CAYMAN ISLANDS LAW BULLETIN

NO 10

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Cayman Islands Government

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CAYMAN ISLANDS LAW SCHOOL

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

Citation:

Cases appearing in this volume should be cited as (1994) 10 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 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 tenth edition of the Cayman Islands Law Bulletin, in 'snap shot' form, will convey to the reader the increasingly diverse and complex nature of local litigation, continually advancing the frontiers of Cayman law. Emulating the industry of the judiciary and the local practicing attorneys, the academics at the Law School have produced two articles of regional relevance, directly succeeding the case summaries. Mr. John Epp (at p 44) calls for the introduction, locally, of a structured system of continuing legal education on the British model; whilst Mr. Andy Darkoh-Agyeman (at p 48) also returns to the 'mother' jurisdiction in advocating the implementation, locally, of those provisions of the English Criminal Justice Acts, 1988 and 1991, which deal with the competency of child witnesses.

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 and with a minimum of delay between the date of judgment and the report. Discussions were held with Dr. Milner who wholeheartedly endorsed the concept.

The current edition contains case summaries of the majority of Grand Court judgments delivered in chambers and in open court by Harre CJ and Schofield J during the period August 16 1993 to May 5 1994. The majority of the judgments of Smellie J for this period will appear in the next edition.

Certain judgments contained insufficient information to be usefully summarised 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 provide a full reporting service but rather to supply sufficient information about a case to allow practitioners and students to determine whether it is of use to them before immersion in its full text .

The second purpose of the Law Bulletin is to provide a forum in which judges, legal practitioners, 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 summarisation 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, case notes or commentaries are very welcome.

Mitchell C. Davies.
Editor

Case Summaries

Summaries of judgments of the Grand Court of the Cayman Islands.

August 16 1993 to May 5 1994

BANKING LAW

Banking confidentiality - Enforcement of overseas summonses

In the Matter of X Trust and Banking Corporation (Cayman) Ltd and X Trust and Savings Association

Grand Court (360/93)
Harre CJ
November 5 1993

Legislation

Confidential Relationships (Preservation) Law (as amended) Ss3(2)(b)(v) & 3A

Authorities referred to

Attorney-General v Bank of Nova Scotia (1985) CILR 418
X AG v A Bank [1983] 2 All ER 464
Tournier v National Provincial and Union Bank of England Ltd [1923] All ER 550
R v Grossman (1981) 73 Cr App Rep 302
Re State of Norway's Application (No 2) [1989] 2 WLR 458

Mr Timms for the applicant
Mr Marsden *amicus curiae*

This was an application to authorise disclosure to the United States Internal Revenue Service ("IRS") of certain confidential information referred to in a summons by X Trust and Savings Association ("the Bank") or X Trust and Banking Corporation (Cayman) Ltd ("Cayman Trust"). On June 15, 1988 the IRS issued a summons to the Bank, which was organised under the laws of the United States with branches and subsidiaries there and in various other locations around the world, one of which being the Cayman Trust. The summons sought, *inter alia*, records relating to the transfer of $9,500 or more by any person during any 90 day period between the United States and the Cayman Islands during the years of 1986 and 1987, for the purpose of determining possible United States tax liability. The summons did not identify the persons in respect of whose liability it was issued, and could only be served on the authority of an order from a United States court.

As Cayman Trust was wholly owned by the Bank, documents located at the Trust were deemed under United States law to be within the legal control of the Bank to the extent that the Bank could be compelled, on threat of sanction, to produce the documents in response to a *subpoena* issued to the Bank.

Various domestic records were produced and in October, 1990 the IRS requested that the Bank produce both foreign and domestic records relating to 1500 transfers. In January, 1991 the IRS filed a motion in a U.S. District Court seeking to enforce its summons in relation to these transfers; all of the corresponding documentation was

located in Hong Kong.

The Bank argued that it could not be required to produce the documents located in Hong Kong because of the application of Hong Kong Banking Confidentiality Laws. In response to an order by the District Court ordering the Bank to produce the documents notwithstanding Hong Kong law, the governments of Hong Kong and the United Kingdom issued special directions to the Bank prohibiting it from complying with the order. The District Court subsequently found that the actions of the two governments demonstrated substantial government interest in enforcing their confidentiality laws, an interest which outweighed the IRS interest in enforcing its "John Doe" summons. The order was modified to require the Bank to use "all good faith" in attempting to produce the records and further required the Bank to file periodic status reports summarising its efforts in order that the courts could monitor the Bank's compliance.

In May, 1991 the Bank learned that the IRS was seeking documents located at the Cayman Trust and advised the IRS and the District Court that the documents were protected from disclosure by banking confidentiality laws but did produce documents for which consent had been obtained by the relevant customers.

A second motion, filed by the IRS in March, 1992 in relation to documents for transfers to or from Cayman Trust, was withdrawn before it was heard. In opposition to the motion, the Bank argued that the District Court's ruling as to the Hong Kong documents applied to the documents located in the Cayman Islands. The governments of the United Kingdom and Cayman Islands submitted a brief arguing three main points, namely that: (1) the orders to produce the Bank records were inconsistent with International Law and comity; (2) the balance of relevant factors favoured the substantial interests of the United Kingdom and Cayman Islands governments in enforcing the Cayman Islands Confidential Relationships (Preservation) Law; and (3) the court should defer to Cayman Law in the light of the ongoing and successful co-operation between the Governments of the Cayman Islands and the United States in criminal prosecution and investigation.

Following further production by the Bank of records within the United States, the IRS once again sought production of documents located in the Cayman Islands. In response, the Bank contacted the relevant Cayman Trust customers and released records of only those customers who had given their consent.

Proceedings to enforce the summons with respect to the documents at Cayman Trust were stayed until application to the Grand Court had been heard in order that a resolution might be reached.

Held: (application to authorise disclosure refused)

(i) The preservation of confidentiality and its important role to the economy of the Cayman Islands outweighed the interests of the IRS in enforcing a summons which lacked reference to any

specific person.

(ii) A summons which lacked such specificity was an unreasonable exercise of extra territorial jurisdiction. If s3(2)(b)(v) Confidential Relationships (Preservation) Law were extended to matters of enforcement, process emanating from a foreign jurisdiction would be allowed thus circumventing the carefully crafted safeguards in s3A.

(iii) It was necessary to show that the important interests of the United States would be undermined by non-compliance, or that the information sought was of vital interest to the investigation.

(iv) The purpose of s3(2)(b)(v) Confidential Relationships (Preservation) Law, which authorises disclosure of confidential information where it is reasonably necessary for the protection of the bank's interest, was to import the exception to the general common law rule as to banking confidentiality expressed in Tournier.

WB

Banking confidentiality - Construction of statute

In the Matter of X Bank

Grand Court (361/93)
Harre CJ
January 26 1994

Legislation

Confidential Relationships (Preservation) Law (as amended) s3(2)(b)(v)

Authority referred to

Attorney General v Bank of Nova Scotia (1984-5) CILR 418
Police Authority of Huddersfield v Watson [1974] 1 KB 842
Tournier v National Provincial and Union Bank of England [1924] 1 KB 461
X AG v A Bank [1983] 2 All ER 464

Mr Moses for the applicant
Mr Archie for the Attorney General

By the present application, the court was asked to make a determination with regard to two matters of construction of the Confidential Relationships (Preservation) Law (as amended) ("the Law") in relation to the seeking, divulging or obtaining of confidential information in certain English High Court actions. Firstly, whether the words "any proceedings, cause or matter" referred to in s3(2)(b)(v) of the Law referred only to proceedings and causes or matters within the Cayman Islands.

Section 3(2)(b)(v) of the Law states that "[the] Law has no application to the seeking, divulging, or obtaining, of confidential information...by or to...a bank in any proceedings, cause or matter when...it is reasonably necessary for the protection of the bank's interest, either as against its customers or as against third parties in respect of transactions of the bank for, or with, its customer;..."

The second matter of construction was the

scope of the exemption from the duty of confidentiality conferred upon the bank.

Held: (order as follows)

(i) The scope of the exemption should not be dependent upon territorial considerations but on the extent to which disclosure was reasonably necessary to protect the bank's interest.

(ii) Following Bank of Nova Scotia, the exemption contemplated proceedings, causes or matters to which the bank were a party. It was in the interest of the bank, through its liquidators, to recover in an action against auditors the maximum possible for its creditors. Disclosure was therefore permissible to the extent reasonably necessary to protect the interest of the plaintiff in certain English proceedings.

WB

CIVIL PROCEDURE

Civil procedure - Directions

B v B

Grand Court (125/93)
Harre CJ
December 9 1993

Legislation

Matrimonial Causes Law s4
Rules of Jamaica rule 48(1)
Rules of the Supreme Court of England and Wales Order 2 rule 4

Mr Parkinson for the petitioner
Mr Alberga for the respondent

The petitioner brought an application for ancillary relief and a hearing date was fixed. The parties exchanged affidavits. The petitioner sought further and better particulars of the respondent's affidavit.

Held: (further affidavits to be exchanged)

(i) S4 Matrimonial Causes Law provides for the local application of Jamaican procedure. The court could give such directions as to the further conduct of the proceedings as it thought necessary to secure the just, expeditious and economical disposal thereof.

(ii) The ancillary relief application was adjourned as it was clear that the matter was not ready for determination. The normal procedure in such a case was to treat the first hearing as a summons for directions. There was no need for a further application requesting directions.

(iii) The petitioner was ordered to provide a further affidavit within 28 days. The respondent was to reply by affidavit within 28 days of the petitioner serving the new affidavit. Each party was to provide lists of all documents no later than 14 days after the last affidavit was served. Early general discovery was appropriate in

this case as with all complex cases.

JE

Civil Procedure - Pleadings - Admissions

Myers v Kohlschein

Grand Court (261/90)
Harre CJ
July 31 1992 (delivered *nunc pro tunc* March 31 1994)

Authoritive Works

Powers and Harris Medical Negligence (1990)

Mr Alberga QC for the plaintiff
Mr Shea for the defendant

The plaintiff brought an action in negligence against the defendant physician. She alleged that her fatal cancer was misdiagnosed and mistreated depriving her of proper treatment and (probably) cure. The defendant's attorney had stated in a letter that "negligence as pleaded in the statement of claim is admitted". The court was asked to determine if this acknowledgment included an admission that the negligence caused the loss.

Held: (motion denied)

(i) The defendant was correct in arguing that the negligent act was a separate issue from that of causation of the loss. According to Powers and Harris:

"An admission of 'liability' by a defendant is generally understood to include an admission that the harmful consequences pleaded (though not their pecuniary evaluation) were caused by fault on the part of the defendant, but for the avoidance of doubt a written and open admission that such consequences were in fact so caused must always be expressly obtained before a plaintiff may safely proceed to trial on the issue of quantum alone."

(ii) The defendant's admission fell short of the "written and open admission" required to stop the defendant from arguing the causation issue.

JE

(*Editor's note:* for related litigation see p 40 *infra.*)

Civil procedure - Death of plaintiff before judgment - Judgment nunc pro tunc

Myers v Kohlschein

Grand Court (261/90)
Harre CJ
March 31 1994

Legislation

Rules of the Supreme Court of England and Wales Order 35 rule 9

Authority referred to

Turner v London and South Western Railway Co (1874) LR 17 Esq 561

Mr Alberga QC for the plaintiff
Mr Shea for the defendant

The plaintiff was suffering from terminal cancer. She brought an action in negligence against her physician. At the trial, evidence was given that she had a very short time to live; she died twenty-two days after the trial. By that time the court had reached its conclusion on causation and liability as well as major items of damage. A part of the reserved judgment had been written.

The deceased's husband, as administrator of her estate, was made a party to the action and applied for judgment to be entered *nunc pro tunc* as being on the last day of trial.

Held: (application granted)

(i) The Grand Court Rules did not address this matter. Therefore the court would refer to the Rules of the Supreme Court of England and Wales, Order 35 rule 9. This provided:

"Where a party to any action dies after the verdict or finding of the issues of fact and before judgment is given, judgment may be given notwithstanding the death, but the foregoing provision shall not be taken as affecting the power of the judge to make an order under Order 15, rule 7(2) before giving judgment."

