CAYMAN ISLANDS LAW BULLETIN

NO 7

DECEMBER 1992

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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 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 7 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.

EDITORIAL STAFF

Mitchell C. Davies
Director of Legal Studies
Editor

John Epp
Law Lecturer

Patrick O'Hagan
Law Lecturer

Andy Darkoh-Agyeman
Law Lecturer

Alistair Cutts
Law Lecturer

Gwen Brucker
Law Lecturer

Myrna Gregson
Attorney-at-Law

Monica Levy
Executive Officer

INDEX

EDITORIAL NOTE 4

CASE NOTES 5

ARTICLE 77

"Consent or no Consent - is that the Question?"
Mitchell C. Davies
Director of Legal Studies

EDITORIAL NOTE

This is the seventh edition of the Cayman Islands Law Bulletin with the next edition being due for publication in January 1993.

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 four bound volumes (1980-83, 1984-85, 1986-87 and 1988-89). 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 summaries of the majority of judgments of the Grand Court and Court of Appeal delivered in chambers and in open court during the period January 1 1992 to October 20 1992. Due to the significance and general interests generated by the BCCI matter the Judgment of Harre J is reproduced in full. Reports of Judgments of Harre J. on matters other than BCCI have been held over to the next issue of the Bulletin.

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 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 Director of Legal Studies, Mitchell C. Davies, analysing a topical controversy relating to the law of theft.

We would like to extend out thanks once again for joining the editorial team to Attorney-at Law Myrna Gregson of the law firm Myers & Alberga.

We would also 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.

Any comments which you may have are very welcome.

Mitchell C. Davies
Editor

CASE NOTES

SUMMARIES OF JUDGMENTS OF THE GRAND COURT AND THE COURT OF APPEAL OF THE CAYMAN ISLANDS.

January 1 1992 to October 20 1992.

Civil Procedure	6
Company Law	10
Contract	23
Criminal law	26
Criminal Law - Sentencing	61
Evidence	65
Equity & Trusts	66
Family	68
Land	71
Personal Injury	73
Private International Law	75

Civil Procedure

Interlocutory applications - Temporary injunctions - Security for costs

E and C Ltd v M Ltd

Grand Court (110/92)
Schofield J

Legislation

Companies Law S 71

Mrs Pierson for the plaintiffs
Mr Lamontagne and Mr Garcia for the defendants

M Ltd. lent money to E and C Ltd. The loan was secured by a chattel mortgage and a real property mortgage. E alleged that the loan agreement was varied orally. M Ltd. alleged a breach of the agreement and seized and sold the chattel and conducted a sale of the real property. The title has not yet been transferred. E seeks a declaration that the money claimed as due is not due and seeks an order restraining the sale of the real property or its transfer.

M Ltd. brings a cross application for security for costs.

Held: (applications granted)

Inspite of the fact that this application comes at the very last minute the extreme consequences of M Ltd.'s remedy and the points raised justify a temporary injunction on the transfer of title, pending a hearing of the merits. The plaintiffs say they are impecunious. However the order is conditional on their furnishing security in the amount of US$20,000.00 as a cross-undertaking. Also the plaintiffs must undertake to pursue this action expeditiously.

M Ltd. will have an order for security for costs to protect it in the event the plaintiffs fail. The plaintiffs must provide security for costs in the amount of CI$7,000.00.

JE

Civil jury trial

J v Detective Inspector Z and the Commissioner of the Royal Cayman Islands Police Force and the Attorney General of the Cayman Islands

Grand Court (164/92)
Malone CJ
August 19 1992

Legislation

Judicature Law 1975 S 25
Criminal Procedure Code 1975 S 121A
Supreme Court Act 1981 S 69 (UK)

Mr Quinn for the plaintiff
Mrs Banks for the defendants

The plaintiff brings an application under the Judicature Law S.25 for an order that his action be tried by jury.

Held: (application dismissed)

A civil cause has not been tried on this Island for many years, if ever, by a jury. Civil jury trials are rare throughout the former British Caribbean.

Under the law of the Cayman Islands the sole test to determine this request is whether the matter can be properly tried by a jury. The first two defendants are senior police officers. Their positions in this small community are not conducive to a jury trial.

JE

Application for summary judgment

Frederick v Cayman Airways Ltd

Grand Court (149/92)
Schofield J
June 10 1992

Mr Turner for the plaintiff
Mr Barrie for the defendant

The plaintiff was employed by the defendant airline company from June, 1991 to December, 1991. She became eligible for employee medical insurance in September, 1991. She incurred medical expenses amounting to US $9,713.63. The defendant initially refused to pay anything and then subsequently agreed to pay part of the claim.

The plaintiff applied for summary judgment for the disputed part of the claim amounting to US $6,966.35. The defendant company argued that there was a triable issue relating to the disputed amount in that it was incurred in connection with treatment for a medical condition which existed prior to the plaintiff's employment and therefore not covered by the insurance scheme. Of the disputed amount, US $694 was incurred as a result of a treatment in the United States of America in November, 1991 when a condition of "polycystic ovaries" was diagnosed.

The defendant argued that ovarian cyst had been diagnosed in May, 1991 (prior to the plaintiff's employment with the airline) and that this was the same as "polycystic ovaries". The diagnosis, it was argued, was a "pre-existing condition" under the terms of the Cayman Airways health plan. The plaintiff contended that the November diagnosis was not the same as the May diagnosis.

The evidence revealed that during the May diagnosis another condition known as endometriosis had been detected. Another diagnosis took place in September and it was confirmed that the plaintiff was suffering from endometriosis. The balance of the claim on the summons related to the cost of the examination and treatment of the endometriosis. The plaintiff argued that before September, there had been no firm diagnosis of endometriosis and therefore this was not a "pre-existing condition".

Held: (refusing summary judgment)

(i) In relation to the US $694 claim, there was little evidence upon which to determine whether the diagnosis and treatment in May, 1991 related to the same condition as that diagnosed in November, 1991. The matter therefore had to proceed to trial.

(ii) If an employee is suffering from a latent illness of which she is not aware before she obtains the benefit of an insurance scheme and thereafter has it diagnosed and treated, that is not a "pre-existing condition". If, on the other hand, the illness manifests itself after a medical examination before the employee becomes entitled to the benefit of an insurance scheme and subsequent medical examination reveals the source of the condition, then that condition pre-dates the operation of the insurance scheme. This must be so even if the patient went through a protracted period of diagnosis before the condition was correctly diagnosed. It did appear from the evidence available that the plaintiff was suffering from endometriosis in May, 1991 and went to see a doctor with problems related to that and other conditions. One condition was diagnosed but the doctor was not certain whether endometriosis existed. Certain possibilities had to be eliminated and the elimination of those possibilities was part of the diagnostic process for the endometriosis and was therefore part of the treatment.

AD

Consent order - Effect of consent order - Preliminary issue

S Ltd v R

Grand Court (439/89)
Schofield J
August 14 1992

Cases referred to

Siebe F Gorman and Co Ltd v Pneupac Ltd [1982] 1 WLR 185
Purcell v F C Trigell Ltd [1971] 1 Q B 358
Mullins v Howell [1979] 11 Ch D 763
Noel v Becker [1971] 1 WLR 355

Legislation

Supreme Court Practice Order 25 rule 2

Authoritative works

Halsbury's Laws of England 4th Ed Vol 37 Para 389

Mr Timms for the plaintiff
Sir Fred Phillips and Ms Brooks for the defendant

After the discharge of a Mareva injunction the defendant sought an order for damages and costs. By a summons for direction he asked for an early hearing and a consent order was filed setting out a timetable for the filing of his points of claim and the plaintiff's points of defence.

The plaintiff was late with its defence but an extension of time to file the defence was granted by Harre J. The plaintiff says that the defendant is guilty of inordinate delay and thus is barred from bringing the application. The plaintiff says this preliminary issue should be determined before a trial date to assess any damages is set.

The defendant objects on two grounds:

(i) the timetable set by the consent order was a contract between the parties and as such there can be no additional hearings.

(ii) the hearing of a preliminary issue would not facilitate an expeditious disposal of this matter.

Held: (order as follows)

(i) "Consent order" is an ambiguous term. An order given "by consent" may evidence a real contract between the parties or the lack of objection by the opposing party. In the former case the court will only interfere with such an order on the basis that it would with any other contract. In the latter case, since there is no contract the court can vary it as it would any order given without consent. Siebe F Gorman and Co. Ltd. v. Pneupac Ltd. at pp 189-90).

(ii) The weight of authority leads to the conclusion that although some interlocutory orders made by consent may contain or evidence a contractual arrangement between the parties the court is more likely to find in the case of interlocutory orders that no contract was intended. The court is more likely to keep open its powers to vary or make further orders in interlocutory proceedings.

(iii) On the facts of this case the parties were simply setting a course of the proceeding and not making a contract involving an inherent agreement not to return to court if a variation were required.

(iv) If the plaintiff is successful in its preliminary objection a great deal of preparation will be wasted, and further the court will stand empty as no matters can be scheduled at the last minute. Therefore the plaintiff's application to have the preliminary issue determined before a trial date is set is granted.

JE

Pleading - Leave to amend

G v C

Grand Court (92/92)
Malone CJ
August 13 1992

Authority referred to

Shelby v Federated European Bank Ltd [1931] 1 K B 254

Mrs Messer for the plaintiff
Ms Brooks for the defendant

The defendant seeks leave to amend the defence and counterclaim. The plaintiff says the amendment to the counterclaim is not justified because it admits a new cause of action which did not exist at the date this writ was issued. The defendant argues that the cause of action existed but the specifics of damages were not crystalized until recently.

Held: (application granted)

The court will refuse to allow an amendment to

introduce a new claim which did not exist at the date of service of the original pleading which is sought to be amended (Shelby's case). It will not refuse to allow an amendment simply because it introduces a new claim nor will it refuse to allow an amendment which is merely additional to an existing cause of action.

JE

COMPANY LAW

In view of its general interest, the judgment of the Grand Court on 19th ~June, 1992 approving the agreements known as the Majority Shareholder Agreements and the Pooling Agreements in the BCCI matter is reproduced in full.

Preferential Payments in Insolvency

Bank of Credit and Commerce International (Overseas) Ltd and others

Grand Court (284 285 and 286/91)
Harre J
February 17 1992

Mr Denman and Mr Finlay for the Attorney General
Mr Clifford for the Official Liquidators

Yesterday I gave leave for the liquidators of Bank of Credit and Commerce International (Overseas) Ltd. ("BCCI Overseas") and Credit and Finance Corporation Limited ("CFC") to execute, with one exception, a series of agreements which have come to be known as the Majority Shareholder Agreements and the Pooling Agreements, and to do everything necessary to implement them fully and comply with their terms. The exception was the agreement containing the terms and conditions on which the Majority Shareholders and the principal BCCI companies' relationship with International Credit and Investment Company (Overseas) Ltd. ("ICIC Overseas") and its related companies, the ICIC group, would be resolved.

The reason for that was that I wanted to hear the specific submissions relating to the ICIC group which were due to be heard immediately after those relating to BCCI Overseas and CFC before making a decision. That has now happened, and in view of the judgment which I shall be delivering later this morning in relation to the ICIC group, I extend the leave given yesterday to include the ICIC agreement.

The intent of the Majority Shareholder Agreements, taken together, is that the Government of Abu Dhabi will make funds available, subject to conditions, for distribution to certain ordinary secured creditors of the principal BCCI companies. The main agreement is a Contribution Agreement dealing with those funds which will be available to the creditors of the principal BCCI companies who accept the offer, one of the terms of which is that they release any claims which they may have against the Government of Abu Dhabi, the Majority Shareholders, and related persons. The principal BCCI companies and the government of Abu Dhabi, the Majority Shareholders, and related persons will also enter into wide-ranging mutual releases, and

the Abu Dhabi parties will be admitted as creditors in the liquidation of BCCI Overseas and BCCI SA.

Consideration of the effect of the mutual releases is fundamental to the assessment of the Abu Dhabi offer. Before going further into that, I make one general comment. It goes without saying that this Court is exercising its own independent jurisdiction in this matter, and I was satisfied that Sections 162 and 163 of our Companies Law provide ample jurisdiction to make the orders and directions which I did make. Indeed, no submission to the contrary was made.

In reaching that conclusion, I was assisted, not only by the submissions made by Mr. Pascoe on behalf of the liquidators, but by those made at my request by Mr. Denman as Amicus Curiae, a friend of the court. Nevertheless, I have to recognise, as I am glad to do, that these agreements are part of an immense international effort to salvage what can be salvaged for the creditors out of the BCCI debacle. In that connection, I respectfully adopt what was said by the then Vice-Chancellor in England, Sir Nicholas Browne-Wilkinson, in earlier related proceedings about this situation. It was this:

"It will require the most difficult and complicated attempts at cooperation between the different national jurisdictions which I hope will be forthcoming. I am told that such cooperation is already forthcoming from at least three other jurisdictions including Abu Dhabi itself, with a view to coordinating what is an overwhelmingly difficult problem, given the absence of any international structure to deal with it. But whether the matter is dealt with by way of winding up --" as, of course, we now know it is being "--or whether it is dealt with by schemes of arrangement, my present understanding is that all the assets worldwide will have to be taken into account, as will all creditors."

I do not doubt that the Cayman Islands was one of the jurisdictions referred to by the former vice-Chancellor, and his successor, Sir Donald Nicholls, has expressly recognised in his judgment of the 8th April, 1992 that the courts of England, Luzembourg and the Cayman Islands are striving to achieve the same object of conducting the winding up of the companies in question in the best interests of the creditors. In exercising its own jurisdiction, this Court is very cognizant of the importance of maintaining that approach.

Having made these general observations, I now turn to the recommendation by the liquidators that the Majority Shareholder Agreements, and the Pooling Agreements which I have yet to describe, be implemented. Under the Pooling Agreements the assets of BCCI Holdings and its subsidiaries, BCCI Overseas, CFC and BCCI SA, including participating branches of BCCI SA BCCI Overseas, would be pooled and distributed rateably among creditors. I see no sensible alternative to this. The liquidators' report speaks of the many ways in which the affairs of BCCI SA and BCCI Overseas are hopelessly entangled. To circumvent the hugely expensive and time-consuming task of trying to unravel the confusion must be in the best interests of creditors. One important objective of the agreements is to conduct the processing of claims and the distribution to creditors in a more orderly fashion by treating the liquidations of foreign branches of BCCI Overseas and BCCI SA as ancillary to the principal liquidators in the Cayman Islands and

Luxembourg respectively. BCCI Overseas has 63 branches in 28 countries, and BCCI SA has 47 branches in 13 countries. Those figures show the extent to which it is shared by BCCI Overseas and BCCI SA.

Not surprisingly, the approach of the liquidators in these two companies to the Majority Shareholder agreements and the Pooling Agreements has been similar. I have had the benefit of reading the judgment of the learned Vice-Chancellor delivered on the 12th of June in which he approved the proposals of BCCI SA. In what I now say, I have respectfully and freely drawn upon what he then said.

First, I revert to the mutual releases between the BCCI companies and the Abu Dhabi parties. I have seen on a confidential basis the legal advice given to the liquidators, and it would be quite wrong to canvass in public the strengths and weaknesses of the claims which it is proposed to be released. Those releases have not yet been achieved, and to do that would put the company and the liquidators at a disadvantage in any future negotiations or litigation. But anyone who reads the liquidators' report can see that court proceedings in respect of these mutual claims would be likely to be protracted (five to ten years is estimated) enormously expensive and with an uncertain outcome both as to liability and to enforceability of recovery.

The first alternative to the proposals is further negotiations. Affidavit evidence produced by the Abu Dhabi authorities in England was read to me. It was that the Majority Shareholders were themselves the principal victims of the fraud within the BCCI group, and that thy have suffered loss exceeding $6,000 million. They point out that no one else has offered to make any substantial payment for the general body of creditors. They have repeated that the commercial terms of the proposals are not negotiable. They will not increase the amount of their offer. I do not believe that the door is open to further negotiations on these lines in realistic terms.

The second alternative, if the proposals are rejected, is court proceedings by the liquidators against the Abu Dhabi parties. In that event, distribution to creditors is unlikely to be made for years. The latest estimate is that the assets of the principal BCCI companies are expected to realise about $1,301 million. All this money would have to be retained by the liquidators to meet the $2.2 thousand million proprietary claims being asserted by the Abu Dhabi authorities. If those claims succeeded, the companies could well be wiped out. At best, the liquidators could make no distribution until after the claim has been resolved.

If the Abu Dhabi offer is accepted and its contribution of some $1,500 million is included, the likely dividend becomes a little over 32 percent with the first distribution to depositors probably being made by the middle of next year.

The liquidators have also applied for a set of directions which we will call, as they have, the "Cayman Directions". The primary object of the Cayman Directions is to provide the claims in the liquidation of BCCI Overseas to be dealt with in accordance with a defined set of rules. In the absence of the Court having made its own rules governing the winding up of companies, the matter falls to be dealt with in accordance with the general practice of the Court. In the present case I accept the proposal that the rules contained in the Insolvency Rules 1986 of England and Wales, insofar as they

relate to winding up of companies by order of the High Court of Justice in England, should apply to the winding up of BCCI Overseas by order of this Court, to the extent that they are not inconsistent with the Companies Law.

In delivering his directions on the 2nd of March, 1992 and in his judgment of the 8th June, the Vice-Chancellor considered whether or not directions should be given to the English liquidators to convene a meeting of the creditors. He considered the practical problems arising in the conduct of a far from ordinary liquidation involving large numbers of creditors located in different jurisdictions. In particular, he considered the problem of the timing of such a meeting against the background of the timetable laid down by the Majority Shareholder agreements.

The same sort of practical problems would arise in attempting to convene meetings of creditors of BCCI Overseas for the purposes of Section 104 of the Companies Law (Revised). However, by the same Section the Court is entitled to have regard to the wishes of creditors as proved to it by any sufficient evidence. The establishment of a committee of creditors will provide a convenient means for this purpose. In addition, the formation of such a committee will bring the liquidation of BCCI Overseas in the Cayman Islands into line in this respect with the proceedings relating to BCCI SA in England and Luxembourg. An order for the establishment of such a committee will be included in the Cayman directions.

At the hearing yesterday the Majority Shareholders and other creditors were represented and expressed willingness and desire to serve on the creditors' committee. The direction to be included in the Cayman Directions is a direction that a committee of creditors should be formed with matters relating to its constitution, function, and membership being adjourned for consideration in chambers, and that notice of that hearing should be served on the creditors to whom I have referred. That is to say, in addition to the Majority Shareholders Visa International, National Bank of Oman Ltd., Petroservicios Ltda., and BCC (MISR) SAE. In other respects, the Cayman Directions were approved in accordance with the draft directions sought and set out in Appendix 1 of the liquidators' report dated 24th of March, 1992.

I have not attempted to go exhaustively into the factors for and against the proposals which the liquidators have set out in their report dated the 24th of March. That report has been quite widely circulated and was extensively referred to during the hearing yesterday.

I have considered them all carefully and conclude that, without a doubt, acceptance of the package of agreements proposed is in the best interests of the creditors as a whole. It is scant to them to be told that half a loaf is better than no bread, but the alternative is a gamble and, in my judgment, a gamble against the odds. It hazards the present offer against speculative prospects of a better result through negotiation or litigation.

Like the Vice-Chancellor in England, I attach little importance to the fact that only creditors who relinquish any claims that they may themselves have against the Abu Dhabi parties may share in the final contribution by them. There is no evidence of such independent claims, and the precautionary requirement is a reasonable one.

Of course, in spite of the efforts already made, all may yet be in vain, and a great deal of time and money may have been wasted on this proposed settlement, but to reject the proposals now converts that possibility into a certainty. The Abu Dhabi government's offer is conditional on acceptance by creditors with admitted claims totalling $7,000 million. The Abu Dhabi Government can waive this high figure, but not without the liquidators' consent if acceptances are less than $4,750 million. The liquidators would not give such consent without returning to the Court for further directions. That is a very important safeguard for the creditors.

There is another important point with which I must conclude. Unlike the hearing here, the application by the liquidators of BCCI SA in London was strenuously opposed, and the decision by the Vice-Chancellor is under appeal. Should that appeal succeed, the liquidators of BCCI Overseas have undertaken to seek further directions from this Court.

I now turn to the application by the liquidators of ICIC Overseas in case number 286 of 1991. They seek approval in that capacity of an agreement substantially in the form of a draft ICIC agreement which they have already placed before the Court in their capacity as liquidators of BCCI Overseas and CFC. The agreement is one of the Majority Shareholder Agreements, and I need not repeat what I have already said with regard to aspects of those agreements viewed as a package. It is important, however, to understand the place of the ICIC agreement in that package and within the BCCI group.

It is apparent from the Provisional Liquidators' investigations to date that ICIC Overseas was established to provide banking services to clients on a confidential basis to facilitate the purchase and sale of BCCI Holdings shares, either directly or indirectly through an intermediary, and to engage in banking business to create profits for use by BCCI employees and for charitable purposes. BCCI Overseas functioned as a bookkeeping centre for transactions initiated, organised and approved elsewhere. It was the recipient of funds from BCCI Overseas and, perhaps, other members of the BCCI group, and it acted as a conduit for those and other funds to other members of the ICIC group.

All ICIC Overseas accounts and reconciliations were located in Grand Cayman, and the day-to-day booking of transactions was carried out in Grand Cayman. However it is apparent from the Liquidators' investigations so far that the decision-making in ICIC Overseas was initiated and coordinated by BCCI management an others, and that the affairs of the ICIC group and the BCCI group were intertwined further by cross-borrowings and deposits.

The link between ICIC Overseas and the BCCI group, the way in which the BCCI group managed its affairs, and the intervention of BCCI management in the affairs of ICIC Overseas, makes it difficult to distinguish clearly in some instances, between the funds belonging to ICIC Overseas and those belonging to the BCCI group. There are depositors, customers and borrowers common to both the BCCI group and ICIC Overseas.

