CAYMAN ISLANDS LAW BULLETIN

NO 8

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Cayman Islands Government

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CAYMAN ISLANDS LAW SCHOOL

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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 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 8 Law Bulletin with the year in which the action was commenced preceding and in round brackets.

Abbreviations

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

Contributions

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

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EDITORIAL NOTE

This is the eighth edition of the Cayman Islands Law Bulletin and whilst it is only approximately four months since the publication of the seventh edition its size once again reflects the continuing growth in local litigation resulting in an increasingly onerous judicial case load. The recent announcement of the temporary appointment of Mr. Justice Bingham from Jamaica to assist the local judiciary is therefore to be welcomed although it may be expected to presage an even larger ninth edition due for publication in the early summer. This edition features two articles of local relevance. His Honour Judge Schofield addresses the controversial issue of the circumstances in which jury members ought to be apprised of a defendant's previous convictions (at p 52) whilst local attorney Mr. Duncan Nichols lays bare the startling limitations of the 1964 Workmen's Compensation Law (at p 56)

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 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 March 5 1992 to February 26 1993.

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.

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

Any comments and contributions in the form of legal articles or case notes 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.

March 5 1992 to February 26 1993

CIVIL PROCEDURE

Injunction - Jurisdiction - Validity - Discharge

MK as Administrator v EB as Administrator (No 3)

Grand Court (103/86)
Malone CJ
January 5 1993

Cases referred to

Chanel v FW Woolworth [1981] 1 All ER 745
Grafton Isaacs v Emery Robertson [1985] 1 AC 97
South Carolina Insurance v Associate Maatschappij [1986] 3 All ER 487
American Cyanmid Co v Ethicon Ltd [1975] AC 396
Re Oriental Credit Ltd [1988] 1 All ER 892

Mr Lamontagne QC for the applicant MK as administrator
Mr Grant for the respondent EB as administrator

The action was commenced by originating summons on April 12, 1986. EB applied for the discharge of an injunction obtained against the respondent through an ex parte application on April 9, 1986 which restrained EB from dealing with the property in dispute in any manner. The injunction did not contain an expiry date.

Held: (application dismissed)

(i) MK relied on Chanel v FW Woolworth which held that in interlocutory matters a party could not raise again a point which had already been decided unless there was evidence of some significant change in circumstance. That authority was not applicable because the current circumstance was not a situation where an interlocutory matter had been raised for a second hearing. The injunction was granted ex parte so EB was not heard. MK argued further that by delaying six years EB had to accept the injunction as it stood. Grafton Isaacs v Emery Robertson did not support that proposition.

(ii) EB attacked the injunction on two grounds namely jurisdiction and incomplete disclosure. The Grand Court is empowered to grant an
ex parte injunction. That power remains unfettered by statute: South Carolina Insurance v Associate Maatschappij. It was not lost by the making of an incorrect decision by the court or the absence of facts relevant to the exercise of the court's discretion. The court was not to be afraid to use this wide discretion in novel situations: Re Oriental Credit Ltd. The objection based on incomplete disclosure failed because the information in question was enclosed in a letter which was part of an exhibit before the court.

(iii) The principles to be applied in applications for interlocutory injunctions are found in American Cyanamid Co v Ethicon Ltd. The injunction was consistent with those principles. Regrettably the order was not made to a fixed date. Orders were to be so made when the application was made ex parte.

The injunction was needed to protect an interest and there was no reason to remove it.

JE

Procedure - Originating summons - Conversion to

proceedings by writ

MK as Administrator v EB as Administrator (No 4)

Grand Court (103/86)
Malone CJ
January 22 1993

Cases referred to

Cayman Islands News Bureau Limited v Cohen and Cohen Associates Limited (1987) CILR 370

Legislation

Supreme Court Practice Order 28 rule 8

Mr Lamontagne QC for the applicant MK as administrator
Mr Grant for the respondent EB as administrator

This action was commenced by originating summons in 1986. The applicants applied for an order under Order 28 rule 8 to continue as if the action had been begun by writ and for an order fixing the time for service, filing of the statement of claim and other consequential matters.

The application was based on the allegation that the respondent had transferred the property in question from the estate to himself thereby making the proceedings of a contentious nature.

Held: (application dismissed)

(i) Cayman Islands News Bureau Limited v Cohen and Cohen Associates Limited held that it was inappropriate to proceed by way of originating summons where the proceedings were contentious. (A matter is contentious where the facts are in dispute.)

(ii) An originating summons would be appropriate if there were disagreement as to the legal consequences arising from undisputed facts. Here the facts were not in dispute. There was no reason to change to proceedings by way of writ.

JE

Contempt - Committal proceedings - Enforcement

SW v TR and EE

Grand Court (169/92)
Harre J
September 11 1992

Cases referred to

United Telephone Company v Dale (1884) 25 Ch D 778
Lewis v Lewis [1991] 3 All ER 252

Legislation

Rules of the Supreme Court 1965 Order 45 rr 5 and 7

Authoritative works referred to

Supreme Court Practice page 734

Mr Bergstrom for the plaintiff
Mrs Maierhofer for the defendant

During a motion to commit the first defendant for contempt a preliminary issue was raised. The order, made ex parte on May 25, 1992, restrained the defendants from interfering with the plaintiff or approaching the plaintiff's home and place of work.

The order was served on May 28, 1992. The order served did not bear a penal endorsement. It was alleged that TR breached the order on two occasions in June, 1992. A further copy of the order, endorsed with a penal notice, was served on August 21, 1992. The court considered the effect of an order not bearing a penal endorsement.

Held: (application dismissed)

(i) It is stated in the Supreme Court Practice (at p 734) that "it is a necessary condition for the enforcement of a judgment or order under [Order 45] rule 5 by way of sequestration or committal that the copy of the judgment or order served under this rule should have the requisite penal notice endorsed thereon". There was no reason not to follow that common sense approach. (United Telephone Company v Dale and Lewis v Lewis were distinguishable.)

(ii) The plaintiff did not need the leave of the court to serve the order with the penal notice. If there was a future breach of that order TR's whole course of conduct since the first order was served would be considered by the court.

In any urgent injunction obtained before the issuance of a writ it is desirable to order that the writ be issued and served forthwith.

JE

Judgment Orders - Party's failure to comply

Phyllison Ltd v G H Ltd

Grand Court (401/99)
Schofield J
December 8 1992

Legislation

Grand Court Law S 18

Authority referred to

Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218

Mr Turner for the plaintiff
Mr Hill QC and Mr Ashenheim for the defendant

The defendant company was given judgment in a suit brought by the plaintiff company. A counterclaim was made by the defendant for rescission of a contract entered into with the plaintiff for the purchase of an apartment in the Great House condominium complex at West Bay Road, Grand Cayman.

The defendant sent the plaintiff a notice of rescission after the judgment. The defendant however failed to comply with the judgment order to pay the plaintiff the sum of $676,937.35 plus interest as restitution.

The defendant's contention was that the court should order the amount to be paid into court to offset any costs awarded against the plaintiff and any amount to be awarded in favour of the defendant in an action yet to be brought against the plaintiff for deceit.

Five months had elapsed since the date of the original judgment.

Held: (granting the plaintiff's application)

(i) The restitution order was part of the judgment. Any direction as to the payment of the restitution and the method thereof would be a direction consequent upon the judgment. Restitutio in integrum was offered and regarded by the defendant as a condition for any rescission of the contract.

According to RSC Order 45 rule 10, a party entitled under any judgment or order to any relief subject to the fulfillment of any condition and who failed to fulfil the condition is deemed to have abandoned the benefit of the judgment or order, unless the court directs otherwise. The fulfillment of the condition was of the essence of the judgment. Restitutio in intergrum is a condition to rescission: Erlanger v New Sombrero Phosphate Co.

By failing to pay the agreed restitution the defendant stood to forfeit the benefit of the judgment.

(ii) The defendant's contention of having the sum offset against costs awarded against the plaintiff and against damages to be awarded in favour of the defendant in an action yet to be brought had no merit. The argument was merely being used to delay the payment of restitution. The court would not order the restitution to be paid into court.

(iii) The court, in the exercise of its equitable discretion within the spirit of S 18 of the Grand Court Law, would however allow the defendant a further 2 days within which to make restitutio in intergrum of $676,937.35 together with interest since the defendant had declared that the funds were immediately available to fulfil the condition. In the absence of payment, the benefit of the judgment would be deemed to have been forfeited.

AD

Judge granting leave to appeal his own judgment - Principles to be applied

In the Matter of X Co Ltd (in liquidation) and the Companies Law (Revised)

Grand Court (339/84)
Malone CJ
September 3 1992

Cases referred to

Ex Parte Gilchrist (1886) 17 QBD 521
The Iran Nabuvat [1990] 3 All ER 9

Mr Jones for the respondents
Mr Lamontagne for the appellants

In applying for leave to appeal a ruling delivered on 25 August 1992, it was submitted by counsel for the appellant that leave should be granted, contending:

1. That the decision was unprecedented in that it went against the normal court practice of preferring the interests of the creditors over those of the liquidators.

2. That the ruling did not deal with the financial and other important matters raised at the hearing.

3. That the court's decision wrongfully left the creditor with a strong and legitimate sense of grievance.

In opposing the application Mr. Jones submitted that it was not enough to say that the ruling was unprecedented or that account had not been taken of financial aspects or that the court's discretion was not correctly exercised. The application, it was submitted, needed to be supported by points of law which could potentially lead to a reversal of the court's decision.

Held: (application allowed)

(i) The appellant did not have to explain his reasons for seeking leave to appeal in terms of points of law. The jurisdiction of a judge in granting or refusing leave to appeal his own decision 'is a very delicate one' (per Lord Esher M.R. in ex parte Gilchrist).

(ii) Arguing afresh the original application was not necessary as the judge was already apprised of the issues. In deciding whether the appellant had an arguable case the bias: "must always be towards allowing the full court to consider the complaints of the dissatisfied litigant, and the justification for leave to appeal....must be that it is unfair to the respondent that he should be required to defend the decision below; (and) unfair to the litigants because the (court's) time is being spent listening to an appeal which should not be before it, thereby causing delay to other litigants; and unfair to the appellant himself who needs to be saved from his own folly in seeking to appeal the unappealable." The Iran Nabuvat.

GB

Judgment in default - Undue delay in applying to set aside

McNeill v Banfield (1) Hula (2)

Grand Court (247/89)
Malone CJ
October 14 1992

Mr Hill QC for the applicants (defendants in the original action)
Ms Bridges for the respondent (plaintiff in the original action)

Judgment in default of defence was obtained in October 1989 against the applicants in the sum of U.S. $270,000.00 (together with interest). The applicants sought to have the judgment set aside and counterclaimed.

The claim related to repayment of a loan made by the respondent to the applicants secured on two apartments at Mariner's Cove.

The respondent had traced the first applicant to Oregon, U.S.A. where he had sought to file the Cayman Islands' judgment. Only at this stage and some sixteen and a half months after the Cayman Islands' judgment did the applicants file their application to have the judgment set aside on the basis that they had a good defence to the action and counterclaim for loss and damages suffered as a result of breaches of the loan and other agreements by the respondent relating to a time-share scheme. The first hearing of the application was in March 1992.

Held: (dismissing the application)

(i) On the evidence presented there was an undue delay in making the application which had prejudiced the respondent.

(ii) The application would be dismissed with costs in favour of the respondent.

AC

Insolvency - Failure to take steps to recover money held by the court

E S Corp v BSA et al

Grand Court (217/81)
Malone CJ
January 13 1993

Cases referred to

Birkett v James [1978] AC 297
Halls and Another v O'Dell and Others [1992] 2 WLR

308

Mr Jones for the plaintiff
Mr Alberga and Mr Quin for the defendants

The first and third defendants filed an application for an order to dismiss for want of prosecution the plaintiff's writ of summons filed May 5, 1981 and to pay out to the first defendant, together with interest, the money paid into court by the first defendant pursuant to the court's order of February 25, 1986.

The plaintiff company was in liquidation, a U.S. bankruptcy court having appointed a liquidator. No steps had been taken, by the liquidator, to recover money held by the court since February 25, 1986. It was submitted that the failure of the liquidator to take steps to recover the money was explicable only on the grounds that he was unable to proceed. In support of this submission counsel for the plaintiff cited an order of the U.S. bankruptcy court for the district of New Jersey on March 3, 1992 made in the bankruptcy proceedings of the second defendant staying the bankruptcy proceedings until final disposition on criminal matters involving the second defendant. Counsel further submitted that any inordinate and inexcusable delay which had taken place would not prevent a fair trial and caused no serious prejudice to the defendants.

Held: (application granted)

(i) The discretion to dismiss an action for want of prosecution must be exercised in accordance with the principles stated by the House of Lord in Brickett v James, recognising two kinds of cases: Those arising from the breach of a pre-emptory order and those arising from inordinate and inexcusable delay. In order to establish whether a delay by the plaintiff had been inordinate and inexcusable it was necessary to show that the delay gave rise to a substantial risk that it was not possible to have a fair trial of the issues in an action, or was such as was likely to have caused (or would cause) prejudice to the respective defendants. A causal link must be proved between the delay and the inability to have a fair trial: Halls and another v O'Dell and others. Furthermore the power to dismiss for want of prosecution should not normally be exercised when there existed an unexpired limitation period since the plaintiff would be unable to start fresh proceedings.

(ii) The March 3 order made in the bankruptcy proceedings of the second defendant, absent evidence to the contrary, acted as a stay only in those proceedings. The same was true of the filing on October 11 1983 of the defendant's bankruptcy petition. Accordingly, the plaintiff was at all times able, prior and subsequent to the order of 3 March to proceed against the first and third defendants without disobeying the U.S. bankruptcy court.

(iii) Even if the filing of the voluntary petition on October 11 and the order of March 3 (staying the proceedings by the plaintiff against the second defendant) could have been extended to the first and third defendants the filing of the stay to permit the taking of proceedings against the second defendant must allow proceedings to be taken against the first and third defendants. Thus, over a period of 10 years 10 months from the commencement of the action to 3 March 1992 the plaintiff would have had 3 years 1 month in which to proceed against the first and third defendants. Therefore, the stay imposed by the order of 3 March was no excuse for the inordinate delay in taking proceedings against the first and third defendants even if the liquidator recognised it as a stay that prevented his taking proceedings against those defendants.

(iv) With respect to unfair prejudice, the subject matter of this action was alleged by the plaintiff to have been purportedly transferred fraudulently, or by a transfer void ab initio on the 30 May 1980 to the account of the first defendant. It followed that if the

transfer to the first defendant was not void ab initio or void due to fraud the first defendant had been prejudiced as it was without its money for over 11 years. Since the plaintiff could have proceeded before 3 March 1992 against the first and third defendants it was thereby guilty of inordinate and inexcusable delay to the prejudice of the first defendant.