(Order 15 rule 7(2) empowers the court to order a person to whom the interest or liability of any party is assigned, transmitted or devolves to be made a party to the cause or matter.)

(ii) Little assistance was provided by Turner v London and South Western Railway Co.

(iii) An order *nunc pro tunc* would be made. The judgment was delivered as of July 31, 1992 on March 31, 1994.

(*Editor's note:* for related litigation see p 40 *infra*.)

JE

Mareva injunction - Abuse of process

In the Matter of X Trust Company

Grand Court (230/89)
Harre CJ
November 16 1993

Authority referred to

AJ Bekhor v Bilton [1981] 2 All ER 565

Sir Fred Phillips QC and Miss Brooks for the applicant
Mr McCann for the liquidators

A Mareva injunction had been in place for over three years. The liquidators sought continuation of the Mareva injunction and cited three reasons for delay: (1) the liquidator hoped to obtain additional evidence for the purpose of misfeasance proceedings against X (the basis for the Mareva injunction) from criminal proceedings to which X was not a defendant; (2) the liquidator hoped to obtain more such evidence from X's statement of affairs which was yet to be filed in aid of the Mareva; (3) the liquidator was concerned about payment of the liquidator's fees by the Cayman Islands Government.

Held: (order discharged)

(i) It was the duty of a plaintiff to press on quickly with his action after obtaining a Mareva injunction. Not to do so amounted to an abuse of process.

(ii) It was not the purpose of a Mareva injunction to give a plaintiff an indefinite period to improve his case but rather to prevent the injustice of a defendant removing assets from the jurisdiction which might otherwise have been available to satisfy a judgment. (AJ Bekhor v Bilton applied.)

WB

(*Editor's note:* for related litigation see p 18 *infra.*)

COMPANY LAW

Court's power to order examination - Limitations on liquidator's power to examine third party

Re X Bank and Y Investment Co

Grand Court (284 & 286/91) and (389/92)
Harre CJ
March 2 1994

Legislation

The Banks and Trust Companies Law
The Companies Law (Revised) Ss126-7
The Insolvency Act 1986 (UK)

Authority referred to

Morris & Ors v Director of Serious Fraud Office and Ors [1993] 1 All ER 788
Re British & Commonwealth Holdings plc (Nos 1 and 2) [1993] AC 426
Cloverbay Ltd v BCCI SA [1991] Ch 90
Re Arrows Ltd (No 2) [1992] BCLC 126
Re Rolls Razor Ltd [1968] 3 All ER 698

Mr McQuater for the applicant
Mr McCombe and Mr Alberga for the respondent

W, a U.S. attorney practising in Paris, was serving as legal adviser to, among others, a group of companies owned by the P family and in an executive capacity to certain other companies. As a result of orders made by the court, on application of the liquidators of X Bank and Y Co, W appeared for examination. Y Co had commenced proceedings by which it claimed against a number of defendants including Dr P, a member of the P family. Among the relief granted was an order that certain defendants cause a director or other responsible officer to attend the court to be examined on oath as to their assets. W also appeared in response to that order.

A list of proposed areas of questioning was submitted on behalf of the liquidators. Objection was raised on behalf of W to his being obliged to answer questions insofar as they were intended to elicit answers relating to any litigation involving several of his clients. It was submitted that the liquidators had given no reasons why the answers sought were reasonably required for the discharge of their functions and that this was fatal to their claim to question W at all.

The liquidators submitted that the exercise of the court's discretion, pursuant to s126 Companies Law (Revised), to summon and examine individuals arose only in relation to a decision as to whether the order should be made or set aside and that the order already made should stand unconditionally, there having been no application to set it aside.

On behalf of W, it was submitted that it was oppressive to require a lawyer of an opponent in litigation to answer questions and, moreover, that the courts have been particularly astute in protecting the

interests of those accused of fraud in the civil courts.

Held: (order as follows)

(i) The relevant Cayman law, Ss126 and 127 of the Companies Law (Revised), prescribed extraordinary powers for the court to summon and examine individuals. The equivalent English provisions were embodied in Ss236(2)(c) and 237(4) of the Insolvency Act 1986 rendering the English case-law on these provisions relevant to the present determination.

(ii) The powers conferred by s236 of the Insolvency Act 1986 enabled the court to help a liquidator to discover the truth of the circumstances in connection with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator was able, as effectively as possible, to complete his function. It was, therefore, appropriate for the liquidator to be able to discover the facts surrounding the case with as little expense as possible. (Re Rolls Razor Ltd applied.)

(iii) There existed an element of oppression against those subject to an order. The examinees were not in the ordinary sense witnesses and the ordinary standards of procedure were not applicable. There existed no general duty on third parties to give information regarding a company in liquidation, unless an order (under s126) had been made; if, by giving the information, a risk of exposure to liability arose an element of oppression would exist. (Cloverbay Ltd applied.)

(iv) The power to summon and examine individuals was an extraordinary power and discretion must be exercised after carefully balancing the factors involved; on the one hand, the reasonable requirements of the administrator to carry out his task, and on the other the need to avoid making an order which was unreasonable, unnecessary or "oppressive" to the person concerned: Re Rolls Razor Ltd. The proper case for an order was one where the liquidator reasonably required examination of the documents or persons to carry out his functions and where the process did not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements.

(v) An order for oral examination was much more likely to be oppressive than an order for the production of documents. Oral examination provided the opportunity for pre-trial depositions which the liquidator would not otherwise be entitled to; the person examined had to answer on oath and his answers could both provide evidence in support of a subsequent claim brought by the liquidator and also form the basis of later cross-examination. (Cloverbay Ltd applied.)

It remained a matter for the court's discretion to determine to what extent the examination should be allowed and to ensure that it were conducted according to its requirements.

(vi) The evidence sought from W was not fundamental to the success of the liquidators in carrying out their function or even to the assessment of whether or not there was a cause of action against defendants from whom assets may have been recoverable. Therefore, the balancing considerations led to amendment of the order as follows:

(1) Examination of W could not relate to or concern pending litigation in which any of his clients were engaged, or to any issue raised therein.

(2) Examination could not relate to certain information which came into his possession as an attorney acting for any client.

(3) W would be entitled to object to any question on the ground of attorney-client confidentiality and, if necessary, the court would consider whether such objection should be upheld.

WB

Stay of voluntary winding up order - Application by liquidator

Y Ltd v Registrar of Companies

Grand Court (22/94)
Schofield J
April 18 1994

Legislation

Companies Law (Revised) Ss 102 & 140

Mr Hampson for the applicant

This was an application to stay a voluntary winding up of Y Ltd. ("the Company").

The Company was incorporated as an exempted company under the provisions of the Companies Law (Revised). Its purpose was to hold an investment in a South African investment company. After incorporation, the Company purchased 100% of the share capital of the investment company, together with a loan receivable from that company, representing its only asset. The Company had no liabilities. At the request of its beneficial owner, the Company resolved to be wound up voluntarily. A director was appointed liquidator.

Repayment of the loan receivable was frozen as a consequence of the "South African foreign debt standstill". Thus, the debt could not be repaid without the specific approval of the Reserve Bank (which was seldom given). Consultations between the beneficial owner of the Company and the South African banking authorities were conducted and the beneficial owner requested the liquidator to make the present application that the voluntary winding up be stayed with a view to increasing the prospects of recovering the loan.

Held: (application granted)

(i) S140 of the Companies Law (Revised) authorised the Grand Court to exercise, in the case of a voluntary winding up, the powers available to it on a compulsory

winding up. One such power, contained in s102, was to stay the winding up.

(ii) A stay of a voluntary winding up had been granted in England under similarly worded statutory provisions (Ss307 and 256(1) of the Companies Act 1948): Re Calgary and Edmonton Land Co. Ltd.

(iii) The power given by s140 could be exercised upon an application made by the liquidator and there was no reason to limit the exercise of this jurisdiction simply because s102 provided that an application for a stay of a compulsory winding up could only be made by a creditor or contributory of the company. Where the application was made under s140 for the exercise of a power which the court could exercise under s102, it was the former, rather than the latter, which determined by whom the application could be made.

WB

Distribution of funds in voluntary liquidation - Depositors untraceable - Duty of liquidator - Applicable periods of limitation

In the Matter of A Bank and Trust Corporation

Grand Court (431/93)
Smellie J
March 18 1994

Legislation

Companies Law (Revised) s40

Companies (Winding-up) Rules 1949 rule 106

Authority referred to

In re AramCo Ltd (1980-83) CILR 202
Re Compania de Electricidad de la Provincia de Buenos Aires [1978] 3 All ER 668

Mr Turner for the applicant

Application was made on behalf of the liquidator of A Bank and Trust Corporation ("the bank") for directions as to the proper distribution of funds, derived from certain depositors of the bank, held by the liquidator in trust. No forwarding address for any of the depositors existed in the bank's records and the liquidator had found it impossible to locate them.

The bank was placed in voluntary liquidation on 29 December, 1989. Notices from the liquidator requiring creditors to file their claims were published in the local Gazette and in local newspaper advertisements setting a deadline for the submission of claims pursuant to rule 106(1) of the Companies (Winding-up) Rules 1949. No claims were submitted in respect of any of the deposits in question.

Rule 106(2) of the 1949 Rules requires that the liquidator, in a voluntary liquidation, send a copy of the notice to the place of abode of each person who, to the knowledge of the liquidator, claimed to be a creditor and whose claim had not been

admitted. The depositors in question had an arrangement with the bank to operate a "hold mail" account. Under such arrangement an embargo was placed on the forwarding of correspondence to the depositor including account statements, debit/credit advices etc. Thus, no forwarding addresses or contact telephone numbers were retained at the bank.

It was submitted by counsel for the liquidator that because the subject debts were apparent on the books of the bank, the statutory limitation period could be regarded as not having commenced to run against the claims of those depositors until the date of the resolution to wind-up rather than as of the date the debts were incurred. Therefore, the liability to meet those debts would continue until such time as the limitation period would ordinarily expire (six years after the winding-up began and after acknowledgment in the balance sheet).

A question arose as to whether the depositors, whose names were identified with the debts in question, were to be regarded as creditors who had proved in the liquidation thereby investing the liquidators with an obligation to make provision.

Held: (order as follows)

(i) The liquidator's discretion to require creditors to submit claims in proof of the debt was retained in the case of a voluntary liquidation, notwithstanding that the liabilities were apparent on the company's books. Where the circumstances so merited, it was proper for the liquidators to adopt either the 1949 Rules or the Insolvency Rules 1986. The liquidator's reliance upon discretion was properly based on rule 106 of the Companies (Winding-up) Rules 1949, which was based on the U.K. Companies Act 1948 (In re AramCo Ltd. applied.)

(ii) The obligation on the liquidator, under rule 106(2) of the 1949 Rules, to provide a copy of the notice existed only where there was a known address or place of abode.

(iii) The claims in question were founded on simple contract and the limitation period for actions arising from them would be six years as ordained by s7 Limitation Law 1991.

(iv) A liquidator had no duty in a voluntary liquidation to admit and make provision for debts that appeared to be owed to creditors, merely because the debts featured in the company's books, if the creditor had failed to submit any kind of claim. (Re Compania de Electricidad de las Provincia de Buenos Aires applied.)

(v) A period of six years after resolution to wind-up was more than reasonably sufficient to allow an interested depositor or other person taking on his behalf to submit a claim. After this period, the liquidator was at liberty to pay the balance then remaining to the contributors in proportion to their shareholding in the company at the time the bank entered into voluntary liquidation.

WB

Liquidators - Insufficient funds to answer misfeasance claim

In the Matter of X Trust Company

Grand Court (230/89)
Harre CJ
April 15 1994

Sir Fred Phillips QC and Miss Brooks for the applicant
Mr McCann for the liquidator

The liquidator indicated that he had no funds to deal with an application based on a summons which asked that a misfeasance claim, brought against X, be struck out on the basis that it was: "scandalous, frivolous or vexatious or alternatively that it is an abuse of process in that it disclosed no reasonable cause of action". The liquidator filed a notice of discontinuance of the misfeasance proceedings. Counsel for the applicant acknowledged that the filing of notice of discontinuance and the striking out of the misfeasance summons would have the same result; *viz.* the bringing of the misfeasance proceedings to an end.

