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Cayman Islands Government

CAYMAN ISLANDS LAW BULLETIN

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CAYMAN ISLANDS LAW SCHOOL

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Citation:

Cases appearing in this volume should be cited as (1994) 11 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.

INDEX

AGENCY

Agency - Indemnity claim against principal

Rainero v Cumber (T/A Cayman Rent-a-Villas) and Steward (Third Party)

Grand Court (13/92)
Smellie J
February 11 1994

Authorities referred to

Britain v Lloyd 14 NTW 726
Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 Ch D 339
Adams v Morgan & Co Ltd [1913] 2 KB 234
Eastern Shipping Co Ltd v Quah Beng Kee [1924] 1 AC 177
Chaudry v Prabhaka [1988] 3 All ER 718
Bonsor v Musicians Union [1956] AC 104

Mr Clifford for the defendant
Mr Giglioli for the third party

These were third party proceedings in which the defendant was claiming indemnity from the third party as a result of liabilities incurred whilst acting as agent for that party.

The plaintiff, a visitor to the Islands, had arranged through the rental services offered by the defendant to rent the third party's villa located at Cayman Kai. The plaintiff paid the defendant, in advance, the entire amount of the rent which was intended to cover the period 20th December 1991 to 4th January 1992, a total of US$10,410.00. This sum, less the defendant's commission, was paid over to the third party.

On arrival at the villa the plaintiff was dissatisfied with its condition and purported to rescind the agreement. He agreed to stay in the villa for only three days and demanded a refund of the rent paid in advance. The three nights' stay was offered at a discounted rent of $900 in total. The plaintiff had throughout dealt with the defendant and knew nothing about the undisclosed principal. He expected repayment from the defendant.

The defendant paid over to the plaintiff the entire sum, less the rent for three days. The defendant then sought to claim the amount of $9,510 paid to the plaintiff from the third party. The third party refused, contending that the premises were fit to be let and that the plaintiff's complaints were unjustified and, further, that the defendant had no authority to agree any funds beyond the rental rebate of $100 per night which he had approved. The third party had prohibited the defendant from making any rebate to the plaintiff.

The third party counterclaimed for damages for bookings cancelled by the defendant after the Rainero booking. There was some evidence that at least two bookings were obtained, deposits taken and then cancelled by the defendant on her own accord. The defendant stated the reason for the cancellation as being the result of a negative inspection report conducted by the Department of Tourism.

The defendant further assumed that the rental licence for the premises had been automatically revoked as a result of the negative report and that the premises were therefore not available to be lawfully rented subsequent to it.

Case Summaries

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

February 1 1994 to October 14 1994

was only at liberty to cancel the booking if the premises were unfit to be let at the time. She was also obliged to act for the benefit of her principal: Bonsor v Musicians Union.

The defendant had acted in breach of these duties in cancelling the April bookings. The defendant's contention that the tourist accommodation licence for the premises had been automatically revoked by the Department of Tourism's negative report, and that the premises could not be legally tenanted until May 1, 1992, when notice of a new licence had been received by the defendant, was not sustainable. No evidence existed that the licence had been revoked at any time.

The third party's claim would succeed, therefore, in relation to bookings cancelled after February 28 1992. Post-judgment interest of 7 1/2% until payment, and costs of the counterclaim were awarded to the third party.

AD

Editor's note: For related litigation see P. 15 infra.

CIVIL PROCEDURE

Editor's note: the succeeding five summaries involve inter related litigation.

Summons to amend writ - Exercise of discretion - Appropriate forum to resolve dispute - Prayer for declaration of share ownership - Parties to be joined as defendants - Application to strike out - Exercise of discretion

I Ltd (in liquidation) v S & Others

Grand Court (389/92)
Harre CJ
August 1 1994

Legislation

Grand Court (Civil Procedure) Rules Rr 24 and 13(3)
Rules of The Supreme Court Order 13 r 1

Authorities referred to

Re Harrods (Buenos Aires) Ltd [1992] Ch 72
Waterhouse v Reid [1938] 1 KB 743
Rawson Trust Company Ltd v GCTC Ltd (1980-83) CILR 214
Russian Commercial & Industrial Bank v British Bank for Foreign Trade [1921] 2 AC
Vine v National Dock Labour Board [1956] AC 488
Williams & Humbert v W & H Trade Marks Ltd [1986] 1 AC 368
Lonrho plc v Fayed [1992] AC
The Volvox Hollandia [1988] Lloyds Rep 361
Guaranty Trust Company of New York v Hannay & Co [1915] 2 KB 536

Mr Purle QC and Mr McQuater for the plaintiff
Mr McCombe QC and Mr Alberga QC and Mr Trace for the defendants

It was argued for the plaintiffs that the Grand Court (Civil Procedure) Rules, Rule 24, was satisfied.

The plaintiff was the majority shareholder in F Ltd. The writ alleged that there had been a wrongful transfer of 88% of F Ltd.'s shareholding in A Co. to L Ltd. and a further wrongful transfer of the shares to F Properties, a subsidiary of C SA.

1. The plaintiffs and the fifth and seventh defendants (L Ltd. and C SA) brought a summons to amend the writ and statement of claim so as to remove the sixth defendant (F Ltd.) and add it as second plaintiff.

The proposed claim was the mirror image of an action already begun in Pakistan, and on this ground the defendants argued that the Cayman Islands was not the appropriate forum and the court's discretion should not be exercised to allow the plaintiffs to amend the writ. F Ltd., L Ltd. and F Properties were not parties to the Pakistan action.

The plaintiff company, F Ltd. and L Ltd. were incorporated in the Cayman Islands. A Co was incorporated in England, and C SA was incorporated in Panama.

2. The plaintiffs sought to amend the writ to include a prayer for a declaration that F Ltd. was the sole beneficial owner of the entire issued share capital of A Co, or alternatively a declaration as to the extent of its shareholding. C SA argued that L Ltd. should not be joined as a defendant in the action as there was no real dispute between L Ltd. and I Ltd. or F Ltd. as to the ownership of the shares in A Co. It was alleged that the only reason the plaintiffs sought to include L Ltd. was so as to bring in C SA.

3. The defendants L Ltd. and C SA brought a summons to strike out those parts of the plaintiffs' statement of claim alleging conspiracy and knowing assistance on the ground that they disclosed no cause of action and/or may have prejudiced, embarrassed or delayed the fair trial of the cause, and/or they were an abuse of the process of the court.

Held: (allowing the amendments but disallowing the summons to strike out)

(i) The Grand Court (Civil Procedure) Rules, Rule 24, was satisfied. The question of which was the appropriate court for resolution of a proposed claim was to be taken into account in the exercise of discretion to allow the amendment. Following Re Harrods (Buenos Aires) Ltd., the court must consider what is being tried in order to decide where it is to be tried. In the action, the main issue was the control of various subsidiaries of A Co. It would be exceptional for a court to go behind the shareholding to decide where the claim was to be determined in the light of the respective importance of operations in different jurisdictions. Accordingly in the present case the Cayman Islands was the appropriate forum and the amendment would be allowed.

(ii) The new claim had to be one which the court would grant leave to serve on C SA out of the jurisdiction. This was governed by the Grand Court (Civil Procedure) Rules, Rule 13(3), on which the court took guidance from the English Rules of the Supreme Court, Order 13, rule 1, that the proposed defendant was a necessary or proper party. Following Russian Commercial & Industrial Bank v British Bank for Foreign Trade and Vine v National Dock Labour Board, the question for the declaration must be a real and not a theoretical question, and the discretion to grant a declaration should not be exercised save for good reason.

The plaintiffs alleged conspiracy and knowing assistance in breach of fiduciary duty which was an ample and real reason for identifying L Ltd. and C SA as entities who had a true reason for opposing the declaration even though L Ltd. made no claim to ownership of the shares. The amendments were therefore allowed and leave to serve on C SA in

Panama was given.

(iii) It was obvious that prolonged and serious argument would have been necessary on the application to strike out, and it did not appear that any part of the pleading would be struck out or that the trial would be substantially cut down or simplified. Following Williams & Humbert v W & H Trade Marks Ltd. and Lonrho PLC v Fayed, the application would therefore be refused. Furthermore, an application to strike out should always be made promptly and the lateness of the summons reinforced the conclusion that it should not be heard.

SAAC

Liberty to adduce expert evidence - Pre trial exchange of expert evidence

I Ltd (in liquidation) and F Ltd v S and Others

Grand Court (389/92)
Harre CJ
August 1 1994

Mr Purle QC and Mr McQuater for the plaintiffs
Mr McCombe QC Mr Alberga QC and Mr Trace for the defendants

The fifth and seventh defendants, L Ltd. and C SA, had sought an order that the parties be at liberty to adduce expert evidence at the trial. It was agreed that the experts should be a forensic document examiner, a chartered accountant and a banking regulations expert, but it was in issue whether the documents should be exchanged simultaneously in accordance with normal practice or sequentially.

Held: (allowing sequential exchange of the accountant and banker reports)

(i) To achieve fairness and mutuality, the rules of pre-trial disclosure normally required simultaneous exchange of experts' reports on or before a fixed date.

(ii) In relation to the reports by the accountant and banking expert, it was not enough for the plaintiffs to say that the gist of the case was plain from what the defendants already had by way of pleadings and particulars and the first plaintiff's list of documents; a balance of fairness could best be achieved by having sequential reports from the experts, with questions of timing to be the subject of further submissions.

(iii) In relation to the forensic document expert, further submissions were required from the plaintiffs as to the time needed to examine the documents, in order to determine whether the forensic document examiner's reports would also be required to be sequential.

SAAC

Postponement of trial

I Ltd (in liquidation) and Another v S and Others

Grand Court (389/92)
Harre CJ
August 9 1994

Mr Purle QC and Mr McQuater for the plaintiff
Mr McCombe QC Mr Alberga QC and Mr Trace for the defendants

This was a summons brought by the fifth and seventh defendants for vacation of the trial date.

The defendants argued for the vacation on the following grounds: (a) the issues for trial had not been fully formulated; (b) further discovery was still required; (c) there was insufficient time for solicitors and counsel to prepare for the trial; (d) there were pending appeals on amendments to the pleadings; (e) there would have been no prejudice to the plaintiffs in granting a postponement of the trial.

The plaintiffs argued for the existing trial date on the grounds that: (a) the fifth and seventh corporate defendants were in effect one individual, (X), and that the amendments in the pleadings would affect the plaintiffs' remedies against X but would have little effect on the issues of fact at the trial; (b) the postponement would prejudice the plaintiffs as the trial concerned the ownership of shares in a company controlling oil resources which were a wasting asset; (c) speedy resolution of matters of accounting concerning alleged benefits was necessary, especially in relation to £1,800,000 (Sterling) dividend declared on disputed shares.

Held: (dismissing the summons)

The court must consider the extent to which the amendments to the pleadings had increased the work in preparation for the trial. On the facts, it was not impossible for the issues to be fully formulated and all material to be made available in time to prepare for the trial. The case involved many busy London counsel and instructing solicitors so a postponement would lead to many months delay. Furthermore, there was a good possibility of an early special sitting of the Court of Appeal to determine the pleadings issues before trial. Therefore the summons to vacate was dismissed.

SAAC

Amendment of writ and statement of claim

I Ltd (in liquidation) and Another v S and Others

Grand Court (389/92)
Harre CJ
August 9 1994

Authorities referred to

Ross v Caunters [1980] Ch 297
Ilkiw v Samuels [1963] 1 WLR 991

Mr Purle QC and Mr McQuater for the plaintiff
Mr McCombe QC Mr Alberga QC and Mr Trace for the defendants

The plaintiffs sought amendments to a writ and statement of claim which were disputed by the defendants. The defendants argued that the amendments should not be allowed on the following grounds: (a) there was a lack of particularity in the amendments, especially in relation to an allegation of a fraudulent disposition of shares; (b) parts of the amended statement of claim should not be allowed pending the determination of an appeal against the amendments, for which leave had been granted; (c) the defendants had been surprised by substantial amendments at a late stage, after having asked for four months what their nature would be.

The defendants also argued that there was insufficient particularity in the Heads of Damage.

The defendants also argued that the plaintiffs' claim for legal expenses in investigating their claim should not be allowed in damages, but should be recoverable only as costs.

The defendants further argued that the claim in

conspiracy did not found a claim for the whole or part of any deficit in the first plaintiff's assets.

Held: (allowing the amendments)

(i) There was still three months until the date fixed for trial, the pleadings were not closed, and the opportunity to seek further and better particulars and further discovery remained. Whenever a party imputed fraud or mischief the facts were to be stated with especial particularity and care. Taking the amended pleading as a whole, it was sufficiently particular to fulfil its essential function as set out in the English Rules of the Supreme Court note 18\12\2, and to enable the next step in the action to be taken without unfair embarrassment to the defendants.

(ii) The amendments concentrated on the beneficial ownership of certain shares, but even on the pleadings as unamended, the same matter was in issue. The preparation for trial should take place on the basis of the pleadings as they stood from time to time unless and until the Court of Appeal determined otherwise. To rule otherwise would lead to substantial delay.

(iii) The Heads of Damage were sufficiently particular. To require more would nullify the benefit which was intended to be achieved by the order for a split trial for liability and quantum of damages.

(iv) The issue of whether the expense of investigating the claim should be treated as damages or costs was a matter which was fit to go to trial for decision. The English case law was not determinative.

(v) An amendment which restored an abandoned cause of action could be done no less than any other amendment. If there were an issue of estoppel it would be for argument at trial.

(vi) The argument against the conspiracy claim on the basis of causation would not be dealt with as a pleading point but was a matter for trial.

(vii) All amendments would therefore be allowed.

SAAC

Examination of witness abroad - Jurisdiction of court

I Ltd (in liquidation) and Another v S and Others

Grand Court (389/92)
Harre CJ
August 17 1994

Authorities referred to

Re Boyse (1880) 20 Ch D 760
Langen v Tate (1880) 24 Ch D 552
Berdon v Greenwood (Unreported)
Re A Debtor [1978] 1 WLR 1512
St Edmundsbury & Ipswich Diocesan Board of Finance v Clarke [1973] 1 Ch 323
Tito v Waddell [1975] 1 WLR 1303
Buckingham v Daily News Ltd [1956] 2 QB 534
Tameshwar v The Queen [1957] AC 476
Goold v Evans & Co [1951] 2 TLR 1189
Bank of Credit and Commerce International SA v Aboody [1992] 4 All ER 955

Mr Purle QC and Mr McQuater for the plaintiffs
Mr McCombe QC Mr Alberga QC and Mr Trace for the defendants

The fifth and seventh defendants brought a summons for two alternative forms of relief. First, they asked for an order that a letter of request be issued to the appropriate judicial authority in Saudi Arabia for the

examination of the third defendant, X, in Saudi Arabia, with the trial judge (or other person determined by the court) as special examiner. In the alternative, preferred by the defendants, they asked for an order that the evidence of X be taken in Saudi Arabia as part of the trial itself.