WB

Discovery of documents - Breach of undertaking not to make improper use thereof

In the Matter of H of H Ltd and the Companies Law

Grand Court (107/92)
Malone CJ
January 18 1993

Cases referred to

Dory and another v Richard Wolf GmbH et al (1990) 1 Fleet Street Rep 271
Crest Homes plc v Marks et al [1987] AC 829
Sybron Corporation v Barclays Bank [1985] 1 Ch 29
Apple Corporation Ltd v Apple Computer Ltd (1992) Times April 10

Mr Todd and Mr Quin for the applicant
Ms Bridges for the respondent

The petitioners filed a summons seeking, inter alia, the leave of the court to have access to (restructuring) documents for use in connection with proceedings which had been filed by the petitioners on August 7 1992. The application was made notwithstanding their failure to apply to the court for leave to use the information contained in the documents when originally produced to the court under a petition filed for the winding up of H & H Ltd. for the purposes of proceedings to be commenced by them in Rotterdam.

The respondent countered with a summons on September 23, 1992 seeking, inter alia, a dismissal, withdrawal or stay of the Rotterdam proceedings or alternatively that the petitioners be ordered to take such steps as were necessary to dismiss, withdraw or stay the writs of summons in the Rotterdam proceedings.

The restructuring documents confirmed that the court was misled as to the configuration of the corporate structure of the H & H group of companies. These documents had been used by the petitioners' U.S. and Dutch attorneys in drafting the complaint/pleading in the Rotterdam proceedings inconsistent with assurances given by their counsel in the production order that the documents would not be used for any purpose other than that of the proceedings commenced by the petition filed on March 20, 1992. As soon as the petitioners learned of the use made of the restructuring documents they brought the matter to the attention of the court by summons dated September 18, 1992.

The following facts led to the conclusion that the restructuring documents were inadvertently and innocently used in the Rotterdam proceedings: a) the petitioners' lack of knowledge that the documents would be used in the Rotterdam proceedings; b) lack of knowledge by the petitioners' Cayman Attorneys that the Rotterdam proceedings were contemplated; c) absent agreement, there is no restriction in the Netherlands or the U.S. against the use in other proceedings of documents discovered for the purposes of an action; and d) the petitioners' Dutch and U.S. Attorneys were not aware of any restriction on the use of the restructuring documents and the order of 27 April 1992 contained no express restriction which would have made them aware.

Held: (petition granted)

(i) The rule is that documents obtained on discovery may be used only for the purpose of the action in which the discovery was given. The implied undertaking, however, not to use the documents for any collateral or ulterior purpose is subject to the discretion of the court, in special circumstances, to release the party from that implied undertaking. Leave may be granted even where there has been a breach of the implied undertaking: Dory and another v Richard Wolf GmBH et al.

(ii) The petitioners' attorney's submission against the existence of an implied undertaking was supported by the fact that a production order is analogous to an Anton Piller order, the difference between discovery by an Anton Piller order and that by discovery order is that the latter, unlike the former, gives to the party required to produce the documents an opportunity whether or not to make disclosure.

(iii) The Rotterdam proceedings were part of a global battle between the parties of which the petition was a part and, like the petition, their purpose was to attack the restructuring which the petitioners assert was fraudulent. Both proceedings attacked the restructuring and were proceedings in the same global battle. Therefore it could not be said that the Rotterdam proceedings were an abuse of process or that they were alien or collateral proceedings to the petition as they provided a means to set aside the restructuring and had to be commenced to avoid missing the Dutch limitation dateline.

(iv) A breach of a court order is of grave concern to the court even when the breach resulted from inadvertence or was not of a serious nature in the sense that no injustice was occasioned. However, justice could not properly be done between the parties in the Rotterdam proceedings if the restructuring documents were not before the Dutch court. Moreover, to grant leave in this instance would act as no disincentive to parties making full disclosure. The public interest in discovering the truth outweighed the public interest in confidentiality notwithstanding the breach of the implied undertaking.

WB

Duty of attorney to correct affidavit evidence innocently put before the court when found inaccurate - Legal professional privilege - Effect of fraud allegation - Circumstances of waiver

In the Matter of H of H Ltd and the Companies Law (Revised)

Court of Appeal (13/92)
Georges JA
February 26 1993

Cases referred to

Myers v Elman [1940] AC 282
O'Rourke v Derbyshire [1920] AC 581
Derby v Weldon (No 7) [1990] 1 WLR 1156
Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp et al (No 2) [1981] Comm LR 138

Mr Craxford and Ms Bridges for appellant
Mr Alberga and Mr Quin for respondents

This was an appeal from an order of the Chief Justice requiring Ms. A to appear for cross-examination on affidavits filed by her in interlocutory proceedings taken during the course of the hearing of the preliminary application relating to a petition for the winding up of H & H. Ltd., a Cayman Islands exempted company. The petitioners were P and his

sons and the respondent was B Enterprises Ltd. (hereafter "B Ltd.") a company registered in the British Virgin Islands and wholly controlled by C the brother of P.

H & H Ltd., a holding company, was originally formed to hold shares owned by family members in various manufacturing companies in the U.S., France, Spain, and Portugal. At the time of this appeal, P directly and C through B Ltd. each held 50% of the shares in 14 different subsidiary companies registered in various parts of the world. The petition filed March 26, 1992, asked for a winding up as relations between C and his sons on the one hand and P and his sons on the other had completely broken down so that there was a deadlock in the management of H & H Ltd.

The petition, served on X & Y, the respondents' Cayman Islands Attorneys, was handed to Ms. A who indicated at the time that she had no instructions to accept service. Ms. A was also handed a letter from Q & Co., the petitioners' Cayman Islands Attorneys, seeking undertakings from B Ltd. through C that until such time as a final order was made on the petition there would be no change in the structure of the group of companies, the shares of which were held directly or indirectly by H & H Ltd., and that none of the companies would dispose of any asset or enter into any transaction other than in the ordinary and proper course of business. A deadline of March 27, 1992, was fixed for compliance with that request.

There was no response from X & Y and on March 31, 1992, Q & Co. filed a summons asking for the appointment of a provisional liquidator. In a hearing on the summons on April 1, 1992, provisional liquidators were appointed. The provisional liquidators were empowered to take possession of, collect and protect the assets of H & H Ltd. and all of its subsidiaries, to protect the business of the manufacturing companies, to take possession of the books, documents and other records of H & H Ltd., and to procure the observance of the matter on which undertakings had been sought. The order appointing the provisional liquidators was served on the respondents' Cayman
Attorneys on April 8, 1992.

On April 1, 1992, and again on April 9, 1992, X & Y informed Q & Co. that they were seeking instructions from their clients in respect of the undertakings being sought, that they anticipated being instructed to apply to have the order discharged and that the deadline given had been unrealistic because such an undertaking required careful consideration. Q & Co. replied that the attitude of X & Y and their client was extraordinary and stated their concern about the propriety of C's intention towards the H & H group of companies.

On April 10, 1992, Ms. A filed a summons to abridge the time within which the respondent could file a summons to discharge the ex parte order, the basis of which was that the petitioners had failed in their ex parte application to disclose all material facts. This was supported by an affidavit sworn by Ms. A - such affidavit being pertinent to the appeal. This affidavit reviewed the chronology of events and restated that the importance of giving undertakings required careful consideration and expressed concern about the likelihood that P would initiate law suits on the mere suspicion that one of the undertakings might have been broken. In the affidavit Ms. A offered undertakings to the effect that there would be no change in the structure of the H & H group or in the ownership of any of the shares in the issued share capital except for nominal shares that are or may be customary or required under local laws and customs for local managers, officers and directors. Additionally, none of the companies would allot or issue any fresh share capital or dispose of any material asset or enter into any material transaction other than in the ordinary course of business.

Appended to the affidavit was a memorandum dated April 9, 1992, from C's principal legal adviser, Mr. M, recounting efforts by representatives of the firm to which the provisional liquidators belonged to take control on behalf of the provisional liquidators of the operations of H & H subsidiaries in the U.S. The memorandum stated that these efforts to interfere with the operation of the manufacturing companies were calculated to, and if allowed to continue would, cause serious damage to their business. This affidavit though filed in the proceedings was never read before the Chief Justice. The application to abridge the return date was refused and it was directed that the summons be heard on April 27, 1992.

On April 15, 1992, while in New York, at the offices of the respondents' principal legal adviser to discuss the matter of the petition generally, Ms. A learned that there had been a restructuring of the shareholding of the manufacturing companies comprised within the H & H group, the desired effect was to insulate the operation of the affected companies from the control of H & H. A consequence of this restructuring was that B Ltd., as a director of H & H Ltd., was unable to give the assurance held out by Ms. A in her affidavit of April 10, 1992, since B Ltd. would have no control over the appointment of persons to the board of directors of the manufacturing companies. On that same date she was aware that the Delaware attorneys acting for the provisional liquidators had been notified of the changes and she herself wrote TB & Co. on April 16, 1992 informing them that the steps they proposed to take to secure control of one of the manufacturing companies were inappropriate.

On the next working day, April 22, 1992, Ms. A had filed an affidavit to be used at the April 27, 1992 hearing of her summons for the variation of the order appointing the provisional liquidators or for their discharge. Her view was that the affidavit would inform the court of the restructuring which had taken place. This affidavit dealt primarily with events relating to the fact that petitioners had failed in their ex parte application to disclose all material facts. A second memorandum ("explanatory memorandum"), also written by Mr. M, was attached to Ms. A's affidavit.

The restructuring involved the creation of various trusts which made it possible to separate voting rights in the shares in the manufacturing companies. The effect of the restructuring was that P and his sons would be unable, through their ownership of 50% of the shares of H & H Ltd., to exercise any control over appointments to the board of directors of the manufacturing companies and thus were unable to interfere in any way with their day to day management. Control of the trusts, in which the voting rights were vested, remained with C.

By letter dated April 24, 1992, Q & Co. sought further particulars of the restructuring outlined by the memorandum and copies of all documents by which it had purportedly been effected. On April 27, 1992, the Chief Justice on application of the petitioners made an order for the production of the restructuring documents. On May 1, 1992, X & Y sent the petitioners' attorneys copies of documents relating to the current ownership structure of the U.S., French and Spanish companies together with a deed of transfer effecting the transfer of K Ltd. shares from Graceton NV to a trust and on the same day the petitioners received a copy of an affidavit sworn by Mr. M explaining the restructuring.

On May 5, 1992, Q & Co. sent a letter to X & Y drawing their attention to Myers v Elman defining authoritatively the duty of a solicitor in England, who had innocently placed before the court an affidavit which that solicitor later discovered contained false material. Specifically, this duty obliged the solicitor to ensure that the matter be "put right" at the earliest possible date if he continued to act as the solicitor of record. The letter noted that Q & Co. were not satisfied that the matter had been "put right" by the

April 22, 1992 affidavit and the attached explanatory memorandum. The letter warned that if Ms. A failed to fulfil her duties to the court as outlined by the letter, an appropriate application would be made to the Chief Justice.

On May 28, 1992 Ms. A filed a further affidavit which reviewed the steps she had taken upon hearing of the restructuring on April 15, 1992. She accepted and acknowledged that her affidavit of April 10, 1992, and her offer of the undertakings suggested that there had been no material alteration in the structure of the H & H group of companies. It was further submitted that with the knowledge that she now had of the existing structure the undertakings should not have been offered because the respondents did not have the power to procure compliance with them and apologised for the filing of an affidavit which might have misled the court. Ms. A also stated that while preparing the affidavit of April 10, 1992, she had sought instructions from the respondents' principal legal counsel but could not recall whether she had received these instructions before swearing to the affidavit.

Knowledge of the restructuring resulted in the need for a substantial amendment of the original petition and an amended petition was filed on June 12, 1992. It was asserted that in securing the restructuring and concealing it the respondent had acted dishonestly and unscrupulously misleading the petitioners and attempting to mislead the court; and, further, had acted in breach of his fiduciary duty as a director of H & H Ltd. It was also alleged that C and his principal legal counsel had acted in criminal contempt of court.

On July 27, 1992, the petitioners filed a summons seeking three orders:

1. An order that Ms. A appear for cross-examination with particular reference to the reasons why and the circumstances in which her affidavit of April 10, 1992 came to contain statements which were false and misleading and how the memorandum came to be annexed to it, pursuant to the Civil Evidence Rules, rule 4(3) and/or Order 38 rule 2 and/or under the inherent jurisdiction of the court;

2. An order pursuant to Order 24 rule 12 that the respondents produce all documents in their possession which were relevant to the reasons why Ms. A's affidavit came to have the memorandum attached; and

3. An order under the inherent jurisdiction of the court that X & Y produce all documents in their possession relevant to the matter mentioned in relation to the second order sought.

The three orders were granted. This appeal was lodged against those orders.

The petitioners filed a notice asking that the decision of the Chief Justice be affirmed on grounds other than those relied on by the Chief Justice. The petitioners submitted that the Chief Justice should have found that there was sufficient prima facie evidence to indicate fraud and underhanded dealings on the part of the respondent. Such finding would have destroyed any claim of legal professional privilege.

The following issues arose:

1. The central issue was the application of the principle in Myers v Elman that a solicitor, in England, put right any matter contained in an affidavit which had been innocently placed before the court which that solicitor later discovered contained false or misleading information to the facts of this case.

Q & Co. argued that the duty ought not to be narrowly defined as this might result in facts not being disclosed which would show that the solicitor was guilty of improper conduct in permitting the false information

to be placed before the court. A salient issue, it was contended, was whether the placing of the false or defective material before the court was due to the professional misconduct of a solicitor acting for one of the parties.

2. Whether there was sufficient evidence of fraud by the respondents such that a claim of legal professional priviledge would have been destroyed and the production of documents containing privileged communications could be ordered under Order 24 rule 12.

3. Whether the respondents' professional privilege had been waived by production of some, but not all, protected documents.

Held: (appeal allowed)

(i) The duty outlined in Myers v Elman that a solicitor, in England, is obliged to put right any matter contained in an affidavit which had been innocently placed before the court which that solicitor later discovered contained false material is also the duty of a Cayman Attorney to the Grand Court. The duty outlined in Myers, to put the matter right, is to ensure that the correct facts are before the court so that there could be little risk of injustice arising from a decision being reached on inaccurate information. However, once misinformation is corrected the substantive litigation can properly proceed.

(ii) The court was not misled however since Ms. A's affidavit of April 10, 1992, together with the April 9, 1992 attached memorandum was not used until the hearing of April 27, 1992. By then the affidavit of April 22, 1992 had already been filed disclosing the restructuring. Thus, the matter had been "put right" before any action had been taken.

(iii) The fact that the matter had been corrected leaves untouched the power of the court to punish its officers for misconduct. When all the facts emerge in the substantive trial, it may well emerge that the punitive jurisdiction of the court should be exercised with respect to the solicitor. An enquiry can then take place to determine the degree of culpability of the offending solicitor and the nature of the penalty which should be imposed.