X wished to initiate an enquiry as to damages based on the plaintiff's undertaking which was given in the usual form at the time the Mareva injunction was granted. The injunction was discharged because of subsequent delays in bringing the misfeasance summons. The court was not referred to any authority with regard to the ordering of an enquiry as to damages but made reference to the White Book, (1991) which states: "An inquiry as to damages will not be ordered until either the plaintiff has failed on the merits at trial or it was established before the trial that the injunction ought not to have been granted in the first instance."

There was a further freestanding affidavit which was therein described as "relative to certain contempt proceedings". There was, however, no motion relating to any contempt before the court.

Held: (dismissing the application)

(i) The proper course in relation to X's summons was that it should be adjourned *sine die* on the liquidator's existing undertaking to file notice of discontinuance of the misfeasance summons.

(ii) It was not appropriate to make an order for an enquiry as to damages following the hearing because, *inter alia*, the liquidator was not in a position to deal with it. It would have been wrong for the liquidator to be without funds to address the issue of whether any damages ought to be paid or whether any order for costs ought to be made against the liquidator.

(iii) There was no likelihood that pending litigation could be prejudiced by the liquidator giving his account of that litigation to the creditors, who were persons having a genuine interest.

WB

(Editor's note: for related litigation see p 11 *supra.)*

CONFLICT OF LAWS

Recognition of receiver appointed in a foreign jurisdiction - Whether proceedings penal in nature

S v X Trust

Grand Court (447/93)
Schofield J
November 8 1993

Ms Bridges for the Plaintiff

Legislation

Securities Act 1933 Ss5 17(a) & 20(d) (US)
Securities Exchange Act 1934 Ss10(b) & 21(d) (US)

Authority referred to

Canadian Arab Financial Corporation and Kilderkin Investments Ltd v Player (1984) CILR 63
Schemmer & Others v Property Resources Ltd & Others [1974] 3 All ER 451
Huntington v Attrill [1893] AC 150
Raulin v Fischer [1911] 2 KB 93
Wisconsin v The Pelican Insurance Company (1887) 127 US 265
Nanus Asia Company Inc & Southridge International Inc v Standard Chartered Bank (Misc Proceedings Nos 1459 and 1460 of 1988)

The plaintiff brought the present application seeking the order of the court that he be recognised in the Cayman Islands as the Receiver of the respondent trust. The plaintiff was appointed as Receiver of the trust by the U.S. District Court, Tampa Division, Florida. The plaintiff in those proceedings, the U.S. Securities and Exchange Commission, ("SEC"), alleged that the trust had made sales of unregistered securities and had engaged in a scheme to defraud investors in violation of the Securities Act 1933 and the Securities Exchange Act 1934.

The Receiver contended, in his application to have his Receivership recognised by the Grand Court, that the essence of the SEC's complaint was of a civil nature.

Held: (dismissing the application)

(i) The Grand Court enjoyed the same jurisdiction in recognising Receivers appointed by a foreign court as the English courts: Canadian Arab Financial Corp. v Player. Two key issues underpinned such recognition, namely, (1) that the Grand Court was satisfied that there was sufficient connection between the entity subject to the Receivership Order and the foreign court making the Order; and (2) that the recognition of the Receivership would not amount to giving effect to the penal laws of a foreign jurisdiction.

(ii) Notwithstanding that the courts of the United States would characterise the proceedings under the legislation as remedial, it was for the Grand Court to determine afresh whether the legislation,

applying English principles, imposed penal sanctions.

Whilst both the 1933 and 1934 Acts were designed to protect the investing public and to compensate them for losses sustained through improper practices, this, and the fact that SEC actions were commenced by civil complaint, was inconclusive. Schofield J concluded:

"A description of a fine or penalty as civil does not to my mind avoid the penal nature of such fine or penalty."

(iii) Under English law, it was possible to sever the remedial part of a foreign statute from the penal part: Raulin v Fischer.

(iv) On the present facts, it could not be denied, notwithstanding the compensatory aspects of the proceedings, that proceedings were brought by a body representing the State, *viz.* the SEC, and as such were penal in nature: Wisconsin v The Pelican Insurance Company and Nanus Asia Company Inc v Standard Chartered Bank.

MD

CONTRACT

Mistake - Plea of non est factum - Effect of plea where signature was effected carelessly - Allegation of fraudulent misrepresentation inducing signature

Miller v Ebanks and others

Grand Court (308/91)
Harre CJ
January 14 1994

Authority referred to

Saunders v Anglia Building Society [1970] 3 All ER 961
Muskham Finance Ltd v Howard [1963] 1 QB 904

Mr Parkinson for the plaintiff
Mr Nelson for the defendants

The plaintiff brought an action against his four daughters JAE, SH, LLE and SMM alleging that he was induced by them (the defendants) to sign a document by fraudulent misrepresentation. The plaintiff also alleged *non est factum*.

According to the plaintiff, JAE and LLE acting for themselves and as agents for the other defendants, orally represented to him that he should sign several documents in order to allow the defendants to obtain a bank loan. That representation, according to the plaintiff, was untrue and the actual purpose in signing the documents was to induce him to transfer an apartment at Prospect to LLE and SMM and a house at North Side to JAE and SH. The plaintiff argued *non est factum* in that his signature on the documents had been obtained by fraud with him neither understanding the content of the documents nor voluntarily executing them as required by s107 of the Registered Land Law (Revised). The plaintiff further contended that although there were certificates on the reverse of the documents, indicating that he had appeared before a Justice of the Peace, this had not been the case.

The defendants denied making any representation to their father about obtaining a loan from the bank. They averred, rather, that they had been giving their father substantial financial support over a number of years with the transfer of the properties representing a consensual *quid pro quo* for the continuation of such assistance after his impending remarriage. The defendants contended that it was a term of the agreement that their father would be at liberty to reside in the North Side house for the rest of his life. They also claimed to have agreed to assume the plaintiff's mortgage obligation with respect to the North Side house. The North Side house had been registered in the sole ownership of the plaintiff. The Prospect apartment was registered in the names of the plaintiff, his deceased wife and one of the defendants, as joint proprietors.

The evidence revealed that the defendants, who claimed to know nothing of the remarriage until it had taken place, met the day after the wedding and decided not to continue funding him anymore unless they had some assurance about their inheritance. The defendants therefore prepared the necessary Land Registry forms relating to the transfer of the two properties. The mortgagee bank was consulted about the life insurance payable upon transfer of the North Side house. The arrangement, in these terms, was said to have been agreed to by the plaintiff.

The plaintiff and his second wife, W2, stated that the defendants had told them the bank was "down on" the plaintiff. The plaintiff alleged that the defendants had discussed the sale of the Prospect apartment and using the proceeds thereof to repay the North Side house mortgage. The plaintiff had eventually agreed to sign the documents which, he alleged, had been folded leaving only the bottom part visible for signature. W2 stated that when she demanded to see the content of the document she was told it was a family affair. Another witness, G, who was married to one of the daughters of the plaintiff who was not a party to the proceedings, gave evidence in support of the plaintiff.

Held: (dismissing the plaintiff's claim)

(i) As to the plea of *non est factum*: the plaintiff was aged 69 and was possessed of limited reading and writing skills. He was incapable of understanding a legal document through the written word but displayed general independence of mind and spirit. Furthermore, W2, although advanced in years and of Dutch origin, had lived in Cayman since 1982 and spoke fluent English.

(ii) In most cases where *non est factum* had been successfully pleaded the mistake was the product of fraud. The relevant principles had been authoritatively stated by the House of Lords in Saunders v Anglia Building Society [1970]. The nature of the doctrine in relation to the present case could be found in extracts from their Lordships' speeches.

Lord Pearson, citing Donovan LJ in Muskham Finance Ltd v Howard [1963], had observed that the plea of *non est factum* was to be kept within narrow limits as much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to disown his signature by simply asserting that he did not understand that which he had signed.

Lord Wilberforce had observed that the courts must be alive to the competing objectives of protecting the illiterate whilst not imperilling innocent third parties. The law's concern to grant relief where consent was truly lacking was to be tempered by requiring the maker of the signature to act responsibly and carefully when signing legal documents.

(iii) The plaintiff had signed the documents knowing that he was making land transfers to his daughters in order to safeguard the payments relating to the existing charge on his home. The

plaintiff's contention, that he believed an additional bank loan to have been applied for, was not sustainable.

(iv) Whilst there was no evidence that it was explained to him that if he died before W2 she would be at the mercy of his daughters, that circumstance did not discharge the heavy burden of proof which rested on him. Moreover, he had been careless in signing legal documents without seeking professional advice, especially in view of his recent marriage which he must have realised had important legal implications.

(v) Lord Reid observed in Saunders v Anglia Building Society that in order for the plea of *non est factum* to succeed, there was a need to show a fundamental difference between the document signed and that which it was believed to be. What amounted to sufficient difference would depend on all the circumstances of the case, being a matter for the courts to determine. Viscount Dilhorne had noted that it would not suffice if the maker of the signature thought that in some respect it would have a different legal effect from that which it had. Into this latter category fell plaintiff's case.

(vi) The irregularity of the Justice of the Peace certifying the documents and acknowledging the plaintiff's signature in his absence, although an improper procedure, did not, of itself, affect the validity of the registration of the transfers.

(vii) The plaintiff's allegation of fraud based, *inter alia*, upon the fact of his illiteracy, the abuse of the mandatory certificate of the Justice of the Peace and the determination of the defendants to preserve their "investment" in their inheritance, would be rejected. The defendants' explanation of the transaction, namely that it was a response to the plaintiff's cash-flow situation, was to be preferred. Furthermore, the evidence showed the defendants to be in an apparently strong negotiating position, making any fraud unnecessary.

The plaintiff's claim would fail with judgment being given to the defendants with costs.

AD

Contract - Purported variation of agreement

Ebanks and Coldev Developments Ltd v Morritt Properties (Cayman) Ltd

Grand Court (110/92)
Harre CJ
March 10 1994

First plaintiff in person
No appearance by the second plaintiff
Mr Lamontagne QC for the defendant

The second plaintiff (a company owned by the first plaintiff) had agreed, by a purchase contract dated 1 August, 1989, to purchase a boat being constructed by a Florida based company.

The defendant had made a loan of US$500,000 to the first plaintiff to enable the purchase to be made. An agreement dated 23 August, 1989 provided that the loan was to be secured by a first mortgage on the boat together with collateral security by way of mortgage on the property of the second plaintiff and on the first plaintiff's personal home. The first plaintiff was to arrange for the second plaintiff's interest in the boat purchase to be assigned to the defendant who would re-assign ownership upon completion of the first mortgage. The defendant was to take 30% of the gross income from the boat's operations until full repayment had been made.

A further agreement was entered into on 16 October, 1989 which purported to consummate the transactions contemplated by the earlier agreement. The agreement of 16 October, 1989 called itself the "main agreement" and provided that, *inter alia*, no amendments to the agreement were to be effective or binding on the parties unless evidenced in writing and signed by each of the parties.

The first plaintiff's evidence was that there had been an oral variation of the main agreement effected by the first plaintiff acting personally and on behalf of the second defendant. This was to the effect that the defendant would not take a mortgage on the boat but would, instead, take title to it. The boat would be operated by the second plaintiff as a commercial pleasure craft and the outstanding loan would be repaid by instalments.

The defendant's evidence was that the transaction proceeded entirely in accordance with the agreements of 23 August, 1989 and 16 October, 1989. As such, when the boat ran aground off Cuba on its journey from Florida to Grand Cayman it was under the ownership of the defendant as security for the loan until the loan was either repaid in full or a first charge over the boat as security for it was released. Neither of these events had happened.

The plaintiffs sought, by originating summons, in addition to injunctive and other relief, a declaration that the mortgage over property in George Town entered by the defendant in the Land Registry was not owing to the defendant by virtue of the alleged oral amendment to the agreements.

The evidence was considered.