It was common ground that the evidence of X was of the greatest importance and that X would not risk extradition to the United States by coming to the Cayman Islands or other place where a similar risk existed.

The plaintiffs argued that because X was evading justice in the United States he should not be granted any indulgence by a Cayman Islands court. Furthermore, it was argued that because X was not recognising the Cayman court's jurisdiction the application should be dismissed as X could give evidence through the fifth and seventh defendants (which were companies under his control) without having the burden of proceedings if he lost.

It was also argued by the plaintiffs that by hearing evidence outside the jurisdiction the court was assuming an extra-territorial jurisdiction.

Held: (adjourning the summons)

(i) It was the duty of the Cayman court to do justice on the issues before it on the basis of all material evidence which it was able to have presented to it, irrespective of extraneous considerations relating to X. Following Re Boyse, Langen v Tate and Berdon v Greenwood, it might have been otherwise if X had left or were staying away from Cayman to escape cross-examination or to avoid or delay a trial; or if expense were a significant factor in relation to the amount at stake; or if it were a plaintiff who had chosen his jurisdiction who wished to avoid giving evidence there; or if there were other sufficient evidence available. However, X had compelling reasons for not coming to the Cayman Islands which were unconnected with the present trial. Re A Debtor was distinguished on the grounds that the possibility of cross-examination of the debtor in that case out of the jurisdiction by the trial judge did not arise.

(ii) It was necessary to decide whether in the interest of all parties there existed a procedure whereby in practical terms examination of X could take place *viva voce* before the trial judge himself in Saudi Arabia. The Cayman practice was to follow the English Rules of the Supreme Court, Order 35, rule 3, whereby a judge could, if he thought it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thought fit.

(iii) Following St Edmundsbury, the court was able to leave the court room in order to receive evidence of objects which could not be carried before it, or to receive evidence from a witness in the jurisdiction who was unable to attend, provided appropriate safeguards were observed. Following Tito v Waddell, the court could leave the court room to receive evidence by viewing it, even if outside the jurisdiction. However, the court could not take oral evidence outside the jurisdiction from a witness, because, unlike a view, this involved a coercive jurisdiction to deal with a witness who might refuse to answer questions or produce documents, insult or threaten the court, or lie under oath, which could not effectively be exercised without imposing some sanction, which would necessarily involve assuming an extra-territorial jurisdiction. The court therefore had no jurisdiction to sit as part of the trial to hear evidence in Saudi Arabia.

(iv) No ruling of the kind made by Megarry J in Tito v Waddell would be made. It was not merely a question of timing: sensitive matters of religion, culture and diplomacy arose. The learned Chief

Justice would take the matter up at governmental level and adjourn the summons in the mean time to a date to be fixed on or before the date fixed for trial, and the parties would be notified of any date on which the court required the summons to be restored. The learned Chief Justice expressed his willingness to make the journey and spend time examining and cross-examining X if the representatives of the defendants were to indicate any alternative venue to which P would be prepared to travel for the purpose.

SAAC

Review of taxation of costs

Cayman Hotel and Golf Inc v Resort Gems Ltd & Others

Grand Court (449/93)
Smellie J
April 11 1994

Legislation

Judicature Law s30(4)

Rules of the Supreme Court 1965 Order 62 rule 35(4)

Authorities referred to

McCallister v Santa Cruz Investment Company Limited (trading as Tortuga Club) (No 2) (1985) CILR 411

Tower Corporation Ltd v Hadsphaltic International (1986) CILR 40

Mr Parkinson for the plaintiff
Mr Lamontagne QC for the defendants

The plaintiff brought a summons for review of the taxation of costs conducted by the Deputy Clerk of Court on August 9, 1993 pursuant to an earlier order of the Grand Court which awarded costs to the defendants. The summons was brought pursuant to s30(4) of the Judicature Law. The plaintiff objected to the sum allowed for the taking by counsel of instructions to defend on the basis that: (a) only a rough estimate of time spent was provided and: (b) the sum covered time spent not only by the instructing attorney but also by leading counsel. The plaintiff also objected to the sum allowed for leading counsel's attendance in chambers on interlocutory matters, and generally on the basis that the court had not certified the case fit for conduct by junior and leading counsel. Further objections were raised regarding imprecision, costs allowed in respect of drafting of documents and photocopying.

Held: (allowing the plaintiff's application in part)

(i) The standard to be applied in fixing an appropriate sum for the taking by counsel of instructions to defend was established in McCallister v Santa Cruz Investment Co. Ltd. (No 2). The test was whether the time or disbursement was necessary or reasonably expended on collation of facts and collection of necessary supporting documents from the client to enable the appropriate process to be prepared. In exercising the discretion to allow a sum greater than the minimum set in part III B of the Schedule to the Judicature Law. the taxing officer should take account of the cost of obtaining everything, "properly forming part of the overall instructions for a correctly framed suit or defence. It will properly form part of the overall instructions if it

is necessary or reasonable for that purpose. This would not include matters of pure convenience, considerations of excess caution or unnecessary repetition." In the absence of a detailed time chart, it was difficult to assess whether time spent and claimed was necessary and reasonable. It was necessary to encourage the need for uniformity of practice in the keeping of time charges.

The practice of involving leading counsel at a very early stage (approved in respect of the engagement of counsel from overseas in Tower Corporation v Hadsphaltic International) would be approved in the engagement of resident leading counsel. However, the time claimed by the defendants' attorney was excessive and was reduced to 12 hours for the instructing attorney and 15 hours for leading counsel.

(ii) Although it may be necessary in certain cases to disallow unnecessary costs of a second or leading counsel there was no clear reason of policy or practice to impose a general requirement for certification. This was a case which the learned judge would have been prepared to certify as fit for leading counsel. Costs were allowed as taxed.

(iii) In the absence of details to justify the estimates of time spent on necessary attendances, the taxing officer would not have been able to assess with any precision whether the time claimed was reasonably and necessarily incurred. Further, certain matters such as drafting of documents should not have been included. Deductions were warranted.

(iv) Other objections were disallowed. In particular the practice of photocopying authorities and making them available was to be encouraged, and the successful party who does so should recover his costs. Lists of authorities were to be exchanged as soon as possible, so that both parties know what material has to be photocopied and made available to the court.

HN

Pre judgment interest

Rainero v Cumber (T/A Cayman Rent-A-Villas)

Grand Court (13/92)
Smellie J
April 20 1994

Legislation

Judicature Law 1975 s62
Rules of the Supreme Court 1965 Order 18 rule 8

Authority referred to

London Chatham and Dover Ry Co v Smith's Eastern Ry Co [1893] AC 429

Mr Clifford for the defendant
Mr Giglioli for the third party

Judgment was delivered on February 11, 1994 in respect of matters claimed by the defendant and counter-claimed by the third party. The outstanding issue of pre-judgment interest was put over to March 24, 1994.

The defendant sought to recover interest at 7% on the sum of $9150 rent paid to the plaintiff from February 17, 1992 until the date of judgment. The defendant alleged that the rental sum should have been repaid to the defendant no later than February 17, 1992 the date the third party was put on notice that the debt was owed. Alternatively, the third party was guilty of delaying tactics in order to postpone or avoid judgment and payment. The third party submitted that s62(3)d Judicature Law precluded the award of pre-judgment and post-judgment interest in

the same matter. He further objected that pre-judgment interest was not specifically pleaded in the statement of claim as required by RSC Order 18 rule 8.

Held: (application granted)

(i) The real objective of s62(3) was to avoid a duplicity of awards. It did not preclude an award of pre-judgment interest up to the date of judgment and an award of post-judgment interest from the date of judgment until payment.

(ii) The real objective of Order 18 rule 8 was to ensure that the opposing party was not prejudiced at trial by the absence of particulars of the claim for interest. A general claim for interest was pleaded but not particularised in the statement of claim. As there was no prejudice to the third party, the strict procedural requirements of Order 18 rule 8 would not be enforced.

(iii) Interest was to be awarded to a successful party not as compensation for the damage done but for being kept out of money which ought to have been paid to him: London, Chatham and Dover Ry. Co. v Smith's Eastern Ry. Co. As regards pre-judgment interest, that principle must be applied subject to s62(2) Judicature Law which required the applicant first to satisfy the court that the indebted party had no serious defence to the action, or was using delaying tactics in order to postpone payment. The third party, although not guilty of delaying tactics, had no serious defence to the action. However, since there would have been considerable protraction of the proceedings by virtue of the other claims brought by the defendant and by the omission to consolidate them, and since the third party's counterclaim succeeded in part, it was appropriate to reduce the interest period by one-half. The defendant was entitled to be reimbursed the rent monies she had paid or undertaken to pay to the plaintiff, as of February 17, 1992, interest to be paid at the rate of 7% calculated as of February 17, 1993 until February 11, 1994, the date of judgment.

HN

Summons to vary ex parte order - Founded upon impugned affidavit - Discharge of order for discovery - Application for fresh order for discovery - Summons to amend writ - Imposition of constructive trusteeship on stranger - Meaning of knowledge

C Ltd v A Bank and Eight Others

Grand Court (482/93)
Smellie J
August 4 1994

Legislation

Grand Court (Civil Procedure) Rules Rule 26

Authorities referred to

Norwich Pharmacal Co v Customs and Excise [1973] 2 All ER 943
Bankers Trust Co v Shapira [1980] 3 All ER 353
Ebanks v Clarke (1992-93) CILR 195
Cayman Islands News Bureau Ltd v Cohen & Cohen Associates Ltd (1988-89) CILR 195
R v General Commissioners for the Income Tax Acts ex parte Princess Edmond de Polignac [1917] 1 KB 486
Bank Mellat v Nikpour (1985) Fleet Street Reports 87
Lloyds Bowmaker Ltd v Britannia Arrow Holdings PLC [1988] 3 All ER 178

Brinks Mat Ltd v Elcombe & Others [1988] 3 All ER 188
The Nordglimt [1988] 2 All ER 531
Tate Access Floors v Bosell [1990] 3 All ER 303
Behbehani et al v Salem et al [1989] 2 All ER 143
A & another v C & Others [1980] 2 All ER 347
Federal Savings & Loan Insurance Corp v Molinaro and Six Others (1988-89) CILR 6
Dubai Bank v Galadari [1990] 1 Lloyds Rep 120
Carl Zeiss Stiftung v Herbert Smith & Co (a firm) (No 2) [1968] 2 All ER 1233
Selanger United Rubber Estates Ltd v Craddock (a bankrupt) (No 3) [1968] 2 All ER 1073
Iorgulescu v Swiss Bank & Trust Corp Ltd (1983) (unreported)

Authoritative Works

Halsbury's Laws Vol 48 (4th ed)
All England Reports Annual Review 1992

Mr Lamontagne QC for the plaintiff
Mr Quin and Mr Hellman for the eight defendants
Mr Alberga QC for the bank

The plaintiff is a corporation based in Texas. The first and third defendants were highly placed executive employees of the plaintiff. The ninth defendant is a bank and trust company carrying on business in the Cayman Islands. The remaining defendants are corporate entities owned or controlled by the first and third defendants.

The plaintiff brought proceedings in Texas alleging that the first and third defendants fraudulently, and in breach of their fiduciary responsibilities owed to their employer, misappropriated millions of dollars of the plaintiff's money.

The present proceedings were initiated by the plaintiff as satellite proceedings to the Texan action, asserting that some of the misappropriated funds had been traced to certain accounts maintained with the ninth defendant ("the bank") believed to be in the name or names of one or other of the first eight defendants.

Service of a writ *ex juris* had been made against the first eight defendants (the "former defendants") subsequent to the plaintiff's *ex parte* application brought on November 2, 1993. Interlocutory relief and orders for discovery were made respecting funds held by the former defendants in accounts maintained with any bank within the jurisdiction. The bank was also restrained by the court's order from disposing of any funds which it was holding for any of the former defendants.

On May 20th 1994, the plaintiff discontinued proceedings against the former defendants after it had become clear that the chief affidavit evidence (innocently) relied upon by the plaintiff in obtaining the order had contained deliberate falsehoods. In the light of the foregoing, the plaintiff sought by three summonses dated April and May 1994:

1. To vary the *ex parte* order of November 1993:

2. A fresh order for discovery to facilitate any future tracing action respecting the allegedly stolen funds; and

3. To amend the original writ by striking the indorsements against the former 1st-8th defendants.

Taking these in turn:

1. By its summons of April, 1994 the plaintiff sought the discharge of the *ex parte* order made

against the former defendants and the substitution of widened injunctive orders against the bank whereby any accounts which the former defendant had held any legal or beneficial interest in, at any time, would be frozen. The plaintiff further sought orders for the early discovery of records pertaining to such accounts.

The proposed amendments to the plaintiff's writ would result in striking out the separate claims against the former defendants and substituting indorsements for declaratory relief against the bank as constructive trustee of all funds received by it, or held in any way, on behalf of the 1st - 4th former defendants. Indorsements for tracing orders were also sought against the bank.

The plaintiff sought these amendments without asserting any impropriety or wilful blindness against the bank. Instead, basing itself on Norwich Pharmacal Co. v Customs and Excise; Bankers Trust Co. v Shapira; Ebanks v Clarke and C.I. News Bureau v Cohen Associates Ltd. the plaintiff urged that the use of the bank as an instrument to dispose of the proceeds of the alleged fraud gave rise to a duty, incumbent upon the bank, to assist the plaintiff in the tracing and recovery of those proceeds to the extent that the former had become constructive trustee for the latter and was thereby liable to account.

The bank objected asserting that the *ex parte* order should be discharged *in toto*, it being the product of affidavit evidence which was deliberately false and misleading and which went to the merits of the proceedings. Specifically, the bank argued that in its forced response to the impugned affidavit it had allowed the plaintiff to acquire information it could not otherwise have benefitted from. The court was accordingly asked to exercise its discretion in discharging the *ex parte* order in its entirety and denying the plaintiff's request for variation.