The background to the ICIC agreement is that the Majority Shareholders claim to have tracing or other proprietary and trust claims against ICIC Overseas, ICIC Investments, and other companies in the ICIC group, as well as the

principal BCCI companies arising from the alleged misappropriation and misapplication of sums deposited by the Majority Shareholders with ICIC Overseas, which totaled in excess of $2,000 million. Pursuant to the ICIC agreement, it is intended that the ICIC group will be ring-fenced, the assets of the companies pooled and the companies liquidated.

Among the terms of the agreement are mutual releases between the Majority Shareholders, the principal BCCI companies and ICIC. From that it can be seen that the prospect of a conflict of interest situation arises for the liquidators in their capacities as liquidators of BCCI Overseas and CFC, and of ICIC Overseas.

I am satisfied that the ICIC agreement would be of considerable benefit to the creditors of ICIC Overseas. Indeed, they would, as far as can be foreseen, do comparatively well. Without the agreement, and even assuming that a claim against BCCI for $2 billion is sound with no viable claim the other way, what matters in the present situation more than the merits is the prospect of seeing any of the fruits of victory. They could be minimal or even non-existent without the rescue package of which the ICIC agreement is a part. However, there is no fully independent opinion before the liquidators or the Court dealing with the merits of the mutual claims between ICIC and the principal BCCI companies. The liquidators act on both sides.

The court undoubtedly has jurisdiction to approve the agreements no less than in the case of the others with which I have already dealt, but should I exercise it in these circumstances? In the ordinary case, I would be almost compelled to adjourn the matter for independent advice to be obtained, but this is the exceptional case. The ICIC agreement is an important building block in the structure in the overall scheme of partial rescue offered by the Majority Shareholders. Without it that structure collapses.

However, the whole matter is urgent, even taking into account the extended deadlines to which the Majority Shareholders have agreed. Their attitudes is clear from the affidavit which they put in Cause 284 of 1991. Further delays can jeopardize the whole negotiations and be catastrophic.

If the Majority Shareholders' tracing or other proprietary claims are left in place and succeed, they could not only wipe out any return to the creditor of ICIC Overseas, but by reason of their nature spill over against the creditors of the principal BCCI companies. It would be wrong for me to comment in more detail than is revealed in the Liquidators report on the claims by the Majority Shareholders, but as the Liquidators themselves recognize, even the pursuit of such a claim would prevent any worthwhile distribution being made to creditors until it was resolved. They would be years ahead. The elimination of the claim is on any view an advantage of such an overwhelming kind that it is hard to envisage any independent expert advising against it.

This matter of conflict of interest is a serious and difficult one, but taking into account all the matters to which I have referred, I conclude that I should approve, without further delay, an agreement substantially in the form of a draft submitted to me, and authorise and empower the Liquidators to execute it and do the acts and things referred to in paragraphs 18.3.1 and 18.3.2 of their report to the Court dated the 24th April 1992 and so order.

I also direct that the Insolvency Rules 1986 of England and Wales shall apply, as in the case of BCCI Overseas, to the Liquidators of CFC and ICIC Overseas.

The Liquidators' costs in each application will be paid as an expense in the respective liquidation, as will the expenses of the Government of the Cayman Islands in providing, through the good offices of the Attorney-General, the services of Mr. Denman as Amicus Curiae. The Majority Shareholders indicated that they sought no order for costs.

Preferential payments in insolvency

In the Matter of the X Bank
In the Matter of Y Ltd
In the Matter of Z Ltd

Grand Court (284 285 and 286/1991)
Harre J
February 17 1992

Mr Denman and Mr Finlay for the Attorney General
Mr Clifford for the Official Liquidators

An application was made to determine whether the joint official liquidators of the above-named companies could be at liberty to pay the reasonable expenses incurred by the Governor-in-Council as a result of initiating proceedings under section 14(1)(v), (3) and (4)(d) of the Banks and Trust Companies Law, 1989 in priority of all other debts of each company pursuant to section 161(1)(a) of the Companies Law (Revised) which provides for various preferential payments in a winding up.

Section 14 of the Banks and Trust Companies Law, 1989 authorises the Governor-in-Council, when of the opinion that one or other of the adverse situations set out in the section has arisen in relation to the holder of a licence under the Law to:

(1) appoint a person to assume control of the licensee's affairs, who holds all the powers of a receiver or manager of a business appointed under s.18 of the Bankruptcy Law (revised) (Section 14(1)(v)); and

(2) require the person so appointed to submit reports and recommendations to the Governor and Inspector of Banks and Trust Companies and on receipt of such reports and recommendations the Governor may, among other things, revoke the licence and apply to the Grand Court for an order that the licensee be wound up by the court (section 14(3)).

Section 161 of the Companies Law (revised) provides for various preferential payments in a winding up, including "rates, taxes, assessments or impositions imposed or made under provision of any law applicable to the Islands becoming due and payable within the 12 months next before the relevant date." (S.161(1)(a).

Held: (application allowed)

(i) The reasonable costs incurred "at the expense of the licensee" in accordance with S.14 of the Banks and Trust Companies Law 1989 are "assessments or impositions imposed or made", under the provisions of that Law so as to fall within one of the categories of preferential payments.

(ii) The reasonable expenses incurred by the Governor-in-Council as a result of initiating the

proceedings set out in S.14(1), (3) and (4)(d) of the Banks and Trust Companies Law, 1989 include any sums which are imposed or assessed in accordance with the paragraph and are those which directly and reasonably arise from the proper exercise by the appointee of his function.

(iii) The relevant date to determine preferential payment under S.161 of the Companies Law (Revised) is the date of the winding up order.

JE

Companies - Loans to shareholders - Open ended loans - Interest

EH v RS LF and B Ltd

Grand Court (46/88)
Malone CJ
November 13 1991

Legislation

Local Companies (Control) Law
Companies Act 1948 S 190 (UK)

Authoritative Works

Palmer's Company Law 24th ed Para 77-08 at p 1100

The plaintiff was unrepresented
Mr Muirhead QC and Mr Hampson for the defendants

The plaintiff was a shareholder of the defendant company. The first two defendants are shareholders and directors of the defendant company. In March, 1987, the plaintiff executed what appears to be an agreement for the sale of shares and received a cheque which was later negotiated. The plaintiff seeks a declaration that she is still beneficial owner of her shares, and an accounting of all profits due from the company.

The defendant company counterclaims seeking repayment of two alleged loans.

Held: (judgment for the defendants)

(i) The form of the contract is not prescribed by the Local Companies (Control) Law nor the Articles of Association. The facts reveal that the plaintiff entered into a valid agreement in March, 1987 and therefore she has sold her shares.

Even if the plaintiff were still a shareholder there would be no amount due to her until the company declared a dividend (Refer to Palmer's Company Law).

(ii) The documentary evidence shows the plaintiff received two loans from the defendant company. Such loans are not illegal under the Local Companies (Control) Law since the Law has no provision corresponding to S.190 of the English Companies Act, 1948.

No time was fixed for the repayment of these loans. More than five years has passed since the first loan and more than four years in the case of the second loan. Repayment is now overdue. Since no provision was made for interest, no interest is payable.

JE

local physician.

JE

Restraining order

In the Matter of the X Bank Ltd and the Companies Law (Revised)

Grand Court (436/91)
Malone CJ
March 31 1992

Legislation

Companies Law (Revised)

Mr Foster for the appellant
Mr Lamontagne and Mr Bannon for the respondent

The official liquidators of X Bank were granted an order in March, 1992 restraining Mr. H. (now a foreign resident), a director of the bank until its winding up, from leaving these Islands. The order was given to ensure Mr. H's attendance for an examination on oath concerning the affairs and assets of the bank and the full production of documents. Mr. H now applies for the discharge of this order on the grounds of ill-health.

Held: (application dismissed)

There are over $3 million in assets which are not accounted for. Mr. H has not responded fully to the request for information made by the joint liquidators. The court is not persuaded that his health problems cannot be handled by a local physician.

JE

Estoppel - Affirmation - Effect of false disclosure

Fiduciary duties of promoters and directors - Director with interest in contract with company - Duty to declare nature of interest - Rescission of contract - Restitutio in integrum

P Ltd v G H Ltd

Grand Court (401/90)
Schofield J
July 1 1992

Cases referred to

Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218
Aberdeen Ry v Blackie (1854) 1 Macq HL 461
Gluckstein v Barnes [1900] A C 240
Omnium Electric Palaces Ltd v Baines [1914] 1 Ch 332 347
Smith v Kay (1859) 7 HLC 750
Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch 392
Spence v Crawford [[illegible]] 3 All ER 27[illegible]
Pedro Development [illegible] v Huig Z[illegible]ant and

another (GC 212/89)

Mr Foster and Mr Turner for the plaintiff
Mr Alberga QC and Mr B Ashenheim for the defendant

The W family in Grand Cayman owned a piece of land at West Bay Beach North along the Seven Mile Beach, upon which is currently built the Great House condominium complex.

In 1987, the W family was approached by one B with a proposal to develop a condominium complex on their piece of land. A joint venture was proposed.

The W family owned and controlled a family business called GCC Ltd. and for the purpose of the condominium project, a subsidiary company called N Co. was created to transact on behalf of the W family.

A company, G H Ltd., (the defendant in this case) was formed for the purpose of developing the complex and N Co. gave G H Ltd. an option to purchase the land for the project for US$4 million. The option was to be exercised by 30th June, 1988 and was subject to two conditions, namely, that B procured the subscription of 2,500,000 preference shares and that agreements be secured for the purchase of twelve apartments in the complex to be built. G H Ltd.'s capital was to consist of 50,000 ordinary shares of US$1.00 and US $4.5 million worth of preference shares. N Co. was to be paid US$2 million in cash and issued US$2 million worth of preference shares. Preference shares worth US$2.5 million were to be issued to other investors.

B arranged for the subscription of 1,250,000 preference shares by L. an American industrialist, 500,000 by P, a property developer (the subscription was by P's family company, AFS) and 250,000 to H. B. himself subscribed for 500,000 preference shares. The preference shares were all taken by 16th June, 1988. A. took 1,000 ordinary shares.

To satisfy the other condition, B continued attempting to secure agreements for the purchase of the apartments and wanted to secure for himself apartment number 21. To achieve the sale, B was prepared to take apartment 9 instead whenever a purchaser expressed an interest in apartment 21. If someone expressed an interest in apartment 9, B was prepared to take apartment 19. B who is a senior partner of a firm of quantity surveyors, formed his own company, P Ltd., (limited by guarantee) for the purpose of purchasing properties and intended to purchase the apartment or apartments through P Ltd. B owned beneficially 100% shares in P Ltd.

In the memorandum prepared by B offering the shares in G H Ltd., he failed to mention his interest in P Ltd. to prospective shareholders and failed to disclose his intention to purchase one or two apartments in the complex. B fixed the prices for the apartments and was responsible for their sale. For the purpose of seeing to the management of the project and sale of the apartments, B formed a company called D.S.I.

A purchaser had earlier expressed deep interest in apartment 21 and to ensure the sale of the twelve apartments within the option time limit, B shifted his interest to apartment 9, priced at US$820,000.00. Another purchaser expressed an interest in apartment 9 and B changed for apartment 19, also priced at US$820,000.00. The purchaser of apartment 21 dropped out and

B switched back to apartment 21, the latter being his favourite.

B contracted through P Ltd. for the purchase of apartment 21 on 3rd June, 1988. The agreement was signed with G H Ltd. (B was the sole director of G H Ltd. at the time, the other three corporate directors having been retired six days earlier.) B failed to arrange for an independent Board of Directors to be appointed to approve the contract (herein referred to as the P Ltd. contract). Apartment 21 had originally been priced at US$811,200.00 and the contract price was US$820,000.00.

P (AFS), having contracted to purchase apartment 22, had earlier expressed an interest in apartment 21 and B, without disclosing he was purchasing it, simply said P could have the first option if it became available. B held on to apartments 19 and 21. B and P subsequently agreed to exchange apartment 19 for 22 and 22 was later sold to another purchaser. L also bought one apartment.

B did not disclose his interest in P Ltd to any of the directors/shareholders until the first meeting of a newly constituted Board of Directors (B,W,A and another person representing P and L) on 6th February, 1989, and he stated he only had 30% shares (when he actually had 100% shares). At the first annual general meeting on 30th December, 1988, B failed to disclose his interest in P Ltd. and failed to disclose that he was purchasing two of the apartments through P Ltd.

Concern was expressed by some of the shareholders of G H Ltd. about the extent of the discount at which P Ltd. had purchased two of the units.

There appeared a division between B and A on the one hand and the other directors (which by then included P and L) on the other hand.

Around September, 1990 three of the directors took legal advice to terminate a project management agreement signed with B in February, 1990 and to rescind the contract with P Ltd. Notices of the rescission were given to B. The rescission was ratified at a subsequent meeting of the Board of Directors of G H Ltd.

P Ltd. filed a suit seeking inter alia:

(i) a declaration that the notices of rescission were ineffectual;

(ii) in the alternative, that G H Ltd. is estopped and/or prevented from rescinding the agreement of sale;

(iii) that G H Ltd. perform its obligation under the sale contract; and

(iv) damages in respect of the loss suffered by P Ltd. as a result of G H Ltd.'s breach of the agreement of sale.

G H Ltd. filed a counterclaim, seeking a declaration that G H Ltd. was entitled to rescind the contract with P Ltd and in the alternative damages for conspiracy. In addition, the defendant company sought a rectification of the Land Register on the ground that two rooms (maid's quarters) separate from apartment 21 had been wrongly included in the Land Register as part of apartment 21.

In evidence, B conceded he had a fiduciary duty to disclose his purchase of apartment 21 to the subscribers of G H Ltd. He however stated that his breach was merely technical. He testified that he was unaware of his duty to disclose his interest in P Ltd. to the shareholders of G H Ltd. B said he had discussed on various occasions his intention to purchase an apartment with each of W,P and L. Some of the shareholders gave evidence that they were unaware that B had 100% shares in P Ltd. even up to the time the rescission notice was given and that if they had known of the situation, they would have reconsidered their decision to subscribe in G H Ltd.'s shares. W said B misrepresented the identity of P Ltd. to him as "an Englishman well known to him".

P also stated in evidence that B was able to sell apartment 22 at a price $230,000.00 more than he (B) himself had agreed to pay. B had discussed with him that the $230,000.00 profit be paid into P Ltd. or into P's company, AFS. P said he had insisted the money be paid to G H Ltd.

Held: (dismissing the plaintiff's claim)

(i) The three witnesses for the defence (the shareholders) had different backgrounds and had only been brought together by their common interest of investing in the project. They could not therefore be said to have conspired in any way to deprive B of his apartment. The witnesses had become frustrated with the handling of the project by B. B had not been honest with the shareholders. He had deceived his co-investors up to the time of the hearing. He had no credible explanation for informing the other investors that he only had 30% shares in P Ltd.

(ii) On the date the contract with P Ltd. was entered into, B was both promoter and director of G H Ltd. In both capacities he owed fiduciary duties to G H Ltd. In particular, as a promoter, he had a duty to disclose to G H Ltd. any interest which he had in any transaction entered into by that company (Erlanger v New Sombrero Phosphate Co.). As a director he had a duty not to put himself in a position where his own interests conflicted with that of G H Ltd. (Aberdeen Ry v Blackie). B was in breach of both duties. There were no shareholders for B to disclose his interest to on 3rd June, 1988 but he had a duty to notify potential shareholders: (Erlanger v New Sombrero Phosphate Co. and Gluckstein v Barnes). He could have done so in the memorandum or at least to one identified shareholder at the time, N Co.

(iii) B was in control of G H Ltd. and could have arranged the appointment of independent directors to whom he could have declared his interest at the first shareholder's meeting in December, 1988 to seek ratification of the contract.

(iv) The potential shareholders in G H Ltd. had a right to know that B's company, P Ltd., had contracted to purchase two apartments in the Great House. Upon that information they would have decided whether or not to invest in G H Ltd. They would have had an indication as to whether B as a 100% shareholder in P Ltd. would have been able to find the funds to pay for both apartments to fulfill the terms of the option. B's non-disclosure could not be regarded as a mere technical breach of his fiduciary duties to G H Ltd. The false disclosure of a 30% interest in P Ltd. was of a material particular. As a director, B ought to have ascertained the responsibilities involved in

the position.

(v) Against an argument that the Articles of Association of G H Ltd. permitted B to enter into a contract with the company, the judge stated that a company could not be deprived of its remedy of rescission or other remedy against a promoter by any provision in the Articles drawn with the astuteness of drafting regulations for the purpose of relieving promoters of the general equitable obligations recognized and enforced in Erlanger v New Sombrero Phosphate Co.

(vi) The plaintiff's argument that the inconsistency of G H Ltd.'s actions with regard to the intention to rescind was an indication of affirmation, was held not to be persuasive. Had B's interest in P Ltd. been 30% as stated, one may well have determined that G H Ltd., by its subsequent actions in proceeding as if the contract with P Ltd. was effective, had affirmed the contract. But the directors of G H Ltd. did not know the extent of B's interest in P Ltd. even beyond the date they purported to rescind the contract. The extent of B's interest was a material fact which ought to have been disclosed. Had the other directors of G H Ltd. known that B had 100% share in P Ltd., they might have taken a different stance. Parties can only affirm a contract after they have discovered the whole of the material facts. The directors of G H Ltd. did not know all the material facts until after the commencement of the hearing and could therefore not be said to have affirmed the contract.

(vii) G H Ltd. could not be said to be estopped from rescinding the contract with P Ltd. A representation cannot be relied on as an estoppel if induced by the concealment of any material fact on the part of the person who wishes to use it as such.

(viii) Regarding the plaintiff's argument that the contract could not be rescinded because restitutio in integrum was impossible, apartment 21 having been altered by way of improvement to its design and that it would be impossible to do justice between the parties by returning the apartment to G H Ltd., it could not be gainsaid that the apartment had been altered in its design since the contract was entered into. Nevertheless the authorities show that where the substantial identity of a subject matter remained, restitutio in integrum is regarded as possible (Lagunas Nitrate Co. v Lagunas Syndicate and Spence v Crawford). The defendant company was prepared to take the apartment in its altered state and compensate the plaintiff by repayment of all installments so far paid together with interest and payment of all expenses relating to any alteration to the apartment. The money spent by the plaintiff on apartment 21 should not affect the substantial justice of the case or its overall outcome.

(ix) P Ltd. on the above considerations was not entitled to any of the reliefs sought. The court has always emphasized the fiduciary duties of promoters and directors of limited companies (Pedro Development Ltd. v Huig Zuiderant and another). It would be a strange decision if the court endorsed B's deceit and granted him relief.

(x) The counterclaim would not be granted since the court would have been inclined to find an affirmation of the contract if B's 30% declared interest in P Ltd. had been true. G H Ltd. was entitled to rescind the contract with P Ltd. In so far as the claim relating to rectification of the Land Register regarding the

maid's quarters was concerned, since apartment 21 was reverting to G H Ltd., they could determine how to assign it.

AD

Insolvency - appointment of Liquidators

In the Matter of the X Company Ltd

For the Petitioner Mr Denman
For the provisional liquidator Mr Clifford
For the creditor Ms O'Connor-Connolly

Cases referred to

Re Esal (Commodities) Ltd. [1988] BCC 475
Re Arrows Ltd (1991) BCC 11
Re Maxwell Communications Corporation [1991] PLC

Following the order that the X Company Ltd. be wound up, official liquidators were appointed. The appointed liquidators were also the liquidators of Y (Overseas) Ltd. and the Z Corporation. Both companies were members of the Y group incorporated in the Cayman Islands with there existing the prospect of substantial claims and counterclaims between Y (Overseas) and the Z Corporation. The Court considered the appointment in the light of a potential conflict of interest.

Held:(order as follows)

(i) The type of potential conflicts of interest which may arise in this situation do not in practice give rise to any serious difficulties because they are well known to the experienced insolvency practitioners. (Re Esal (Commodities) Ltd.)

(ii) Any potential conflict of interest can be dealt with if and when it arises. (Re Arrows Ltd.)

(iii) Liquidators faced with a conflict of interest should have no difficulty in securing the appointment of necessary independent persons by the Court. (Re Maxwell Communications Corp.).

WB

CONTRACT

Rental agreement as agent for principal - Subsequent agreement to refund as principal - Agent's right to be indemnified by principal

Rainero v Cumber (T/A Cayman Rent-A-Villas) and John Stewart(Third Party)

Grand Court (13/92)
Malone CJ
May 20 1992

Cases cited

Britain v Lloyd (1845) 14 N & W 762
Boston Deep Sea Fishing and Ice Co v Ansell(1888) 39 Ch D 339
Adams v Morgan & Co Ltd [1924]

Mr Turner for the plaintiff

Mrs Messer for the defendant
Mr Giglioli for the third party

The defendant, acting as the agent for a third party principal, rented property belonging to the principal to the plaintiff at a total rental of $10,410.00. The plaintiff sought rescission of the rental agreement on the ground that the property was not in the condition it was represented to be. He asked for the refund of the rent, less $900 for three nights' accommodation at a rate of $300 per night. The defendant who had by then paid over the rent to the principal, refunded $5,000 and promised to refund the remainder ($4,500) on a subsequent date.

The defendant asserted it was the responsibility of the principal to ensure the property was in a rentable condition and sought to be indemnified by the principal for the rent refund.

Held: (allowing the indemnity application and refusing to strike out the third party notice)

(i) Prima facie, if an agent carries on a business for a principal, he/she is entitled in the absence of special circumstances to a full indemnity (Britain v Lloyd) and conversely he/she is bound to account for every profit (Boston Deep Sea Fishing & Ice Co v Ansell). Consequently an agent who is placed by his/her principal in a position in which he/she becomes liable to pay and does pay money to a third party is entitled to be indemnified in respect of that payment notwithstanding that the principal may not thereby have been relieved from liability (Adams v Morgan & Co Ltd.)

(ii) It follows that if the principal was responsible for maintaining the property and failed to do so and as a result the defendant was compelled to refund the rent, she was entitled to be indemnified. This was not affected by the fact that the agreement to refund (the subject of the action) was not made on behalf of the principal. The agreement to refund was intimately connected to the rental agreement. The third party notice pleaded matters relating to the rental agreement.

