CAYMAN ISLANDS LAW BULLETIN

NO 9

DECEMBER 1993

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 appearing 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 (1993) 9 Law Bulletin.

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

The ninth edition of the Cayman Islands Law Bulletin, in 'snap-shot' form, conveys to the reader the increasingly diverse and complex nature of the work being litigated locally. The relative bulk of this edition once again reflects the increasing frequency, and complexity of the judgments being handed down from the Bench. The ninth edition also features two articles of local relevance by Law School lecturers. Messrs. Alistair Cutts and Andy Darkoh-Agyeman address the thorny problem of marriages of convenience (at p 60) whilst Ms. Gwen Brucker considers the impact locally of the new Limited Duration Company, the progeny of the Companies (Amendment) Law 1993 (at P 67).

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 five bound volumes (1980-83, 1984-85, 1986-87, 1988-89 and 1990-91). 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 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 February 1 1993 to October 22 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, legal academics 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.

February 1 1993 - October 22 1993

ADMINISTRATIVE LAW

Appellate review of judicial discretion

In the Matter of X and the Companies Law

Grand Court
Malone CJ
February 1 1993

Authority referred to

Eagil Trust v Pigott-Brown [1985] 3 All ER 119

Mr Todd for the applicant
Ms Bridges for the respondent

The petitioners sought leave to appeal the ruling given on January 18, 1993, with respect to whether the court should exercise its discretion to grant leave to use the restructuring documents in the Rotterdam Proceedings, a stay pending appeal, and costs.

Held: (leave to appeal refused)

The function of the Court of Appeal was to review the exercise of the judge's discretion and not to entertain an appeal from it in the sense of being invited to substitute its own discretion for that of the judge. (Eagil Trust v Pigott-Brown.)

(Editor's note: see (1993) 8 Law Bulletin 12 *et seq.)*

WB

Judicial review - Application for orders of *Prohibition* and *Certiorari* - Effect of public enquiry on writ action involving the same issues

Hurlstone Construction Ltd v Sir Peter Allen (Commissioner of Enquiry)

Grand Court (222/93)
Harre J
June 7 1993

Legislation

Commission of Enquiry Law Ss 2-10

Cases referred to

R v St Lawrence Hospital Statutory Visitors ex parte Pritchard [1953] 1 WLR 1158
Attorney General v The Times Newspaper Ltd [1974] AC 273
Vine Products Ltd v Green [1966] Ch 484
Ex parte Bread Manufacturers Ltd [1937] SR (NSW)

Mr R Alberga QC and Mr M Alberga for the applicant
Ms Lorna Dilbert for the respondent

On February 18, 1993, the Governor of the Cayman

Islands constituted a Commission of Enquiry under S 2(1) of the Commission of Enquiry Law. Sir Peter Allen was appointed as the sole Commissioner to conduct the enquiry into the events leading to the tendering, award and execution of the contract for the construction of the Dr. Hortor Memorial Hospital at George Town and to consider whether those circumstances revealed any breach of standard Government practices, standard Board practices or policies of the Board of the Health Service Authority, or breach of the public trust or breach of relevant laws and regulations. The Commissioner was to make such recommendations as he thought fit.

Under the Governor's direction, the enquiry was to be held in public but the Commissioner had the power to examine witnesses in private whenever he considered it desirable.

The applicant was seeking judicial review by way of *certiorari* to quash the "decision" of the Commissioner to proceed with the enquiry, notwithstanding that proceedings were pending in the Grand Court between the applicant on the one hand and the Cayman Islands Health Service Authority and the Government of the Cayman Islands on the other in connection with the same contract. The Commissioner was also to commence public hearings in connection with the enquiry.

The applicant was also applying for a *prohibition* to restrain and/or prohibit the respondent from proceeding with the enquiry until after judgment in the writ action.

S 10 of the Commission of Enquiry Law states:

"The Commissioner acting under this Law, shall have the powers of the Judge of the Grand Court to summon witnesses and to call for the production of books, plans, and documents and to examine witnesses and parties concerned on oath; and no Commissioner shall be liable to any action or suit for any matter or thing done by him as such Commissioner."

It was submitted on behalf of the respondent that the Grand Court was precluded by S 10 from exercising any supervisory jurisdiction by way of judicial review over the activities of a Commission of Enquiry. It was also argued on behalf of the respondent that the order of *certiorari* was not available in this case.

The contract in issue was entered into between the Health Service Authority ("HSA"), a statutory body, and Hurlstone Construction Ltd after extensive negotiation. The contract was executed on November 17, 1992, the day before a general election which brought about a change of Government in the Cayman Islands.

On December 24, 1992, the HSA repudiated the contract and on February 9, 1993, Hurlstone Construction Ltd issued a writ against the HSA and the Attorney General, acting on behalf of the Government. The writ was subsequently amended claiming damages against the HSA for breach of contract, rectification of the contract, damages for losses suffered by reason of negligence and/or breach of statutory duty, an order or declaration that Hurlstone Construction Ltd was entitled to retain the sum of C.I.$1m paid by the HSA to it and/or a declaration as to the rights and obligations of Hurlstone Construction Ltd and the HSA under the contract.

Against the Government, Hurlstone Construction Ltd was claiming damages for losses suffered by it by reason of the wrongful inducement of a breach or breaches by the HSA of the contract and/or damages for breach of statutory duty.

The applicant was also claiming costs and interest

against both defendants.

Following the termination of the contract, there was considerable correspondence between the attorneys acting for Hurlstone Construction Ltd on the one hand and the Government and the HSA on the other. The correspondence indicated three things:

(i) the Commissioner's enquiry foreshadowed the issues which were to arise in the writ action;
(ii) settlement negotiations were in train;
(iii) the Government's position was going to be indicated.

As regards the third situation above, the Solicitor General, acting both on behalf of the Government and the HSA, had indicated in his letter to Hurlstone Construction Ltd's attorney that if, by April 9, it appeared that a settlement was not going to be reached, the Attorney General would, in the public interest, apply to the Grand Court for a ruling on any possible conflict between the terms of reference of the enquiry and the writ action. The letter went on to state that the Government would ensure that the Commissioner did not begin to take evidence until a ruling had been given and that it would comply with the ruling. On April 30 the Solicitor General had to retreat from his undertaking because the Commissioner, who was entirely independent of the Government, had taken a different view in opposing the application to suspend the enquiry.

In relation to the application for judicial review, the Government was no more than an interested party on whom the proceedings had been served and made no submissions.

Various contractual issues, including rectification of the contract, repayment of mobilisation fees of C.I.$1m and the extent of the work done by the applicant before the termination of the contract were to be determined in the writ action.

The applicant submitted that there was likely to be a significant overlap in the evidence relating to the subject of the enquiry and the writ action. It was further submitted that if the Commissioner proceeded, the following consequences were likely to ensue: (1) the applicant would be disadvantaged by public discussion of issues of a politically sensitive nature before the court directed its attention to them; (2) witnesses would be examined on oath before the trial and would have to show their hands before discovery of documents in the writ action to the advantage of the defendants; (3) undesirable public pressure would be created in relation to the proceedings in court. Because of the politically charged nature of the matter, the public enquiry and the giving of evidence at it was likely to create an atmosphere which would lead to pressure being brought on witnesses in the court proceedings and even subconsciously upon the judge; (4) the merits of the facts before the court would be exposed to perhaps undesirable political discussion while the case was still pending.

The applicant relied on Attorney General v The Times Newspaper Ltd and argued that it would be contempt of court to publish material which pre-judged the issues of pending litigation or was likely to cause public pre-judgment of the issues. The applicant argued further that there was a risk that settlement negotiations would be prejudiced or jeopardised if the enquiry went ahead.

Held: (refusing the application)

(i) It was not correct to assert that the court lacked supervisory jurisdiction over the Commission's activities. The latter part of S 10 merely granted the Commissioner immunity from suit for anything done in the performance of his functions as a Commissioner. The section did not oust the supervisory jurisdiction of the Grand Court.

(ii) On the issue of whether *certiorari* was available, it was stated in R v St. Lawrence's Hospital that the remedy by way of *certiorari* only lies where the applicant seeks to quash something which is a "determination" or a "decision".

The Commissioner was under a duty to act judicially; merely fixing a date for the commencement of his enquiry was not a "decision" which was amenable to the relief of *certiorari*.

(iii) On the question of whether *prohibition* was available as a matter of law so that the Commissioner could be restrained from proceeding further on the grounds of prospective breach of natural justice, there was authority for the proposition that *certiorari* or *prohibition* would issue in respect of any exercise of statutory powers involving such decisions even as the issue of a witness summons. The Commissioner's decision in the present case could well have legal consequences by virtue of the procedural nature through which it was to be carried out and irrespective of the final recommendations which the Commissioner was going to make, and whether or not such recommendations were to be accepted.

(iv) There was likely to be significant overlap in the evidence relating to the issues in the writ action and the issues to be investigated by the Commissioner. The applicant's personnel, members of the HSA and the consultants of the parties were among prospective witnesses to be subject to examination before the Commissioner and in the writ action.

(v) It was of extreme public interest that no conduct should be permitted likely to prevent a litigant in a court of justice from having his case tried free from all matters of prejudice. But the administration of justice, important though it is, is not the only matter in which the public is vitally interested. The case may be one in which as between competing matters of public interest, the possibility of prejudice to a litigant may be required to yield to other superior considerations. The discussion of public affairs and the denunciation of public abuses, actual and supposed, could not be required to be suspended merely because the discussion and denunciation may, as an unintended by product, cause some likelihood of prejudice to a person who happens at the time to be a litigant. (Per Lord Reid in Attorney General v The Times Newspaper referring to the judgment of Jordan C J in Ex parte Bread Manufacturers Ltd.)

(vi) The Times Newspaper case concerned an issue of contempt of court in relation to a newspaper article directly concerned with a central issue in a pending case arising from a major tragedy in which the emotions of the public were deeply aroused. That was something far removed from the case before the Grand Court, but the analogy between contempt and what was said to be the mischief in the case before the court - the prospect of decisions which may be prejudicial to the proper administration of justice and in breach of natural justice - was valid. Lord Diplock stated in The Times Newspaper case that the parties should be able to have unhindered access to the law and the court's determination should be procedurally correct and free of all bias.

(vii) In the general interest of the community, it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. But as the purpose and existence of the courts of law is to preserve freedom within the law for all well-disposed members of the community, it is manifest that the court must never impose any limitations upon free

speech or free criticism beyond those which are absolutely necessary. When the court has to consider the propriety of some conduct, decisions will often depend upon whether one aspect of the public interest definitely outweighs another aspect of the public interest. (Per Lord Morris of Borth-Y-Gest in The Times Newspaper case.)

The applicant had contended that the enquiry involved a real risk of prejudice to both parties to the writ action and to the administration of justice in the Cayman Islands. The enquiry to be conducted by the Commissioner had been constituted by the Governor, who could issue a Commission in relation to matters of public administration only when he deemed it desirable and in the interests of the public welfare. The Commissioner was bound by oath to discharge his trust and perform his duties fully, faithfully and impartially. Though the enquiry was designated as a public hearing, the Commissioner was entitled to exclude any person(s) and examine witnesses in private whenever he considered it desirable to do so. The Commissioner had power to regulate his proceedings. He was in a different position from a politician who is usually restrained from general debate under the cloak of parliamentary privilege respecting matters which are *sub judice*.

(viii) Judicial notice was to be taken of the fact that the Commissioner was a former Chief Justice of great experience. He had the powers of the Judge of the Grand Court to examine witnesses and parties on oath and that implied that he was guided by the rules of evidence. His report was to be submitted to the Governor, and a decision as to whether the report would be published in whole or in part at any particular time could properly be the subject of a recommendation by the Commissioner.

(ix) One factor which had to be given weight in the applicant's submission was the risk of settlement negotiations being prejudiced or jeopardised if the enquiry went ahead. That was an argument however which cut both ways. The decision could affect either party in the settlement negotiation and in relation to the writ action generally. In the light of all these considerations, the court had to strike a balance founded upon public policy. Any action to prevent interference with the administration of justice has to be limited to what is reasonably necessary for that purpose. Freedom of speech was not to be limited to any greater extent than absolutely necessary but such freedom was subject to curtailment where a real risk of prejudice to the administration of justice arose.

(x) The issue of whether there had been any breach of the public trust in relation to the award of the hospital contract was one which was of great and legitimate public concern and had to be laid to rest one way or the other at the earliest opportunity. The Commission of Enquiry, if conducted properly (as the court was confident it would be), would not provoke public debate as to what the decision of the court ought to be and where the merits and rights in the writ action lay. There was no evidence of conduct calculated to inhibit the parties in the writ action from availing themselves of their right to have their legal remedies determined by the court by exposing them to prejudicial discussion of the merits before the action was duly disposed of. The judgment of the court would provide the media with an indication of the limits of what it would regard as permissible.

(xi) The matter was one in which the public interest in maintaining freedom of investigation of matters of great and legitimate public concern was paramount, notwithstanding the indirect effect which that might

have on those involved in the writ action. The action was naturally going to be determined only on the basis of admissible evidence relevant to the specific issues then before the court.

Accordingly, the originating motion by the applicant for judicial review by way of *certiorari* and *prohibition* and related relief would be dismissed with the consequence that the stay of proceedings of the Commission of Enquiry, pending that determination, would be lifted.

(xii) No order for costs would be made in view of the position in which the applicant found itself following the letter from the Acting Solicitor General.

(xiii) Leave to appeal would be granted together with a stay pending appeal. The stay would be on the condition that an application be made expeditiously at the next sitting of the Court of Appeal which was set to begin on July 26, for the appeal to be heard during that sitting or at a special sitting as soon as possible thereafter.

AD

CIVIL PROCEDURE

Civil Procedure - Applications - Affidavits - Filing in response - *Forum non conveniens*

I Ltd v G Co

Grand Court (356/92)
Schofield J
June 2 1993

Mr Foster for the applicant/defendant
Mr Barrie for the respondent/plaintiff

The plaintiff, a locally registered company, commenced an action seeking a declaration regarding its liability under insurance policies it issued to the defendant. The plaintiff was granted leave to serve the process out of this jurisdiction. The defendant applied to have that order, as well as the writ, set aside. The parties have filed affidavits and affidavits in response to each other's affidavits. The plaintiff/respondent filed a further affidavit at the last moment which the defendant requested should not be considered.

Held: (application granted)

(i) The purpose of the insurance policies was to provide insurance to United States Agricultural companies against potential liabilities in the United States. An action was underway in California. The respondent had unsuccessfully challenged that action in California on the basis of *forum non conveniens*.

(ii) Although there exists no formal rule as to the number of affidavits a party can file, the practice in the Grand Court is that the applicant files affidavits in support of his application, the respondent then files affidavits in reply and then, if need be, the applicant can file final, answering, affidavits. Exceptions will be made only if an entirely new

matter is raised or circumstances change. The late affidavit had not met that test and would not be considered.

(iii) In respect to issues of *forum non conveniens*, the authorities required the court to take a broad view of the matter.

(Editor's note: see SR v WR and I Ltd v G Co & Others *infra*.*)*

JE

Application to strike out action - Plaintiff's case could have been pleaded in previous action involving same parties and same issues - Defence of *res judicata* / estoppel

G H Ltd v Martyn Bould and Phyllison Ltd

Grand Court (434/92)
Schofield J
June 8 1993

Cases referred to

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and another [1975] AC 581
Henderson v Henderson (1843) 3 Hare 100
Gouldrei Foucard and Sons v Sinclair and Russian Chamber of Commerce in London [1916-17] All ER 898
Republic of India and another v India Steamship Co Ltd [1993] 2 WLR 461

Mr Alberga QC and Mr Ashenheim for the plaintiff

Mr Turner for the defendants

The second defendant in the present action, Phyllison Ltd, originally brought a suit against the present plaintiff, G H Ltd, seeking a declaration that a rescission notice served by G H Ltd to rescind a contract for the sale and purchase of an apartment in the Great House condominium complex was invalid. In addition, Phyllison Ltd sought damages for losses suffered as a result of G H Ltd's alleged breach of contract of sale. The said contract was entered into between Phyllison Ltd and G H Ltd in June, 1988. G H Ltd counter-claimed for, *inter alia*, a declaration that it was entitled to rescind the contract.

The first defendant, B, was, at the time of the contract, the director of Phyllison Ltd and also one of the directors of G H Ltd. B was the promoter and sole director of G H Ltd at the time of its formation. B had subsequently falsely declared to the Board of Directors of G H Ltd that he had only thirty per cent shares in Phyllison Ltd. It transpired that he had a one hundred per cent beneficial interest in Phyllison Ltd.

At the time of the contract, B was the sole director of G H Ltd and he failed to appoint an independent Board of Directors to approve the contract. G H Ltd gave Phyllison Ltd notice to rescind the contract on the ground of B's failure to disclose his beneficial interest in Phyllison Ltd. Phyllison Ltd had brought the first action to seek a declaration that the rescission notice was invalid. G H Ltd counter-claimed by asserting it was entitled to rescind. The court granted rescission and ordered *restitutio in integrum* of Phyllison Ltd's expenditure in relation to the contract.

In the second action in the series, Phyllison Ltd sought to enforce the restitution order. G H Ltd

claimed it was contemplating an action for deceit against B and that the damages to be awarded could be set off against the restitution order. This was rejected by the court and G H Ltd was ordered to make the payment within a stipulated time or lose the benefit of the judgment granting rescission.

The present action was the third in the series. G H Ltd was claiming against B and Phyllison Ltd, damages for deceit, an injunction restraining the defendants from removing, disposing of or otherwise dealing with money paid to Phyllison Ltd by way of *restitutio in integrum* until further order of the court and a declaration that the said money was held by Phyllison Ltd as trustee for G H Ltd as creditor of B and/or Phyllison Ltd.

The deceit claim related to B's failure to disclose his interest in Phyllison Ltd at the time of the purchase of the apartment and his further inaccurate declaration as to the extent of his beneficial interest in Phyllison Ltd. This non-disclosure had formed part of the first proceedings.

B and Phyllison Ltd sought to have the deceit action struck out on the grounds that it was vexatious, an abuse of the process of the court and that considerations of *res judicata* or estoppel applied.

G H Ltd stated that as defendants in the first action, they were not aware, until the commencement of the trial, that there was any ground for claiming deceit. G H Ltd further argued that it was unnecessary to interrupt proceedings and ask for an adjournment to amend the pleadings to join B as a defendant making clear their view that it was unlikely that the court would, in any event, grant such an application.

The major part of the damages claimed for deceit related to costs in the first proceedings, being the difference between the taxed costs and the actual costs incurred. G H Ltd argued it would have been impossible for th at issue to be raised in the first proceedings because the extent of the damages had not then been determined.

G H Ltd relied on the authority of Gouldrei, Foucard and Sons v Sinclair to the effect that a successful claim for rescission did not preclude the successful claimant from bringing an action for fraud against the individual defendant because, on the claim for rescission, no proof of fraud was necessary and consequently the causes of action were different. G H Ltd also relied on Republic of India and another v India Steamship Co Ltd to the effect that a plaintiff can bring an action initially for a small part of a whole damage claim and subsequently bring another action respecting the balance.