Counsel for the bank relied primarily upon R v General Commissioners for the purposes of the Income Tax Acts in asserting that where a court order has been obtained by the exercise of deliberate (and not merely inadvertent) falsehoods the court should exercise its discretion in discharging the whole of the order and resist any entreaties to solve any part of it. This response, it was argued, was necessary in order for the court to protect its own process from abuse.

Counsel for the plaintiff argued that the hard-line approach asserted by the bank was not, according to authority, apposite when the merits of the plaintiff's case otherwise dictated. In this regard counsel emphasised:

(a) that no reliance was intended to be placed upon the impugned affidavit; instead, eight separate points of evidence would be advanced to indicate that moneys allegedly stolen from the plaintiff by the 1st and 3rd former defendants may have come into the possession of the bank as constructive trustee for the plaintiff; and

(b) that the author of the bad affidavit should be considered by the court to be the plaintiff's independent contractor (upon which innocent reliance had been placed by the plaintiff) and not the plaintiff.

2. By its first summons of May 1994, the plaintiff sought to obtain a fresh order for discovery in order to determine whether a future tracing action against the bank would be worthwhile. In this regard, counsel for the bank asserted the paramount duty of *uberrima fides* which the plaintiff, through its use of impugned evidence, had breached. Counsel further objected to this summons on the grounds that it was not appropriate for the court to grant early discovery before any statement of claim had been issued in the proceedings. Attorneys for the former

defendants further asserted, in written memoranda to the court, that the plaintiff be directed to observe the *caveat* that any discovery granted in Cayman would give the plaintiff no automatic right to use information thereby obtained in foreign proceedings.

3. By its second summons of May 1994, the plaintiff sought amendment to its original writ by striking the indorsements standing against the 1st-8th former defendants whereby, *inter alia*, damages for fraud, wrongful conversion and breach of fiduciary duty were claimed. The substituted indorsements sought, *inter alia*, declarations that the bank was constructive trustee for the plaintiff of all funds which it received either directly or beneficially on behalf of the former defendants; and tracing orders.

Counsel for the bank objected to this summons on the basis:

(a) that the proposed amendment to the writ disclosed no proper cause of action in that no declaration of the bank as constructive trustee could follow in the absence of establishing that the bank's officers knew or shut their eyes to any obvious fact that the money received had been fraudulently obtained; and

(b) that in the absence of the former defendants any proper trial of the action would be embarrassed.

Held: (order as follows)

(i) It was acknowledged that the hard-line approach manifested in R v Kensington Income Tax Commissioners had been modified by the courts recognizing the existence of judicial discretion to afford the applicant a, *'locus poenitentiae'* - an opportunity to rectify transgressions. The learned judge concluded that, "the only constant in the exercise of discretion appears to be that each case will depend on its circumstances": Bank Mellatt v Nikpour.

(ii) It was to be noted, however, that the modern restatement of principles did not admit to an automatic reprise even where the transgression was innocent: Lloyds Bowmaker Ltd. v Britannia Arrow Holdings PLC and Brinks Mat Ltd. v Elcombe.

(iii) Particular assistance was to be derived from the judgment of Hobhouse J in The Nordglimt which encapsulated the modern principles. The English court had here been persuaded not to set aside its previous order notwithstanding material inaccuracies in the evidence upon which the order was based. This determination was reached consequent upon a finding that the inaccuracies were not deliberate and did not affect the merits by affording the plaintiff any advantage.

The present facts were, however, the antithesis of The Nordglimt: here the impugned affidavit evidence had clearly been given deliberately without any acceptable attempt being made by the plaintiff to rectify or explain the inaccuracies. Moreover, such inaccuracies went to the merits of the present case with the plaintiff having received much information deriving from the bank's response to the said affidavit.

(iv) Whilst acknowledging that the plaintiff had no complicity in rendering the impugned affidavit, the plaintiff was admonished for its reluctance to elicit further information with regard to the circumstances leading to the making of the said affidavit. Such behaviour was strongly suggestive of a breach by the plaintiff of its duty of *uberrima fides* owed to the court.

(v) In relation to the plaintiff's application for a fresh order for discovery, the court was obliged to

perform a delicate balancing exercise paying appropriate regard to the interests of the plaintiff who had established a *prima facie* case, whilst at the same time enforcing the paramount duty of *uberrima fides*.

(vi) The court's discretion to regrant a discovery order was invoked by proof of a serious risk of prejudice to the plaintiff if the order were refused: Behbehani v Salem; Dubai Bank v Galadari.

(vii) In considering its exercise of such discretion, the court would disregard entirely the impugned affidavit. Any determination favourable to the plaintiff would be dependent upon the court being compelled to this conclusion by the weight of the other evidence supporting the plaintiff's *prima facie* case.

The following were the salient points of evidence thus defined:

(a) approximately $3m taken from the plaintiff had been traced to bank accounts in the United States held in the names of the former 1st, 2nd and 3rd defendants. The suggestions by the former 1st defendant that such transfers were authorised were tenuous in the extreme; the evidence gave rise to a strong *prima facie* conclusion of fraud.

(b) The existence of a letter sent from the bank to the 1st former defendant was strongly indicative of the existence of some sort of banking relationship between the parties. This conclusion was reinforced by evidence of telephone traffic between the parties.

(c) A senior officer of the bank admitted in affidavit evidence to a transfer in 1992 of $100,000 from the bank to the former second defendant the, "corporate alter ego" of the former first defendant.

(d) Discovery ordered during the Texan proceedings revealed that the former defendants had no assets to speak of in the United States; they had failed to disclose the existence of assets elsewhere.

(viii) The foregoing (which excluded any matters raised as a result of the impugned affidavit) presented compelling evidence that there was a risk that unspecified assets belonging to the plaintiff had been, or were, currently being held in the Cayman Islands and would likely remain unidentified in the absence of an appropriate court order for discovery.

(ix) The absence of a statement of claim was not prejudicial to the interests of the bank and would not preclude the court from granting an order for discovery: Federal Savings and Loan Insurance Corp. v Molinaro. The weight of the untainted evidence indicated that the plaintiff ought to be afforded the opportunity of discovering whether sufficient of its assets remained in the Cayman Islands to justify the further expense of a tracing action to recover them.

(x) The concern that the plaintiff must observe the *caveat* that any local discovery would not automatically be of assistance in foreign proceedings had been met by the appropriate undertaking having been given by counsel for the plaintiff.

(xi) Applying the authorities of Norwich Pharmacal Co v Customs and Excise and Bankers Trust v Shapira the bank, having become innocently mixed up in the tortious acts of others, came under a duty to provide full information.

The duty of the bank was the direct result of the strong evidence of wrong doing which had manifested itself to the court.

(xii) Accordingly, the fresh order for discovery in aid of potential tracing proceedings would be granted subject to the following *caveats:*

(1) costs would be awarded to the bank in respect of: a) the expenses generated by its response to the since discharged *ex parte* order; and b) the expenses to be incurred in meeting the new order; and

(2) the present order was made for the purposes of any future tracing action only and the information obtained pursuant to it was not to be put to any other use or otherwise disclosed;

(3) an application to amend Mareva injunctive relief attaching to the *ex parte* order necessarily failed upon the discharge of the said order. The court was vested, however, with the authority to regrant such relief, where there existed a substantial risk that assets within the jurisdiction would become dissipated. This was not the case on the present facts; not only had the former defendants had ample opportunity to remove any such assets previously, but the court was entitled to assume that such assets still held by the bank would be retained by it (as a responsible institution) until the need for retention had passed.

(xiii) Neither of the bank's objections to the plaintiff's summons to amend its original writ were sustainable for the following reasons:

(a) counsel for the plaintiff had indicated that no attempt would be made to assert liability against the bank as constructive trustee at any time earlier than November 1993, when the bank first received notice of these proceedings and, in particular, notice that monies held to the benefit of the former defendants were impressed with a trust.

To reflect the fact that there was nothing to suggest that the bank could or should have been aware of any trust prior to this date the proposed amendments would be narrowed.

(b) Rule 26 Grand Court (Civil Procedure) Rules answered Counsel's second objection that the proper trial of any action would be impeded by the absence of the former 1st-8th defendants: "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties..."

It was further to be noted that the former defendants could seek to be joined to the proceedings at any time to protect any interest they considered in need of protection.

(xiv) If, in the event, it were established that the conduct of the former defendants fell short of fraud, it was probable that they would still be found to have been in breach of their fiduciary duties owed to the plaintiff, this being sufficient to give rise to a constructive trust.

(xv) The degree of knowledge/notice necessary to convert the defendant into a constructive trustee was knowledge of the facts which gave rise to the trust. 'Knowledge' was to be construed in wider terms than actual knowledge (of the fraud/breach of fiduciary duty) and would extend to knowledge of circumstances which would put an honest and reasonable man on enquiry: Carl Zeiss Stiftung v Herbert Smith & Co. (No2); Selangor United Rubber v Craddock (No 3).

The very least that could be stated in regard to the present circumstances was that as of November 1993, the bank would have been put on inquiry once it was apprised of the plaintiff's claim.

(xvi) Further submissions would be invited from counsel as to the costs of the two summonses of May 1994, and as to the final wording of the present

order.

MD

Application to set aside court order - Locus standi

In the Matter of civil proceedings before the Ontario Securities Commission Toronto Canada

Grand Court (83/94)
Smellie J
June 26 1994

Legislation

Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978

Confidential Relationships (Preservation) Law 1976 (as amended) S3A

Authorities referred to

Re IG Farbenindustrie AG Agreement [1943] 2 All ER 525
Boeing co v PPG Industries Inc [1988] 3 All ER 839
Hasselbald (GB) Ltd v Orbinson [1985] 1 All ER 173

Mr Moses Mrs Escalante and Mr Lockwood QC for Ontario Securities Commission

Mr Jones for the Cayman companies
Mr Helfrecht for the Attorney-General
Mr McCann for the respondents

The application was in connection with proceedings before the Grand Court in furtherance of letters rogatory issued by the Ontario Securities Commission. The letters rogatory had been granted by the order of the Grand Court on April 14 1994.

On April 25, 1994, three Cayman Islands companies had issued a summons for an order to discharge the order of April 14 1994.

The Cayman companies also sought to intervene in an application brought by the respondents pursuant to s3A of the Confidential Relationships (Preservation) Law.

On April 27 1994, the Ontario Securities Commission had, by a cross-summons, applied to have the Cayman companies' summons dismissed on the ground that the Cayman companies had no *locus standi*. It transpired, however, that the Cayman companies had been served with the order of April 14 1994.

Held. (allowing the application in part)

(i) The Cayman companies lacked *locus standi* to discharge the order of April 14 1994. The application under the Evidence Order 1978 could be made *ex parte* directing a witness to attend for oral examination or to produce oral evidence. It was a procedural order intended to facilitate the taking of evidence for the purpose of foreign proceedings at the request of a foreign court or tribunal.

(ii) While it may have been the case that the Cayman companies had a commercial or proprietary interest in the information to be disclosed, it had not been shown that they had a legal interest which could fall to be determined either in the letters rogatory proceedings in Cayman or in the proceedings before the Ontario Securities Commission: Re I.G. Farbenindustrie A.G. Agreement

Furthermore, the Cayman companies were not

parties to the Ontario proceedings nor were they witnesses responding to the letter of request from the Commission although some of their present and past officers were: Boeing G v PPG Industries Inc.

(iii) On the question of whether the Cayman companies were entitled to intervene in the s3A application, the court's jurisdiction to hear applications under this provision was established and circumscribed by the sub-section itself.

S3A required any person obliged to give evidence relating to confidential information before any court, tribunal or other authority, to first seek the directions of the court where if necessary an adjournment could may be granted. The application was to be made to a judge of the Grand Court *in camera*. Seven days notice was to be given to the Attorney-General and any party to the proceedings.

S3A(2) on its face entitled a person who had been given notice of the application, being a party to the proceedings, to be heard. Mere receipt of notice, however, did not give rise to such right. The 'proceedings' referred to were those of Ontario to which the Cayman companies were not parties.

The court was not prepared to construe, 'a party to the proceedings in question' to include persons with commercial, proprietary or even legal interests in those proceedings but who were not in fact parties to them.

(iv) Whilst it was not possible to grant audience to the Cayman companies as parties to the proceedings, it was accepted, on the present facts, that a narrow construction of s3A could operate to unfairly prejudice the companies. In this regard, it was of importance to note that the court always retained the discretion in the exercise of its inherent jurisdiction to direct that any person not eligible to be joined as a party should nonetheless be given notice of the proceedings with the opportunity to address such arguments to the court as the court considered appropriate: Hasselblad (G.B.) Ltd v Orbinson. Nothing in s3A operated to exclude this parallel inherent discretion.

The court had good reason to exercise its discretion in favour of the Cayman companies on the present facts.

AD

Editor's note: For related litigation see next succeeding summary

Application to discharge Grand Court order - Proceedings in foreign jurisdiction

In the Matter of a civil action before the Ontario Securities Commission Toronto Canada

Grand Court (83/94)
Smellie J
July 7 1994

Legislation

Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978

Rules of the Supreme Court of England and Wales Order 70

Messrs Lockwood QC and Devlin for Ontario Securities Commission
Mr Jones for the applicants

The applicants were parties to proceedings before the Ontario Securities Commission. The Commission sought on April 14, 1994 by *ex parte* application, an order under the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978 to obtain evidence from the Grand Court of the Cayman Islands to assist in proceedings before it.

From the application sent by the Chairman of the Commission and from the affidavit of Counsel for the Commission, the Grand Court was left with the impression that the Commission was constituted as a tribunal for the purpose of that hearing and that the Chairman was presiding in the capacity of Chairman of the tribunal. The Grand Court therefore made the order under that belief. It was later revealed in evidence that the hearing was being conducted by a panel of three persons appointed by the Commission.

The applicants sought a discharge of the order on two grounds:

(1) that the letter of request did not emanate from a foreign court as is required by the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978 and therefore the Grand Court had no jurisdiction to make the order; and

(2) that the Commission on seeking the *ex parte* order failed to make full and frank disclosure of relevant facts at the time of the application and that the court was misled as to the true facts and operated under a misapprehension.

It appeared from the evidence that the Commission panel was not aware of the application made by the Chairman of the Commission and, further, was not aware of the proceedings the application had triggered in the Cayman Islands until the evidence was sought to be admitted before the panel in Toronto.

The Chairman, in making the application, was not exercising any judicial or quasi-judicial authority and not being a member of the panel was not acting on its behalf. The letter of request was in reality a request made on behalf of the staff of the Security Commission acting in its investigatory capacity as one of the parties before the panel.