(iv) The two matters on which the Chief Justice thought that further information was needed: (a) why was the petitioner's understanding of the structuring of the companies accepted as accurate when that structuring no longer existed; and (b) why the explanatory memorandum was attached to the affidavit of April 10, 1992, and how it came to be exhibited on the record, had been answered. Ms. A could not give any evidence except hearsay as to why the respondents' principal legal counsel had not earlier revealed the restructuring. Since there was no basis for the order for the cross-examination of Ms. A the order for production of documents must fail since the purpose of the documents was to assist in making effective the cross-examination.

(v) Production of documents could be ordered on the basis of the relevance of the affidavit to the issue of fraud under Order 24 rule 12. The documents sought must be relevant to the circumstances in which Ms. A's affidavit of April 10, 1992 came to contain statements which were false and misleading. Some of the documents, production of which would be required under the order, which may have been material would otherwise be privileged on the ground that they consisted of communications between the client and attorney in the course of the preparation of the case. Mere allegation of fraud is not enough to justify a breach of legal professional privilege. It must be shown to the satisfaction of the court that prima facie a state of things exists which, if not displaced at trial, would support a charge of fraud: O'Rourke v Derbyshire. An order to disclose documents for which legal privilege is claimed will only be made in very exceptional

circumstances: Derby v Weldon.

The primary argument relied upon by the petitioners to support the allegation of fraud was the restructuring of the H & H group of companies and its subsequent concealment. The concealment also resulted in a misleading affidavit being filed which was used to obtain a Mareva injunction against H & H Ltd., and P and his sons. The restructuring itself was not fraudulent and its concealment could not make it so. On the evidence it could not be said that from the mere fact of restructuring an inference of fraud could be drawn, thus, the legal privilege could not be lifted.

(vi) The petitioners' argument that the professional privilege had been waived was unpersuasive. To allow an individual item to be taken out of context would be to risk injustice through its real weight or meaning being misunderstood: Nea Kartria Maritime Co. Ltd. v Atlantic and Great Lakes Steamship Corp. et al. No principle of fairness arose to require production of additional material so as to ensure that the material revealed did not convey only a partial and potentially misleading picture. As a result of the finding that the Myers v Elman principle did not support an application for the cross-examination of Ms. A on her affidavit, there was no need to require the production of additional material under the principle defined in Nea Karteria.

WB

COMPANY LAW

Insolvency Settlement - Principles to be applied in acceptance of offer by Official Liquidator - Conflict of interest of advisors

In the Matter of X Co Ltd (in liquidation) and the Companies Law (Revised)

Grand Court (339/84)
Malone CJ
August 23 1992

Authority referred to

Leon v York-O-Matic Ltd [1966] 3 All ER 277

Mr Jones for the Official Liquidator
Mr Lamontagne for X Co Ltd

This was an application by the Official Liquidator for a direction by the court that he be authorised to accept or reject the offer of settlement received in respect of litigation currently in the Third District Court of Appeal of Florida.

The application was opposed by Y Co., a creditor of the X Co., and a contributor of the liquidator's loan fund set up to meet the costs of legal proceedings for the recovery of losses sustained because of the negligence of the company's auditors.

On December 7, 1990 a judgment in the sum of U.S. $15.7 million was entered against the former auditors of X Co. The judgment represented the net loss caused by the auditors to the company and approximately double the amount of several subsequent offers made by the auditors to the Official Liquidator in consideration for terminating their appeal against the original judgment. Those offers were rejected.

On April 14, 1992 rejection of the offers was put into question when the Florida Court of Appeal, on appeal by the auditors against the judgment of the Florida Circuit Court, set aside the judgment obtained from the court on December 7, 1990. The Official Liquidator then appealed to the full Court of Appeal

which was not expected to give a decision before the 31st of August 1992. Also pending was another offer by the auditors to the Official Liquidator for U.S.$450,000.00 in consideration for waiver by the auditors of the order for costs made in their favour by the Florida Court of Appeal and withdrawal by the Official Liquidator of his application for a re-hearing by the full Court of Appeal.

The Official Liquidator took advice on the prospects of a successful appeal to the full Court of Appeal from two American attorneys-at-law. The first opinion suggested that the Official Liquidator should reject the settlement offer and seek to restore the judgment of December 7, 1990. The opinion was offered by an attorney whose remuneration was dependent upon her success on the appeal and thus indicated a possible conflict of interest. The second opinion favoured acceptance of the settlement offer, but was also not free from conflicts of interest as this attorney was an in-house attorney for the New York branch of the firm in which the Official Liquidator was a partner.

Held: (authorising acceptance of settlement offer)

(i) In approaching the issue of whether to accept or reject the offer the court must consider all of the evidence relevant to the proposed settlement. This included: (a) evidence going to the Official Liquidator's prospect of success in the Florida Court of Appeal; (b) evidence from which a reasonable assessment could be made of the financial consequences of the decision to both the creditors and the Official Liquidator; and (c) evidence as to the wishes of the creditors and the account of their view taken by the Official Liquidator.

(ii) The court would not exercise the Official Liquidator's discretion but, rather, consider the correctness or otherwise of his decision by criteria applied by Plowman J in Leon v York-o-Matic Ltd. In particular it was necessary: "to have regard to the general principles of fairness and commercial morality which underlies the details of the insolvency law as applied to companies."

(iii) The disparity between the settlement offer of U.S.$450,000.00 and the judgment obtained of U.S.$15.7 million, was so great that to give up judgment in return for the offer would be something no reasonable liquidator should do in the absence of good cause. Assured failure of the appeal lodged by the Official Liquidator would provide good cause, but the evidence as to the chances of success or failure did not show with certainty what would be the outcome in the full Court of Appeal or the Florida Supreme Court.

(iv) On balance, the opinion evidence suggested that the chances of failure to restore the judgment of December 7, 1990 were greater than the chances of success. Furthermore, it was reasonable to have regard to the fact that failure would be more likely as the judgment to be overturned was a unanimous judgment of three judges of the Court of Appeal.

Despite the advisor's conflict of interest the Official Liquidator would be acting bona fide and within his powers in accepting the settlement offer.

GB

CONTRACT

Fraudulent misrepresentation - Plaintiff induced to purchase truck not owned by the defendant

Ferryman Investment Ltd and O'Brien v Bodden

Grand Court (181/91)

Malone CJ
December 2 1992

Authority referred to

Leasinggesselschaft G m b H v Cayman Austrian Concrete Co and others (143/88)

Mr Turner for the plaintiffs
Mr Lamontagne for the defendant

The second plaintiff, at the request of the first plaintiff, paid on the latter's behalf the sum of US $175,000 to the defendant for the purchase of four cement concrete mixers (herein referred to as "the trucks") which the defendant had fraudulently misrepresented she owned.

It appeared from the evidence that a company, Cayman Austrian Concrete Co., had obtained the four trucks from Leasingesselschaft of Austria. To pay for the clearance of the trucks, Cayman Austrian Concrete Co. had borrowed C.I.$92,626.80 from the defendant. The defendant subsequently transferred the four trucks to the first plaintiff for the sum of US $175,000, the amount of which was paid by the second plaintiff. The defendant had fraudulently misrepresented that she owned the trucks.

The first plaintiff had subsequently been compelled at its own expense to send the trucks back to Leasingesselschaft in Austria and in addition been asked to pay US $50,000 to Leasingesselschaft for their use of the trucks.

In evidence, the defendant conceded that the trucks were owned by Leasingesselschaft but went on to state that the payment of US $175,000 was a repayment of the loan by the first plaintiff on behalf of Cayman Austrian Concrete Co.

Held: (ordering repayment of the sum paid by the plaintiffs)

(i) There had been previous proceedings which had established the ownership of the trucks in Leasingesselschaft and also the amount owed by Cayman Austrian Concrete Co. to the defendant, namely C.I.$92,626.80. If the first plaintiff was repaying the loan on behalf of Cayman Austrian Concrete Co. there was no reason why it should pay more than the amount owed.

(ii) The defendant's evidence that the loan was US $175,000 and that it had been agreed between herself and the plaintiffs that only C.I $92,626.80 be repaid was not credible. The defendant made a fraudulent misrepresentation when she indicated she owned the trucks and thereby transferred them to the first plaintiff for US $175,000. The sum paid was recoverable from the defendant. The US $50,000 paid to Leasingesselschaft by the first plaintiff for the use of the trucks was also recoverable as the loss was the direct consequence of the defendant's action. Post judgment interest at 7.5% per annum would be awarded.

AD

Alleged breach of contract - Wrongful repudiation of contractual obligation by defendant - allegation of substandard work

Smith v Mellaneo

Grand Court (118A/90)
Harre J
May 12 1992

Mr Murray for the plaintiff
Mr Collins for the defendant

The plaintiff contracted with the defendant for the removal of windows and doors of a dwelling house occupied by the plaintiff and their replacement with new ones. The property was owned by a company and occupied by the plaintiff.

The written agreement specified the type of windows and doors for the replacement but not the sizes. The contract price was C.I.$4,300 and the plaintiff made an advance payment of C.I. $2,150 and a subsequent payment of C.I. $200.

The defendant commenced the work but failed to complete and repudiated the contract. The plaintiff alleged the work done by the defendant was substandard, unprofessional and unworkmanlike. The plaintiff claimed that he was obliged to carry out substantial remedial work to complete the agreed work.

The defendant alleged it was the plaintiff's constant personal interference with the work that made him repudiate the contract. The defendant denied that his work was substandard and unprofessional and asserted that it was rather the remedial works carried out by the plaintiff which fell within this description. The defendant said that after his repudiation he had tried to recommence the work but had been prevented from doing so by the plaintiff's tenant who occupied the premises.

The thrust of the plaintiff's claim was the standard of the defendant's work. The plaintiff had engaged an expert who visited the property and had observed that the new windows were not the same sizes as the old ones and in whose opinion the filling in of the resultant gaps had been very badly done. The expert had taken photographs at different times, some in January, 1991 and others in February, 1992 . From the photographs, the walls adjacent to the windows appeared unsightly both inside and outside the house.

The plaintiff further claimed damages for damage done to the old windows during their removal by the defendant.

Held: (rejecting in part plaintiff's claim)

(i) The case rested on the credibility of the parties. The plaintiff gave an impression of being a perfectionist and was probably difficult to work with. The defendant was however at fault in walking away from the contract in the way he did. The defendant's letter of repudiation was apologetic in tone and made no mention of the plaintiff's conduct as the reason for repudiation. The defendant however offered to let one, T, complete the work and receive the balance of the contract price. To that extent it was not a total repudiation.

(ii) The evidence regarding the quality of the work and who was responsible for what was the plaintiff's word against the defendant's. The plaintiff had indicated he was going to call three witnesses but had in fact called no one. It was impossible to determine from the photographs which ones related to work done by the plaintiff and which related to work done by the defendant. Judging from the photographs, if the subsequent work was done by someone else, there was no means of determining the quality of the original work done by the defendant. As the onus of proof fell upon the plaintiff and he had failed to discharge it, the defendant's evidence about quality had to be accepted. He performed the work to the standard reasonably to be expected from a one-man jobbing builder.

(iii) It was not clear from the agreement whether the defendant was required to replace the old windows with new ones of the same sizes. The new windows were slightly different in sizes but that in itself did not give the plaintiff cause to complain. The defendant was

entitled to instal windows of the standard size which is what he did. Consequently the defendant was not liable for drapes and Venetian blinds purchased by the plaintiff to fit the windows. Regarding the damage to the old windows during removal, the defendant was under no obligation to remove the old windows in undamaged and marketable condition.

(iv) The plaintiff had stated that he took it upon himself to do the remedial work because he was unable to get a worker to do it and quoted his hourly rate at $150.00. There was evidence from various bills that on separate occasions he had engaged workers and had paid them between five and twenty dollars per hour. The plaintiff produced, as part of the remedial work, a bill for $870 which he claimed was work done by a construction company in replacing, inter alia, the ceiling, the damage of which he claimed had been occasioned by the defendant's work and not by a hurricane which occurred after the defendant's repudiation.

It was apparent from this evidence that the plaintiff had not been entirely frank and had inflated his claim.

(v) The defendant was however not entitled to repudiate the agreement and refuse to complete the work. The plaintiff had paid just over half of the contract price, but even taking that into account, he was entitled to a sum in general damages for non-completion of the work over and above the amount which he saved. The plaintiff was awarded $1,500.

AD

CRIMINAL LAW

Burglary - Accused found in possession of stolen vehicle - Doctrine of recent possession - Intent permanently to deprive

R v Ebanks

Grand Court (33/192)
Malone CJ
January 16 1993

Legislation

Penal Code S 222(A)(2)

Mr Levy for the appellant
Mr Bulgin for the respondent

The appellant was charged and convicted on counts of burglary and theft of a car from the same house on the same occasion.

The evidence revealed that the car keys had been left on a kitchen counter in the house in question the previous night. The car had been parked on the driveway of the house.

The appellant was seen driving the missing car in the early hours of the night the car was stolen. According to the police, the appellant when interviewed had said he had borrowed the car from a friend. He could not however say who the friend was. In court, the appellant denied having said this and asserted that he had seen the car abandoned in a street near where he lived. The court believed the Crown witness and concluded that the car had not been borrowed.

The finding thus disclosed a burglary and shortly afterwards the appellant had been found in possession of a car which had been parked in the driveway of the burgled house. The appellant had given a false account of how he came to be in possession of the car and the

keys. It had to be decided however whether the appellant intended to steal the vehicle.

Held: (affirming the conviction in part and substituting one offence with another)

(i) The Crown had proved beyond reasonable doubt that the appellant was the burglar. There was no need to consider the doctrine of recent possession in connection with the burglary, there being direct evidence of the circumstances in which the appellant came into possession of the stolen goods which had not been recovered.

(ii) There was no doubt that the car had been taken by the appellant. The question was whether he intended permanently to deprive the owner of the possession of the car. Cars are not infrequently taken to get away with stolen goods or for joy riding with no intention of assuming the rights of an owner. The appellant, by taking the car in the course of the burglary knew he was committing a wrongful act. The circumstances did not however disclose an intention to assume ownership of the car. Such intention could not be inferred from the circumstances. Those uncertainties could not be resolved by the application of the doctrine of recent possession. On the evidence, assumption of ownership had not been proved. The appellant, by virtue of S 222A of the Penal Code could however be convicted on the alternative offence of taking a conveyance for his own use without the owner's consent.

AD

Drugs - Possession with intent to supply - Means enquiry before fine imposed

R v Powell

Grand Court
Harre J
July 31 1992

The appellant in person
Mrs Escalante for the Crown

The appellant was convicted by the learned magistrate of possession of cocaine with intent to supply and was sentenced to 3 years imprisonment and a fine of $3,000 or 6 months imprisonment in default of payment. A concurrent sentence of 9 months imprisonment was also imposed on the appellant's plea of guilty to possession of ganja.