Held: (dismissing the application)

(i) There was no purported oral modification of the agreements. Even if there had been, this would have been ineffective due to the express terms of the main agreement. The defendant held title to the boat as security for the loan and accordingly the summons of the first plaintiff was dismissed.

(ii) The second plaintiff was not represented and its application would be dismissed pursuant to the defendant's application for such.

AC

CRIMINAL LAW

Rehabilitation of Offenders Law - Disclosure of criminal convictions - Meaning of spent conviction

R v McCafferty

Grand Court (SCA 29/93)
Schofield J
February 25 1994

Mr Helfrecht for the Crown
Mr McCann for the respondent

Legislation

Caymanian Protection Law s74(1)(a)
Rehabilitation of Offenders Law Ss4(2) & 4(6)

The respondent, a British citizen, had applied in June, 1992 to the Caymanian Protection Board for the grant of a gainful occupation licence. The application form required the respondent to give details of all criminal proceedings previously brought against him. The respondent failed to supply details of convictions recorded against him, in 1986, by the Falkirk court respecting offences of assault and causing a breach of the peace. Such failure was due to the respondent having formed the belief that the convictions had become "spent" by the time of the application to the Board. He had supplied details of a "drink-driving" conviction recorded against him in 1992.

The respondent was charged before the senior magistrate with making a false statement to the Board, contrary to s74(1)(a) Caymanian Protection Law.

The senior magistrate, applying s4(2) Rehabilitation of Offenders Law, ruled, in accordance with the respondents' submissions, that the convictions were spent convictions in accordance with the Law.

s4(2) proceeds, *inter alia:*

"Where a question seeking information with respect to a person's previous convictions....is put to him or any other person otherwise than in proceedings before a judicial authority:-

(a) the question shall be treated as not relating to spent convictions....; and
(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction..."

The Crown appealed, by way of case stated, against the decision of the senior magistrate.

Held: (allowing the appeal)

(i) S4(2) did not preclude questions being asked by a judicial authority regarding spent convictions.

(ii) S4(6) of the Law, which had not been drawn to the senior magistrate's attention, defined "proceedings before a judicial authority" to include: "proceedings before any tribunal, body or person having power...to determine any question affecting the rights, privileges, obligations or liabilities of any person..."

Accordingly, the Caymanian Protection Board was, for present purposes, by virtue of s4(6), a judicial authority. The incorrectly completed application to the Board formed an essential part of the proceedings before it and the senior magistrate had erred in concluding that s4(2) allowed the respondent to fail to declare convictions which, in other circumstances, would be regarded as spent.

(iii) No order would be made in deference to the Crown's wish that the decision of the magistrate should not be formally quashed due to the *bona fide* nature of the respondent's mistake.

MD

Forfeiture order - Need to show aetiology of funds subject to order - Determination as to due restoration

Watler v R

Grand Court (SCA 21/92)
Schofield J
February 25 1994

Mr Helfrecht for the Crown
Mr Furniss for the appellant

Legislation

Misuse of Drugs Law s16(1)

The appellant, together with two others, Smith and Wright, were charged with possession of cocaine and possession of cocaine with intent to supply, after a police raid of their residence in Prospect. All three were acquitted of these offences. Smith and Wright were, however, convicted of failing to provide a urine specimen; Smith was further convicted of possession of ganja and possession of a utensil used in the preparation of a controlled drug. The appellant was acquitted of all charges brought against her.

The present appeal related to a forfeiture order made by the learned magistrate in exercise of the powers conferred by s16(1) Misuse of Drugs Law. The subject matter of the order was two sums of money discovered in a closet in the appellant's room (which she shared with Smith). Although the evidence of Smith was inconsistent, in the absence of the appellant claiming the money, the learned magistrate in making the order concluded that it belonged to Smith.

Held: (setting aside the order for forfeiture)

(i) It was not open to the learned magistrate to make a forfeiture order; even if the money had belonged to Smith (which was not established) none of the offences for which Smith had been convicted could have led to the acquisition

of the money.

(ii) In determining who to return the money to the proper course would be to remit the matter to the magistrate in any case of competing claims. On the present facts, there was no competition; Smith had abandoned his claim, Wright had never claimed the money, but the appellant now did assert her claim.

(iii) The forfeited money would be returned to the appellant.

MD

Crime - Misuse of Drugs Law - Presumption of possession

David Najera v R

Grand Court (SCA 184/92)
Schofield J
November 19 1993

Legislation

Misuse of Drugs Law s7(1)(b)

Authority referred to

Seymour and Green v R (1988-89) CILR n9

Mr Hampson for the appellant
Mr Archie for the Crown

The appellant appealed against his conviction on a charge of possession of cocaine with intent to supply. He also appealed against the sentence imposed of eight years imprisonment together with a fine of $100.

On May 3, 1991 the police found 187.2 grammes of 76% cocaine hydrochloride in the appellant's small apartment on a stereo shelf next to some records.

The appellant alleged that possession was not established and that the presumption in s7(1)(b) of the Misuse of Drugs Law did not apply.

Held: (appeal dismissed)

(i) The statutory presumption did not arise against an occupier of premises merely because the drug was found concealed on those premises. The prosecution must also prove that the drug was contained in some chattel located on the premises and that the accused was in possession of that chattel: Seymour and Green v R.

(ii) A packet on a shelf was not "contained" within the meaning of the section and therefore the presumption did not apply. The evidence, however, did support the conviction.

(iii) The sentence was heavy but not manifestly excessive nor wrong in principle.

JE

CRIMINAL LAW - SENTENCING

Crim. App No.	Case No.	Offence	Sentence
35/92	5660/91	Defilement of girl under 12 years	5 years Imp. Deportation rec.
46/92	4683/90	Poss. of ganja with intent to supply	2 1/2 years Imp. and $1500 fine or 3 months Imp. in default
46/92	4684/90	Poss. of cocaine with intent to supply	2 1/2 years Imp. and $1500 fine or 3 months Imp. (Conc.)
1/93	3749/92	Defilement of girl under 12 years	4 1/2 years Imp.
4/93	2342/92	Incest	2 1/2 years Imp.
4/93	2343/92	Defilement of girl under 12 years	5 years Imp.
6/93	2076/90	Poss. of cocaine with intent to supply	5 years Imp. and $500 fine or 10 days Imp.
15/93	2427/91	Poss. of cocaine with intent to supply	2 1/2 years Imp. (Immediate release from custody)
19/93	1786/92	Cons. of ganja	6 months Imp.
21/93	2251/92	Poss. of ganja with intent to supply	2 years Imp. (6 months susp.) Deportation rec.
22/93	2837/92	Burglary	2 years Imp. and activation of 3 months susp. sentence
27/93	1553/92	Poss. of cocaine with intent to supply	4 years Imp. and $200 fine or 2 months Imp.
30/93	77/93	Assault Occ. A.B.H.	1 year Imp.
31/93	1986/92	Poss. of cocaine with intent to supply	18 months Imp. and activation of 6 months suspended sentence (Consec.)
31/93	2979/92	Cons. cocaine	6 months Imp. (Conc.)

33/93	71/93	Handling stolen goods	12 months Imp.
33/93	871/93	Burglary	12 months Imp. (Conc. with 71/93)
34/93	30/93	Burglary	18 months Imp.
34/93	83/93	Burglary	12 months Imp. (Consec.)
34/93	84/93	Burglary	12 months Imp. (Conc.)
34/93	85/93	Burglary	6 months Imp. (Consec.)
46/93	3688/92	Being conc. in the poss. of cocaine	2 years Imp.
46/93	3689/92	Cons. of cocaine	18 months Imp. (Conc.)
46/93	3690/92	Cons. of ganja	6 months Imp. (Conc.)
47/93	2379/93	Poss. of ganja with intent to supply	18 months Imp.
49/93	1127/93	Poss. of cocaine with intent to supply	18 months Imp.
49/93	1128/93	Cons. of ganja	6 months Imp. (Conc.)
49/93	1455/93	Poss. of cocaine with intent to supply	2 years Imp.
49/93	1457/93	Cons. of ganja	6 months Imp. (Conc.)
51/93	1392/92	Being engaged in smuggling	2 years Imp. Vessel forfeited
51/93	1429/92	Poss. of ganja	6 months Imp. (Conc.)
51/93	1384/92	Poss. of ganja with intent to supply	5 years Imp.
2/94	3851/92	Poss. of ganja with intent to supply	2 1/2 years Imp. and $100 fine or 1 month Imp.

MD

CRIMINAL PROCEDURE

Drugs - Possession of cocaine - Possession with intent to supply - Refusal to grant adjournment for defendant to seek legal representation

Scott William and Karr v R

Grand Court (SCA 87/92)
Harre CJ
November 19 1993

Authority referred to

The State v Fitzpatrick Darrell (1976) 24 WIR 211
Gales Hires v R [1944] AC 155
Mary Kingston v R (1948) 32 Cr App Rep 183
Frank Robinson v R [1985] 1 AC 956

Mrs Levers and Mr Hampson for Scott
Mr Collins for Williams
Mr Furniss for Karr
Mr Roberts for the Crown

The three appellants were arrested and convicted of possession of cocaine and possession with intent to supply, on their arrival in Grand Cayman from Jamaica.

Scott appealed on the ground, *inter alia*, that the learned magistrate had refused to grant him an adjournment on the first day of the scheduled trial and that such refusal amounted to a miscarriage of justice.

The record of the trial revealed that, following pleas of not guilty to all the charges by all three defendants, Scott had asked for an adjournment on the ground that he had only become aware on the first day of the trial that his counsel was not going to represent him and had refused to make the journey from Jamaica until his fee had been paid. Scott stated in an affidavit that as a result of the foregoing he could not prepare his defence properly and, furthermore, that he had not been advised of his right to apply for legal aid.

According to the trial record, the learned magistrate had refused the adjournment because the matter had been on the list since February 19, 1992 and had been set down for trial on May 19, 1992. Furthermore, a witness had travelled from the UK and counsel for Karr had travelled from Jamaica.

It appeared that although counsel for Karr had been instructed to represent Scott, his work permit had been restricted to one case only.

Held: (allowing the appeal)

(i) Several authorities on the question of the right of an accused person to be defended by an attorney were brought to the court's attention. In The State v Darrell the Court of Appeal of Guyana found that the constitution of that country, in restating the common law, guaranteed a right to be defended by an attorney. In Gales Hires v R (followed in Kingston v R) Lord Maughan emphasised the need for those accused of serious crimes to be guaranteed legal representation.

The Privy Council opinion in Robinson v R was to the opposite effect. The opinion turned on the interpretation of s20 of the Constitution of Jamaica, the relevant part of which stated that every person who was charged with a criminal offence should be permitted to defend himself in person or by a legal representative of his own choice.

Although a similar constitutional provision did not exist in the Cayman Islands, the Constitution of Jamaica enshrined a fundamental human right which the court would wish to uphold by application of the same principles. In Robinson v R the case had been adjourned on 19 occasions. The defendant's appeal was dismissed on the ground that the right to legal representation under the Constitution was not absolute in that an adjournment would not invariably follow in order to ensure legal representation. In exercising a discretion whether or not to grant an adjournment, it was for the judge to consider all relevant factors including the availability of witnesses.

(ii) On the present facts, the delay between the apprehension of the defendants and the trial had been only two months. An adjournment, although likely to be inconvenient and expensive, would not have precluded the possibility of a proper trial. The question was whether there had been a miscarriage of justice in respect of all or any of the defendants as a result of lack of proper representation.

(iii) In all the circumstances, a retrial was necessary. Although Williams' case was slightly different as it hinged on the voluntariness of her confession to the police, in the circumstances it would be manifestly unjust not to give her, together with the other defendants, the opportunity of a new trial.

AD

Criminal procedure - Charge specifying wrong section of Penal Code - Handling - Charge not specifying the manner in which offence was committed

Wright v R

Grand Court (183/92)
Harre CJ
August 16 1993

Authority referred to

R v Nicklin [1977] 1 WLR 403
Kimberly van der bol (SCA 22/93)
R v Adam Rankine (169/91)

Mr McField for the appellant
Mrs Banks for the respondent

The appellant appealed against his conviction on the general ground that he was not guilty of the offence of handling stolen goods. He was alleged to have handled a cassette recorder stolen from the Pines retirement home.