G H Ltd argued in the previous proceedings that a non-disclosure could not amount to a misrepresentation and therefore damages could not be awarded; only rescission of the contract was available. The court accepted those submissions and ordered rescission of the contract. G H Ltd was now claiming that there was deceit and that damages were available. The later argument therefore contradicted the submission in the first action.

Held: (dismissing the action on the ground of *res judicata*)

(i) The defendants were not relying on the doctrine of *res judicata* in its narrow sense. It had been stated in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd that there was a wider sense in which the doctrine of *res judicata* operated making it an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. In Henderson v

Henderson it was said that where a given matter becomes the subject of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to raise, at a later date, issues which the earlier tribunal was competent to hear. This principle applied equally whether the omission was caused through negligence, inadvertence or even accident. The plea of *res judicata* could, accordingly, (with limited exceptions) be raised in response to any issue which properly belonged to earlier litigation and which the parties, exercising reasonable diligence, could have brought forward at the time.

(ii) There was nothing in the facts related in the statement of claim which was new to the court. The facts related to those raised in the first proceedings. The essence of the first suit was B's failure to declare his interest in Phyllison Ltd when the latter contracted with G H Ltd to purchase an apartment in the Great House. B's deceit was known to G H Ltd before the close of arguments in the first proceedings and was made the subject of final submissions by counsel. There was ample time between the commencement and the conclusion of the first trial for all the issues in the present case to be raised. G H Ltd had no satisfactory answer to the question as to why the issues in the instant suit were not raised in the first proceedings.

(iii) Regarding the amendment of the pleading to join B, the court would inevitably have granted an application by G H Ltd, as G H Ltd had been caught by surprise as to the extent of B's interest in Phyllison Ltd. It had been stated in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd that the rules exist for the orderly conduct of litigation, especially for the prevention of surprise, and accordingly, in so far as possible, the tendency today in all jurisdictions was to simplify the technical rules of pleading.

(iv) It was open to G H Ltd in the first action to add a claim for the difference between its actual costs and its taxed costs without quantifying that claim, if such a claim could be supported in law. The general rule, however, is that such costs cannot be claimed as damages (see McGregor on Damages, 15th Edition, Chapter 16 para 662). None of a limited number of exceptions had application in the case at hand.

(v) G H Ltd ought to have aired all the present issues in the earlier proceedings and it would be unjust for them to be permitted to air the issues now. In Republic of India and another v India Steamship Co Ltd, the plaintiff had succeeded because the House of Lords decided the matter on the construction of an English statutory provision and the decision therefore did not detract from the Privy Council's decision in Yat Tung.

Applying the principles set out in Yat Tung, the court was driven to strike out the action as an abuse of process.

(vi) Concerning other minor heads of damages claimed, such as interest on the amounts payable as *restitutio in integrum*, submissions were made on those issues in the first action and the determination made took them into account. It would therefore be an abuse of the court's process to have those matters ventilated again as well as being vexatious to B and Phyllison Ltd.

For the above reasons, the claim was struck out as being an abuse of the process of the court and as

being vexatious. The suit would be dismissed.

(Editor's note: the reader is referred to the Cayman Islands Law Bulletin as follows for summaries of the earlier related judgments: (1992) 7 Law Bulletin 18 and (1993) 8 Law Bulletin 8.)

AD

Procedure - Judgment in default of defence - Setting aside

FM Ltd v IS Ltd

Grand Court (264/93)
Smellie Ag J
September 24 1993

Legislation

Grand Court (Civil Procedure) Rules 19 23 42 and 62
Rules of the Supreme Court of England and Wales Order 19 rule 2

Cases referred to

Ebanks v Plain (1988-89) CILR 421
Gibbings v Strong [1984] 26 Ch D 66

Authoritative Works

Supreme Court Practice

Mr Watler for the plaintiff
Mr Turner for the defendant

On June 10, 1993, the plaintiff commenced an action by specially endorsed writ alleging the breach of a contract (oral and written) for the sale of shares. The documents were served on the defendant on June 11 1993. On June 24, 1993, the defendant entered an appearance. The plaintiff's attorney filed a Minute of Order on July 7 1993 and obtained default judgment on July 14. The same day the defendant served its defence. It was not known when the judgment was actually signed so the court was unable to determine if the defence was served prior to the rendering of the judgment.

The defendant sought to set aside the judgment entered in default of defence on two grounds: (1) that the judgment was irregularly obtained; and (2) that the defendant had a good defence and justice required that the issues be tried.

Held: (application granted)

(i) When the plaintiff filed its Minute of Order the defendant was three weeks out of time. (Grand Court Rule 42.) The procedure followed by the plaintiff in filing and obtaining a judgment in default was in keeping with Order 19 rule 2 of the Rules of Supreme Court of England, applicable due to the lack of an applicable Grand Court Rule. (Ebanks v Plain applied.)

(ii) It was not necessary for the plaintiff to proceed by summons in spite of that being the "customary practice" as was noted in Ebanks v Plain. As such the plaintiff's route was not irregular.

(iii) Since there was no evidence as to whether or not the judgment was signed before the defence was

served this irregularity was not proven. (Gibbings v Strong applied.)

(iv) Grand Court Rule 23 did not apply to the case at Bar being directed at summary judgment. It was, however, open to the plaintiff to use this route if he desired.

(v) The plaintiff could not proceed under Grand Court Rule 19 because an appearance was entered by the defendant.

(vi) The defendant's invitation to use Grand Court Rule 62(2) *ex post facto* to direct how English rules were to be applied locally, would be declined.

(vii) The court exercised its discretion under Order 19 rule 19 of the Supreme Court Rules to set aside the judgment in default finding that it was just to do so given that the defendant displayed a good arguable defence.

JE

Civil Procedure - Commencement of actions against estate where no grant of probate or administration has been made

Personal Representatives of the Estate of P (Deceased) v Personal Representative of the Estate of R (Deceased)

Grand Court
Harre CJ

August 18 1993

Legislation

Estates Proceedings Law
Rules of The Supreme Court of England and Wales Order 15 rule 6A
Proceedings Against Estates Act 1970 S 2 (UK)
Supreme Court Act 1981 S 87(2) (UK)
Grand Court Law S 13
Grand Court (Civil Procedure) Rules Rule 62

Authorities referred to

Rawson Trust v GCTC Ltd (1980-83) CILR 214
McCallister v Tortuga Club (1985) CILR 411

Mr Hill QC and Mr Murray for the applicant/defendant
Mr Alberga QC and Mr Barrie for the respondent/plaintiff

The plaintiff had brought an action against the estate of R (Deceased) for damages under the Law of Torts Reform Law (Revised) and the Estates Proceedings Law 1974 in respect of the alleged negligence of the late R in driving a motor vehicle which collided with the one driven by the late P.

The action had been commenced on 9th January 1992 against Mrs. R as the deceased's personal representative. It was then accepted that at the time of commencement of the action Mrs. R was not, in fact, the personal representative of the deceased.

The plaintiffs' attorney had sought leave to amend the writ and statement of claim on becoming aware of this fact and an order was made accordingly on 21

January 1992. On that date Mrs. R's application for letters of administration was granted. The plaintiffs applied to reamend the writ and statement of claim to restore the name of Mrs. R as personal representative.

The applicant sought to strike out the writ and statement of claim and subsequent orders on the grounds that as at the date of commencement of the action Mrs. R was not the personal representative of the estate, that the proceedings were a nullity and that RSC Order 15 rule 6A did not apply in this jurisdiction.

Held: (dismissing the application)

(i) S 13 of the Grand Court Law imports English practice and procedure into the law of the Cayman Islands where that law was silent. The steps since the commencement of the action were ones of practice and procedure and accordingly RSC Order 15 rule 6A applied in the Cayman Islands to the extent provided for in S 20 of the Grand Court Law and Rule 62 of the Grand Court (Civil Procedure) Rules.

(ii) Accordingly the action was not a nullity nor was it rendered a nullity by the subsequent orders and should proceed accordingly.

AC

Civil procedure - Civil jury trial

N v C Ltd

Grand Court (271/93)
Schofield J
October 6 1993

Legislation

Judicature Law 1975 S 25

Cases referred to

Ward v James [1965] 1 All ER 563
Barnett v Bob Sotos Diving Ltd (1988-89) CILR 171

Mr Quin for the plaintiff
Mr Lamontagne for the defendant

The plaintiff alleged unlawful dismissal and requested that the case be tried by a jury. The defendant had a high profile in the community.

Held: (application dismissed)

(i) Ward v James was to be distinguished, it addressed a personal injury issue and interpreted a statutory provision having different wording.

(ii) The Judicature Law S 25 established that the court need only be satisfied that the case is a proper one for a jury trial. If it is so satisfied then it must order a jury trial.

(iii) In making that determination the court could pay regard to increased costs of a jury trial (see

Barnett v Bob Sotos Diving Ltd), the size of the community, the difficulty in finding citizens who do not have preconceptions about the case and the complexities of the issues of fact and law. This was not an appropriate case for a jury trial.

(Editor's note: see (1992) 7 Law Bulletin 6.)

JE

Civil procedure - Pleadings - Striking out - Time Bar

B v J

Grand Court (177/93)
Schofield J
October 6 1993

Legislation

Law of Torts Reform Law 1977
Succession Law 1975
Limitation Act 1939 (UK)
Rules of The Supreme Court of England and Wales Order 3 rule 5

Authority referred to

Thompson v Brown Construction Ltd [1981] 2 All ER 296

Mr McField for the plaintiff
Mr Hampson for the defendant

The plaintiff commenced an action in April 1993 seeking compensation for losses arising out of the death of her husband in a traffic accident in January 1990. The defendant applied to strike out the writ and statement of claim on the basis that the suit was time barred.

Held: (application granted)

(i) The Law of Torts Reform Law 1977 provided that such an action must be commenced within one year of the death. The Limitation Law 1991, which came into effect August 15 1991, did not assist the plaintiff as S 44(2) could not revive previously barred actions.

(ii) The statutory discretion in the Limitation Law 1991 S 39, similar to that which is found in the Limitation Act 1939 S 2(d), did not apply. Thompson v Brown Construction was not authority for the proposition that the court has an inherent jurisdiction to extend a limitation period imposed by statute. The power to extend a time limit under the Succession Law S 4 is confined to applications under that Law. Finally, Order 3 rule 5 of the Rules of the Supreme Court could have no effect on statutory time bars. An extension of time was not a matter of the court's inherent power.

JE

Procedure - Pleading - Striking out - Summary judgment

A Bank v C and another

Grand Court (371/92)

Smellie Ag J
July 19 1993

Legislation

Grand Court (Civil Procedure) Rules 23 and 41(1)
Rules of the Supreme Court of England and Wales Order 18 rule 19
Registered Land Law S 77

Cases referred to

Barnett Ltd v Kerr-Jarrett (1980-83) CILR N-1
Knowles v Roberts (1888) 38 Ch D 263
British and Colonial Land Association v Foster (1887) 4 TLR 574
Stephenson v Garnett [1898] 1 QB 677
Spring Grove Services Ltd v Deane (1972) 116 SJ 844
Yat Tung Investment Co Ltd v Dao Hang Bank Ltd [1975] AC 581
Tse Kwong Lam v Wong Chit Sen [1988] 3 All ER 54
Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] 2 All ER 633
Paradise Manor Ltd v Bank of Nova Scotia (1985) CILR 437
Cayman National Bank Ltd v Smith and Pierson (1992) 8 Law Bulletin 40
Greenhalgh v Mallard [1947] 2 All ER 255
Wing v Thurlow (1893) 10 TLR 53
Fieldrank Ltd v E Stein [1961] 3 All ER 681
M v Yorke Motors (a firm) v Edwards [1982] 1 WLR 444

Authoritative works

Supreme Court Practice

Mrs Messer for the plaintiff
Mr Turner for the defendant

The plaintiff lent the defendants US$250,000 to purchase, as joint tenants, a condominium unit. The loan was secured by a mortgage registered under the Registered Land Law. The plaintiff defaulted under the agreement and a public auction was held in December 1990. No buyers came forward. The plaintiff then received an order pursuant to S 77 of the Registered Land Law to allow a sale of the unit by private treaty. The property was sold but a shortfall of $US89,000 was left unpaid. The plaintiff commenced an action to recover that amount plus accruing interest. The defendants filed a defence and counterclaim. The plaintiff sought to strike out the defence and counterclaim and enter final judgment.

Held: (application dismissed)

(i) The defendant alleged that the plaintiff failed to adequately advertise the unit or ascertain its fair market value. Improper calculation of the alleged debt was also alleged.

(ii) The plaintiff relied on Grand Court Rules 23 and 41(1). It was alleged that the pleading failed to disclose a cause of action or defence, that it would delay a fair trial, and that it was an abuse of process as contemplated by Rule 41(1). Pursuant to Rule 23 a final judgment would not be given if the defendants showed "a good defence on the merits" or evidence which "disclosed such facts as may be deemed sufficient" to entitle them to defend. Since the principles applicable to Rules 23 and 41 were distinct, a defence (and counterclaim) complying with one rule could be struck out under the other. The pleadings were tested against each set of principles.

(iii) Rule 41(1)(a) was to be read as disclosing no "reasonable" cause of action. A reasonable cause of action was one with "some chance of success on the face of the pleadings" and one which disclosed some legal basis for the remedy sought. (Barnett Ltd v Kerr-Jarrett applied.) There was a technical case for the defence triable on the merits.

(iv) Rule 41 was nearly identical to Order 18 rule 19 of the Rules of the Supreme Court of England and Wales. The subrule similar to Rule 41(1)(c) has been interpreted by the cases listed in the notes to rule 19 in the Supreme Court Practice. Knowles v Roberts and British Colonial Land Association v Foster would be adopted. The plaintiff argued that the pleadings were a delay tactic. The defence and counterclaim were filed approximately one year after the sale of the property. The sale orders were not appealed. The pleadings however, did not in themselves offend the rule so they were not struck out.

(v) Rule 41(1)(d) provided the court with a summary power to strike out pleadings as being an abuse of process. This power was to be exercised with great caution. The plaintiff argued that the defence and counterclaim brought into question the earlier sale orders of the court and that those issues should have been raised at that time. As a general principle, it would be an abuse of process to attempt to litigate an identical question even if the matter was not strictly *res judicata*. (Stephenson v Garrett and Spring Grove Services Ltd v Deanne applied.) It was also an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. (Yat Tung Investment Co Ltd v Dao Hang Bank Ltd applied.) From the pleadings and counsel's submissions which included reference to Tse Kwong Lam v Wong Chit Sen, Cuckmere Brick Co. Ltd v Mutual Finance Ltd, Paradise Manor Ltd v Bank of Nova Scotia, Cayman National Bank Ltd v Smith and Pierson it appeared that the pleadings were not an abuse of process as they raised somewhat different issues than those previously determined by the court.

(vi) Rule 23 allowed final judgment to be entered only where an appearance had been entered and where the plaintiff could nonetheless depone to the belief that there was no valid defence to the action. The affidavit filed was not sufficient to sustain the application.

(vii) Doubt existed as to the *bona fides* of the defendants' case due to the deliberate and substantial delay in this matter. They had failed to challenge the proposed sale price or the sale itself during the plaintiff's earlier applications. They did not appeal the orders. The overall state of affairs required the court to impose a condition on the defendants with its leave to defend pursuant to Rule 23(6) and Wing v Thurlow, Fieldrank Ltd v E. Stein, and MV v Yorke Motors (a firm) v Edwards.

(viii) The defendants were given leave to defend on the condition that they paid into court an amount equal to one-half of the plaintiff's claim within 21 days. If the defendant failed to pay in the amount specified within the time limit the plaintiff was given leave to enter final judgment.

(ix) The defendants failed to pay their debts to the strata company in which their unit was located. The plaintiff was to satisfy this debt before title could be transferred to the new owners. The same was to form part of the plaintiff's claim against the defendant.

JE

Civil Procedure - Service *ex juris* - *Ex parte* application - Disclosure to court - *Forum non conveniens*

SR v WR

Grand Court (D108/92)
Schofield J
February 2 1993

Legislation

Grand Court (Civil Procedure) Rules R 13/3

Cases referred to

The Hagen [1908] P 189
The Spiliada [1986] 3 All ER 843

Authoritative works

Shorter Oxford English Dictionary

Mr Collins for the petitioner
Mr Shea for the respondent

The petitioner received an order through an *ex parte* application granting her leave to serve the petition out of the jurisdiction by way of substituted service. The respondent filed an appearance under protest and sought to have the order set aside on the grounds that the petitioner failed to make full and frank disclosure of all material facts on her *ex parte* application.

The respondent also sought an order staying the divorce and ancillary relief proceedings on the basis of *forum non conveniens*. He had commenced proceedings in another jurisdiction two weeks prior to the wife's petition being filed.

Held: (application granted in part)

(i) Farwell LJ in The Hagen stated that "...full and fair disclosure is necessary in all *ex parte* applications, and a failure to make such full and fair disclosure would justify the court in discharging the order, even though the party might afterwards be in a position to make another application".

The petitioner failed to disclose to the court that she had received word that the respondent had started proceedings in another jurisdiction and that the respondent's counsel had contacted her to come into his office in George Town to be served. Furthermore she failed to inform the court that the respondent had local counsel through whom service might have been effected. Both of these facts were relevant considerations. Leave was set aside.

(ii) "Sub-process" in Rule 13(3) means process following the originating process (the Shorter Oxford English Dictionary, definition of the prefix "sub"). The petition was the originating process and it remained in place despite the order setting aside leave.

(iii) The leading case on *forum non conveniens* is The Spiliada. Divorce cases provide additional considerations as the remedies available vary dramatically from jurisdiction to jurisdiction especially when children are affected.

The wife alleged desertion. Eight of their eleven married years were spent in Cayman. The parties owned property here. It would be unjust to deny her recourse to the Grand Court. Order denied.

(Editor's note: see I Ltd v G and Others *infra.)*

JE

Injunction - Change in circumstances - Non-disclosure - Discharge

PH v G Ltd

Grand Court (256/93)
Smellie Ag J
July 27 1993

Cases referred to

Vine v National Dock Labour Board [1957] AC 488
Francis v Municipal Councillors of Kuala Lumpur [1962] 3 All ER 633
Barron v Potter [1914] 1 Ch 895
Morris v Redland Brick Ltd [1970] AC 652
Anton Piller KG v Manufacturing Processes Ltd [1975] 1 All ER 779

Mr Alberga QC for the plaintiff
Mr Jones for the defendant

The plaintiff, an employer, shareholder and director of G Ltd, alleged that he was wrongfully and invalidly dismissed by the defendants.

The court considered an application by the defendant to discharge an order rendered June 10, 1993, granting prohibitory and mandatory injunctions. The defendant argued that mandatory or prohibitory injunctions were unavailable where damages would suffice.

Held: (application granted)

(i) The plaintiff relied on Vine v National Dock Labour Board and Francis v Municipal Councillors of Kuala Lumpur as authority for the proposition that the court could grant the equitable relief of an injunction and ultimately a declaration that the purported dismissal was *ultra vires*, illegal and of no effect. He argued that he still met the test of having a "high probability of success" to justify the continued imposition of the mandatory injunction inspite of the change of circumstances through new Board resolutions. Further, he argued that since there were serious questions to be tried, the court was justified in continuing the prohibitory injunctions. The plaintiff argued that the defendant's reliance on Barron v Potter as justification for its method of conducting the affairs of the Board was misconceived.