The appellant had been convicted mainly on the evidence of an informer. Having asked the appellant whether he had any "stuff" the appellant had given a cocaine rock to the informer in return for a $25 note saying it was "the only one he had left".

The $25 note had been given to the informer by the police who had photocopied the note. It was never found.

The appellant had contended before the learned magistrate that the informant's request had merely been for a cigarette from the appellant. The learned magistrate had rejected this defence.

The appellant appealed against conviction and sentence.

Held: (dismissing the appeal against conviction and imprisonment but reducing the fine)

(i) The learned magistrate had reached the right conclusion on the evidence and the appeal against conviction was dismissed.

(ii) The learned magistrate had accepted evidence that

the cocaine rock supplied by the appellant was "the only one that he had left" and that at the time of the offence the appellant was an active supplier of the drug. Accordingly, a sentence of 3 years imprisonment was not manifestly harsh or excessive.

(iii) Whilst a fine was mandatory for the offence it was in this case excessive. A fine must be tailored to the appellant's ability to pay and no enquiry had been made as to this. Accordingly the fine was to be reduced to a nominal amount of $100 with 1 month imprisonment in default plus a 1 month period for payment after release from prison.

AC

Sentencing - Permitting another to drive without insurance - Disqualified from driving

Welcome v R

Grand Court (48/92)
Harre J
October 30 1992

Legislation

Motor Vehicle Insurance (Third Party Risks) Law 1964 S 3(1) & (2)
Motor Vehicle Insurance (Third Party Risks) Law 1990 S 3(1) & (2)

Authority referred to

Christian v R (SCA 215/91)

Mr Furniss for the appellant
Mrs Escalante for the Crown

The appellant was convicted in the summary court following a guilty plea on a charge of permitting a person to drive a motor vehicle without insurance and was disqualified from driving for 12 months.

The 'special reasons' put forward for the appellant not being disqualified were that the appellant's daughter (who was driving the car with the appellant as a passenger) was covered by a United States Insurance policy which the appellant believed would cover her in the Cayman Islands. Further the appellant's daughter did not intend to drive more than 100 yards on a side road.

The appellant appealed against sentence.

Held: (allowing the appeal in part)

(i) The belief that an insurance policy issued in one country automatically covered a person driving a car which was not her own in another country was not a reasonable one. However the possibility that the appellant put the reason forward as an excuse to protect his daughter coupled with the fact that the intended drive was only 100 yards on a quiet road had to be considered.

(ii) In the circumstances the learned magistrate should have found that 'special reasons' did exist to mitigate the 12 month period of disqualification which would be reduced to 3 months accordingly.

AC

Reasonable or excessive use of force in self-defence - Appropriate punishment

Maitland v R

Grand Court (SCA 156/91)
Harre J
June 26 1992

Mr Furniss for the appellant
Mrs Escalante for the Crown

The appellant was a security guard at a nightclub who, in the course of removing one Paz, a drunken patron, from the dance floor, had struck the victim on the head with his baton rendering him unconscious. The appellant was subsequently convicted of assault occasioning actual bodily harm and was given a suspended sentence and a substantial fine. In so doing the learned magistrate gave no credence to the evidence of the bar manager, preferring that of an off-duty police officer, Inspector Myles, who had witnessed the events from close range.

The appellant appealed on the basis that the prosecution had failed to discharge their burden of disproving, beyond reasonable doubt, that the appellant had acted in self defence. Specifically, the appellant contended that he had been struck by Paz and had responded with the baton due to his belief that Paz was about to draw a knife when the latter had reached into his pocket.

Held: (allowing the appeal against sentence in part)

(i) The learned magistrate had been entitled to disregard the evidence of the bar manager and prefer that of Inspector Myles.

(ii) The evidence of Inspector Myles and another security guard indicated that the appellant had become agitated and that he had over-reacted to the situation at a time when the appellant was not under any threat of injury.

(iii) Of great significance was the evidence which indicated the demeanour of Paz; viz that he was generally loquacious but was unsteady on his feet being extremely drunk and was unexcitable. Whilst the evidence supported the appellant's claim that Paz had reached into his pockets before being struck by the appellant this issue had been sufficiently dealt with by the learned magistrate. Even if the appellant's version of events were accepted, his response had been excessive, unnecessary and extremely dangerous.

(iv) The learned magistrate had erred however in imposing both a substantial fine and a suspended prison sentence. Taking the evidence as a whole this was not an offence which merited imprisonment and to this extent the sentence would be quashed.

MD

Driving whilst intoxicated - Appropriateness of imposing custodial sentence

Walton v R

Grand Court (SCA 219/91)
Schofield J
October 30 1992

Legislation

Traffic Law 1973 S 66

The appellant had been convicted before the learned magistrate for driving whilst intoxicated contrary to S 66 Traffic Law 1973 and was sentenced to serve three months imprisonment, a fine was imposed and the appellant was disqualified from driving for two years.

Held: (varying the sentence)

A one month term of imprisonment, suspended for two years, a fine of $500 and an order of disqualification for two years, would be substituted for the following reasons:

a) Whilst the appellant had two previous convictions involving motor vehicles and alcohol he was a man of mature years (55), had a good working record and a good reputation in society.

b) As the appellant was unrepresented before the learned magistrate and as the offence was not one for which the appellant would necessarily be on notice that he stood to lose his liberty, a custodial sentence should only have been imposed after the appellant had been so warned by the learned magistrate in order to afford him the opportunity of instructing counsel to represent him.

MD

Being concerned in the possession of cocaine - Weight of evidence - Denial of access to a material defence witness

Johnson v R

Grand Court (SCA 89/92)
Schofield J
November 6 1992

Legislation

Misuse of Drugs Law S 3(1)

Mrs Levers and Mr Hampson for the appellant
Mr Archie for the Crown

The appellant had been convicted for being concerned in the possession of cocaine contrary to S 3(1) Misuse of drugs law. The appellant had met with a Ms. White who had passed to him two parcels each containing one gram of cocaine. Ms White had previously been interviewed at the police station where police officers, unknown to her, had examined the parcels and re-wrapped them. Ms White had made a telephone call to the appellant from the police station telling him that she had just arrived from Jamaica and had "something" for him to collect from a man known as "Fish Tea".

The police interrupted the subsequent meeting between the appellant and Ms. White and made the arrest, finding the appellant to be in possession of the two parcels, as yet unopened. He also had on his person C.I.$900 and US $100.

The appellant explained to the court that the money represented rent collected from his tenants which he was to use as payment for a delivery of concrete. A bill in this respect was produced in evidence.

Ms. White had not been called as a witness by the Crown and the defence were unable to elicit her whereabouts. Defence counsel had asked Superintendent Burgess, during the course of his giving evidence, if he was aware of what had become of her. Crown Counsel objected to this question on the grounds that it was irrelevant. The learned magistrate sustained the objection.

Held: (allowing the appeal)

(i) These facts showed "The thinnest of prosecution cases". Whilst the learned magistrate had made much of the telephone conversation between Ms. White and the appellant there was nothing in it which could not be given an innocent interpretation.

(ii) The learned magistrate, in sustaining Crown

counsel's objection to the enquiry as to Ms. White's whereabouts, had prejudiced the defence case, with Ms. White's evidence being very relevant to the Crown's case against the appellant. Justice had not been done.

MD

Drugs - Presumption of possession - Refusal to give urine sample

Seymour v R

Grand Court (SCA 157/92)
Malone CJ
December 24 1992

Legislation

Misuse of Drugs Law S 7

Authority referred to

R v Sparrow (1972) 57 Cr App Rep 352

Mr Collins for the appellant
Ms Dilbert for the Crown

The appellant was convicted on charges of possession of ganja and refusing to provide a urine specimen for which he was sentenced to 9 months imprisonment and 6 months imprisonment respectively - the sentences to run concurrently.

Ganja had been found in a locker at Northward prison where the appellant was a prisoner. Before the learned magistrate the appellant had admitted that he possessed the key to the locker and controlled the shelf of the locker on which the ganja was found but denied that the ganja was his. The locker was shared with another inmate, X, to whom the appellant had lent the key on this occasion.

The appellant appealed against conviction and sentence.

Held: (dismissing the appeal against conviction but allowing the appeal against sentence in part)

(i) The learned magistrate had correctly cited S 7 of the Misuse of Drugs Law and was correct in his finding that by their silence in the court the appellant and X had not rebutted the presumption under that section that a person who had anything in his possession in which a drug had been found had possession of the drug until the contrary was proved by that person.

(ii) The appellant's excuse for not providing a urine specimen being that traces of ganja might be found in his urine as a result of inhalation of other people's smoke was not a reasonable one. It may have been an excuse for traces of ganja being found in his system, but not for failing to providing a urine specimen.

Both convictions would be affirmed. The sentence in respect of the first charge would be reduced to three months and on the second charge reduced to one month - sentences to run concurrently.

AC

CRIMINAL LAW – SENTENCING

Crim. App. No.	Case No.	Offence	Sentence
17/92	2096/91	Poss of ganja with intent to supply	3 years Imp. + $200 or 7 days Imp.
20/92	5484/91	Poss of Cocaine	12 months Imp.
20/92	5485/91	Poss of utensil used in consumption of cocaine	
		Consumption of ganja	6 months Imp.
20/92	5481/91		3 months Imp.
		Consumption of cocaine	
20/92	5482/91		9 months Imp.
		Consumption of cocaine	
20/92	5268/91		6 months Imp. (All above to run concurrently with 5484/91)
21/92	2096/91	Poss of Ganja with intent to supply	3 years Imp. and $200 or 7 days Imp.
22/92	3431/91	Grievous Bodily Harm	18 months Imp.
23/92	3073/91	Handling stolen goods	2 years Imp.
23/92	3586/91	Burglary	2 years Imp. (concurrent)
24/92	3751/91	Poss of ganja with intent to supply	2 1/2 years Imp.
26/92	2950/91	Poss of cocaine with intent to supply	4 1/2 years Imp. +$500 or 7 days Imp. (concurrent)
26/92	2951/91	Poss of cocaine with intent to supply	(3 years Imp. +$500 or 7 days Imp.
26/92	2955/91	Poss of ganja	3 months Imp. (concurrent)
28/92	817/92	Burglary	18 month Imp.
28/92	818/92	Escaping lawful custody	3 months Imp. (Consecutive)
28/92	820/92	Damage to Property	3 months Imp. (Concurrent
28/92	916/92	Taking conveyance without authority	3 months Imp. (concurrent)
28/92	865/92	Obtaining property by deception	3 months Imp. (concurrent)

28/92	1039/92	Theft	6 months Imp. (consecutive)
28/92	6035/91	Burglary	12 months Imp. (concurrent)
29/92	2813/91	Poss of cocaine with intent to supply	4 years Imp.
31/92	2970/91	Being conc in poss of cocaine with intent to supply	18 months Imp. + $1000 or 4 months Imp.
32/92	5983/91 5984/91	Theft Refusing to provide urine sample	6 months Imp. 3 months Imp. (Concurrent)
32/92	5985/91	Burglary	3 months Imp. (Concurrent)
32/92	548/92	Handling stolen goods	12 months Imp. (consecutive)
32/92	549/92	Burglary	3 months Imp. (concurrent)
32/92	550/92	Burglary	3 months Imp. (consecutive)
33/92	2966/91	Poss of cocaine with intent to supply	4 years Imp. + $3000 or 6 months Imp.
33/92	2032/91	Poss of cocaine with intent to supply	4 years Imp. + $100 or 6 months Imp.
34/92	5724/91	Selling cocaine	2 years Imp. and $200 or 7 days Imp.
34/92	5565/91	Burglary	3 month Imp. (Concurrent)
34/92	5566/91	Burglary	6 months Imp. (Consecutive)
34/92	5566/91	Burglary	6 months Imp. (consecutive)
37/92	5249/91	Poss of ganja	6 months Imp.
37/92	531/92	Poss of ganja with intent to supply	3 years Imp. (Consecutive)
37/92	526/92	Poss of ganja with intent to supply	2 years Imp. (concurrent)
37/92	715/92	Consuming ganja	3 months Imp (concurrent).

MD

CRIMINAL PROCEDURE

Judgment - Minimum requirements - Absence fatal to conviction?

R v Rankine

Grand Court (SCA 169/91)
Harre J
July 31 1992

Legislation

Criminal Procedure Code Ss 51 & 52

Authority Referred to

Smith and Ebanks v R (1988-89) CILR 162

Mr Furniss for the appellant
Mrs Escalante for the Crown

The appellant was convicted of two charges of handling stolen goods in the summary court.

The summary court record of the case did not include any judgment but simply the verdict of "guilty on both charges". The appellant appealed against conviction.

Held: (allowing the appeal)

(i) The minimum requirements of a judgment had been considered in Smith and Ebanks v R and were implied in Ss 51 and 52 of the Criminal Procedure Code. The judgment should contain, at the very least, a statement of the issue or issues for determination, the decision on them and the reasons for that decision.

(ii) The court had to consider the evidence as a whole and determine whether the defect could have resulted in a substantial miscarriage of justice rendering it fatal to the conviction.

(iii) On the basis of the record the convictions were unsafe and unsatisfactory and were quashed accordingly. An order would have been made for the immediate release of the appellant but for the fact that he was already being lawfully held in custody for other reasons.

AC

Disqualification of driver's licence - Exercise of judicial discretion - Burden of Proof on defendant

Goring v R

Grand Court (SCA 98/92)
Schofield J
October 10 1992

Legislation

Motor Vehicle Insurance (Third Party Risks) Law 1964 S 3(1)

Authority Cited

R v Cholette (SCA 29/1990)

Following a motor vehicle accident it was discovered that the appellant had been driving whilst uninsured. She was subsequently convicted of the offence contrary to S 3(1) Motor Vehicle Insurance (Third Party Risks) Law and was disqualified from driving for twelve months. Such disqualification is mandatory under the Law in the absence of special reasons.

The appellant had urged the learned magistrate to exercise his discretion in not ordering a disqualification of her licence pleading the "special reason" of her medical condition at the time of the accident. Specifically the appellant asserted that she had been suffering from an eye infection and that on the day of the accident she was on her way to the hospital, a taxi which she had ordered for this purpose having failed to arrive.

The learned magistrate remained unconvinced that these reasons should persuade him to exercise his discretion in the appellant's favour and accordingly the order or disqualification was made.

Held: (dismissing the appeal)

(i) When a defendant has made a statement of fact in mitigation, the court must usually accept it in the absence of evidence from the Crown to the contary. Accordingly, had the learned magistrate based his decision on disbelief of the appellant's medical condition he would have been in error. This, however, was not the case.

(ii) In the light of the appellant's evidence being uncontradicted it was incumbent upon the court to accept it. It must also be accepted that a medical emergency could amount to a special reason for not imposing a disqualification order.

