CAYMAN ISLANDS LAW BULLETIN

NO 6

JANUARY 1992

Cayman Islands Government

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The Cayman Islands Law Bulletin is intended to provide an information and reporting service for attorneys and others who may need to be aware of developments in the law of the Cayman Islands. The material entered in the Law Bulletin is not intended to be exhaustive or authoritative but should be regarded as an index and a record of material which may be of some use in legal work. While reasonable care is taken in the preparation of material for publication in the Law Bulletin, neither the Cayman Islands Law School nor the Cayman Islands Government accepts responsibility in law for the accuracy of the contents of this issue, nor do the views expressed necessarily reflect the opinion of the Cayman Islands Government.

Citation

Cases appearing in this volume should be cited as 6 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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EDITORIAL NOTE

This is the sixth 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 October 1 1991 to December 31 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 Patrick O'Hagan dealing with timeshares as well as an article by Professor John Ritson on the tort of negligent trespass.

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

October 1 1991 to December 31 1991

CIVIL PROCEDURE

Amendment of pleading - New cause of action - Limitation period

K and B v C

Grand Court (236/91)
Harre J
January 31 1992

Cases referred to:
Guinness Mahon v Washington International Bank and Trust Ltd (1987) CILR 447
Swiss Bank & Trust Corporation v Iorgulescu (CICA 3/83)

Legislation:
Grand Court Law s20
Rules of the Supreme Court O20 r 5
Grand Court (Civil Procedure) Rules r 62(2)

Mr P Lamontagne QC for the plaintiffs
Mr E Grant for the defendant

To avoid duplication in actions, an order was made in October 1991 that the plaintiffs should elect to proceed with this action or Cause No. 103/86 both of which related to a Deed of Gift of land. The plaintiffs elected to proceed with this action and therefore the other action was stayed pending further order. However, the stayed action referred to an additional piece of land.

The plaintiffs sought leave to amend their originating summons to include the issues surrounding the additional piece of land.

Held: (application granted)

(1) The principles which govern an amendment to pleadings are concisely stated by Hull J in Guinness Mahon v Washington International Bank and Trust Ltd. Amendments should be allowed for the purpose of determining the real controversy between the parties as long as the opponent is not prejudiced.

(2) The defendant submits the new cause of action is statute barred.
This issue was dealt with in Guinness Mahon and in Swiss Bank & Trust [illegible] which raise new causes of action which may be statute barred should not be easily granted. Guinness Mahon held that English law applies so that where an amendment raises a new cause of action based on the same or substantially similar facts to those already pleaded, it may be granted even if the limitation period has expired. However, the Court of Appeal said in Swiss Bank that the issue was not settled.

(3) Grand Court Law s20 and the Grand Court (Civil Procedure) Rules do not incorporate the English rules themselves but rather "the practice and procedure in similar matters ... so far as local circumstances permit". So in relation to such a practice the "relevant period of limitation" must mean any such period of limitation in accordance with Cayman Law.
This point as well as the detailed reasons in Guinness Mahon show that Order 20 r5 is not in conflict with Cayman law.

(4) Since the proposed amendments arise out of the same or substantially the same facts and the defendant will not suffer prejudice, leave to amend as proposed is granted.

JE

Discovery - Inspection of documents

A Co and B Co v D and E Co

Grand Court (59/89)

Schofield J
December 17 1991

Mr A Jones for the plaintiffs
Ms C Bridges for the defendants

D, who was at one time a director, shareholder and employee of A Co and a director of B Co, was in charge of the every day operations of and a shareholder E Co.

The plaintiffs commenced an action for breach of contract and/or fiduciary duty alleging that D had failed to use proper energy as an employee and further that he solicited customers from the plaintiffs to E Co.

In a summons for specific discovery the plaintiffs sought an order authorizing inspection of:

(i) all documentation comprising or relating to the application by or on behalf of E Co for a license to carry on trust business;

(ii) all invoices rendered by E Co to the companies specified in Schedule A of the Re-Amended Statement of Claim, together with all covering letters sent with such invoices and all accounting records supporting the amounts specified in such invoices;

(iii) all time sheets maintained by D for the period of one year after he commenced working full time for E Co;

(iv) the audited financial statements and any management accounts of E Co for the period from commencement of its business to date ; and

(v) all files relating to the companies specified in Schedule A to the Re-Amended Statement of Claim ; or

(vi) alternatively, all correspondence, file notes and memoranda contained in the files relating to each of the companies specified in Schedule A to the Re-Amended Statement of Claim created during the periods (a) from 1st November, 1988 to 31st May, 1989 and (b) three months either side of the date of transfer to E Co.

Held: (application granted in part)

(1) The plaintiff shall have an order with respect to the items listed in (i) and (iii). Item (v) is too broadly worded. The items listed in (ii) and (iv) concern damages and in this case cannot be inspected until liability has been proven. Therefore there will be no order with respect to (ii), (iv) and (v).

(2) Upon the undertaking of the attorney for the plaintiffs not to divulge to his clients, without the consent of the defendants or order of the court, the contents of the items in (vi), the items therein may be inspected and copied.

JE

Injunction - Foreign proceedings
(See Family Law - Divorce)

CRIMINAL LAW

Drugs - Forfeiture
(See Forfeiture)

Drugs - Possession of cocaine with intent to supply - Meaning of "supply"

Brown v Regina

Grand Court (72/91)
Harre J
October 29 1991

Cases referred to:
R v Maginnis [1987] AC 303
R v Dempsey [1986] 82 Cr App Rep 291

Appellant in person
Ms L Dilbert for the Crown

The appellant was convicted of possession of cocaine with intent to supply. The drugs had been discovered by police officers during the course of a search of the appellant's home, on the person of a lady friend of his. Her evidence, which the appellant confirmed, was that he had given the drugs to her for their temporary safe-keeping.

At the trial, the learned magistrate had opined that the law required no more than an act of giving something to another in order for that thing to have been "supplied"

The appellant appealed against his conviction.

Held: (allowing the appeal)

(1) Referring to the English authorities, it was clear that "supply" connotes an intention to benefit the transferee, rather than simply a physical transfer of property. Accordingly the learned magistrate had erred in law.

(2) Whilst the appellant had been charged with possession with intent to supply only, the definition applied by the learned magistrate to the term "supply" prevented the appellant from giving an explanation of how the drug came to be in his possession. The inference that he intended to supply the cocaine was not the only one which could be drawn.

(3) The lesser charge of simple possession was substituted.

(4) This being the appellant's first conviction in respect of a drug offence, the appropriate sentence would be 6 months imprisonment, plus a fine of $500 or 1 month imprisonment in default.

MD

Evidence - Breath testing machine
(See Evidence - Breath testing)

Evidence - Corroboration
(See Evidence - Corroboration)

Evidence - Identification
(See Evidence - Identification)

Evidence - Possession with intent to supply - Inference of required intent from the facts
(See Criminal Law (Sentencing) - Drugs)

Forfeiture - Proceeds of trafficking

McField v Regina

Grand Court (SCA 54/91)
Harre J
October 29 1991

Case referred to:
Blaire v Regina (SCA 61/91)

Legislation:
Misuse of Drugs Law s16(1)

Mr D Murray for the appellant
Ms L Dilbert for the Crown

The appellant had been convicted on charges of possession and consumption of ganja and possession of cocaine with intent to supply. Upon his arrest, an amount of $274.25 was found in his possession and the Crown had forfeited the money following an order made upon his conviction.

The issue of appeal was whether the forfeiture order had been properly made under s16(1) Misuse of Drugs Law which relates to forfeiture of money relating to or has been acquired due to or as a result of the offence of drug trafficking. The offence in question related to possession of a controlled drug with intent to supply, the supply being anticipated as a future occurrence.