(iii) The application to strike out the third party notice on the grounds that: (a) it disclosed no reasonable cause of action; (b) it was scandalous, frivolous and /or vexatious and (c) that it was an abuse of the process of the court - must be dismissed with costs to the defendant.

AD

Application for summary judgment - Dishonoured promissory note - Damages for alleged breach of contract cannot be set-off against claim

Metallgesellschaft Hong Kong Ltd v Omni Metals Trading

Grand Court (382/91)
Malone CJ
January 30 1992

Cases referred to

Brown Shipley & Co Ltd v Alicia Hosiery Ltd [1966] 1 Lloyds Rep 668
James Lamont & Co Ltd v Hylands Ltd [1950]1 All ER 341
Bond Street Ltd v Avalon Promotions [1972] 1 All ER 545
Nova (Jersey) Knit Ltd v Kammgarn Spinneri

GmbH [1977] 2 All ER 463
Agra and Mastersman's Bank v Leighton [1866] LR 2 Exch 56
Lloyds Bank v Ellis Fewster and others [1983] 2 All ER 424

Legislation

Judicature Law S 62(2)

Mr Jones for the plaintiff
Mr Turner for the defendant

The plaintiff applied for summary judgment in an action on dishonoured promissory notes. The defendant failed to aver a total lack of consideration and consequently did not apply for leave to defend.

The defendant however opposed the application on two grounds:

(i) This concerned the amount in dispute. The plaintiff claimed that the principal sum due was US $5,353,559.55. The defendant claimed that the balance due was US $3,498,147.20.

(ii) Furthermore, the plaintiff claimed that the payment of a promissory note in the sum of US $4,278,759.55 had matured on the 30 August, 1991. Against this, the defendant had alleged the existence of an oral agreement that payment of the note was to be deferred by the issue of further promissory notes in the sum of approximately US $300,000.00 and US $350,000 payable over a number of months. The defendant alleged the plaintiff was in breach of this oral agreement and sought to set off the damages for the breach plus interest against the plaintiff's claim. The plaintiff denied the existence of any such agreement and stated in the alternative that even if there was such an agreement, it did not give rise to an allowable set-off.

Held: (granting the application for summary judgment)

(i) In Brown Shipley & Co. Ltd. v Alicia Hosiery Ltd. it was established that bills of exchange should be treated as cash. In James Lamont & Co.Ltd. v Hylands Ltd. it was declared that where there is an action between the immediate parties to a bill of exchange, judgment should be given on the bill and it is not to be held up by virtue of some counterclaim which the defendant asserts; this is so even where the counterclaim relates to the specific subject matter of the contract. In Bond Street Ltd. v Avalon Promotions it was said the court was not bound to give judgment in every case of a dishonoured bill. The effect of this comment was however negatived by the House of Lords in Nova (Jersey) Knit Ltd. v Kammgarn Spinneri GmbH where it was said that an unliquidated cross-claim cannot be relied on by way of set-off against a claim on a bill of exchange. It had earlier been stated in Agra and Masterman's Bank v Leighton that as between the immediate parties, a practical failure of consideration may be relied on as a pro tanto defence, but only when the amount involved is liquidated or ascertained.

(ii) Following the above authorities, the defendant's counterclaim could not be allowed against the plaintiff's claim as it was unascertained and unliquidated. Further, if there was a basis for the counterclaim at all, it was a different contract, although it related to the specific subject matter. The practice of not allowing a defendant to establish a set-off or counterclaim against a bill of exchange will

obtain whether the counterclaim is connected with or arises out of, or is independent of, the contract in respect of which the bill, cheque or note was given and whether or not the action is between the immediate parties to the bill. If the defendant wished to pursue any counterclaim, it had to be done separately.

(iii) As regards the dispute over the exact amount owed, the defendant could not have unconditional leave to defend as to the difference, if any, because there was no triable issue, the defendant not averring a total lack of consideration. The plaintiff was therefore entitled to be paid US $5,353,559.55. In addition, the circumstances justified the exercise of the judge's discretion to award interest to the plaintiff under S.62(2) of the Judicature Law at a half yearly rate of 10% until the date of payment.

AD

Criminal Law

Murder - Weighing evidence in absence of corpse - Principles to be applied

R v Ebanks & Bush

Grand Court
Schofield J
October 20 1992

Legislation

Criminal Procedure Code S 56

Authority cited

R v Onufrejczyk [1955] 1 All ER 247

Mr Archie & Mr Roberts for the Crown
Mr. Lamontagne QC for Tony T. Ebanks
Mr. Harrison & Mr Levy for Tony E Bush

The indictment alleged that the two accused were responsible for the murders of Bernie Anglin (Count 1) who disappeared in October 1987, and Charles Scott (Count 2) who disappeared in December 1990. In neither case had the body been recovered, but articles of clothing were found on the ironshore and in the sea shortly after the disappearances.

The evidence against both defendants on both counts was circumstantial, and the most likely motive was that both men were suspected of being homosexuals.

The main evidence against Bush on the first count on the indictment was as follows:

(i) Bush was the last person to see Bernie Anglin alive. According to Bush's evidence, Bush and Bernie had been drinking at Bush's house when Bush suggested that Bernie and he go into the bushes behind Ebanks' home in order to smoke some ganja. Some time later Bush returned alone. On his return he asked Kent Ebanks, who was at Tony Ebanks' house, if he had seen Bernie. Later in his statement to the police however, Bush claimed that Bernie had left by another route. It is common ground that Bernie was not seen again after this incident.

(ii) There was evidence also of two alleged confessions made by Bush:

(a) to Ivon Ebanks who, whilst sharing a cell with Bush at Northward Prison in 1988, alleged that Bush had admitted to the killing of Bernie in the bushes behind Ebanks' house, by shooting him in the head three times and then by hitting him with a rock and a piece of wood. The supposed motive was that Bush was acting in concert with a Jamaican who had an ongoing drug-related dispute with Bernie.

(b) to Denise Ebanks, a former girl-friend of Bush, who alleged that in 1988 Bush had told her that he had killed Bernie and that she was to keep quiet about it.

(iii) Evidence also existed of an altercation which had taken place in a bar at Spanish Cove where Bernie's brother and wife work. About two months after Bernie's disappearance Bush entered the bar and was refused service due to his suspected involvement with Bernie's disappearance. An argument ensued during the course of which Bush was accused of killing Bernie. Bush responded with the threat: "Do you want me to do the same thing to you?"

(iv) On the night prior to Bernie's disappearance Bush had met with one Sidney Parchment and had produced a knife stating that he felt like killing someone that night, and that having cut "their throat" he would tie a block to "their feet" and drop "them" in the sea.

The evidence against Ebanks on the first count on the indictment was as follows:

(i) The strongest evidence against Ebanks on the first count came from Ebanks' sisters Paula and Andrea, who both testified that Ebanks had told them of his having witnessed the killing and that he had helped to dispose of the body in the sea. The reason for the killing was stated as being that Bernie was a homosexual.

(ii) The other evidence against Ebanks consisted of statements made by Ebanks which were largely exculpatory. One such statement was contained in the testimony of one Roger Manderson, a friend of Ebanks', who had given Ebanks a lift in his car shortly after Bernie's disappearance. Whilst in the car Manderson asked Ebanks who he thought had killed Bernie. Ebanks replied unequivocally that he knew who had killed Bernie and had in fact witnessed a third person strangling Bernie with a tee shirt, and then smash him over the head with a large rock. Ebanks stated that he did not report the matter to the police because the body disappeared.

The second count on the indictment concerned the disappearance of Charles Scott, who disappeared on 14th December 1990, having also been last seen on Ebanks' property.

The evidence against Bush and Ebanks on the second count was as follows:

(i) In the month prior to Charles' disappearance Ebanks and another man had been sitting on the porch of Ebanks' house when Charles walked by. The two men had commented that Charles and Sidney Parchment both deserved to be dead because they were "queers". Ebanks added that he could not wait for a certain person to come out of prison.

(ii) Further evidence was given by Mrs. Aldria Ebanks, a neighbour of Tony Ebanks, who, having seen Charles with the two defendants at 2.30 a.m. on December 15th, heard Bush say to

Ebanks: "all you have to do is stick with me". At 4.00 a.m. Mrs. Ebanks alleged that she was awoken by screams coming from the direction of Tony Ebanks' house.

(iii) Tony Bush had lied to the police concerning the time he had last seen Charles, firstly saying it was about 7.30 or 8:00 p.m. on the Friday evening, but then agreeing that, as stated by Mrs. Aldria Ebanks, he had been with Charles in the early hours of Saturday morning.

Three defence witnesses however had been called who testified that they saw Charles on Saturday evening and Sunday lunch-time.

Held: (convicting Bush and Ebanks on count one, of murder and being an accessory after the fact to murder respectively, and acquitting both defendants in respect of count two.)

(i) Four principles were to be applied in the consideration of the evidence:

(a) The absence of a body is not fatal to the prosecution's case if it can establish circumstantial evidence which leads to murder being the only conclusion - R v Onufrejczyk applied.

(b) The fact that the two defendants had already spent time together in prison had no bearing on the decision.

(c) Extra-judicial statements made by one defendant against the other could not be considered when determining the case against the other.

(d) The two counts on the indictment were to be considered independently of each other.

(ii) Count One: R v Bush

The salient evidence against Bush was:

(a) He was the last person to see Bernie alive.

(b) Both Ivon Ebanks and Denise Ebanks were honest and reliable witnesses. There was no reason why they would both have falsely testified as to Bush having recounted to them his responsibility for Bernie's death. Bush's account may have been exaggerated, but he had not fabricated the story to bolster his own image but rather had embellished the facts.

(c) Sidney Parchment's evidence, concerning the conversation with Bush, shortly before Bernie's disappearance, was also to be believed. The most that could be said of this evidence however was that Bush's prior words were consistent with his later admissions of what he did to Bernie.

(d) Bush's question to Kent Ebanks as to whether the latter had seen Bernie emerge from the bush was inconsistent with his statement that Bernie had left the bush in the opposite direction.

However, the altercation which had taken place at Spanish Cove did not carry evidential weight. The Crown urged that Bush's threat, ("Do you want me to do the same thing to you?) was tacit acceptance that he had killed Bernie. This was not so; Bernie's brother's recollection of the event may have been blurred after five years, but in any event Bush's reply had been ambiguous and spontaneous.

(iii) Count one: R v Ebanks

The salient evidence against Ebanks was:

(a) Evidence from four witnesses that Ebanks had told them of his knowledge of the circumstances of Bernie's death.

(b) Whilst many of Ebanks' statements were exculpatory some parts thereof were inherently unlikely, as for example Ebanks' weak justification to Roger Manderson as to why he failed to report Bernie's death to the police.

(c) Ebanks' sisters both testified as to alleged conversations they had had with Ebanks in which he admitted his involvement in Bernie's disappearance. They were honest and reliable witnesses. However the highest the evidence went was to suggest that Ebanks had entered the bush with Bush intending to beat Bernie. Ebanks had then left and the act of killing Bernie had been performed by Bush in Ebanks' absence. Ebanks then assisted in the disposal of the body.

Accordingly Ebanks was not guilty of the murder of Bernie, but was an accessory after the fact to murder as provided for in S.56 Criminal Procedure Code.

(iv) Count two: R v Ebanks and Bush

The following issues were to bear no evidential weight:

(a) Ebanks' involvement in a conversation to the effect that Charles Scott should be dead because he was queer.

(b) The scream allegedly heard by Mrs. Ebanks at 4.00 a.m. coming from the direction of Ebanks' house. No-one else heard the screams and there were other houses nearer to Tony Ebanks' than that of Mrs. Ebanks.

(c) Bush's lies to the police concerning the last time he saw Charles alive. Such lies were not explainable only as an indication of Bush's involvement in Charles' disappearance.

(d) The evidence of the three defence witnesses who testified to seeing Charles alive on the Saturday night and Sunday. This evidence was honestly given, but probably mistaken.

(v) Whilst a great deal of suspicion hung over the two defendants in connection with Charles' disappearance there was insufficient evidence against each defendant to satisfy the court, beyond a reasonable doubt, that either was guilty on the second count.

MD

Sentence - Recommendation for deportation - Jurisdiction - Full enquiry

Ramon Diaz v R

Grand Court (SCA 231/91)
Schofield J
April 14 1992

Authority referred to

John W Margeson v R (CICA 8/90)

Legislation

Caymanian Protection Law S 59

Mr Furniss for the appellant

Mr Roberts for the Crown

The accused pleaded guilty to a charge of burglary contrary to S.220 (1)(b) of the Penal Code. In addition to a term of imprisonment he was recommended for deportation. He has lived on the islands for five years, is married to a Caymanian and has three children. It is against that recommendation that this appeal is made.

Held: (appeal allowed)

The Grand Court has jurisdiction to entertain an appeal against a recommendation for deportation made under S.59 Caymanian Protection Law according to John W. Margeson v R. In Margeson the Cayman Islands Court of Appeal stated:

"In our judgment there should be a full enquiry into a case before any order recommending deportation is made. A person who is likely to be the subject of the order should be given notice of what may happen to him. The object of that is to give him the opportunity to prepare his answer to a suggestion that he should be recommended for deportation. It follows that no court should make an order recommending deportation without full enquiry into all the circumstances. It should not be done, as has sometimes happened, by adding a sentence as if by an after thought at the end of observations about any sentence of imprisonment or fine. It would be advisable for judges to invite counsel to address them specifically on the possibility of a recommendation for deportation to be made".

There was no such enquiry held in this case.

JE

Rape - Corroboration requirement - Lies as corroboration - Essence of alibi evidence - Identification of defendant - Relevance of forensic evidence

Ebanks v R

Cayman Islands Court of Appeal (CICA 22/91)
Zacca Pres Georges and Kerr JJA
August 12 1992

Cases referred to

R v Lucas (1981) 73 Cr App R 159
R v Reid [1978] 27 WLR 254

Mr Harrison for the appellant
Mrs Hernandez for the Crown

The appellant was appealing against his convictions on two charges of having raped B and having committed an unnatural offence with the same person on 2 November, 1989.

The prosecution case was that the appellant had entered the complainant's residence, held her at knife point and raped her, turning her over from time to time to have coitus per anum and then reverting back to normal intercourse. After intercourse, the appellant had stolen some money and jewellery from the complainant.

The complainant had gone to the hospital around 4.45 a.m and the police had been contacted to interview her.

The complainant's linen and night clothes were sent for forensic examination.

From the evidence, it seems the police had seen the appellant within the vicinity of the

complainant's house while on patrol in the early morning hours around the date of the offence. There was conflicting evidence as to the date the police saw the appellant. According to the appellant he had met the police in the early hours of Wednesday, 1 November. The police maintained they had seen him in the early hours of Thursday, 2 November.

The complainant was unable to identify the attacker and her description of the man was quite vague. During police interview, the appellant admitted knowing the complainant but denied being the rapist.

Forensic evidence of hair pieces found in the complainant's linen matched that of the appellant. Semen stains found in the complainant's linen also matched that of the appellant. A fourth test on the semen stain was not conclusive. From figures collated in the United States of America, the expert concluded that there was one chance in 50,000 that the stains could have been made by semen from some person other than the appellant.

The expert called by the defence had challenged the correctness of applying the statistics collated in the U.S.A. to the Cayman Islands where there are large kinship groups.

The trial judge had directed the jury as to the requirement for corroboration of the evidence of the complainant. After defining corroboration to the jury, the trial judge had gone on to state that if the jury were satisfied that the appellant had deliberately lied when he said the police officers had not seen him on Thursday, 2 November and that the motive for lying was the realisation of his guilt and fear of the truth, then they could regard the lie as corroborative of the complainant's evidence in the sense which he had defined it, (i.e. evidence from an independent source confirming the complainant's evidence in some material particular and implicating the appellant in the offence with which he had been charged).

The appellant was convicted by the jury and he was appealing on the grounds (inter alia) that:

(1) The trial judge erred in his direction to the jury with regard to the corroborative evidence when he said if they were satisfied that the appellant was lying as to the date he met the police, then that was capable of corroborating the evidence of the complainant.

The appellant argued that there was no question of corroborating any identification evidence of the complainant since she had given no satisfactory description of her assailant from which identification was possible.

(2) That the trial judge had failed adequately to put the appellant's case to the jury, in particular the issue of the appellant's alibi. He had further directed the jury that alibi evidence given by a witness called by the appellant to the effect that the appellant had telephoned her on the morning of Wednesday, 1 November, was irrelevant.

Held: (allowing the appeal)

(i) The trial judge misdirected the jury on the issue of lies as corroboration. Acting in accordance with the direction that if the jury ascertained from the police evidence that the defendant was lying, there would be sufficient evidence to convict even without considering the evidence of the forensic experts, would result in the appellant being convicted on the basis that he had been seen in the vicinity of the scene of

the crime shortly after it had been committed and lied about his presence there. The proof of the lie would have been used to bolster lack of proper evidence of identification. If there had been some weak identification on the criteria of the rules in Turnbull, a proven lie could possibly strengthen it. Where there was no such identification, as on the present facts, proof of the lie cannot be advanced as a substitute under the guise of corroboration.

(ii) As to the alibi evidence, this focused on the dispute as to whether the police saw the appellant on the morning of 1 or 2 November. The appellant's whereabouts on the morning of 2 November was not closely investigated. The appellant had stated in cross-examination that he stayed at home all day on 2 November because it was a rainy day. In the summing up the trial judge had stated that the appellant had failed to say where he was in the early hours of Thursday, 2 November. The trial judge had stated that a witness called by the appellant had talked about a telephone call received from the appellant on the morning of 1 November and that her evidence was irrelevant as far as the events of 2 November were concerned. The evidence given by the appellant could reasonably bear the meaning that he was at home all day on Thursday, 2 November. To say that the appellant had presented no evidence on this issue was a misdirection. It was also a misdirection to say that the evidence of the appellant's witness that the appellant had spoken to her on the telephone on the morning of 1 November was irrelevant. It was relevant in that it tended to support the appellant's story that he was walking from the Treasure Island (where he alleged he went to make an international phone call) homewards around 4.00 a.m that morning. Since the dispute was centered around the question whether the police saw the appellant on the 1 or 2 November, any evidence which indicated that it was more likely that the meeting was on Wednesday (1 November) was relevant.

(iii) Whilst the direction on the alibi was accurate, it is desirable for the judge to emphasise specifically that where an alibi is in issue, the burden of proof does not shift onto the accused. It remains always on the Crown and even if the alibi is rejected, the jury must review the case for the prosecution in order to satisfy themselves that the guilt of the accused has been proved so that they can feel sure and certain about it.

(iv) The character of the above misdirections was such that the proviso could not be applied. Indeed it is not often that the proviso can be applied where there has been a misdirection with regard to corroboration.

(v) The issue was whether there should be a new trial. The evidence implicating the appellant was essentially forensic - similarity of hair samples and matching seminal fluid. The DNA matching was said by the expert to have greater certainty than the comparison of hair specimen. It was also clear that in the context of these Islands where there are large kinship groups, the probability figures used in the U.S.A. can be questioned. The police evidence as to the sighting of the appellant was flawed. The police interview was directed to events taking place on Wednesday (1 November) and the police had sought to explain this by saying since 4.00 a.m was shortly after midnight, the date of the previous day had been mistakenly used. During the interview the police had questioned the appellant about his activities on the morning of 2 November (the date of the incident). This contrast makes the suggested explanation of the error unlikely.

(vi) In R v Reid Lord Diplock discussed the factors to be weighed in deciding whether it was in the interests of justice to order a new trial when allowing an appeal in a criminal matter. Persons who have committed serious crimes should not be allowed to escape because of a blunder on the part of the judge. While the trial judge did err in this case, the issue goes beyond this to the essential reliability of the forensic evidence of identification unsupported by other evidence of the presence of the appellant at or near the scene of the crime. A retrial will be an ordeal for both the appellant and the complainant, the events in question having taken place two and a half years earlier. Accordingly, the interests of justice did not require a retrial. The appeal would be allowed without further order.

AD

Speeding - Ordering suspension of the appellant's licence in unrelated matter - Procedure to be followed

Walton v R

Grand Court (SCA 111/91)
Schofield J

Legislation

Traffic Law Ss 63(1)(a) and 49(3)

Mr Furniss for the appellant
Mrs Escalante for the Crown

Following the appellant's plea of "guilty" to the charge of speeding, contrary to S.63(1)(a) Traffic Law, the learned magistrate admonished her for this offence, but, having become concerned as to her fitness to drive due to her extreme deafness which had become apparent at the trial, ordered the suspension of her driving licence until a local driving test had been passed. Pending the outcome of this appeal the appellant's driving licence had been restored to her upon her supplying a medical certificate to the satisfaction of the Cayman Licensing Authority.

Held: (allowing the appeal and restoring the appellant's licence)

(i) Before embarking upon such a serious decision as holding a person's driving licence in abeyance, the court should first forewarn offenders of the proposed course of action to enable them to have the opportunity to respond; in the present case this would have allowed the appellant to adduce the relevant medical certificate and prevent the need for this appeal.

(ii) The order of the court was inappropriate to the offence charged which was in no way exacerbated by the appellant's impaired hearing.

MD

Misuse of drugs law - Production Orders - Whether "drug trafficking" implicitly includes "money laundering" - Meaning of "benefitted from drug trafficking"

In the matter of an Application under Section 16L (A) and (B) of the Misuse of Drugs (Amendment) Law 1988 (Law 8 of 1988)

Grand Court
Malone CJ
December 16 1991

Legislation

Misuse of Drugs Law Ss 2 16L and 16O
Drug Trafficking Offences Act 1986 Ss 27 and 38

Authority Cited

R v Central Criminal Court ex parte Francis & Francis (a firm) [1988] 1 All ER 677

Mr Alberga QC & Ms O'Connor-Connolly for the applicant
Mr Smellie Solicitor General for the respondent

On August 13 1991 a legal practitioner was served with a production order under the Misuse of Drugs Law 1988, requiring him to give up various documents and records to constable K. In granting this order the Learned Chief Justice was satisfied that the conditions expressed in S.16L(4) of the Law were satisfied. S.16(L)(4) provides, inter alia, that in order for a production order to be made the court must be satisfied that:

(a) reasonable grounds exist to suspect that a specified person has benefitted from drug trafficking; and

(b) that reasonable grounds exist indicating that the material produced (not being subject to legal privilege) would be of substantial value to the investigation and that it is in the public interest that access to the material be given.