(iii) The burden rests firmly on the defendant to persuade the court that the discretion should be exercised in her favour. In this regard the severity of the illness requiring hospital treatment is relevant. In the present case the appellant had not adduced any medical evidence to support her contention that the journey to the hospital was necessary on that day. She had not therefore done enough to dissuade the court from imposing the mandatory sanction.

MD

Possession of ganja - Credibility of evidence - Observance of rules of procedure - Jurisdiction to make a deportation order

R v Millwood

Grand Court (SCA 179/91)
Harre J
October 23 1992

Legislation

Criminal Procedure Code Ss 67-69

Authority Cited

Margeson v R (CICA No 8 of 1990)

On August 27 1991 the appellant was sentenced by the summary court to 3 1/2 years imprisonment with a deportation order also being made for the possession of ganja with intent to supply.

The Crown had alleged that during the course of a search conducted by customs officers at Owen Roberts Airport the appellant was found to be in possession of some one pound and nine ounces of ganja. The ganja had been concealed, inter alia, within five ornamental figurines.

A record of an interview between the appellant and customs officers amounting to a full confession was relied upon by the Crown. The appellant however:

a) Denied that he had been involved in the interview at all; and

b) Denied that he could read and write, claiming further that any documents which he had signed had been in order to retrieve his belonging; and

c) Denied that the box containing the figurines was his.

The appellant appealed, claiming inter alia:-

1. That the conviction was unsafe and unsatisfactory by reason of the learned senior magistrate failing to accurately refer to the appellant's defence in his summing up.

2. That the sentence was manifestly harsh and excessive.

3. That the court order for deportation lacked jurisdiction.

Held: (dismissing the appeal but quashing the order for deportation)

(i) The learned magistrate in considering the whole of the evidence had rightly rejected the appellant's story which was "totally incredible".

(ii) The learned magistrate had adequately, albeit briefly, considered the defence.

(iii) Certain procedural requirements contained within Ss 67 and 69 Criminal Procedure Code had not been observed by the court. Specifically the appellant had not:-

(a) been informed that if he elected to testify he would be subject to cross examination;

(b) been informed that he was entitled to call other witnesses and evidence;

(c) been given the opportunity to address the court at the conclusion of his case.

Such requirements were to be observed in every case however unlikely it may appear to the court that their observance would affect its outcome. On the present facts however no miscarriage of justice had occurred.

(iv) The sentence imposed was severe. However in the light of the fact that no credit could be given in respect of a guilty plea where there existed no real defence, the sentence was not manifestly harsh or excessive and would not be interfered with.

(v) The order for deportation however had been made in excess of jurisdiction. Even if the order were regarded as no more than a recommendation the appellant was afforded no notice that such a recommendation might be made and accordingly lacked any opportunity to contest it.

MD

Drugs - Being concerned in the possession of cocaine with intent to supply

Nicoletta v R

Grand Court (SCA 212A/91)
Harre J
November 20 1992

Legislation

Criminal Procedure Code (Amendment) Law 1983 S 3

Cases referred to

R v Hughes (1985) 81 Cr App Rep 344
R v Turner & others (1975) 61 Cr App Rep 67
R v Pipe (1967) 51 Cr App Rep 17

Mr Hampson for the appellant
Mr Roberts for the Crown

The appellant was convicted on one charge of being concerned in the possession of cocaine with intent to

supply and on two charges of possession of cocaine with intent to supply. He was sentenced to four years imprisonment and a fine for the first charge and concurrent sentences of two and a half years imprisonment and a fine for the second two charges.

The arrest of the appellant was made after an undercover operation of the Drug Squad. Before the learned magistrate the prosecution had alleged that an undercover officer had arranged with another man (X) for cocaine to be supplied to him. It was alleged that the appellant had come to X's apartment and supplied the officer with cocaine via X and an arrangement had then been made whereby the appellant would supply more cocaine to the officer later in the day.

It was at this stage that the arrest was made by other officers of the Drug Squad. The defence before the learned magistrate had been that this entire story was a fabrication.

The appellant appealed against conviction and sentence.

Held: (allowing the appeal in part)

(i) With regard to the conviction of being concerned with the possession of cocaine with intent to supply, even if every word of the prosecution evidence was accepted the charge was not made out beyond a reasonable doubt. Possession of some kind had to be proved and this was wholly lacking.

(ii) With regard to the conviction on two charges of possession of cocaine with intent to supply, the fact that the judgment of the learned magistrate did not adequately set out the point or points for determination, the decision thereon and the reasons for the decision was not fatal to the conviction unless the court was satisfied that a substantial miscarriage of justice had actually occurred. Having reviewed the evidence independently, whilst the learned magistrate did not expressly evaluate the evidence of the two charges, he did come to, and record, an express conclusion on each of the charges. The learned magistrate had exercised his discretion rightly in assessing the evidence of the accomplice X and had come to a proper conclusion on it. Accomplice evidence could be admitted where the accomplice had not been charged and R v Turner confined R v Pipe to situations where the accomplice had been charged but not tried.

(iii) The learned magistrate's remarks on evidence as to the appellant's life-style were unfortunate and he took some account of prejudicial matter not relevant to the particular charges. Nonetheless the conclusion was inevitable on the evidence and no substantial miscarriage of justice had occurred.

Conviction and sentence on the charge of being concerned in the possession of cocaine with intent to supply would therefore be quashed. Convictions and sentences on the charges of possession of cocaine with intent to supply would be affirmed.

AC

EVIDENCE

Evidence of conviction in another jurisdiction inadmissible

R v Ebanks (D) and Ebanks (S)

Grand Court (53/91)
Schofield J
January 20 1993

Legislation

Evidence Law S 12

Cases referred to

Hollington v Hewthorn and Co Ltd [1943] KB 587
Hunter v Chief Constable of West Midlands [1981] 3 All ER 727

Mr Archie and Mr Roberts for the Crown
Mr Henriques QC and Mr Nicole for D Ebanks
Mrs Levers and Mr Hampson for S Ebanks

The defendants, accused of drug trafficking, objected to the admissibility of four groups of evidence sought to be introduced by the prosecution.

Two of those groups of evidence were held to be relevant to the indictment and therefore admissible. The other two groups of evidence related to the judgment of a United States District Court in Florida convicting FC who was alleged to have financed the purchase of a vessel together with one of the accused. FC was alleged to have pleaded guilty to seven counts of importation of marijuana and seven counts of possession with intent to distribute marijuana and one count of filing a false personal tax return. The prosecution wished to tender the necessary documentation relating to the indictment and a plea agreement leading up to the judgment.

Held: (rejecting the evidence of foreign conviction)

Section 12 of the Evidence Law did not render those documents admissible. The provision related to the procedure by which documentary evidence may be admitted where the original document would itself be admissible. The section was not concerned with principles of admissibility. At common law, a judgment in personam is not considered evidence of the truth either of the decision or the grounds thereof between strangers to the action or between a party to that action and a stranger: Hollington v Hewthorn and Co. Ltd. Although the decision in Hollington has been superceded by statute in England and the decision has also been criticised (Hunter v Chief Constable of West Midlands), it has not been overruled by subsequent judicial authority.

A conviction in a United States District Court was not relevant in a Cayman Islands' court: Hollington applied. It was important that any evidence tendered to the court which adversely affected the accused could be challenged by the accused. The evidence was therefore inadmissible.

AD

Authenticity of confession evidence - Principles to be applied

Bush v R

Grand Court (SCA 230/91)
Harre J
June 26 1992

Mr Furniss for the appellant
Mrs Escalante for the Crown

On July 30th 1991 the appellant had pleaded guilty to nine charges of burglary, three were left on file, but in respect of the remaining six he received sentences totalling two years and three months. According to a note of the learned magistrate his intention had been to impose a total sentence of two years.

The appellant appealed originally only against sentence on the grounds that it was excessive in the light of his co-operation with officers of the C.I.D. He subsequently alleged however that he had committed only two of the burglaries and that he had been induced to confess to the other offences following an offer by police officers that if he did so proceedings against his mother, alleging the possession of unlicenced ammunition, would be discontinued.

Held: (allowing the appeal against sentence in part)

(i) The appellant had gone into some detail about the burglaries and his answers generally had a "ring of truth" about them. Furthermore, eye witnesses from the scene of some of the burglaries gave descriptions fitting the appellant. Accordingly the police evidence was to be believed: no threats or promises had been made to the appellant who had been properly convicted on the basis of his own confession.

(ii) The appeal against sentence would be allowed but only to the extent of a three month adjustment to reflect the intention of the senior magistrate to impose a total sentence of two years imprisonment.

MD

FAMILY LAW

Ancillary relief - Property adjustment - Periodic payments

A v A

Grand Court (D21/92)
Malone CJ
January 29 1993

Mrs Maierhofer for the petitioner
Mr Levy for the respondent

The court was asked to divide the interest in the parties' only significant asset, the matrimonial home. The property could not be subdivided. Neither party had the capacity to buy the other out and a sale of the property would have caused hardship to the extended family members who resided there.

The petitioner earned CI$ 1,000 per month and her expenses were CI$ 810 per month. Her expenses were subject to reduction to the extent of CI$ 120 per month if the respondent paid his share of the mortgage payment on the property. Potentially her income could be supplemented by adult children living on the property.

The respondent had no steady employment. When employed he earned CI$ 1,600. He claimed expenses of CI$ 1,480 but this was extravagant when it was borne in mind that he lived rent free on the property, contributed nothing to the household expenses and, since September 1991, had not contributed to the mortgage payment.

Held: (judgment as follows)

(i) The property was over valued by the parties. There was no water in the wooden building adjacent to the main concrete home. The buildings were crowded on the property. The purchase price and mortgage for improvements provided a more realistic figure.

(ii) The respondent was to transfer his 50% interest in the property, valued at CI$ 12,333, to the petitioner. The respondent was to receive CI$ 300 per month from the petitioner until 50% was paid. During such time as the respondent continued to reside on the property the value of the his half share was to be written down by CI$ 150 per month.

JE

Child - Definition of term - Common Law presumption

RHB Trust Co v LSEB and FTD

Grand Court (218/92)
Harre J

October 14 1992

RHB Trust Co v LSEB and PAH

Grand Court (219/92)
Harre J
October 14 1992

Cases referred to

Garston Todd Grant v Ann Watson-Morgan (CICA 29/89)
Galloway v Galloway [1956] AC 299
Sydall v Casting Ltd [1967] 1 QB 302
Ministry of Home Affairs v Fisher [1980] AC 319

Legislation

Guardianship and Custody of Children Law S 7(1) (Revised)
Family Law Reform Act 1969 S 15 (UK)

Mr Turner for the applicant RHB Trust Co ex parte

The court considered whether an illegitimate child was a beneficiary under either LSEB settlement number 1 or LSEB settlement number 2, both governed by the laws of the Cayman Islands.

Held: (order as follows)

(i) The settlements listed named beneficiaries and "children" born thereof. The meaning of "child" was considered by the Cayman Islands Court of Appeal in Garston Todd Grant v Ann Watson-Morgan. In interpreting S 7(1) of the Guardianship and Custody of Children Law (Revised) the court ruled "child" did not include illegitimate children.

In Galloway v Galloway the court ruled "child", prima facie, was to be construed as lawful child. The Privy Council in Ministry of Home Affairs v Fisher followed the House of Lords decision in Sydall v Casting Ltd in saying that "child" meant legitimate child. Clear words were needed if illegitimate or adopted children were to be treated in the same way as legitimate children at common law.

(ii) Though England had altered the harshness of the common law through the Family Law Reform Act 1969 the common law survived unaltered in the Cayman Islands. Therefore the illegitimate child in question were not within the class of beneficiaries.

Note: Following the decision of the Cayman Islands Court of Appeal referred to herein, the definition of "child" in section 2 of the Guardianship and Custody of Children Law (Revised) was amended to include an illegitimate child. (Law 5 of 1992)

JE

Ancillary relief - Maintenance - Periodic payments

Mazie Eloain St Louis v Paul Carlyle St Louis

Grand Court (D 97/92)
Malone CJ
December 7 1992

Ms Bodden for the petitioner
Ms Brooks for the respondent

The parties agreed on all matters except the amount of the periodic payments for the support of the two children of the marriage. The children were aged seven and three years. The respondent was a bus driver earning $1,600.00 per month with expenses of $1,572.00 per month including voluntary maintenance of $400.00 per month. The petitioner's earnings amounted to $1,701.00 per month but

her expenses were $2,186.00 per month. The income figure did not include the voluntary maintenance, which the petitioner alleged was not regularly paid.

Held: (order as follows)

Having regard to the respective means of the parties the respondent was ordered to pay the petitioner $500.00 per month for the support of the children. The increase of $100.00 was to be met by the respondent reducing the amount he expended on laundry, and restaurant meals.

JE

Ancillary relief - Distribution of assets - One third rule - Maintenance - Clean break - Leave to apply if significant change in circumstances

F v F

Grand Court (D58/91)
Schofield J
December 1 1992

Authority referred to

J v E (1991) 7 Law Bulletin 67

Mr Hamilton QC and Mr Levy for the petitioner wife
Mr Hill QC and Mr Hampson for the respondent husband

The parties were married for 8 years (approximately one-third of the husband's professional career). The respondent was 16 years older than the petitioner. The petition was filed in May, 1991. There was one child aged 7 years. The court distributed the family assets and considered whether the petitioner was entitled to maintenance.

The assets under consideration included a house valued at L 120,000, substantial bank accounts and local properties. The court also heard evidence of financial waste and living expense loans. The respondent undertook to pay the child's school fees of US$ 162.60 per month and he offered to pay US $500 to US $600 per month as maintenance for the child. He suggested a lump sum of US $50,000 for the petitioner and no maintenance. The petitioner requested a lump sum of US $800,000 to US $1,300,000.

Held: (judgment as follows)

(i) The wife was reluctant to work. She had secretarial experience. To maintain her earlier life-style she would have to contribute financially. Taking into account the expense of a helper/nanny her potential net income was US $1,750 per month.

(ii) Both parties desired a clean break. The lump sum figures put forward by the parties were unrealistic. The husband's figure was insufficient for the wife to start a new life for herself and the child. The wife's suggestion bore no relationship to the capital assets available for distribution or the potential incomes of the parties.

(iii) The husband's interest in his professional practice was not an asset which could be taken into account for the wife's benefit. The husband had 14 years of professional experience before they were married and he brought money into the marriage. His professional success was not the product of years of team work. J v E was distinguishable - where the parties were married longer and the wife had made a far greater contribution to her husband's career.

(iv) Particular regard was paid to the interests of the child. Neither party had the capital assets nor the potential or actual income necessary to allow the kind of financing required to effect a clean break. Therefore an order was made that the wife receive a lump sum equal to one-third of the proceeds of the sale of the house in England and

periodic payments of US$ 3,250 per month. The one-third rule, a recognised guide in the Grand Court, was applied.