Held: (dismissing the appeal)

(1) Although under the provision, any money obtained by the appellant from some past drug deal could not be said to have been acquired due to or as a result of the offence for which he has presently been convicted, looking at the circumstances in which the appellant was arrested (i.e. asking the officers if they wanted to buy drugs when approached in the early morning hours with the drugs in his possession), the irresistible inference was that the appellant had been trafficking that night and that the money in his possession was the proceeds of sale of part of the controlled drug in connection with which he had been arrested and charged.

(2) The money was therefore rightly forfeited.

AD

Forfeiture - Property forfeited to causally relate to accused's offence

Levy v Regina

Grand Court (68/91)
Harre J
October 29 1991

Cases referred to:
McField v Regina S.C.A. 54/91
George Dixon v Regina (unreported)

Legislation:
Misuse of Drugs Law s16(1)
Penal Code s25

Mr D Murray for the appellant
Ms L Dilbert for the Crown

The appellant had been convicted of possession of cocaine with intent to supply. This appeal concerned the forfeiture of $976 seized by police officers from the house of the appellant and his wife.

Held: (allowing the appeal)

(1) In order for the power of forfeiture to arise pursuant to s16(1) Misuse of Drugs Law, the money must relate to, or be acquired as a result of the offence for which the appellant had been convicted.

(2) On the present facts there was insufficient evidence that the money found in the appellant's possession related to the offence for which he had been convicted (regardless of whether it was the proceeds of a previous drugs deal

(3) There was nothing inherently improbable about the claim of the appellant that $350 of the money belonged to his wife. This was to be returned to her forthwith. The balance was to be utilised in part payment of the fine imposed as in Dixon v Regina.

MD

Guilty plea - Unrepresented defendant in mitigation outlining circumstances amounting to defence - Role of magistrate

Bush v Regina

Grand Court (SCA 168/91)
Schofield J
October 30 1991

Cases refered to:
Regina v Brian Kilcullen (SCA 51/90)
Rankin v Regina (CA 18/91)

Mr G Hampson for the appellant
Mr Hernandez for the Crown

The appellant had appeared unrepresented before the summary court where he had pleaded guilty inter alia to possession of a utensil used in the preparation of ganja, namely, a set of weighing scales. In mitigation the appellant intimated to the learned magistrate that the scales were used solely for domestic purposes.

Held: (appeal allowed)

(1) Regina v Brian Kilcullen followed allowing an appeal against conviction after a guilty plea.

(2) The appellant's mitigation was a clear qualification to his guilty plea and the learned magistrate should have questioned him further to ensure that the appellant was not putting before the court anything which could amount to a defence and that every ingredient of the charge had been satisfied (Brenton Gilbert Rankin v Regina).

(3) A retrial on this charge in this case, which was the appellant's first offence, would operate oppressively against the appellant because the sentence on the other charges had already been partially served. There was no suggestion that the appellant had been dealing in ganja and the fault of permitting the appellant to enter an initial guilty plea lay with the summary court. The court also considered the appellant's personal domestic circumstances.

PO

Rape - Entry of building as trespasser with intent to rape - Victim mental defective unable to give consent

Ebanks v Regina
(See 3 Law Bulletin 1991 for the trial judgment)

Cayman Islands Court of Appeal
Zacca, Pres: Georges and Kerr JJA
November 26 1991

Cases referred to:
Re Bramblevale Ltd. [1969] 3 All ER 1062

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

The appellant had been convicted of the offence of burglary with intent to rape and had been sentenced to 1 year's imprisonment. The intended victim, Miss "A", was mentally handicapped and mute.

The incident had taken place in a small apartment occupied by Miss "A" which was contiguous to the apartment of the owners, the "B's".

Mrs "B" had been alerted to the presence of the accused by the fact that Miss "A"'s light had been turned out, a task which Miss "A" was incapable of performing. Upon entering Miss "A"'s apartment, Mrs. "B" found the appellant adjusting his pants.

At trial, the learned Chief Justice, stressing the significance of the light having been turned off, determined that the

only tenable explanation which accounted for the appellant's presence was that he intended to have sexual intercourse with Miss "A" knowing of her inability to give consent.

Held: (allowing the appeal)

(1) The learned Chief Justice had erred in his conclusion that the applicant's intention to commit rape was supplied by the evidence which showed that the appellant had turned out the light. Turning the light off was not, in itself, proof beyond reasonable doubt that rape was intended.

(2) The evidence which showed that the appellant has been adjusting his pants was equally consistent with him having been urinating.

MD

Threatening violence - Application of no case to answer - Whether charge sheet should correspond with evidence

Brown and Ebanks v Regina

Grand Court (SCA 117/91)
Schofield J
December 20 1991

Mr G Hampson for the appellants
Mr A Roberts for the Crown

Before the summary court the appellants had denied involvement in the theft of turtles and threatening violence against a co-defendant. The latter gave evidence against the appellants before the magistrate who found both appellants guilty on both charges. On appeal to the Grand Court the appellants contended:

(a) that the learned magistrate erred in law in dismissing the submission of no case to answer; and

(b) on all the facts the learned magistrate arrived at the wrong conclusion on conviction and sentence.

Held: (appeal allowed in part)

(1) At the stage of the application of no case to answer the prosecution case had not been discredited and there were therefore ample grounds to put the appellants on their defence. The learned magistrate warned himself of the dangers of acting on uncorroborated evidence but went on to find corroboration in the evidence of other Crown witnesses.

(2) The learned magistrate failed to consider that the evidence given in court by the co-defendant, against whom it was alleged the threat had been uttered, did not correspond with the words spoken according to the charge sheet. The evidence of threatening violence against both appellants was unsatisfactory.

(3) The appeal against the conviction of threatening was allowed and against the conviction and sentence for theft dismissed.

PO

Trespass - Lawful excuse - Onus on prosecution to prove absence of lawful excuse

Bodden v Regina

Grand Court (SCA 6/91)
Schofield J
January 24 1992

Legislation:
Penal Code s248(1)

Mr G Hampson for the appellant
Mr Hernandez for the Crown

At first instance the appellant was convicted of criminal trespass contrary to s248 Penal Code in that she 'without lawful business entered upon the premises of a private residence'. The appellant had given evidence that she had entered onto the premises at the behest of one G. Before the learned magistrate evidence was given that at the time of the alleged offence the residence in question was unoccupied. A witness alleged, although not proven by the

presentation of documentation, that a bank mortgagee held first charge over the premises, that the premises had been vacated by the mortgagor and that the mortgagee to protect its interest had attempted to secure the premises.

Held: (allowing the appeal)

(1) The prosecution had not proved that the appellant had no lawful business in the house as no evidence was adduced as to whether G had a right to invite the appellant onto the premises.

(2) The evidence of the mortgagee was not relevant as it had not been shown to have any right to grant or refuse G permission to occupy the premises.