Having supplied various documents under the order the practitioner now applied, by originating summons, to have the order discharged or varied. The Misuse of Drugs law is modelled upon the English Drug Trafficking Offences Act 1986. In particular, the definition of "drug trafficking" within section 2 of the Law repeats largely the definition contained in S.38(1) 1988 Act. However, section 2 omits that part of the definition in the parent act which includes within the term "drug trafficking", "money laundering". Accordingly, while the offence of money laundering is described in section 16 of the Law, the definition of drug trafficking within section 2 does not extend to that offence.

Grounds of appeal:

1. Mr. Alberga contended that as the target of the investigation, G, was being investigated only for the purposes of money laundering, and as the Misuse of Drugs Law nowhere defines "money laundering" as "drug trafficking", then it followed that no production order in respect of G's affairs could be made.

2. It was contended further that G was not a person who had benefitted from drug trafficking. S.1(3) Drug Trafficking Offences Act 1986, unlike the Misuse of Drugs Law, provides a definition of "benefit".

It was contended that the words "has benefitted from drug trafficking" within S.2 of the law must mean benefitted in a way envisaged by S.16L (1) and 16L (4) - and as money laundering was omitted from those provisions, it could not be

said that reasonable grounds existed for suspecting that G benefitted from drug trafficking.

3. It was further contended that there did not exist reasonable grounds to suspect that the material to which the application related:

(i) was likely to be of substantial value to the investigation: and

(ii) was not protected by legal privilege, within S.16L (4) (b) (1) and (11)

4. It was further submitted that it was wrong for the Learned Chief Justice to have made the order without the benefit of submissions as to why it should not be made.

5. It was further contended that the requirement expressed in S.16L (1) & (2) that the material applied for must be "particular material" or "material of a particular description" had not been satisfied.

Held: (allowing a variation of the production order)

(i) Although the line of inquiry being here pursued was into money laundering, in the circumstances of this application, the investigation did not cease to be one investigating drug trafficking, as defined by section 2 of the law. The police investigation was part of a wider investigation which clearly focused upon the suspected drug dealing activities of associates of G's. If the funds of G's associates which G was suspected of laundering were themselves not suspected to be drug related then the contention of Mr. Alberga would stand.

As reasonable grounds existed to suggest that purported sales of land made to G were fictitious, it followed that it was reasonable to suspect that the fictitious sales represented the laundering by G of the proceeds of drug trafficking. Accordingly, as reasonable grounds existed to suspect G of laundering money, and as the investigation was one into drug trafficking, Mr. Alberga's suggested test, approved by the court, namely that G must be the target of the investigation, was satisfied.

(ii) Although there exists no statutory definition of "benefitting from drug trafficking" under the Misuse of Drugs Law, the natural meaning of the expression comprehends the receipt of a payment or other reward in connection with drug trafficking carried on by another. Since it was reasonable to suspect G of money laundering, the circumstances provided reasonable grounds to suspect that G knowingly received a benefit from the drug trafficking under investigation.

(iii) Applying the decision of the H.L. in R v Central Criminal Court ex parte Francis and Francis (a firm) where it was held that items which would otherwise be protected by legal privilege, lose that status if the solicitor or other person holding the items has the intention of furthering a criminal purpose - privilege could afford no protection on the present facts. This was because even though the practitioner was very likely holding the documents innocently, there existed reasonable grounds to suspect his client, G, of using them to further the criminal purpose of money laundering. Furthermore, the value of the documents to the drug trafficking investigation was likely to lead to the identification of other members of the organisation thereby satisfying the requirements of S.16L(4)(b) (1).

(iv) The H.L. in R v Central Criminal court, ex parte Francis and Francis (a firm) held, in the context of S.27 Drug Trafficking Offences Act 1986, that an application by police thereunder for the production of documents should be heard ex parte. Accordingly the procedure adopted by the Learned Chief Justice was correct.

(v) The material contemplated by S.16L (1) & (2) was expressed in the alternative, underscoring the distinction between "particular material" and "material of a particular description". However, provided the material fell into one or other of the two classes, it mattered not that it was unclear as to which of the two it was encompassed by.

The scope of the order however would be amended: As it presently stood it extended to all items which pertained to transactions with G and as such the order was too widely expressed. It would not be appropriate to restrict the material to "documents" only as today material is capable of being recorded in many different forms. However the order's scope would be limited to cover material relating to dealings between G and specified persons or entities.

MD

Unrepresented defendant - Role of magistrate - Admission into evidence record of police interview

Morris v R

Grand Court (180/91)

Schofield J
August 28 1992

Legislation

Police Law S 63
Misuse of Drugs Law S 3(1)

Authority referred to

SFJ (An Infant) v Chief Constable of Kent The Times June 17 1982

Mr Hampson for appellant
Mr Roberts for the Crown

The appellant was convicted of resisting arrest contrary to S.63 of the Police Law; of assaulting police contrary to S.63 of the Police Law; and of possession of cocaine with intent to supply contrary to S.3(1)(m) of the Misuse of Drugs Law. The appellant appealed against the convictions.

The first ground of appeal was that the magistrate erred in insisting that the trial continue without granting the appellant an adjournment to apply for legal aid.

At the commencement of the hearing the appellant's attorney sought to withdraw from representing the appellant because his fees had not been paid. The appellant's attorney also refused to take the case on a legal aid basis. Following withdrawal by his attorney the appellant sought an adjournment which was refused.

The second ground of appeal was that the magistrate erred in the procedure he adopted in admitting into evidence a record of an interview

of the appellant by the police.

The record of the interview was introduced through the testimony of one of the police officers present during the interview. The learned magistrate asked the appellant to look at the document and asked whether he recognised his own signature and initials. When the appellant admitted having signed the document the magistrate admitted it into evidence.

There were furthermore several areas of discrepancy between the evidence of the various police officers.

The final ground of appeal was that the learned magistrate did not assist the appellant in securing witnesses who he impliedly desired to call, or assist him, an unrepresented defendant, in the presentation of his case.

The appellant had commented to the learned magistrate that two witnesses who were present at the scene had not been called, but did not expressly request that they be called as witnesses.

Held: (appeal allowed in part)

(i) The appellant was not prejudiced by his lack of legal representation. He presented his case adequately and no miscarriage of justice arose from the learned magistrate's refusal of an adjournment.

(ii) The learned magistrate was in error in admitting the document into evidence as he did. The admissibility of such a document rests not on whether an interviewee signed the document but on whether it was a true record of an interview with him and whether the answers were given voluntarily. It is not always necessary to determine the admissibility of documents by conducting a trial within a trial (An Infant) v Chief Constable of Kent). However, there are advantages to a defendant learning what the magistrate's decision is on the question of admissibility before the close of the prosecution case. Whether or not a trial within a trial is conducted depends on the nature of the case and the document sought to be admitted into evidence; before a document is admitted the question of its admissibility must be determined. However, there was no prejudice to the appellant in the learned magistrate's erroneous handling of the document.

(iii) The learned magistrate assessed the overall impact of the evidence. Minor contradictions in evidence may enhance rather than detract from credibility and lead to a conclusion that the evidence is not rehearsed. On assessment of the evidence the learned magistrate was right to believe the prosecution evidence and disbelieve the appellant.

(iv) It is the duty of the court to assist an unrepresented defendant and it is most satisfactory when a transcript shows that a defendant has been guided along through a trial in a polite and gentle manner. The appellant was afforded a fair trial and was assisted by the court to question witnesses fully and to put before the court all the court required to know in order to make a proper decision.

(v) The sentence of imprisonment would be reduced from 8 years to 6 years.

WB

Burglary - Identification of property - Accomplice evidence

R v Mullings and Rankine

Grand Court (SCA 194/90)
Schofield J
February 28 1992

Mr Furniss for the appellants
Mrs Escalante for the Crown

Following a burglary at Faces Night Club where two speakers had been stolen, the appellants were arrested and charged, in part on the evidence of an accomplice, Pantry, who had pleaded guilty to the offence. Both appellants denied their involvement in the burglary. Two speakers which had been discovered in M's room were identified by the owner and manager of the night club as being those which had been stolen. At trial M asserted that he had purchased the speakers in Miami. Following their convictions both appellants appealed on the basis that the identification of the speakers had been unreliable.

Held: (dismissing the appeals but varying Mulling's sentence)

(i) The manager's expertise, coupled with the fact that the speakers had been damaged during a fracas at the night club, vindicated the learned magistrate's acceptance of their identification. Pantry's evidence had therefore been corroborated.

(ii) While Pantry's evidence against Rankine was uncorroborated the learned magistrate had been mindful of the dangers of acting upon such evidence and his conclusion that Pantry had been telling the truth would not be interfered with.

(iii) A twelve month sentence of imprisonment imposed upon Rankine was not excessive in the light of his two previous convictions for burglary. However, an immediate prison term which had been imposed upon Mullings was inappropriate, Mullings being a first offender with a young family. A six month term of imprisonment, suspended for two years would be substituted.

MD

Consumption and intention to supply cocaine - Sentencing principles

R v Bodden

Grand Court (SCA 154/91)
Schofield J
February 26 1992

Mr Quin for the appellant
Mrs Escalante for the Crown

The appellant had been approached by X, an undercover police officer, who, posing as a tourist, had given the appellant $400 to obtain a quantity of cocaine. The appellant used the money to purchase cocaine but then, together with another, consumed it himself. The appellant was charged with the offences of consumption of cocaine, possession of utensils used in the consumption of cocaine, possession of cocaine with intent to supply and being

concerned in the possession of cocaine with intent to supply. He entered pleas of guilty to the first three offences and not guilty to the other two. The learned magistrate passed a sentence of two years imprisonment in respect of each intent to supply offence, to run concurrently. Furthermore, a six month term of imprisonment was imposed in relation to each of the other charges, one to run consecutively and one concurrently.

Held: (allowing the appeal in part)

(i) To punish the appellant twice for what amounted to one series of actions was unjust. The sentence in respect of being concerned in the possession of cocaine with intent to supply would therefore be set aside.

(ii) Whilst the appellant had a previous conviction for the consumption of cocaine, it was necessary to take account of the fact that his actions had been motivated by a need to satisfy his addiction rather than to make financial gain. In all the circumstances the overall penalty of 2 1/2 years imprisonment, imposed by the learned magistrate, was excessive and would be reduced to 15 months.

MD

Review of evidence - Attaching appropriate weight

R v Bidden and Scott

Grand Court (SCA 124/91)
Schofield J
March 3 1992

Mr Murray for the appellant
Mr Archie for the Crown

The appellants, two police officers, had been charged with taking three lobsters out of the sea in closed season, and with taking twenty-eight conch from a replenishment zone, this being eight more than is permitted under the Marine Conservation Law. The charges were laid following evidence given by X, a Marine Enforcement Officer. The appellants appealed against their conviction for both offences.

Held: (allowing the appeal)

(i) The learned magistrate had failed to appreciate fully the significance of the evidence of Y, called by the appellants, who had testified that X, himself a former police officer, held a grudge against the appellants and had coerced Y, by threats, into making a false statement that he (Y) had loaned two spear-guns to the appellants. Because the credibility of X's evidence was crucial to the Crown's case it required the learned magistrate to have made a finding as to the veracity of Y's evidence which, by omitting any reference to in his judgment, he had failed to do.

(ii) The learned magistrate had also misunderstood the nature of the appellants' defence in relation to the taking of the conch. S had testified that he had taken ten conch on the fishing trip to use as bait, therefore by implication the defence was that only 18 conch had been (lawfully) taken from the sea. The learned magistrate, however, had understood S to be pleading that he had taken only ten conch from out of the sea.

(iii) Furthermore, it was clear that the prosecution had failed to establish beyond

reasonable doubt that the fishing had taken place in a replenishment zone.

MD

Rape - Grounds of appeal - Identification - Requirement of Corroboration - Inducement by police of statement - Right to request legal representation during currency of trial - Directions on mens rea

R v Pierson Davis and Rose

Cayman Islands Court of Appeal (20 21 and 38/91)
Zacca pres Georges and Kerr JJA
August 12 1992

Cases referred to

R v Galbraith [1981] 1 WLR 1039
R v Kelly (1929) 21 Cr App R 151
R v Elton (1942) 28 Cr App R 126
R v Howes (1964) 48 Cr App R 172
R v Kingston (1948) 32 Cr App R 183
DPP v Morgan (1975) 61 Cr App R 136
R v Fitzroy Brown 154/90 (May 11 1992)

Mr Murray Miss Bodden and Mr Harrison for the appellants

The three appellants, together with two accomplices who had previously pleaded guilty (Thompson and McLean) were charged and convicted of rape. The scene of the alleged offences was the apartment of the mother of one of the appellants. The alleged offences had taken place after the complainant, aged 18, had accepted a lift home after a party. Rather than being taken home, she and the appellant Rose were dropped off at the apartment, with an assurance being given to the complainant that upon the return of the others, she would be taken home. According to the complainant's evidence (which was largely corroborated by Thompson) thereupon Rose requested that she should have sexual intercourse with him. She declined. The other three men returned and she was locked in the bedroom. Rose then re-entered the room and had non-consenual sexual intercourse with the complainant who was pulling his hair and screaming for help. Aided and abetted by each other Davis then had non-consenual sexual intercourse with the complainant followed by Rose again, then Thompson (who had pleaded guilty) then Pierson and then McLean (the other man who had pleaded guilty). The complainant then alleged that she was told that she would be killed if she told anyone of the incident. She was later driven towards her home and dropped off at the roadside with instructions of how to get home. She proceeded to the hospital where she was examined by a doctor.

Later that day, in the company of police, she identified three of her alleged assailants - Davis, Thompson and McLean, at McDonald's restaurant. Prior to identification in court, the complainant had not identified Pierson, although it was the defence's case that Pierson too had been in McDonalds at the time of the identification of the others.

The appellants all alleged that the intercourse had been consensual, and pleaded that there was no case to answer. Their pleas were refused.

Before Sir Denis Malone C J and a jury the

appellants were all convicted. They appealed basing themselves on different grounds:

Pierson appealed on three grounds;

I. The principal ground of Pierson's appeal was that of identification. It was common ground that the apartment in which the intercourse took place was dark there being no light inside and no street lights outside. Counsel for Pierson asserted that this manifested itself in the allegation that five men raped the complainant when, once Ebanks the driver was taken into account, there were six men in all. Counsel contended that as there had been no attempt to clear up this ambiguity at the trial there was no case to answer against Pierson who had not been previously named by the complainant and against whom only a dock identification had been made.

II. The second ground of appeal related also to the complainant's original failure to identify Pierson. Counsel submitted that in the light of this her evidence was incapable of amounting to the required corroboration of Thompson and McLean, and this fact should have been made clear by the Learned Chief Justice to the jury.

III. The third ground of appeal was counsel's contention that the Learned Chief Justice had not sufficiently warned the jury against pooling all the evidence against the other defendants and using it against the appellant.

<u>Held</u>: (appeal against conviction dismissed; but sentence varied)

(i) The Learned Chief Justice had specifically alluded to the weakness of the complainant's evidence in relation to Pierson. The real complication was the part played, if any, by Ebanks. The ambiguity however, was to be resolved by accepting McLean's evidence which was to the effect that Ebanks had left with his wife before the alleged rape had taken place. Other ambiguities in the complainant's evidence had been sufficiently dealt with by the Learned Chief Justice.

(ii) The Learned Chief Justice had sufficiently warned the jury of the danger of using the complainant's evidence as being corroborative of that of McLean and Thompson. His Lordship had emphasized that this could only be safely done if the jury was sure that Pierson was one of the five men in the house and had taken part in the rape. To assist them, the Learned Chief Justice had reminded the jury that Ebanks, according to common ground, had soon left the house thus removing this potential complication from the Crown's case.

(iii) There was no merit in this ground of appeal; the Learned Chief Justice had been alive to this danger and had carefully instructed the jury in terms, inter alia, that: "...some of the evidence is applicable to all of the cases but some of the evidence is applicable to only one or the other."

Pierson's sentence of 4 years imprisonment, 6 months of which was to be suspended, was to be reduced to a total sentence of 3-1/2 years in keeping with the Chief Justice's intention. The law did not permit the sentence imposed by the Learned Chief Justice, viz a custodial sentence of 4 years to be suspended for 6 months.

Davis appealed on three grounds:

I. The first ground of appeal put forward by Davis was the allegation that the appellant's statement to the police should not have been

admitted into evidence, it being the product of an inducement that he would thereafter be released from custody, and as such, was involuntary.

II. The second ground of appeal related to a request by Davis, after the morning of the first day of the hearing, that he should be allowed counsel to represent him. The Learned Chief Justice took the view (incorrectly it was here contended) that as he himself had raised the matter with Davis before the trial began, he was unable now to acquiesce in the request once the trial had commenced.

III. Thirdly, counsel for Davis contended in a like manner to Pierson's Counsel, that the jury may have come to the conclusion that they could pool all the evidence against all the defendants and apply it against the appellant.

Held: (dismissing the appeal)

(i) Although in the light of a statement by the police officer concerned it was clear that the Learned Chief Justice had erred in his conclusion that there had been no inducement, the proviso would be applied and the conviction affirmed.

(ii) According to such authorities as R v. Kelly and R v. Elton the Learned Chief Justice had erred in declining the request of the appellant to be allowed legal representation. However, whilst there was no doubt that this had been detrimental to the appellant's defence, the case against him was a very strong one, with his culpability being inseparable from that of the rest of the gang. Accordingly, due to the very strong case which had been presented by the prosecution, even if represented, the jury would inevitably have reached the same conclusion, and the proviso would again be applied and the conviction affirmed.

(iii) As in the case of Pierson, there was no merit in this ground of appeal.

Rose appealed on one ground:

The basis of Rose's appeal was that the Learned Chief Justice had failed to give the jury an adequate direction on the mens rea required for the offence of rape: in particular it was contended that the jury may have been left with the impression that all that had to be established was that the victim did not consent (this being a matter of actus reus). Counsel for Rose, citing the decision of the House of Lords in D. P. P. v Morgan, contended that the Learned Chief Justice had erred in failing to address the question of honest belief in consent and the effect of mistake.

Held: (dismissing the appeal)

The appellant's defence was that the complainant consented: the prosecution's case was that she did not, to the knowledge of the appellant. There was accordingly no scope for the defence of mistaken belief and consent. Accordingly the directions of the Learned Chief Justice were fair and adequate.

MD

Careless Driving - Conflict of evidence

R v Elliott

Grand Court (SCA 164/91)
Malone CJ
August 14 1992

Mr McField for the appellant
Mr Roberts for the respondent

On the night of October 13, 1990 the appellant's van and the respondent's car which had been ahead of it, had come into collision. Before the learned magistrate the appellant was found guilty of careless driving. The appellant challenged the decision of the learned magistrate on the basis that he had misdirected himself in preferring the complainant's evidence over to his own where conflicts had arisen. The appellant further contended that the learned magistrate had improperly cross-examined him thereby creating the impression of bias.

Held: (dismissing the appeal)

In the light of internal inconsistencies in the appellant's evidence it was unsurprising that the learned magistrate should prefer the evidence of the complainant. Furthermore, whilst the learned magistrate had perhaps laboured the cross-examination of the appellant unduly, it was on an important issue and did not unduly interfere with the conduct of the defence.

MD

Possession of a utensil used in the consumption of cocaine - Possession of cocaine

Robinson v R

Grand Court (SCA 65/92)
Schofield J

The appellant was convicted before a magistrate of possession of a utensil used in the consumption of cocaine and possession of cocaine.

Two police officers had entered Bill McField's yard which is frequented by drug users. On their approach the appellant moved away from a group of men he had been with and hid in some bushes. The police officer hunted the appellant out and near to him, though at least 15 feet away from the group, they discovered a piece of plastic pipe. Upon laboratory examination the pipe was found to contain traces of cocaine. The appellant elected not to testify.

Held: (dismissing the appeal)

From the evidence the learned magistrate was entitled to find it proved that the appellant was in possession of the pipe, which was clearly for use in the consumption of cocaine and that the appellant was in possession of the cocaine upon the pipe. The twin facts that the appellant was so close to the piece of pipe, together with his action in attempting to hide from the police officers, indicated the irrestibility of the evidence against him.

MD

Evidence - Existence of reasonable doubt

Christopher A Bryan v R

Grand Court (SCA 195/91)
Schofield J
March 27 1992

Mr Furniss for the appellants
Mr Roberts for the Crown

The appellant was convicted at first instance on a charge of burglary. In a contested hearing evidence was given against the appellant by an alleged accomplice. The learned magistrate observed that there was no apparent reason, nor was a reason tendered, for the accomplice to tell falsehoods against the appellant. However the learned magistrate also indicated that in giving evidence the accomplice was not being wholly truthful and was attempting to minimize his own involvement in the burglary.

Held: (allowing the appeal)

A doubt should have existed in the mind of the learned magistrate. If the accomplice was prepared to lie about the extent of his own involvement, he may have had a desire to shift the blame onto someone who was blameless. A doubt existed on the issue of whether the appellant was involved in the burglary at all.

POH

Assault Occasioning actual bodily harm - Plea of self defence - Imposition of a compensation order

Marcella Delisa Henry v R

Grand Court (SCA 197/91)
Schofield J
March 27 1992

Mr Furniss for the appellant
Mr Roberts for the Crown

The appellant was convicted on a charge of assault occasioning actual bodily harm contrary to S.202 of the Penal Code.