It was argued on behalf of the Commission that in signing the letter for the order the Chairman was doing so on behalf of the panel and that the Commission under Canadian law was content to regard the letter of request as its own and consequently treating it as a valid letter of request.

Held: (allowing the application)

(i) In granting the order of April 14 1994, the Grand Court was of the impression from the letter of request and affidavit of counsel that the Commission was itself constituted as a tribunal for the purpose of that hearing.

It became clear from the evidence that in signing and issuing the letter of request, the Chairman of the Commission did so entirely in an administrative capacity.

As a matter of Cayman law, the Grand Court had no jurisdiction to act in furtherance of a foreign letter of request unless it emanated from a foreign court.

(ii) As to the argument that as a matter of Canadian law the panel was content to regard the letter of request as its own, the issue had to be decided as a matter of Cayman law.

(iii) Counsel for the Commission had requested that the Grand Court accept jurisdiction retrospectively

because the panel had adopted the Chairman's letter of request. Such jurisdiction was a prerequisite to the making of the order of April 14 1994. It could not be vested retrospectively, *a fortiori*, by virtue of something occurring without the panel's knowledge or consent.

(iv) As the matter stood, the order of April 14 1994 had been procured irregularly. Although this was done without a full understanding of what by Cayman law was required to found jurisdiction in the Grand Court, there could be no snatching at jurisdiction. Either it existed or it did not, and on the present facts, it plainly did not.

The order therefore would be discharged and consequential orders for the repatriation of the evidence within the custody of the Commission would be dealt with in accordance with further directions of the court.

(v) A further submission by the applicants that the Commission was guilty of material non-disclosure in procuring the order of April 14 1994 no longer fell for decision in the light of the foregoing conclusion on the jurisdictional issue. The court was nonetheless obliged to note its satisfaction that any material non-disclosures were not deliberately effected to mislead the court.

AD

Confidential relationships - Demands for evidence - Directions

In the Matter of the Confidential Relationships (Preservation) Law 1976 (as Amended) and In the Matter of An Application By X Ltd For Directions

Grand Court (205/94)

Smellie J
September 20 1994

Legislation

Confidential Relationships (Preservation) Law 1976 (as amended) s3A

Mr Nelson for the applicants
Mr Helfrecht *amicus curiae*
Mr Timms for the liquidators

The applicant, X Ltd., a Cayman Islands company, managed the local affairs of A Co, also a Cayman Islands company, carrying on business in the United States. A professional law firm *(sic)* from the United States, which had provided services to A Co before they were placed in voluntary liquidation, commenced an action in the United States alleging that A Co had failed to pay for legal services rendered. A Co counterclaimed alleging that negligent advice had been given. The firm made discovery demands which appeared to raise confidentiality issues locally with respect to A Co and its clients. X Ltd. applied for directions pursuant to s3A of the Confidential Relationships (Preservation) Law.

Held: (disclosure would not be given)

(i) S3A of the Law mandated that any person required to give into evidence confidential information (as defined in the Law) must first obtain directions from the Grand Court. S3A (6)(a) required that when considering what order was to be made under that section a judge should have regard to public policy concerns, the effects on innocent third parties, and, "whether such order would operate as a denial of the rights of any person in the enforcement of a just claim." Those requirements

were applicable to both local and foreign actions.

(ii) The considerations of the Law required the court to examine the background and likely merits of the foreign action. With regard to the merits of the debt claim, it was to be noted that the foreign court had placed a stay of proceedings on the action upon the liquidation order being issued. (Under the foreign law this did not affect the validity of the disclosure demand.) In the light of the stay, it appeared that the present attempt to gain information was a "fishing expedition" with the effect of involving X Ltd. in an unnecessary and time consuming exercise.

JE

Leave to appeal - Final or interlocutory order

In the Matter of The Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 et al

Court of Appeal (200/94)
Harre CJ (sitting as a single judge of the Court of Appeal)
August 30 1994

Legislation

Supreme Court Rules Order 59 rule 1A
Court of Appeal Law Ss 22 and 24

Authorities referred to

Re Harrison's Share [1955] Ch D 260
Salter Rex & Co v Ghosh [1971] 2 QB 597
Boeing Co v PPG Industries Inc [1988] 3 All ER 839
H Properties Ltd & X v B (1994) 11 Law Bulletin 33
Rio Tinto Zinc v Westinghouse [1978] 1 All ER 434
Radio Corporation of America v Rouland Corporation [1956] 1 All ER 549
United States v Carver (1980-83) CILR 297
Becker v Bank of Nova Scotia (1987) CILR 389

Authoritative works

Halsbury's Laws Of England (4th ed) vol 26

Mr Quin for the applicant
Mr Alberga QC and Mr McCann for the respondent

C obtained an *ex parte* order for the taking of depositions before an examiner and the production of documents in accordance with the procedure under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 and Order 70 of the Rules of the Supreme Court of England and Wales ("RSC"). At the *inter partes* hearings W, the party against whom the order was made, applied to have the order set aside. The judge narrowed, but refused to set aside, the order. The judge refused leave to appeal and refused the application for stay of the order pending attempts to determine whether any avenues of appeal were open to W. (The order was still subject to review under s3A of the Confidential Relationships (Preservation) Law 1976.) W sought to appeal the refusal of leave arguing first that the leave of the judge was not necessary. The court was asked to determine whether leave was required. The answer to that question depended on whether the order appealed against was an interlocutory or a final order. (A final order can be appealed to the Court of Appeal without leave.)

A preliminary decision was given from the Bench but the opposite conclusion was reached in the written decision.

Held: (the *inter partes* order was an

interlocutory order)

(i) An order pronounced by a judge was always capable of being withdrawn, altered or modified by him until it was drawn up, passed and entered. In the meantime, it was provisionally effective and could be treated as a subsisting order in cases where the justice of the case required it and the right of withdrawal would not be prejudiced thereby: Re Harrison's Share. The *status quo* had been maintained by the parties rendering the change in decision allowable.

(ii) The determination of whether an order was interlocutory or final had proven problematic in the past: Salter Rex & Co v Ghosh, (per Lord Denning MR). Order 59 rule 1A RSC consolidated the common law. It was appropriate to apply it in this case as no local rule applied. The general rule was recorded in rule 1A (3): a judgment or order shall be treated as final if the entire cause would finally be determined by that decision, subject only to appeal. Subrule (6) required that a number of particular kinds of judgments and orders be treated as interlocutory notwithstanding subrule (3). One of these was, "an order setting aside or refusing to set aside another judgment or order (whether such other judgment or order is final or interlocutory)", a category which included the order made at the inter parties hearing. The cases in Halsbury's Laws of England defining a final order assisted the court.

The fact that the order was still subject to directions under s3A of the Confidential Relationships (Preservation) Law was of no consequence in determining whether or not the order was final. Similarly, the fact that W once thought the order was interlocutory was irrelevant. Boeing Co v PPG Industries Inc which had been cited to the court was not helpful. Similarly, Rio Tinto Zinc v Westinghouse Radio Corporation of America v Rouland Corporations, and United States v Carver added nothing to the present deliberations.

(iii) A single judge of the Court of Appeal had the power to grant a stay of execution pending appeal: Court of Appeal Law s24 (1) and Becker v Bank of Nova Scotia. When a Grand Court judge refused leave to appeal an order, any appeal, other than issues listed in the Court of Appeal Law s24 (1) (e.g. (a) stay, (b) injunction, (c) extension of time) should be made to the full Court of Appeal: H Properties Ltd. v B. [The full Court of Appeal only exists when the members serving on that panel are on the Island for that purpose. Between such sessions no full Court of Appeal exists.] The court would apply the equitable spirit of s22 of the Court of Appeal Law in determining appeals. It would not use that provision to narrow the definition of an interlocutory judgment.

JE

Editor's note: The Cayman Islands Court of Appeal overturned the disclosure order in December 1994.

Summons for further and better list of documents - Directions

X Investment Company Ltd (in liquidation) and Another v S and Others

Grand Court (389/92)
Harre CJ
August 5 1994

Legislation

Grand Court (Civil Procedure) Rules Rule 47
Rules of The Supreme Court Order 24 rule 5

Authorities referred to

Taylor v Batten (1878) 4 QBD 85
Hill v Hart Davis (1884) 26 Ch D 470
Cooke v Smith [1891] 1 Ch D 509
Budden v Wilkinson (1893) 2 QB 432
Milbank v Milbank [1900] 1 Ch 376
Sveriges Angfartygs Assurans Foreing v The 1976 Eagle Insurance Company SA (Transcript 1990)
Lonrho Ltd v The Shell Petroleum Company (Transcript January 25 1980)

Mr Purle QC and Mr McQuater for the plaintiff
Mr Alberga QC and Mr Sibley for the defendants

This was a summons brought by the fifth and seventh defendants seeking an order that the first plaintiff file and serve a further and better list of documents.

A supplementary list of documents was served by the plaintiffs which the defendants alleged failed to comply with the plaintiff's discovery obligations specifically in respect of the following three matters:

(1) the list failed to describe the documents sufficiently clearly so as to enable individual documents to be identified;
(2) documents which were in various bundles did not appear to be of the same nature;
(3) the supplementary list did not conform to the format used in the original list.

Held: (allowing the application in part)

(i) Orders for discovery were governed by the Grand Court (Civil Procedure) Rules, Rule 47. The practice in Cayman has been to be guided by the English Rules of the Supreme Court, Order 24, rule 5, while retaining a discretion within the ambit of the local Rule 47. Following comments in Sveriges Angfartygs Assurans Foreing v The 1976 Eagle Insurance Company SA, the nineteenth century English authorities on the English provision were no longer to be considered binding nor persuasive in modern circumstances.

The requirement of enumeration and description of documents under the RSC are to enable the court to see if the rule or order for discovery has been complied with and to enable the court to make an order for production which is clear and can be enforced. The documents must be sufficiently identified to enable the other party to ask for those which he wishes to inspect, and should accordingly consist of items in order of date with the number of the item, the description and the date.

The descriptive section of the supplementary list did no more than indicate in the broadest terms the categories under which the supplementary list had been presented. However, that was unobjectionable.

(ii) The argument that documents in a particular file must be of a similar nature was rejected. What was important was that the form of listing achieved the objectives of the discovery process. In the present case there was an allegation of fabrication and therefore the sequence of documents on the record was important. Accordingly the bundles, although not containing documents of the same nature, would not be split up. However, 'sub-bundles' were to be created out of the bundles containing heterogenous files, by referring to the page numbers of the bundles. For example, a bundle containing bills, invoices and credit advices could be divided into sub-bundles by listing the pages at which the bills occurred within that bundle, then the pages at which the invoices occurred, and then the pages at which the credit advices occurred. Additionally, the period of time covered by the items in each sub-bundle was also to be shown.

(iii) Personnel files and files on numbered accounts could not conveniently be further categorised by reference to the individual items therein. However,

the period covered by each numbered account file was important and was ordered to be shown.

SAAC

Application pursuant to the Trust Law - Costs

In the Matter of a Trust Deed Made by O and In the Matter of the Trusts Law (Revised) re Costs

Grand Court (100/93)
Smellie J
April 6 1994

Legislation

Judicature Law s30
Trust Law (Revised) s45
Rules of the Supreme Court of England and Wales Order 12 rule 2

Authorities referred to

In re Buckton [1907] 2 Ch 406
In re Spurling's Will Trust [1966] 1 WLR 920
JM Bodden & Son v K Bodden (1990-91) CILR 241
McAllister v Tortuga Club (1985) CILR 411
C Ebanks (as administrator of the Estate of NL Ebanks deceased) v Allen and Bodden (1986) CILR 180 CA

Mr Clifford for beneficiary No 1
Mr Quinn for beneficiary No 2
Mr Giglioli (as guardian *ad litem)* for beneficiary No 3 (a minor)
Mr Nelson for beneficiary No 4 (personally and as a representative)
Mr Timms for the trustees

In May 1993, an order was given upon an application by the trustee for advice arising out of foreign proceedings hostile to the trustee, brought by beneficiary No.1. The proceedings were instituted as an application for directions pursuant to the Trusts Law (Revised) s45. All beneficiaries were summoned to appear and did appear in the local proceeding. Beneficiary No.1 served a cross-summons which was withdrawn before the hearing. This summons was brought by the said beneficiary seeking an order for costs of the local proceedings on an indemnity basis to be paid by the trust fund. The other beneficiaries sought similar orders for their own benefit. The trustee opposed the application.

Held: (application granted)

(i) The Judicature Law s30 (and the tariff thereunder) applied to orders for costs in litigious actions subject to the proviso in s30(3) which made that provision subject to any other law. The question of costs in this matter was governed by the Trusts Law (Revised) as the application was not litigious in nature and the latter law provided the court with a separate authority to award costs for applications thereunder. Costs were said to be, "in the discretion of the court" pursuant to s45. The court had the authority to award costs on an indemnity basis from the estate.

(ii) In re Buckton was instructive on the matter of the exercise of the court's discretion. Beneficiary No.1 had a legitimate expectation that her costs would be met even though she had brought an application in another jurisdiction and had unsuccessfully sought an order of the opposite result locally. The court would, in appropriate cases, take into account any unjustifiable length in the proceedings. Further account was taken of the cross-summons which was filed by beneficiary No.1 as it required the trustee to incur additional expense.

The said beneficiary would be awarded costs on an indemnity basis from the trust fund, less an amount to be taxed for the trustee's costs in addressing her cross-summons. Beneficiary No.1 was required to bear the costs of her cross-summons.

(iii) Since the Judicature Law did not apply, the practice and procedure of taxation was governed by Order 62 rule 12 of the Supreme Court Rules. The importation of the practice and procedure (as opposed to the substantive elements) of Order 62 found support in the Court of Appeal decision in C Ebanks (as administrator of the Estate of NL Ebanks deceased) v Allen and Bodden. The case of McAllister v Tortuga Club was distinguished as it fell within the ambit of the Judicature Law s30.

(iv) Beneficiaries Nos.2 and 4 were joined in the proceedings by direction of the court and were entitled to costs on an indemnity basis from the trust fund. No.4 also acted as a representative of other beneficiaries and was entitled to similar costs. The guardian of beneficiary No.3 was also awarded costs on an indemnity basis from the trust fund.

(v) The trustees' costs were awarded on an indemnity basis from the trust fund pursuant to the discretion in the Trust Law (Revised) s45 even though their right to be paid on this basis was expressed in the trust deed and supported by: In re Spurling's Will Trust and JM Bodden & Son v K Bodden.