PO

CRIMINAL LAW (SENTENCING)

COURT OF APPEAL JUDGMENTS

CASE NO	CRIM APPEAL NO	OFFENCES	SENTENCE
1538/91	4/91	Possession of ganja	Fined $1000 or 9 months imprisonment; aircraft and money forfeited
4526/90	10/91	Robbery	4 1/2 years imprisonment
1538/91	23/91	Consumption of ganja	3 months imprisonment
1539/91	23/91	Consumption of cocaine	6 months imprisonment (concurrent) and previously suspended sentence to run consecutively
3927/90	24/91	Possession of cocaine with intent to supply	5 years imprisonment and $100 fine or 10 days imprisonment
146/91	26/91	Possession of cocaine with intent to supply	3 years imprisonment and $526 or 10 days imprisonment
1004/91	26/91	Consumption of cocaine	6 months imprisonment
31/91	28/91	Possession of cocaine with intent to supply	3 years imprisonment and fine of $1000 or 3 months imprisonment
32/91	28/91	Possession of cocaine with intent to supply	4 years imprisonment and fine of $1000 or 3 months imprisonment
189/90	31/91	Importation of ganja	3 years imprisonment
4705/89	32/91	Possession of cocaine with intent to supply	4 years imprisonment and fine of $1000 or 3 months imprisonment
3901/90	33/91	Being concerned in the possession of cocaine	4 years imprisonment
2593/91	34/91	Possession of ganja with intent to supply	18 months imprisonment concurrent with sentence presently being served and fine of $200 or 2 months imprisonment
356/91	35/91	Theft	12 months imprisonment

357/91	35/91	Theft	6 months imprisonment
358/91	35/91	Attempted burglary	9 months imprisonment (concurrent)
360/91	35/91	Assault	6 months imprisonment
361/91	35/91	Resisting arrest	6 months imprisonment (concurrent)
362/91	35/91	Armed with dangerous weapon	3 months imprisonment (concurrent)
363/91	35/91	Disorderly conduct	10 days imprisonment (consecutive)
1605/91	37/91	Obtaining property by deception	2 years imprisonment - 1 year suspended for 1 [illegible]
534/91	40/91	Possession of cocaine with intent to supply	1 year and 9 months imprisonment and or 3 months imprisonment
535/91	40/91	Consumption of cocaine	12 months imprisonment (concurrent)
1191/90	41/91	Driving without licence	Fined $30 or 10 days imprisonment
1194/90	41/91	Giving false name and address to a constable	2 months imprisonment (concurrent with sentence already being served)
1214/90	41/91	Wounding	$400 to complainant or 1 month imprisonment
1215/90	41/91	Damage to property	Fined $150 or 1 month imprisonment and compensation of $200 1 month imprisonment

Drugs - Simple possession and possession with intent to supply - Comparative severity

Ebanks and Smith v Regina

Grand Court (SCA 78/91 and 81/91)
Schofield J
December 20 1991

Mr G Hampson for the appellants
Mr A Roberts for the Crown

The appellants who were in premises under police observation panicked upon observing a police vehicle approach the premises and ran off in different directions. Although the police during observation did not see cocaine nor the preparation of cocaine, the appellant Smith was observed to attempt to throw away an object which proved to be 1.529g of freshly cooked cocaine. The appellant Ebanks had been observed on the premises walking to and fro and carrying a machete and he admitted to the police that it was he who warned other people in the house of the imminent arrival of the police. Before the learned magistrate the appellant Smith admitted possession of cocaine but was convicted of the more serious offence of possession with intent to supply. The appellant Ebanks was convicted of being concerned in the possession of cocaine and he was further convicted of consuming cocaine.

Held: (appeal allowed in part)

(1) On the facts, the magistrate had correctly drawn the inference that the cocaine was in Smith's possession with intent to supply given the quantity of cocaine in his possession and the calibre of the appellant's evidence.

(2) On the facts the learned magistrate was correct to find that Ebanks was concerned in Smith's possession of the cocaine.

(3) Smith had been sentenced to 3 years imprisonment whilst Ebanks had been sentenced to 27 months imprisonment. There was nothing to suggest that Ebanks was involved in the supply of the drug. That Ebanks should receive a sentence of more than half that given to Smith for being concerned in Smith's possession was excessive. Furthermore the totality of sentence was harsh. Ebank's total sentence was reduced to 15 months.

PO

Mitigation - Effect of entrapment - Effect of guilty pleas - Effect of other factors

R v Cortazar & Rodriquez

Grand Court (SCA 174/90)
Harre J
October 29 1991

Cases referred to:
R v McNulty, Carmona & Fox (SCA 167/91) 4 Law Bulletin 16
Browning v Watson (JWH) (Rochester) [1953] 1 WLR 1172
R v Kirzner 38 CCC (2D) 131

Mr N Hill QC and Mr D Murray for the appellants
Ms L Dilbert for the Crown

The appellants had been convicted, following their pleas of guilty, of possession of cocaine and possession with intent to supply. They were the sole occupants of a plane which landed at Owen Roberts Airport with a cargo of 612.6 kilograms of cocaine.

The appellants were members of a gang whose members were based in Florida and Columbia which had been infiltrated by the FBI. A plan was devised to lure the gang members to Grand Cayman with the object of extraditing them to the USA. When the plane arrived at Owen Roberts Airport it was met by two members of the Florida gang, members of the FBI and local police officers. The Florida gang members were extradited there to face charges.

The appellants, who were thus the only members of the gang to be charged in Grand Cayman, were sentenced to 12 years imprisonment, plus a fine of CI$20,000 or 6 months imprisonment in default and 10 1/2 years imprisonment plus a fine of CI$12,000 or 6 months imprisonment in default. The aircraft was also forfeited.

Their appeals were against sentence. The appellants contended:

(i) that the sentences were excessive.in particular, that they failed to take account of their pleas of "guilty";

(ii) that the learned magistrate had failed to recognise, as a factor of mitigation, the danger into which the appellants' families would have been placed had the appellants refused to transport the drugs;

(iii) that the learned magistrate had failed to recognise as a factor of mitigation that the appellants had been entrapped: and

(iv) that the learned magistrate erred in treating the appellants as principals in the offence, the principals being the persons who were to face charges in Miami.

Held: (dismissing the appeals)

(1) Whilst the appellants had changed their pleas to "guilty" only on the day of the trial, there was nothing to suggest that the learned magistrate had held this against them. His judgment indicated that he had properly given them credit for the pleas.

(2) The intention of the gang members to involve local people made this a more serious case than that of Regina v McNulty, Carmona & Fox.

(3) No account was to be taken of the appellants' contention that had they not so acted their families would have been put in danger. To take judicial notice of such a proposition would be to acknowledge the effectiveness of such oppression and make it easier for it to succeed.

(4) The English authorities indicated that the use of **agents provocateur** was improper where they encouraged the commission of crimes which would not otherwise have been committed (Browning v Watson (JWH) (Rochester)). The present case was readily distinguishable. Whilst a crime would not otherwise have been committed in the Cayman Islands, here a gang of professional criminals had been outwitted by law enforcement officers.

(5) Neither of the appellants could be described as anything other than principals in the enterprise. The sentencing of each appellant reflected the respective culpability of each.

MD

Motor vehicle - Disqualification order - Meaning of "special reasons" for the purpose of imposing more severe sentence.

Tibbetts v Regina

Grand Court (SCA 128/91)
Harre J
October 31 1991

Legislation:
Traffic Law s61

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

The appellant had been convicted of the offence of driving whilst intoxicated and had been disqualified from driving for 15 months. Section 61 Traffic Law provides for a 12 month disqualification "unless the court for special reasons thinks fit to order a longer period of suspension".

The learned magistrate had found the prevalence of drinking and driving in the Islands and the need to "maintain strong and consistent action in this matter" as "special reasons" for imposing a suspension beyond 12 months.

Held: (allowing the appeal in part and reducing the sentence)

(1) "Special reason" is one which is special to the facts of the particular case. It is a circumstance directly connected with the commission of the offence and which the court ought to take into consideration in imposing punishment. It is a matter aggravating the particular offence. The

learned magistrate's reason of seeking to deter drinking and driving was a general one, not amounting to "special reason".

(2) The sentence was reduced to 12 months disqualification.

AD

Motor vehicle - Disqualification order - Duty of magistrate when imposing - Careless driving - Leaving scene of accident

Ebanks v Regina

Grand Court
Schofield J
January 24 1992

Legislation:
Traffic Law ss 59(2) (c) & 66

Mr D Murray for the appellant
Mr I Archie for the Crown

The appellant had been convicted, following his pleas of "guilty", to offences of leaving the scene of an accident and careless driving contrary to ss59(2)(c) and 66 Traffic Law respectively. The learned magistrate, taking cognisance of the appellant's admission that he had been drinking prior to the accident, fined the appellant and disqualified him from driving for 12 months. The appeal was against the disqualification order only.

