresses. For multi-member groups, representative mediation can be awkward although as in all comparisons, this is fact specific. Litigation, in addition to being awkward, may also be internally divisive.

Aversion to taking risks is generally client specific. Risktakers are more willing to adapt to the concept of a neutral making a binding decision as is the case in arbitration or litigation. In contrast, those who are adverse to taking a risk prefer to have control over the final disposition; therefore mediation and negotiation are good alternatives.

Some parties need to have their day in court. Litigation and arbitration satisfy this need, while, to a certain degree the same can be said of mediation.

Rarely do the parties to a dispute find themselves on equal footing. Usually one party, through either resources (knowledge, time, money, reputation) or attributes (strong personality, commitment and willingness to take risks) is in the dominant position. The weaker party, in most cases, will not be in a good position to achieve a reasonably satisfactory result through negotiation or mediation. Similarly, the weaker party will suffer the consequences of his limited resources in arbitration or litigation. However, judges have been known to take note either consciously or subconsciously of power imbalances.[32] Thus, it is within their power while searching for the truth to informally shift the balance closer to even.

6. Definition of the Neutral's Role

The extent to which the role of the neutral can be defined by the parties varies greatly with the type of dispute resolution process chosen. The court's role is very well defined in litigation. It is very intrusive in the sense that the parties must accept the judge assigned (subject to limited exceptions), her decision and the process used to reach it. Arbitration is less intrusive in that the parties through an agreement can appoint the neutral (or narrow the pool from which she is selected) and the decision making process used. A mediator is also chosen by the parties but generally speaking is more flexible in accepting input on procedure and the topics to be discussed.

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[30] Effron, supra, note 3 at 485.

[31] R.L. Bonn, "Arbitration: An Alternative System for Handling Contract Related Disputes" (1972), 17 Admin.Sci.Q. 254 at 262.

[32] Fiss, supra, note 28 at 1077.

7. Accessibility

The expenses involved in and the delay before which negotiation (as a forum of dispute resolution) can begin are generally nil. Mediation usually has a very short lead time and minimal expenses for the parties involved. Generally speaking, the opposite is true for litigation and to a certain extent arbitration. The latter is less susceptible to a delay in resolution if the parties are sincere in their wish for a resolution. However, if one party refuses to consent to participate in any form of dispute resolution, even if he is bound to do so by a contract, only the court through the litigation process can force an ultimate resolution of the dispute.

8. Confidentiality

A traditional safety check on the courts and, therefore, the litigation process is the rule that justice cannot be administered in private or behind closed doors.[33] Subject to the hybrids noted above,[34] the litigation process cannot accommodate a desire for privacy while arbitration, mediation and negotiation can do so. Privacy is achieved with the assistance of the concepts of without prejudice discussions, common law privilege, contracts of confidentiality and statutory protection.[35]

9. Cost

The costs involved in conflict resolution are always important to the parties. The infrastructure of litigation and negotiation cost the disputants very little. Court charges are modest while the judge and the courtroom are supplied by the state. Obviously in negotiations none of the above need be an immediate concern. Mediation and arbitration are funded by the parties. In certain disputes the fees can be significant.[36]

Of course the extent to which the parties require the assistance of counsel (or other professional advice) depends on each case. However, it is fair to say that negotiation and mediation are easier for the unassisted layman to use.

10. Practice, Procedure and Format

To initiate the resolution of a dispute through adjudication (either litigation or arbitration) or mediation some formal steps must be taken, even if it is as basic as agreeing to a mediator or arbitrator or filing a writ. By contrast, negotiations can be commenced without any formalities and can continue even though other forms are in use. It is usual for parties to secure counsel for an adjudicative process, while the attendance of counsel in the mediation and negotiation is dictated by the circumstances.

If the negotiations are not successful, the parties involved in litigation move forward at a comparatively slow pace through a defined process of discovery to an assigned hearing date before an assigned judge.

At trial, traditional formalities are observed and the law is defined and applied.[37] Eventually a reasoned decision is given and the court will assist in its enforcement or hear its appeal. The parties who choose arbitration to resolve their dispute may move somewhat faster through a limited form of discovery (usually limited to documents) to a reasonably negotiable hearing date before a neutral selected either by agreement or by a court from a predetermined pool.