Evidence was laid against her at first instance that she had attacked a former boy friend with a broken bottle causing injury to his chest requiring thirty one sutures. The appellant was sentenced to 9 months imprisonment suspended for two years and ordered to pay compensation of $1000 to the complainant. The appellant appealed against sentence and conviction claiming that she had acted in self defence.

Held: (dismissing the appeal but discharging the compensation order)

The element of self defence sufficient to warrant the use of a bottle was not apparent from her statement to police. Even if the complainant did assault her, the kind of assault afflicted did not warrant the degree of force used. Whilst a prison sentence was warranted in this matter in the circumstances of the case the compensation order was inappropriate. The complainant, if he wished to seek damages, had recourse to the civil courts.

POH

Possession of ganja with intent to supply - Principles of sentencing

Lillis Mae Ebanks v R

Grand Court (SCA 107/91)
Schofield J
February 27 1992

The appellant was apprehended with 75 grams of ganja, CI$120 and US$3 Before the learned magistrate she claimed that she had obtained the ganja in the belief that it would alleviate her asthma. However, in an interview with the police, immediately after her arrest, she admitted that she had the ganja to sell to others. The appellant was sentenced to 18 months imprisonment together with a fine of $200 or 2 months imprisonment. The money found in the appellant's possession was ordered to be forfeited. The appellant appealed against sentence and conviction.

Held: (dismissing appeal against conviction, upholding in part the appeal against sentence)

The conviction was safe and sound. The appellant had no previous convictions. The sentence was out of line with sentences imposed on similar offenders for similar offences. The prison sentence was reduced to 12 months and the fine was set aside but the order for forfeiture was correct.

POH

Possession of ganja with intent to supply - Whether the appellant had equal involvement - Circumstances of undue hardship

Huxable v R

Grand Court (SCA 146/91)
Malone CJ
April 1 1992

Legislation

Misuse of Drugs Law S 3(1)(m)

Mr Hampson for the appellant

The appellant was charged with possession of ganja with intent to supply contrary to S.3(1)(m) Misuse of Drugs Law. Following his plea of guilty the appellant was sentenced to 4 years imprisonment and fined $500 or 2 months imprisonment in default.

The appellant's story was that he had brought into the Islands a suitcase containing clothes, for one Giffon. He had agreed to take the suitcase back to the United States and only at arrival at Owen Roberts airport did Giffon inform him that it contained ganja (some 63 lbs). He proceeded to attempt to clear security with the substance and was caught. The appellant paid his own air fare, but Giffon paid for his hotel expenses.
The appeal was against sentence, on the basis:

(1) That the learned magistrate had erred in taking the view that the appellant and Giffon were involved together in an enterprise of smuggling ganja from the Cayman Islands to the U.S.A.; and

(2) That the appellant's wife and family (in the U.S.A.) would be severely affected by the sentence in particular since the offence was committed the appellant's daughter had met

with a severe accident which led to the incurring of heavy medical expenses. The family was unable to meet its bills and their mortgage was in danger of being foreclosed.

Held: (reducing the sentence to three years imprisonment)

(i) The learned magistrate rightly viewed the apellant's story as implausible. It was fanciful to suppose that the appellant would pay his own airfare for the purpose of bringing Giffon a suitcase full of clothes. It was equally implausible that Giffon would pay the appellant's hotel bills for having performed this task. Accordingly, the learned magistrate was correct in reaching the conclusion of the equal involvement of the appellant and Giffon.

(ii) In the light of the events which had befallen the appellant's family since the offence was committed, coupled with the fact that he would be in Cayman whilst his family were in the U.S.A., this was a case of unusual hardship and the sentence of imprisonment would therefore be reduced to one of three years.

MD

Specificity of charge - Need to specify conviction - Role of a magistrate in trial

Kelley v R

Grand Court (SCA 89/91)
Schofield J
July 1 1992

Legislation

Penal Code Ss 201 & 202

Criminal Procedure Code S 13 & 52(2)

Mr Levy for the appellant
Mr Roberts for the Crown

The charge laid against the appellant was that of assault causing actual bodily harm, contrary to S.202 Penal Code. However before the court the appellant was simply charged with "assault" (meaning common assault), which is an offence contrary to S.201 Penal Code. The appellant was not given the right to elect a trial by jury. Counsel for the appellant asserted that the prosecution had sought leave for the charge to be reduced to that of common assault but there was no record of this. The learned magistrate, whom the appellant claimed gave the impression of bias, found the appellant "guilty as charged".

Held: (allowing the appeal)

(i) According to S.13 Criminal Procedure Code a charge must be in writing, therefore the form of the trial was defective from the outset if the charge was intended to be common assault, as there had been no formal amendment made. Conversely, if the charge was assault occasioning actual bodily harm then the failure of the court to give the appellant a right to elect a trial by jury rendered the trial a nullity.

(ii) The learned magistrate had compounded matters by finding the appellant "guilty as charged". S.52(2) Criminal Procedure Code requires the section of the law under which a conviction results to be specified

(iii) The numerous interventions by the learned magistrate, particularly when the complainant was being examined in chief, were excessive and the appellant may have been left with the impression of bias. Magistrates should be alive to be desirability of only entering the arena where such is necessary to clarify a point which has arisen.

MD

Possession of Cocaine with intent to supply - Permitting premises to be used in supplying a controlled drug - Meaning of "being concerned in possession of cocaine"

Roache & Foster v R

Grand Court (SCA 204/205 91)
Schofield J
July 1 1992

Legislation

Misuse of Drugs Law S 3(1)(M)

Misuse of Drugs Law S 3(2)(a)

Mr Hampson for the appellant
Mr Roberts for the Crown

The learned senior magistrate had convicted Roache of possession of cocaine with intent to supply contrary to S.3(1)(m) Misuse of Drugs Law and Foster with being concerned in the possession of cocaine with intent to supply contrary to the same provision. Foster was further found guilty of permitting premises to be used in the supplying of a controlled drug contrary to S.3(2)(a) Misuse of Drugs Law.

Foster is the part owner of a tailors business on Eastern Avenue. He was there at work on May 4th 1991 when he was visited by a Miss Stewart and the appellant, Roache. Also at the shop was police constable Ahmed who was posing as a purchaser of cocaine. After speaking to Foster, Stewart approached Ahmed asking him how much "stuff" he wanted. Ahmed replied that he wanted an ounce. Stewart spoke with Roache and then with Foster. Foster passed a screwdriver to Roache and Roache and Stewart went to a room at the back of the shop. Roache's evidence was that the screwdriver was used to gain entry to the room and once therein Stewart took a small bag from her clothes and gave it to Roache although its contents, Roach claimed, were unknown to him. They returned to the shop and gave the bag to Ahmed. The bag contained cocaine. They agreed to go outside to test the substance whereupon Ahmed arrested Stewart & Roache.

Whilst Stewart admitted her involvement in the transaction both Roache and Foster denied knowledge of the drug transaction. Roache claimed that he had no knowledge that the substance was cocaine and Foster stated that he was busy in the shop and had paid no attention to the conversation which had passed between Stewart and Ahmed excepting that he had been asked for, and had provided, a screwdriver.

Held: (allowing the appeal of Foster in part)

(i) The learned magistrate had been correct in believing the evidence of Ahmed and disbelieving that of the appellants. Roache had fully participated in the supply of the cocaine and had been properly convicted.

(ii) It was fanciful to suppose that Foster had taken no interest in the transaction on his premises. He must have known that cocaine was being supplied on the premises he was occupying and therefore his appeal against conviction for permitting this offence would be dismissed. However, there was no evidence that the appellant was concerned in the possession of cocaine, in the sense that he participated in it and therefore his appeal, to this extent, would be allowed.

MD

Drugs - Refusal to give urine specimen

Powell and Seymour v R

Grand Court (46/92 and 64/92)
Schofield J
August 18 1992

Legislation

Misuse of Drugs Law Ss 4(1) and (2)

Mr Quin for first appellant
second appellant in person
Mr Roberts for the Crown

Both appellants were convicted of failing to provide a urine specimen for a laboratory test, contrary to S.4(2) of the Misuse of Drugs Law.

The situation arose from officers of the Drugs Squad observing a group of men at the First appellant's residence who were suspected of consuming controlled drugs. The men were arrested on this basis and were asked to provide a urine specimen at the police station. All six men refused and the appellants pleaded "not guilty' to a charge under S.4(2) of the Misuse of Drugs law.

The appellants appealed against the convictions.

Held: (allowing both appeals)

(i) Before a specimen may be required of a person pursuant to S.4(2) he must be shown to be properly arrested under S.4(1).

(ii) The appellants had committed no offence at the time they were arrested.

(iii) To justify an arrest a police officer must have a real suspicion that a person has committed an offence and he must have identified that offence. The suspicion in relation to that offence must be reasonable.

(iv) There was no reasonable suspicion such as to justify the arrest of the appellants and therefore no basis for the request of a urine specimen. The appellants were entitled to refuse to give the specimen.

Convictions quashed and sentences set aside.

AC

Duplicity of charges

Pearson v R

Grand Court (226/91)
Schofield J
September 2 1992

Authority referred to

R v Fennell [1970] 3 ALL ER 215

Legislation

Criminal Procedure Code S 71

Mr Furniss for the appellant
Mr Roberts for the Crown

The appellant was convicted of:

1. Obstructing the police contrary to S.204 (b) of the Penal Code
2. Assaulting police officers contrary to S.63 of the Police Law
3. Resisting Arrest contrary to S.63 of the Police Law
4. Disorderly conduct contrary to S.151 of the Penal Code
5. Damage to property contrary to S.244 of the Penal Code

The incident had occurred during the course of a search of the appellant's home by police officers looking for evidence against the appellant's son. A struggle arose when the police officers arrested the appellant's son.

The appellant appealed against the convictions on the ground that the magistrate was wrong in law to convict on all five charges as the charges duplicated each other.

Held: allowing the appeal in part)

(i) Where a number of minor offences overlap with each other or with serious offences in what is really one incident and one course of criminal conduct the court should avoid a multiplicity of convictions and invoke section 71 of the Criminal Procedure Code accordingly.

(ii) The appeal against charges 2 and 5 was dismissed.

The appeal against charges 1,3 and 4 was allowed, the three convictions and sentences imposed therein being set aside and an order made for the appellant's absolute discharge from each of those charges.

AC

Aggravated burglary - Credibility of witnesses

R v Wright

Grand Court (SCA 35/91)
Schofield J
May 22 1992

Legislation

Penal Code S 221(1)

Mr Levy for the accused
Mrs Hernandez for the Crown

The accused was charged with aggravated burglary contrary to S.221(1) of the Penal Code. The prosecution evidence was that the accused

had entered part of a dwelling house occupied by M at Mary's Street, George Town, as a trespasser with intent to steal and that at the time of entry had a knife with him.

According to M, the prosecution witness, who described himself as a missionary, he had rented a room in a house belonging to one Sister E at Mary Street. He had fallen asleep over his studies on the night in question with the bedside light still on when in the early morning hours he was awakened by noises. He said he saw the accused holding a knife with a shiny blade and walking towards his closet. He got up and chased the intruder out of the house. The intruder disappeared momentarily but later came back to fetch his bicycle which was parked in the bushes. He said the accused pulled the knife as he confronted him outside the house to ascertain what he was doing in his room.

The accused's version of events differed in many respects. He did not deny going into the house but denied entering M's room. His explanation for being there was that he lived next door to the house, a relative and his girl friend had come to occupy his own room and he had gone to M's house to fetch water (which he habitually did) in order to go and spend the night in another house in Prospect. He said he was related to M's landlady. He admitted he held out a knife when M confronted him outside the house because M himself seemed to be taking something out of his pocket. The accused called evidence to confirm that he lived next door and that members of his household had habitually fetched water from Sister E's house.

Held: (allowing the appeal)

(i) The case rested on the credibility of the parties. M's evidence that the accused was inside his room with an open knife and that he chased out the intruder without alerting the other tenants was not wholly convincing. Furthermore, some statements made by M to the police were inconsistent with his evidence in court.

(ii) There was evidence, confirmed by witnesses, that the accused lived next door and had habitually fetched water from where M lived. The accused, being a relative of M's landlady, had lawful cause to be in the house or yard. The prosecution had failed to prove beyond doubt that the accused did enter M's room. The accused accordingly was to be acquitted and released.

AD

Road traffic - Careless driving resulting in collision

Ebanks v R

Grand Court (SCA 106/91)
Schofield J
May 13 1992

Legislation

Traffic Law S 66

Mr Alberga for the appellant
Mr Roberts for the Crown

The appellant was convicted of careless driving contrary to S.66 of the Traffic Law. He was driving out of Old Prospect Road to join the main road at Spotts when his vehicle collided with that of C who was the main prosecution witness.

C's evidence was that he was driving on the main road in the direction of George Town when the accused drove out of the side road and turned across his path. He stated that the point of impact occurred on his side of the road. The appellant's evidence was that he had completed his turn onto the main road when C's vehicle came at him on his side of the road. The two versions were conflicting. The police officer who was called to the scene had drawn a sketch showing where the two vehicles rested after the collision. The sketch, together with the debris on the road confirmed that the point of impact was on the appellant's side of the road. The evidence thus supported the appellant's version.

Held: (allowing the appeal)

From the police officer's evidence, the most likely version of the cause of the accident was the appellant's. It was distinctly possible that the appellant had completed his turn into the main road when the accident occurred. It was difficult to understand how the learned magistrate came to the conclusion that C's evidence was supported by that of the police officer. The conviction must be quashed and the sentence imposed set aside.

AD

Sentencing - Wrong in principle to combine custodial sentence with probation order

Bodden v R

Grand Court (SCA 112/91)
Schofield J
March 5 1992

Legislation

Penal Code Ss 194 and 244
Police Law S 66

Cases referred to

R v Evans (1959) 43 Cr App R 66
R v Sacratous (1984) 6 Cr App R (s) 33

Mr Murray for the appellant
Mr Archie for the Crown

The appellant was convicted on three charges of:

(1) damage to property, contrary to S.244 of the Penal Code;
(2) disorderly conduct at a Police Station, contrary to S.66 of the Police Law; and
(3) wounding, contrary to S.194 of the Penal Code.

The evidence was that the appellant was drunk while engaging in the course of conduct forming the subject of the above charges. She was a first offender.

On the first charge she was given one year's probation order and ordered to pay compensation of $123.75 to the Grand Pavilion Hotel for criminal damage. On the second charge she was fined $50 or 14 days imprisonment in default.

On the third charge she was sentenced to 6 weeks imprisonment.

She appealed against sentence.

Held: (allowing the appeal in part)

(i) It was wrong in principle to combine a probation order with a custodial sentence (R v Evans, R v Socratous). The learned magistrate was in danger of confusing two principles of sentencing, the deterrent and the rehabilitative, and achieving neither.

(ii) In all the circumstances and despite the seriousness of the offences, particularly the wounding offence, a rehabilitative approach was appropriate. The sentence of 6 weeks imprisonment would be set aside and substituted with one year's probation order.

AD

Sentencing - Possession of cocaine with intent to supply - Prison sentences excessive in circumstances

Ebanks v R

Grand Court (SCA 59/91)
Malone CJ
March 3 1992

Cases referred to

Michael St Jude Douglas v R (4398/90)

R v Blair (SCA 61/91)

Mr Hill QC and Mr Murray for the appellant
Mr Roberts for the Crown

The appellant was convicted, together with an accomplice, on three counts, namely, of possession of cocaine with intent to supply (two counts) and possession of a utensil used for cocaine consumption.

The appellant, who at the time of the offence was a police constable, was arrested together with his accomplice as a result of police entrapment. He pleaded guilty to the three counts and was sentenced as follows:

(1) 8 years imprisonment and a fine of $5,000.00 with six months imprisonment in default for possession of more than 4 ounces of cocaine;

(2) 6 years imprisonment and a fine of $1,000.00 with 3 months imprisonment in default for possession of less than 2 ounces of cocaine;

(3) 6 months imprisonment for possession of the utensil.

The terms of 8 years and 6 years were to run concurrently and the term of 6 months, to run consecutively.

The appeal was against sentence.

Held: (allowing the appeal and reducing the sentences)

(i) The fact that the appellant was a policeman at the time and apparently the mastermind of the operation justified the imposition of a heavier sentence than his accomplice. Carrying out the offence in police uniform added to the gravity of the offence. However account had to be taken of the fact that he had consequently been dismissed from the police force.

(ii) In passing sentence, the learned magistrate had mistaken the quantity under the first count to be 6 ounces instead of 4 and had imposed quite an excessive penalty. The excessiveness of the sentence for the first count reflects on the sentence for the second count.

In Michael St. Jude Douglas v R a sentence of 8 years imprisonment for possession of 6.5 ounces was reduced on appeal to 6 1/2 years. That showed that 8 years for more than 4 but less than 5 ounces was excessive even for a culprit who was a policeman.

(iii) The sentence of 8 years would be reduced to 6 years, the 6 years sentence would be reduced to 4, both to run concurrently. The fine of $5,000 would be reduced to $2,000, 2 months imprisonment in default; the fine of $1,000 would not be altered but the period of imprisonment in default would be reduced to 1 month. In the event of the non-payment of the fines the sentences in default would run concurrently but consecutive to the other prison sentences. The sentence of 6 months for the possession of a utensil would not be altered but would run concurrently with and not consecutively to the other sentences of imprisonment.

(iv) The order of forfeiture in relation to the appellant's motor car and money found on his person would be quashed.

AD

Sentencing - Careless driving - Disqualification from driving - Sentence too harsh in circumstances

McLaughlin v R

Grand Court (SCA 144/91)
Schofield J
February 21 1992

Mr Furniss for the appellant
Mr Archie for the Crown

The appellant, a police constable, was convicted of careless driving, having been involved in an accident involving two other vehicles. The appellant had received a radio call in the police vehicle he was driving. Accompanied by another constable, he made his way to the scene.

At a four-way junction controlled by traffic lights he was involved in a collision involving two other vehicles. A passenger in one of the vehicles suffered injury.

Evidence was given that the appellant had failed to slow down at the four-way junction and had failed to notice one of the vehicles which in fact had the right of way.

The appellant was found guilty of careless driving, fined $200 and was disqualified from driving for 3 months.

Held: (allowing the appeal in part)

(i) The appeal against conviction would be dismissed.

(ii) The sentence was however excessive in the circumstances. The appellant was a first offender and would suffer ignominy within the police force for his actions over and above that suffered by the ordinary offender. Although this was a serious offence of careless driving, it did not warrant such a severe approach of 3 months' disqualification. The appeal against disqualification would be allowed and the disqualification quashed.

AD

Road traffic - Careless driving resulting in collision - Credibility of witnesses

Lowe v R

Grand Court (SCA 188/90)
Schofield J
February 21 1992

Mr Furniss for the appellant
Mr Archie for the Crown

The appellant was convicted of careless driving and fined $170. He was appealing against conviction.

The appellant, who at the material time was driving a pick-up truck had pulled out into the opposite lane in order to make a sharp manoeuvre into a car park. The vehicle of the Crown witness, Ms. C was immediately behind the appellant. According to the Crown witness, the appellant did not indicate he was turning left and thinking the appellant was turning right, she sought to overtake him on the left side. There was a collision. The appellant asserted he indicated to turn left. The learned magistrate believed the Crown witness and convicted the appellant.

Held: (dismissing the appeal)

The learned magistrate had the opportunity of seeing and hearing both the appellant and the prosecution witness. He had made a finding of fact based on credibility. The finding would not be interfered with.

AD

Sentencing - Whether correct in principle to impose a fine when making a community service order

Ebanks v R

Grand Court (SCA 129/91)
Schofield J
April 24 1992

Mr Hampson for the appellant
Mr Roberts for the Crown

The appellant and another person were found in possession of a small quantity of cocaine. She pleaded guilty to a charge of possession [illegible]

cocaine and was convicted.

She was ordered to perform 150 hours of community service and in addition fined $1000.

She appealed against sentence on the ground that it was not correct in principle to make a community service order and impose a fine at the same time.

Held: (dismissing the appeal)

There was nothing wrong in law about the imposition of a community service order and a fine at the same time.

Although there are circumstances in which it would be inappropriate in principle to combine a community service order with a fine, each case depends on its merits. The earning capacity of the offender as affected by the order is a major factor in determining the correct approach and level of sentence.

Although the appellant's circumstances had changed between the period of the sentencing and the time of the appeal (i.e. the appellant had since had a baby and had given up her employment), the learned magistrate could not be faulted in his approach to sentence on the circumstances as presented to him at the time.

AD

Road traffic - Careless driving resulting in accident - Leaving the scene of an accident

Gall v R

Grand Court (SCA 145/91)
Schofield J
April 3 1992

Legislation

Traffic Law Ss 59(2)(c) and 66

Mr Furniss for the appellant
Mr Roberts for the Crown

The appellant had been convicted of careless driving contrary to S.66 of the Traffic Law and leaving the scene of an accident, contrary to S.59(2)(c) of the same Law.

The Crown's evidence was that the appellant drove his vehicle into the vehicle of the Crown witness, Ms. T, while the latter was turning off Walker's road into a private road.

The appellant argued firstly that Ms. T did not have her indicator on. Secondly, that there had been no impact between the two vehicles.

The evidence showed a slight dent on Ms. T's vehicle but no apparent damage to the appellant's vehicle.

The appellant had left the scene of the accident after an argument and according to the Crown witness, had not left any particulars

The learned magistrate had found the appellant guilty on both charges.

Held: (dismissing the appeal)

(i) The learned magistrate had been correct in his finding against the appellant. The slight damage to Ms. T's vehicle was consistent with the collision she had testified to. The conviction for careless driving was safe and sound.

(ii) The appellant was under a duty to remain at the scene of the accident (until the arrival of the police) and could only depart if there was reasonable cause for doing so. The appellant's view that there had been no collision was patently wrong. In the circumstance, the conviction for leaving the scene of an accident was safe and sound.