Held: (allowing the appeal)

(1) There was no evidence upon which the learned magistrate could conclude beyond reasonable doubt that the appellant had been driving with excess alcohol in his blood.

(2) The disqualification had been imposed in relation to the relatively minor offence of careless driving rather than the more serious offence of leaving the scene of an accident. Such a severe approach was not warranted given the nature of this offence.

(3) Before exercising discretion in imposing a disqualification order the magistrate is under a duty to inform the defendant of his intention in order to allow the defendant to provide the magistrate with an account of his personal circumstances which may illustrate that the imposition of such a penalty would be overly harsh. The learned magistrate had not forewarned the appellant of his intention on the present facts.

MD

EVIDENCE

Breath testing procedure - Prosecution to prove test was properly conducted

Wood v Regina

Grand Court (SCA 130/91)
Schofield J
January 30 1992

Legislation:
Traffic Law Section 61(B)

Mr K Collins for the appellant
Mr I Archie for the Crown

The appellant was convicted of driving under the influence of alcohol. She was appealing on the ground that the breath test upon which she was convicted had not been carried out properly.

She had been arrested after being observed driving carelessly and suspected of driving under the influence of alcohol. A breath test was conducted with an 'Intoxilyser 5000' instrument which had recorded a reading of 201 milligrams of alcohol in 100 milliliters of blood.

The instrument was ruled to be in good working order by the magistrate after reviewing the prosecution evidence. The test was also ruled to have been properly conducted and the accused was convicted.

Held: (allowing the appeal)

(1) The prosecution bore the onus of proof to satisfy the court that the breath test had been properly carried out in accordance with the operator's manual. It did appear from the prosecution evidence that the onus had not been satisfied and that the learned magistrate had erred in holding that the test had been properly conducted. The conviction would therefore be quashed and the sentence set aside.

*Note: The efficiency of the machine was not the major issue. There is always a presumption, until the contrary is proved by the defence, that such mechanical items are in proper working order (i.e. presumption of regularity).

AD

Corroboration - Accomplice testifying for Crown

Gouldborne v Regina

Grand Court (SCA 40/91)
Malone C J
August 9 1991

Legislation:
Caymanian Protection Law, 1984 ss24, 30(1) and 30(2)

Ms S Brooks for the appellant
Ms L Dilbert for the Crown

The appellant had been convicted of employing another person (Miss C) not possessed of Caymanian Status and who at the time of the employment had no Gainful Occupation Licence contrary to ss24 and 30(2) Caymanian Protection Law, 1984.

Miss C had pleaded guilty to a charge of being gainfully employed without a licence contrary to s30(1) and was testifying for the Crown.

The appellant's grounds of appeal were (inter alia) that Miss C being an accomplice in the case, the learned magistrate should have warned himself of the danger of convicting the appellant on the evidence of the accomplice without corroboration (i.e. independent supportive evidence

implicating the accused); that there was corroboration of the appellant's evidence which the magistrate had ignored and that there was insufficient evidence upon which to found a conviction.

Miss C had been observed by an immigration officer to be sitting behind a desk in the appellant's business writing and using the telephone. The appellant admitted Miss C had been in the business on certain days but not in the capacity of an employee. Miss C had admitted working for the appellant without a Gainful Occupation Licence and had been charged and convicted.

The appellant's conviction had been based solely on the evidence of Miss C. The immigration officer's evidence had not been referred to by the learned magistrate.

Held: (dismissing the appeal)

(1) Although the magistrate had to warn himself of the danger of convicting on the uncorroborated evidence of Miss C who was an accomplice in the case, if the evidence of the accomplice was believed and there was sufficient evidence against the accused, the magistrate could convict without corroboration.

(2) The evidence of the immigration officer was capable of providing the necessary corroborative evidence as it supported the accomplice's evidence in some material particular and the fact that such evidence was not referred to by the magistrate was in fact to the appellant's favour.

(3) The magistrate had believed the evidence of Miss C and had found the evidence of the appellant lacking in credibility. The accomplice's evidence was strong enough to found a conviction.

(4) The Court had power in determining an appeal, to draw inferences of both fact and law. The findings of fact made by the learned magistrate were properly made and were sufficient in themselves without taking account of the immigration officer's evidence to find the appellant guilty, even bearing in mind the dangers of convicting on the uncorroborated evidence of an accomplice. Both conviction and sentence were affirmed.

AD

Identification evidence - Identification of accused

Frederick v Regina

Grand Court (SCA 101/91)
Schofield J
November 29 1991

Legislation:
Penal Code s230

Appellant in person
Ms L Dilbert for the Crown

The appellant had been convicted of handling stolen goods, namely a Bianchi bicycle, contrary to s230 Penal Code. The appellant's defence was that there had been a mistaken identity.

At the appeal, the Court reviewed the circumstances of the identification of the accused by two prosecution witnesses (police officers) who allegedly had known the appellant for over three years. The appellant was said to have been seen on Eastern Avenue, George Town, riding the bicycle which had been reported stolen. The police officers gave chase and the appellant was said to have ridden to the car park of a bar, abandoned the bicycle and then disappeared.

The prosecution evidence revealed that the sighting took place during night time. The evidence as to the lighting of the area was not satisfactory and the sighting appeared to have been a fleeting glance. It was unclear from what distance the witnesses saw the rider of the bicycle and whether they actually saw the rider's face.

Held: (allowing the appeal)

(1) The circumstances of the identification made the conviction unsafe and unsatisfactory. The conviction was accordingly quashed and the sentence set aside.

*Note: For guidelines on identification evidence, the reader is referred to the Court of Appeal's decision of R v Turnbull [1976] 3 All ER 549.

AD

Unfavourable witness for prosecution - Prosecution failing to contradict evidence of the witness

Christian v Regina

Grand Court (SCA 9/91)
Schofield J
Undated

Legislation:
Penal Code s146(e)

Mr D Murray for the appellant
Mr I Archie for the Crown

The appellant was appealing against a conviction of being an idle and disorderly person contrary to s146(e) Penal Code. The charge was that he had at a public place, namely the Reef Point Restaurant, Breakers in Grand Cayman, conducted himself in a manner likely to cause a breach of the peace.

The principal prosecution witness, a police officer, had gone to the restaurant and seen the appellant there. The appellant according to the officer had become abusive and shouted threats and obscenities at him for the reason that the officer had brought a speeding charge against the appellant the day before the incident in question. The appellant had denied the allegation of shouting threats and obscenities and had rather alleged that the police officer had been harassing him.

The owner of the restaurant, a Mrs P, was called as a Crown witness. Her evidence was in the main unfavourable to the prosecution. She admitted hearing the appellant confronting the police officer but denied that he shouted threats or obscenities. The prosecution did not call other evidence to contradict her nor allege that she was lying. The learned magistrate had believed the police officer and convicted the appellant.

Held: (allowing the appeal)

(1) The prosecution had failed to discharge the burden of proving that the appellant had actually committed the offence. The evidence of the prosecution witness which was in the appellant's favour had not been contradicted. The learned magistrate, before convicting the appellant ought to have satisfied himself beyond doubt that Mrs. P was an untruthful witness. Such a finding had not been made.

(2) The conviction was therefore unsafe and would be quashed.

AD

FAMILY LAW

Ancillary relief - Matrimonial property

P v P

Grand Court (D1/90)
Harre J
December 13 1991

Cases referred to:
Miller v Miller (unreported)
Wachtel v Wachtel [1973] 1 All ER 829

Legislation:
Matrimonial Causes Law s21

Mr K Collins for the petitioner
Ms E Maierhofer for the respondent

The parties were married for four years and there was one child of the marriage, age 6. Both parties had incomes with the wife earning $1000 per month and the husband $1700 per month.

While married the parties lived with one parent so they could save money to build a house of their own. After buying a lot the wife helped extensively in preparing the property for building. A house was under construction when they separated.