(v) Maintenance payments do not "tapper-off" as suggested by the husband. The evidence did not reveal a definite time frame in which the court could expect the wife to be independent. Time changes circumstances. The parties were given liberty to apply for variation should either of their circumstances significantly alter.

JE

Ancillary relief - Premature application - Committal order -Maintenance - Set off

LW v JH

Grand Court (D58/91)
Schofield J
October 7 1992

Mr Hamilton QC and Mr Levy for the petitioner
Mr Hill QC and Mr Hampson for the respondent

The husband sought a final determination of ancillary matters. The wife sought a committal order for alleged non payment of interim maintenance.

Held: (application denied)

(i) The husband did not present enough evidence on the joint custody application. The opinion of the child's counsellor and the Department of Social Services would assist in determining the child's best interests.

(ii) The evidence regarding the matrimonial assets was incomplete. The evidence lead to the conclusion that the house in England was to be sold with the funds to be held in trust pending a collection of the missing details. An adjournment was ordered.

(iii) The wife's application was ill-founded. The husband had set off maintenance payments against credit card and telephone bills which the wife incurred without his consent but for which he was held liable. The short fall due to the wife was to be paid forthwith.

JE

LABOUR LAW

Independent contractor - Member of work force - Interpretation of indemnity clause

Henry Solomon v The Attorney General of the Government of the Cayman Islands and Orville Andy Ryan (Third Party)

Grand Court (294/88)
Harre J
October 7 1992

Cases referred to

Mersey Docks and Harbour Board v Coggins and Griffith [1947] AC 1
Savory v Holland, Hannen and Cubitt [1964] 3 All ER 18
Denham v Midland Employers' Mutual Assurance Ltd [1955] 2 QB 437

Mr Hill QC and Mrs Reid for the plaintiff
Mr Marsden for the defendant
Mr Alberga QC and Mr Clifford for the third party

At the material time the plaintiff was an employee of the

Cayman Islands Government Public Works Department. On April 21, 1986 the plaintiff was on a construction site at Northward Prison where the independent contractor Mr. Ryan had a crew. The plaintiff's supervisor instructed him to assist Mr. Ryan's crew to load a metal door onto the plaintiff's truck for transport to the PWD compound. The door fell onto the plaintiff's foot causing injury. Damages were agreed.

The plaintiff claimed damages from the government as his employer for negligence and breach of statutory duty. The defendant's only defence was that the plaintiff was not acting in the course of his employment. The defendant claimed indemnity from the third party based on the contract between them. The defendant alleged that the plaintiff became a part of the third party's work force, and was therefore liable to indemnify the defendant for the claim of a member of the third party's work force against the defendant pursuant to clause 13 of the contract.

The court considered whether the plaintiff was a member of the third party's work force at the time of the contract and the effect of the indemnity clause between the defendant and the third party.

Held: (judgment for the plaintiff, third party claim dismissed)

(i) "Work force" was not a term of art. A servant of one person may on a particular occasion and for a particular purpose become the servant of another not withstanding that he continued in the service of his general employer and is paid by him: Mersey Docks and Harbour Board v Coggins and Griffiths. If an employee is injured as a result of a negligent act on the worksite the employer at the material time for the purpose of compensation is the person who could tell the servant what he had to do and how he had do it. Membership in a work force does not depend on the existence of a contract of service. Therefore the plaintiff was not a member of the third party's workforce.

(ii) The relevant part of clause 13 of the contract between the defendant and the third party stated that: "[t]he government accepts no liability whatsoever for any damage or injury to the contractor's work force or any claims by third parties and the contractor fully indemnifies the government against all such claims". The clause was a shield for the government against claims by persons other than its own employees and it could not be used as a sword by the government to transfer its liability to the third party in this case.

JE

Unfair dismissal not actionable in the Grand Court at first instance - Wrongful dismissal - Legality of employer paying salary in lieu of notice - offer more than was contractually due to plaintiff - Abuse of the court's process

Roulstone and Coffee v Cayman Airways Ltd

Grand Court (308 & 309/92)
Schofield J
January 13 1993

Legislation

Labour Law 1987 S 48

Authority referred to

Gunton v Richmond-Upon-Thames LBC [1981] 1 Ch 448

Mr Murray for the plaintiff
Mr Barrie for the defendant

The defendant company made a consolidated application to strike out two claims brought by their former employees whose employment as flight attendants had

been terminated.

The plaintiff claimed that the termination of their contracts of employment was unfair and wrongful. Each of the plaintiffs sought eleven months' salary for unfair dismissal. Alternatively both claimed damages for wrongful dismissal.

The defendant had offered each of the plaintiffs one month's salary plus vacation pay in lieu of notice.

The terms of the contract provided that either the employer or employee could terminate the agreement without cause upon giving 14 days notice in writing. The employer, with cause, could terminate the employment at any time.

Held: (granting the defendant's application)

(i) Unfair dismissal was not actionable at first instance in the Grand Court. An action for unfair dismissal had to be brought under S 48 of the Labour Law, 1987 which requires a complaint to be made to the Director of Labour and thereafter if not satisfied with the Director's decision, the aggrieved party may appeal to the Appeals Tribunal. A final appeal lay to the Grand Court. Accordingly the claim for unfair dismissal would be struck out.

(ii) The common law provides a remedy for wrongful dismissal. It is however lawful for an employer to give an employee salary in lieu of notice. The plaintiffs had been offered one month's salary in lieu of notice. Under the terms of their employment, the notice requirement was only 14 days and therefore they were only entitled to two weeks' pay in lieu of notice. The offer by the defendant was therefore in excess of the plaintiffs' entitlement if their employment was terminated without cause and in excess of any damages that the court would have awarded the plaintiffs if they proved wrongful dismissal. The action for wrongful dismissal was therefore an abuse of the court's process.

AD

LAND LAW

Mortgagee's duty to mortgagor once power of sale has accrued

Cayman National Bank Ltd v Smith and Pierson (formerly Smith)

Grand Court (257/92)
Malone CJ
September 1 1992

Legislation

Registered Land Law (revised) Ss 75 and 77

Cases referred to

Cuckmere Brick Co. Ltd v Mutual Finance Ltd [1971] 2 All ER 633
Paradise Manor Ltd v BNS (1985) CILR

Mr Stafford for the plaintiff
Mr Merren for the defendants

The defendants were registered joint proprietors of the property over which the plaintiff was proprietor of a registered charge.

It was conceded by the defendant that the power to sell had accrued and the plaintiff sought leave of the court under S 77 of the Registered Land Law (Revised) to effect a sale by private treaty of the charged property.

Two previous attempts to sell the property by public auction had been made.

The issue related to the nature of the duty owed by a mortgagee to a mortgagor once the power of the sale has accrued. The defendant contended that before exercising its discretion under S 77 of the Law the court must know:

1. The reserve price of the property and the value of the property; and

2. To what extent the property was advertised before the auctions were held.

The plaintiff contended:

1. That as registered proprietor of a charge with the power to sell it could set the conditions of sale without interference from the defendants; and

2. That the court's exercise of its discretion under S 77 of the Law was confined to ensuring compliance with the statutory procedure for giving notice under S 72 of the law.

Held: (adjournment granted to defendants)

(i) The provisio to S 77 of the law ensures in the case of a variation a measure of protection to the owner of property subject to a charge by withholding permission to vary.

(ii) The merits of the plaintiff's application could not be examined as the plaintiff had not disclosed material matter such as the value of the property or the price reserved or the extent of the advertisement.

(iii) An order would be made that the defendants had 7 days to file an affidavit in reply to the plaintiff's application showing why sale by private treaty should not be permitted; the plaintiff to be entitled to reply to the defendant's affidavit within 7 days thereafter.

AC

Land - Specific performance where there exists no privity of contract of co-owner - Damages in lieu

Jackson v Sunshine Realty (1) Bosch (2) Tatum (3)

Grand Court (433/91)
Harre J
September 18 1992

Legislation

Registered Land Law (Revised) 1971 S 100(1)(a)

Ms Brooks for the plaintiff
Mr Hampson for the second defendant
Mr Collins for the third defendant

The first defendant, Sunshine Realty, was no longer a party to the action as it had been acknowledged that the second defendant was not acting on the first defendant's behalf in respect of the matters for which the cause of action arose.

The third defendant did not attend. The matter was heard in her absence and Mr. Collins was given leave to withdraw.

In 1990 the second defendant (employed by Sunshine Realty) had placed an advertisement in the Caymanian Compass for the sale of an undeveloped parcel of land in George Town. The telephone number given was that of Sunshine Realty. The second defendant had accepted an offer of $8,000 for the parcel which was paid to him by the plaintiff. The court accepted that the plaintiff did not know at the time of payment that the property was registered in the sole name of the third defendant.

Whilst the land was beneficially owned by the second defendant and the third defendant (his former girlfriend) in two equal shares it was registered in the sole name of the third defendant who would not co-operate in the

transfer to the plaintiff. The agreement between the second and third defendants when they bought the property stated, inter alia, that it was "owned by both...in two equal shares. Both of the parties are aware that the title is held by [the third defendant and that it] can be transferred in both names at any time".

The second defendant refused to return the $8,000 but was happy for the property to be transferred to the plaintiff but, as the third defendant would not co-operate, the plaintiff sought specific performance of the contract with the second defendant or, in the alternative, damages in respect of its breach.

The third defendant in her defence denied liability in damages to the plaintiff on the basis that there was no privity of contract between them. Further, she held the property as trustee for herself and the second defendant as beneficial owners and, under S 100 (1)(a) of the Registered Land Law the second defendant did not have an interest in the land which he could dispose of without her express agreement or signature.

Evidence was adduced to the court that two parcels of land had been purchased by the second and third defendants with the intention that each should be jointly owned. The second defendant submitted however that when their relationship ended it was orally agreed that he should have ownership of the parcel in question and the third defendant should have ownership of the other parcel.

Held: (dismissing the application for specific performance and awarding damages).

(i) On the evidence there was an oral agreement between the second and third defendants whereby the second defendant was to have full ownership of the parcel in question and it was in reliance on that agreement that the second defendant agreed to sell the parcel to the plaintiff.

(ii) Notwithstanding the above there was no privity of contract between the third defendant and the plaintiff and consequently an order of specific performance could not be made.

(iii) The second defendant was liable in damages to the plaintiff in the sum of $14,011 (which included $4,000 compensation for loss of bargain).

(iv) The third defendant remained registered proprietor of the parcel but was ordered to indemnify the second defendant against the whole of his liability to the plaintiff save for that part of the damages ($1,011) being interest on the sum of $8,000 paid to the second defendant.

(v) The third defendant was to indemnify the second defendant in respect of costs awarded to the plaintiff.

AC

Land - Sale by chargee - Leave to effect sale by private treaty

Cayman National Bank Ltd v Smith (1) Pierson (formerly Smith) (2)

Grand Court (257/92)
Malone CJ
December 24 1992

Legislation

Registered Land Law (Revised) 1971 Ss 75 and 77
Grand Court Law S 18

Mr Shea for the plaintiff
Mr Merren for the first defendant

The plaintiff as chargee sought leave of the court under S 77 of the Registered Land Law to effect a sale by private treaty of the charged property.

The issue arose as to whether in granting leave the court was empowered to impose conditions to the grant and, if so, what was to be the extent of the court's involvement.

Held: (granting leave)

(i) Whilst the proviso to S 77 did not expressly empower the court to impose conditions when granting leave, a court had to give reasons for its decision and the language of S 77 allowed for the imposition of conditions when leave was granted.

(ii) So far as the court's involvement was concerned and notwithstanding the fact that the chargee's duty of good faith to the chargor under S 75 applied, mutatis mutandis, to sale by private treaty, the intention of the legislature was for the court to have a supervisory role over such sales by private treaty. The advertisement of the property by the plaintiff had been adequate.

Leave would be granted for sale by private treaty for not less than CI$200,000.00.

AC

Land - Special Lands Disputes Tribunal - Land Title Settlement Law - Custom

The Estates of Tidyman Macaltric Ebanks and Henry Ebanks v The Estate of Kenneth Chisholm

Grand Court (193/89)
Harre J
March 5 1992

Legislation

Land Title Settlement Law S 7

Land Adjudication Law 1971 S 16(2)(a)

Authority referred to

Stanshal Eden (Estate of James M Eden) v The Crown (652/76) Appeal 45 of 1976

Mr Hill QC and Mr Connolly for the Estate of Kenneth Chisholm
Mr Marsden for the Crown
Mr Adams as amicus curiae

During the land adjudication process land situated in Block 41 A Parcel 1 had been awarded to the Ebanks family by the adjudicator appointed under the Land Adjudication Law 1971. This decision was subsequently referred to the Special Tribunal constituted under the Land Title Settlement Law.

The Special Tribunal awarded an area of approximately 267 acres to the Ebanks estate and an area of some 136 acres to the Chisholm estate. The remainder of the land vested, in the Special Tribunal's view, in the Crown under S 7 of the Land Title Settlement Law.

The Chisholm estate appealed against the award by the Special Tribunal on the basis that the Special Tribunal:-

a) Erred in law in making the award of land to the Crown; and

b) Misdirected itself in law on the issue and existence and applicability of custom relating to the possession of swamp land adjacent to dry land belonging to the appellant.

Held: (dismissing the appeal)

(i) The Special Tribunal had not erred in law. The following opinion of the Special Tribunal would be endorsed:

a) "the mere use of land without any unequivocal act or acts that the person using it was asserting a right to the land for the statutory period cannot found a claim by him. There must be unequivocal evidence of animus possedendi.

b) there is no general principle that to establish possession of an area of land the claimant must show that he made physical use of the whole of it, provided the boundaries were known and undisputed.

c) to establish adverse possession the claimant must show 'open and peaceful possession' to the exclusion of the public at large for the requisite period of time.

d) in determining (c) above regard must be had to the nature and condition of the land and generally to the circumstances of the case."

There was no unequivocal evidence of an assertion of a right to the whole area. The Special Tribunal came to a reasonable and sustainable conclusion erring, if at all, on the side of generosity to the appellant's claim.

(ii) A custom is a rule that has obtained the force of law and which has existed from time immemorial without interruption and which is also reasonable and certain (in respect of both nature and locality). The evidence presented to the Special Tribunal fell short of establishing the existence of any custom.

(iii) The proviso to S 16 (2) (a) of the Land Adjudication Law did not give legislative recognition to the determination by custom of swamp or cliff land lying outside a parcel of land. The fact that the Crown had made no claim to the land awarded to it was of no significance.

Appeal dismissed and judgment of the Special Tribunal affirmed.