JE

Dismissal for want of prosecution

Harvey's Construction Ltd v Daniel (Danny) Scott

Grand Court (363/90)
Harre CJ
July 25 1994

Authorities referred to

Instrumatic Ltd v Supabrace Ltd [1969] 2 All ER 131
Allen v Sir Alfred McAlpine (1968) 2 QB 229

Mr Shea for the plaintiff
Mr Hill QC for the defendant

The defendant sought dismissal of the plaintiff's action for want of prosecution. A specially endorsed writ alleging a debt due was filed in September 1990. A defence and counterclaim were filed in December 1990. The plaintiff filed a notice of intention to proceed in April 1992. An order for directions was given in November 1992. Another notice of intention to proceed was filed in February 1994 and a second summons for directions was filed in April 1994, followed by the present application. The defendant claimed that he had lost many relevant documents and that witnesses had left the Island.

Held: (application dismissed)

(i) The onus lay on the defendant to establish that the delay had been inordinate and inexcusable and that such delay would give rise to a substantial risk that it was not possible to have a fair trial of the issues in the action, or was such as to be likely to cause serious prejudice to the defendant.

(ii) The period of negotiations prior to the issuance of the writ did not count against the plaintiff. However the subsequent delay of three and a half years was inordinate in a case of this kind. After the

first directions were given, some negotiations transpired but neither party appeared anxious to proceed. The defendant's obligation in the case of a counterclaim was described in Instramatic Ltd. v Supabrace per Lord Denning MR. The defendants were unable to complain of the plaintiff's delay when they had not pursued the counterclaim. Furthermore, no purpose was served in dismissing the claim before the limitation period expired.

(iii) The test in Allen v Sir Alfred McAlpine would be applied: "The principle upon which we go is clear: When the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straightaway." The alleged loss of documents was not due to the plaintiff's delay but due to the defendant's ineptitude. The unavailability of the workers was not the sole responsibility of the plaintiff. On balance the action should be allowed to take its course.

JE

Stay of proceedings pending payment of costs - Security for costs

M D Receiver/Manager for Company No 1 v S I Limited

Grand Court (430/92)
Harre CJ
May 3 1994

Authorities referred to

Bettinson v Bettinson [1965] Ch 165
M'Cabe v Bank of Ireland (1889) 14 App Cas 415

Mr Telfer for the plaintiff
Mr Turner for the defendant

The defendant sought a stay of proceedings on the basis that the company which successfully brought the motion to have the plaintiff appointed receiver/manager owed the defendant costs under orders of the Grand Court in other matters. The plaintiff argued that as a receiver/manager under court order it was not the same party as the one who sought their appointment. In the alternative, the defendant sought an order for security for costs.

Held: (applications dismissed)

(i) A plaintiff who was suing, "substantially by the same title" in a second action could be stayed from proceeding until the costs in the first action had been paid: M'Cabe v Bank of Ireland. However, the court appointed receiver was not one and the same as the party who sought its appointment under this rule. The principle in Bettinson v Bettinson (the court will not entertain an application by a person who is in contempt of court until he has purged himself of that contempt) did not apply.

(ii) The plaintiff was an officer of the court that appointed it receiver/manager. Through its attorney it had given an undertaking to pay costs if the court so ordered. Such undertaking was sufficient.

JE

Interim payment - Personal injuries

JB v AE and RE

Grand Court (548/93)
Schofield J
April 22 1994

Legislation

Grand Court (Civil Procedure) Rules Rr 49A-49C

Authority referred to

Schott Kem Ltd v Bentley and Others [1990] 3 All ER 850

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

The plaintiff brought an application for an interim payment pursuant to Rule 49A of the Grand Court (Civil Procedure) Rules. The claim was based on a motor vehicle accident wherein the defendant admitted liability but pleaded contributory negligence alleging that the plaintiff had failed to wear his seat belt. The plaintiff denied that this failure contributed to his injury.

Held: (application granted)

(i) The provision of the rule was clear. The defendant in this case had means through his insurance protection. The interim payment was not to exceed a reasonable proportion of the likely damage award.

(ii) It was not necessary for the plaintiff to satisfy the court of his need for an interim payment nor that he would suffer prejudice if he were given an advance payment: Schott Kam Ltd. v Bentley and Others.

(iii) Since interest payments on special damages could not be ordered until the date of judgment (unlike in other jurisdictions where interest could be ordered to run from the date of the commencement of the suit) it was unjust to keep a plaintiff from recovering those damages as he would inevitably be awarded them at trial.

(iv) The medical evidence suggested that the plaintiff's personal injuries were not severe, although he alleged otherwise. He lost wages and incurred pain and suffering in the eleven months preceding the application. Some of his bills had been paid by the defendant's insurer prior to the application; therefore an order for payment of $4300 was made.

JE

Pleading - Striking out during trial - Restoration of pleadings

B v H Properties Ltd and X

Grand Court (341/93)
Smellie J
May 27 1994

Legislation

Rules of the Supreme Court of England and Wales Order 18 rule 13 Order 19 rule 9 and Order 24 Rr 16 & 17

Authority referred to

Bain v Patel (1983) Times August 2

Mr Croxford for the plaintiff
Mr Jones for the defendants

During the trial of this action the court made an order striking out the defence and entering judgment for the plaintiff. The defendants sought to persuade the court that it was still seized of jurisdiction and able to set aside that order.

Held: (application dismissed)

(i) The defendants argued that the striking out of the defence rendered the judgment a, "judgment in default of defence" and as such the court would still be seized of jurisdiction to set aside the judgment under Order 24 rule 17 of the Supreme Court Rules (no Grand Court Rule applying). The court did not accept the proposition that an aborted trial was the same as a trial that had never begun. Striking out a defence during a trial deemed the claim to be admitted pursuant to Order 18 rule 13 of the Supreme Court Rules. Therefore the trial was concluded upon perfection of that judgment and the court became *functus officio*.

(ii) Bain v Patel was doubtful and could be distinguished. In that case the trial had not yet begun. The plain wording of Order 19 rule 9, which related only to judgments entered under Order 19 itself, made it clear that it was not appropriate to extend that power to applications to rescind a striking out of defence under Order 24 rule 16.

JE

Editor's note: Smellie J refused leave to appeal on May 31, 1994, see P. 56 infra. For other related litigation see next succeeding summary.

Appeal against a refusal of leave by the Grand Court - Appeal of refusal of leave application to full Court of Appeal

H Properties Ltd and X v B

Court of Appeal (Chambers)(341/93)
Harre CJ
July 11 1994

Legislation

Court of Appeal Law s26(1)
Court of Appeal Rules 1987 Rr21 and 24

Mr Jones for the appellants
Ms Bridges for the respondent

The appellant sought leave to appeal the decision of Smellie J in refusing to give leave to appeal the decision in B v H et al. The matter was brought before a single judge of the Court of Appeal. A preliminary objection was raised by the respondent with regard to the power of a single appellate judge to hear the application.

Held: (application dismissed)

The powers of a single judge of the Court of Appeal were defined in the Court of Appeal Law s26(1) and the Court of Appeal Rules Rr 21 and 24. The whole of Rule 24 referred to a case or matter which was already pending before the Court of Appeal and not to any application for leave to take a case or matter before it. Such an application did not itself cause the case or matter to be pending before the court. The application for leave to appeal was to be made to the full Court of Appeal. Costs of this application were to be paid by the applicant to the respondent.

JE

COMPANY LAW

Liquidation of bank - Unidentified depositors - Directions

In the Matter of X Bank and Trust Corporation (in voluntary liquidation) and In the Matter of the Companies Law (Revised) Cap 22

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

Legislation

Companies Law (Revised) Ss 120 140
Companies (Winding-up) Rules 1949 Rr 106 107
Insolvency Rules 1986 Rr 4.74 4.75
Limitations Law Ss 2 7 27 34 35

Authorities referred to

Handlingair Douglas Ltd Action Casualty and Surety Co (1987) CILR 441
In the Matter of Cayman Islands Television and Video Production Company Limited Cause 38\93
In re Aramco Ltd (1980-83) CILR 202
Jones v Bellgrove Properties Ltd [1949] 2 KB 700
Re Compania de Electricidad de la Provincia de Buenos Aires [1978] 3 All ER 668

Mr Turner for the liquidator

This was an application by the liquidator of X Bank and Trust Corporation ("the bank") for directions pursuant to the Companies Law (Revised) s140 concerning the disposition of funds held by the liquidator.

The bank went into voluntary liquidation in 1989 and the liquidator placed notices in the Gazette and a local newspaper requiring claims by creditors in proof of debt to be made by March 31, 1990 in the form specified by the notice. No claims were made in respect of certain deposits; no forwarding address for those depositors was held in the bank's records and the liquidator concluded it was impossible to locate the depositors.

The deposits were held in liquidation upon a declaration of trust made on January 27, 1993, declared to expire as of December 30, 1995, on which date any balance remaining was to be paid to the contributaries if any apparent creditor failed to lodge a satisfactory proof of debt before that date.

Directions for the disposition of the unclaimed trust fund were sought.

Held: (directions as follows)

(i) The liquidator's discretion to require submission of claims in proof of debt in the specified form was retained in a voluntary liquidation, whether under the Companies (Winding-up) Rules 1949 R 106, or the Insolvency Rules 1986. Rr 4.73, 4.74. Following In re Aramco Ltd., the recognition of the applicability of the Insolvency Rules 1986 did not preclude the application of the Companies (Winding-up) Rules 1949 to a particular liquidation if the circumstances merited it, and the use by the liquidator of the Companies (Winding-up) Rules 1949 was appropriate in the present case.

(ii) The Companies (Winding-up) Rules 1949 precluded the Insolvency Rules 1986, Rr 4.74, and so the liquidator was not required to send to every creditor a copy of the prescribed form of proof of debt, but was required under the Companies (Winding-up) Rules 1949, R 106(2), to 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.

(iii) An acknowledgment of the subject debts in the books of the bank did not satisfy the requirements of the Limitation Law 1991 s35 so as to operate as an extension of the limitation period provided by s34 of the Law. Following Re Compania de Electricidad de la Provincia de Buenos Aires, for an acknowledgment to extend the limitation period it had to be communicated to the creditor for whose benefit it was made: this did not apply to the present case.

(iv) There were very persuasive *dicta* in Re Compania de Electricidad de la Provincia de Buenos Aires that the debts in this case were not specialty debts, therefore the correct limitation period was six years under the Limitation Law s7, rather than the twelve year period under s10.

(v) There were very persuasive *dicta* in Re Compania de Electricidad de la Provincia de Buenos Aires that where, as here, the liquidator published proper advertisements and proper notices, and no form of claim of proof of debt was submitted in time by the creditors in question, the mere fact that the debts appeared in the bank's books did not place the liquidator under a duty in a voluntary liquidation to admit and make provisions for those debts; nor was the liquidator entitled to admit or make provision for such debts. But in a voluntary liquidation there was no general rule that a debt must be supported by sworn proof.

(vi) Mere advertisement does not absolve a liquidator from his duty to communicate with those who have claimed or may claim in the liquidation and with whom it is possible for him to communicate.

(vii) The liquidator had not constituted himself a trustee of the funds to the inalienable benefit of the apparent creditors, but to the benefit of the liquidation as a whole. This vested a discretionary entitlement in any apparent creditor. No cause of action based on trust could accrue to a creditor who failed to submit the requisite proof.

(viii) In exercise of the statutory power under the Company Law (Revised) s140, the date for submission of further claims was fixed at December 29, 1995, until which time the liquidator would hold the funds according to the declaration of trust, and after which time the liquidator could pay the remaining balance to the contributories in proportion to their shareholding in the bank at the time of liquidation.

SAAC

Company liquidation - Rejection of applicant's proof of debt by liquidator

In the Matter of H Investment Ltd
(In Voluntary Liquidation)
In the Matter of the Companies Law (Revised) and Rule 4:83 of the Insolvency Rules

H v A (as liquidator of H Investment Ltd)

Grand Court (103/94)
Smellie J
October 14 1994

Legislation

Companies Winding-up Rules 1949
Insolvency Rules 1986

Authorities referred to

Re Kentwood [1960] 2 All ER 655
Saunders v Anglia Building Society [1977] AC 1004
Howes v Bishop [1909] 2 KB 390
Barclays Bank PLC v O'Brien [1990] 4 All ER 433
Porter v Moore [1909] 2 Ch 367
Fung Kai Sun v Chan Fui Hing and others [1951] AC 489
William Lacey (Houstlow) Ltd v Davis [1957] 1 WLR 932

Mr Mahfood QC for the applicant
Mr Jones for the respondent
Mr Mostyn for Mrs H

The applicant was seeking to set aside the decision of the respondent liquidator rejecting *in toto* his proof of debt submitted in the voluntary liquidation of H Investment Ltd. (HIL) in the sum of US$386,800.00.

The applicant and his wife, Mrs. H, were the only shareholders of HIL. The breakdown of the marriage had led to the decision to go into voluntary liquidation. The principal asset of HIL was the former matrimonial home. The building contractor was H C Ltd. (HCL), a company owned jointly by the applicant and his brother.

The house was sold on the open market in the course of the liquidation for US$900,000. The applicant's proof of debt consisted mainly of money owed to him by HIL by way of costs incurred in the construction of the house. The applicant claimed that he had been given a director's loan by HCL for the construction of the house. He also claimed it had been agreed between himself and his wife that the cost incurred by HCL would be repaid by HIL. The applicant produced in evidence a balance sheet purporting to reflect the indebtedness and signed by his wife and himself as a true record of the indebtedness and of HIL's financial status at the time.

The application proceeded on two alternative grounds:

(1) that the respondent liquidator had erred in rejecting the balance sheet as conclusive evidence of the debt owed to him and that Mrs. H should be estopped from denying the contents of the balance sheet, not having raised any objection to it at the meeting at which HIL was put into voluntary liquidation;

(2) that the applicant be entitled to recover the debt on a *quantum meruit* basis reflecting the fact that the work was done by HCL and that an understanding existed that the money would be repaid to him on account of the director's loan. The debt of US$386,800 was said to comprise the director's loan of US$334,800 plus US$52,000 said to represent the applicant's cash contribution towards the purchase of a Lexus motor car registered in the name of HIL. The applicant claimed that the transfer of the car to HIL was by way of a loan of its asset value to HIL. The sum of US$386,800 appeared in the balance sheet as 'shareholders' loans'. Apart from the loan of US$334,800, HCL claimed to have incurred certain other costs in the construction of the house. These claims totalled US$337,500 including US$150.00 said to have been paid to the applicant as director's salary whilst supervising the building of the house.