At the time of the application, the wife lived with her sister's family. The husband lived in a studio apartment which he purchased after separation. The husband owned two lots worth $15,000 each, another lot with a partially completed house valued at $50,000 and a studio apartment with a net worth of $15,000. The wife had no assets.

The wife sought a lump sum order.

Held: (application granted)

(1) The parties agreed that the husband should have custody, care and control of the child and therefore it is so ordered.

(2) In Miller v Miller, Summerfield CJ found that "matrimonial property" in s21 MCL roughly equated with, but was not restricted to, the concept of "family assets" in Wachtel v Wachtel.

(3) The wife shall have a lump sum order of $20,000 leaving the husband with slightly more than 2/3 of the joint income and 3/4 of the capital.

JE

Separation agreement - Effect on ancillary relief - Consideration of salary and benefits
(See Separation agreement)

Divorce - Injunction to restrain continuance of proceedings in foreign jurisdiction - Principles - Jurisdiction

P v R (No 2)

Grand Court (D 58/91)
Schofield J
January 21 1992

Cases referred to:
SNI Aerospatiale v Lee Kui Jak [1987] 3 All ER 510
Spiliada Maritime Corp v Consulex Ltd (The Spiliada) [1986] 3 All ER 843
Levett v Levett [1957] 1 All ER 720
Russell v Russell and Roebuck [1957] 1 All ER 929

Indyka v Indyka [1967] 2 All ER 689

Legislation:
Matrimonial Causes Law s5

Mr A Turner for the petitioner
Mr N Hill QC and Mr G Hampson for the respondent

The husband filed a petition for divorce on May 10 1991 in England. The wife filed a petition for divorce on May 28 1991 in Cayman. On an **ex parte** application made by the wife in July 1991 the court granted an injunction restraining R from continuing to prosecute his petition in England. The injunction was lifted after 4 days when the husband gave an undertaking to refrain from prosecuting his action, and negotiations began.

In October 1991 the court ruled affirmatively on its jurisdiction to grant, and it did grant, an order pending suit in favour of the wife. With the delivery of those orders the husband considered his undertaking abated, and took steps to pursue his petition in England. The court ordered an interim injunction and set an **inter partes** hearing to determine the validity of a permanent injunction.

Held: (application granted)

(1) The principles governing the grant of an injunction to restrain the commencement or continuance of proceedings in a foreign jurisdiction are found in SNI Aerospatiale v Lee Kui Jak. The court will only restrain the husband from pursuing proceedings in a foreign court if the first court is the natural forum for the trial, the pursuit in a foreign court would be vexatious or oppressive, and the husband will not be deprived of the advantages in the foreign forum.

(2) The test in Spiliada Maritime Corp v Consulex Ltd does not apply to injunctions. The Grand Court of the Cayman Islands provides the natural forum as both parties are ordinarily resident on the Island and all witnesses live in Cayman. This court can deal with all the issues of fact and law. The husband is not at a judicial disadvantage.

(3) For the husband to pursue his proceedings in England would be vexatious and oppressive to the wife. The injunction remains in force. The husband is granted leave to file a cross-petition within 14 days.

JE

Maintenance - Orders pending suit - Jurisdiction

P v R (No 1)

Grand Court (D58/91)
Schofield J
October 31 1991

Cases referred to:
Russell v Russell and Roebuck [1957] 1 All ER 929
Levett v Levett [1957] 1 All ER 720

Legislation:
Matrimonial Causes Law ss 5 & 19

Mr A Turner for the petitioner
Mr N Hill QC and Mr G Hampson for the respondent

The wife brought an application for an order of maintenance pending suit pursuant to s19 MCL. She was ordinarily resident in the Island for at least two years immediately preceding the presentation of the petition as required by s5 MCL.

The husband challenged the court's jurisdiction to make an order pending suit on the basis that since he does not fall within the scope of s5 MCL (and therefore he is ineligible to cross-petition), the court should not entertain the wife's application.

Held: (application granted)

(1) The cases of Russell v Russell and Roebuck and Levett v Levett do not assist the court. With respect to the latter decision it is not accepted as authority for the proposition that the court cannot exercise jurisdiction in ancillary matters where the statute expressly provides it with jurisdiction.

(2) The application is properly filed pursuant to s5 MCL and therefore the court will make an order pursuant to s19 MCL pending the outcome of the suit.

JE

Separation agreement - Affect on ancillary relief - Consideration of salary and benefits

X v X

Grand Court (D4/91)
Schofield J
October 17 1991

Cases referred to:
Preedy v Preedy (unreported)
Hetley v Hetley (unreported)
Miller v Miller (unreported)
Wachtel v Wachtel [1973] 1 All ER 829
Collins v Collins [1943] 2 All ER 474
Macey v Macey (1982) 3 FLR 7

Legislation:
Matrimonial Causes Law ss 18 and 21

Mrs S Pierson for the petitioner
Mr R Alberga QC and Mr A Foster for the respondent

The parties were married in 1971. They had 3 children now aged 14, 13 and 7 years. The older two children were off the Island at boarding school, while the youngest was being educated locally. The petition was proved in July 1991. The parties agreed that the wife shall have the custody of the children.

In April 1990 the parties drafted a separation agreement between themselves which directed an equal division of the capital assets valued at USD $760,000.

At the time of the application, the husband was an employed and received a remuneration package valued at $120,000 per annum made up of a salary of $66,000 and benefits. The husband was cohabiting with a lady who had a salary of $45,000 per annum. The wife had been employed for approximately a year as an administrator earning $25,000 per annum. She could earn more but had sacrificed the money so that she has flexible hours to look after the children. The wife's expenses exceeded her income by $1700 per month even though she was living in modest accommodation. The question of maintenance for the wife and children was before the court.

Held: (application granted)

(1) The separation agreement is binding and the maintenance order is based on an equal distribution. That lump sum will allow the wife to set up a new household.

(2) The 'one-third rule' has been applied in the Grand Court (see Preedy v Preedy and Hetley v Hetley) but the Matrimonial Causes Law ss 18 and 21 gives the court a much wider discretion (see Miller v Miller). The wife's assertion that she should be put in a reasonable financial position so that the children do not suffer a much reduced life style has merit.

(3) Wachtel v Wachtel does not mean that in all cases where capital assets are divided equally there should be no periodical payments for the wife. The level of the division of the assets must be taken into account when assessing the level of periodical maintenance however.

(4) Following Collins v Collins the benefits portion of the husband's remuneration will be considered in determining his ability to pay maintenance.

(5) Following Macey v Macey the income of the husband's cohabitee will also be considered in determining his ability to pay maintenance.

(6) The husband shall pay $1100 per month for maintenance for the wife, and $1400 per month for the 3 children as well as their school fees, boarding expenses and reasonable holiday expenses when at boarding school.

JE

LAND LAW

Land Law - Mistake on the register - Rectification of the register - Whether rectification can be used to reopen issues in the land adjudication

Cook-Bodden v Kirkconnell et al

Grand Court (408/86)
Harre J
October 22 1991

Cases referred to:
Ebanks v Powery (No 571/1978)
Wood v Wood et al 1980-83 CILR 281 CA
Bodden et al v Wilson unreported

Legislation:
Registered land Law (R) 1971 s140
Land Adjudication Law 1971 s9(2)

W Chin See QC for and E Grant for the plaintiff
Lamontagne QC and C Adams for the defendants

The plaintiff, a personal representative, sought rectification of the register on grounds of mistake pursuant to s140(1) of the Registered Land Law (R) 1971. The mistake was alleged to have arisen during the process of adjudication under the Land Adjudication Law of 1971. No attempt was made closer to the time of adjudication to avail of the appeal procedures under the 1971 Adjudication Law because during the period of adjudication the estate was unrepresented and unadministered. The court was asked to determine as a preliminary issue whether the plaintiff could avail of s140 of the Land Registration Law which provides that '[a] court may order rectification of the register ...where it is satisfied that any registration including first registration has been obtained, made or omitted by fraud or mistake.'