AC

PERSONAL INJURY

Personal injury - Assessment of damages

Ebanks v Callender (F) and Callender (WA)

Grand Court (280/86)
Harre J
June 3 1992

Legislation

Motor Vehicle Insurance (Third Party) Risk Law 1964 S 3(1)

Cases referred to

McLeod (or Houston) v Buchanan [1940] 2 AC
Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd [1961] 1 All ER 404
Smith v Leech Brain & Co Ltd and another [1961] 3 All ER 1159
Fish v Associated Contract Cleaners [1988] Kemp & Kemp G2 - 030
Pakes v Rodge Kemp & Kemp G2 - 022

Authority relied on

Kemp & Kemp on Quantum of Damages

Mr Barrie for the plaintiff
No appearance by either defendant

The plaintiff, a passenger in a car driven by her friend B, was injured when a jeep driven by the second defendant

struck the side of the car. The evidence revealed that the jeep had been hired by the first defendant (the second defendant's father) and he had represented to the hire company that he was going to be the sole driver. He permitted the second defendant to drive the vehicle. The statutory third party insurance consequently did not extend to cover the son. Both defendants were therefore in breach of the statutory duty contained in S 3(1) of the Motor Vehicle Insurance (Third Party) Risk Law, 1964.

The first defendant denied permitting the second defendant to use the vehicle and put forward an alibi that he was at the beach with friends at the time of the accident. The second defendant denied that the injuries and consequential loss were caused by his negligence.

Both defendants failed to make an appearance in court.

The plaintiff, at the time of the accident was already suffering from a chronic disorder - systemic lupus erythematosus and was on steroid therapy. Medical examination after the accident revealed the death of the head of the femur resulting in the flattening of the femoral head and causing the plaintiff pain in the right hip. It was stated in evidence that patients with lupus, being treated with steroids over a long period, as the plaintiff was, were prone to that hip condition.

Some side effects resulted from the treatment of the plaintiff after the accident: hip replacement surgery subsequently took place. The accident exacerbated the plaintiff's pre-existing condition of systematic lupus and caused the ultimate demise of the right hip.

Held: (defendants liable to the plaintiff)

(i) There was liability on the part of both defendants in respect of any damages caused: McLeod (or Houston) v Buchanan. In assessing damages a distinction was to be drawn between the question of whether a person could reasonably anticipate a type of injury and the question of whether that person could reasonably anticipate the extent of injury of the type which could be foreseen. A tortfeasor had to take his victim as he found him. This principle had not been overridden by the decision in Overseas Tankship (UK) Ltd. v Morts Dock and Engineering Co. Ltd.

(ii) The plaintiff had suffered pain likely to persist for a very long time. She had a limp because her right leg had now been shortened. She had also suffered a general loss of amenity by reason of a restriction on her activities and pleasures. She was likely to have a revision of the replacement surgery at some time in the future. The revised operation was likely to cost 20% to 30% more than the original operation.

Pakes v Rodge, Fish v Associated Contract Cleaners and Olds v Grimault in which similar injuries were suffered, were useful guides. Regard was to be paid to the plaintiff's age and the likelihood of major surgery. Accordingly C.I $32,500.00 for pain and suffering and loss of amenity would be awarded.

(iii) For pecuniary loss, C.I.$20,261.69 would be awarded for medical expenses incurred. C.I.$23,111 (plus 20% of that amount) would be awarded for the cost of future medical care. With regard to loss of earnings the evidence showed that the plaintiff could have mitigated her loss by returning to some sort of sedentary work from 5th March, 1990 (five years after the accident). The plaintiff had been a waitress before the accident and earned an average of C.I.$200 per week. Evidence was produced by her manager that she could be earning twice that amount by March, 1989. The loss of earnings calculated from 5th April, 1985 to 5th March, 1989 at C.I.$200 per week and from 6th March, 1989 to 5th March, 1990 at C.I.$400 per week produced a figure of C.I.$59,600.00.

For loss of future wages, the court was to base itself on the plaintiff's earning capacity at the time of the accident calculated from March, 1990 when the plaintiff was nearly 39 years old and multiplied the earnings by a multiplicand of 5.7 to produce a figure of C.I.$39,900. It was to be recognised that the plaintiff would not be expected to

continue in her line of employment, which was usually the reserve of young people, beyond the age of 45.

The total damages awarded was C.I.$175,374 plus costs.

AD

Personal injury - Assessment of damages

Adamek v Jurgens

Grand Court (232/90)
Harre J
July 17 1992

Cases referred to

Donnelly v Joyce [1973] 3 All ER 475
Housecroft v Burnett [1986] 1 All ER 332
Hammer v Martin and Sheckles (327/91)

Authority relied on Kemp & Kemp on Quantum of Damages

Mr Murray for the plaintiff
Mr Shea for the defendant

The plaintiff and his fiancee were struck by a vehicle driven by the defendant when the two were on a motor scooter. The fiancee died. The defendant admitted liability. The issue before the court was the amount of damages claimable.

The plaintiff suffered a severe fracture of the tibia and fibula bones of the left leg and received protracted treatment both in the Cayman Islands and the United States between August, 1988 and November, 1990 for, inter alia, the placing of a rod into the tibia, hyperbaric oxygen therapy (i.e lying in a casket-like cylinder), bone and skin grafts and treatment against infection.

Expert medical evidence revealed that there was a 30 per cent chance that the plaintiff was going to have some recurring infection problems or wound drainage in the future. That was going to require further surgery. The plaintiff was going to suffer about 15 per cent functional disability. The plaintiff suffered a permanent stiff ankle which was going to affect the knee. There was less than a 10 per cent possibility that the plaintiff might lose the leg. He was going to need at the very least a periodic follow up by an orthopaedic surgeon twice a year for the rest of his life. He had a limp which was going to be permanent.

The plaintiff's mother had given up her employment from which she earned US $47,000 per annum to provide home care for the plaintiff.

The plaintiff's claim was as follows:-

1. Special damages together with interest:

a) Cost of home care at US $48 per hour for 5,475 hours US $262,800

b) Estimated cost of future medical expenses US $ 19,500

c) Estimated cost of future home care US $ 26,280

d) Loss of earning capacity US $ 65,000

2. General damages for pain and suffering.

Held: (awarding the plaintiff damages)

(i) For the cost of home care provided by the mother, there were two important English authorities: Donnelly v Joyce and Housecroft v Burnett. Donnelly established that the plaintiff's loss is the existence of the need for

nursing services, the value of which for the purpose of damages is the proper and reasonable cost of supplying that need, calculated at the commercial rate of employing someone to do what the relative is doing. Donnelly had the effect of making either a nil award or a full award. Housecroft established that neither of the extreme solutions was right. Some assessments could be somewhere in between, depending on the facts of each case.

(ii) If a relative gave up a highly paid employment, then the commercial rate was applicable. If on the other hand the relative gave up low paid employment, the award should be what would have been made if no employment had been given up. The award in the present case fell within the first alternative. The award should however be slightly less than the commercial rate which would have been paid for professional home care. The mother had provided home care for two years and four months and for this an award of US $109,666 was calculated as the appropriate figure.

(iii) For future medical expenses an award of US $19,500 would be made since the plaintiff was going to have a half-yearly review calculated on a multiplier of 15. An award of US $125,542.57 would be made for past medical expenses.

(iv) Cost of future home care was not awarded, the matter being unclear as to the nature of the future care and by whom. No award was made for loss of future earning. The plaintiff was earning US $374.62 per week in a family business before the accident. The loss of earning up to the time of the hearing was calculated at US $21,181.77.

(v) For general damages for pain and suffering and loss of amenity several English authorities from Kemp & Kemp on the Quantum of Damages were relevant. Also of assistance was the local case of Hammer v Martin and Sheckles. US $70,000 would be awarded with an additional US $15,000 for clinical depression suffered by the plaintiff.

The total award was US $360,890.34 plus costs.

AD

TORT – TRESPASS

Trespass to goods - Liability of co-owner - Trespass onto land to detain goods of which a party is co-owner - Whether co-owner or person acting with his authority can trespass onto land to take the property

Mahogany Estate Ltd v Stephenson and Gonzales

Grand Court (515/91)
Malone CJ
October 9 1992

Mr Grant for the plaintiff
Mr Turner for the defendant

The plaintiff's claim was for trespass to land and/or goods, conversion, detinue and conspiracy by the defendants, who had come onto his land to take a tractor for their own use.

The first defendant had written to the plaintiff demanding repayment of moneys he had made towards the purchase of a tractor which was in the use of the plaintiff. The letters had been ignored and the first defendant had authorised the seizure of the tractor by the second defendant who had taken it from the plaintiff's premises and transported it to his own compound where, with the authorisation of the first defendant, he had put it to use at a public garbage dump in the performance of a government contract. After about a fortnight the plaintiff had taken the tractor back from the second defendant.

The first defendant counterclaimed for, inter alia, a

declaration that he had a legal and/or beneficial interest in the tractor, an order that the plaintiff deliver the tractor to him or alternatively repayment by the plaintiff of a sum totalling US $56,636, being the cost of the tractor.

The history of the case was that LB, the administrator of the estate of TB, formed the plaintiff company in order to develop land forming part of the estate of TB. For this purpose LB engaged the first defendant, an architect, to lay out the development. It was agreed that the development would be carried out in phases and that for his professional services the first defendant was to be given lots on the development. What was in dispute was exactly which lots were to be given. What was not in dispute was that lots 11 and 12 had been assigned by the plaintiff to the first defendant as reward.

Lots 11 and 12 were subsequently sold to B. It did appear from the Land Registry that the previous owner was LB, as administrator of the estate of TB. The proceeds of sale were however deposited to the first defendant's account.

The plaintiff alleged that there had been an agreement between himself and the first defendant that the proceeds of lots 11 and 12 be used to pay for the tractor purchased for the development. The first defendant denied any such agreement.

There was documentary evidence in the nature of three General Sales Agreements (GSA's) and documents of transfer. One GSA showed that lot 11 had been assigned by the plaintiff to the first defendant. The other two GSA's showed sales of lots 79 and 80 by the first defendant to B. Two Transfers of Land showed transfers of lots 79 and 80 by the plaintiff to B. There was however no GSA relating to any transfer of lot 12 by the plaintiff to the first defendant.

The documentary evidence seemed to confirm the oral agreement made between the plaintiff and the first defendant. The plaintiff however contended in evidence that the oral testimony did not encompass all the facts, in particular that it was agreed that to keep the development going, the first defendant should re-assign lots 11 and 12 to the plaintiff. There was however no re-assignment document. The first defendant disputed any such agreement to re-assign.

The bill of sale of the tractor was the security for the loan and the loan agreement described the first defendant as the "beneficial owner" of the tractor. The first defendant stated that it was agreed he was to be re-imbursed in full all costs plus interest. It was revealed that the plaintiff had contributed US $10,000 towards the purchase of the tractor.

Held: (allowing the claim in part)

(i) The evidence as to the giving of security to the bank by a bill of sale of the tractor and the fact of the loan being made to the first defendant, who was to have a proprietary interest in the tractor, was convincing.

By virtue of the plaintiff's US $10,000 contribution towards the purchase, the plaintiff and the first defendant became co-owners in common with distinct and several title to their shares which were not
equal.

(ii) The facts led logically to the conclusion that there was to be repayment to the first defendant as he had no need for the tractor which was needed by the plaintiff. Since the transaction created a co-ownership in common, the repayment to the first defendant would result in the acquisition by the plaintiff of the entire proprietary interest in the tractor.

(iii) An owner in common was not liable in conversion against his co-owner if he merely made use of the property in a reasonable way. The claim in conversion therefore failed against the first defendant and also against the second defendant since the second defendant was acting on the authority of the first defendant.

(iv) The claim in detinue also failed against both defendants since the second defendant acted on the authority of the first defendant. The first defendant had a right to the possession of the tractor as a co-owner. An action for trespass to goods could not be sustained for the same reasons.

(v) There was no evidence of re-assignment. If there had been a re-assignment the first defendant would have lost out and had nothing for his services. The fact that the proceeds of lots 11 and 12 were deposited to the first defendant's account defeated the plaintiff's contention. The plaintiff's argument that the sale of lots 11 and 12 were to pay for the tractor was not convincing. The total cost of acquiring the tractor came to US $56,636.00 out of which the plaintiff contributed US $10,000. The sale of the two lots fetching C.I $29,400 was in fact far short of the first defendant's re-imbursement of US $46,636.00.

(vi) For the foregoing reasons, there was no conspiracy on the part of the first and second defendants to commit trespass to goods or to detain and convert the tractor for their own use.

(vii) On the issue of trespass to land, by November, 1991 the relationship between the first defendant and the plaintiff, which had led to the purchase of the tractor, had long ended and although the first defendant still had an interest in the tractor, he had no interest in the plaintiff's land. The interest in the tractor and demand for repayment of the sum due did not entitle the first defendant to go onto the plaintiff's land. Both defendants were therefore trespassers but neither committed any damage and therefore any damages awarded would be nominal. The plaintiff would be awarded damages of $100 for the trespass. The defendants were jointly and severally liable.

(viii) As regards the counterclaim, the first defendant was entitled to US $46,636.00 from the plaintiff. Since his proprietary interest was not exclusive, he was only entitled to a declaration that he had a legal and beneficial proprietary interest in the tractor.

AD

TRUSTS

Construction of fee agreement - Intended date of termination - Principles to be applied

In the Matter of the Trust Law (Revised)
In the Matter of the S Trust

Grand Court (225/92)
Schofield J
January 22 1993

Cases referred to

Re Gulbenkian's Settlements [1970] AC 508
In Re Duke of Norfolk's Settlement Trust [1982] 2 Ch 61
Prenn v Simmonds [1971] 3 All ER 237
Reardon Smith Line Ltd v Hansen Tangen [1976] 3 All ER 570
Re Orwell's Will Trusts [1982] 3 All ER 177

Mr Walker QC and Mr Foster for the plaintiff
Mr Alberga QC and Mrs Maierhofer for the guardian ad litem

This application was brought seeking a declaration as to the effect of a charging clause contained in the trust deed which established the "S" Trust. The trust deed was dated January 18th 1989 and was drafted by officers of Cititrust, its Swiss affiliate Confidas, and their Cayman Attorneys.

At the time when the trust deed was executed the settlor was, to his knowledge, (though not to that of the officers

of Cititrust or Confidas) terminally ill. The settlor died on February 28th 1989.

By this application Cititrust sought a declaration that the fee agreement, executed contemporaneously with the trust deed, terminated upon the settlor's death. It was further contended that thereafter Cititrust could levy charges according to its "ordinary scale" these being considerably higher than those payable in accordance with the fee agreement. (Provision existed under the agreement for the trustees to charge, on a quantum meruit basis, in respect of work performed on the settlor's death to reflect the increased work generated by this event.)

Held: (refusing the application but deferring the final order and the determination of costs).

(i) In construing the documents in order to determine their intended effect a common - sense approach was to be adopted: per Lord Upjohn in Re Gulbenkian's Settlements. Applying this principle to the relevant clauses of the fee agreement there was nothing express or by necessary implication to suggest that the agreement was to terminate on the death of the settlor.

(ii) It was possible, as urged by Cititrust, to regard the trust as consisting of two phases, one inter vivos and the other posthumous with the fee agreement being effective only during the former.