It was argued on the appellant's behalf that the particulars of the offence specified the wrong section of the Penal Code and, further, that the particulars should have specified the

way in which the offence of handling was alleged to have occurred. That is to say, whether he dishonestly received the goods or undertook to receive them or assisted in their retention, removal, disposal or realisation by or for the benefit of another person or arranged to do so.

It was also submitted that the decision of the learned magistrate was defective in that he failed to supply reasons.

Held: (dismissing the appeal)

(i) Although the particulars of offence specified the wrong section of the Penal Code, the point was not taken in the court below where present counsel had also appeared for the appellant (then the defendant). The record showed that no one was misled and no injustice ensued. The charge contained the necessary statement of the specific offence with which the appellant was charged, together with such particulars as were necessary for giving reasonable information as to the nature of the offence alleged and the acts or omissions alleged to have given rise to it.

(ii) In relation to the manner of handling, the English Court of Appeal in R v Nicklin [1977] ruled that an indictment which alleged an offence of handling *simpliciter*, unparticularised, was not a defective indictment and a conviction of a particular type of handling in such circumstances could be upheld where so to do would lead to no injustice or confusion. The better practice was always to particularise the form of handling alleged.

On the present facts the charge was expressed in sufficiently specific terms.

(iii) As regards the giving of reasons for the decision, it was argued on behalf of the appellant that Kimberly van der bol (22/93) was authority for the proposition that failure so to do would be fatal to any ensuing conviction. The principle, however, was not to be so widely drawn. The preferable rule was that the lack of any record of a judgment would only be fatal to a conviction where it had led to a substantial miscarriage of justice: R v Adam Rankine (169/91).

(iv) On the evidence before him, the magistrate had been correct in finding that the appellant had believed the item to be stolen and had nevertheless arranged to purchase it. The reasons for the magistrate's conclusion were sufficiently clear from the judgment and were consistent with the evidence. The appeal against conviction would therefore be dismissed.

AD

FAMILY LAW

Ancillary relief - One-third rule - Matrimonial property

CB v CB

Grand Court (99/91)
Harre CJ
May 5 1994

Legislation

Matrimonial Causes Law Ss 18 and 21

Authority referred to

Miller v Miller Grand Court (68/90)

Mr Murray for the petitioner
Mrs Messer for the respondent

The parties married in 1980. They had lived apart for four years. During their ten years together they lived for eight years in the petitioner's mother's home, and for two years in rented accommodation. Their children were adults. The wife helped to raise the children in addition to working in the family business for eight years.

The wife had an annual income of US$6,240 and a house in Miami worth US$79,000. The petitioner had a home valued at US$350,000 in Grand Cayman. His annual income was US$20,000.

The petitioner contended that the Cayman house was bought with his mother's money in 1991, for the use of the petitioner and his sons. The court was asked to decide the ancillary relief issues.

Held: (judgment for the respondent)

(i) The petitioner's house, although purchased with his mother's money for the use of the petitioner and his sons, was an asset of the petitioner for the purposes of the Matrimonial Causes Law s21(e): Miller v Miller.

(ii) The relevant factors were to be found in the Matrimonial Causes Law s18. There was no reason to assume that the earning power of the parties was likely to increase.

(iii) The 'one-third' guideline was a valid starting point. In the present circumstances it also served as an appropriate division ratio.

(iv) The petitioner was to be put to his election: he could either sell the property in Cayman within one year of the death of his mother or judgment (which ever was the later) for not less than its market value and pay one-third to the respondent, or have the property valued forthwith and pay one-third of the appraised value to the respondent within thirty days. The petitioner would receive a two-thirds share in the Miami property which would be taken into account upon the sale of the Cayman property.

(v) An income supplement received by the

respondent from her son was to have no bearing as this represented a voluntarily payment.

(vi) The petitioner was to pay interim maintenance to the respondent in the amount of CI$350 per month until the final disposal of the Cayman property.

JE

Affiliation - Maintenance - Interpretation of Affiliation Law - Prospective effect of legislation

Sambula v Longsworth

Grand Court (1/93)
Schofield J
November 3 1993

Legislation

Affiliation Law 1973 s5
Affiliation (Amendment) Law 1992

Authoritative Works

Halsbury's Laws of England (4th ed) Vol 44 para 922

Mr Collins for the appellant
Ms Brooks for the respondent

The appellant was the father of the respondent's two and a half year old child. He was married to a different woman. The appellant had an important job with a good income, but had many expenses, leaving him with a negative balance each month. His wife earned an equally good income which left their family unit with an income of CI$3000 per month. The appellant also had a property which was to be rented in the near future for CI$1350 per month. The appellant and his wife had four children.

By an affiliation order in September, 1992 the appellant was ordered to pay CI$50 per week as maintenance for the child, the maximum allowed under s5 of the Affiliation Law 1973. The Affiliation (Amendment) Law 1992 (effective November 17, 1992) amended the 1973 Law by removing the limit and leaving the court with a discretion to award a reasonable sum having "regard to the means of the parties and all the circumstances of the case".

The respondent, who had since moved to Belize, sought an increase in maintenance; and in September, 1993 the learned magistrate had increased the original order to CI$100 per week, retrospective to June 1, 1993. The appellant appealed against that order.

Held: (allowing the appeal in part)

(i) The cost of living was less in Belize than in Cayman. The means of the parties was properly assessed in relation to the place where their money was earned and expended. In all the circumstances, the order of CI$100 per week was not erroneous. The appellant's illegitimate child should have the same chance in life as his legitimate children.

(ii) The learned magistrate had erred however in ordering that the order operate

retrospectively. There existed a presumption against retrospective interpretation of legislation: Halsbury's Laws of England. A retrospective effect was not to be given: "unless, by express words or necessary implication, it appears that this was the intention of the legislature" (at para 922). The key phrase of the section giving variation of order powers - s5(7) Affiliation Law, 1973 - stated that the power may be exercised "in such manner and to such extent" as the court considered fit. This phrase was to be contrasted with s5(4) of the same Law which allowed a court to make an initial order post birth "calculated from the birth of the child". The latter phrase gave the court a clear power to make an order with retrospective effect, while the former did not. The order was altered to take effect seven days from the date of the learned magistrate's order.

JE

IMMIGRATION LAW

Employment - Working without gainful occupation licence

Ringrose v R

Grand Court (49/93)
Schofield J
March 4 1994

Legislation

Caymanian Protection Law s30(1)

Authorities referred to

R v Brown (1963) 5 WIR 394
R v Gray (1965) 8 WIR 272

Mr Murray and Mr Garcia for the appellant
Mr Helfrecht for the Crown

Whilst working as a DJ in a local nightclub, the appellant had been convicted of the offence of working without a gainful occupation licence, contrary to s30(1) of the Caymanian Protection Law.

The appellant appealed against conviction on the following grounds, namely:-

(1) That the charge was defective in that it did not indicate that the appellant was alleged to be of non-Caymanian status which counsel argued was essential to the validity of the charge.

(2) That there was an inconsistency with the verdict in the appellant's trial and the acquittal reached in the trial of the company charged with employing the appellant without a gainful occupation licence.

(3) That the learned magistrate's remark: - "I cannot be satisfied what, if anything, [the appellant] was actually paid for his work as a D.J." - was inconsistent with a finding of guilt on the part of the appellant. Proof of such payment was an essential part of the Crown's case.

Held: (allowing the appeal)

(i) The first ground of appeal failed. The Caymanian Protection Law created two categories of persons; those with Caymanian status who did not require a licence to work and those of non-Caymanian status who did. It was inherent in the nature of the charge that the appellant was alleged to be of non-Caymanian status so there was no ambiguity in the allegations of the charge.

(ii) The second ground of appeal failed. Although the appellant and the alleged corporate employer had been tried together and different verdicts had been reached in each case, this was legally supportable. The learned magistrate had been under a duty to consider each case independently and the evidence presented against the appellant was stronger than that against the company.

(iii) The third and fourth grounds of appeal, which sought to challenge the veracity of the Crown's case, would be considered together.

In the absence of a specific determination in the learned magistrate's judgment that the appellant was paid to work as a DJ, it was hard to accept Crown Counsel's submission that the words "if anything" in the learned magistrate's note on sentence were a slip and that the learned magistrate did not mean what he wrote. In addition, the learned magistrate's statement in his judgment that: "Evidence of one co-defendant is not evidence against another co-defendant" was an incorrect statement of law in that the testimony of one defendant must be assessed both for and against a co-defendant where it touched that co-defendant. From the evidence it appeared that the learned magistrate may have ignored testimony which fell to be put in the appellant's favour; another testimony in favour of the appellant may not have been given the weight it deserved.

(iv) The conviction was unsafe and would be quashed and the order for conditional discharge made upon it set aside.

AC

LAND LAW

Registration of title pursuant to the Land Adjudication Law - Claim to beneficial entitlement under a registered title by virtue of a constructive trust - Res judicata.

Cook-Bodden (as administrator of the estate of William Eden Sr deceased) v Kirconnell and Kirkconnell

Grand Court (19/92)
Harre CJ
January 7 1994

Legislation

Land Adjudication Law 1971
Registered Land Law s23

Authority referred to

Assets Company Ltd v Roihi et al [1905] AC 176
Life Association of Scotland v Siddall (1861) DeG F & J 58
Goodtitle D Parker v Baldwin [1803-13] All ER 474
Over v Harwood (1900) 1AB 803
Duffield v Duffield (1829) 3 Bli NS 260
Frazer v Walker [1967] 1 All ER 649
Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No3) [1968] 2 All ER 1073
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd et al [1975] AC 581
Greenhalgh v Mallard [1947] 2 All ER 255

Mr Grant for the plaintiff
Mr Lamontagne QC for the defendants

The dispute related to the ownership of four parcels of land in Little Cayman; two at Jacksons and two at Bloody Bay.

The defendants were registered proprietors of three of the parcels and the first defendant was registered proprietor of the fourth as administrator of the estate of his mother - a sister of William Eden Sr.

William Eden (William Eden Sr.'s father) had died in 1880 leaving the residue of his estate on trust for his children (and his deceased son and daughter's children) with a direction to the trustees to either sell it and divide the proceeds or distribute it *in specie*. The four parcels in question formed part of the trust property.

The plaintiff brought his claim on the following grounds:

(1) the defendants were executors *de son tort* of the estate of William Eden Sr. and were liable for damages to the estate.

(2) the defendants were trustees *de son tort* or constructive trustees of the four parcels and by virtue of the equitable principle of tracing were obliged to transfer the lands back to the estate, account for any profit made and pay whatever damages had been suffered by the estate.

The court considered copious evidence as to the history of dealings with the title to the four parcels. The defendants alleged that they were not aware of anyone other than their deceased mother and themselves having any interest in the parcels.

Held: (application dismissed)

(i) The claim that the defendants were executors *de son tort* was not in issue here as any such claim could only apply in this case to the lands claimed on behalf of the estate, which were not the subject of this action.

(ii) Bearing in mind the express purpose of the Land Adjudication Law (ie registration and the simplification of conveyancing), *vis a vis* the certainty in invoking the proviso to s23 of the Registered Land Law 1971 in that, notwithstanding registration as proprietor with absolute title vesting in that person absolute ownership, the proprietor was not relieved from any duty to which he was subject as a trustee, the burden of proof lay with the person invoking the proviso to prove that the registered proprietor was a trustee who owed a duty to such person as a beneficiary of a trust to which the registered land was subject. In doing so, it was for such person to prove his case on the strength of some title of his own and not by relying on allegations of weakness in the defendants' title. The latter was all the plaintiff was able to do. Accordingly he could not discharge his burden of proof and the claim failed. The parcels did not remain today subject to any trust arising under the deceased's estates.

(iii) In any event, the Jacksons lands had been subject to an action of rectification commenced in 1984 by the plaintiff and dismissed by the Grand Court in 1991. Accordingly the plaintiff would have been estopped on the basis of *res judicata* in respect of that land.