Held: (action dismissed)

(1) Notwithstanding that the estate was in a position analogous to a that of a person under disability, the adjudication process under the Land Adjudication Law 1971 was intended to be and is veiled in all respects from scrutiny under the powers of rectification contained in s140 of the Registered Land law (R) 1971 (Ebanks v Powery Wood v Wood).

PO

ARTICLES AND CASE COMMENTS

TIME SHARE IN THE CAYMAN ISLANDS[1]

At the time of writing there are several timeshare schemes in operation in The Cayman Islands. It is suggested that Cayman will probably follow other countries blessed with a good climate and pleasant beaches and witness a burgeoning of timeshare development in the short term future.

Timeshare as a method of property holding does not fit neatly into any existing proprietary categories and presents a problem to common law jurisdictions. Lawyers establishing timeshare schemes or advising those considering acquiring a timeshare *unit* encounter an array of different methods of granting timeshares in property. This article examines the various forms of timeshare holding possible in this jurisdiction and questions the merits of these schemes essentially from the prospective of purchaser.

Time share can be described as 'the right to occupy on an exclusive basis, particular property for a period of less than one year, generally at the same time every year, for some period of time greater than one year'.[2] Existing timeshare schemes in the Cayman Islands are found in condominium complexes in which up to 50 timeshare *units* can be sold in respect of each apartment in the complex. A time share *unit* is a form of right in respect of the property, which may be personal or real, and which grants the owner exclusive possession of the property for a specified period at the same time every year or in some cases at different times in the year subject to a pre-arranged cycle. The acquisition of some form of alienable devisable right or *interest* in the property is a significant feature in marketing timeshare as the use of the unit is equated with purchase of a holiday home. Provided that a proprietary interest is vested in the purchaser this is not

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[1] See generally; *International Timesharing* James Edmonds, London 1984
Sale and Management of Flats: practice and Precedents, Ch.23, J. Cawthorn, Butterworths, London, 1985. *The Law of Flats* ,Ch.13, T. Aldridge, Oyez Longman, London, 1983.

[2] J. Cawthorn, *supra* at 270.

an incorrect representation. However, if the purchaser obtains a mere *personal interest* then like most such interests in real property it is precarious. As stated above, the common law has faced problems accommodating the timeshare phenomena and some ingenuinty has been expended getting around these difficulties. Various schemes have been devised in other jurisdictions to enable the grant of some form of right *in rem* to unit owners.[3]

Time share in the Cayman Islands can take one of the following forms:

1.) A fee simple interest in the *unit;*

2.) A licence to use the *unit;*

3.) A club scheme; and,

4.) A timesnare Lease.

I shall discuss each of these *seriatum.*

Fee Simple.

Obvious advantages attach to the grant of a freehold title; it is an attractive interest as it is perpetual and one can mortgage it and therefore borrow the money to pay for the timeshare secured against the property itself. It used to be the case that property could be conveyed to any number of people in the Cayman Islands to hold together as tenants in common, each co-tenant having an undivided legal freehold share in the property .[4] However since 1981 the number of co-owners in respect of any one property is limited to nine and therefore only nine units could be held in freehold timeshare in any one apartment.[5] This restriction was effected by secondary legislation in the Registered Land (Prescription Under Section 99) Order, 1981 and could be amended with ease in the case of timeshare if the Governor in Council saw fit.

However, apart from the limitation on the number of concurrent owners, there are other problems with concurrent ownership of the fee simple as each tenant in common has a right to possession of the premises which he can protect by action against his co-tenants[6]. It would seem that a *unit* affording

[3] For a full discussion of these see Edmonds *Supra,* fn. 1.
[4] See Division 6 of the Registered Land Law (R) 1971.
Such co-ownership by tenants in common has been impossible in Headland and Wales since 1926, but not in both Irish jurisdictions where the position approximates to the position in Cayman nor, it seems, in Scotland.
[5] This presumes the apartment is held under Strata Title.

exclusive possession to one tenant in common for a limited period could be accommodated by a suitably drafted contract entered into by all the holders of any particular *unit* curtailing the contracting parties' right of unity of possession. However problems would arise if a co-tenant sought to sell his interest or devise it. A form of chain of indemnity would be required to restrict the right of possession of an assignee from one of the original contracting parties and successors in title of one of the contracting parties, of course, would not be bound by their predecessors in title contract. Furthermore, problems may arise should any successor in title seek a partition of the property[7]. For the above reasons, it is considered that granting freehold timeshare interests isn't practible[8].

Licence[9]

This form of timeshare holding is to be found already in this jurisdiction. In practice what happens is that the timeshare developer usually transfers the legal and beneficial title of the development to the timeshare management company which then sells a right of vacation residence to the purchasers[10]. It is suggested that this contractual licence is analogous to renting a room in a hotel. Can the contractual licensee protect the purchaser's interest ? Section 98 of the Registered Land Law (R) 1971 provides:

> ' Without prejudice to Section 127, a licence is not capable of registration.'

This is a reference to substantive registration and Section 98(2) continues:

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[6]For a discussion of the incidents of legal tenancy in common see Megarry and Wade, *The Law of Real Property* 4th Edition Ch. 7.

[7]Registered Land Law (R) 1971 s103. Under s 103 the Register 'Shall in default of agreement as to petition order sale of the property.'

[8]Joint tenancies, which require the existence of the four unities before they exist, appear even less attractive due to the right of survivorship. The unattractive nature of freehold ownership is a view shared by Cawthorn and Edmonds, *supra,* fn.1 in relation to the admittedly more stringent freehold regime in operation in England and Wales.

[9]See generally Dawson and Pearse, *Licences Relating to the Occupation or Use of Land;* (1954) 70 LQR 326 (Lord Evershed)

[10]For various time share licence precedents see Edmonds, *Supra* fn.1 Appendix B

' A licence relating to the use or enjoyment of land is ineffective against a bona fide purchaser for valuable consideration unless the licensee has protected his interest by
lodging a caution under that section. '

Section 127 enables, *inter alia*, a licensee to lodge a caution at the Register which may either limit or prevent registration of dispositions and subsequent entries on the register.

At first brush this may seem to offer protection to time share licensees. However, although the matter has not been decided, it is suggested that it only enables registration of a licence if that licence is an interest in land[11]. Section 98(2) does not use the term interest loosely. If it were so used one could presumably place a caution having booked an hotel room . Traditionally[12] licences break down into three categories; contractual, licences coupled with an interest, and a licence coupled with an equity arising out of a constructive trust[13]. It is received learning that the latter two categories of licence are interests in land. It is a principle of the law of real property that only interests in land bind third parties and under the Registered Land Law, in the absence of *mala fides*, only interests in land which are registered (or, in the case of a caution, at least noted on the register) can bind third parties irrespective of notice.

Whether contractual licences might constitute an interest and thus bind third parties was a moot point for many years[14]. The high point for such licences having a propriety property was reached in the cases of *Errington v Errington* (1952[15]) and *E.R. Ives Investmnet Ltd v High* (1967[16]). However in its 1989 decision of *Ashburn Anstalt V W J Arnold*[17], the English Court of Appeal indicated that it would be most unsafe to put too much reliance on these decisions. If, as seems probable, a Caymanian court were to follow the dictum (albeit *obiter)* of the English Court of Appeal in *Asburn Anstalt v. Arnold* then it would hold that contractual licences are not interests in land and therefore can not be registered as cautions on the register[18].