The liquidator had redeemed from the proceeds of

the house, a guarantee given by HIL (secured by a charge on the house) to Z bank in favour of HCL in the amount of CI$250,000. Mrs. H maintained that the security was signed by herself at the applicant's insistence in order to provide security for HCL which was in dire need of refinancing from the bank. She denied any outstanding liabilities to HCL in respect of the construction of the house.

Mrs. H stated that the debt claimed by the applicant as shown in the balance sheet was not factually established. She said it had been contrived and was a devise to deprive her of her interest in the matrimonial home. She denied any agreement with the applicant and asserted that the figures were unreliable. She put the cost of the construction of the house at US$700,000 and denied awareness of any arrangement by which HCL was required to provide subsidy for the construction of the house.

The balance sheet in question had been drawn up by an accountant employed by HCL. It was based on information provided by the applicant. The balance sheet contained no information relating to the purported HCL loan nor to the cost of the Lexus motor car. It also omitted reference to any security with the Z bank.

The circumstances under which Mrs. H's signature came to be appended to the balance sheet were in dispute. She claimed as reasons for her signature: pressure exerted on her, a desire to salvage the marriage and inadequate opportunity to properly consider the content of the document. Another reason she claimed for having signed the document was to enable it to be presented to the bank to obtain a loan for a project in Little Cayman in which HIL was to become a joint partner. In short, Mrs. H was raising the pleas of *non est factum* and undue influence.

The applicant maintained that Mrs. H had had ample time to examine the balance sheet and had signed it as a director of HIL in affirmation of a pre-existing oral agreement. The applicant further asserted that Mrs. H had not challenged the balance sheet at the liquidation meeting.

Held: (dismissing the appeal in part)

(i) The procedural and jurisdictional principle that a party may appeal against the findings of a liquidator and that the court in determining the appeal is not confined to dealing with the matter only as an appeal on the record but may consider all the evidence put before it, was clearly established in Re Kentwood. The court had power to reverse or vary the decision of the liquidator.

(ii) The redemption of Z bank's liability of CI$250,000 was of crucial evidential relevance in determining what agreement was reached between the applicant and Mrs. H. When that amount was added to what Mrs. H claimed had actually been spent on the house, the resultant figure was nearly US$1,000,000 which matched the applicant's estimate of cost. There was therefore no basis for his claim for a further US$334,800.

(iii) The evidence was compelling that Mrs. H had signed the balance sheet out of wifely loyalty and for the sake of procuring finance for the Little Cayman project; however the pleas of *non est factum* and undue influence were not sustainable. This conclusion was fortified by her failure to raise any objection to the balance sheet at the liquidation meeting where the various items were discussed. She had a background as a businesswoman of experience and sophistication and her claims that she had been embarrassed or coerced by the applicant into signing the balance sheet were not tenable. There were no exceptional circumstances to give rise to the conclusion that Mrs. H had made a fundamental mistake as to the character or effect of the document

she had signed: Saunders v Anglia Building Society.

(iv) As to the plea of undue influence, although the presumption can arise between husband and wife in respect of dispositions made in his favour where there is shown to exist unquestioning reliance on, and faith in, his conduct of their joint financial affairs, it did not arise in the present case: Barclays Bank PLC v O'Brien.

(v) The balance sheet could not be properly regarded as a 'disposition' in favour of the husband; the balance sheet was intended by Mrs. H to be only a representation to the prospective lending bank as to the financial status of HIL. It was to be concluded that Mrs. H did not intend to endorse the balance sheet as proof of any indebtedness of HIL to the applicant. The balance sheet was to be regarded as inaccurate and unreliable having been created at the behest of the applicant. At best, it was nothing more than an unaudited statement of HIL's assets and liabilities as the applicant would wish them presented.

Mrs. H, while not protesting the balance sheet at the liquidator's meeting, would nonetheless have been entitled to expect that the liquidator, in the proper execution of his duties, would have ascertained the financial status of HIL before any final distribution of assets. There was a deadlock between the applicant and Mrs. H and the indications, by reference to what had clearly been an inflated claim as to the value of the motor car, were that the applicant had prepared the balance sheet to suit him. Consequently, it could not be accepted that Mrs. H's signature on the balance sheet signified her agreement that HIL was liable to reimburse nearly the entire original value to the applicant.

(vi) As to the HCL liabilities claimed by the applicant, Mrs. H would not have been able to properly verify them even if she had wished to do so for, as admitted in evidence by the applicant, the relevant sum was his own estimate based on his recollection of what was expended on the construction of the house and what would have been owed to HCL on his director's loan account. There was no evidence that the loan had ever been discussed with Mrs. H.

No acceptable explanation had been given by the applicant as to why certain of items being claimed, including the bank guarantee, were not included in the balance sheet. The signatures of Mrs. H and the applicant on the balance sheet could not be taken as evidencing on behalf of HIL an agreement that it owed the sum of US$334,800 to the applicant as costs associated with the construction of the house. Neither was a plea of estoppel to be effective against Mrs. H.

It was of the first importance to the liquidation that the liquidator should be satisfied about the financial status of the company with regard to obtaining an accurate picture of its assets and liabilities. The applicant could not assert, therefore, that he should be allowed to rely upon a balance sheet punctuated with patent inaccuracies and omissions. The applicant, moreover, had failed to establish that he would be materially prejudiced by the rejection of the balance sheet. There was no evidence to support his assertion that he had agreed to put the company into liquidation only because he had been led to believe that his claim would not be challenged. The evidence showed, to the contrary, that the liquidation was inevitable because of the deadlock between the shareholders.

There was no evidence that the motor car had been a gift to HIL nor was there evidence of any trust relationship. The purchase of the car was therefore to be treated as a loan to HIL to be repaid in any liquidation. The amount to be paid was that realised from the sale of the vehicle at the time of the

liquidation which, due to an accident, had been only CI$2439.02.

(vii) Regarding the applicant's alternative argument that he should be paid on a *quantum meruit* basis for the work done by HCL, there was no evidence of any agreement that HCL would provide any major subsidy which would be repaid by HIL. Mrs. H testified to a budget of $700,000 as relating to the acquisition of the house. If there had been any agreement with HCL regarding any subsidy, in the absence of an express contract it would be implied that HIL would repay the reasonable expenses incurred above and beyond the funds made available by HCL. This would be in the nature of a quasi-contract: William Lacey (Hounslow) Ltd. v Davis. The burden of proving the quantum as well as the reasonableness of the quantum rested firmly with the applicant, there being no strict contractual basis for the repayment of whatever sum may have been charged or expended. The amount of US$301,800 paid to Z bank by HIL on account of HCL's indebtedness was to be taken into consideration as that sum was ostensibly claimed by HCL and in effect paid as part of the construction debt.

The evidence as a whole provided a totally unsatisfactory basis upon which to found reasonable proof of the liabilities claimed and a number of the claims being made, including the amount of the director's salary and Z bank's guarantee, were doubtful. On the assumption that HCL's costs were correct, HIL had already paid that cost and the sum allocated to the applicant's salary on account of Z bank's guarantee.

Accordingly, there was no reasonable basis upon which to find a debt owed to the applicant by HIL, either by express or implied contract or on a bare *quantum meruit* basis with respect to the construction of the house. The appeal would succeed, therefore, only in respect of the value of the motor car realised in the liquidation.

AD

CRIMINAL LAW

Contempt of court - Weighing evidence - Sentence

Attorney-General v Smith

Grand Court (109/94)
Smellie J
June 6 1994

Authorities referred to

Moore v Clerk of Assize Bristol [1972] 1 All ER 58
Danielle Pars v Alex Antonio Brown (144/92)

Authoritative Works

Archbold's Criminal Pleading Evidence & Practice

Mr Clarke for the Attorney-General
Mr Furniss for the respondent

In early March 1994 the trial on indictment of R v Royce, Pouchie and Brown was proceeding before the Grand Court for the offence of causing grievous bodily harm. The main witness for the prosecution, M, was in the course of giving his testimony in chief when the court interrupted proceedings for the mid morning break at about 11.30.a.m.

The respondent who was, respectively, a cousin and a friend of the defendants, had been present throughout the morning's trial. The respondent followed M to the precinct of the Court House. The

chief witness for the Attorney-General in the present proceedings, X, testified that he had witnessed the respondent and M arguing and had overheard the respondent say to M: "If my brother goes to jail you will get a hole in your head". He had also heard the respondent ask, "are you threatening me?" Thereupon X testified that the respondent pushed M and slapped him on the face.

The respondent's version of events was that M had first threatened to shoot him (the respondent) and that the respondent had retorted that he would do the same thing to M.

Although the respondent denied throughout that any connection existed between the issuance of the threat and the ongoing proceedings, under cross examination from the Crown he had admitted threatening M: "If my cousin goes to jail I will put a hole in your head".

M did not testify in the present proceedings.

Held: (convicting the respondent)

(i) The respondent's evidence was wholly rejected, it was clear that he had issued the threat with the objective of intimidating M from giving further testimony in the proceedings.

The regular attendance of the respondent at the trial and his, "inordinately keen interest in the proceedings" fortified the court in its conclusions as to the real motivation for the respondent's conduct.

(ii) The victimization of a witness was not only a grievous wrong to the person affected but was also a contempt of the court: Moore v Clerk of Assize, Bristol.

(iii) Taking into account the court's finding that the contempt was deliberately aimed at intimidating the witness, but balancing against that fact the youth of the respondent (20 years) and the absence of any other relevant offences, a sentence of 3 months' imprisonment would be imposed.

MD

Possession of cocaine with intent to supply - Evidence - When a fine may be imposed alongside substantial term of imprisonment

Ebanks v R

Grand Court (101/92)
Smellie J
February 15 1994

Authority referred to

Blackman v R (1984) CILR 55

Mr Furniss for the appellant
Mrs Escalante for the Crown

Before the learned magistrate, the appellant had been found guilty on two counts of possession of cocaine with intent to supply. A term of imprisonment was imposed together with a fine of $2000 or 6 months imprisonment in default.

The appellant's arrest followed a surveillance operation conducted by the police acting on information received. The appellant was observed to converse with two persons, separately, who both gave him money whereupon the appellant was seen to enter the bushes opposite his premises. He was there observed to dig in the earth for something. On

the approach of the police, the appellant was seen to throw a small foil packet into the bushes. This was retrieved and found to contain cocaine rocks. Another package containing more cocaine rocks was located in the vicinity where the appellant had been observed to be digging.

The learned magistrate had rejected the appellant's explanation that he had gone into the bushes to relieve himself and knew nothing of the packet of cocaine.

Held: (dismissing the appeal, but varying sentence)

(i) The learned magistrate was entitled to accept the police officers as witnesses of truth. He was also entitled to find that the existence of the second package of cocaine was consistent only with the appellant having buried it there. The intent to supply could be deduced from all the circumstances (including the fact that the total cache amounted to some 1.654 grams of cocaine).

(ii) The learned magistrate had imposed the $2000 fine without having first inquired into the appellant's means. A fine should not be imposed alongside a substantive term of imprisonment if the likely result was that the accused would have to serve an additional period of incarceration due to his inability to pay: Blackmore v R. The fine would accordingly be quashed.

MD

CRIMINAL LAW - SENTENCING

CRIM APP NO	CASE NO	OFFENCE	SENTENCE
20/93	3370/92	Robbery	3 Years Imp.
25/93	3342/92	Poss. of cocaine with intent to supply	4 years Imp. + $1000 fine or 4 months Imp.
28/93	3817/91	Permitting person not qualified to drive	Fined $100 or 6 weeks Imp.
28/93	3818/91	Permitting person to drive without insurance	Disqualified for 12 months and fined $200 or 2 month Imp.
39/93	4180/92	Permitting use of vehicle without insurance	Disqualified for 12 months and fined $300 or 1 month Imp.
41/93	1261/93	Causing G.B.H.	4 years Imp.
42/93	1796/91	Poss of ganja with intent to supply	12 months Imp.
42/93	1974/91	Failing to provide urine specimen	6 months Imp
42/93	1685/91	Failing to provide urine specimen	6 months Imp. (Conc.)
42/93	1686/91	Resisting arrest	6 months Imp. (Conc.)
48/93	310/93	Poss. of cocaine with intent to supply	4 years Imp. Forfeiture of vehicle
50/93	3691/92	Cons. of cocaine	6 months Imp. (Conc. with 3692/92)
50/93	3692/92	Being conc. in poss of cocaine	4 years Imp.
83/93	3669/93	Poss. of ganja with intent to supply	18 months Imp fined $200 or 1 month Imp.
83/93	3670/93	Attempting to export ganja from Cayman	To remain on file. Rec. for deportation

CRIM. APP. NO.	CASE NO.	OFFENCE	SENTENCE
3/94	2243/93	Burglary	18 months Imp.
3/94	2244/93	Burglary	18 months Imp. (Conc.) Compensation order of $385 or 2 months Imp.
3/94	2653/93	Poss. of cocaine	6 months Imp. (Conc. with 3262/93)
3/94	2654/93	Poss. of ganja	3 months Imp. (Conc. as above)
3/94	2655/93	Cons. cocaine	6 months Imp. (Conc. as above)
3/94	2656/93	Cons. ganja	3 months Imp. (Conc. as above)
3/94	3056/93	Failing to surrender to bail condition	1 month Imp. (Conc. as above)
3/94	3262/93	Theft	6 month Imp. (Consec. to 2243/93)
5/94	28/93	Burglary	12 months Imp.
5/94	29/93	Burglary	6 months Imp. (Conc.) Compensation order of $25 or 7 days Imp. Activation of susp. sentence imposed on 22/10/92
6/94	2565/93	Theft	12 months Imp.
7/94	2684/93	Refusing to supply urine specimen	3 months Imp. (Consec. to 2685/93 & 2686/93)
7/94	2685/93	Burglary	18 months Imp. (Consec. to earlier sentence)