AD

Drugs - Being concerned in possession of cocaine with intent to supply - Defendant must not only have knowledge of possession but must also participate in the offence

Robinson v R

Grand Court (SCA 186/91)
Schofield J
May 27 1992

Legislation

Misuse of Drugs Law S 3(1)

Authority referred to

Hughes v R (1985) 81 Cr App R 344

Mr Hampson for the appellant

Mrs Escalante for the Crown

The appellant had appeared in the summary court in person and pleaded guilty to a charge of being concerned in the possession of cocaine with intent to supply, contrary to S.3(1) of the Misuse of Drugs Law.

He had admitted having travelled with one D who was found in possession of 78.3 grams of cocaine. He knew D was in possession of the drug. There was no evidence that the appellant was taking part in any trafficking.

The appeal was against conviction and sentence.

Held: (allowing the appeal and ordering a retrial)

For a conviction to be based on a defendant's plea of 'guilty', the court must be satisfied that the defendant admits each and every ingredient of the charge. In the case of being concerned in the possession of cocaine with intent to supply, the court must be satisfied that:

(a) another person was in possession of the drug with intent to supply;

(b) the defendant participated in the enterprise; and

(c) the defendant knew the nature of the enterprise.

The defendant in this case had admitted knowledge of D's possession but had not been questioned on the other ingredients of the offence.

The conviction would be quashed and a retrial ordered.

*Note: Normally a defendant who pleads guilty cannot appeal against conviction. Where however an appeal court is of the view that an unrepresented defendant did not understand the elements of the offence to which he had pleaded guilty, it has the power to quash the conviction and order a retrial.

AD

Drugs - Possession of ganja - Failing to provide urine specimen for test - Accused not having legal representation at Summary Court - Allegation of miscarriage of justice

Bernard v R

Grand Court (SCA 67/92)
Schofield J
May 27 1992

Legislation

Misuse of Drugs Law Ss 3(1)(k) and 4(2)

Mr Furniss for the appellant
Mrs Escalante for the Crown

The appellant was convicted on two charges of possession of ganja, contrary to S.3(1)(k) of the Misuse of Drugs Law and failing to give a specimen of urine for a laboratory test contrary to S.4(2) of the Misuse of Drugs Law.

He was appealing on the grounds that he had not been given adequate time to seek legal representation; that he had not been in possession of any ganja and that he refused to give a urine sample because there had been no reason for him to be stopped and searched.

Held: (dismissing the appeal)

(i) The appellant had first been arrested in July, 1991, the first trial date was in December, 1991. This had been adjourned for the appellant to seek an attorney. By the second trial date of March 31, 1992, the appellant had still not been able to afford an attorney. The learned magistrate had to balance the inconvenience and cost of an adjournment against the possibility of the appellant not being able to raise an attorney's fee given further time. He came to a balanced decision which would not be interfered with.

(ii) Regarding the evidence, the learned magistrate heard the prosecution evidence and that of the appellant. The police had been alerted to the vehicle driven by the appellant as having been seen in a known drugs area and the occupants of the vehicle were reasonably suspected of carrying drugs. The police, based on reasonable suspicion, had stopped and searched the appellant and found a total quantity of 2.5 grams of ganja in his possession. There was reasonable suspicion that the appellant had consumed ganja and accordingly a sample of urine had been requested for analysis. The appellant had denied the police evidence and challenged the need for the urine specimen.

The decision rested on the credibility of the evidence. The learned magistrate had the opportunity of seeing and hearing all the evidence and had thereby found the two charges adequately proved. There had been no miscarriage of justice.

(iii) The appellant had received prison

sentences of 9 months and 6 months to run concurrently. He had several previous convictions relating to drug offences. The sentences would not be disturbed.

AD

Road traffic - Careless driving resulting in collision - Credibility of witnesses

McFarlane v R

Grand Court (SCA 37/91)
Schofield J
May 29 1992

Legislation

Traffic Law S 66

Mr Furniss for the appellant
Mrs Escalante for the Crown

The appellant was convicted in the Summary Court of careless driving, contrary to S.66 of the Traffic Law.

The Crown's evidence was that the appellant had driven from a side road to a junction and without taking a proper look had pulled out into the North Sound road (the main road) thereby colliding with a vehicle travelling on the main road. The evidence of the Crown witness was to the effect that he had braked to avoid a collision when the appellant unexpectedly pulled into the main road. However, because the road was wet, he skidded and an impact could not be avoided. Police sketch plans confirmed the braking by the Crown witness of some forty feet from the point of the collision. It also confirmed that the Crown witness was not travelling at any speed greater than 30 m.p.h.

The appellant had also admitted not looking to the right (from where the other vehicle was travelling) before pulling into the main road.

Held: (dismissing the appeal)

The learned magistrate was justified, after ascertaining all the evidence, in accepting the evidence of the Crown witness in preference to that of the appellant. There was ample evidence to lead to the conclusion that the appellant was careless in not observing the other vehicle or in committing an error of judgment in pulling out of the side road in the face of the other vehicle.

AD

Road traffic - Using a motor vehicle without insurance - Disqualification from driving for 12 months - 'Special reasons' to mitigate sentence

Christian v R

Grand Court (SCA 215/91)
Schofield J
May 29 1992

Legislation

Motor Vehicle Insurance (Third Party Risks) Law 1964 (as amended) S 3(1) and (2)

Mr Furniss for the appellant
Mrs Escalante for the Crown

The appellant's appeal was against a 12 month disqualification from driving following a conviction on a plea of guilty, of using a motor vehicle without insurance, contrary to S.3(1) of the Motor Vehicle Insurance (Third Party Risks) Law, 1964.

The provision makes it unlawful for any person to use or to cause or permit any other person to use a motor vehicle on the road without a policy of insurance or security in respect of third party risk covering the person or that other person.

On a summary conviction a magistrate has the power to impose a fine not exceeding fifty pounds sterling or three months imprisonment or both. The person convicted shall also be disqualified from driving for twelve months unless the court, for 'special reasons' thinks fit to order otherwise.

The 'special reasons' put forward by the appellant in the Summary Court was that he had at the time of the offence been driving his brother's vehicle. This vehicle had for a period of time been insured, naming him as a driver on the certificate. Unknown to him his name had been removed when the brother got married.

The appellant had failed to produce the old insurance document and failed to call the brother to testify. An affidavit was produced on appeal stating that at the time of the hearing, the brother, a former police constable, had left the force and gone to live in the United States of America and it had proved impossible to call him as a witness or to locate the old insurance documents.

Held: (allowing the appeal in part)

(i) English authorities on what amounts to 'special reasons' for not endorsing a driving licence or not disqualifying an offender under English traffic legislation cannot simply be transported into the Caymanian system, the Cayman traffic legislation being different from that of England. For instance the provisions for mandatory and discretionary powers of endorsement of licences and disqualification are different in the two systems. English authorities on 'special reasons' were therefore inappropriate in the present case.

(ii) The appellant had done enough to show that he was misled into thinking he was insured to drive the motor vehicle. In the circumstances the learned magistrate should have found that there were 'special reasons' to mitigate the normal consequences of the conviction. The disqualification order would therefore be set aside.

AD

CRIMINAL LAW - SENTENCING

CASE NO.	CRIM APP. NO.	OFFENCE	SENTENCE
222/90	19/91	Being Conc. in Possession of Cocaine	4 Years Imp. & $6.000 fine or 6 months Imp. in default. Order for deportation
338/90	9/91	Rape	8 years Imp.
1206/90	9/91	Robbery	4 years Imp. (Concurrent)
2102/90	7/91	Poss of Cocaine with intent to supply	9 years Imp. + $10,000 fine or 6 months Imp.
2638/90	36/91	Poss of Cocaine with intent to supply	4 years Imp + $15,000 fine or 3 months Imp.
2660/90	36/91	Poss. of utensils used in preparation of cocaine	1 year Imp. (Concurrent)
3438/90	44/91	Employment of Person without G.O.L.	$1,000 fine or 3 months Imp.
4318/90	18/91	Indecent Assault on female	4 1/2 years Imp.
4461/90	2/92	Poss of Cocaine with intent to supply	4 years Imp + $1,000 fine or 3 months Imp.
4806/90	45/91	Consumption of Ganja	6 months Imp.
4809/90	45/91	Poss of Ganja with intent to supply	9 months Imp. (Concurrent)
4810/90	45/91	Poss of Cocaine with intent to supply	2 years Imp. (Consecutive)
129/91	1/92	Poss of Cocaine with intent to supply	3 years Imp.
1375/91	39/91	Poss of Cocaine with intent to supply	4 1/2 years Imp. + $60 fine or 10 days Imp. Deportation rec.
1834/91	5/92	Refusing to provide urine sample	Fine $500 or 2 months Imp.

1839/91	*5/92*	*Assault Causing A.B.H.*	*18 months Imp. (6 months susp.)*
3489/91	*5/92*	*Incitement to resist arrest*	*$250 fine or 1 month Imp.*
2166/91	*9/92*	*Handling Stolen Goods*	*12 months Imp.*
2456/91	*9/92*	*Handling Stolen Goods*	*12 months Imp.*
3176/91	*9/92*	*Theft*	*12 months Imp.*
2455/91	*9/92*	*Handling Stolen goods*	*12 months Imp. (All Above to run concurrently)*
5098/91	*9/92*	*Theft*	*12 months Imp.*
4659/91	*9/92*	*Consuming Ganja*	*12 months Imp.*
4660/91	*9/92*	*Consuming Cocaine*	*18 months Imp. (Concurrent)*
5524/91	*9/92*	*Taking of Marine Life*	*1 month Imp.* *On appeal total sentence on 9/92 reduced to 2 years. 9 months Imp.*
2243/91	*47/91*	*Consuming Cocaine*	*6 months Imp (Concurrent)*
2244/91	*47/91*	*Consuming Ganja*	*3 months Imp. (Concurrent) with a robbery sentence)*
2245/91	*47/91*	*Assault Causing A.B.H.*	*3 months Imp. (Consecutive)*
2414/91 *2415/91*	*4/92* *4/92*	*Possession of Ganja with intent to supply* *Poss of Cocaine with intent to Supply*	*1 year Imp.* *3 years Imp (Consecutive) + $500 fine or 2 months Imp.*
2885/91 *2887/91* *2887/91*	*8/92* *8/92* *8/92*	*Poss of Ganja* *Consumption of Ganja* *Consumption of Cocaine*	*9 months Imp.* *6 months Imp. (Concurrent)* *9 months Imp. (Concurrent)*

3433/91	8/92	*Poss of Cocaine with intent to supply*	*3 years Imp. + $300 fine or 3 months Imp.*
2010/90	38/91	*Rape*	*5 Years Imprisonment*
3595/90	7/92	*Causing Death by Reckless Driving*	*18 months Imp. (9 months suspended) and 5 years Disqualification*
1832/91	20/91	*Rape*	*3 1/2 years Imp.*
1546/90	42/91	*Possession of Cocaine with intent to supply*	*12 years imprisonment - $20,000 or 6 months Imp. in default. Plane forfeited.*
1546/90	42/91	*Possession of Cocaine with intent to supply*	*10 1/2 years imprisonment + $12,000 fine or 6 mths Imp. in default Plane forfeited.*
2138/90	25/91	*Importation of Cocaine*	*4 years imprisonment + $70 fine or 10 days Imp. in default*
2139/90	25/91	*Possession of Cocaine with intent to supply*	*4 years imprisonment concurrent with 2138/90 Deportation recommended*
3457/91	18/92	*Possession of Cocaine with intent to supply*	*5 years imprisonment + $100 or 10 days Imp. in default. Deportation recommended*
4534/91	11/92	*Consumption of Cocaine*	*6 months Imprisonment*
4535	11/92	*Wounding*	*18 months imp. (Consec.)*
3380/91	11/92	*Refusing to provide Urine specimen*	*$600 fines or 2 months Imp. (Concurrent)*
5931/91	11/92	*Wounding*	*18 months Imp. (Concurrent)*
5956/91	11/92	*Consumption of Cocaine*	*9 months Imp. (Concurrent)*
4809/91	12/92	*Theft*	*6 months Imp.*
4810/91	12/92	*Theft*	*18 months Imp. (Concurrent)*
4975/91	13/92	*Giving false name to police officer*	*$60 fine or 1 month Imp. Concurrent with 4977/91*
4977/91	13/92	*Possession of Ganja with intent supply*	*18 months imprisonment*
4666/91	10/92	*Possession of Ganja*	*9 months imprisonment*

4667/91	*19/92*	*Consuming Ganja*	*6 months Imp. (Consec) + activation of 3 months sentence previously suspended.*
5959/91	*19/92*	*Consumption of Cocaine*	*9 months Imp. (Concurrent) & $500 fine or 2 months Imp. in default.*
5960/91	*19/92*	*Consumption of Ganja*	*9 months Imp. (Concurrent)*

MD

Evidence

Evidence - Credibility of prosecution witnesses doubted in part - Failing to allow evidence of hostile witness - Failing to give accused opportunity to cross-examine Crown witness

Jackson v R

Grand Court (SCA 122/91)
Schofield J
May 7 1992

Mr Hampson for the appellant
Mr Roberts for the Crown

The appellant was charged with two offences of 'being concerned in the possession of cocaine with intent to supply another person' and 'possession of cocaine' as a result of police entrapment.

He was approached by two police officers who posed as purchasers. He apparently referred them to his 14 year old nephew who supplied one of the officers. The appellant was thereby arrested and his house searched. His person was not there and then searched; this was not done until he had been brought to the police station. The police officer gave evidence that one rock of cocaine was found in the accused's possession when searched at the police station.

The learned magistrate found it strange that the police officers immediately searched the appellant's house and not his person. The appellant was convicted of being concerned in the possession of cocaine with intent to supply but acquitted on the second count of possession of cocaine.

He appealed against conviction.

Held: (allowing the appeal)

(i) The learned magistrate apparently doubted the credibility of the evidence of the search of the appellant's person at the police station and had consequently acquitted him of possession. To convict the accused on the first count, the learned magistrate had relied on the evidence of the same witnesses he had doubted with respect to the second count. The appellant's testimony that he had not participated in the supply did not seem to have been considered by the learned Magistrate.

(ii) The nephew testified for the Crown but his earlier written testimony was in conflict with his evidence on oath and he was accordingly treated as a hostile witness. It appeared from the record that the nephew was ordered to be remanded in custody after exchanges between himself and Crown counsel during cross-examination. The appellant thereby did not get the chance to cross-examine the Crown witness. Further, when the appellant attempted to interject a statement made by Crown counsel, the learned magistrate had told him he did not accept what he said, apparently giving an impression of uncreditworthiness.

(iii) All the above circumstances made the conviction unsafe and unsatisfactory and would therefore be quashed.

AD

Corroboration - Accomplice testifying for the Crown

Gouldborne v R

Cayman Islands Court of Appeal (CICA Criminal 44/91)
Zacca Pres Henry and Kerr JJA
April 10 and 16 1992

Cases referred to

Bissessar v Jordan [1965] WLR 315
The King v Baskerville [1918] 2 KB 658

Legislation

Caymanian Protection Law 1984 Ss 30(1) and 30(2)

Ms Brooks for the appellant
Ms Dilbert for the Crown

In February, 1991, the appellant was convicted in the Magistrate's Court of having employed another person without a gainful occupation licence contrary to S.30(2) of the Caymanian Protection Law, 1984 and fined $1,000.00. His appeal to the Grand Court against conviction was dismissed.

He then appealed to the Court of Appeal on the ground that he had been convicted on the evidence of an accomplice without corroboration. The accomplice, Ms C had pleaded guilty to a charge of working for the appellant without a gainful occupation licence and had testified for the Crown. The only other Crown witness in the case was an immigration officer who had seen Ms C working in the appellant's beauty salon, had interviewed her and obtained an admission that Ms C was working in the salon.

In the Grand Court it was submitted on behalf of the appellant that there was no evidence capable of corroborating the evidence of Ms C and that in the absence of corroboration it was dangerous for the magistrate to act on the evidence and that there was no indication in the judgment that the magistrate had warned himself of the danger nor looked for corroboration. In the Court of Appeal, it was submitted on behalf of the appellant that the evidence of the immigration officer could not corroborate that of Ms C since it did not actually implicate the appellant in the offence (The King v Baskerville)

Held: (dismissing the appeal and affirming the sentence)

The evidence of the immigration officer that he saw Ms C working in the appellant's salon (writing and using the telephone) was capable of corroborating the evidence of Ms C and did in fact corroborate that evidence. The evidence clearly justified the conviction.

* Note: The reader is referred to (1991) 6 Law Bulletin for the Grand Court judgment

AD

Equity & Trusts

Application for Beddoe order - Circumstances when trustees may litigate and be indemnified from the trust fund

In The Matter of a Trust Settlement

Grand Court (487/91)
Malone CJ
January 22 1992

Cases referred to

National Anti-Vivisection Society Ltd v Doddington & others (1989) The Times 23 November
Morice v Bishop of Durham [1804] Ch 399
In Re Londonderry's Settlement [1965] 1 Ch 918
In Re Cowin (1866) 33 Ch D 179

Mr Jones for the trustees
Mr Mowbray QC Mr Foster and Mr Stephens for Captain Lemos and family
Mr Duckworth for three other beneficiaries

The plaintiffs had commenced actions in Greece and the Cayman Islands concerning a settlement which has the defendants as trustees. The trustees, though parties to the Cayman action were not parties to the Greek action, the purpose of which was to set aside the trust. In the Cayman action, the plaintiffs had taken out two summonses in November 1991 for a mandatory injunction requiring, inter alia, that the trustees give the beneficiaries access to various classes of accounting documents. Such access had previously been denied by the trustees.

In this application the trustees sought a Beddoe order from the court. (This being an application to the court by the trustees whereby leave is sought to bring or defend an action. Where leave is granted the trustees are entitled to be re-imbursed their costs out of the trust estate, regardless of the result of the action).

This leave was specifically sought by the trustees in respect of:

(a) defending the two summonses; and

(b) seeking a direction that it was appropriate for the trustees, at the trust's expense, to seek legal advice in connection with the Greek action.

Mr. Mowbray contended that:

(a)The trustees' application in connection with the Greek action should be denied. To allow the application would work an injustice in that the trust fund would be burdened with the costs even if the plaintiffs were successful in the Greek action. (Applying the dictum of Mummery J, in National Anti-Vivisection Society Ltd v Doddington.)

(b) It would be wrong to allow the trustees to have their costs paid out of the fund, as was being sought, in respect of their response to the November Summonses. The claims of the beneficiaries, asserted Mr. Mobray, were unanswerable as the trustees were invested with a fundamental duty to account.

Held: (allowing the application with costs to be bourne by the plaintiffs):

(i) As trustees, the applicants had a duty to protect the trust and a correlative right to be indemnified out of trust funds if they acted properly for the benefit of the trust. In seeking to obtain legal advice in connection with the Greek action, the trustees were, prima facie, acting properly since the objective of that action was to set aside the trust. The factor of injustice to which Mr. Mowbray alluded had no application on these facts therefore, win or lose the trustees would be entitled to have their costs paid from the trust fund.

(ii) Whilst beneficiaries have, prima facie, the right to inspect trust documents, this right is not an absolute one. It was necessary to look at the reality of the plaintiffs' position. They were attempting, as beneficiaries, to claim a right to information which

may have assisted their denial, before the Greek courts, of the existence of the trust. It was noteworthy that the objective of the plaintiffs in the Greek action was not one shared by all the beneficiaries, and further, if pursued in Cayman, would, on account of the Trust (Foreign Element) Law, be unlikely to succeed.

MD

Family

Maintenance - Variation - Marked change in circumstances

K v A

Grand Court (27/89)
Malone CJ
April 7 1992

Mr Shea for the petitioner
Mrs Maierhofer for the respondent

By a consent order in December 1990 the parties achieved a clean break. The respondent was given care and control of the child and the petitioner was to pay CI$350.00 per month child support and the petitioner was to be solely responsible for the school fees and educational expenses.

The child has now moved off the island to a boarding school. The petitioner alleges this as a marked change in the circumstances and as school fees and expenses are solely his responsibility the payments should be reduced to a normal amount.

Held: (application granted in part)

The child only lives with the respondent during vacations. The increase in the school costs which include living expenses is a marked change in the circumstances. The amount to be paid to the respondent for child support is reduced to CI$90 per week for every complete week that the child is living with the respondent.

JE

J v E

Grand Court (131/91)
Malone CJ
August 5 1992

Cases referred to

Wachtel v Wachtel [1973] 1 All ER 829
J R Miller v A L Miller Case No 68 of 1980

Legislation

Matrimonial Causes Law (9/76) Ss 18 and 21

Mr Alberga QC and Mr Clifford for the petitioner
Mrs Maierhoffer for the respondent

The parties were married for over sixteen years. They divided the obligations of matrimony between them. The husband worked professionally and the wife cared for the home and the children. The parties agreed on arrangements for the children but they ask

the court to divide the family assets and determine the maintenance for the wife.

The husband had to place a large sum of money in a frozen account as one of the conditions of becoming a partner in his professional firm. It can only be removed if he dies or leaves the firm. Without the fund he will drop to employee status and take a significant reduction in pay.

Held: (judgment for the respondent)

The wording of S.21 Matrimonial Causes Law confers a wide discretion on the court. The court can take cognisance of the wife's contribution in looking after the house and family (Miller v Miller). It assisted in his success.

The wife has an interest in the frozen account. The funds in it were raised during the course of marriage and the account is an asset of a revenue-producing nature (Wachtel v Wachtel). By virtue of S21(c) and (f) M.C.L. the court can order that the interest may be realized out of another source.

The starting point to a division of assets is the "one-third rule" though it is flexible to secure justice (Wachtel v Wachtel). In spite of the petitioner's objections the matrimonial home is to be sold and the interest due to the wife will be paid out of his share. If the husband must reduce his lifestyle to cover his debts this is not an unreasonable result.

The sale must take place within six months. The husband must pay the wife US$350.00 per month maintenance for herself.

JE

Maintenance - Summons of commitment - Burden of proof

B v B

Grand Court (39/86)
Malone CJ
February 20 1992

Legislation

Judicature Law S 45

Petitioner in person
Mr Furniss for the respondent

The respondent was ordered to pay periodical maintenance. The respondent is in arrears. The petitioner now applies by summons of commitment to enforce payment.