(ii) The test of "a strong probability of success" to justify the continued imposition of mandatory injunctive relief (Morris v Redland Brick Ltd) took into account the strength of the plaintiff's case.

(iii) The new legal state of affairs left the plaintiff without evidence of a strong case. Furthermore, there was not a "strong probability" that the plaintiff would be able to establish the existence of "special circumstances" as required by Francis to support his claim for a declaration of the status of an employee.

Therefore the mandatory injunction would be discharged.

(iv) The test for the imposition of a prohibitory injunction was different. Prohibitory injunctions were only available where there exists "serious issues to be tried". The issue upon which the injunction was now based was questionable, therefore the equitable relief would be discontinued.

(v) The plaintiff did not fail in his duty of disclosure by failing to exhibit the proposed new Articles of Association which were referred to in his affidavit, because they were not material to the court's deliberations. The general rule was that any dispute as to disclosure in obtaining an *ex parte* order should be investigated at the trial of the action and not, save in exceptional circumstances, at the *inter parties* hearing.

JE

Pleadings - Striking out - Want of prosecution

AW v R Ltd

Grand Court (SCA 101/90)
Schofield J
June 1 1993

Cases referred to

Birkett v James [1977] 2 All ER 801
Grand Court (180/87)

Mr Parkinson for the applicant
Mr Murray for the respondent

The respondent brought an action for personal injuries after she slipped and fell on a boat owned by the agent of the applicant defendant in May, 1984. The action was brought in breach of contract and negligence. It was commenced two months before the limitation period expired. The defendant applied for the action to be dismissed for want of prosecution.

Held: (application granted)

(i) In Grand Court (180/87), where a similar application had been raised, Smellie Ag J followed Birkett v James in holding that the power to strike out should only be exercised where the court is satisfied either: (1) that the default has been wilful and contumelious; or (2) that there has been inordinate and inexcusable delay on the part of the plaintiff and that such delay would give rise to a substantial risk of, (a) it not being possible to have a fair trial or, (b) causing serious prejudice to the defendant.

(ii) Time elapsing before the writ was filed could not of itself constitute inordinate delay, but "[a] late start makes it more incumbent on the plaintiff to proceed with all due speed". (Birkett v James)

(iii) The plaintiff had not pursued the action in a diligent fashion. The delay in filing post-writ matters was inordinate. The excuses put forward were not

sufficient. The defendant had suffered prejudice because an important witness had left the Islands and was unlikely to be available to testify. Further, the expert retained by the defendant (who observed the boat in question post-incident) had since died. This was significant because the boat in question had been extensively modified since the inspections due to repairs after Hurricane Gilbert.

JE

Solicitors - Professional Conduct - Costs

DL as Executor v LL et al

Grand Court (203/92)
Harre CJ
September 16 1993

Legislation

Judicature Law
Grand Court (Civil Procedure) Rules R 34
Rules of the Supreme Court of England and Wales Order 18 rule 21

Authoritative works

Supreme Court Practice

Mr Nichol for the plaintiff/respondent
Mr O'Riordan for the defendant/applicant

The defendants brought an application to set aside a judgment obtained without a trial pursuant to S 59 of the Judicature Law.

The original action concerned trespass to land through use of a disputed right of way. The defendants' first attorney, though he filed an appearance in July, 1992, failed to file a defence. He also failed to inform the defendants that on December 3, 1992, the court had directed that the matter be set down as a short cause pursuant to Grand Court Rule 34 without further pleadings (subject to the defendants' liberty to apply for further orders), and he failed to inform the defendants of the trial on July 20, 1993. No one appeared for the defendants and a judgment, including an injunction, was entered against them.

Held: (application granted with condition)

(i) When proceeding by short cause without full pleadings pursuant to Grand Court Rule 34 it must be made absolutely clear to the court what it is asked to adjudicate. (See the note to the corresponding rule in England (order 18 rule 21) found in Supreme Court Practice.) The defendants' new attorney filed a draft defence alleging first, an unrestricted right of way across the plaintiff's land by prescription and second, that a disputed ladder and path were on Crown land rather than on the plaintiff's land.

The court gave weight to the fact that: (1) the defendants did not appear at the trial through the failure of their attorney to inform them of it, (2) the issues to be determined were not fully before the court, (3) the issues raised triable issues and (4) more fundamentally, it was "of particular importance that justice should not only be done but be seen to be done". The requirements of S 59 of the Judicature Law were satisfied.

(ii) The court ordered the judgment to be set aside

on the directions that the defendants file a defence within 28 days and on the conditions that: (1) the injunction granted by the trial court against the use of the right of way would remain in force, (2) the defendants paid into court the portion of the plaintiff's costs wasted in respect of the trial, within 28 days.

JE

DL as Executor v LL et al (continued)

Grand Court (203/92)
Harre CJ
September 16 1993

Legislation

Judicature Law S 59
Grand Court (Civil Procedure) Rules R 34
Rules of the Supreme Court of England and Wales Order 18 rule 21

Authoritative works

Supreme Court Practice

Mr. Nichol for the plaintiff/respondent
Mr O'Riordan for the defendant/applicant

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Held: (defendants' first attorney ordered to show cause)

(i) The judgment obtained without a trial was set aside on conditions. (See DL as Executor, *supra.*)

(ii) The defendants' first attorney was ordered to attend at a date to be fixed to show cause why an order of costs should not be made against him personally.

JE

CONFLICT OF LAWS

Civil procedure - *Forum non-conveniens* - Forum shopping - Submission to the forum - Granting negative declarations

I Ltd v G Co and Others

Grand Court (356/92 & 205/92)
Schofield J
August 6 1993

Cases referred to

Spiliada Maritime Corp v Cansulex Ltd [1986] 3 All ER 843
Pick v Manufacturers Life Insurance Company [1958] 2 Lloyd's Rep 93
Rossano v Manufacturers Life Insurance Co Ltd [1962] 2 All ER 214
The Volvox Hollandia [1988] 2 Lloyd's Rep 361
First National Bank of Boston v Union Bank of Switzerland and others [1990] 1 Lloyd's Rep 32
Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1990] 3 All ER 404
Re Harrods (Buenos Aires) Ltd (No 2) [1991] 4 All ER 348

Mr Henriques QC with Mr Barrie for the plaintiffs
Mr Lamontagne QC with Mrs Maierhofer for M
Mr Hill QC with Mr Parkinson for F
Mr Foster for G

The applications were consolidated as they arose out of very similar circumstances involving a mutual plaintiff and identical principles and issues of law.

I Ltd and A Ltd are incorporated in the Cayman Islands under the Companies Law as exempt companies, I Ltd having acquired the business of A Ltd in 1985. F and G are United States Corporations incorporated in the State of Alabama and the State of Arizona respectively.

M is a United States Corporation incorporated in the State of Minnesota; it provided insurance to F.

The plaintiffs provided insurance cover to F and G in the form of products liability, completed operations and contractual liability insurance cover. M also provided insurance cover for F.

Actions had been brought in North Carolina against F in respect of contaminated fertilizer which F supplied.

F maintained that I Ltd should provide cover for the defence of these proceedings and an indemnity in respect of any judgment against F. F maintained that M should do the same.

M had brought an action in Alabama claiming that M was not liable to indemnify F in respect of the North Carolina proceedings and that A Ltd and I Ltd were liable to indemnify F.

G was the subject of four actions against it in the State of California and maintained that I Ltd was under a duty to provide cover for the defence of the actions and an indemnity in respect of any judgment against G.

The following matters had to be dealt with by the court:-

(1) A Ltd and I Ltd sought declarations as against F, G and M that they were not liable to defend or indemnify those companies in the actions brought in the USA. The basis for this claim was the terms of the policies themselves and, in addition, in the case of F, that the policy limit for the year in respect of which the claims were made had already been reached.

(2) A Ltd and I Ltd sought a further declaration as against G that the policies were void for material

non-disclosure.

(3) All defendants sought a declaration that the leave which had been granted for the plaintiffs to serve all the defendants out of the jurisdiction should be discharged in that applying the doctrine of *forum non conveniens* the Cayman Islands was not the most appropriate forum to try the action.

(4) F and G sought orders that the writ of summons and service of notice of writ be set aside and the action be dismissed. G asked that the court find that the claim should be struck out as an abuse of the process of the court. M and F adopted G's submissions in this regard.

(5) As one of the main factors upon which the plaintiffs relied in the contention that the Cayman Islands was the appropriate forum (in the initial application for service out of the jurisdiction) was that Cayman law was the proper law of the insurance policies it was necessary (in the absence of an express choice in the policies) for the court to make a provisional decision as to what was the proper law of the policies.

Held: (granting the orders sought by the defendants in both suits)

(i) Following the basic test on an application as to *forum non conveniens* as set out by Lord Goff in The Spiliada, the Cayman Islands was not the most appropriate forum to try the action. The factors in reaching this conclusion were, *inter alia*, that (as a provisional decision) the proper law of the insurance policies was not that of the Cayman Islands as all factors pointed to the United States' jurisdictions and proceedings were already more advanced in those jurisdictions.

(ii) Following The Volvox Hollandia the court had to exercise great caution before granting negative declarations, particularly where they arose in a conflict of laws situation. Furthermore the plaintiffs appeared to be forum shopping. Accordingly the prayers for negative declarations were not to be granted and were to be struck out as an abuse of the process of the court.

(iii) As G and F only entered conditional appearances they had not submitted to the court's jurisdiction. As M had entered a general appearance it had so submitted but was entitled to an order setting aside leave to serve out of the jurisdiction.

AC

CONTRACT

Standard form contract - Admissibility of parol evidence to qualify written agreement - Existence of collateral agreement

W v M

Grand Court (126/93)
Schofield J
September 2 1993

Mr Parkinson for the plaintiff
Mr O'Riordan for the defendant

The defendant was applying to set aside a summary

judgment awarded to the plaintiff for alleged breach of a car hire agreement.

The defendant rented a motor car from the plaintiff at the rate of $30 per day. The motor car was to be returned on January 8, 1993. A rental agreement was signed by the defendant. The agreement was amended when the original motor car was substituted with another one.

The agreement contained a clause to the effect that the hirer was fully responsible for any damage caused to the vehicle while it was in his possession. The hirer was required to pay a deposit of $600 such amount being refundable on the return of the vehicle. If the vehicle was damaged, the cost of repair was to be deducted from the deposit and if the cost of repair was more than the deposit, the hirer was to pay the balance.

The vehicle could not be returned on January 8 because it was destroyed by fire on that date.

The plaintiff commenced an action for the value of the motor car, less the total amount of deposit, and damages for loss of profit by reason of the plaintiff being deprived of the use of the motor car.

The writ and statement of claim were served on the defendant and she failed to make an appearance. Judgment was entered for the plaintiff with damages to be assessed. The defendant applied to have the judgment set aside. The defendant's attorney filed an affidavit in support of the application explaining the reason for the delay in defending the action. The defendant maintained she had an arguable defence on the merits.

The draft defence set out three points: (1) that the rental for the motor car was $25 per day and $5 per day was for full insurance coverage and that the defendant understood that the vehicle was insured, on a comprehensive basis, for all usual risks; (2) that the destruction of the vehicle was not the fault of the defendant and may have been the result of a latent defect or inadequate maintenance and the defendant was therefore not liable; (3) that the plaintiff was not entitled to claim the ongoing loss of profit by way of hire fees.

The plaintiff's attorney referred to the parol evidence rule and stated that extrinsic evidence could not be admitted to vary the terms of the written agreement and that nothing in the draft defence took the case outside the parol evidence rule. It was argued on behalf of the plaintiff that as the defence was presently drafted, parol evidence could not be admitted to take the rental agreement beyond its written form, particularly with reference to the clause relating to responsibility for damage to the vehicle while in the hirer's possession.

Held: (setting aside the judgment on terms)

(i) The plaintiff's attorney was right in his contention regarding the rule against admissibility of parol evidence to qualify a written agreement.

(ii) It did appear from the draft defence that it did not adequately set out the defendant's case. The plaintiff had not denied that there was a collateral agreement relating to insurance. A note at the foot of the agreement stating, *inter alia*, that driving whilst intoxicated and negligent driving were not covered was indicative of the existence of a collateral agreement (an exception to the parol evidence rule) relating to insurance cover for the vehicle. The draft defence unfortunately failed to allude to the existence of such a collateral agreement. The existence of such an agreement was

likely to affect the defendant's liability for damages.

(iii) The defendant would be given the opportunity to defend, although the defence might be in a form other than that submitted in draft as the draft ignored completely the fact that there was some agreement between the parties relating to insurance of the motor car and prevented the defendant from pleading an arguable case as a consequence.

The summary judgment would be set aside on terms that the defendant filed a defence within 7 days. The plaintiff was entitled to all costs to date.

AD

CRIMINAL LAW

Careless driving - Police vehicle - Level of Fine

Powell v R

Grand Court (SCA 10/92)
Schofield J
July 23 1993

Appellant in person
Mr Archie for the Crown

The appellant, a police officer, while responding to a report of a serious accident went into a skid and slid into an electricity pole. The police car was wrecked and the appellant was charged and convicted of careless driving. Much of the trial was taken up in a challenge of sketches sought to be used as evidence of what had transpired. The value of the sketches was sufficiently put into question by other evidence and was disregarded. The appellant admitted that his vehicle went into a skid of 300 to 400 feet in length. The fact of the skid suggested he was travelling at a high speed. Just prior to the skid, the appellant asserted he had wanted to switch his bright lights on to have better vision into the bend, and when he momentarily took his eyes off the road to locate the switch the vehicle began to go off the road; in making a correction it had gone into the skid.

Held: (affirming the conviction and reducing the fine)

(i) Although strict speed limits may not have applied to the appellant who was driving an emergency vehicle, he was still under a duty to exercise the proper degree of care in the circumstances. In entering the bend at night at the speed he did the appellant departed from the degree of care expected of him by taking his eyes off the road to locate the light switch.

(ii) The appellant's driving record was impeccable, the fact that he was responding to an emergency made it unnecessary for the learned magistrate to punish the offence with a substantial fine.

WB

Credibility of witnesses - Discrepancies in evidence

Pearson v R

Grand Court (SCA 132/92)
Schofield J
July 23 1993

Legislation

Penal Code Ss 151(b) & S 244
Police Law S 63

Mr Archie for the appellant
Mr Murray for the Crown

The appellant was convicted of disorderly conduct, assaulting police, resisting arrest, and damage to property. The case rested upon the credibility of witnesses. The prosecution evidence came from the testimony of two detectives. They testified that they were instructed by a superior officer to take the appellant to the police station. Upon doing so the appellant became aggressive and swore at the officers, whereupon he was told that he was under arrest for disorderly conduct. The appellant continued to be aggressive and poked one of the officers in the chest with a paint brush. Reinforcements had to be called before the officers could arrest the appellant.

The appellant testified that while painting his aunt's house he felt someone grab his arm from behind and was pushed up against the porch. He looked around and saw the two officers whom he knew to be policemen, although they had not so identified themselves. When he tried to pull his arm away a struggle ensued. The appellant denied swearing at the officers. The appellant's aunt was called as a witness and her testimony corresponded with that of the appellant.

Held: (conviction affirmed but custodial sentence substituted with a fine)

(i) The learned magistrate had the advantage of seeing the witnesses and assessing their credibility directly. On independent review of the evidence it was not possible to conclude that his assessment was wrong. Some minor discrepancies between witnesses is expected from the testimony of honest witnesses.

(ii) The appellant was a first offender and the offences were not the most serious of their kind. The learned magistrate, therefore, erred in adopting a custodial approach to the sentence for resisting arrest, even though the sentence was suspended.

WB

Drugs - Possession with intent to supply

Holness v R

Grand Court (SCA 130/92)
Schofield J
May 21 1993

Legislation

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

Mr Roberts for the Crown
Appellant in person

The appellant was convicted before the Senior

Magistrate of possession of ganja with intent to supply and was sentenced to 2 years imprisonment of which 6 months was suspended.

The appellant had been at the Director of Prisons' home outside the prison and close to the prison fence when she had asked a painter whether the Director was there. On being told that he was not, the appellant had started to leave at which point two prison officers pulled up in a car and shouted to ask what the appellant was doing. The appellant threw a package from her bag under a tree. The package was found to contain 30 grammes of ganja and a stone.

Only later did one of the prison officers go to apprehend the appellant who was then re-arrested by a police officer. The appellant denied taking a package out of her bag and throwing it under a tree.

The appellant appealed against conviction and sentence.

Held: (dismissing the appeal)

(i) The Senior Magistrate had carefully considered the discrepancies and oddities in the evidence and was satisfied beyond doubt that the appellant did throw the package containing ganja under the tree. The Senior Magistrate's finding that the evidence was sufficient to prove an intent to supply was irresistible given the amount of ganja (together with its packaging and the stone to give it weight) and the proximity of the appellant to the prison fence.

(ii) The sentence was legal and appropriate for an offence of this seriousness.

AC

Being concerned in the possession of cocaine - Statutory rebuttable presumption - Meaning of container

Logan v R

Court of Appeal (19/1991)
Zacca Pres Kerr and Henry JJA
April 7 1993

Legislation

Misuse of Drugs Law Ss 3(1) 3(1)(m) & 7(1)(b)

Cases referred to

Gibson v R (1988-89) CILR 336
R v Carr-Briant (1944) Cr App R 76

Mr Hampson for the appellant
Mr Roberts for the Crown

The appellant had been convicted of possession of cocaine with intent to supply, contrary to S 3(1)(m) Misuse of Drugs Law and for being concerned in the possession of cocaine, contrary to S 3(1) of the same Law. The appellant had picked up a passenger at the airport and was subsequently stopped by police. When questioned by the police the appellant denied knowing his passenger but stated that he had been asked to pick-up someone at the airport. The passenger was searched and over 1 lb of cocaine was found hidden in two aerosol containers in his travelling bag along with a notebook containing the

appellant's name and telephone number. The appellant was arrested and subsequently convicted on the charges set out above. The passenger pleaded guilty and was convicted of possession of cocaine with intent to supply.

On appeal to the Grand Court the convictions were affirmed but the custodial sentence was reduced from 10 years to 9 years. The appellant further appealed to the Court of Appeal.

Held: (allowing the appeal in part)

(i) The Crown had not proved beyond a reasonable doubt that the appellant had possession of the controlled drug contained in the travelling baggage of the passenger in his car. A driver of a motor vehicle would certainly be in control of the vehicle but it did not follow that he was in possession, custody or control of the personal belongings of his passenger. The conveyance (the motor vehicle) was not a "container" contemplated by subsection 7(1)(b); the aerosols containing the prohibited drug were, at the material time, in the possession of the passenger. In the absence of the divesting of any proprietary right, custody or control, exclusive possession remained in the passenger.

(ii) The statutory presumption in S 7(1)(b), as applied to the charge of possession with intent to supply, did not apply to this case.

(iii) *(Obiter)* Where the statutory, rebuttable, presumption did apply it could only be invoked after all the evidence had been heard. (Gibson v R.) S 7(1) places an onus of proof upon the accused to be positively discharged by the evidence. Being one which lies on the accused, and consistent with established principle, the onus is lighter than that which rests on the prosecution, being on the balance of probabilities. (R v Carr-Briant.) The statute expressly states that the basis upon which the presumption must rest is beyond a reasonable doubt. It is implicit in the presumption that knowledge is presumed against anyone in possession, custody or control of the container.