CRIM APP. NO.	CASE NO.	OFFENCE	SENTENCE
7/94	2686/93	Buglary	18 months Imp (as above but Conc. with 2685/93)
7/94	400/93	Burglary	12 months Imp. (Conc. with earlier sentence)
7/94	2401/93	Burglary	12 months Imp.(Conc. with 2400/93 and with earlier sentence).
8/94	2524/93	Refusing to supply urine specimen	6 months Imp. (Conc. with 2876/93)
8/94	2525/93	Poss. of ganja	6 months Imp. (Conc. as above) 6 months susp. sentence imposed on 6/4/92 activated (Consec. to 2876/93)
8/94	2874/93	Theft	6 months Imp. (Conc. with 2872/93)
8/94	2875/93	Theft	6 months Imp. (Conc. with 2874/93)
8/94	2876/93	Refusing to provide urine specimen	6 months Imp. (Conc. with 2874/93)
8/94	3434/93	Interference with vehicle without owner's consent	2 months Imp. (Conc. with 2874/93)
8/94	2872/93	Burglary	2 years Imp.
8/94	2873/93	Resisting arrest	3 months Imp. (Conc. with 2872/93)

CRIM. APP. NO.	CASE NO.	OFFENCE	SENTENCE
8/94	3433/93	Being rogue and vagabond	3 months Imp. (Conc. with 2874/93)
8/94	3432/93	Theft	12 months Imp. (as above)
8/94	3106/93	Failing to surrender to bail condition	1 month Imp. (as above)
8/94	3107/93	Failing to surrender to bail condition	1 month Imp. (as above)
10/94	3329/93	Poss. of ganja with intent to supply	18 months Imp. Rec. for deportation.
11/94	1143/93	Cons. of cocaine	12 months Imp.
11/94	1144/93	Cons. of ganja	6 months Imp. (Conc.)
11/94	1146/93	Poss. of cocaine with intent to supply	4/2 years Imp. (Conc.)
12/94	1248/93	Assault occ. A.B.H	18 months Imp. Compensation order or 2 months Imp.
12/94	1249/93	Handling stolen goods	12 months Imp. (Consec. to 1251/93)
12/94	1250/93	Burglary	18 months Imp. (Conc. with 1251/93)
12/94	1251/93	Burglary	18 months Imp. (Consec. with 1248/93)
12/94	1252/93	Burglary	18 months Imp. (Conc. with 1251/93)

CRIM. APP. NO.	CASE NO.	OFFENCE	SENTENCE
12/94	221/93	Poss. of cocaine	12 months Imp. (Conc. with 1249/93)
12/94	223/93	Failing to provide urine specimen	6 months Imp. (as above)
12/94	2707/93	Assault occ. A.B.H.	6 months Imp. (Conc. with 1248/93) Compensation order of $250 or 1 month Imp. (Consec. to 1248/93)
12/94	2302/93	Escaping lawful custody	3 months Imp. (Conc. with 1249/93)
12/94	711/93	Carrying offensive weapon	3 months Imp. (as above) Total: 48 months Imp.
15/94	2719/93	Failing to give urine specimen	6 months Imp. (Conc. with 3416/93)
15/94	3534/93	Failing to surrender to bail condition	3 months Imp. (as above)
15/94	3515/93	Failing to surrender to custody	3 months Imp. (as above) Susp. sentence imposed on 3/6/93 activated
15/94	3416/93	Burglary	12 months Imp. Compensation order of $144.50 or 30 days Imp.
16/94	1741/93	Common assault	9 months Imp. Compensation order of $500 or 2 months Imp.
16/94	90/93	Obstructing police	3 months Imp. (Consec. to 1741/93)

CRIM. APP. NO.	CASE NO.	OFFENCE	SENTENCE
16/94	261/93	Being rogue & vagabond	1 month Imp. (Conc. with 262/93) Susp. for 2 years
16/94	262/93	Assaulting police	3 months Imp. Susp. for 2 years. Compensation order of $200 or 30 days Imp.
16/94	263/93	Assaulting Police	1 month Imp. Susp. for 2 years (Conc. with 262/93) Compensation order of $100 or 2 months Imp.
16/94	264/93	Assaulting police	3 months Imp. (Consec. to 262/93) Susp. for 2 years Compensation order of $300 or 2 months Imp. (Consec.)
16/94	265/93	Assaulting Police	1 month Imp. (Conc. with 262/93) Susp. or 2 years Compensation order of $100 or 14 days Imp. Breach of binding over order: $100 forfeit or 1 month Imp. (Consec).
16/94	3085/93	Failing to surrender to bail condition	3 months Imp. (Consec. to 90/93)
16/94	3086/93	Failing to surrender to bail condition	3 months Imp. (Conc. with 3085/93)

CRIM. APP. NO	CASE NO.	OFFENCE	SENTENCE
16/94	3087/93	Failing to surrender to bail condition	3 months Imp. (as above)
16/94	3088/93	Failing to surrender to bail condition	3 months Imp. (Conc. with 3086/93)

MD

CRIMINAL PROCEDURE

Forfeiture - Vessel carrying prohibited goods - Whether forfeiture of prohibited goods and vessel applies in rem or in personam

Haylock v Attorney-General

Grand Court (196/91)
Harre CJ
October 7 1994

Legislation

Customs Law Ss10(3) 53(1) 59 (1)(c) and (2) 59(5) 64(8) and 70
Firearms Law (Revised) Ss7 and 40
Customs and Excise Management Act 1979 s141
Customs and Excise Act 1952

Authorities referred to

Denton v John Lister Ltd and Another [1971] 3 All ER 669
Custom and Excise Commissioner v Air Canada [1991] 1 All ER 570
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356
Sweet v Parsley [1969] 1 All ER 347
Customs and Excise Commissioners v Jack Bradley (Accrington) Ltd [1958] 3 All ER 219
Tuck and son v Prieston (1887) 19 QBD 629
Clarke v Customs Comptroller [1987] 39 WIR 29

Mr Hill QC and Mr McCann for the appellant
Mr Archie for the Crown

The appellant was appealing against the forfeiture by the Customs Department of the vessel, "Real Thing". The vessel landed at the George Town Harbour, unloaded and purported to declare all firearms aboard to the Customs Department.

A subsequent search of the vessel by the police revealed a number of firearms and ammunition concealed in a cabin. Importation of the firearms in question into the Islands was prohibited or restricted by both the Firearms Laws (Revised) and the Customs Law and were liable to seizure under the Customs Law. Any vessel or aircraft carrying the prohibited goods was also liable to seizure. The Customs Department seized the vessel under Ss59(1)(c) and (2) of the Customs Law.

S7 of the Firearms Law (Revised) provides that a person shall not be deemed to import any firearm into the Islands unless such firearms are intended to be disembarked in the Islands otherwise than for the purpose of delivery to a Customs Officer. By s40 of the Law, the prohibition is made not to apply where the firearms form part of the equipment of a vessel or aircraft or are in the possession of an officer or crew member of the vessel or aircraft.

The grounds of appeal were:

(1) That the magistrate erred in finding that the forfeiture of the vessel did not depend upon the commission of any offence under the Customs (or other) Law.

(2) That the magistrate erred in law in finding that the firearm did not form part of the equipment of the vessel.

(3) That the magistrate erred in law in finding that the vessel was used for the concealment of the firearms and ammunition within the meaning of s53(1) of the Customs Law.

(4) That the magistrate misdirected himself on the burden and standard of proof and the nature of the proceedings.

Held: (dismissing the appeal)

(i) On the first ground, on the authority of Denton v John Lister Ltd. & Another concerning importation of prohibited goods and power of seizure under the Customs and Excise Act 1952, the forfeiture proceedings were *in rem* and not *in personam*.

(ii) The main issue in the proceedings was whether the goods in question were prohibited and liable to be forfeited. If they were so liable, then those proceedings were not interested in the identity of the persons who imported them. In Customs and Excise Commissioners v Air Canada it was held that a commercial jet on a scheduled flight which had been used for the carriage of a thing liable to forfeiture could itself be forfeited. The action was said to be *in rem*. The confiscatory provision operated against the res and was wholly independent of the knowledge, motive or attitude of the owner or other persons associated with the *res*.

In the present case, the argument of counsel for the appellant was whether any criminal act had been committed by anyone at all. The wording of the forfeiture provision was to be construed on the basis that it is the state of affairs described therein which is the basis of the forfeiture, irrespective of such extraneous considerations as *mens rea* or even the identity of any suspected wrongdoer.

(iii) The English cases referred to involved illegal importation of goods - the commission of offences - yet they were proceeded on the basis that the nature of the proceedings was an action *in rem* based on the existence of a particular state of facts. In the case before the court, the factual basis of the forfeiture of the goods was that they were goods, the importation of which was prohibited or restricted under the Customs Law, and they were found concealed aboard the vessel. The state of affairs made the goods and the vessel liable to forfeiture.

(iv) As regards the second ground, it had been submitted that the firearms had been acquired and secured for the purpose of protecting the vessel and her crew against pirates operating on the Caribbean seas. The issue of whether the firearms formed part of the equipment of the vessel was irrelevant to the determination of the appeal. The issue of whether the firearms were goods, the importation of which was restricted by or under any enactment, did not need to be answered by recourse to the Firearms Law.

(v) As regards the third ground, the evidence showed that the firearms were securely stored under lock and key on board the vessel. There was a failure to make a full declaration of all the firearms aboard. The explanation given was that in the past difficulties had been experienced with the inability of the Customs authorities to return a weapon in their possession late at night. There was therefore a concealment which took place on board the ship.

(vi) As to the issues of burden and standard of proof and the nature of the proceedings, the learned magistrate described the hearing before him as an appeal against the seizure of the vessel "Real Thing" indicating that he regarded the burden of proof as being on the appellant. As to the standard of proof, the magistrate made reference to the, "court being, satisfied on the balance of probabilities" that the firearms in question did not form part of the equipment of the vessel. The learned magistrate had been correct in both respects. The forfeiture provisions, whilst Draconian, were to some extent mitigated by the administrative powers of the

Governor in Council under s70 and the Comptroller under s64(8) as well as the power of redemption under s59(5) of the Customs Law.

(vii) The magistrate was further correct in referring to the proceedings as an appeal. That was the description adopted in s64 of the Customs Law. The procedure in the court followed that of an appeal. The magistrate described the forfeiture provisions of s59 as not judicial but administrative in character. The proceeding as an appeal therefore had a hybrid element.

The appeal had elements in common with a judicial review of administrative action.

It was to be noted that the Cayman appeal process differed in certain respects from that of England and other jurisdictions such as Barbados.

In England and Barbados, the claimant would give notice that the item in question was not liable to forfeiture and the onus of establishing that there were reasonable grounds for seizure of the item rested on the forfeiting authority. The Cayman provisions were not along those lines.

The appeal would, accordingly, be dismissed.

AD

Alleged malicious procurement of search warrants - Whether reasonable suspicion existed

Rea v Detective Inspector Gibbs Commissioner of The Royal Cayman Islands Police Force and the Attorney-General of the Cayman Islands

Grand Court (164/92)
Harre CJ
July 5 1994

Legislation

Misuse of Drugs Law s16(M)
Criminal Law Amendment Act 1885 s10
Police Law s27

Authorities referred to

Elsee v Smith (1822) 2 Chit 304
Hope v Evered (1886)
Lea v Charrington (1889)
QBD 45
Reynolds v Metropolitan Police Commissioner
[1984] 3 All ER 649
Roy v Prior [1971] AC 470
Everett v Ribbands [1952] 1 All ER 823
Abrath v North Eastern Rly Co (1886) 11 App Cas
247
Cotton v James (1830) 1 B & Ad 128
Taylor v Williams (1831) 1 B & Ad 845
Abbott v Refuge Assurance Co Ltd [1962] 1 QB 433
Meering v Graham-White Aviation Co Ltd 122LT 44
CA
Glinski v Mclver [1962] 1 All ER 696
Cox v Wirrall (1607) Gro Jac 193
Panton v Williams (1841) 2 QB 169
Ravenga v Mackintosh (1824) 2 B & C 693
Broad v Ham (1839) 5 Bing NC 722
Shaaban Bin Hussein and Ors v Chang Fook Kan
and another [1969] 3 All ER 1626
McArdle v Egan [1933] All ER 611
Gifford v Kelson [1943] 51 Man R 120
Wills v Bowley [1982] 2 All ER 656
R v Darwin McLean (15/79)
Bodoo v Joseph 7 WIR 373
Cedeno v O'Brien 7 WIR 192
R v Melvin Spragg 23 WIR 371
G v S (1992) 93 CILR 203

Tempest v Snowden [1952] 1 KB 130
R v Inland Revenue Commissioners et al ex parte Rossminster Ltd et al [1979] 3 All ER 385
Conway v Rimmer [1968] AC 910

Mr Alberga QC for the plaintiff
Mr Lamontagne QC for the defendant

The plaintiff was seeking a declaration that a production order obtained on October 25, 1991 by the first defendant as servant and agent of the Government of the Cayman Islands was falsely, wrongfully and maliciously procured for suspecting that the plaintiff had carried on or benefitted from drug trafficking. The plaintiff was also seeking, *inter alia*, damages for personal injuries, financial loss and for trespass alleged against the first defendant as agents of the second defendant and of the Government of the Cayman Islands in the unlawful and wrongful seizure and removal of the plaintiff's property.

Subsequent to an audit of the procedures of a bank of which the plaintiff was managing director, it became apparent to the Head Office of the bank that the extent of the plaintiff's private business interests were significantly greater than had been previously disclosed. This was a matter of much concern to the employer, who, with the plaintiff's consent, carried out audits of other companies in which the plaintiff had an interest. No procedural irregularities were thereby disclosed.

Subsequently, the first defendant laid three informations in support of applications for search warrants against the plaintiff under s16(M) of the Misuse of Drugs Law. They stated that there was reasonable suspicion that the plaintiff had benefitted from drugs and that materials relating to drug trafficking likely to be of substantial value could be found on his premises.

Under the sub-section, a constable could seize and retain any material found (other than items subject to legal privilege) likely to be of substantial value to the investigation for which the warrant was issued. The informations referred to certain business entities and a named individual.

Three warrants were issued to search the premises of a company controlled by the bank and the plaintiff's private residence. The warrants made reference to specific items which did not necessarily correspond with those in the information laid before the judge. A further warrant was issued in relation to safety deposit boxes at X bank.

Apart from the fact that a warrant was issued for the search of the premises pursuant to s16(M) of the Misuse of Drug Law, the defendants denied all the allegations in the plaintiff's statement of claim. It was denied that the warrants applied for did not comply with the provisions of the Misuse of Drugs Law. The defence also relied on s27 of the Police Law insofar as the legality of the search under the warrant was concerned.

Held: (dismissing the plaintiff's claim)

(i) Elsee v Smith established that an 'action on the case' could be brought against a person who caused a warrant to search premises and apprehend persons on suspicion of felony if that was done maliciously and without reasonable or probable cause.