Held: (application dismissed)

The petitioner has the burden of establishing that the case comes within the provisions of S.45(1) of the Judicature Law if she is to succeed. She did not call any witnesses. Her evidence in cross-examination tends to show that the cautions she has registered in the Land Registry have tied up all the respondent's assets.

She should apply for a final order to dispose of the outstanding ancillary matters and lift the cautions which now stand between her and the relief she seeks.

JE

Adoption - Parental consent - Standard consent form - Consent unreasonably withheld - Court dispensing with consent

In the Matter of the Adoption of Children Law (Revised) and The Application of C and N for an Order to Adopt A (an infant)

Grand Court (90/91)
Malone CJ
February 12 1992

Cases referred to

Re W (an infant) [1971] 2 All ER 49
Re L (1962) 106 Sol Jo 611

A B and C B v X's Curator (1962) SC 124

Legislation

Adoption of Children Law Ss 10 11 & 15
Adoption Act 1958 (UK)

Ms Brooks for the applicant
Ms Conolly for the respondent
Ms Dilbert for the Adoption Board

The natural mother, a foreign national, is aged 27. The non-married father is a Caymanian aged 21. He supports the natural mother's position. She has spent periods of time under a work permit. Child A has spent a total of two months and twenty-seven days in his natural mother's care and one year, one month and ten days in N and C's care. The natural mother kept in contact by telephone and numerous visits. The days she did not visit were explained by her lack of financial resources, and the requirement she leave the Island periodically to comply with Immigration Regulations.

N and C had no children and have developed strong bonds with the child. They provide for him. They allow the natural mother access. Unfortunately C has a degenerative disease. Their family will ensure they have sufficient funds for N and C to care for the child.

The social welfare officer recommends an adoption order.

Held: (application dismissed)

(i) The social welfare officer erred in treating this as a case of abandonment. The natural mother's financial circumstances and required trips off the Islands were beyond her control. The natural mother was not correct to use N and C as she did, but through this she provided well for the child.

(ii) The natural mother signed a form entitled "Consent of Parent or Guardian of Child" and another entitled "Certificate of Receipt of Memorandum" acknowledging that she had read a memorandum explaining the Adoption of Children Law.

Her signature was witnessed by a notary public rather than a Justice of the Peace but this is not significant. From the evidence it is clear she did not understand the consequences of signing the forms.

She did not consent to an adoption as adoption is defined in S.15 of the Law.

(iii) In considering whether the natural mother's consent is being unreasonably withheld within the meaning of S.11 of the Law the court referred to Re W and Re L. The burden of proving that the consent is being unreasonably withheld is on the proposed

adopters as in Re L.

The reasonableness test is an objective test having regard to the totality of the circumstances.

The natural mother is a devoted mother and has not neglected nor abandoned A nor displayed an uncaring attitude. She has not handled all things properly but her relationship to her child should not be ended.

(iv) The natural father claims to be an individual whose consent is required. He concedes that the father of an illegitimate child is not a parent within the meaning of the Law. However he claims to be a person who has agreed within the meaning of S. 10(4) of the Law to contribute to the maintenance of the child. The evidence reveals he will pay when he has means. This is too vague to constitute an agreement within the meaning of S.10(4) and therefore his consent would not be required.

JE

Land Law

Land law - Equitable interest under trust

Ebanks v Ebanks

Grand Court (287/91)
Malone CJ
October 10 1991

Authority referred to

Gissing v Gissing [1971] AC 886

Mr Murray for the plaintiff
Defendant not present and unrepresented

The plaintiff sought:

1. An order declaring that she had an unregisterable equitable interest in the property which was registered in the name of the defendant.

2. Leave to enter judgment against the defendant in a sum representing the value of her unregisterable interest.

The plaintiff and the defendant (a married man) had lived together for 13 years and had had 2 children in that time.

The property was purchased and registered in the sole name of the defendant on the understanding that it would be jointly owned when the defendant was divorced and the couple was married.

The plaintiff contributed directly towards the cost of building the house on the property and indirectly in making it a home. The direct contribution was assessed at $29,040.00 and the indirect contribution at $10,000.00.

Held: (application granted)

(i) The situation was one of a constructive trust as recognised by Gissing v Gissing in that:

(a) there was a common intention that the plaintiff was to have a beneficial interest in the property; and

(b) the plaintiff acted to her detriment on the basis of that intention.

(ii) The equitable rule requiring written evidence of a trust in land does not apply to a constructive trust.

(iii) The quantum of the beneficial interest included both the direct and indirect contributions.

AC

Land law - Rectification of register in case of fraud - Whether rectification can be ordered in case of first registration pursuant to land adjudication process

Ebanks v Clarke

Grand Court (233/90)
Schofield J
March 19 1992

Cases referred to

Waimiha Saw Milling Co Ltd v Waione Timber Co Ltd [1926] AC 101 106-7
Roberts v Toussaint and others [1963] 6 WLR 431
Ebanks v Powery (No 571/1978)
Wood v Wood (No 411/1980)
Wilson v Bodden et al (No 195/1983)
Cook-Bodden v Kirkconnel et al (No 408/1986)
Willis v Earl Howe [1893] 2 Ch 545
Beaman v A R T S Ltd [1949] 1 KB 550 559
McCormick v Grogan [1869] LR 4 HL 82 97

Legislation

Registered Land Law 1971 Ss 23 and 140
Land Adjudication Law 1971

Mr Hill QC and Ms Maierhofer for the plaintiff
Mr Lamontagne QC and Mr Nelson for the defendant

The plaintiff, who was illiterate, paid off the mortgage on a piece of land owned by his half-brother - FC. The land was then transferred by way of deed of gift to the plaintiff; FC being entitled to occupy for life one of the two dwelling houses on the land. FC continued to live there with a lady-friend - EF. The plaintiff spent much of his time at sea but continued to maintain the land. When the house in which FC and EF lived fell into disrepair the plaintiff invited them to move into the larger house on the property with him. There was no record of the deed of gift being produced to the records officer.

In the land adjudication process of 1974 FC applied for the land certificate and the land was registered in his name. The plaintiff was not aware that the adjudication process was taking place.

In 1987 FC transferred the land to himself, EF and her daughter, the defendant. There was no consideration for the transfer.

EF died in 1989. FC died in 1990.

The plaintiff sought a declaration that he was entitled to be registered as the proprietor of the land and an order for rectification of the register.

Held: (declaration granted and order for rectification made)

(i) Notwithstanding S.140 of the Registered Land Law 1971 being subject to the provisions of the Land Adjudication Law 1971 and the Court accepting that there should be an element of finality about the adjudication and registration process, the Court should never permit fraud to prevail or sanctify the results of fraudulent or dishonest transactions.

The Registered Land Law did not preclude

rectification of a first registration made pursuant to the adjudication process in such a case.
A fraud on the adjudication process itself must always be open to review.

(ii) Four circumstances must be present for rectification to be ordered:

(a) there must have been a fraud
(b) the fraud must deprive the plaintiff of title of the estate
(c) the fraud must be concealed; and
(d) the fraud must be such that it could not with reasonable diligence have been discovered sooner than it was in fact discovered.

(iii) The defendant was not in possession of the land and did not acquire it for valuable consideration. S.140(2) of the Registered Land Law did not assist.

(iv) Alternatively, under equitable principles the defendant held the land in trust for the plaintiff as equity converts a party who has obtained property by fraud into a trustee for the party who is a victim of that fraud. The defendant was only passed the title of the perpetrator of the fraud i.e. a trusteeship and a declaration would be granted to that effect and an order to rectify the land register made accordingly.

AC

Personal Injury

Damages - Assessment for personal injuries

McLaughlin v Marchadie and Mike's Ice and Refrigeration Co Ltd

Grand Court (328/91)
Schofield J

Cases referred to

Huddleston v Hassan and another (301/90)
Morris v Payne Citation Kemp and Kemp Quantum of Damages Para 9-023
Hamby v Maudsley Kemp & Kemp Quantum of Damages Para 9-024/1
Calder v Lummus Crest Ltd Kemp & Kemp Quantum of Damages Para 9-020
Powery v Minzett (180/91)

Authoritative works referred to

Kemp and Kemp Quantum of Damages

Mr Murray for the plaintiff
Mr Shea for the defendants

The plaintiff is a 42 year old prison officer who suffered injuries to his left knee, right ankle, shoulder and neck (and consequential headaches) in a motor vehicle accident in October, 1989. The defendants admit liability, and special damages are agreed.

The court is asked to determine the amount of damages for pain, suffering and loss of amenities.

The plaintiff attended hospital but was not admitted. X-rays revealed a chip fracture to the anterior border of the tibia. The medical evidence was given by report. Dr. Newball, an orthopaedist, made diagnoses of: (1) post traumatic bursitis of left shoulder (frozen shoulder),(2) grade 1 sprain of left knee, (3) lesion of medial branch saphenous nerve in left knee, and (4) chip fracture of tibia. Dr. Newball said the injury to the shoulder may need surgical

treatment, and the plaintiff will have to avoid heavy lifting.

The plaintiff underwent five months of physiotherapy which improved the ankle and knee. Due to an increase in shoulder pain the plaintiff underwent a shoulder manipulation under general anaesthesia, which improved his condition somewhat. However the plaintiff has had to stop jogging and exercising.

Held: (judgment for the plaintiff)

(i) Huddleston v Hassan and another states that authorities from foreign jurisdictions are no more than a general guide. The U.K. cases of Morris v Payne, Hamby v Maudsley and Calder v Lummus Crest Ltd. are helpful. Powery v Minzett is not useful in this case.

(ii) The court assessed damages for pain, suffering and loss of amenities at CI$6500.00.

JE

Damages - Assessment for personal injuries - Third party assistance

Hammer v Martin and Sheckles

Grand Court (327/91)
Schofield J

Authority referred to

Huddleston v Hassan and another (301/90)

Authoritative work referred to

Kemp and Kemp Quantum of Damages

Mr Murray for the plaintiff
Mr Shea for the defendants

The plaintiff is a 23 year old waiter who suffered a fracture to his left kneecap and significant facial lacerations in a motor vehicle accident in April of 1990. The court is asked to determine the question of damages.

As a result of the accident the plaintiff had a patellectomy (removal of the kneecap). He was in hospital for 21 days. One week after his release he returned to his homeland.

Medical evidence was tendered by report. The cast was removed 6 weeks post accident. He stayed in hospital for 3 days for intensive physiotherapy. He is left with a weak leg. The 10 degree restriction on flexion can be cured with exercise. There is a small chance that surgery will be required on the former bed of the patella.

The scars are noticeable but not repulsive or disgusting. Corrective plastic surgery is forecast at a cost of between US$38,175 and US$45,810.

The plaintiff can no longer ski, play soccer or squash. His ability to play tennis or ride horses is restricted. He still goes to the physiotherapist on occasion.

Special damages except loss of earnings are agreed at US$3761. Even though the doctor certified him fit for work in July, 1990 the plaintiff found walking too much for him. He resumed work at the end of October, 1990.

Held: (judgment for the plaintiff)

(i) The plaintiff is honest and not a malingerer. The

Court accepted the evidence that he could not work until October, 1990. His wage loss is calculated at the low season average of US$600 per week.

(ii) His mother nursed him at home for a brief period. The court made a nominal award of US$1000 to the plaintiff which must be passed on to his mother.

(iii) Because there is a remote possibility that the plaintiff will have to undergo further surgery on his knee the award would reflect the highest cost quoted to cover the plastic surgery in order to cover both the certain plastic surgery and the chance of further knee surgery.

(iv) Huddleston v Hassan and another states that authorities from foreign jurisdictions are no more than a general guide. Jamaican authorities are not relevant in this jurisdiction.

The court awarded US$55,000 for pain suffering and loss of amenities.

JE

PRIVATE INTERNATIONAL LAW

Writ - Service out of jurisdiction - Circumstances when proper

Fidelity and Guarantee International Ltd (In Liquidation)

Grand Court (491/91)
Schofield J
March 27 1992

Legislation

Grand Court (Civil Procedure) Rules r 15(1)
RSC Order 11 r 1(1)(F) RSC (UK)

Insurance Law S 4(5)

Ms Bridges for the applicants/defendants
Mr. Turner for the respondent/plaintiff

On an ex parte summons filed in December 1991 the plaintiff company obtained an order for leave to serve both defendants with a writ out of the jurisdiction. The first defendant was the sole shareholder and director of the company which had its place of business in Cayman and which had been incorporated with the objective of providing insurance cover in respect of medical malpractice risks. The second defendant was the wife of the first defendant.

It was alleged that the first defendant had acted fraudulently, and in breach of his fiduciary duty owed to the company by converting company funds and assets to his own use and to that of a company in which he held a controlling interest.

It was further alleged against both defendants that they had fraudulently caused the plaintiff company to guarantee their personal indebtedness, and that it had thereby suffered financial loss. The Superintendent of Insurance had suspended the plaintiff company's insurer's licence and the company was now in liquidation. The sums involved amounted to more than US$2m.

The defendants sought to set aside the order for leave to serve notice of the writ out of the jurisdiction, viz the U.S.A. The defendants contended that as they were citizens of the U.S.A., and as the plaintiff company carried on its business exclusively

outside of the Cayman Islands, the Grand Court lacked jurisdiction to serve the defendants out of the jurisdiction.

Held: (dismissing the application)

(i) Whilst the business of the company, in accordance with S.41(5) Insurance Law, was exclusively of an international nature, that did not "take away the Cayman Islands quality of the company". If the damage alleged had occurred, the victim was a Cayman Islands company carrying out business in these Islands. Accordingly the action was within the scope of Order 11 R 1 (1)(F) R.S.C. - the claim being founded on a tort with the damage being sustained or resulting from an act committed within the jurisdiction.

(ii) The granting of the application would not be interfered with for failure to comply with rule 15(1), Grand Court (Civil Procedure) Rules requiring the swearing of an affidavit, setting out the grounds of the application.

Whilst such grounds had not been included in an affidavit, the granting of leave would stand this being a case where the facts fell within order 11 R 1(i)F.

MD

Jurisdiction

L Ltd v S

Grand Court (490/91)
Schofield J

April 6 1992

Legislation

RSC Order 11 rule 1(1)(d)

Ms Bridges for the defendant
Mr Turner for the plaintiff

The defendant is a resident of a foreign country. The plaintiff is a Cayman Islands company of which the defendant was the sole shareholder and director. It is now in liquidation.

On December 9, 1991 the plaintiff was given leave to serve the writ on the defendant out of the jurisdiction. The defendant brings this application to set aside that order and further, requests an order setting aside the writ of summons on the grounds that the Grand Court has no jurisdiction.

Held: (application dismissed)

The writ alleges that the defendant received a loan from the plaintiff in 1987 which was secured by a promissory note in 1988. The loan was not repaid.

The loan agreement contains a jurisdiction clause referring to a foreign jurisdiction. The promissory note contains a similar clause referring to the Cayman Islands. The plaintiff is suing on the promissory note so the Grand Court has jurisdiction. The suit comes within the provisions of Order 11 r 1(1)(d). Costs to the plaintiff.

JE

CONSENT OR NO CONSENT - IS THAT THE QUESTION?

The objectives of the Criminal Law Revision Committee, when drafting the radical reforms proposed by the 1966 Theft Bill, were described by a contemporary commentator,[1] as being

"..to do away with the more embarrassing & restrictive technicalities of the existing law.."

In the same place it was observed that the Committee faced a choice between creating a specific definition of the various theft offences and their elements, or one whose generality would allow it to evolve to meet the challenges presented by ever more complex and sophisticated dishonest dealing. Megaw LJ, in delivering the judgment of the Court of Appeal in *Lawrence v Comr. of Police for the Metropolis*[2] noted that the new S.1(1) offence under the 1968 Act comprised four elements:

"(1) a dishonest (2) appropriation (3) of property belonging to another (4) with the intention of permanently depriving the other of it."

The *actus reus* elements within (2) & (3) above were clearly intended to extend the boundaries of larceny which had become tamed by its over-complexity. The breadth of the definitional elements, coupled with the fact that certain of them, such as those offered in respect of "dishonesty" and "appropriation "were only intended to be partial, provides strong evidence that the Committee were eschewing the laboured specificity with which the law of stealing had become over-run under the Larceny Acts. Moreover, in omitting any reference to the question of consent within Section 1(1) it may be further surmised that the Committee's priority was to create a readily comprehensible framework for the protection of property rights.

The integral elements of the *actus reus* of "stealing", within S.1(1) of the Larceny Act 1916 were that it referred to the conduct of:

"A person.. who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen.."

This paper focuses upon the question of whether the omission of a lack of consent requirement from the new definition of theft was deliberate or inadvertent. In short, is the offence of theft committed when the defendant, with the required *mens rea*, tricks his victim into consensually parting with his property? This fundamental and seemingly elementary question has spawned three House of Lords decisions, the latest of which,[3] with all respect to their lordships, has followed the

[1] Hadden [1967] Crim.L.R.669.
[2] [1970] 3 All ER 933 at 935. Endorsed by the House of Lords at [1971] 2 All ER 1253 at 1255.

pattern of the previous two decisions[4] in bringing little clarification to bear upon the subject. Furthermore, the thorny question of consent has also proved divisive to the harmony of the Civil and Criminal divisions of the Court of Appeal.[5] The conflict was ironically resolved by the House of Lords in *R v Gomez* in favour of the lord justices less versed in the criminal law.

The former law of stealing was abundantly clear: the taking and carrying away had to be without the consent of the owner. The only exception was that of the dishonest bailee for whom specific provision was made by the inclusion within S.1(1) Larceny Act 1916 of the offence of larceny by trick. This provided that:

"..a person may be guilty of stealing...notwithstanding that he has lawful possession thereof if, being a bailee or part-owner thereof, he fraudulently converts the same to his own use or to the use of any person other than the owner."

The dishonest bailee could however escape conviction if it could not be established that he had intended to misappropriate the property from the out-set.[6] Whilst the extended definitions of "appropriation"[7] and "belonging to another" within Ss.3(1) and 5(4) of the 1968 Act, have successfully exorcised this limitation, the jettisoning of the lack of consent requirement has inadvertently thrown into doubt the status of another.

In *Lawrence*[8] the House of Lords ruled that the failure of the Committee to include a lack of consent requirement within the S1.(1) theft offence could not have been inadvertent and it followed therefore that the new offence could be established even where the victim consensually handed over the property which was the subject of the charge.

The facts concerned the arrival into England of the unfortunate Mr. Occhi, an Italian student who spoke very little English. On his arrival at Victoria Station he requested the appellant taxi driver to take him to Ladbroke Grove. He was informed that the journey was long and would be very expensive. Occhi offered the appellant one pound, but, his wallet still being open, allowed the appellant to take a further six pounds from it. In fact the correct fare would have been 10s 6d. In affirming the appellant's conviction for the theft of six pounds, the House of Lords unanimously determined that it was no defence for the

[3] *R v Gomez* [1992] Times December 8 1992.
[4] *R v Lawrence* [1971] 2 All ER 1253 and *R v Morris and Anderton v Burnside* [1983] 3 All ER 288.
[5] C.f *Dobson v General Accident Fire and Life Assurance plc* [1989] 3 All ER 927 and *R v Gomez* [1991] 3 All ER 394 (CA).
[6] See for example *Moynes v Coopper* [1956] 1 All ER 450.
[7] Noted by Professor Cross very prophetically in a contemporary commentary as being the word which "..is in many ways the most important in the whole new definition of theft." [1966] Crim.L.R.415 at 417.
[8] *Supra* N.6

appellant to argue that he had taken the additional six pounds with Mr. Occhi's consent.[9] Viscount Dilhorne, in delivering the judgment of the House, stated:

"I see no ground for concluding that the omission of the words 'without the consent of the owner' was inadvertent & not deliberate...Parliament by the omission of these words has relieved the prosecution of the burden of establishing that the taking was without the owner's consent. That is no longer an ingredient of the offence."

The law relating to this element of the *actus reus* appeared to be settled therefore, and it is perhaps unsurprising that Viscount Dilhorne, in a sanguine moment, uttered the fiat that the 1968 Act had "greatly simplified the law".[10]

The *actus reus* elements of the theft offence were again dispatched to the House of Lords for clarification in the consolidated appeals of *R v Morris* and *Anderton v Burnside*[11] Both prosecutions arose out of efforts by the appellants to obtain supermarket items at an under-value by substituting price labels from lesser-priced items for those displayed on the desired product. In *Morris* the appellant was arrested after he had paid the lower price; in *Burnside* the appellant was arrested at the check-out prior to him having paid the lesser amount. Both appellants argued that there had been no appropriation of the goods prior to reaching the check-out; Morris argued further that there could be no appropriation after the check-out had been passed as ownership in the goods had already passed to him.[12]

Lord Lane, in giving the judgment of the Court of Appeal, felt constrained by the decision in *Lawrence* to conclude that an appropriation occurred as soon as a customer took an item from a shelf with the intention of buying it. Applying Viscount Dilhorne's judgment it was no defence to argue that such conduct had the implied consent of the shop-owner: an appropriation under the 1968 Act did not connote any lack of consent, as had taking and carrying away under the Larceny Act 1916. Moreover, it was not necessary to show that the appellant had assumed all the rights of the owner; the assumption of a singular right was enough[13] - the right of the shop-owner to remove his products from the shelves. Accordingly the Court of Appeal, applying *Lawrence*, determined that Morris had effected an appropriation even before he switched the price labels - at the time when he removed the items from the shelf.

The House of Lords, whilst affirming the convictions of both Morris and Burnside, differed from the Court of Appeal as to the timing of the appropriations. Lord Roskill, delivering the judgment of the House of

[9] *Ibid* at p.1255.
[10] *Ibid* at p.1254.
[11] *Supra* N.6.
[12] Ownership passes to the customer when payment is made: *Lacis v Cashmarts* [1969] 2 QB 400.
[13] See also *Anderton v Wish* [1980] Crim.L.R. 319 Per Roskill LJ.

Lords, stated unequivocally:[14]

"In the context of S.3(1), the concept of appropriation in my view involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights."