WB

Obstructing the course of justice - Assault occasioning actual bodily harm

R v Ebanks

Grand Court (IND 41/92)
Schofield J
July 20 1993

Mr Roberts for the Crown
Mrs Messer for the accused

The accused was charged with two counts of obstructing the course of justice in endeavouring to dissuade, hinder or prevent each of two witnesses from testifying in court and a third count of assaulting one witness occasioning actual bodily harm.

In April 1992, one, Diaz, committed burglary at a condominium at the Island Pines condominium complex on Seven Mile Beach. Diaz was confronted in the condominium by the residents who later identified him on a beach in the company of the accused.

The following month one of the witnesses, Mrs. B, testified that she saw the accused looking up at some of the units in the complex and asked him if he was looking for anyone in particular. The accused responded that it was none of her business and he could be anywhere he wanted to be. On further inquiry by the witness the accused said that she and her husband were causing trouble for him and his friends. Mrs. B further testified that she became nervous and when she started walking back towards her apartment the accused followed and threatened to hit her and told her that she and her husband would not be around to testify against his friend.

By this time Mr. B, the second witness, heard loud voices and went outside. He testified that the accused was using profane language and tried to persuade him to leave. The accused continued to utter threats that they would not be around to testify. Mrs. B went indoors and returned with a camera with which she took a photograph of the accused. Mrs. B testified that the accused lunged at her, got hold of her arm and twisted it. Mr. B intervened and struggled with the accused during which he suffered scratches to his knee, foot and toes. Mr. B further testified that the accused again threatened them saying that someone would break into their apartment and smash their heads in and stab them. They then decided to telephone the police and walked to the pay phone, the accused, they said, followed them and got into the phone booth. Mr. B grabbed the accused in a strangle hold after which the accused walked off.

The accused was found later that night at the Police Station where he appeared to be intoxicated; he was bailed to appear at the Police Station approximately one week later when he was interviewed, under caution, a record of which was admitted without objection.

An American staying at a neighbouring condominium testified that he was in his apartment when he heard a loud boom and then voices. When he went to his front door to see what was happening he saw Mr. B and the accused pushing each other. He said that he heard someone say "call the police" and the accused left. He then went back into his condominium.

The accused testified that he was looking for a lady friend at an apartment in the Island Pines complex when Mrs. B approached him and asked him what he was doing there. He replied that he was looking for a friend. Mrs. B, he alleged, was mumbling as if she wanted to start trouble, at which time the accused started to walk back to the street, towards the friend's apartment. Suddenly, Mr. B came out of his apartment and Mrs. B went indoors returning with a camera with which she took a photograph of him. The accused took exception to this and he tried to grab the camera, but it was strapped to Mrs. B's arm. Mr. B hit him on the shoulder and he returned and pushed Mr. B in self defence.

At the time of the incident the accused testified that he did not know that Diaz was being charged but he had agreed to testify if necessary. Further he did not have any intention of talking to the witnesses and did not know where they lived before that time.

The accused called the manager of Island Pines as his witness. She knew the accused and testified that he had friends who were owners at the complex.

Held: (allowing the appeal in part)

(i) To prove that the accused intended by his threats to dissuade the witnesses from testifying against his friend, Crown Counsel argued unsuccessfully that it was the intention of the accused at the time he

uttered the words which was relevant, notwithstanding the fact that the accused did not make the initial approach. The evidence in the present case did not show that the accused was seeking out the witnesses at their apartment that night. Rather, the accused became upset and lost his temper uttering stupid threats when Mrs. B approached him. The uttered threats had not been made in order to dissuade the witnesses from testifying. The two counts of obstructing the course of justice were not adequately proved.

(ii) The third count of assault occasioning bodily harm was proven. The accused threatened Mrs. B so to put her in fear, he lunged at her, held her arm to wrest the camera from her and in doing so twisted her arm. The accused had no legal right to do that since he was not defending himself and would have perceived no violence being intended to his own person from either Mr. or Mrs. B.

WB

Possession of unlicensed firearm - Discharge of firearm - Conviction on accomplice testimony - Prosecution case not proved to the required criminal standard

Godden v R

Grand Court (39/93)
Schofield J
September 8 1993

Legislation

Firearms Law Ss 15 and 18

Mr Furniss for the appellant
Ms Escalante for the Crown

The appellant was appealing against his conviction for the possession of firearm contrary to S 15 of the Firearms Law and for the discharge of a firearm contrary to S 18 of the same Law.

The Crown's case was that the appellant and one Jamaican musician, M, who had come to the Islands to perform a concert, had fired a gun five times in the early hours of March 27, 1993.

M pleaded guilty to a charge of discharging a firearm and testified for the Crown. Another musician, C, who had come to perform with M also testified for the Crown. According to M and C, after performance at the Mingles Night Club, they went to a dance at premises off Crewe Road in George Town. They said they had left the dance at about 3 a.m. and had asked the appellant for a lift in his van.

M said the appellant had pulled a gun, fired a shot in the air and had then handed it to him to fire it. M said he fired a shot through the van window and gave the gun back to the appellant. The appellant then fired three shots in the air after opening the van door.

C testified that upon the invitation of the appellant, M had fired two shots and given the gun back to the appellant who then fired three more shots in the air.

Two police detectives testified that they were on duty that morning and that after hearing five shots - three in rapid succession and two after ten to twenty seconds' pause - they had gone to the area and discovered at one spot three spent cartridges and at another spot, two spent cartridges.

Upon cross-examination, one of the officers stated that after the arrest of the suspects, forensic tests for traces of gunpowder had taken place but he did not know the results. The other officer could not confirm the testing but said that normally this would be done as a matter of procedure.

The appellant testified that he had gone to the dance in the early morning hours but denied having given the musicians, M and C, a lift. He said he had gone to the dance in a Nissan car and not in a van. His mother had a van but another person, H, was driving it that night.

After the appellant's arrest, the police had searched his car and house and found no gun. H testified to confirm that he had driven the van at the time in question and had given a lift to five persons including M and C after the dance. The appellant was not one of them. H said C had handed a gun to M in the van and he had fired it five times.

Another witness, G, testified for the defence and said he had given M and C a lift on the way to the dance and that shortly before they came to a police road block, C had revealed that he had a gun in his possession and wondered whether the police would perform a body search.

The magistrate had doubted the veracity of the evidence of the prosecution witnesses M and C as regards who fired what shots and in what sequence and yet went on to convict the appellant on the two charges.

Held: (allowing the appeal)

(i) The learned magistrate, having doubted the veracity of the evidence of the prosecution witnesses, ought to have looked more carefully and analytically into the prosecution case. There were major inconsistencies between the evidence of M and C as to the number and order of shots fired. Furthermore, they had every reason to lie to avoid facing serious charges of possession of an unlicensed firearm which could have led to lengthy trials and possible imprisonment thus destroying their careers as entertainers for the immediate future. It was in their interest to minimise their own involvement and cast the blame on another person.

(ii) The learned magistrate had doubted the evidence of G on the ground that it would have been difficult for M and C to get the firearm through Customs. Since the gun was not manufactured in the Islands, the appellant would have faced the same difficulty getting it through Customs. The learned magistrate had also disbelieved the evidence of G that he gave two complete strangers a lift after the dance.

(iii) In the light of all the circumstances, neither the evidence of H nor G fell to be disbelieved. Neither police officer denied that the appellant was tested forensically for traces of gunpowder. It was reasonable to conclude that the appellant was tested for traces of gunpowder but that the result was negative.

(iv) The prosecution had not proved the case even on the balance of probabilities and were far away from satisfying the criminal standard of beyond reasonable doubt. The magistrate did not give the evidence a balanced consideration. The appeal would therefore be allowed.

AD

Murder - Self-defence - Provocation

R v Witter

Grand Court (30/92)
Schofield J
February 19 1993

Mr Roberts and Mr Bulgin for the Crown
Mr Collins for the defendant

The defendant had been charged with the murder of one Charles Marvick Moore. He admitted stabbing the victim but alleged it was in self-defence. The wife of the defendant, M, was allegedly having an affair with the deceased.

According to the defendant, he had on one occasion found his wife in a compromising position with the deceased in a bathroom. A week later, he was repairing a car when his wife came home, changed her clothes and went out. The defendant's question as to where his wife was going had not been answered and an offer to give her a lift had been refused. The defendant followed, armed with a knife, which he alleged he had been working with and had mistakenly put in his pocket as he hurriedly dressed.

The defendant eventually traced his wife to the deceased's apartment where a confrontation took place. The deceased fled from his apartment as the defendant chased him with the knife. The defendant confronted his wife, and the landlord, on hearing the noise, came to intervene. According to the landlord, the defendant uttered words to the effect that he would kill Moore if he found him.

One witness, JC, saw the defendant trying to persuade his wife to accompany him home but the wife refused. The wife then disappeared. According to JC, the defendant was still searching for his wife when Moore re-appeared on his bicycle.

Another witness, SC, said she heard some screaming coming from William Drive, a nearby street, and as she walked towards that direction, she saw, under a street light located between William Drive and Mango Street, the defendant standing over somebody and holding an object resembling a knife and moving his hand up and down twice in what appeared to be a stabbing motion. She also saw the defendant kick the person on the ground. She said she was about seven yards from the scene. SC called the police and when she came back, she saw a man lying on his back with blood all over his stomach.

JC had also stated that when Moore got off his bicycle, a confrontation had ensued, Moore fell in consequence of it and fled. The defendant had pursued him to Mango Street where another confrontation took place. JC lost sight of the combatants momentarily and later saw Moore with blood on his chest.

According to the defendant, Moore, a television repairer by trade, had attacked him first with a satellite dish and he had tried to defend himself. The defendant said he had used the knife because he had mistaken the satellite dish for a machette. He denied stabbing Moore and said he had only slashed him on his back as he fell while trying to run away.

The defendant had himself gone to the police station to report the incident. The victim was pronounced dead at the George Town hospital. A post mortem revealed the death was caused by a stab wound passing through the left side of the breast bone and

through the heart, transecting the right coronary artery and puncturing the aorta. There was also a cut on the victim's face and back.

At the trial, the defendant challenged the admissibility of the police interview record on two grounds, namely, that he had not been allowed to contact his wife and a lawyer before the interview and that the necessary caution had not been administered. In the interview, the defendant had initially denied using a knife but later admitted it.

It was argued by the defence, that even if self-defence was not available to the defendant, there was clear evidence of provocation on the part of the victim and the defendant's wife.

Held: (accepting the defence of provocation and reducing the murder charge to manslaughter)

(i) Regarding the objection to the admissibility of the evidence, the court had the opportunity of seeing and hearing the testimony of the defendant and the police officers. The court was satisfied that the defendant did not request a lawyer as a precondition to answering questions.

(ii) Evidence was also given that the defendant was cautioned before interview and that he was reminded he was under caution on the resumption of the interview after an interval. Although one officer was uncertain in his recollection about this, the objection by the defendant was ruled to be without merit. The purpose of a caution was to inform a suspect of his right to remain silent. The defendant was admittedly aware of this right and had exercised it at some stages.

(iii) In relation to the pre-condition of first speaking to his wife, no authority existed requiring the observance of such a request. There was no evidence that the questioning amounted to oppression making the answers involuntary.

(iv) The evidence that the defendant was acting in self-defence lacked credibility in many respects. Certain parts of his evidence to the police, as, for example, why he carried the knife with him that evening and how he got to know the apartment occupied by Moore, were patently untrue. If one took into account the whole of the defendant's action, both before and after the stabbing, the irresistible conclusion was that he was not acting in self-defence when he engaged Moore in combat. It was undeniable that the victim was equally armed and ready for confrontation. The defendant went out armed with a knife. He went out to meet violence, and faced force with force. In any violent engagement, there may well be actions of defence and offence by both combatants, and it may well be that the actual fatal move was a defensive one. It was beyond doubt however that the defendant was engaged in combat with Moore rather than merely defending himself against violence. The defendant clearly knew that his action would cause Moore really serious harm.

(v) The defendant had, just before the fatal incident, found his wife, for the second time in one week, in a compromising position with Moore. His wife had been provoking him and he had been engaged by his wife's lover in combat at the lover's house. His wife continued to humiliate and hurt him by refusing to return home with him. It was hard to imagine a more provocative situation. The defendant's action demonstrated that he was provoked; there was no cooling off period. The

defendant had been provoked, as would any reasonable man in these circumstances, so as to lose his self-control. The provocation was sufficient to reduce the murder charge to manslaughter.

(Editor's note: the conviction was quashed by the Court of Appeal November 22, 1993.)

AD

Burglary - Identification evidence - Evidence of accomplice - Possession of recently stolen property

R v Minzett

Grand Court (6/93)
Harre J
April 6 1993

Mr Bulgin for the Crown
Accused in person

Two police officers were on mobile patrol when they saw two men carrying an object along the road in Cumber Avenue, Bodden Town. The officers approached the men, whereupon they dropped the object and ran away. One was caught after a chase but the other escaped. The object was identified by the police officers to be an air conditioning unit.

The officers testified that when the two men dropped the object to escape, they recognised the defendant whom both had known for some years. The defendant was recognised underneath a street light and when the headlights of the police car shone on him. The police car, it was stated in evidence, was about ten feet away. One officer had a view of the defendant in profile while the other officer had a full face view.

The officers subsequently went to the defendant's residence where they saw him breathing and sweating as if he had been running. The officers discovered the defendant was still wearing the attire they had seen him wearing when first identified. Evidence was given that the lapse of time between the initial identification and the visit to the defendant's house was about 25 minutes.

The defendant disputed the identification and denied any involvement. He called as a witness, the other man alleged to have been involved in the offence, to prove his own lack of involvement. The alleged accomplice said he was too drunk to know who was with him at the time.

A Crown witness had testified that the air conditioning unit had gone missing from the Sea Pine Cottage which was under her care at the material time.

Held: (convicting the defendant)

(i) Special caution was needed when dealing with identification evidence. Experience showed that even honest witnesses could be mistaken and that although recognition may be more reliable than identification of a stranger, mistakes can occur even in the recognition of close relatives and friends. Police identification evidence was no exception.

(ii) The evidence of the accomplice was worthless.

(iii) Although the officers' identification was a fleeting one and took place at night, it was an unimpeded identification of a man, from a small community, who the officers knew well. The area was lit by a street lamp and the headlights of the police car. The officers' identification was strengthened by the fact that the attire they saw the defendant wearing at home was the same attire in which they had identified him previously.

(iv) The defendant and another person had been seen by the officers carrying an air conditioning unit eight to nine hundred feet away from the cottage where an air conditioning unit had gone missing. The possession of recently stolen property in the circumstances amply justified the inference that those in possession had stolen it. The case had been proved beyond reasonable doubt that the defendant had entered the Sea Pine Cottage, as a trespasser, and stolen therefrom the air conditioning unit; he was accordingly guilty of burglary.

AD

Misuse of Drugs Law - Reasonable suspicion of officer

Ebanks (Patrick) v R

Grand Court (120/92)
Schofield J
October 15 1993

Legislation

Misuse of Drugs Law Ss 4(2) 5(1) & 12

Authority referred to

Brian P Rankine v R (SCA 53 & 61 of 1989)

Mr Furniss for the appellant
Mr Roberts for the Crown

The appellant appealed against his conviction by the Senior Magistrate on charges of refusing to provide a urine sample contrary to S 4(2) Misuse of Drugs Law and resisting a search contrary to Ss 5(1) & 12 of the same law.

The evidence was laid by a police constable who testified that he witnessed the appellant acting suspiciously in Watercourse Road, West Bay. The officer attempted to search the appellant who was seen to swallow something and then run away. The appellant turned himself in two days later explaining that his reason for running away was that he had panicked. He declined to provide a urine sample.

The appellant did not give evidence, was convicted, and appealed.

Held: (dismissing the appeal)

(i) Under S 5 Misuse of Drugs Law a constable may detain and search any person whom he has reasonable grounds to suspect is in possession of a controlled drug. The evidence of the police officer, which included references to the way in which the appellant was talking and acting, together with his tone of voice, allowed the court to conclude that the power of search was exercised lawfully.

(ii) Applying Brian P Rankine v R the conduct of

running away may amount to resisting a search.

(iii) The request for a urine sample had been lawful; the interviewing officer had reasonable grounds to suspect that the appellant had committed an offence under the Misuse of Drugs Law, including, for example, the transgression of S 5.

MD

Misuse of Drugs Law - Discrepancies in police evidence

Ebanks & Rivers v R

Grand Court (108/92)
Schofield J
October 15 1993

Legislation

Misuse of Drugs Law Ss 3(1)(m) & 4(2)

Mr Ebanks in person
Mr Furniss for the appellant Rivers
Mr Roberts for the Crown

The appellants had been convicted by the Senior Magistrate on a charge of possession of ganja with intent to supply contrary to S 3(1)(m) Misuse of Drugs Law. Ebanks had been further convicted of failing to provide a specimen of urine contrary to S 4(2) of the same Law.

The evidence was laid by police officers who, whilst on nocturnal observation duties at the corner of Northwest Point Road in West Bay, had witnessed the appellants acting suspiciously. On approximately five occasions cars had driven up to the appellant and the officer closest to them had heard inquiries made of them such as whether there was any "fresh herb". Rivers had allegedly commented that it was a good thing for their business that there was no "fresh herb". On three occasions the officers witnessed Ebanks take something from the base of a tree and then transact with the occupants of the cars. Rivers largely remained where he was, apparently on watch for police vehicles. On one occasion it was alleged that he left in a car for five minutes.

Ten minutes after Rivers left the scene, the officers arrested Ebanks and found concealed, in the base of the tree, a bag containing 5.8 grammes of ganja.

Ebanks was interviewed under caution asserting that his visits to the tree had been in order to urinate. He refused, when requested, to provide a sample of urine.

Rivers was also arrested and interviewed; he alleged that he had visited the scene in order to inform Ebanks about a football match on television. He denied knowledge of the ganja.

Both appellants elected to remain silent at trial. The magistrate considered certain minor discrepancies in the police evidence but concluded that these did not go to credibility and convicted both appellants as charged, sentencing them to twelve months imprisonment each on the possession with intent to supply charge with Ebanks sentenced to a further term of six months imprisonment for failure to supply a urine sample.

Held: (dismissing the appeals)

(i) The discrepancies in the evidence of the police officers did not go to credibility. Their evidence had clearly not been rehearsed and it would have been very strange had their evidence exactly corresponded given the differing vantage points of each. The case against Ebanks was overwhelming on both counts.

(ii) The evidence against Rivers showed that he too had custody and control of the ganja, taking into account both his actions and his words to Ebanks.

MD

Burden of Proof - Presumption of innocence

Seymour v R

Grand Court (21/93)
Schofield J
October 22 1993

Mr Furniss for appellant
Mr Roberts for the Crown

On 23 February, 1992, two police officers on mobile patrol spotted a White Honda Prelude on South Sound Road travelling approximately 22 miles over the speed limit. The officers gave chase during which speeds of 80 m.p.h. to 90 m.p.h. were reached; because of the erratic driving the officers decided to give up the chase. The registration number of the vehicle was noted and the officers identified the driver as the appellant. The prosecution offered one witness who testified to having seen the chase and identified the driver of the Honda car as the appellant.