Whilst it was true that onerous duties passed to the trustees on the event of the settlor's death or serious incapacity the fee agreement specifically made provision for fees to be charged on a quantum meruit basis where the trustees' work increased. Accordingly there was nothing to suggest that any distinction between the two phases, (if such existed) was to be "transported to the fee agreement".

(iii) Whilst the existing circumstances which surrounded the execution of the fee agreement were to be taken account of this did not allow the court to invoke the "armchair principle". Rather than regarding the circumstances solely from the settlor's perspective, the court was to consider all the salient evidence objectively, to discern that which was known to both parties at the date of the agreement. (This was not however to regard the fee agreement as a commercial contract.)

Adopting this objective stance one aspect of the transaction known to both parties was that the trust was settled in contemplation of the settlor's possible early death. Had the intention of the parties been that the fee arrangement was to terminate on the settlor's death a provision to this effect would have been incorporated in the document. As no such clause appeared it could not have been the parties' intention that the life of the fee clause should be co-extensive with that of the settlor.

Furthermore, it was extremely unlikely that the settlor would go to such great lengths in protecting his assets for his family only to leave them to negotiate fees with the trustee on his death.

(iv) A further rule of construction to be applied and which operated contrary to Cititrust's claim was the contra proferentum rule - an instrument is to be construed more strictly against its maker.

*The reader is referred to (1991) 5 Law Bulletin 32 for previous litigation in connection with this settlement.

MD

Application for payment of litigation expenses from trust - Recipients other than trustees

In the Matter of a Trust Settlement

Grand Court (487/91)
Malone CJ

February 4 1993

Authority Referred to

National Anti-Vivisection Society Ltd v Doddington and others (1989) The Times 23 November

Ruling on an originating summons dated October 13 1992 the Honourable Chief Justice held that trustees had a duty to protect the trust assets and directed that they be ordered to defend Greek proceedings at the expense of the trust fund.

The trustees presently applied to the court pursuant to an amended originating summons, seeking a direction that the trustees be authorised to pay the legal fees and expenses of certain named entities (being assets of the trust), and individuals who it was anticipated could be represented in the Greek proceedings jointly with the trustees.

Held: (allowing the application)

The application was an unusual one in that it sought to extend a pre-emptive order whereby trustee's costs would be met from the trust fund to persons or entities not being trustees. There was no authority to support the application and its result would be likely to increase costs. Whilst being mindful of the need not to accede to such an application were it to produce a real injustice, in the present circumstances the application would be granted. The named individuals were entitled to an indemnity as a corollary of the earlier ruling that the trustees were so entitled.

Moreover, the named entities would be entitled to this protection being assets of the trust.

*The reader is referred to (1993) 7 Law Bulletin 65 for the earlier ruling in connection with this settlement.

MD

SHOULD JURIES KNOW OF A DEFENDANT'S CONVICTIONS?[1]

"Members of the jury, the evidence that the defendant stole the memorandum rests solely on his having been found in possession of that memorandum very shortly after it was stolen from the solicitor's office. Now, the evidence points no more to his having stolen the memorandum than to his having handled it. For you to draw any inference against the defendant the facts must point irresistibly to that inference. But there is this factor which you cannot ignore. The defendant has 244 previous convictions, 230 of which are for burglary. Do you then consider that if any inference is to be drawn it is that he is guilty of the theft of the memorandum from the solicitors' office rather than handling it subsequent to its theft?"

Those of us raised in a common law jurisdiction will see the obvious flaw in that summing-up. However, there is a certain school of thought which considers that a jury has a right to know of the previous convictions of a defendant. The acquittal of Simon Berkowitz of the burglary at Paddy Ashdown's solicitors' office has opened up a debate on the issue (see "Jurors' right to know", JK Spencer, p.10, The Times, August 13, 1992).

In the trial of Berkowitz, Judge Michael Coombe refused the application of the prosecutor to introduce into evidence the fact that the defendant had 244 previous convictions of which 230 were for burglary. No one has suggested that he was wrong to do so under our existing rules, but it is argued that those rules, should be changed; that juries should be made aware of a defendant's previous record in every case. I believe that the present law is sound and lends fairness to a trial; that a change in the law would involve too much risk. Under the existing English law[2] a defendant's

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[1] *His Honour, Mr Justice Schofield, judge of the Grand Court, Cayman Islands. The author and editor are grateful to the "New Law Journal", wherein this article first appeared, for consenting to its republication here.*

[2] *In general terms the law in the Cayman Islands in this regard is the same as that in England. Certain provisions of the Vagrancy Act, 1824, find their equivalent in sections 147 and 148 of our Penal Code. Section 27(3) Theft Act 1968 finds its Cayman equivalent in section 233(3) of the Penal Code. The Official Secrets Act, 1911, has*

(Footnote continued)

previous convictions are allowed to go to the jury:

a) if his antecedent history forms a necessary ingredient of the offence charged, (see eg in some offences under the Vagrancy Act 1824);

b) under various statutory provisions (eg S 27(3) Theft Act 1968 *and S 1(2) Official Secrets Act, 1911);*

c) in rebuttal, to meet evidence of good character given for the defence;

d) in cross-examination of a defendant, under the circumstances set out in S 1(f) of the Criminal Evidence Act 1898;

e) if the probative force of the circumstances of commission of a previous crime supports the allegations that the defendant committed the offence charged - similar fact evidence.

Similar fact evidence will not be admitted if the judge considers that the prejudicial effect of the evidence outweighs its probative value and the courts have shown reluctance to admit such evidence. Mr. Spencer argues that juries can be relied upon to weigh the value of evidence for themselves, and that to keep such evidence from juries shows a pitiful lack of confidence in their capabilities. He says that if juries are, as Lord Devlin has put it, "the lamp by which we know that freedom lives and the great gift of the common law to the civilised world" then they should be capable of giving every piece of evidence its appropriate weight. Of course not all judges and lawyers share Lord Devlin's confidence in the jury system. But in any event, for a system to work at all, it must be governed by appropriate rules. This applies to the jury system as to any other system of conducting trials. Experience over the centuries has shown that juries are apt to place a disproportionate amount of weight to previous convictions and so it is better, unless there are strong reasons to the contrary, to keep previous convictions from them. This does not demonstrate lack of faith in a jury's ability to reach a just conclusion or lack of faith in the jury system itself.

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[2] (continued)
been applied to the Cayman Islands. Section 1(f) Criminal Evidence Act 1898, finds its equivalent (with a minor modification) in section 18(f) of our Evidence Law.

It merely provides assistance to the proper operation of a jury trial.

It is argued that a defendant's record is relevant evidence because criminal statistics show that, in general, people who have criminal records are considerably more likely to offend than people who do not. Furthermore, that people who have previous convictions for a certain kind of crime, such as sexual offences, are more likely to repeat that behaviour. The evolution of the existing rules of evidence has not ignored these factors or the possible relevance of a defendant's record. The rules have evolved because experience has shown that courts must be extremely careful in balancing what is logically probative against the dangers inherent in allowing all that is probative to go to the jury. It is better for a judge with experience of juries to weigh the probative force of evidence against its possible prejudicial effect. The courts have shied away from allowing evidence of previous acts to be proved merely to show general disposition or propensity on the part of a defendant. Common sense may tell us that a man with a certain propensity may be likely to demonstrate that propensity but it seems dangerous and downright unfair to allow such a common sense approach to influence a tribunal in making a determination which may affect a persons liberty.

As Lord Justice Mustill said in R v Clive Malcolm Brooks [3] *the rules relating to the admission of similar fact evidence are an uneasy mixture of logic, common sense and expediency. It seems that the courts led themselves into getting the mix wrong by placing too much emphasis on a striking similarity between earlier offences and the offence charged before admitting evidence of the earlier offences. In R v P (a father), the Court of Appeal felt bound by earlier authorities which suggested that in sexual cases a feature of a similarity beyond the paederast's or the incestuous father's "stock-in-trade" need be shown before one victim's evidence could be properly admitted in connection with a charge involving a second victim.*

The House of Lords overruled the Court of Appeal decision and held that it was not appropriate to single out striking similarity as an essential element in such cases (see The Times, July 1, 1991). The essential feature before similar fact evidence could be admitted was that its probative force was sufficiently great to make it just to admit it, despite its prejudicial effect. The House of Lords has rectified an imbalance

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[3] (1991) 92 Cr App Rep 36 at 39.

which developed through earlier cases which may have led to criticism as to the operation of the rules precluding certain kinds of similar fact evidence. But that the courts had become too rigid in their interpretation of the rules and had been too eager to refuse admission of similar fact evidence does not invalidate the existence of the rules. The fact that the courts have wrongly interpreted the rules does not provide an argument for abandoning the rules altogether.

In the Cayman Islands, a defendant before the Grand Court may elect to be tried by judge alone. If he does so, the judge has to account for his decision not only to his conscience but, in a judgment, to the defendant, the prosecutor, and to the Court of Appeal. In my former jurisdiction of Kenya, I sat without a jury and had to write a judgment in every case. I have therefore sat in the jury's position of having to determine the facts, with the added burden of having to give reasons for my determination. I cannot imagine how I would frame to my own satisfaction a judgment in which I held that the totality of evidence in relation to the offence charged was not quite sufficient to satisfy me that the defendant had committed the offence, but that, in taking into consideration his previous convictions, the balance became tipped against him and a conviction would result.

If I could not, by reference to previous convictions in a judgment, satisfactorily justify tipping the scales against a defendant who would otherwise go free, how could I permit previous convictions to go to a jury unless they had probative value in relation to the particular offence charged? Consider summing-up which explains, on the one hand, the relevance of a defendant's previous convictions and on the other, the dangers of attaching too much weight to such previous convictions. Should the judge then go on to explain that there is undoubtedly the tendency on the part of the law enforcement officers to pick out a suspect with previous convictions? Whilst judges are not unused to asking juries to perform difficult balancing exercises, this is one exercise which I am sure should not be left to them. I am in no doubt that if I cannot write a satisfactory judgment in which previous convictions have probative force, then I cannot reasonably expect a jury, which does not give its reasons to anyone, to deal satisfactorily with evidence of previous convictions where they are not of particular relevance to the offence in the indictment.

IS THE WORKMEN'S COMPENSATION LAW WORKABLE?[1]

This paper focuses upon the legal remedies available to an employee in Grand Cayman who, in the course of his employment, has sustained personal injury as a result of an accident.

If the accident occurred in the UK one would automatically consider, firstly, whether any benefit was payable under the Social Security Act 1975 and, secondly, and perhaps more importantly, whether the employee had any grounds for an action based on the negligence of his employer or his breach of statutory duty. There are no provisions in Scots or English law for a no-fault workmen's compensation system whereby an employer is bound to make payments to an injured employee irrespective of fault.

The position in Cayman is somewhat different. Prima facie there appear to be two basic options open to the injured employee. If fault on the part of the employer can be established in accordance with the general principles of the tort of negligence, then the employee may well be able to obtain damages for his injuries. If there is simply an accident which has resulted in injury to the employee, but there has been no fault on the part of the employer, then one might assume that the Workmen's Compensation Law 1964 (Law 20 of 1964), as amended (Law 28 of 1966), and the Workmen's Compensation Regulations 1965 made thereunder, would provide assistance. It is submitted, however, that the Law is hopelessly out of date and will provide no adequate remedy to the employee in such a case.

The function of the Law is to provide a system of no-fault compensation and can be summed up in the opening words of section 3: "If in any employment a workman suffers personal injury by accident arising out of and in the course of such employment his employer shall be liable to pay compensation in accordance with the provisions of this Law". There are, of course, various exceptions to the rule and the remainder of section 3 sets out the circumstances in which liability would be excluded, such as, if the accident is proved to be attributable to the workman's own serious and wilful misconduct.

There are detailed provisions for the calculation, variation and distribution of the amount of compensation (sections 5-11) and, by section 12, proceedings for the recovery of compensation under the Law must be commenced within six months of the date of the accident causing the injury or, in the case of death, six months from the date of death.

Two further matters are worth noting about the general structure of the Law. Firstly, section 19 preserves the right to pursue an action against the employer where there has been negligence.[2] *The section gives the workman the option of either compensation under the Law, or damages, but not both. Secondly, sections 26 to 32 provide a procedure for the workman to apply to the Grand Court for a determination of the amount of compensation if no amount is agreed with the employer within four weeks notice being given to him. The Workmen's Compensation Regulations 1965 provide*

[1] Duncan E Nicol, Advocate, Scotland; Attorney-at-Law, Cayman Islands with *C S Gill & Co.*

[2] *There is an absence of reported cases on this type of action in Cayman, but an illustration of the principles involved can be seen in the English case of Wilsons and Clyde Coal Co. v English [1938] A.C. 57.*

the detailed rules and forms for the procedure.

From the foregoing brief outline of the provisions of the 1964 Law, it can be seen that there appears to be a sensible no-fault compensation scheme on the Cayman Islands statute book. However, to complete the picture one must look at the definition of who is a "workman" for the purposes of the Law and that is found in section 2. As originally enacted in 1964 it provided: " "workman" means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, or otherwise, whether the contract is express or implied, is oral or in writing, and whether the remuneration is calculated by time or by work done;". This, however, was amended in 1966 by the addition of the following to the end of the definition: "so, however, that any such person whose remuneration exceeds seven hundred and fifty pounds a year shall not be regarded as a workman unless his contract of service or apprenticeship so provides". (emphasis added). Although the principle of a reasonable limitation is understandable, the problem is that the monetary limits, apart from being converted into decimal currency, have not been increased for over twenty-five years.

By failing to keep the financial limit alive almost all employees are precluded from relying on the 1964 Law, unless there is a specific provision in their contracts of employment bringing them within the ambit of the statute.

The problem is also compounded by the fact that even if the employee could bring himself within the definition of "workman", the amounts of compensation payable, in terms of section 5, are similarly out of date. For example, where death results from the injury and the workman leaves a dependent, the amount of compensation is a sum equal to thirty-six months wages or seven hundred and fifty pounds, whichever is less. If the case is one of permanent total incapacity, as defined, the sum is forty-eight months wages or one thousand pounds, again, whichever is less.

It is submitted that the present situation of having an out of date, and apparently forgotten, Law on the statute book, particularly when it deals with an important issue such as no-fault compensation, is worse than having no statutory provision at all. It seems, therefore, that a review of the Workmen's Compensation Law 1964, as amended, is now long overdue. The simplest way of dealing with the situation would probably be to increase the monetary amounts and bring them up to date. Also, however, there may be merit in making either all workmen, or all of certain classes of workmen, automatically covered and thus avoid the need to use contractual terms.[3]

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[3] *An appropriate model could possibly be found in some of the Canadian Provincial Legislation - see D.K. Allen, Accident Compensation after Pearson - Alternative Accident Compensation Strategies p. 197 at 212.)*