AC

SUCCESSION

Formal validity of will - Lack of attestation

In the Estate of X

Grand Court (33/89)
Harre CJ
January 26 1994

Legislation

Wills Law (Revised) s6
Probate and Administration Rules 24 and 25

Mr Hill for the applicants
Mr Parkinson for the respondent

Prior to undergoing emergency surgery, X, who was terminally ill, asked his sister for a pen and paper so that he could make his will in case he did not survive the operation. X wrote the document and signed it in his sister's presence, he then asked one of the nurses present for an envelope in which he placed the document and sealed it. Afterwards he gave the sealed envelope to his brother. Although these events were witnessed by a number of people, no one other than X subscribed to the will or attested to it.

Held: (order as follows)

(i) S6 of the Wills Law required the attestation and subscription of two or more witnesses in the presence of the testator in order for the will to be valid; although no particular form of attestation was prescribed, a total failure, as in this case, conflicted with the requirements of s6 with the consequence of invalidity.

(ii) The Probate and Administration Rules 24 and 25 provided for the submission of an affidavit of execution from one or more of the attesting witnesses in a case of doubt as to the "due execution of a will by lack of any sufficient attestation clause"; or where no such affidavit could be obtained, submission of an affidavit "from any person to show that the signature on the will is the handwriting of the deceased". These provisions applied, however, only where there was some doubt as to the due execution of the will; in this case there was no due execution.

WB

TORT - NEGLIGENCE

Negligence - Duty of Care - Contributory negligence

Jackson v Smith

Grand Court (381/91)
Schofield J
December 9 1993

Authority referred to

Nance v British Columbia Electric Rly Co Ltd [1951] AC 601

Mr Ritchie for the plaintiff
Mr Lamontagne QC for the defendant

The defendant, while riding his motor cycle eastbound on Newlands Road, collided with the plaintiff, who was riding his bicycle in the same direction. According to witnesses, the motor cycle was being driven erratically prior to the collision. The plaintiff indicated that he was attempting to move to the other side of the road in the moments before impact. The collision occurred 7.5 feet from the left hand shoulder where the road was 22.5 feet wide.

As a result of the collision, the plaintiff suffered a serious hip injury which resulted in two operations and the likelihood of hip replacement surgery every ten to fifteen years for the remainder of his life. The total damages were agreed at $248,213.38.

The court was asked to determine liability, and considered the defences of an absence of negligence and contributory negligence.

Held: (apportioning liability at 50%)

(i) The defendant owed a duty of care to other road users and was negligent in following the plaintiff too closely. The plaintiff, however, did not take reasonable care in attempting his manoeuvre and therefore was guilty of contributory negligence: Nance v BCERC Ltd. The plaintiff's award would be reduced by 50%.

(ii) A party to an accident formed his own perceptions of what occurred. Such were as prone to error as that of any honest witness. If one party's version was contrary to his own interest this would not amount to an admission.

JE

Medical negligence - Causation - Quantum

Myers v Kohlschein

Grand Court (261/90)
Harre CJ
July 31 1992 (delivered *nunc pro tunc* March 31 1994)

Legislation

Law of Torts Reform Law (Revised) 1977

Authority referred to

Hotson v Berkshire Area Health Authority [1987] 2 All ER 909
Wilsher v Essex Area Health Authority [1988] 1 All ER 871
McGhee v National Coal Board [1972] 3 All ER 1008
Pickett v British Rail Engineering Ltd [1979] 1 All ER 774
Barnett v Kensington & Chelsea Hospital Management Committee [1969] 1 QB 428
Sutton v Population Services Family Planning Programme Ltd (1981) Lexis Transcript
Jefferson v Cape Insulation Ltd (1981) Kemp F2-100
Adamek v Jurgens Grand Court (232/90)

Mr Alberga QC for the plaintiff
Mr Shea for the defendant

The plaintiff was a Canadian citizen employed by the Cayman Islands Government as a teacher. She was married to a policeman. In May, 1989 the plaintiff was aged 32 years. During May, 1989 she consulted the defendant physician regarding her pregnancy. In July, 1989 the plaintiff noticed that a lump, smaller than the size of a pea, had developed in her right breast. In August, 1989, during the first in a series of monthly visits to the defendant, she brought the lump to his attention. He refused to examine her, saying that such lumps were normal during pregnancy. By the next month's visit the lump had doubled in size. The plaintiff informed the defendant of this change but he again refused to examine her, advising that she had nothing to worry about. Because of these comments she did not raise the issue of the lump during the October visit. In November the plaintiff told the defendant that the lump had increased in size to that of a plum. She stressed her concern and he examined her. The defendant assured her that there was no need for concern, and told her that a mammogram was not possible during pregnancy. He undertook to address the matter if the lump persisted post birth. Each two weeks thereafter she visited the defendant and raised the issue of the lump. The defendant's advice did not change.

In early January, 1990 the plaintiff gave birth to a son. Thereafter the right breast was very tender and she suffered a fever. The defendant told the plaintiff not to worry and to wait a further 6 weeks to see if the lump would subside. This advice was repeated on two further occasions that month.

Later in January the plaintiff noticed a further lump and she sought a second opinion. The second physician advised that she have a mammogram and that the lump be removed. The defendant concurred with the advice regarding the mammogram in February, 1990. The plaintiff returned to Canada for this treatment, undergoing surgery in March, 1990. The lump was found to be malignant. Cancer was also diagnosed in nodes under her right arm.

A complete mastecotomy was performed on March 28, 1990 and she underwent six months of chemotherapy. Eventually her ovaries were removed. Then the cancer spread to her spine and skull. The plaintiff was too ill to attend the trial. The court gave leave to have her evidence given by affidavit subject to cross-examination by conference telephone.

The plaintiff died 22 days after the trial. The judgment was pronounced *nunc pro tunc* as at the last day of the trial.

Held: (judgment for the plaintiff)

(i) The defendant's negligence, commencing in August, 1989, either caused or materially contributed to the plaintiff's advanced state of fatal cancer and the pain and suffering she endured. On the balance of probabilities, the plaintiff's cancer was curable at that date. (The evidence indicated an 80% likelihood of this.) (Wilsher v Essex Area Health Authority and McGhee v National Coal Board applied.)

(ii) The plaintiff endured surgery, radiation and much pain and suffering. She also suffered wage loss, lost years of life and special damages. A portion of the losses would have occurred even if the cancer had been properly treated; accordingly the award would be reduced by 10%.

(iii) The plaintiff claimed the loss of wages suffered by her mother who had missed work to look after the plaintiff and her child. As this loss would not have occurred but for the defendant's negligence it would be allowed in full. She also claimed CDN$200 per month as the approximate value of board and lodging in her mother's home. This claim would be allowed subject to a 25% reduction to reflect the low cost of living in Canada.

(iv) The plaintiff claimed pre-trial wage loss. On the balance of probabilities the plaintiff would have continued in the employment of the Cayman Islands Government to this date. She had attempted to mitigate her loss by taking a temporary position in Canada. Had she been properly treated she would have missed only two to three weeks of work, post maternity leave. Her wage loss as claimed would be allowed.

(v) The future wage loss claim was subject to the evidence that she had no more than one year to live. (Judgment being *nunc pro tunc*.) A multiplier of one would therefore be applied to her annual net wage.

(vi) A claim for "lost years" had been recognised in Pickett v British Rail Engineering Ltd. The surplus available after deducting the plaintiff's living expenses was 66% of the plaintiff's net earnings. This was to be subject to a multiplier accounting for the vicissitudes of life. Even if she had been properly treated, cancer might have recurred. The normal multiplier in a case like this would be "15", but on the present facts would be reduced to "12" because the chances of a complete cure were 80%.

(vii) The plaintiff also claimed the cost of future medical care. She had the option of free care through a Canadian provincial health plan or, alternatively, private treatment at a cost per annum of $6,300. Whilst the plaintiff was required to act reasonably in mitigating her loss, opting for private care was not unreasonable in these circumstances.

(viii) A claim for future child care was also brought by the plaintiff in the amount of CND$12,000 per annum, using a multiplier of "12". The defendant was correct in identifying this claim to essentially be a dependency claim under Part II of the Law of Torts Reform Law (revised). As such, it

would not be appropriate to deal with it during the lifetime of the plaintiff. By agreement of the parties, the claim for cost of future child care would be adjourned until after the plaintiff's death.

(ix) English authorities addressing damages for pain and suffering and loss of amenity of life were only "guidelines or pointers" for the Cayman court. (Jefferson v Cape Insulation Ltd and Adamek v Jurgen considered.) The mental suffering of knowing that one's days are numbered could only be considerable in the case of a woman not beyond her early thirties. The award under this head would be $100,000.

(x) An award would also be made to cover local and foreign medical expenses including hospital fees, the cost of relocating the family to Canada, telephone calls and special home renovations.

JE

(Editor's note: for related litigation see p 10 *supra.)*

TRUSTS

Misapplication of trust monies - Breach of trust

L v X Y and Z Ltd

Grand Court (250/92)
Schofield J
April 29 1994

Mr Turner for the plaintiff

The proceedings related to the recovery of monies alleged to have been misapplied in breach of trust by the first defendant who provided services to the plaintiff (a United States resident) and a company incorporated by the plaintiff in the Cayman Islands. Proceedings against the second and third defendants had been dismissed.

Held: (judgment for the plaintiff)

The defendant had debited monies from the account and had applied them for his own benefit and the benefit of his own companies. He had misapplied the monies fraudulently and in breach of trust and the plaintiff was entitled to recover the amount together with interest which would have been earned had the monies not been so misapplied, plus costs.

AC

Continuing Professional Development Has Come of Age

Introduction

Mandatory Continuing Professional Development is now a reality for the members of the Law Society of England and Wales[1] and the Law Society of Scotland.[2] These bodies have followed the lead of many innovative jurisdictions in implementing a scheme that requires members to continue to expand their knowledge and skills. Not only will the profession be better equipped to serve the public, it will be able to learn to adapt to changing market conditions and business practices.

History

Continuing legal education and professional development has long been recognised as a valuable endeavour. It allows a solicitor to study new areas of substantive law and continue to revise previously considered subjects. Also, it provides an opportunity for the expansion of practical skills including aspects of the business of practicing law. Whether mandated by specific regulations or not, the solicitor is required by basic professional responsibility to ensure that he stays abreast of all developments in the law that may affect his area of practice.

Jurisdictions in America began voluntary continuing legal education schemes in the 1940's,[3] while Canada followed suit in the 1960's.[4] In England, the Benson Committee endorsed the idea of a programme of continuing legal education for solicitors in its 1979 report,[5] but it was not until 1985 that a formal programme of compulsory continuing education was implemented by the Law Society of England and Wales.[6] The first stage of the Scottish continuing professional development scheme became mandatory on November 1, 1993.[7]

Britain

"Continuing professional development" is defined by the Law Society of England and Wales to mean "a course, lecture, seminar or other programme or other method of study (whether requiring attendance or not) that is relevant to the needs and professional standards of solicitors and complies with guidance issued from time to time by the Society".[8] The Scots define it as "relevant education and study by a solicitor to develop his or her professional knowledge, skills and abilities".[9]

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[1] The Law Society of England and Wales, Professional Standards and Development Directorate, Continuing Professional Development, (1993) p. 1.

[2] Law Society of Scotland, Guidelines For Compliance With Continuing Professional Development Regulations, (1993) p. 2.

[3] Paul A. Wolkin, "The Conception and Birth of the Association of Continuing Legal Education" in Continuing Legal Education: The Handbook For CLE Professionals (ACLEA: Chicago, 1992) (hereinafter "CLE Handbook") p. A1.a.

[4] Hugh Robertson, "Continuing Legal Education in Canada" in CLE Handbook, supra, note 3, p. A1.b.

[5] The Royal Commission on Legal Services: Final Report Volume 1 (1979) (CMND 7648) p. 651.

[6] Law Society of England and Wales, supra, note 1.

[7] Law Society of Scotland, supra, note 2.

[8] The Law Society, "Professional Standards Bulletin No. 8", supplement (1992) to The Guide to the Professional Conduct of Solicitors (LS: London, 1990) p. 1.