The appellant testified that the Honda car had been giving her problems and she had taken it in to her father's garage on February 22 1992, and left it there for repairs over the weekend. The mechanic also testified that the car was in the garage over the weekend and could have only been started by being pushed. The appellant further testified that on February 23 1992, she was at work at her job as a waitress during the time the offences were committed and produced her time card for the day in question. Additionally, the appellant called the manager of the restaurant who testified that although he could not be certain he himself was on duty that day, the employee time cards could not have been tampered with and if the employee went missing for more than half an hour he would have noticed it.

Held: (allowing the appeal)

The appellant appeared before the Summary Court an innocent person. Evidence of an alibi was present to the court. The appellant did not have to prove her alibi, but the evidence she presented, including the testimony of the restaurant manager, production of her time card, and testimony of the mechanic casted great doubt upon the prosecution case.

WB

Possession of ganja - Circumstantial evidence - Meaning of Possession - Requirement of Knowledge - Accomplice evidence - Forfeiture order

Powery Ebanks (James) and Ebanks (Erlon) v R

Grand Court (140/93 150/93 & 151/93)
Harre CJ
July 16 1993

Legislation

Misuse of Drugs Law S 7
Drug Trafficking Offences Act 1986 (UK)

Cases referred to

R v Hester [1973] AC 296
R v Searle [1971] Crim LR 592
R v Bland [1988] Crim LR 41
R v Gibson (1988-89) CILR 336
A-G of Hong Kong v Wong Muk Ping [1987] AC 501
R v Gordon (CA 30/91)
R v Dickens [1990] 2 All ER 626

Mrs Levers & Mr Hampson for the appellant Powery
Mr Furniss for Ebanks (J)
Ebanks (E) in person
Mr Bulgin for the Crown

Acting on information received, the police had boarded a vessel, "The Hustler" on which they discovered pieces of ganja and scattered seed. The police were taken to Sand Rock where they discovered ten pounds of ganja. The police made several arrests; three persons, Degan, Smith and Patterson were Crown witnesses having entered "guilty" pleas to charges of possession of ganja and possession of ganja with intent to supply.

Mrs Levers on behalf of Powery, argued seven grounds of appeal against conviction. These were adopted, with additional submissions being made, by Mr. Furniss on behalf of James Ebanks. Erlon Ebanks was not represented and made no submissions to the court.

The magistrate found the following facts proved from the evidence:

1. Powery was the co-owner of "the Hustler".

2. He loaned the boat to persons for the purpose of going to Jamaica to collect ganja.

3. Powery met the boat on its return at Sand Rock, a cove three miles from Morgan's Harbour.

4. On the morning of the boat's return, containers had been unloaded, and weighed in Powery's presence.

5. Degan, who had gone on the trip, and Patterson, who had not, were also present at the weighing.

6. Powery told Patterson that if challenged by police he was to tell them that they had been looking or a cow.

7. Powery had obtained the services of Degan, a licensed boat pilot.

The following were the Grounds of Appeal put on behalf of Powery:

Grounds 1,2 and 5 were argued together asserting, respectively, that the learned magistrate had erred in law in:

1. Not upholding the "no case to answer" submission made on his behalf; and

2. Holding that the appellant was at all material times in possession of "The Hustler"; and

5. Not making a distinction between the possession of the container, and its contents, and the mental element applying in respect of each.

Ground 4 asserted that the magistrate had confused the issues of onus of proof and presumptions arising under the Misuse of Drugs Law. Specifically, the magistrate's observation that nothing weakened "the inference that ...Powery was not only concerned in the possession of ganja...but was in control and had custody thereof." was challenged.

Grounds 3 and 6 asserted that the magistrate erred in law with regard to his treatment of the circumstantial evidence and that he drew inferences as to the guilt of the appellant based upon speculation.

Ground 7 asserted that the magistrate misdirected himself as to the treatment of accomplice evidence.

Ground 8 asserted that the magistrate erred in law in ordering the forfeiture of the appellant's boat under the provisions of the Misuse of Drugs Law.

Held: (dismissing the appeals)

Grounds 3 & 6:

(i) Having shown himself to be alive to the dangers of convicting on the uncorroborated evidence of accomplices, the magistrate was entitled to accept the evidence of Degan and Smith as to: (a) the presence of Powery at the boat's departure and return; and (b) Degan's having been invited by Powery on the trip in order to utilise his skills as a pilot, if necessary.

(ii) Evidence of Degan and Patterson was adduced as to what followed after the boat's return. Whilst there existed unresolved conflicts in the evidence of Patterson and Degan (each saying, for example, that it was the other involved in the weighing exercise) they agreed as to the critical issues of Powery inviting them to the scene and of Powery's presence at the scene.

(iii) It followed that the magistrate was entitled to reach the findings of fact expressed.

Grounds 1,2,and 5:

(iv) In the light of the weight of the prosecution's evidence there was far more against the appellant than ownership of the boat which would not of itself give rise to any presumption under S 7 Misuse of Drugs Law. Accordingly, the magistrate had correctly concluded that a case to answer existed.

(v) It could not be said that Powery was in possession of any drug whilst the drugs remained on the boat, as knowledge is an essential element of possession and at this point he had no more than a hope or expectation. When the containers reached the shore however, the appellant had joint possession of them and, by virtue of his acquired knowledge, their contents.

Ground 4:

(vi) The magistrate had not confused onus of proof and S 7 presumptions. In legitimately relying upon the accomplice evidence the magistrate correctly considered it to be unnecessary to invoke any presumptions.

Ground 7:

(vii) The magistrate was clearly mindful of the dangers of convicting on the basis of uncorroborated accomplice evidence and the fact that one accomplice, as a 'suspect witness', cannot corroborate another. Furthermore the accomplice evidence was not the sole evidence, there being also police evidence as to what was found on the boat and at Sand Rock. The magistrate had been entitled to believe the essential particulars of the accomplice evidence.

(viii) It was to be remembered that failure to accept/reject part of a witness's evidence did not oblige the magistrate/jury to reject/accept it *in toto*. This principle applied equally to accomplices as to any other witness.

Ground 8:

(ix) Taken in isolation the magistrate's ruling at the end of the trial record as to forfeiture of the boat was defective: it went no further than to conclude that a strong presumption existed that Powery had benefitted from drug trafficking. However, it was clear from the record that the magistrate's final ruling had followed later, not having been made until after evidence had been called on behalf of both the appellant and the Crown.

The Crown had discharged its duty of leading *prima facie* evidence of property held by the appellant during the relevant period. It was not necessary for the Crown to go further, as alleged by counsel for the appellant, in making enquiries as to the source of the money and lead evidence as to the actual sums involved.

(x) In relation to the other appellants there was little to add; the magistrate had been entitled to accept the evidence which placed them on the boat to Jamaica. The inevitable consequence of the decision regarding the appellant Powery was the conviction of the other two appellants.

MD

CRIMINAL PROCEDURE

Criminal procedure - Arrest - Reasonable suspicion - Evidence - Testimony - Significance of discrepancies

Hydes v R

Grand Court (SCA 17/92 and SCA 62/92)
Harre CJ
April 16 1993

Legislation

Misuse of Drugs Law S 4(1)

Authority referred to

R v McLaughlin and Burke (1988-89) CILR 417

Mr Hampson for the appellant
Mr Roberts for the Crown

Leave was given for these two appeals to be heard together. The first ground of appeal was that the learned Senior Magistrate erred in finding that the discrepancies in evidence between the police officers was not significant. The second ground regarded the sentence. The final ground challenged the finding of a reasonable suspicion that the appellant had committed an offence under the Misuse of Drugs Laws S 4(1) which gave rise to his conviction for failing to provide a urine sample.

Held: (appeal dismissed)

(i) The inconsistencies between the witnesses' evidence were minor and may have reflected the fact witnesses are required to answer only the questions put to them.

(ii) On the whole of the evidence the conviction was supportable.

(iii) The sentence imposed by the magistrate for possession of ganja with intent to supply was six months immediate imprisonment. Though the amount of ganja was on the lesser side and the appellant had not been convicted of a drug offence since 1985 the sentence was not wrong in principle.

(iv) Sergeant G. arrested the appellant after Sergeant E. reported to him that he had seen the appellant smoking ganja. An immediate arrest had not been effected due to the presence of other individuals to whom the police did not want their presence revealed.

(v) "Reasonable suspicion" was considered by Collett CJ in R v McLaughlin and Burke. The court is required to consider the quality and source of the information received giving rise to the suspicion, judged as at the time it was received. Without appropriate explanation, factors such as the anonymity of the officer providing the information and his failure to arrest the accused contemporaneously might be factors leading a court to the conclusion that the suspicion was not reasonable. The suspicion in this case was reasonable and the conviction was to stand.

JE

Possession of cocaine with intent to supply - Admissibility of confession

Lawrence v R

Grand Court (SCA 115/92)
Harre CJ
April 16 1993

Mr Furniss for the appellant
Ms Dilbert for the Crown

The appellant was convicted in the Summary Court of possession of cocaine with intent to supply. He was sentenced to a fine of $2000 or 4 months imprisonment in default of payment.

A search of the appellant's residence by three police officers with the appellant himself present was conducted whilst the appellant was already in custody on another drug related matter.

During the course of the search a bottle was found which contained cocaine and pieces of foil paper. The find was made in an annex to the appellant's main residence which was readily accessible to other people.

The conviction had been secured on the basis of evidence by the police officers as to an exchange between one of them and the appellant during which the appellant had responded "that's all" to an officer's question after the find and had also said that the foil was for wrapping the cocaine. At all times thereafter the appellant denied making these admissions.

The admissibility of the officer's question and the appellant's reply were challenged on appeal on the ground that a caution was not administered to the appellant before the question was asked.

The appellant appealed against conviction and sentence.

Held: (dismissing the appeal against conviction but varying the sentence)

(i) The fact that the appellant was already in custody on another charge did not preclude the asking of questions in respect of another offence but the requirement remained that a caution should be given as soon as the police officer had evidence of reasonable grounds for suspecting that the person had committed an offence. However, before this stage was reached questions must be permitted although answers to them could not be compelled.

(ii) The admissibility of a confession was a matter for the judge's discretion with the onus being on the prosecution to prove that the admission was voluntary. The Crown's evidence satisfied that burden.

(iii) The sentence was excessive with no enquiry having been made as to the appellant's means. A fine of $1000 with 1 month's imprisonment in default of payment would be substituted.

AC

Judgment - Required elements - Assessment of evidence

R v Vanderbol

Grand Court (SCA 22/93)
Schofield J
June 25 1993

Legislation

Traffic Law Ss 62(8)(a) & 62(2)

Cases referred to

Smith and Ebanks v R (1988-89) CILR 162
The SS Hontestroom [1927] AC 37

Mr Hampson for the appellant
Mr Clarke for the Crown

The appellant appealed against her conviction of failing to provide a specimen of breath, contrary to S 62 (8) Traffic Law. The appellant was arrested on suspicion of driving whilst intoxicated and taken to

the Police Traffic Department where she was told that a breath test would be conducted. The appellant agreed to provide a specimen but when called to the machine claimed to have felt light-headed, to have leaned forward and fallen out of her chair and onto the floor. The appellant indicated that she felt sick and tried, unsuccessfully, to vomit. The appellant was called again to the machine and again leaned forward and fell on the floor. The appellant testified that she had not eaten and had generally had a rough evening. When she rose to take the test one of the tabs on her high-heeled shoes had come off and she slipped to her knees. She was asked if she wanted to go to the hospital and had replied that it was probably a good idea. She further testified that she did blow into the machine but the officers had told her that she had not done it correctly.

Counsel for the appellant argued that the judgment of the learned magistrate was unsatisfactory in that there was no sufficient analysis of the evidence which resulted in unreasonable findings. Crown counsel also regarded the judgment as deficient.

Held: (allowing the appeal)

(i) The Grand Court may decide an appeal with reference to matters of fact as well as matters of law (S 170 of the Criminal Procedure Code) and thus it has an independent duty to assess the evidence to ensure that the learned magistrate did not err in his assessment and fall into erroneous findings of fact. However, any findings of fact reached by the magistrate on that assessment were not to be lightly disturbed. Unless it could be shown that the trial judge had failed to use, or had misused, his preliminary assessment of the facts, the appellate court was not to reverse such conclusions merely as a result of their own criticisms and comparisons of the witnesses and of their own view of the probabilities of the case. (The SS Hontestroom.)

(ii) The judgment in this case did not demonstrate that the learned magistrate had given proper and fair consideration to the evidence as a whole. Proper reasons were to be given for preferring some evidence over other evidence. To hold up the prosecution version of events, without reason, amounted to shifting the burden, incumbent upon the prosecution, to prove its case and disprove any defence put forward.

(iii) A judgment should contain the point or points for determination, the decision thereon, and the reasons for that decision. (Smith and Ebanks v R) The assessment of the evidence must demonstrate a proper and fair approach.

WB

Magistrates court - Raising of court lists - Desirability of placing all offences before one magistrate - Appropriate sentence for youthful offender

Bush v R

Grand Court (172/92)
Schofield J
May 21 1993

Mr Furniss for the appellant
Mr Roberts for the Crown

The appellant, when one month past his eighteenth birthday, was charged, in November 1992, with a series of burglary offences, with taking and driving away a motor car, driving without insurance, driving whilst disqualified and driving without a driving licence.

For reasons which were unclear, the burglary charges were placed in the Senior Magistrate's list whilst the motoring offences appeared in the list of the magistrate.

The Senior Magistrate, whilst aware of the appellant's burglary convictions, was unaware that he was currently serving a suspended sentence for taking and driving away a motor vehicle, neither was he informed of the serious motoring offences currently pending against him. The appellant was sentenced to twelve months imprisonment, six months of which was suspended.

Later that day, the appellant appeared before the magistrate in respect of the traffic offences to which he pleaded "guilty". The learned magistrate was told of the sentences handed down that morning by the Senior Magistrate and was also made aware of the previous suspended sentence in respect of taking and driving away a motor vehicle. The learned magistrate accordingly activated the suspended sentence and imposed an additional two month sentence, running consecutively, for driving without insurance. The total sentences of eight months imprisonment were expressed to take effect after the immediate six month term imposed by the Senior Magistrate.

Accordingly the appellant received, at the end of the day, an immediate term of fourteen months imprisonment with the result that the suspended term of imprisonment imposed by the Senior Magistrate would be spent in prison.

The appellant appealed against sentence.

Held: (dismissing the appeal)

(i) Whilst the learned magistrate's sentence cut across the sentence of the learned Senior Magistrate neither could be faulted for their sentencing policy. The problems were encountered due to the two sets of offences being dealt with in different courts. The better practice, wherever possible, was for an offender facing a number of charges, to be sentenced by the same court and on the same occasion.

(ii) Whilst fourteen months, as a first term of imprisonment was, for a youthful offender, "on the high side", it was not manifestly excessive.

MD

CRIMINAL LAW - SENTENCING

Crim. App. No.	Case No.	Offence	Sentence
19/91	222/90	Being concerned in possession of Cocaine	4 years Imp. Order for deportation
46/91	940/90	Manslaughter	14 years Imp.
14/92	4995/91	Robbery	8 years Imp.
15/92	4995/91	Robbery	7 Years Imp.
27/92	2637/91	Resisting arrest	6 months Imp.
27/92	2638/91	Assaulting police	6 months Imp.
27/92	2640/91	Poss of Cocaine with intent to supply	8 years Imp. Conc. Fined $500 or 14 days Imp. in default. Order for deportation
38/92	5735/91	Theft	6 months Imp.
38/92	5740/91	Obtaining property by deception	3 months Imp. Consec.
38/92	5741/91	Obtaining property by deception	3 months Imp. Conc.
38/92	5742/91	Obtaining Property by deception	3 months Imp. Conc.
38/92	5743/91	Obtaining property by deception	3 months Imp. Conc.
38/92	5744/91	Obtaining property by deception	3 months Imp. Conc.
38/92	5745/91	Obtaining property by deception	3 months Imp. Conc.
38/92	5746/91	Obtaining property by deception	3 months Imp. Conc.
41/92	5073/91	Theft	12 months Imp. Consec. to existing sentence
41/92	6056/91	Leaving scene of accident	Fined $50 or Ten days Imp.

Crim. App. No.	Case No.	Offence	Sentence
41/92	6057/91	Taking and driving away	6 months Imp. Consec. to existing sentence
41/92	6058/91	Driving without insurance	Fined $50 or Ten days Imp.
41/92	6059/91	Driving without licence	Fined $25 or Ten days Imp.
41/92	6060/91	Dangerous driving	Fined $50 or 14 days Imp.
41/92	6090/91	Giving false name to constable	1 month Imp. Conc. with existing sentence
41/92	6091/91	Failing to comply with traffic sign	Fined $50 or 14 days Imp.
41/92	608/92	Attempted Burglary	6 months Imp. Conc.
43/92	3944/91	Driving without Insurance	Fined $200 or 1 day Imp. Disqualified for 12 months
43/92	3945/91	Using vehicle with expired reg.	Fined $30 or 7 days Imp.
47/92	522/92	Poss of Cocaine with intent to supply	3 years Imp. & a fine of $100 or one month Imp.
48/92	523/92	Poss of Cocaine with intent to supply	3 years Imp. and a fine of $100 or one month Imp.
5/93	2449/92	Burglary	3 years Imp
5/93		Taking Away Conveyance	9 months Imp. Conc.
7/93	2741/92	Poss of Ganja with intent to supply	2 years Imp.
8/93	2710/92	Poss of Cocaine with intent to supply	5 years Imp. and a fine of $100 or 2 months Imp.
9/93	661/92	Burglary	9 months Imp.

Crim. App. No.	Case No.	Offence	Sentence
9/93	666/92	Burglary	3 months Imp. Conc.
9/93	667/92	Burglary	9 months Imp. Consec.
9/93	667/92	Burglary	9 months Imp. Conc.
9/93	1995/92	Burglary	6 months Imp. Consec.
10/93	1995/92	Burglary	6 months Imp.
10/93	2490/92	Handling stolen goods	9 months Imp. Conc.
10/93	2491/92	Handling stolen goods	18 months Imp. Consec.
11/93	780/92	Poss of Cocaine with intent to supply	4 1/2 years Imp. Conc. with 4860/91 (3 years)
11/93	1932/92	Burglary	15 months Imp.
11/93	1949/92	Assault Causing A.B.H.	3 months Imp.Consec.
11/93	1950/92	Possession of Ganja	6 months Imp. Consec.
11/93	2860/92	Consuming Ganja	3 months Imp. Conc.
18/93	2356/92	Burglary	12 months Imp.
18/93	2357/92	Consumption of Cocaine	9 months Imp. Conc.
18/93	2358/92	Consumption of Ganja	6 months Imp. Conc.
23/93	3789/92	Burglary	18 months Imp.
23/93	3791/92	Causing/ Inflicting Grevious Bodily Harm	18 months Imp. Conc.
23/93	4210/92	Causing/ Inflicting Grevious Bodily Harm	3 years Imp. Conc..