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[11] See Chesire and Burn's *Modern Law of Real Property*, 14th Edition Butterworths, London, 1988 at p.575.
[12] See Wade and Megarry *supra* fn.6, 777-780
[13] See generally Oakley, *Constructive Trusts*(2nd Edition), Chapter 11, Chesire and Burn's,*supra* at. p.562. *Binnions v Evans* [1979] Ch 359, *Inwards v Baker* [1965] 2 QB 29, *Hussey v Palmer* [1972] 1 WLR 1286, *Re Sharpe* [1980] 1 WLR 219,
[14] See Chesire and Burn's,*supra fn.11*, Ch. 18
[15] [1952] 1 K.B. 290,[1952] 1 All ER 149
[16] [1967] 2 Q.B. 379,[1967] 1 All ER 504
[17] [1988] 2 Al ER 147

If the above is correct, the only protection available to a timeshare licence would arise if the licence were coupled with an equity through some form of propriety estoppel against the legal title holder of the time share property. In the vast majority of cases this is unlikely to arise. Even if such an interest were to arise the owner would have to realise that he had obtained an equitable registerable interest and then proceed to register it by caution.

The ramifications of this should be obvious. An unscrupulous developer can with ease sell or mortgage the development over the heads of the licence holders to third parties who can take with notice of the licences yet disregard them[19]. This is an unattractive form of timeshare and potential purchasers should be advised to seek insurance to cover their capital outlay. The sole advantage of time share by licence is that stamp duty is not payable on the grant of the licence as. In reality this advantage may be somewhat illusory as in all schemes stamp duty has to be paid at some point. With a licence scheme it is paid either on the purchase of the condominium complex or on transfer to the timeshare company. This cost will obviously be passed on the purchasers. However the licence scheme does avoid stamp duty being payable twice.

Club Scheme

The unsuitability of the above methods has lead lawyers to utilise the trust devise and vest the legal title in the development in trustees to hold for either an unincorporated or an incorporated association composed of the purchasers of the units. The trustees in whom the title is vested are the linchpin of such schemes and one is advised to seek trustees of the 'unimpeachable probity.'[20]

Because an unincorporated association cannot hold property in its own name[21], the equitable interest in the property is held by the members. The attraction of this system is that the unit

[18]The Deputy Registrar has informed me that the only form of licence which he has registered have been licences coupled with an interest such as a profit a prendre.

[19]Note however that in the English decision of *Lyus v. Prowsa Developments Ltd.* [1982] 1 W.L.R. 1044 a purchaser's contract was held to bind a subsequent purchaser who had notice of it, dispite the fact that it was unregistered not an over-riding interest and strictly speaking there was no fraud on the part of the subsequent purchaser.
A note on the applicability of this decision in the Cayman Islands will follow in a subsequent edition of the Cayman Islands' law Bulletin.

[20]See Cranworth, *supra* at fn.1

owners do obtain a proprietary interest and a caution can be lodged on the register just in case the trustee proves wanting in probity. This method of creation of time share holding is not without its difficulties. Firstly, the conveyance by the developer to the trustee must satisfy the principle of certainty of objects, the beneficiary principle and the rule against perpetuities. The problem posed by the beneficiary principle is that the trust must be construed as a trust for individuals not a trust for a purpose. This can prove particularly problematic so far as club ownership is concerned because to ensure that any conveyance on trust to an unincorporated association[22] does not infringe the rule, the conveyance must be clearly for the individual members of that association to take as beneficial owners.

In the 1969 decision of *Re Denley's Trust Deed*[23] Goff J., as he then was, considered that there is an exception to the beneficiary principle in the case of purpose trusts which are indirectly to persons. In that case the devise although clearly for the purpose of the upkeep of a recreation ground, was construed by the learned judge as a valid indirect gift to persons who could use the premises. On this basis a trust to hold and maintain the time share development for beneficiaries could conceivably be construed as indirectly for the benefit of the time share association members and valid. *Re Denely* however, has been subject to criticism and may not be followed in this jurisdiction[24]. Even if Goff J. were followed, as explained below, the trust can only subsist for the bare perpetuity period of 21 years. Assuming that the *Denley* type purpose trust won't be followed, in order for a trust in favour of the time share association to be valid it must be possible for the members of the association for the time being to decide to dissolve the club, sell the property and divide the proceeds of sale among themselves. In the absence of such a power it is probable that the conveyance would be construed void as a non-charitable purpose trust. This problem arises in most common law jurisdictions and careful drafting of the association rules should avoid this difficulty[25].

The nature of the difficulties presented by the beneficiary principle also arise in relation to perpetuities. Two separate

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[21] *Leahy v A-G New South Wales* [1959] AC 457 at 477, [1959] 2 All ER 300 at 306. See :Hayton and Marshall, *Cases and Commentary on the Law of Trusts*, 8th Edition, 1986 at 182. Petit at 52

[22] See Hanbury & Maudsley, *Modern Equity* 13th Edition atp.342, Petit at p.51 Paul Todd, *Equity & Trusts*, 1st Edition, Ch 4. Also [1985] 49 *Conv.* 318 Jean Warburton.

[23] [1969] 1 Ch. 373, [1968] 3 All ER 65.

[24] See Hayton and Marshall, *supra, fn.21,* at 178

[25] For a precedent of a constitution of an association, see Edmonds, *supra* fn. 1, Appendix C.

branches of the one rule arise in relation to conveyances on trust to unincorporated associations; the rule against remoteness and the rule against inalienability[26]. Time share is sold as an assignable devisable asset. The property is conveyed by the developers on trust to the trustees to hold for the members of the club which trust is clearly void if beneficiaries include future members whose interest may not vest within the common law perpetuity period still applicable in the Cayman Islands of twenty one years plus lives in being.[27] As with the problem which the beneficiary principle presents, it seems that the way around this problem is to ensure that the club members are absolutely and beneficially entitled to the property so that their interest vests immediately, any restraint either in the terms of the gift or in the constitution of the association which would prevent the time share members treating the property as their own would render the trust invalid, as Hanworth in *Macaulay's Case* observed[28]:

> ' if the gift is in truth to the present members of the society described by their society name so that they have the beneficial use of the property and can, if they please, alienate and put the proceeds in their own pockets then there is a present gift to individuals which is good; but if the present members ... have no right to appreciate the property or proceeds for their personal benefit then the gift is invalid.'

The second branch of the perpetuity rule[29] arises if the *Re Denly* type purpose trust is followed. An attempt to create a trust for a purpose which may keep the trust property i.e. the time share development, inalienable for a longer period of time than the common law perpetuity period is void and because the *Re Denly* type trust is a purpose trust there are no lives in being and therefore the trust can only exist for a maximum period of 21 years. If one does not limit this form of purpose trust expressly to the 21 year limit then the trust is void.

The above rule against inalienability can, in some cases, be infringed even if the gift is construed as a gift to members. Several authorities indicate that a gift to an association in which the members cannot divide the goods under the rules can

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[26] See Megarry & Wade, *supra* fn. 6, Ch. 7; Chesire & Burns, *supra*, fn. Ch. 5 *Morris & Leach on Perpetuities*; R.H. Maudsley, *The Modern Law of Perpetuities*.

[27] In the case of an ordinary trust under the Trust Law

[28] Quoted in *Leahy supra* fn. 21 at p. 483, the case itself is unreported.

[29] For a full discussion of the application of the Rule against Perpetuates in relation to gifts to unincorporated associations see: [1977] *Conv.* 179, Widdows

be valid nothwithstanding the beneficiary principle[30]. This obviously would prove attractive to a time share developer as it prevents a majority of the members or a weighted majority from deciding to sell the entire property regardless of the wishes of the remaining members including the developer, the disadvantage of such membership rules is that a perpetuity limitation period must be used as the conveyance on trust breaches both aspects of the rule.