[9] Law Society of Scotland, supra, note 2.

Under the current provisions in England (introduced in 1992) all solicitors admitted on or after August 1, 1987, must complete the prescribed continuing professional development requirements. The subject group will be expanded from autumn, 1994, to include all solicitors admitted on or after November 1, 1982, while the balance of the profession will be included four years hence.[10] For recently admitted solicitors the scheme requires them to attend one hour of continuing professional development for each whole month in practice between admission and the 1st of November next.[11] To avoid unduly complicating the record keeping process for solicitors and office managers the scheme uses November 1st as its education requirement deadline date.[12] Thus, for any solicitor in the scheme who has been admitted for at least one full year, all periods end on November 1st of the applicable year as opposed to, for example, the solicitor's actual admission date. Solicitors of one, two and three years experience are required to complete sixteen hours of professional development per year.[13] All other solicitors who fall under the scheme must complete forty-eight hours of education in each three year period.[14] In other words, each solicitor covered by the scheme must complete on average sixteen hours of professional development education per year. It is the responsibility of each solicitor to undertake this education and keep a record of the education completed for inspection by the Law Society on demand.[15]

To ensure that solicitors in remote locations do not have to incur unbearable travel expenses the Law Society allows up to fifty per cent of the development requirements to be fulfilled by "distance-learning courses". These courses are provided by correspondence, video and audio cassettes, and computer based learning programmes.[16] Credit is also given for those who prepare and present lectures at development seminars.[17] Because personal interaction and exchange of ideas between solicitors is critical to appropriate professional development, the Law Society of England and Wales stipulated that at least twenty-five per cent of the requirements must be earned through attendance at a course.[18]

The Scottish scheme is very similar to that prevailing in England in many respects. One important distinction, however, is seen in the implementation provisions. The regulations currently apply to solicitors admitted on or after November 1, 1983. All remaining solicitors will be included three years hence. A further distinction is the annual requirement for hours of training. In Scotland each solicitor to whom the regulations apply must complete twenty hours of continuing professional development each year. Five hours may be undertaken in private study but the remaining fifteen hours must be completed in group study.[19]

There is no shortage of institutions and private education companies accredited to provide courses for continuing professional development.[20] The market provides courses and seminars that allow solicitors to meet the Law Society's direction that "[c]are should be taken that solicitors retain the flexibility, through possession of a range of skills, to move to different areas of work where necessary to meet clients' changing needs".[21] On the horizon there looms the opportunity for solicitors to explore concepts and techniques that were barely under consideration as recent as ten years ago. For example, special

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[10] The Law Society of England and Wales, supra, note 8 at p. 9.
[11] Ibid, at p. 9, s. 37.
[12] Ibid, at p. 11, s. 3.
[13] Ibid, at p. 12, s. 4.
[14] Ibid. Exemptions are available for illness and unemployment and the like according to s. 7.
[15] Ibid, at p. 12, s. 6.
[16] Ibid, at p. 13, code 4.
[17] Ibid, at p. 13, code 8.
[18] Ibid, at p. 13, code 2.

[19] Law Society of Scotland, supra, note 2 at p. 2.
[20] Charles Elly, quoted by Robert Lee, "Continuing Professional Development For Solicitors" (1992) 8 P.N. 164, indicates the existence of 467 external providers.
[21] Law Society of England and Wales, supra, note 8 at p. 12, code B.

consideration must be given, and will be given, to topics in Alternate Dispute Resolution in future seminars sanctioned by the Law Society of England and Wales.[22] Further, as the practice of law develops into a fully matured business pursuit (as predicted by forward thinking members of the profession), significant courses of study on the new challenges facing law firms, and the solutions thereto, will be widely available to the profession.[23]

Comparative Overview

Currently, programmes for continuing legal education and professional development vary dramatically from jurisdiction to jurisdiction.[24] In America, a total of thirty-seven states now have mandatory continuing legal education.[25] Of those with mandatory programmes, the number of hours required per year to remain in good standing with the state law society range from ten to fifteen, of which usually one hour must focus on ethics.[26] The law societies of the provinces of Canada, on the other hand, still have not made continuing legal education mandatory. However, favourable professional errors and omission insurance rates[27] and programme fee subsidies by the law societies have resulted in reasonable levels of participation by lawyers in legal education seminars.[28] Typically, seminars in Canada and America provide a mixture of substantive and procedural law topics, with some courses on the business aspects of the practice of law. In contrast, Australia's continuing legal education programme focuses on the practical aspects of the practice of law rather than on substantive law.[29] Except for New South Wales, mandatory continuing legal education has not been implemented in Australia, mainly due to a lack of support within the profession. However it is suggested that the choice of course emphasis may be at the root of the lethargy.[30]

Cayman

In the Cayman Islands, the only piece of legislation which addresses the practice of law is the Legal Practitioners Law, 1969. This brief statute does not address continuing professional development. Currently, however, a discussion draft of a new regime entitled the Attorney-At-Law draft is in circulation for comment. If it is received favourably and adopted as Government policy it will be introduced to replace the current Law. The draft includes a provision for the establishment of a governing body for the profession to be known as the Cayman Islands Law Society.[31] One of the Society's functions will be "to promote and encourage the advancement and dissemination of legal learning".[32] Certainly this is a welcome provision. In the event that the discussion draft does not become law, it is submitted that the profession, as currently constituted, should either organise professional development seminars or encourage private individuals to conduct such endevours. It is submitted that the implementation of a continuing professional development scheme would greatly benefit the profession and those it seeks to serve.

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22 Lee, supra, note 20 at p. 166.
23 Ward Bower, "Surviving The 1990s", in CLE Handbook, supra, note 3 at p. A3.b.
24 Terry Brooks, "Comparison of the Features of Mandatory Continuing Legal Education Rules In Effect As Of July 1991" in CLE Handbook, supra, note 3 at p. H2.1.
25 Ibid, at p. H2.3.
26 Robertson, supra, note 4 at p. A1.b.
27 For example, see the statistics quoted in Leslie Prosser, "Legal Education and Scholarships" in Annual Report of The Law Society of Saskatchewan (LSS: Saskatoon, 1993) p. 15.
28 Elizabeth Loftus, "Continuing Legal Education in Australia" in CLE Handbook, supra, note 3 at p. A1.c.
29 Ibid.
30 Office of the Legislative Draftsman, Discussion Draft Attorney-At-Law Law, (1993), s. 9.
31 Ibid, s. 10(b).

Conclusion

Continuing professional development provides an opportunity for attorneys to explore new areas of substantive law and refresh or update their knowledge in previously considered areas. Moreover, continuing professional development will provide attorneys with training in the traditional as well as the newly conceived practical skills. However, as with all things that are beneficial to the individual and the profession as a whole, not all members will take the opportunity to improve themselves. It is in this light that one must applaud the decision of the Law Societies of Scotland and England and Wales for their resolve to implement mandatory continuing professional development. It is time for the profession in Cayman to follow this lead.

John A. Epp
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Children's Evidence - Making A Case For The Adoption Of The English Criminal Justice Acts In The Caribbean Jurisdictions

Introduction

In many areas of the law, the common law countries have tended to follow English law, as evolved over centuries. There are times, however, when local needs, practices and circumstances necessitate a departure from the common law principles by the promulgation of legislation to meet those situations. Economic, social and political circumstances in a particular country may also necessitate a departure from the common law.

The law of evidence is one of the most pragmatic adjectival laws, always changing to keep abreast of technological and social advancement. English law of evidence, like that of the other major common law jurisdictions, has been advancing fast either to cater for, or take advantage of, new technology. Sometimes the progression is by systematic analogy and sometimes more radically innovative; in each case the old common law rules have been swept away to be replaced by entirely new legislation. One particularly dynamic area has been the law relating to the giving of evidence by children.

The United States and certain other common law countries took steps to modify the competency and corroboration rules relating to children some years before England. Even within the United Kingdom, Scottish law permitted the child witness to be heard unsworn long before the practice emerged in England.

Most of the Caribbean jurisdictions, when assessing a child witness's competency, have provisions equivalent to the English section 38 of the Children and Young Persons Act 1933 on their statute books and still require corroboration of such evidence. Locally, the Evidence Law says nothing about the competency of children. The Criminal Procedure Code is also silent in this regard except to provide that children may be exempted from the requirement of testifying on oath by reason of their immaturity. Section 22 of the Juveniles Law 1990 (the equivalent of section 38 of the Children and Young Persons Act 1933) requires corroboration before an accused can be convicted on the unsworn testimony of a child.

The aim of this article is to make a case for the adoption of the English Criminal Justice Acts of 1988 and 1991 by the common law Caribbean countries. The combined effect of the two Acts is to create a presumption of competency on the part of child witnesses and to remove the requirement of corroboration for the unsworn testimony of a child and corroboration warning for the sworn testimony of a child.

At common law, as long ago as 1779, it was established in **R v Brasier**[1] that if an infant understood the nature and significance of an oath he could so testify in criminal proceedings. There was no fixed age at which a child could be said to be capable of appreciating the significance of an oath. It was the judge's duty to inquire whether or not the child was competent to testify in this form. The examination had to be in open court in the presence of the jury and the accused.[2] The examination before the jury was to enable them to consider what weight to give the evidence if the child was allowed to testify.[3] Until **R v Hayes**[4] the child's examination was based on his religious beliefs. On occasions, a judge would adjourn a case for witnesses to receive religious instruction to ensure that they understood the nature and consequences of an oath. Some judges objected to a crash course in religious instruction merely for the purpose of testifying on oath and simply ruled the child incompetent to testify.[5] In **R v Hayes** the Court of Appeal adopted a more secular approach, recognising changing attitudes

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1 (1779) 1 Leach 199.
2 R v Dunne [1929] 99 LJ KB 117.
3 R v Reynolds [1950] 1 KB 606.
4 [1977] 1 WLR 234.
5 See: The Evidence of Children: The Law and the Psychology by Spencer and Flin (1990) Blackstone Press, p.47.

towards religion in modern society. The court ruled that of singular importance was the child's sufficient appreciation of the solemnity of the occasion and the added attendant responsibility to tell the truth, going beyond that being the product of normal social conduct.

If a child of tender years,[6] upon the evaluation of the judge, did not appreciate the consequences of testifying on oath in criminal proceedings, the child was allowed to testify unsworn if he possessed sufficient intelligence to appreciate the importance of telling the truth. This was put in statutory form by section 4 of the Criminal Law Amendment Act 1885 and subsequently by section 38 of the Children and Young Persons Act 1933.

Matters were much stricter in civil proceedings in England until as late as 1989 where the child's comprehension of the nature of an oath was a sine qua non of his ability to testify.

Corroboration

The common law required a judge to give the jury a corroboration warning where a child testified on oath. Where the child testified unsworn on behalf of the prosecution, by virtue of section 38(1) of the Children and Young Persons Act 1933 the accused could not be convicted unless the evidence was corroborated by some independent testimony.

The Changes Introduced by the Criminal Justice Act 1988

Section 34(1) of the Criminal Justice Act 1988 abrogates the requirement of corroboration in the case of unsworn evidence of children and section 34(2) abrogates the requirement of a mandatory corroboration warning for the sworn testimony of a child. The section, however, only abolishes the requirement of corroboration and the corroboration warning insofar as those requirements are needed because the witness is a child. Where the offence is of a sexual nature, corroboration is still required.

Adrian Keane has suggested that despite section 34 of the Criminal Justice Act 1988, judges will continue to warn the jury as a matter of practice about the dangers of acting on the uncorroborated evidence of a child because the problems surrounding such evidence still prevail.[7] Not everyone, however, shares the view that children's evidence should be impugned on the grounds that it is inherently fallible;[8] indeed, witnesses of all ages may be prone to lying, deliberate self-delusion and suggestibility.[9]

The Novelty of the Criminal Justice Act 1991

The Pigot Committee, otherwise known as the Home Office Advisory Group on Video Evidence, was set up in 1988 to consider children's evidence in criminal proceedings. The result of the Committee's work is now contained in the Criminal Justice Act 1991. After review by the Home

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[6] R v Khan (1981) 73 Cr. App. Rep. 190. The dividing line of the age below which a child had to face a test of competency and that above which he was regarded competent to testify on oath was put by some judges at 14.