MD

EVIDENCE

Crime - Evidence - Corroboration - Sentence

R v Christian

Grand Court (SCA 133/92)
Schofield J
May 21 1993

Mr Furniss for the appellant
Mr Roberts for the Crown

The appellant was convicted of attempted burglary and appealed on the basis that the conviction was unsatisfactory. He pleaded guilty to three counts of burglary and one count of wounding and was sentenced to two years imprisonment for burglary and a further three months for wounding.

Held: (appeal allowed)

(i) The conviction was unsatisfactory because the evidence was too weak. The single police witness admitted that his view of the key elements was fleeting. The second police officer at the scene was not called to testify. There was no supporting evidence, such as forensic evidence, to show that the appellant had ever held the alleged burglary tool.

(ii) The burglary charges to which the appellant pleaded guilty involved residential properties and were committed over a period of four months. The appellant had a previous conviction for burglary. The wounding was committed by the appellant throwing a bottle at a lady when a piece of broken glass lacerated her leg, leaving a scar. The sentences were appropriate.

JE

Alleged rape - Complainant's evidence discredited - Submission of no case to answer

R v Beecher

Grand Court (23/92)
Harre J
March 18 1993

Cases referred to

R v Galbraith [1981] 1 WLR 1039
R v Barker (1977) 65 Cr App Rep 287

Mr Clark for the Crown
Mr Hamilton QC and Mr McField for the defendant

The defendant had been charged with the rape of the complainant, L. According to L, the incident took place while being examined by the defendant, a gynaecologist. L stated in her examination in chief that she felt the defendant's penis come out of her vagina and touch her leg.

In cross-examination however, L said that she could not be absolutely sure what touched her leg. She also said she did not see the defendant's penis at all nor did she see his fly open or being closed. She did not feel his penis enter her. She saw, rather than felt, a thrusting motion. She also stated that she did not know whether it was the defendant's hand or penis which entered her.

The defence made a submission of no case to answer.

Held: (upholding the submission of no case to answer)

(i) On such a submission of no case to answer, it had to be considered whether there was evidence upon which, if accepted, a reasonable jury, properly directed, could convict. (R v Galbraith.)

In Galbraith it had been said that there were two schools of thought:

(1) that the judge should stop the case if in his view it would be unsafe or unsatisfactory for the jury to convict; or
(2) that he should do so only if there was no evidence upon which a jury, properly directed, could convict.

Although in many cases the question would be one of semantics with each test producing the same result, this was not necessarily so. A balance had to be struck between, on the one hand, the usurpation by the judge of the jury's function and, on the other, the danger of an unjust conviction.

(ii) The complainant had said that she did not know whether it was the defendant's hand or penis which

entered her. This had led to the submission that if she did not know what had entered her, she could not know whether it was a hand or penis which emerged. No general proposition could be advanced that because a woman did not see or feel penetration, that a *prima facie* case of rape could not be made out. However, in the particular circumstances of the present case, there was no answer to the defence submission that the first person who had to be sure that she had been raped was the complainant herself.

(iii) In view of the tenuous nature of the evidence given by the complainant and taking that evidence together with that of other witnesses the prosecution was thrown back upon inviting the jury to come to the view that the only reasonable inference to be drawn from the expert evidence (taking that evidence at its highest) was that the stains containing L's DNA could only have been where they were found, on the defendant's clothing, as a result of sexual intercourse between him and L. No reasonable jury, properly directed, could, in the light of the prosecution evidence as a whole, come to that conclusion or find that the defendant raped L.

Accordingly, the jury were to be instructed to return a verdict of not guilty of the offence of rape with which the defendant had been charged.

AD

LAND LAW

Land encroachment

Whittaker v Challenger

Grand Court (329/91)
Harre CJ
September 21 1993

Legislation

Limitation Law 1991 S 19

Mr Levy for the plaintiffs
Ms Connolly for the defendant

This was a family dispute in respect of two adjoining parcels of land at Northside whereby the plaintiffs alleged that the defendant had encroached upon their parcel by erecting part of his house, a shed and a water cistern on it.

The plaintiffs were husband and wife. The defendant was the husband's son by an earlier marriage. The whole area of land had originally been in the ownership of the defendant's father (one of the plaintiffs) and another.

The plaintiffs' case was to the effect that the extensions causing the encroachment were constructed since 1987 ie since the establishment of boundaries by the Cadastral Survey.

The defendant's case was to the effect that the building work was merely on foundations already in place since 1969.

No expert evidence was adduced by either party.

The case depended upon the Chief Justice's view of the facts.

Held: (judgment for the plaintiffs)

(i) On the balance of probabilities the encroachment took place in and after 1989.

(ii) This was a continuing encroachment and damages were not an appropriate remedy. Accordingly that part of the house, cistern and shed which encroached upon the plaintiffs' land should be pulled down forthwith.

(iii) Nominal damages of $100 were awarded for the encroachment

(iv) Costs to the plaintiffs to be taxed or agreed.

AC

SUCCESSION

Removal and replacement of personal representatives

In the Estate of X

Grand Court
Malone CJ
February 12 1993

Legislation

Succession Law Ss 8 & 10

Mr Murray for the plaintiffs
Mr Grant for the defendant

The defendant was the personal representative of the estate of X and the plaintiffs, beneficiaries of the estate, were seeking his removal and replacement by themselves. It was alleged that since his appointment as personal representative in August 1982, the defendant had failed to file accounts.

The defendant contended that the court had no jurisdiction on the application and if it did have jurisdiction, the facts did not warrant his removal.

Held: (application dismissed)

(i) S 8 of the Succession Law ("the Law") conferred on the court the powers to remove an administrator. S 10 of the Law, which provided that applications for removal or substitution of personal representatives may be made by chamber summons, is a procedural, rather than an enabling, section. As such, S 10 did not confer jurisdiction upon the court, rather it contained the procedure for the implementation of S 8. As S 8 provides for the removal of a personal representative in cases of neglect or misconduct the kind of petition the section requires is one that is to come before a judge in open court.

(ii) The proceedings should have been commenced by petition and not by writ of summons since the plaintiffs, as beneficially interested persons, sought the removal of the defendant as administrator for neglect in the administration of the estate and appointment of themselves in his place.

WB

TRUSTS

Discretionary trust - Trustees duties - Order for judicial accounting - Disclosure of trust documents - Leave for service *ex juris* - Counterclaim - Inconsistent Proceedings - Principles of election

A and Others v Trustees & Others

Grand Court (425/92)
Harre CJ
April 19 1993

Legislation

Order 11 rules 4 15(1) & 21 of the Grand Court (Civil Procedure) Rules
Rule 37 Probate & Administration Rules
Articles 138 & 268 Greek Civil Code
Rules of The Supreme Court of England and Wales Order 43 rule 1

Cases referred to

Re Londonderry's Settlement [1965] Ch 918
O'Rourke v Darbishire [1920] AC 581
Re Cowin (1886) 33 Ch D 179
Shipley v Crouse [1977] 370 Ad 97
Birmingham v Kirwan (1805) 2 Sch & Lef 444
Codrington v Codrington (1875) LR 7
Pitman v Crum Ewing [1911] AC 217
Johnson v Agnew [1980] AC 367
Express Newspapers v News Ltd [1990] 3 All ER 276
British Airways v Laker Airways [1985] 1 AC 58
Castanho v Brown & Root (UK) Ltd [1981] AC 557
Society Aerospatiale v Lee Kui Jak [1987] 1 AC 893

Mr Mobray QC Mr Stevens & Mr Foster for the plaintiffs
Mr Walker QC & Mr Jones for the 1st-6th defendants
Mr McDonnell QC & Mr Ritchie for the 7th-9th defendants
Mr Alberga QC and Mr Quin for G

The litigation concerned a family dispute involving substantial assets settled by the deceased father of the first plaintiff in setting up a Foundation in the Cayman Islands in 1984. The first six defendants to the action are present and past trustees of the Foundation, the 7th-9th defendants being the settlor's widow and two daughters ('the ladies'). B is the other son of the settlor.

The first plaintiff and B had individually commenced separate proceedings in Greece claiming, *inter alia*, that the Foundation amounted to a fictitious gift within Article 138 Greek Civil Code and was therefore void, entitling them to succeed to a moiety of the assets as heirs at law.

In the Cayman proceedings the plaintiffs, whilst not admitting the validity of the Foundation, made serious allegations of misconduct and impropriety on the part of the trustees, seeking redress (including the removal of the trustees) on the basis of its existence.

Under the terms of the Foundation, the settlor's widow and children form the discretionary class of beneficiaries. A's children, the second and third plaintiffs, are among the class able to benefit ultimately

at the expiration of the Foundation's perpetuity period.

The settlement vested wide powers in the trustees but it was clear from the deed itself and from a separate "Memorandum of Wishes" that the settlor intended, during his lifetime, to reserve for himself a large degree of control.

The present litigation concerned four separate summonses raised by the plaintiffs, B and the trustees:-

The Accounting Summons:

In their first summons the plaintiffs called, under rule 21 Grand Court (Civil Procedure) Rules, for the court to exercise its discretion in ordering the release, by the trustees, of certain accounting information pertaining to the Foundation. The plaintiffs alleged that the defendants had an absolute legal duty either as regular or bare trustees to account to the plaintiff beneficiaries.

It was contended by the defendant trustees, supported by the ladies, that the right to a summary order for judicial accounting was subject to various qualifications such as cost and expedition, operating to make disclosure in the present case inappropriate, *a fortiori* because an exhaustive audit had already been carried out. The trustees further contended that in obtaining information about the Foundation from Cayman A and B were engaging in a "fishing exercise" of use to the Greek proceedings. Finally, the trustees asserted that any duty to account was dependent upon the plaintiffs admitting the validity of the Foundation, which they had not.

The Disclosure Summons:

In their second summons the plaintiffs sought an injunction allowing inspection of trust documents relating to the Foundation and information pertaining to the appointment of trustees and the appointment and removal of beneficiaries. Accounting information relating to companies controlled by the defendants *qua* trustee was also sought.

The trustees asserted that the right of a beneficiary to inspect trust documents was not an absolute one and required a consideration of the class rights of the beneficiaries as a whole as to whether disclosure was in their best interests. The trustees further asserted that only certain categories of trust documents could, in any event, legitimately be called for by the beneficiaries.

Summons by B:

The first plaintiff's brother sought to discharge an *ex parte* order made in February 1992 granting leave to the first six defendants to serve notice of their counterclaim out of the jurisdiction upon him.

The substance of the defendants' counterclaim was that A was conducting the present action as a nominee of B and that the trustees had the right to require A and B to elect between the two inconsistent actions being maintained currently in the Cayman Islands and Greece.

In his affidavit B asserted that he had never visited the Cayman Islands, that he had no connections with the jurisdiction and that the action of A, seeking an injunction, was maintained entirely independently by the first plaintiff without B's encouragement.

The Election Summonses:

These summonses, dated 24th January and 21st February 1992, were brought by the trustees to require A and B to be put to their election with regard to the two inconsistent sets of proceedings being maintained in Greece (where the Foundation was alleged to be void) and Cayman (where A and B assumed the status of beneficiaries). Allowing the plaintiff to "blow hot and cold" in this way was contended to be vexatious and oppressive to the interests of the defendants.

Counsel for A countered that the prayer in the Greek action amounted to no more than a "step towards the specific delivery sought" of a moiety (18.75%) of the settlor's estate. B maintained that it was an "entirely novel proposition" to suggest that a foreign national who commences proceedings in his own country should be put to his election between those proceedings and proceedings in Cayman, to which he was not a party, simply because both he, and his brother, were pursuing separate actions in Greece asking, *inter alia*, for the Foundation to be set aside.

Held: (order as follows)

The Accounting Summons:

(i) The preliminary issues raised by the defendants made an order for judicial accounting "quite inappropriate". The legitimate concerns of the plaintiffs balanced against the interests of the beneficiaries as a whole would be addressed by the orders to follow.

The Disclosure Summons:

(ii) The general principle concerning a beneficiary's right to inspect trust documents was laid down in O'Rourke v Darbishire where it was stated that the beneficiaries have a proprietary interest in, and therefore a right to see, all such documents. This proposition had been qualified by the Court of Appeal in Re Londonderry where it was observed that where trustees have been invested with discretionary trusts and powers they would not be bound to disclose documentation leading to their decision as such would unduly fetter the position of the trustee.

(iii) In the present circumstances the fact that the trust involved the administration of very large commercial assets indicated the need for a degree of confidentiality.

(iv) It was also stated in Re Londonderry that an allegation of *mala fides* against the trustees would present a cogent reason for disclosure. On the present facts, however, it was to be noted that whilst the plaintiffs had advanced such allegations, the ladies were in strong support of the trustees.

(v) Acting in the best interest of the trust estate and the beneficiaries as a whole, an order for disclosure would be made on the plaintiff's undertaking to pay the reasonable costs of the affected defendants. The order was subject to the *caveat* however that whilst the defendants were to make available to the plaintiffs many trust documents they were not obliged to make disclosure of the accounts of the trust nor any records or vouchers from which the accounts were prepared.

The trustees were to be allowed liberty to apply to the court as to the working out of the order.

Summons by B:

(vi) Although the court was to exercise circumspection in obliging a person outside the jurisdiction to submit to it, the *ex parte* order would not be interfered with. It could not be said that there was an absence of a good arguable case on the election issue and there had not been any material non-disclosure at the *ex parte* stage concerning A and B's Greek proceedings. Furthermore, B had benefitted, and had sought to benefit, from the first plaintiff's application which justified subjecting B to the inconvenience and expense attended by the order for assumed jurisdiction.

The Election Summons:

(vii) This was not a typical *"forum non conveniens"* claim as here the allegation was not that the plaintiffs were pursuing the same claim in different jurisdictions but, rather, that they were maintaining mutually exclusive ones.

(viii) The court gained assistance on the question of election, *inter alia,* by analogy with cases involving applications for restraint of a foreign action by injunction. Whilst no injunction was here sought in relation to foreign proceedings, putting a party to his election as to competing *fora* amounted, nevertheless, to interference with the process of justice in the foreign court.

(ix) Counsel for the plaintiffs had correctly contended that no authority existed to preclude the first plaintiff from maintaining two distinct actions in the separate jurisdictions: one to set aside the Foundation and one to remove the trustees. If the claims were to be divided independently thus, they would cease in actuality to be alternatives.

The court was to be guided by considerations of common sense and equity in seeking an answer devoid of vexation and oppression.

(x) Applying the foregoing principles, the danger of unjust enrichment to A if he were not put to his election was remote. On the other hand the allegations levelled at the trustees were of a serious nature and it would be unjust to preclude the plaintiff from pursuing one remedy at the expense of the other.

(xi) The defendants' assertions that the court should not countenance proceedings in the name of minors (the second and third plaintiffs) not being for their benefit (in that A's success in the Greek action would lead to a diminution of their interests) were unfounded.

(xii) Neither could it be said that A did not come to the Cayman court with clean hands. On the contrary, the defendants' case lent support to A's contention that the defendants wished A to be made to elect the Greek proceedings; with the second and third plaintiffs removed the Cayman action would be over, leaving the trustees free to administer the trust unfettered.

(xiii) In the light of the first plaintiff's complaint against the trustees, further support was apparent for A's assertion that the plaintiff lacked sufficient information to make any election, at least until a ruling on the disclosure summons was forthcoming.

(xiv) Applying the foregoing, the election summonses in relation to A and B would fail. No pre-emptive order for costs to be paid from the trust estate would be made.

MD

Constructive trusts - Breach of fiduciary duties by company director - Requirement of knowledge on the part of the trustee - Meaning of knowledge

X & Y Ltd (in Liquidation)

Grand Court (490/91)
Harre CJ
September 2 1993

Cases referred to

Prospect Properties Ltd (in liquidation) v McNeill & James Bodden II (1990) CILR 171
Pedro Developments Ltd v Huig Zuiderant & Spotts Development Ltd (1990-91) CILR N-7
Arab Monetary Fund v Hashim & Others [1990] 1 All ER 673
Eagle Trust plc v SBC Securities [1992] 4 All ER 488
Lipkin Gorman v Karpnale Ltd [1992] 4 All ER 409
Baden v Societe Generale pour Favoriser le Development (1983) [1992] 4 All ER 161
AGIP (Africa) Ltd v Jackson [1992] 4 ALL ER 385

Mr Turner for the plaintiff
No appearance by either defendant

The plaintiff is a Cayman Islands insurance company which was placed in voluntary liquidation in July 1991. The investigations of the liquidators led them to believe that certain of the plaintiff's assets had been removed from the company by the first defendant, and sole director, A, and his wife, the second defendant.

The claims against the defendants concerned the following:

1. An alleged transfer of two sums of money, US$235.000 & US$54,336, from the plaintiff to U. Corporation, a company controlled by A and onwards to other companies controlled by him or to his personal account in Switzerland. The evidence was in the form of letters written to the plaintiff's bank directing the transfers. The liquidators were unable to find any consideration or satisfactory explanation respecting these transfers.

2. Sums of money totalling US$70,317.59, borrowed by A and his wife on the security of two insurance policies issued by Crown Life Insurance Company of Canada. The assured was A in both cases and the beneficiary, the plaintiff. Three days before the liquidation of the plaintiff, A sought to transfer the policies to H. Co., a company controlled by him with a new beneficiary, "S.C. Life Insurance Trust". Accordingly, even if proceedings in Canada by the plaintiff to recover the benefit of the policies were successful, the plaintiff's interest would be prejudiced at least to the extent of US$70,317.59.

3. Certificates of Deposit, representing deposits of US$1m belonging to the company, were pledged as security to First Union National Bank of Florida in respect of personal loans made to the defendants. US$1,009,745 was lost to the bank who realised its security following the failure of the defendants to make repayment.

4. A sum of US$795,297, representing the balance due to the plaintiff company from its reinsurer, C. (America) Ltd, a company owned and controlled by the first defendant. This sum remained outstanding to the plaintiff never having been transferred by the first defendant. Contrary to the Articles of Association, A had not declared his interest in C. (America) Ltd to the plaintiff.

The statement of claim averred that both defendants were constructive trustees of the foregoing in that they "knew or should have known that the plaintiff was insolvent at all material times" and despite this knowledge deprived the plaintiff of its assets diverting them for the defendants' personal use.

Both defendants countered these allegations by reference to a resolution of the plaintiff, signed by the first defendant in May 1990, declaring that loan proceeds extended to the borrowers continued to "inure to the benefit of the Corporation" thereby constituting sufficient consideration for the plaintiff's guarantee and pledge of Certificates of Deposit. The second defendant asserted further that she was neither a shareholder nor director of the plaintiff and neither knew nor should have known of the plaintiff's insolvency.

Central to liability as constructive trustee is the issue of knowledge:-

In the Baden case, Peter Gibson J had considered the degrees of knowledge required on the part of a stranger to a trust, or a party to a fiduciary relationship (such as that existing between a director and the company) to label him/her a constructive trustee, and concluded that any of the following five degrees of knowledge would, for this purpose, suffice:-

(1) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man: (v) knowledge of circumstances which would put an honest and reasonable man on enquiry.

Held: (order as follows)

(i) In the authorities since the Baden decision it had been acknowledged that what may otherwise fall into categories (iv) and (v) may, in default of satisfactory explanation, in reality fall into categories (ii) or (iii).