During the hearing, rules (often less formal than those found in the courts) are defined by the arbitrator. The role of law maybe limited to the requirement that the rules of natural justice must be applied. The decision of the arbitrator (which may or may not include reasons) comes reasonably quickly but it cannot be enforced without the assistance of the court[38] or a governing body (like a commercial association). The decision may only be challenged on the basis of misconduct or, with the consent of the parties and leave of the court, on a point of law.[39]

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34 J. Jacobs, The Fabric of English Civil Justice (London:Stevens & Sons, 1987) at 22.
35 Supra, notes 11-15.
36 Texas Civil Practice and Remedies Code, tit. 7, c. 154, s.154.073.
37 J.A. Franks, "Dispute Resolution" (1989) 86(34) L.S.Gaz. 37 at 37.
In the Queen's Bench Division of the High Court only about 3% of writs issued reach judgment in a contested trial. See supra, note 2 at 7.

If parties choose mediation to help them resolve their dispute the process may move ahead very quickly if the parties so desire. The extent of information exchanged between the parties depends on any agreement they may reach. Both the meeting date and the selection of the neutral third party are within control of the parties as are the topics of discussion and the general rules of the meeting. Bargaining may take place within the "shadow of the law,"[40] the parameters of it or despite the law.

Any resolution is subject to the parties' agreement and it can be enforced through an action in contract. A party may refuse to comply with the agreement if there is fraud, unconscionability, duress or mistake as defined by the law of contract.[41]

Conclusion

From this brief comparison it can be seen that alternate forums of dispute resolution are not suited to completely displace litigation in conflict resolution. It is equally as true, however, that ADR is duly equipped to be recognised as part of the mainstream conflict resolution process.

The usefulness of ADR has been established both in terms of geography and subject area. The potential for its expansion is significant. The strength of ADR is in its flexibility and adaptability. An understanding of the nature of ADR brings the recognition that it should not be regarded as incompatible with adjudication. Its place as a part of the mainstream conflict resolution system eventually will be acknowledged. This recognition will be achieved through intra-professional education, re-ordering and promotion and through extra-professional publication and funding. The wheels of progress have begun to turn.

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38 "Compared with ordinary court decisions, arbitration is far ahead as far as enforcement in other countries is concerned." See Sanders, "International Commercial Arbitration - How to Improve its Functioning" quoted in Murray, supra, note 24 at 415.

39 Arbitration Act 1979, (1979, c.42), ss. 1,2 and 23.

40 Mnookin, supra, note 27.

41 Murray, supra, note 24 at 373-75.

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 nine students, a Director, four Law Lecturers and an Executive Officer and is located in modern facilities in the Tower Building, George Town.

Students enrolled in the Attorney-at-Law programme prior to October 1991 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. Commencing in October of 1991, students entering the degree programme study for the University of Liverpool LL.B. (Honours) for a period of three years. Those wishing to qualify as Attorneys-at-Law may, provided they possess Caymanian Status, enter the two year Professioal Qualification Course.

Recent developments at the Law School include the following:

(a) The following is a list of recent publications of Law School Staff:

Richard Finlay

The Scope of Application of the Hague-Visby Rules: The Captain Gregos
1991 25 The Law Teacher 55

Mitchell Davies

A Certain Sense of Belonging
The Journal of Criminal Law March/April 1992

Consent or No Consent - is that the question?
The Journal of Criminal Law March/April 1992

John Epp

Texas Pretrial: An Empirical Record and A Call For Reform
1991 10 The Review of Litigation 713

Saskatchewan Pretrials: An Empirical Survey and Proposed Amendments
1991 55 Saskatchewan Law Review 43

Avoiding Rookie Mistakes When Using Experts
1991 2 The Practical Litigator 21

Patrick O'Hagan

Lloyd's Bank v Rosset - McFarlane Revisited
1991 Northern Ireland Law Quarterly

Scintilla Temporis - Legal Artifice or Cornerstone?
1992 Northern Ireland Law Quarterly

Andy Darkoh-Agyeman

Immigration Law of the Cayman Islands
Cayman Islands Law School Publication (pending)

(b) A book authored by former Law Lecturer Piers Hill entitled Criminal Procedure in the Cayman Islands has been completed and is with the publisher. It is hoped that it will be available through the Law School by mid 1992. The Cayman Islands Law Society has generously agreed in principle to underwrite the cost of publication.

(c) Lord Templeman, the Law School patron, attended the fifth graduation ceremony held Monday October 14, 1991 at the Harquail Theatre. Lord Templeman also spoke to a capacity crowd of attorneys and invited members of the public on the subject of Crime and Punishment.

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.