Accordingly, it was inapposite to apply the term to an honest shopper; no appropriation took place until the appellant had removed the items from the shelves and had switched the labels.[15] Until this threshold had been reached the appellant remained within the terms of the shop-owner's implied consent. The term "Appropriation" did not therefore simply connote doing something which the proprietor could do, but went further, requiring an interference with the proprietor's rights.

The House of Lords' ruminations thus far may be summarised as follows: to constitute an appropriation an act done with the owner's consent will suffice *(Lawrence)* but it must be an act which interferes with the owner's rights, rather than being conduct which is embraced by principles of implied authority *(Morris)*. It is unfortunate therefore that their lordships have taken a term employed for its apparent ease of comprehension and translated it into an esoteric term of legal art. Indeed, twenty two years hence the courts have construed the legislation such that it appears increasingly unworthy of Viscount Dilhorne's lavish praise.

With respect the root cause of the dilemma must be laid at the door of Lord Roskill who, in guiding the law to this juncture, did so with only a cursory analysis of *Lawrence* and with no indication as to how the two cases could be reconciled or indeed whether he viewed them as in need of reconciliation.[16] With great brevity his lordship dismissed the earlier decision of the House of Lords by observing:[17]

"That there was in that case a dishonest appropriation was beyond question and the House did not have to consider the precise meaning of <u>that word in S.3(1).</u>"[18]

[14] *Supra* N.6 at p.293.
[15] Lord Keith has pointed out in *Gomez* that the singular act of switching the price labels is enough *infra* p.86.
[16] The proposition will be advanced *infra* that the two cases are closer factually than may first appear.
[17] *Supra* N.6 at p.292.
[18] Implicit in Lord Roskill's statement is the distinction between appropriation in its everyday sense and its technical, extended definition to be found in S.3(1) Theft Act 1968. Lord Roskill appears to be drawing from the writings of Professor Glanville Williams who has himself asserted this distinction *(Textbook of Criminal Law* Second Ed. 1983) with the conclusion that where appropriation in its dictionary sense has occurred *(Lawrence)* consent is no bar to the finding of an appropriation, whereas if the term is employed in its S.3(1) sense
(Footnote continued)

Such reasoning is, with respect, far from convincing. One of the certified questions raised for the House to consider in *Lawrence* was whether the definition of theft within S.1(1) should have engrafted onto it a "lack of consent requirement". As has already been seen Viscount Dilhorne very tersely answered this question in the negative, pausing at the end of his judgment only to register his surprise that their Lordship's House should have been troubled by so facile a question.

As may be observed however, the effect of Lord Roskill's judgment is, that had he been asked the same certified question, his answer would likely have been in the affirmative. According to *Morris* the honest (and also dishonest)[19] shopper who takes goods down from the supermarket shelf to examine them, being within the umbrella of the shop-owner's consent, does not, without more, commit one of the four elements of theft.[20]

However, salvation from this quagmire of burgeoning technicality may be at hand in the form of the steadying influence of the Civil Division of the Court of Appeal[21] where the incisive reasoning of the soon to be appointed Master of the Rolls, Bingham LJ, succeeded in reconciling the hitherto estranged House of Lords decisions.

Apparent Consent Versus Actual Consent:

The key to reconciliation of the authorities, as recognised by Bingham LJ, is to cut a path through the consent myth and to thus arrive at the actual facts depicted in the case law. By adopting this approach it is evident that *Lawrence* may be most accurately described as an "apparent consent" case. It is axiomatic that in fact there was no consent by Occhi for the appellant to take more than the legally permitted fare.[22] This much was recognised by Viscount Dilhorne when he observed:

"The main contention of the appellant in this House and in the Court of Appeal was that Mr. Occhi had consented to the taking of the six pounds...In my opinion, the facts of this case...fall far short of establishing that Mr. Occhi had so consented."

It is submitted that despite His Lordship's pre-occupation with the

[18] (continued)
(Morris) a lack of consent is required. It will be submitted *infra* that Professor William's approach is untenable in its classification of *Lawrence* as an actual consent case. Central to this paper is its denial of such analysis.
[19] See for example *Eddy v Niman* [1981] Crim.L.R. 502
[20] C.f the judgment of Lord Keith in *Gomez infra* p.87 in whose judgment an appropriation occurs as soon as the item is placed in the store's trolley.
[21] *Dobson v General Accident Fire and Life Assurance plc Supra* N.7 Approved by the House of Lords in *Gomez Supra* N.3.
[22] *Supra* N.6 at 1254.

consent question the true basis of the decision in *Lawrence* is betrayed by the above *dictum.* No reasonable jury could conclude that there was in fact consent for the appellant to take what amounted to some fourteen times the legal fare for the journey; it may be questioned whether their lordships' obsession with the consent issue would have continued unabated had the appellant removed a series of travellers' cheques from Mr Occhi's wallet - for the two incidents are legally indistinct.

It is strongly urged therefore that Viscount Dilhorne's consideration of the issue of consent was strictly *obiter dictum.* As revealed from the facts, and recognised by his lordship, taking an additional six pounds was the clearest manifestation of a usurpation of Mr. Occhi's rights and was therefore an appropriation in law. In short, a consideration of the issue of consent was here, as in the next following cases, an unnecessary aside.[23]

The Apparent Consent Cases.

In *Dobson v General Accident Fire and Life Assurance plc*[24] Mr. Dobson had advertised his Rolex watch and a diamond ring for sale at the asking price of some six thousand pounds. A rogue responded to the advertisement and agreed to pay the asking price. It was agreed that payment should be by way of a building society cheque and upon being presented with the cheque the plaintiff handed over the items. It transpired that the building society cheque had been stolen and was therefore worthless. The plaintiff made a claim under his household insurance policy which covered him, *inter alia*, for the theft of his belongings. The defendant insurers declined to meet the claim on the basis that in these circumstances there had been, in law, no theft . In seeking to apply the decision of the House of Lords in *Morris* the defendants contended that there had been no appropriation on the present facts as the defendant had consensually handed over his property which negatived Lord Roskill's requirement of adverse interference.

The Court of Appeal upheld the decision of the judge that the plaintiff's loss had been caused by theft. Parker LJ proceeded on the assumption that the plaintiff had consented to his property being taken. He accordingly applied *Lawrence* in determining that the presence of consent was irrelevant to the appropriation issue, but concluded, in deference to *Morris* that the actions of the rogue amounted to:

" ..a plain interference with or usurpation of the plaintiff's rights."[25]

Thus by conflating the two decisions Parker LJ was able to identify an

[23] Moreover, even where the concept of consensual appropriation has in truth arisen there is authority to indicate that there exists no bar to the finding of an appropriation: *R v Philippou* [1989] Crim L.R.585 *infra* p.88.
[24] *Supra* N.7.
[25] *Ibid* at 935.

appropriation. More instructive for present purposes, however, is the judgment of Bingham LJ. The lord justice also sought to reconcile the two decisions of the House of Lords, and likewise confirmed that the present facts did amount to theft within the 1968 Theft Act. The learned lord justice observed:[26]

"Since, however, the House in *R v Morris* considered that there had plainly been an appropriation in *Lawrence's* case, this must (I think) have been because the Italian student, although he had permitted or allowed his money to be taken, had not in truth consented to the taxi driver taking anything in excess of the correct fare..On the facts of the present case..it can be said, by analogy with *Lawrence's* case, that although the plaintiff permitted.. his property to be taken by the rogue, he had not in truth consented to the rogue becoming owner without giving a valid draft..."

As with *Lawrence* itself the conclusion that an appropriation has occurred follows naturally once the illusion of consent is recognised as such, thereby allowing the court to focus upon the interference with the victim's rights, plainly evident in each case.

The most recent example of "apparent consent" is supplied by the facts of *R v Gomez*[27] where, with respect, it was the failure by the Court of Appeal to appreciate the crucial distinction between apparent and real consent which forced the court into error. The decision of the House of Lords, regrettably does little to redeem this error.

The instrument of the dishonest dealing was, once more, stolen building society cheques. The appellant, who was employed as an assistant at an electrical goods shop, was induced by a third party to persuade the shop manager to accept the cheques as payment for electrical goods. The manager, not knowing that the cheques were worthless, was persuaded to accept them in exchange for goods valued in excess of 16,000 pounds after the appellant had falsely represented to him that the bank had informed him that the cheques were 'as good as cash'.

Counsel for the appellant argued that since the manager had authorised the removal of the goods the presence of consent rebutted any conclusion that the rights of the shop-owner had been adversely interfered with and, according to *Morris* there could therefore have been no appropriation.[28] Incredibly, this reasoning was accepted by the Court of Appeal who quashed the appellant's conviction. Lord Lane, the former Lord Chief Justice, in giving the judgment of the Court concluded[29] that the transfer of the goods to the third party:

[26] *Ibid* at 937.
[27] [1991] 3 All ER 394 (C.A.); Times December 8 1992 (H.L.) Although it is regrettable that neither the Court of Appeal nor the House of Lords recognised it as such.
[28] It is settled law (as far as the appellant himself was concerned) that one who exceeds his authority may thereby commit an appropriation: *Pilgram v Rice-Smith* [1977] 2 All ER 658; *A-G of Hong Kong v Nai-Keung* [1988] Crim.L.R. 125.

"..was with the consent and express authority of the owner and.. accordingly there was no lack of authorisation and no appropriation."

With respect, it appears plain that any apparent consent must have been vitiated as in *Lawrence* and *Dobson* due to the fraud which was instrumental in it being obtained. As was conceded by counsel for the appellant, had the manager known the truth he would not have sanctioned the removal of the equipment. Accordingly, common sense dictates that any consent, being conditional upon the cheque being valid, was rendered ineffectual when this condition was not met. In such circumstances the conduct of the appellant, no longer protected by the illusion of consent, amounted to the clearest evidence of an adverse interference with the owner's rights.

Lord Lane's pious plea that the appropriate charge to bring on these facts was that of obtaining property by deception contrary to S.15(1) Theft Act 1968, is, with respect, no response to the allegation of theft. Indeed, the second certified question to prompt an emphatic 'no' from Viscount Dilhorne in *Lawrence* was whether the two offences were mutually exclusive.[30]

Some sympathy must be felt for Lord Lane, however, whose fidelity to *Lawrence* when *Morris* was before him in the Court of Appeal, resulted in the chastisement of Lord Roskill when the case reached the House of Lords.[31] It is perhaps unsurprising therefore that Lord Lane was heard to utter with some hint of resignation in *Gomez:*

"Suffice it to say that if there is a difference between the two decisions, that was not the view taken by their Lordships in *R v Morris* and that is the decision which we must follow."

The majority of the House of Lords in *Gomez*[32] ruled however that once again Lord Lane's loyalties (this time to *Morris)* were misplaced. According to the Lord Keith [33] the presence of consent was not to be regarded as being inconsistent with the conclusion of there having been an appropriation where the parting with the property had been induced by the defendant's deception. In Lord Keith's view *Lawrence* itself was just such a case. Indeed, his Lordship continued, *Lawrence* made it plain that an appropriation did not invariably connote an act which adversely interfered with the owner's rights. Accordingly on this, and other matters,[34] Lord Roskill had been in error in *Morris*

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29 *Supra* N.7 at 400.

30 This is also contrary to the *dictum* of Lord Roskill in *Morris Supra* N.6 at p.295. Furthermore, Lord Keith in *Gomez* confirmed the fallacy of Lord Lane's reasoning in observing that: "..it (is) irrelevant that what had happened might also have constituted the offence of obtaining property by deception under S.15(1) of the 1968 Act."

31 *Supra* N.7 at p.398.

32 *Supra* N.5 with Lord Lowry dissenting.

33 with whom Lords Slynn, Jauncey and Browne-Wilkinson concurred.

34 Most notably the furore surrounding Lord Roskill's example of a

(Footnote continued)

Lord Roskill, according to Lord Keith, "had undoubtedly been right" in his conclusion that the assumption of any of the owner's rights was evidence of an appropriation. However Lord Roskill had been wrong in suggesting that both the switching of a price label and the removal of the product from the shelf was required.[35] The application of the "singular right theory" was, for Lord Keith, enough to conclude that the removal of a price label (itself an assumption of one of the owner's rights) without more, was an appropriation in law.

Regrettably whilst Lord Keith's application of the "singular right theory" cannot be faulted, the same cannot be said of his reasoning on the consent issue. His lordship reasoned that in such cases as *Lawrence* (and the present) the victim's consent had been obtained fraudulently and this fact would support, rather than deny, the existence of an appropriation. Lord Keith opined that whilst the term 'appropriation' included acts which were by way of adverse interference with the owner's rights that was not to say that:

"...no other act could amount to an appropriation and in particular that no act expressly or impliedly authorised by the owner could in any circumstances do so."

Lord Roskill had accordingly erred in concluding in *Morris* that the presence of authority negatived the finding of an appropriation as this was directly contrary to *Lawrence* which was to be regarded as "authoritative and correct".

By failing to take the fraud point to its logical conclusion of having the effect of vitiating consent, the majority approach denies the existence of the apparent consent/actual consent dichotomy and therefore concludes that in all cases where consent exists an appropriation may arise. The dangerous corollary of this technique is the emergent inability of the law to distinguish the culpable act of the dishonest thief from the innocent act of the honest invitee. Lord Roskill's insistence upon a lack of authorisation was precisely to ensure that the term "appropriation" should not be applied to the conduct of the latter who was afforded the protection of the proprietor's implied consent. In so ruling Lord Roskill worked a reversal of Lord Lane's judgment in the Court of Appeal: no appropriation was manifested by the conduct of simply taking an item from the shelf. In this it is strongly submitted that Lord Roskill was correct. However the following passage in Lord Keith's judgment in *Gomez* heralds an unwelcome return towards the extreme position adopted by Lord Lane. According to his lordship:[36]

[34] (continued) prankster who switches labels in jest, itself a fertile source of academic comment, has finally been laid to rest. Lord Roskill's view that the prankster had not thereby appropriated the property was exposed by Lord Keith as being plainly wrong in that it tended to introduce into the *actus reus* an issue of *mens rea*.

[35] *Supra* N.18.

[36] *Supra* N.5.

"there was much to be said in favour of the view that ...the mere taking of the article from the shelf and putting it in a trolley...amounted to the assumption of one of the rights of the owner and hence (was) an appropriation."

Lord Keith's justification for reaching this conclusion is that by placing the item in his trolley other customers have been deprived of it. It is highly questionable however whether this, coupled with the fact that the activity is something which the proprietor himself can do, should be enough to convert an entirely innocent act into one which satisfies certain of the definitional elements of the theft offence. Admittedly without proof of the required *mens rea* no offence of theft could be successfully prosecuted,[37] but it is nevertheless anomalous that the invitee to a self-service store who does no more than that which he is being depended upon to do by the proprietor has, inescapably, committed all the elements of the *actus reus* of theft.

This startling, and it is suggested untenable, proposition is the inevitable corollary of failing to distinguish between apparent and actual consent. It is strongly submitted that such tortuous results would be readily avoided by recognition of the following principles:

(i) The *Lawrence* line of authority determines that where the facts illustrate the appearance of consent only there will be no difficulty in identifying an appropriation where the requirements in (ii) below are satisfied. All cases where V. has been induced to part with his property by D's fraud come within this category with any apparent consent being thereby vitiated - beyond this the issue of consent has no further relevance - Bingham LJ in *Dobson v General Accident Fire and Life Assurance plc;*[38] and

(ii) An appropriation necessarily (with the exception of the company law cases *infra* p.88 et seq.) connotes a usurpation of, and adverse interference with the owner's rights and will therefore be accompanied by a lack of authority - Lord Roskill in *R v Morris*[39]

The above formula ensures the continued finding of theft in *Lawrence*, *Dobson* and *Gomez* whilst at the same time ensuring that the innocent shopper is isolated from the *actus reus* of the theft offence. Beyond acceptance of the actual/apparent consent dichotomy and with it therefore a recognition that the *Lawrence* line of authority does not involve actual consent, the issue should be attributed no further significance apart from acknowledgment that presence of actual consent (company law cases aside) is inconsistent with a finding of an appropriation.

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[37] Though the majority decision in *Gomez* would seem to effect a reversal of the decision in *Eddy v Niman Supra* N.22 with the accused now being guilty of theft on account of his dishonest intentions when he put the items in the store's basket.
[38] *Supra* N.7.
[39] *Supra* N.6.

The foregoing approach acknowledges the limited relevance of the consent issue to the finding of an appropriation, in stark contrast to most of the authorities which have elevated its importance beyond reason. An indication of the truism of this proposition, which their lordships in *Gomez* would have been well advised to heed, is to be found within the *dictum* of Viscount Dilhorne in *Lawrence* where he stated:[40]

"Belief or the absence of belief that the owner had with such knowledge, (ie knowing that more money was being taken than was due), consented to the appropriation is relevant to the issue of dishonesty, not to the question of whether or not there has been an appropriation."[41]

The Actual Consent Cases.

The bearing which consent may have on the issue of dishonesty was acknowledged by the Court of Appeal in *R v Philippou*[42] which represents the only discernible line of authority concerning theft from a victim who has given a real consent. This authority,[43] concerns the liability of company directors who have unanimously determined to purloin company assets for their own beneficial use. Such cases call for an analysis of the consent problem from a unique perspective as here a legal fiction predicates the conclusion of actual consent. The legal fiction is that underpinning the whole of company law holding that the company, and its human personification, the directors, are in law distinct entities although the latter, as the embodiment of the former, naturally make all of its decisions. Accordingly, once the directors assent to the pillage of company assets their assent is legally attributed to the victim company itself. It is submitted that only in this very special circumstance will the presence of consent be consistent with a conclusion of an appropriation.[44]

In *Philippou*[45] the appellant and another, who were the sole directors of

[40] *Supra* N.6 at 1255.
[41] In *A-G's Reference (No 2 of 1982)* [1984] 2 All ER 216 the consent issue was also said to go to dishonesty rather than appropriation. Indeed, the other three elements of theft were conceded without reference to *Morris*.
[42] *Supra* N.26
[43] C.f *R v Roffell* [1985] VR 511; and *R v Mc Hugh and Tringham* (1988) Cr. App R 385 where *Morris* was applied in each case to deny the existence of an appropriation due to the presence of consent. The House of Lords decision in *Gomez*, as has been seen, denies the inevitability of this conclusion.
[44] The principle advanced by their lordships in *Gomez*, unable to distinguish these facts from the scenario of the innocent customer who places items in the basket provided, treats them with equanimity: in each case the presence of consent is consistent with the conclusion that an appropriation has occurred.
[45] *Supra* N.26 decided by the Court of Appeal without reference to its earlier decision of *R v Mc Hugh and Tringham*.

a company in London, used 369,000 pounds of company funds to finance the purchase of a block of flats in Spain which were registered in the name of another company of which the appellant and his colleague were sole directors and shareholders. The directors were charged with the theft of a chose in action of the London company, (the debt owed by its bankers to it.)

O'Connor LJ, delivering the judgment of the Court of Appeal, applied the following principles in marrying together the decisions of *Morris* and *Lawrence* in arriving at the conclusion that the theft charges were made out:

1. Whilst it could not be denied that the company had consented to the transfer of its funds to Spain, the issue of consent was irrelevant to the question of appropriation: *Lawrence* applied.

2. However, because the funds were being diverted from the London company and its share-holders, for the beneficial use of the directors in their capacity as share-holders of the Spanish company, the dishonest nature of the transaction was betrayed. Furthermore, applying *Morris* this dishonesty revealed the adverse interference with the company's interests which the transfer of the funds represented.

Accordingly, the Court of Appeal, in dismissing the appeal, concluded that there had been no consent of the company on which the appellant could rely. As there was a readily identifiable act of adverse interference, the issue of consent became irrelevant, with the reality of the appropriation being underscored.

Whilst no objection is here taken with the result in *Philippou* the Court of Appeal's apparent assimilation of its own facts with *Lawrence* does give rise to concern as once again, apparent and actual consent are confused. Ironically, it would seem that the preferable approach to be adopted in such cases is to apply the technique misapplied by their lordships in *Gomez* in an apparent consent case and apply it to this paradigm actual consent case. Accordingly, despite the presence of the company's consent an appropriation will be identified because of the fraud on the company which the consent represents.

Conclusion:

The pragmatic solution to the consent issue herein advanced has as its chief attribute the fact that a firm grip is kept on reality. If V. has been deceived into parting with his property in circumstances where had he known the truth it would not have been released, it seems fanciful to describe his conduct as being consensual. It is self-evident that the vast preponderance of theft cases will involve either clandestine conduct such as that witnessed in *Morris*, or the bolder conduct of the trickster evident in *Lawrence, Dobson* and *Gomez*. It is most regrettable that the House of Lords in *Gomez* chose to add fuel to the consent myth by continuing to distinguish the conduct of the clandestine thief from that of the trickster. It is hoped that this paper has made the case for assimilating the situations of the victims of both types of rogue

(and thereby the rogues themselves) and in the process has shown the cogent need to preserve the immunity of the innocent shopper from the embrace of any part of the offence of theft.

The solution herein advanced also ensures that in the majority of cases (the *Philippou* line of authority aside) the term "appropriation" has ascribed to it a similar meaning to that applied to the former terminology under the Larceny Act 1916 of ("without the consent of the owner") "taking and carrying away". It is noteworthy that the Criminal Law Revision Committee only chose to abandon the former language because of a majority perception that the term "appropriation" would be more readily intelligible.

If the term "appropriation" is given the meaning ascribed to it in *Morris* and the term "consent" is pragmatically construed as in *Dobson* the law of theft is reserved a meaning which accords with the expectations of the Criminal Law Revision Committee whilst, at the same time, ensuring that the issue of consent is not attributed a level of significance which it does not merit. By exploding the consent myth the burgeoning complexities of the law are exorcised leaving the courts free to focus on the key question, namely have the victim's rights been adversely interfered with? Only in this way can it be ensured that the aspirations of the Criminal Law Revision Committee will have new life breathed into them.[46]

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[46]Mitchell C. Davies of the Law School, George Town.