(ii) Where a stranger was to be made liable as a constructive trustee on the basis of "knowingly assisting" in a fraudulent breach of trust the true distinction to be drawn was between honest and dishonest assistance. (Agip (Africa), Eagle Trust, and Lipkin Gorman applied.)

(iii) It was clear from the evidence that the second defendant was guilty of lack of probity; her experience as a sales director of a company precluded her from claiming ignorance with regard to business matters.

The following orders would be made:

1. That the first defendant was in breach of his fiduciary duties as a director of the plaintiff and was a trustee / constructive trustee of the sums transferred from the plaintiff's account, namely US$235,000 and US$54,336.

2. That the first defendant repay the aforementioned sums together with interest at the rates that would have been paid by the plaintiff's bankers.

3. That the first defendant was in breach of his fiduciary duties as a director of the plaintiff in instigating the transfer of insurance policies from the plaintiff to H. Co. The first and second defendants were to make repayment of US$70,317.59 being the sums borrowed by them against the policies.

4. That the first defendant was in breach of his fiduciary duties owed to the plaintiff and that both defendants had committed a fraud on the plaintiff, its insured and other creditors in hypothecating Certificates of Deposit of the plaintiff to secure their personal indebtedness to First Union.

5. That the first and second defendants were trustees / constructive trustees of US$1,009,745 representing the sum debited by First Union from the plaintiff's account in order to clear the personal indebtedness of the defendants.

6. That the first and second defendants make payment of the aforementioned sum with interest at the rate that would have been applied by First Union during that period.

7. That the first defendant was in breach of his fiduciary duties owed to the plaintiff in failing to pursue the plaintiff's reinsurance claim totalling US$795,297 against C. (America) Ltd.

8. That the first defendant make payment to the plaintiff of the aforementioned sum together with interest until the date of this judgment at rates that would have been applied by First Union.

9. That the defendants pay post judgment interest at the rate of 7 1/2% per annum.

10. That the defendants pay the costs of the plaintiff as taxed or agreed.

MD

MARRIAGES OF CONVENIENCE UNDER CAYMAN'S IMMIGRATION LAW - THE POTENTIAL PROBLEMS

A marriage of convenience, otherwise known as a 'sham', 'ostensible' or 'limited purpose' marriage[1] is often entered into for the primary purpose of achieving a limited objective without any desire to fulfil usual marital obligations.

The growing problem of sham marriages in most parts of the world (especially in the rich countries) is often precipitated by world economic and political problems. Escalation of international and civil wars in many parts of the world, political turmoil and acute poverty in a number of developing nations very often forces mass migration of populations from the troubled parts of the world to where those fleeing believe there is a better life. Immigration laws of most countries do not usually allow easy settlement and consequently some means, an obvious one being a sham marriage, is found to circumvent the laws. Sham marriages may also be entered into for other purposes such as tax evasion, social security claims and the legitimation of children.

Numerous cases have arisen in various jurisdictions hi-lighting immigration concerns. Typically, a spouse will try to establish entitlement to enter, or to continue to reside, in a country or a spouse, after the objective of the sham marriage has been attained, will go to court to seek to annul the marriage.

Arguments against the validity of such marriages have been advanced in many jurisdictions and at various historical times.[2] Before considering whether or not a sham marriage entered into for a particular purpose such as circumventing immigration laws is valid, one has to examine the nature of marriage itself.

A marriage can be viewed from two distinct angles. Firstly, the marriage ceremony itself - the act of a couple becoming husband and wife. Secondly, the benefits that accrue from the relationship created between a husband and wife. Put another way, the first angle involves considering marriage as a contract whereas the second angle involves considering the status that derives from the marriage.[3] As will be seen, the position of marriages of convenience from the contract perspective is quite clear under English law. More problematic, however, is the question of what benefits accrue from such a contract.

The classic common law definition of a marriage is that of Lord Penzance in the English case of **Hyde v Hyde**:[4]

"...marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others".

There are four elements in the definition:

(1) the marriage must be voluntary i.e. the parties must consent to it.
(2) it must be for life.
(3) the union must be heterosexual.
(4) it must be monogamous.

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[1] See: Wade 'Limited Purpose Marriages' (1982) 45 MLR 159 for other variants.

[2] In M'Innes v More [1782], a Scottish marriage to prevent disgrace arising from pregnancy was held to be invalid. In Kelly v Kelly (1932) 148 LT 143 a marriage ceremony undertaken for business convenience was held to be void. The position of the Roman Catholic church as expressed in the Codex Juris Canonici, Canon 1086, is that if either or both parties by a positive act of will exclude marriage itself, or all rights to conjugal act, or any essential property of marriage, he contracts invalidly.

[3] Professor Bromley makes the distinction in Chapter 2 of Bromley's Family Law (8th edition).

[4] [1866] LRI P + D 130.

To conclude a marriage contract, like any other contract, matters of form and capacity need to be observed. It will be for the law of the forum to characterise the issue as either one of form or one of capacity, so that it may, in turn, determine the applicable law.[5] If both formal and essential requirements are not met, the marriage may be void or voidable.

The distinction between the two is significant in practice. Whilst appearing contradictory, void means void *ab initio* i.e. the marriage is treated as if it never came into existence. As a consequence, while a decree of nullity may be sought in practice, one is not actually necessary in such cases to establish the fact of nullity. Ironically, in the United Kingdom, a party who goes to court to annul such a marriage is entitled to most of the relief granted in consequence of divorce. If on the other hand a marriage is held to be voidable, it is treated as a valid subsisting marriage until a decree of nullity is issued. Only the parties to the marriage may seek to annul it.

Formal validity will be governed by the law of the place of celebration of the marriage. In Cayman, matters of formality are set out in the Marriage Law 1963.

As to capacity, or essential validity, there is debate as to which system of law should govern the issue. The alternative doctrines are the dual domicile doctrine and the law of the intended matrimonial home doctrine. Under Dicey's dual domicile theory both parties to the marriage must have capacity by the law of their ante-nuptial domiciles for the marriage to be essentially valid. Under the intended matrimonial home theory propounded by Dr. Cheshire:

> "The basic presumption is that capacity to marry is governed by the law of the husband's domicil at the time of the marriage, for normally it is in the country of that domicil that the parties intend to establish their permanent home. This presumption, however, is rebutted if it can be inferred that the parties at the time of the marriage intended to establish their home in a certain country and that they did in fact establish it there within a reasonable time."[6]

Whilst it could be argued that many English authorities are inconclusive as to which theory should govern, the general view seems to give prevalence to the dual domicile theory.[7] An exception to this theory had to be formulated based on an 1879 English decision.[8] The exception is to the effect that where a marriage is celebrated in England and one party possesses foreign domicile then the marriage will not be invalidated by reason of lack of capacity under the law of the foreign domiciliary if no such incapacity exists under English law.

In Cayman, the essential requirements for a valid marriage are set out in the Marriage Law 1963 and the Matrimonial Causes Law 1976.

Some examples from English and United States case law may perhaps help to illustrate the difficulties posed by sham marriages in the context of immigration law.

In **Puttick v Attorney-General**[9] a German fugitive who had jumped bail, obtained a forged passport and absconded to England to avoid prosecution and contracted a marriage of convenience. The sole purpose of this was to obtain residence in England. The information given on the marriage certificate consisted of the assumed identity. The court nevertheless held the marriage was valid. In the course of his judgment,[10] Sir George Baker stated:

> "A 'marriage of convenience' is a popular, not a legal, description. All I need say is that this marriage lacked all the purposes and intentions of a genuine and generally accepted union, namely mutual love, support and comfort; cohabitation in the matrimonial home as husband and wife; a marriage for life and the production of children. But that is immaterial to the validity of the marriage."

In another English case, **Silver v Silver,**[11] an Englishman who was married but living apart from his wife met a German lady he wished to live with. To achieve this, he arranged for his step-brother to marry the woman in Germany and come to

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5 *Infra*.
6 See: Cheshire and North 'Private International Law' (12th Edition) p 587.
7 *Ibid* pp 588-599 for evaluation of the theories and reference to English decisions.
8 Sottomayer v De Barros (No.2) [1879] 5 PD 94.
9 [1979] 3 All ER 463.
10 *Ibid* at 469.
11 [1955] 2 All ER 614.

England with her. The main purpose was to enable her to get permanent residence in England. She came and lived with the lover in England until his death. She then met a German man in England and wanted to marry him. She sought an annulment of the marriage to the deceased lover's step-brother. The court refused to annul the marriage.

The judge ruled that:[12]

> "mental reservations on the part of one or both of the parties to the marriage do not affect its validity".

As such he was not persuaded by the American authority of **United States v Rubinstein**[13] in which it was stated:

> "If the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never agreed to be married at all."

In contrast to the above authority, in another United States case, **Faustin v Lewis**[14] a sham marriage was arranged and payment was made for a Haitian woman to marry a United States' citizen in order to get residence in the United States. The Supreme Court held the marriage was valid. The Court, however, exercised its discretion to allow a dissolution as the continued existence of the marriage served no purpose.

The leading English authority is the decision of the House of Lords in **Vervaeke v Smith:**[15]

The facts of the case are complex and raise many issues of a private international law nature beyond the scope of this article.[16] The woman, domiciled in Belgium, had contracted a marriage with a domiciled Englishman. The marriage was a sham as the couple never intended to live together as man and wife and had, in fact, parted at the doors of the register office only to meet on a couple of occasions thereafter with regard to her applications for a British passport and nationality. The marriage was simply to enable the wife to acquire British nationality and, as a consequence, to avoid deportation for being a prostitute.

In earlier and separate proceedings in 1970,[17] the wife had sought a nullity decree on the basis of lack of consent. This was refused by Ormrod J who stated (in a part of the judgment that is not reported):

> " Where a man and a woman consent to marry one another in a formal ceremony, conducted in accordance with the formalities required by law, knowing that it is a marriage ceremony, it is immaterial that they do not intend to live together as man and wife ..... if the parties exchange consents to marry with due formality intending to acquire the status of married persons, it is immaterial that they intend the marriage to take effect in some limited way."

The wife subsequently obtained a nullity decree before the Belgian Courts as under Belgian Civil Law sham marriages were considered repugnant to human dignity and contrary to public policy. It was the question of recognition of this decree that ultimately came before the House of Lords in 1983, after being denied recognition in the High Court and Court of Appeal. In the course of the Lords' opinions, the *dictum* of Ormrod J was affirmed. Lord Hailsham, LC, stated that whilst he would not wish Ormrod J's statement to be of universal application, he had:

> "...no doubt that it would extend to a marriage as here celebrated in England between a British to a foreign national in circumstances where the ceremony was intended to achieve the status of British nationality in the Foreign national by means of the marriage and the private arrangement between the parties was simply to limit their personal relationships to the achievements of the status of a married person with a view to acquiring British nationality for the previous alien partner."[18]

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12 *Ibid* at 615.
13 151 F 2d 915 (2d cir 1945).
14 [1981] 85 NJ.
15 [1982] 2 All ER 144.
16 For more detailed analysis see: Cheshire and North Pp 387 and 677.
17 Messina (formerly Smith orse. Vervaeke) v Smith (Messina intervening) [1971] 2 All ER 1046.
18 [1982] 2 All ER 144 at 148.

Lord Simon made reference to the marriage having been "legally adopted and ... being consonant with our general law of contract."[19]

From this analysis it is clear that, assuming that the marriage has been contracted by persons of full capacity (determined under the appropriate law) and in accordance with the formal requirements of the law of the place of celebration, the marriage will be valid notwithstanding that it was only for a limited purpose.

If the marriage itself is valid in the matrimonial sense then the next question to consider is what effect, if any, its sham character will have upon the other legal incidents of marital status. Should one not logically say that the marriage will be valid for determining benefits which accrue from the status of marriage such as taxation and immigration matters? Alternatively, can it be said that the parties to the valid marriage will not be permitted to acquire all or some of the benefits of such marriage because it was contracted for a limited purpose?

It is now necessary to consider the immigration position in the Cayman Islands in more detail. The two main areas where a marriage of convenience could be seen to have implications within the Islands are in respect of the acquisition of Caymanian status and the right to reside permanently in the Islands.

It is submitted that marriages of convenience will have no impact upon the acquisition of Caymanian status. S 15(5) Immigration Law 1992 provides that :

> "any person who is the spouse of a person who possesses Caymanian status...may apply to the [Immigration] Board for the grant of Caymanian Status".

In addition, the individual must satisfy the other requirements of that section which include the fact that the person must not have lived apart from his spouse for an aggregate period of 12 months out of the five years immediately preceding the application and must have been ordinarily resident in the Islands for a period of 3 years immediately preceding the application.

The Law further provides that the person shall cease to enjoy Caymanian Status so granted if either spouse ceases to possess Caymanian Status or, within 10 years of the grant of status, the marriage 'ends' by way of the person living apart from the spouse under a court order or deed of separation; the person living apart from the spouse in a situation where the Immigration Board considers the marriage has irretrievably broken down or the marriage is dissolved or annulled.[20]

It can be seen therefore that, whilst a valid marriage can lead to the grant of Caymanian status, if the above conditions are satisfied, such a marriage can hardly be called 'convenient'. Whilst it could be argued that if the object was to obtain Caymanian Status then it would still be a 'limited purpose' marriage, one has to consider the time factor. 'Limited purpose' would tend to imply limited in time as well as purpose and this would clearly not be the case here.

Difficulties arise with regard to the grant of a right of permanent residence in the Islands. Provision has been made for policy directions issued under the repealed Caymanian Protection Law 1984 to be used by the Immigration Board for guidance in dealing with applications for permanent residence.[21]

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[19] *Ibid* at 158. Although adopting this stance, the House of Lords did not dwell on matters of form or capacity in respect of this marriage. As far as the issue of consent was concerned for nullity petitions this was a matter of 'quintessential validity' to be governed either by the law of the place of celebration or the law of the country with which the marriage had the most real and substantial connection; English law in either case. It is submitted that the better approach would have been to follow the Court of Appeal reasoning which appears to frame the issue as an exception to the dual domicile test set out above - i.e. whilst there was incapacity according to the wife's ante-nuptial domiciliary law (Belgium) this should not invalidate a marriage in England with an English domiciliary having capacity.

[20] S 18(1)(b).

[21] The Immigration (Temporary Provisions) Directions 22 Oct 1992.

Direction 22 provides: (emphasis supplied)

" In the case of applications from persons with close family connections *[which includes the spouse of a person who possesses Caymanian status]* with the Islands, the Board should be inclined to grant such applications, subject to the following considerations:

(1) They should be satisfied:

(a) in the case of a spouse, that the marriage is genuine and not entered into for the purposes of settlement in the Islands. In determining this they may have regard to the length of the marriage and to all other relevant factors;

(b) that the economic position of the applicant and the applicant's family in the Islands is sufficient for the support of the applicant and his dependants (whether here or elsewhere). "

The wording of S 22(1)(a) is wide and both requirements of part (a) will need to be satisfied separately. The Board will need to be so satisfied on the balance of probabilities.

The Board will have to decide whether in its opinion the marriage is 'genuine'. The Oxford English Dictionary defines 'genuine' as 'not sham or feigned'; this would allow for the grant of rights to be denied notwithstanding the fact that the marriage itself may be 'valid'.

The words 'and not entered into for the purposes of settlement' are more problematic. On a strict interpretation, if the parties simply intended to live (as opposed to 'settle') in the Islands (as presumably will often be the case) then the Board could not be satisfied and an application would have to be refused although it is hoped a common sense interpretation would prevail. It is submitted that it would be at least more consistent if the wording was to reflect the language of S 77 of the Immigration Law 1992.[22] Direction 22(1)(a) would accordingly read:

> "in the case of a spouse, that the marriage was not entered into with the primary intention of avoiding any of the provisions of the Immigration Law or with the intention of obtaining any benefit under that Law".

Similar provisions for curbing marriages of convenience exist under the United Kingdom Immigration Rules of 1977-1985. Under these Rules, a foreign husband or wife wanting to join a spouse who is settled in the UK needs an entry clearance from an Entry Clearance Officer (ECO). Such entry clearance will be refused unless the ECO is satisfied that: (i) the marriage was not entered into primarily to obtain admission to the UK (ii) each of the parties has the intention of living permanently with the other as his/her spouse and (iii) the parties have met.[23]

The UK provisions have raised very complicated problems with regard to arranged marriages entered into by tradition or as a norm between British citizens of Asian origin and spouses from their homelands such as India or Pakistan. Most of these couples often have never met before the wedding day and it is extremely hard discerning the genuineness or otherwise of such marriages.

The UK provisions seem to raise the presumption, although this is denied by some judges, that an arranged marriage involving a British citizen and a foreign spouse celebrated outside the UK is usually entered into with the primary purpose of obtaining admission to the UK. The burden of proving otherwise to the satisfaction of an ECO lies on the applicant seeking admission: see: R v Immigration Appeal Tribunal ex parte Kumar.[24] Most of the UK cases have involved immigration appeals to prove the genuineness of the marriage and the right to enter or reside in the UK.

Attempts to investigate sham marriages often give rise to criticisms of marriage snooping, invasion of privacy and intrusion

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22 *Infra.*

23 See: para 41 of the Immigration Rules as amended by HC 503 (1985). The 1977 Rules referred to: "The husband of a woman who is settled in the United Kingdom or who is on the same occasion being admitted for settlement..." The 1985 amendment refers to: "...a passenger seeking admission.." It thus covers a male or female spouse.

24 [1987] 1 FLR 444. See also: R v Immigration Appeal Tribunal ex parte Bhatia [1986] Family Law 87.

into family life. In Britain, Home Office officials working together with the police to investigate such marriages are often bombarded with criticisms of racism, violation of civil liberties and harassment of immigrants. One such vocal group being the Joint Council for the Welfare of Immigrants. Cases have been sent to the European Court of Human Rights where spouses have been refused entry to join their spouses settled in the UK.[25]

Similar problems are bound to occur when the new Cayman Islands Constitution containing fundamental rights comes into effect. Article 8 of the Constitution, which is a reproduction of Article 8 of the European Convention on Human Rights, deals with the right to respect for private and family life. Any prying into a marriage of convenience is bound to be seen by advocates of civil liberties as an unacceptable intrusion into private and family life.

Most visits by investigating immigration officers are without advance notice and may take the form of dawn raids. Interviews can be of a highly personal nature. In a typical interview in the UK, one Pakistani man was asked a series of questions including: the names of everyone in the house, where each of these people slept, whether he had decorated his bedroom himself, what this decoration was like, for how long he and his wife had practised contraception, and when they stopped doing so. An Indian man, married to a British citizen of Asian origin, was asked whether his marriage was an arranged one or a 'love marriage'; where he had spent his honeymoon; whether he and his wife had slept in the dining room and whether he and his wife normally slept together. The man responded, 'Do you sleep with your wife normally or always?', whereupon the interviewer passed on to the next question.[26]

In Britain, there is a long standing arrangement between the Home Office and local registrars' offices whereby the Home Office is notified where a registrar has 'good reason' to believe that a proposed marriage has been arranged for the 'sole purpose of evading immigration control'. Local registrars are also required to inform the Registrar General of any such belief.