Because a statutory substitution period has never been introduced in this jurisdiction a draftsman is restricted to lives in being plus twenty one years and to extend this to its utmost a 'Royal Lives clause' or its equivalent should be utilized. The difficulty which the common law position presents is that the equitable interest of the *unit* holder in the association property is of uncertain duration and may be as short as 21 years.[31] If however a complete beneficial transfer is effected to the members of the club who can divide the proceeds among themselves it is suggested that no beneficiary period is required as the gift has already vested.[32] Whilst one can understand the attraction of the trust allied with an unincorporated association it has at least the theoretical drawback that some of the members may seek to sell off the timeshare premises against the wishes of others or if they are unable so to do that the trust must determine within the perpetuity period.

The difficulties posed by the rule against perpetuities to which Club Schemes gives rise can be overcome by vesting the legal title of the timeshare development in an incorporated club; a limited company specifically established for that purpose. Each timeshare purchaser becomes a shareholder whose entitlement to utilise the *unit* is granted and regulated by the company memorandum. This type of scheme is favoured in civil law jurisdictions but seemingly isn't used in the United Kingdom,[33] mainly due to the onerous 'prospectus' requirements in relation to public companies in operation there whereby a 'full accurate and fair picture of the state and prospects of the company' must be provided for a purchaser of its shares. It is considered that the absence of such prospectus requirements in these Islands makes such a scheme more attractive to a developer. Timeshare companies will obviously not qualify as Exempted Companies[34] and must therefore comply with the

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[30] *Re Recher's Will Trusts* [1972] Ch 526, *Re Lipinski' Will Trust* [1976] Ch 235. See Petit at 52 ft.note 15

[31] Of course such a drastic outcome would be most unlikely as it could only arise if the existing lives in being or the Royal Lives died shortly after the constitution of the trust.

[32] See: *Holding of Property By Unincorporated Associations* [1985] 49 *Conv.318* Kelvin Widdows.

[33] Edmonds *Supra, fn. 1 at 51*

[34] Part VII The Companies Law 1961 as amended.

provisions in local company legislation for the protection of creditors and members; lists of members and directors must be kept, accounts and audits annually undertaken[35]. Whilst this involves expense for the management company which will be passed on to the *unit* holders it is suggested that the advantages of this type of corporate scheme are apparent in contradistinction to a club scheme. However, with such a system there remains scope for fraud as the officers of the company are able to sell or mortgage the property over the heads of the shareholders even if such transaction is *ultra vires* the powers of the company. Thus a prospective purchaser should ensure that some form of caution has been placed on the register restricting dealing with the company without notification of shareholders.

Leasehold.

Since *Smallwood v. Sheppard*[36](1895) it has been recognised that it is not essential that the quantum of time in respect of which possession is granted under a lease should comprise one single continuous period. The holding is still leasehold provided that the owner of the timeshare unit has exclusive possession of the premises and not mere exclusive occupation rendering him a licensee[37]. In the *Smallwood* case, it was held that a lease granting a right of occupation for three successive bank holidays could constitute a single letting[38]. That a lease can be constituted by an aggregate of discontinuous periods of time lends itself to timeshare.

Leasehold timeshare contain advantages for both developer/vendor and purchaser. A lease is a legal interest in land and, subject to registration is good against the whole world. However unlike a freehold interest discussed above restrictive covenants in favour of other owners of the same unit and owners of other units can bind successors in title of every original owner. The covenants can deal with all matters which are essential to the maintenance of the unit. The consideration for the lease will normally be an initial fine which will in layman's terms constitute the 'price' of the unit however the leasing system permits the periodic levying of an adjustable rent[39] which will cover maintenance of the

[35] Ibid, Part IV as amended by Law 24 of 1987 and Law 14 of 1989.
[36] [1895] 2 QB 627 at 630
[37] *Street v. Mountford* [1985][A.C. 809
[38] See Kevin Grey, *Elements of Land Law*, Butterworths,1987, London.p.433
[39] The rent is adjustable so long as the parties have established a system whereby the rent can be ascertained this

(Footnote continued)

complex[39] with provisions for forfeiture in the event of breach of covenant.

If registered a timeshare leases will bind third parties. However, Section 46 of the Registerd Land Law (R) 1971 provides that only leases which exceed two years are registerable. At present, most timeshare leases endure for eighty to one hundred years. In *Cottage Holiday Associates ltd. v. Customs and Excise Commissioners*[40] Woolf J. distinguished between the lease which created the timeshare interest and the interest itself. The lease may continue for eighty years but the duration of the interest under the lease is arrived at by the addition of the aggregate of separate weeks during that eighty year period which would be a total of twenty months. Section 46 permits registration of a lease

'...for a specified period exceeding two years...'

This would certainly appear to be a reference to the duration of the lease and not the duration of the interest and permits registration of the timeshare lease. That this is correct is confirmed by the wording of Section 28 (d) which confers overriding status on

'leases or agreements for leases for a term not exceeding two years,'

This clearly provides that a lease of eighty years duration but for an interest of only twenty months is not overriding and if the above interpretation of S. 46 were not correct would leave a lacuna in respect of timeshare leasehold interests.

The registration of interests in land, leasehold or freehold is very straightforward and the Land Registry of the Cayman Islands prides itself upon the ability of ordinary citizens to complete registration of conveyances.[41] Registration of a leasehold interest is effected by opening a register in the name of the lessee in respect of the parcel in which that particular lease has been executed[42]. Theoretically there is no limitation on the number of leases which can be registered in respect of any one parcel.

As observed above the existing timeshare schemes in the Cayman Islands are found in condominiums, most of these , although not all, are registered on the Land Registry as Strata Title thereby enabling freehold interests to be sold in each

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[39] (continued)
will not fail for uncertainty, See: *Sudbrook Trading Estate Ltd. v. Eggleton* [1982] 3 W.L.R. 315

[40] [1983] W.L.R. 861

[41] I refer here of course, to completion, and not contract.

[42] S. 46 The Registered Land Law (R) 1971

apartment. If a condominium complex is registerd as a Strata Title each apartment constitutes a parcel having a registered freehold owner. As with every other parcel of land, leasehold interests can be registered against the parcel.

Of the various forms of timeshare holding outlined above it is considered that company schemes, if protected by registration of a caution, whilst expensive, provide an adequate and secure means of timeshare holding in these islands. However, it is suggested that the strata title system combined with leaseholding is tailor made for timeshare. Each timeshare lease holder can register his own lease and protect his *unit* against third parties, he could with ease assign or sublet his interest and successors in title could in turn register their own interest. The leasehold interest can be mortgaged and can be of any duration the timeshare developer wishes from twenty years to 999 years.

Conclusion

Timeshare is an animal which does not quite fit into existing property categories. Many highly publicized cases in other jurisdictions have shown that the *rouge* element has in the past been much attracted by timeshare[43]. Much stigma still attaches to this form of holding and those who market it[44]. However timeshare *per se* is no bad thing. It is of potential economic value in housing tourists throughout the entire year, not just the high season, and it is 'environmentally friendly' as one of the most efficient means of utilizing limited and space. If properly controlled the Cayman Islands can benefit from the arrival of this form of tourist accommodation.

The system of Land registration established in the early 1970's has been in no little measure responsible for the general confidence shown by bankers and investors in the security of land title and the stability of land holding that has accounted for the enormous success story in the Cayman Islands[45]. Timeshare can also avail of the land registration and the strata title legislation. Of the various methods of creating timeshare interests it is suggested that strata holding and

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[43] See *Timeshare: a consumer's guide*, Bourne, N.L.J. January 31st, 1992

[44] At present in the United Kingdom consumer bodies receive about 10,000 complaints a year about timeshare and those who market it. See *The Times*, 'Timeshare curbs nearer', by John Winder, 8th February, 1992, p.6.

[45] See speech given by K. Dunlop, former Register of Lands, Cayman Islands, to conference on Registered Title at St. Lucia, 6-8. October, 1986. Copies available from Law School, George Town.

registered leases in strata units afford the maximum flexibility and protection to timeshare purchasers[46].

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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 Professional Qualification Course.

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.