[7] Adrian Keane, The Modern Law of Evidence (2nd Edition) p.150. It must, however, be noted that where corroboration is required, as in the case of a child victim of sexual abuse, the unsworn evidence of a child is capable of corroborating sworn or unsworn evidence of another child: section 34(3) Criminal Justice Act 1988.

[8] See D.J. Birch, "Children's Evidence" [1992] Crim. LR 262.

[9] See M. Misener, "Children's Hearsay in Child Sexual Abuse Prosecution: A Proposal for Reform" (1991) 33 C.L.Q. 364.

Office, certain far-reaching recommendations were excluded. Most notably, the proposal that the whole of the child witness's evidence, including the cross examination, should be conducted outside court prior to the trial, recorded on video and shown at the trial, was not accepted. Some concession was however made by the Home Office to allow an interview of the child, conducted prior to the trial and recorded on video, to be used as examination in chief. The Committee seems to have borrowed many of its ideas from other jurisdictions such as the United States and Australia where provision has already been made for child witnesses to testify via a television link.

One of the most important innovations of the 1991 Act is the removal of the test of competency for children of tender years. By section 52(1),[10] children under the age of 14 have to give unsworn evidence and those above 14 may testify on oath. The removal of the test of competency means that the child is presumed competent, just like any sane adult witness. The trial judge is no longer permitted to conduct a test of competency as a preliminary issue. It must, however, be noted that section 52(2) of the 1991 Act has tacked a rider to the section to the effect that the power of the court in any criminal proceedings to determine that a particular person is not competent to give evidence shall apply to children of tender years as it applies to other persons. This means that where a child gives evidence and it becomes clear that he is unable to communicate effectively or cannot relate to the facts before him, the trial judge may stop him or ask the jury to disregard the evidence. John Spencer has commented that the effect of the rider to section 52 is to push the competency requirement through the front door, only to unbolt the back door to let it in again.[11] If the child witness is lying then, as with any other witness, this will be tested in cross examination it being ultimately for the jury to consider what weight to give the evidence.

One problem posed by the 1991 Act is that it does not provide a minimum age for competency. In some cases decided before the Act, judges have commented that it would be ridiculous for one to suppose that the evidence of a child of five or under may have any value.[12] Post Act, it seems that the trial judge would have little choice but to let the five year old witness testify and then resort to the rider to section 52 if necessary.

As stated earlier, provision has now been made with regard to sexual offences and those involving violence and cruelty against children, for a child witness to be interviewed by a police officer or social worker, recorded on video, and shown at the trial as the child's evidence in chief. This procedure has several advantages: The intimidating atmosphere of the court room and exposure in person to the accused are both avoided. Furthermore, the child will have a vivid memory of what occurred shortly after the event, at the time of such interview. The pre-recorded interview, moreover, saves the child witness the trauma of repeating the story again and again.

For the purpose of the pre-recorded interview, the age limit is 17 for sexual abuses and 14 in all other cases.[13] Leave of the court is required to tender such pre-recorded interviews as evidence. Such leave may not be granted unless certain conditions, such as the availability of the child for cross examination and satisfaction as to the proper conduct of the interview, are met. The judge will also consider whether it is in the interests of justice to admit the evidence. The defendant is given the opportunity to cross examine the child through his (the

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[10] Inserting a new section 33A into the Criminal Justice Act 1988.

[11] John Spencer, "Children's evidence and the Criminal Justice Bill" (1990) 140 NLJ 1750.

[12] R v Wallwork (1958) 42 Cr. App. Rep. 153; R v Wright and Ormerod (1990) 90 Cr. App. Rep. 95

[13] See section 32 of CJA 1988 for the list of offences to which the video recording provision applies. Where corroboration is required, as in the case of sexual abuse, the pre-recorded interview cannot corroborate the child's testimony in court.

defendant's) lawyer either in person in court or through a live television link where such facilities are available.[14] The defendant is not allowed to cross examine the child personally.[15] The position with regard to the unrepresented defendant is unclear. Will he be denied his right of cross examination? The Act fails to address this issue and perhaps simply assumes that anyone being tried on indictment is bound to be legally represented.

Competency in Civil Proceedings

The common law was very strict in terms of competency in civil proceedings. As has been mentioned, the applicable rule was that either a person was competent to testify on oath or he/she could not testify at all. However, section 96 of the Children Act 1989 has adopted the logic of section 38 of the Children and Young Persons Act 1933 (which applied in criminal proceedings only) in providing that a child who does not understand the nature of an oath but who possesses sufficient intelligence to understand the duty of telling the truth may testify unsworn. The test of competency thus still applies in civil cases in English law.

Adopting the New English Rules in the Caribbean Jurisdictions

England is not the only jurisdiction evaluating its rules on children's evidence in the light of modern technology and the growing trend of both physical and sexual child abuse. The common law jurisdictions of U.S.A., Canada, Australia and New Zealand inherited **R v Brasier (1779)** together with the corroboration rules. Almost all of the above jurisdictions went on to pass legislation on the lines of section 38 of the Children and Young Persons Act 1933.

In the 1970's, however, the United States Federal Rules of Evidence were modified to create a presumption of competency on the part of all witnesses, including children. The presumption is rebuttable. A large number of individual States have adopted the Rules.

In Canada, in the 1980's, the Badgley Committee strongly recommended changes in the competency and corroboration rules relating to children. In response to that, the Canadian government made substantial changes in the Canada Evidence Act, but did not go as far as abolishing the test of competency.[16] The requirement of corroboration for the unsworn testimony of a child was however abolished.

A number of Australian States have relaxed the competency and corroboration rules in relation to children. In South Australia, for example, there are three categories of child witnesses: those above the age of 12, who may testify on oath; those below the age of 12, but who are old enough to promise to tell the truth, who may testify unsworn with no corroboration being required for their evidence (regardless of whether the complaint is sexual or not); and those too immature to satisfy the minimum competency test who may testify unsworn with corroboration being required.[17]

In New Zealand, the position is that children over the age of 12 have to give evidence on oath and those under 12 have to testify unsworn. There is no corroboration requirement, but the judges do give corroboration warnings as a matter of practice.

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[14] Section 32A of CJA 1988, as inserted by section 54 CJA 1991. The defendant cannot insist on the physical presence of the child at the committal proceedings; the Director of Public Prosecutions may waive the committal proceedings stage if he is of the opinion that there is sufficient evidence for the case to go to the Crown Court.

[15] Section 34A CJA 1988.

[16] See section 16 of the Canada Evidence Act 1992.

[17] See Spencer and Flin (op cit at p.43).

On the use of video recorded interviews as evidence, a number of jurisdictions such as the U.S.A. and Canada have legislation permitting the practice. These jurisdictions also permit the use of the live television link for the cross examination of the child witness as an alternative to the appearance of the child in court for cross examination.

A strong case can be made for the adoption by the various common law Caribbean jurisdictions of the English Criminal Justice Acts' provisions insofar as they relate to children's evidence. Most of the Caribbean jurisdictions are governed by local equivalents of section 38 of the Children and Young Persons Act and the common law corroboration rules in relation to children. One reason for this could be that the Caribbean jurisdictions are content with their existing rules; another reason could be that they are not aware of the recent changes in other jurisdictions, taking advantage of modern audio and video technology. Perhaps there is another reason: the Caribbean countries do not have many cases coming to the court involving physical or sexual abuse of children and there may be the belief that there is no need to draft any detailed rules on child competency or spend money on new technology for occasional situations. This latter point will be dealt with below.

In support of the need to "borrow" the English rules may be cited the absence of Law Commissions or Law Review Committees to review the laws in the small jurisdictions. The single parliamentary draftsman will be challenged enough by the volume of new legislation and is unlikely to have the time or resources to review local laws with a view to keeping in step with other countries.

The emotive topic of child abuse was, until recently, regarded as a "Western problem". Most societies in the developing world customarily regarded child sexual abuse as something of an abnormality on the part of the perpetrator and a great taboo in society. An abuse from within family circles was consequently almost a rarity. In most African societal settings, from which many Caribbean traditional practices originate, men had little contact with their daughters in their day to day activities and many had too many concubines to contemplate sexual relations with children. The existence of corporal punishment in these societies was also a factor in the relative rarity of such offences.

Societal and economic advancement, however, has bred social vices, and child sexual abuse is now becoming a growing problem in the Caribbean and other developing societies. Physical abuse cases are also being brought to the attention of the authorities and the courts by social workers and a number of watchdog institutions. One great concern is that offenders are not always the most disadvantaged people in society in terms of intelligence and physical attraction. Some of the perpetrators are articulate, intelligent and manipulative and may sometimes be the bread-winner of the family. To persuade the child to testify against such a person, in open court, can pose serious problems.

In the English-speaking developed countries, public concern about physical cruelty to children began in the U.S.A. A society for the prevention of cruelty to children was founded in New York in 1871. In England, the first such society was formed in Liverpool in 1882. Various English cities founded their own societies as watchdogs for the prevention of cruelty to children. These societies eventually merged to form one national body known as the National Society for the Prevention of Cruelty to Children (NSPCC). The NSPCC has pursued a number of child physical and sexual abuse cases in England.[18]

The law has always treated the evidence of a child with suspicion and denied the child witness the opportunity to have his/her abuser convicted without some independent evidence supporting that of the child. As has been noted, several jurisdictions are taking advantage of modern technology to let the child be heard in more hospitable surroundings than the courtroom.[19] Compelling reasons exist for the common law Caribbean jurisdictions to follow the lead of the

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[18] Ibid.

[19] The accused is of course not denied the opportunity of refuting the allegations in the form of cross examination.

industrialised countries . One cogent matter is that in most of the small Caribbean jurisdictions it is hard to maintain anonymity, which is most important in cases involving child sexual abuse. The courtroom, as well as being filled with intimidating legal persona may also be filled with half of the township, and the shorter the period of time the child spends in court the better. The video recording of the interview with the child, together with the live television link, may provide the court and all concerned parties the greatest opportunity to discern the truth.

Retention of the Corroboration Warning Where the Offence is Sexual

The retention of the mandatory corroboration warning in sexual cases, whether the complainant is a child or adult, is on the whole justifiable. No legal system can be perfect and there is no doubt that there are situations where such a requirement may cause injustice to the complainant and even allow the alleged perpetrator to go free. It is a matter of balancing two evils: the need to ensure on the one hand that the innocent are not incarcerated at the whim of a spiteful complainant and, on the other hand, the need to ensure that the guilty are punished. Where a mandatory corroboration warning is required, the jury may convict in the absence of corroboration if they believe the story of the complainant.

The importance of the corroboration warning is demonstrated by the unfortunate case of **R v Harris**.[20] The complainant, a lesbian wanting to have a baby, induced the defendant who lived in the neighbourhood to have sexual intercourse with her. To avoid prejudicing her lesbian relationship, she alleged rape. She picked out the defendant at the identification parade, having previously described him for the police to arrest him. At the trial, it was his word against hers. He was convicted. The complainant subsequently admitted having lied to the court. She was sentenced to 18 months imprisonment for perverting the course of justice.

Corroboration need not take the form of independent oral testimony. Various items of evidence may together form cumulative corroboration. Corroboration may also take the form of the accused's lies such as a false alibi or the distressed state of the complainant shortly after the incident. The accused, therefore, has to be astute in not corroborating the evidence of the complainant inadvertently.

Conclusion

Video technology is available in almost all Caribbean regions and adopting procedures such as pre-recorded video interviews or live television links would not be beyond the budget of most Caribbean governments. The child victim must be heard without all the drama of the courtroom and where physical appearance is required, it must be brief. Anonymity (which may be preserved by video technology) is also essential where the child is the subject of sexual abuse.

The test of competency is becoming a thing of the past in many jurisdictions, the child being now presumed to be competent, like any other sane person, until the contrary is established. Whilst the Caribbean common law jurisdictions would do well to follow this lead also, one universal problem remains - where to draw the bottom line in the competency rule.

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[20] (1991) The Times, 5th August.