In 1977, the Labour Government, in response to an outcry that marriages of convenience were being used to circumvent immigration laws, introduced a procedure whereby foreign husbands were allowed to enter for a probationary period of 12 months, within which time the genuineness of the marriage could be tested.[27]

Pursuant to S 77 of the Immigration Law, 1992 (which is a new provision not found in any of the previous immigration Laws) "it shall be an offence wilfully to enter into a fraudulent marriage with the primary intention of avoiding any of the provisions of the Law or with the intention of obtaining any benefit under the Law". The offence is punishable on a summary conviction with a term of imprisonment not exceeding one year or with a fine not exceeding $10,000 or both.

The words 'wilful' and 'fraudulent' evoke an evaluation of the offender's intent. 'Wilful' in the context of S 77 means 'deliberate' or 'knowing'. There is, however, a problem with the construction of the provision in that it seems to suggest that a marriage of convenience is *per se* a 'fraudulent' marriage. As has been noted from the various authorities above, a marriage of convenience which has satisfied the formal and essential requirements of a valid marriage is not invalid. It is rather the purpose to be attained which is fraudulent, not the marriage itself. It is submitted the provision should read:

> "it shall be an offence to enter into a marriage primarily for the purpose of obtaining a benefit under this Law or avoiding any of the provisions of this Law or to enable another person to do the same."

So worded, the section would resolve another problem, namely, who may be convicted under the provision. As the section stands, the party with Caymanian Status may, at most, only be charged with aiding and abetting the offence, but not as a principal offender; the Caymanian status holder cannot strictly be said to be: "obtaining a benefit under the Immigration Law or avoiding any of the provisions of the Law".

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[25] See: Abdulaziz, Cabales and Balkandali v UK [1985] 7 EHRR 471.
[26] See: Policing Immigration: Britain's Internal Control by Paul Gordon, p.60.
[27] *Ibid.*

The burden of proving matters will be on the Crown as S 77 does not fall within one of the situations covered by S 79 (which places the burden of proof on persons asserting certain things under the Law). As a criminal offence, the Crown are required to prove the elements of the offence beyond a reasonable doubt. In the absence of admissions as to the pre-nuptial agreement not to fulfil the obligations of a genuine marriage, such an offence is hard to prove. Certain evidence such as the parties living apart shortly after the marriage ceremony, payment of money to induce the marriage, the immigration circumstances of the foreign national and non-consummation of the marriage after the ceremony are all vital but by no means conclusive. Investigating and proving any such offence will again raise the problems of violation of the individuals' civil liberties and criticisms of marriage snooping already alluded to.

The Crown may seek to deport an illegal immigrant or deprive a party of any residential right acquired by virtue of the marriage on any of the following three grounds:

(i) that being an illegal immigrant or overstayer, the person has no right to be on the Island; or

(ii) that he was not entitled to the residential right which the sham marriage conferred on him/her; or

(iii) that as a result of a conviction under S 77, the person has become a deportable person under the Immigration Law. A person who is deported may be refused re-entry on any future occasion.

The essential point however is that the marriage remains valid unless and until one of the parties takes proceedings to annul it.

Conclusion:

To be more effective and reflective of the fact that a sham marriage is still a valid one, S 77 of the Immigration Law would need to be amended in the terms suggested above. The amendment would ensure that the Caymanian involved is equally charged as a principal offender. An alternative method would be to make provision in the existing law for aiding and abetting a person to enter into such a marriage for the purpose of circumventing the Immigration Law.

Efforts must be made to nip sham marriages in the bud before they develop. There are no easy and clear-cut ways of achieving this. As has been stated, there is no absolute method of ascertaining the genuineness or otherwise of a marriage. Marriage Officers would need to be extra vigilant. Greater liaison between Marriage Officers and the Immigration Department as in the United Kingdom would provide some therapy but not a complete panacea. It must however be emphasised that overzealous enthusiasm on the part of Marriage Officers to assist in the implementation of the Immigration Law would make them appear as secondary Immigration Officers and lead to unjustifiable refusals to celebrate genuine marriages in certain circumstances on the basis of unfounded suspicions. An inference cannot simply be drawn that a visitor who falls in love on his second day in the Islands is entering into a marriage of convenience with a view to remaining in the Islands - love brewed overnight is no less fermented than that brewed over several years!

Marriages of convenience are a widespread social disease which cannot be stamped out completely, but perhaps threats of prosecution and public education as to undesired social consequences may help to minimise their growth.[28]

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LIMITED DURATION COMPANIES: STAYING COMPETITIVE IN THE U.S. MARKET FOR OFF-SHORE COMPANIES

The recent emergence of a new form of business organization in the U.S.[1] has rekindled world-wide interest in a statutorily recognised business organisation that limits the liability of its owners, offers a more flexible management structure and avoids two-tiered income taxation associated with incorporation. Modeled after the limitada[2] and GmbH,[3] the recent development of these companies comes as a result of increased competition, particularly among off-shore tax havens, for company business.

Growing more popular in the U.S., as an alternative to both partnership formation and ordinary incorporation, following two favourable United States Internal Revenue Service ("IRS") letter rulings,[4] some form of legislation has now been adopted in more than 15 states[5] with similar legislation being put in place in various off-shore and overseas jurisdictions, including the Cayman Islands.[6]

Historically, small business enterprises have utilized the partnership form of business under which the partners are held personally liable for the firm's debts. The partnership form of business organization remained attractive for many firms on the margin because of the regulatory costs of limited liability, including the double effect of corporate taxation, increased cost of obtaining credit and restrictions on organizational form. The recent recognition by the IRS of a non-corporate entity in which the firm's profits and losses flow directly to the owners for tax purposes, has opened new possibilities for attracting company business through the development of a business form which retains sufficient partnership attributes for taxation purposes yet offers its owners limited liability. Generally, the various statutes now enacted share similar characteristics: that of limited liability for all members without regard to their participation in control; freedom from restrictions on organizational and management structure; and the implementation of partnership-like restrictions on duration.

Practical advantages of a new business form

The characteristics of this increasingly popular business organization, its limited liability, its limited duration, the possibility of direct management by the owners (in proportion to ownership), and the limitations on the transfer of ownership interests, have thus far made it possible to avoid two-tiered taxation by being treated as a pass-through entity for U.S. federal income tax purposes. Pass-through entities such as partnerships and S corporations,[7] are not subject to U.S. federal income tax at the entity level. Rather, all items of income, loss, credit, and deductions flow through to, and are reported by, owners. Higher corporate tax rates, the potential or double taxation and other corporate disincentives added by the U.S. Tax Reform Act of 1986 have made such pass-through entities a more desirable form for conducting business.

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[1] In 1982, Wyoming was first to introduce limited liability company legislation in the U.S. as special interest legislation for an oil company.

[2] See, e.g. Priv. Ltr. Rul. 78-17-129 (Jan. 30, 1978) and Priv. Ltr. Rul. 80-03-072 (Oct. 25, 1979) (referring to limitadas organised under the limited liability company laws of Brazil); Priv. Ltr. Rul. 78-26-023 (Mar. 28, 1978 (referring to the Portuguese "Sociedate por quotas responsibilidade limitadad").

[3] See, e.g. Priv. Ltr. Rul. 82-21-136 (Feb 26. 1982) (Gesellschaftt mit beschraenkter Haftung (GmbH) (organized under the laws of the Federal Republic of Germany).

[4] A letter ruling lacks precedental value I.R.C. S 6110(j)(3)(1988).

[5] Wyoming Limited Liability Company Act, Wyo. Sta. Ann. Ss 17-15-101 to 136 (1977); Florida Limited Liability Company Act, Fla. Stat. Ss 608.401 - 471 (1987); Colo. Rev. Stat. Ss 7-80-101 to -913 (Supp. 1990); Kan. Stat. Ann. Ss 17 7601 to -7650 (Supp. 1991); Ind. Code Ann. Ss 23-16-10. 1-1 (Burns Supp. 1991); Va. Code Ann. Ss 13.1-1000 to 1069 (Michie Supp. 1991); Utah Code Ann. Ss 48-2b-101 to -156 (Supp 1991); Tex. Rev. Civ. Stat. Ann. art. 1528n, arts. 1.019.02 (West Supp. 1992); Nev. Rev. Stat. Ann. Ss 86.011 -.571 (Michie Supp. 1991).

[6] The Companies (Amendment) Law, 1993.

[7] Small business corporations formed under I.R.C. Subchapter S which may elect not to be taxed at the corporate level but have its income, whether distributed or not, passed through and taxed *pro rata* to its shareholders as ordinary income.

The emergence of such a new business form means the restrictions formerly hindering adoption of limited liability are disappearing. Personal or unlimited liability, however, may remain an advantage for some small businesses because it affords lower credit costs without imposing additional oversight burdens on the owners who would, in any case, actively participate in management.[8]

Companies formed under such legislation can, nevertheless, provide personal liability through specific personal guarantees on personal assets or assets of the company. Such personal guarantees may be advantageous as they do not extend to tort liability, avoid exposure to liabilities contracted by other members and may be discontinued as to specific creditors more easily than discontinuing liability for partnership debts.[9] Individual guarantees, however, may necessitate extra contracting costs, but these costs may be outweighed by the advantages to the members compared with joint and several liability. The use of guarantees in the limited liability setting also offers a better opportunity for firms to differentiate among creditors.

Another advantage of adopting this form of business organization is that, notwithstanding the additional costs, limited liability may be advantageous in order to externalize costs to involuntary or "tort" creditors.[10] The effect of limited tort liability depends on the extent to which the firm can obtain third-party insurance against tort liability, whereas unlimited liability simply forces the personally liable members of the firm to cause the firm to purchase such insurance. The advent of limited liability, however, may allow even fully insurable firms to choose not to bear the cost of insurance and thereby transfer tort risk to the victims. If assets and insurance are insufficient to cover the tort risks the court may, in only limited circumstances, pierce the corporate veil in order to compensate the involuntary creditors.[11] Furthermore, limited liability does not insulate the tortfeasor from liability, it merely prevents liability being imposed solely by virtue of ownership status. It is possible that in many instances (particularly in the small business sphere), owners may have sufficiently participated in the tort, either directly or as negligent monitors to be held directly liable. In which case the victim may claim against the tortfeasor directly. Thus, the incentive to insure against tort liability, particularly in small firms, is significant.[12]

Avoidance of Two-Tiered U.S. Federal Income Taxation

Currently, the IRS tax classification system determines whether a business will be taxed as a pass-through entity, with income taxed directly to the owners and losses deductible against owners' income, or whether income is taxed to the corporation when earned, with subsequent distributions taxed again at the recipient/owner level. IRS regulations[13] provide that a business organization will be treated as a corporation for tax purposes if it has at least three of the following characteristics: continuity of life, centralized management, limited liability, and free transferability of interest.

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[8] It has been suggested that an unlimited liability scheme may cause firms to substitute partner-level for firm-level debt to help members control the total amount of debt for which they are responsible. See: David W. Leebron, Limited Liability, Tort Victims, and Creditors, (1991) 91 Colum. L. Rev. 1565, 1590-95 (1991).

[9] Partnership liability continues, even after dissolution, to creditors who do not have knowledge or notice of the dissolution. See: Uniform Partnership Act S 35 (1914) and U.K. Partnership Act 1890 S 36(1).

[10] "Tort" refers to creditors who do not deal intentionally with the firm before the claim arises. This category would arguably include some voluntary creditors, ordinary customers, for example, who reasonably cannot be expected to contract to be paid for the extra risks associated with limited liability. The question will be whether firms may switch mid-stream from a partnership to the limited liability form in order to escape creditor claims. However, since partners need creditors' agreement to discharge liabilities it is hard to see what partners could gain from partnership conversions.

[11] A recent extensive survey of approximately 1500 veil-piercing cases in the U.S. revealed that courts pierced the veil in a lower percentage of tort cases than contract cases. The veil was pierced in only 70 tort cases, two-thirds of which involved corporate shareholders. See: Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study, 76 Cornell L. Rev. 1036 (1991).

[12] In order to protect their own investment in the firm's assets from tort creditors the owners are further motivated to insure.

[13] The Kintner Regulations which arose from United States v Kintner, 216 F. 2d 418 (9th Cir. 1954) in which the IRS unsuccessfully sought to characterise a professional organization as a partnership.

First, a business organization will generally be found to lack the characteristic of continuity of life if the death, insanity, bankruptcy, retirement, resignation, or expulsion of a member causes dissolution, even if the articles of incorporation allow the members to agree to continue the business after a member's disassociation from the firm.[14] The IRS has, by letter ruling, concluded that a firm has continuity of life where the members could, following such dissociation, continue the business by a majority rather than a unanimous vote.[15] Accordingly, any new business form should provide for dissolution on dissociation of a member; and that a unanimous vote be required to continue the business after such dissociation.[16]

The IRS regulations further indicate that free transferability of management rights, as opposed to the right to merely participate in the profits, is a wholly corporate characteristic.[17] Thus, restrictions on the transfer of interests, particularly on a transfer which includes management rights, could be provided for by statute.

Centralized management, as indicated by the IRS regulations, is another characteristic. If any person or group of members has exclusive management control the firm exhibits the characteristic of centralized management.[18] The member's ability to dissolve a firm at will operates as an effective veto power that decreases the need to have a direct say in the management of the company. However, the costs of monitoring management, screening members or binding centralized management personnel may be preferred. Most new companies' legislation provides for management by election,[19] but whatever the form of management chosen a company that adopts centralized management must accept corporate tax treatment or stringent, and possible costly, constraints on both transferability and continuity of life.

A firm that desires limited liability without incurring the additional burden of the two-tiered corporate tax structure, must be careful to reject two of the three remaining corporate characteristics.

Cayman Islands' New Limited Duration Company

The Cayman Islands answer to the new business form which qualifies for pass-through tax treatment is the Limited Duration Company ("LDC"), passed by the Legislative Assembly on 26th March 1993 as an amendment to the current Companies Law.[20] The LDC offers limited liability, a flexible approach to management structure, provides for the placement of restrictions on the transfer of interests and imposes automatic limitations on the duration of the company which can only be overridden by unanimous consent of the owners. This form of business organisation, however, is available only to exempted companies.[21]

LDCs, like corporations, are formed by application, registration and certification with the Registrar of Companies. Formalities such as the precise contents of the Articles of Association and capitalization requirements are not specifically ordained. LDCs do not have rules concerning issuance of ownership interests or discrimination within classes and series of such interests.

Accordingly, LDCs afford the same flexibility in capital structure as do ordinary exempted companies. Moreover, interests in an LDC are not expected to be fully transferable.[22]

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[14] Treas. Reg. S 301.7701-2(b) (1)(as amended in 1983). See also Rev. Rul. 88-76. 1988-2 C.B. 360 in which the IRS ruled that a Wyoming limited liability company lacked continuity of life because it dissolved following the "death, resignation, expulsion, bankruptcy, dissolution of a member or occurence of any other event that terminate[d] the continued membership of a member of the company".

[15] See: Priv. Ltr. Rul. 90-10-027 (Dec. 7, 1989), this was with respect to a Florida LLC.

[16] Drafting of such articles must be done with care, however, to avoid opportunistic conduct by dissociating partners.

[17] See: Treas. Reg. S 301. 7701-2(c)(1) (1991).

[18] See: Treas. Reg. S 301. 7701-2(c)(1) (1991).

[19] See: Nev. Rev. Stat. Ann. Ss 86.071 & 86 291 (1991); Va. Code Ann. S 13. 1-1024 (Mich. Supp. 1991); Utah Code Ann. S 48-2B-125(2)(Supp. 1991); Kan. Stat. Ann. S 17-7612 (Supp. 1990); Fla. Stat. S 608. 422 (Supp. 1989).

[20] The Companies (Amendment) Law 1993.

[21] Companies Law (Revised) S 195A(1). An exempted company is one the objects of which are to be carried out mainly outside the Islands. *Ibid* S 181.

[22] S 195(1).

The Legislation requires that "two or more persons" form an LDC or that the LDC contain two or more members.[23] Though not defined by the Company Law it is likely that "subscribers" or "members" include individuals, general and limited partnerships, limited liability companies, corporation trusts, business trusts, real estate investment trusts, other associations, and other limited duration companies.

Formation of an LDC can be a relatively simple matter. Any existing exempted company or any company on initial application to the Registrar as an exempted company may also register as an LDC. The Memorandum of Association ("Memorandum") must limit the duration of the company to 30 years or less. Further, an LDC is taken to have commenced voluntary winding up on dissolution 90 days after the death, insanity, bankruptcy, dissolution, withdrawal, retirement or resignation of a member of the company. The name of the company must include "limited duration company" or "LDC". If the Memorandum conforms to the law, the Registrar issues a certificate of incorporation or a certificate of registration that the company is registered as an exempted limited duration company. The date of filing marks the beginning of the LDC's legal existence, with the certificate of incorporation or registration as conclusive evidence. Unless the LDC was previously registered as an exempted company, persons taking action on behalf of the LDC before that date, other than business incidental to organization or to obtaining subscriptions for or payment of contributions, may be personally liable because they lack the authority to bind the LDC.

Once organized the LDC is a legally distinct entity, with powers identical to an exempted company. In addition, the Articles of Association ("Articles") may provide that the management of the company be vested in the members either equally, in proportion to their ownership interest or in any other manner as specified in the Articles. Thus, members have ultimate control over management through powers specified in the Articles. Members who choose to have the management powers vested in them are considered the directors of the company but with the power, if so provided by the Articles, to delegate the management to a board of directors. For U.S. income tax purposes, an organization will possess centralized management "if any person (or group of persons which does not include all the members) has continuing exclusive authority to make the management decisions necessary to the conduct of the business for which the organization was formed".[24]

In practice, the focus of inquiry has been on the representative character of management, rather than its centralized structure.[25] If the members appoint managers who own no interest in the business, the organization will always possess centralized management because it cannot be said that the managers are acting on their own behalf. Since the IRS views centralized management as a corporate characteristic, members must structure the LDC so the election or appointment of managers does not have unintended income tax consequences.

The LDC offers the option of requiring consent of all members before all the attributes of ownership may be transferred. The effect of including such a limitation in the Articles is that absent forcing dissolution, a member's right to return on capital is severely limited. Such a provision, however, limits an LDC's appeal to a passive investor who would be unable to adequately assess the entity's business activities.

The LDC amendment does not create any financing provisions. Thus, members may allocate and distribute profits in any manner they see fit. When losses are incurred, the members enjoy the favourable loss deduction rules of partnership taxation.[26] Consequently, members are allowed to increase their basis even though they bear no risk of economic loss.

In conclusion, an LDC will always lack continuity of life and will likely possess limited liability. Hence, U.S. Federal income tax classification of an LDC will depend on whether it lacks either centralized management or free transferability of interests. LDCs offer businesses an alternative to ordinary incorporation, partnership, and trusts by combining the advantages of partnership taxation and limited liability normally associated with corporations; and the Cayman Islands can continue to attract U.S. off-shore company business in a very competitive market.[27]

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[23] S 195B(1)(a).

[24] Treas. Reg. S 301. 7701-2(c)(1) (as amended in 1983). Centralized management does not exist if the centralized authority is subject to ratification by the members of the organization and if the powers and functions of the centralized body amounts to little more than ministerial acts.

[25] See: Zuckman v United States, 524 F.2d 729, 738 (1975).

[26] Partners may deduct their share of partnership losses to the extent of their basis in the partnership, which is increased by their share of the partnership's non-recourse liabilities.

[27] Gwen Brucker, lecturer in law, Cayman Islands Law School.