(ii) In Hope v Evered it was held that if a person established a ground of reasonable suspicion to the satisfaction of the magistrate the decision of the magistrate was an answer to any such claims against the applicant. This did not detract from the general principle emphasised in Reynolds and Another v Commissioner of Police of the Metropolis however,

that the malicious procurement of a search warrant was an actionable wrong. Abrath v North Eastern Rly. Co. further established that the burden of proof fell on the plaintiff who was asserting that no reasonable or probable cause for the issue of the search warrant existed.

In Glinski v McIver it was noted that instances could be envisaged where the prosecutor had dealt at arm's length whereby charges were laid on information given to him by others. If the information was believed by him to be trustworthy, there was good cause for the prosecution. If it was known by him to be untrustworthy and not fit to be believed, there was no cause for it.

There were also cases where from the conduct of the defendant himself it could be reasonably inferred that he was conscious that he had no reasonable or probable cause for the prosecution (Panton v Williams).

(iii) 'Reasonable and probable cause' in the context of s16 (M) of the Misuse of Drugs Law meant: 'reasonable grounds to suspect' or, 'reasonable grounds for suspecting'.

In Shaaban Bin Hussein and others v Chang Fook Kan and Another Lord Devlin had stated:

" 'Suspicion' in its ordinary meaning is a stage of conjecture or surmise where proof is lacking..(and arises) at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end."

It was further to be noted that 'suspicion' indicated much less than 'belief' and took into account matters which could not be included in evidence at all.

(iv) The test of having 'reasonable grounds to suspect' was clearly an objective one: R v Darwin McLean; Bodoo v Joseph; Cedeno v O'Brien; R v Melvin Spragg; G v S and Tempest v Snowdon.

In all the cited cases the judge had evidence upon which to determine the reasonableness of the suspicion.

The court in the present case derived particular assistance from the decision in: R v Inland Revenue Commissioners et al ex parte Rossminster Ltd. et al. Eveleigh LJ had stated in the Court of Appeal:

"In so far as the warrant is concerned, we do not know what evidence was given on oath to the learned judge. What we do know is that it was sufficient to satisfy him that a warrant should be issued. I see no grounds in this whatsoever for concluding that he acted on any wrong principle...There simply is not the evidence in this case to enable this court to say that the learned judge exercised his discretion improperly..."

The House of Lords endorsed these principles; Lord Wilberforce observed that whilst a critical approach was appropriate in construing legislation which impaired the rights of citizens, Parliament, in conferring wide powers, had at the same time introduced substantial safeguards such as the requirement that information should be laid before a judge on oath and that he must be satisfied that reasonable grounds for suspicion existed before issuing any warrant. Furthermore, all cases were to be approached on the premiss that the judge had been astute in the protection of an individual's rights.

(v) On the present facts, the first defendant's omission to take legal advice before asking for the warrants could not be regarded as tending to show absence of reasonable or probable cause, although he would have profited from the advice in relation to the unnecessarily prolix nature of the application

which followed.

The unchallenged assertion of innocence by the plaintiff would be of no avail to him. Investigation of even reasonable suspicion, could lead to the conclusion that the suspicion was unfounded.

The first defendant had persuaded a Grand Court judge that he had the necessary reasonable suspicion. The judge had acted judicially and the plaintiff's assertion that simply because he was innocent meant that the first defendant had lied to obtain the warrant could not be sustained.

(vi) Regarding the plaintiff's assertion that the warrants themselves were bad because the material included was not 'material of a particular description', there was no requirement for the inclusion of such material under s16(M) which was different in character from s16(L).

(vii) As to the allegation that there were major discrepancies between what was asked for in the informations and what was granted in the warrants, since the inclusion of any material in the information and warrants with regard to s16(M) was entirely unnecessary, it followed that any such discrepancies did not invalidate the rest of the warrants which exactly followed the statutory requirements.

The plaintiff's application would therefore be dismissed.

AD

Juvenile - Category A offence - Whether triable upon election in Juvenile Court

Attorney-General v Lennox Seymour (a juvenile)

Grand Court (102/93)
Smellie J
March 24 1994

Legislation

Juvenile Law 1990 Ss 4(1) 9(4)
Criminal Procedure Code 1975
Juvenile Offenders Law 1964 (repealed)
Juveniles (Joint Trial with Adults) Law 1976
Juvenile Law 1975 (repealed)
Penal Code
Prisons Law s11B

Authorities referred to

R v Guildhall Justices ex parte Marshall [1976] 1 All ER 768
Pepper (Inspector of Texas) v Hart [1992] 3 WLR 1032
Re Chance [1936] Ch 266
Kutner v Phillips [1981] 2 QB 276
R v TEB and McKenzie (1985) CILR 316
Arnah v Government of India [1968] AC 192
Curtis McCoy v Regina
London & Country Commercial Properties Investment Ltd v Attorney-General [1953] 1 WLR 312
R v Bullock [1964] 1 QB 481

Mr Roberts for the Crown
Mr Alberga for the Juvenile

The juvenile had elected trial in the Juvenile Court. The Crown appealed to the Grand Court by way of case stated. The issue was whether the indictable offence of grievous bodily harm (a category A offence, triable only on indictment) for which the juvenile stood indicted, was triable upon his election in the Juvenile Court or whether it should be referred for trial, after preliminary inquiry, to the Grand Court. The Crown submitted that, 'indictable

offence' in s19 of the Juvenile Law included only such offences triable on indictment in respect of which an election may be exercised: since s5 of the Criminal Procedure Code gave a right of election only in relation to Category B offences, 'indictable offence' in s19 included only Category B offences, not Category A.

Held: (dismissing the appeal)

(i) Application of the plain English meaning of 'indictable offence' ("an offence for which an indictment may lie": R v Guildhall Justices ex parte Marshall) would include both Category A and B offences.

(ii) It appeared from the history of local legislation concerning the control and welfare of juveniles that the legislature never intended that juveniles should be tried and punished pursuant to the general provisions applicable to adult offenders.

(iii) The Juvenile Court had jurisdiction to try the matter, the juvenile having elected trial in that court. S5 of the Criminal Procedure Code did not apply to the Juvenile Law so as to make indictable offences with which a juvenile may be indicted triable, without his election, in the Grand Court.

(iv) Some provision of sentencing of the kind formerly provided for in the 1964 and 1975 Laws was required for the appropriate sentencing of juveniles who may be convicted of serious indictable offences.

(v) As a result of the implied repeal of the 1976 Law by the Juvenile Law 1990, whereby a judge of the Grand Court may order a joint trial of a juvenile jointly charged with an adult upon such terms and conditions as he may decide to impose (having regard to the welfare of the juvenile and the necessity of doing justice), there was no provision governing the situation when a juvenile was indicted jointly with an adult and the juvenile elected trial before the Juvenile Court. As an adult may not be tried in the Juvenile Court, separate trials must be held. S19(2) covered only the situation where the juvenile elected trial in the Grand Court. Some provision restoring the discretion of the judge of the Grand Court was in need of consideration.

HN

FAMILY LAW

Maintenance pending suit

H v H

Grand Court (D78/93)
Smellie J
February 1 1994

Legislation

Matrimonial Causes Law s19

Mr Quin for the petitioner
Mr Shea for the respondent

The petitioner applied by summons for maintenance pending suit. The trial was scheduled for three months hence. The petitioner and the two minor children of the marriage lived with the petitioner's parents on an interim basis.

Held: (application granted)

(i) The past voluntary contributions (or lack thereof) were of limited relevance to the present application. Regard was given to the respective needs and resources of the parties and the children. Each party was required to bear equally the costs of maintaining the household of the petitioner with whom the children were to reside.

(ii) The petitioner earned CI$4200 per month and the respondent earned CI$6250 per month. Details of the parties' expenses were not complete. As the respondent met the continuing obligations of school fees and the petitioner's car expenses, he would be ordered to pay $2200 per month as maintenance pending suit for the petitioner and the children.

Costs of this application were costs in the cause.

JE

LAND LAW

Option to purchase - Whether arrangement constituted mortgage - Court's power to interfere in arrangement

B v H Properties (Cayman Islands) Ltd and X

Grand Court (341/93)
Smellie J
May 31 1994

Legislation

Registered Land Law Ss 2 37 70 71

Authorities referred to

The Saudi Eagle [1986] 2 Ll Rep 222
Lewis v Frank Love Ltd [1961] 1 WLR 261
Lisle v Reeve [1902] 1 Ch 53
Samuel v Jarrah Timber and Wood Paving Corporation Ltd [1904] AC 323
Kreglinger v New Patagonia Meat and Cold Storage Co Ltd [1914] AC 25
Cityland and Property (Holdings) Ltd v Dabrah [1968] Ch 166
Multiservice Bookbinding Ltd v Marden [1978] 2 All ER 489
Alec Lobb (Garages) Ltd v Total Oil GB Ltd [1985] 1 All ER 303
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827
Haigh v Haigh (1885) 31 Ch 478

Mr Croxford QC for the plaintiff/respondent
Mr Jones and Mr Watler for the defendants/applicants

This was an application by the defendants for leave to appeal against an interlocutory ruling of the Grand Court which set aside an earlier judgment of the Grand Court. A stay of judgment was also sought pending the outcome of the appeal.

The first defendant was the registered proprietor of certain properties and had defaulted in the repayment of a loan due to a bank in the amount of US$3.9m, which was secured by a legal charge on the properties. The bank had completed all the procedures to be in a position to sell the properties if a suitable offer materialised.

In order to buy time, the second defendant entered into an arrangement with the plaintiff which included the following provisions:

(1) The Guarantee Provision. The plaintiff agreed

to guarantee the loan of the first defendant to the bank for 90 days.
(2) The Option Provision. The defendants agreed to release the plaintiff from his guarantee to the bank within 90 days, failing which the plaintiff was granted an option to purchase the properties for the amount of debt owed to the bank. This was accompanied by the right to lodge a caution against dealings in the properties. The second defendant personally guaranteed to the plaintiff that he would cause the first defendant to release the plaintiff from his guarantee to the bank within the 90 day period.
(3) The Promissory Note Provision. Both defendants undertook to execute, jointly and severally, a promissory note to the plaintiff in the amount of $5m, which was to be cancelled upon the exercise by the plaintiff of the option.

The plaintiff obtained a judgment order on November 25 1993 for the sums he had paid under the guarantee to the bank and for specific performance of the option to purchase the properties. In a judgment of May 13 1994, a stay of the November judgment order was granted pending the hearing of the defendants' summons to set aside the November judgment order. In a judgment of May 27 1994, the Grand Court declined to set aside the November judgment order. The present case was an application by the defendants for leave to appeal against the refusal to set aside the order, with a view ultimately to advancing a further re-amended defence, and a stay of the November judgment order pending such an appeal.

The defendants accepted that in order to justify leave to appeal and a further stay, it was required that they show first that they might have a good arguable case that the court had jurisdiction to set aside the November judgment and secondly that they had a good arguable case on the merits to set aside the November judgment.

Held: (leave to appeal refused)

(i) Construing the guarantee provision alone, the guarantee was a personal undertaking by the plaintiff creating a personal liability which did not attach to the properties as security nor did it create an equitable mortgage. Therefore the defendants' argument that the option was a clog on the redemption of a mortgage was unsustainable. Even on the assumption that there had been a mortgage or security, there was no clog on the redemption of the guarantee because the option became exercisable only after the second defendant had failed to redeem the guarantee.

(ii) Construing the option and guarantee provisions together, the arrangement did not constitute an equitable mortgage or any form of secured lending, and accordingly there could still be no sustainable argument that the option amounted to a clog on the redemption of a mortgage. It was an obvious fallacy to suggest that the thing that constituted the equitable mortgage was the thing that constituted the clog on its redemption.

(iii) Construing the promissory note provision, this also could not amount to a clog if there was no mortgage or security to which it could attach. Following Kreglinger v New Patagonia Meat and Cold Storage Co Ltd., even on the assumption that there had been a mortgage or security, the obligations on the defendants under the promissory note provision arose irrespective of whether the defendants redeemed the plaintiff's guarantee, and therefore could constitute no clog.

(iv) The fact that the plaintiff had a right to redeem the bank's charge and require a transfer to himself of the charge under the Registered Land Law s71 did not vest the plaintiff with a virtual security, as such a suggestion assumed that the plaintiff should be

obliged to do so by the terms of the agreement, which he was not.

(v) The option was not void on the grounds of public policy for failure to comply with the Registered Land Law s70, as the option was not given by way of security. Even if the agreement created a security or mortgage, the option would operate as a disposition under the Registered land Law s2, it would not be contrary to s37(2) but would exist by way of contract as provided for by that section, and would therefore not be contrary to the Registered Land Law.

(vi) The promissory note provision did not render the agreement unfair and unconscionable, despite the fact that it was enforceable by the plaintiff even if the defendants had been successful in releasing the plaintiff from the guarantee. The parties were equally experienced businessmen and the plaintiff took considerable risks in guaranteeing the loan, particularly if the defendants had released the plaintiff from the guarantee, for then the plaintiff would only have had unsecured personal recourse against the defendants for the monies he had paid to the bank under the guarantee.

(vii) The promissory note provision was not a penalty clause that would be set aside. The promissory note provision was not a secondary obligation to secure the payment of a sum of money or the attainment of some other object arising from or in consequence of a breach of a primary obligation as required by Photo Production Ltd. v Securicor Transport Ltd., and in no sense could it be regarded as a matter held *in terrorem* to procure performance of obligations, as the promissory note could have been enforced whether or not the release of the guarantee was attained, although the plaintiff could not have enforced the promissory note undertaking if he had elected to exercise the option if the guarantee was not released in the 90 day period.

(viii) The defendants had therefore failed in all attempts to make out an arguable case on the merits for the re-amended defence and accordingly leave to appeal would not be granted.

SAAC

ENFORCEMENT OF INFORMAL LAND MORTGAGES

According to the English law of real property, a charge or mortgage of land can be created by the following traditional methods: a charge by way of legal mortgage, an equitable mortgage of an equitable interest, an informal equitable mortgage and an equitable charge. The informal equitable mortgage is a useful and popular device commonly used to secure short term loans, as it requires a minimum of formalities and before 27th September 1989 could be created by an intention to charge supported by a mere deposit of the title deeds.[1] In registered land it is possible to create the same type of security (termed a lien in the Act)[2] by deposit of the Land Certificate under s.66 Land Registration Act 1925, which has the same effect as deposit of deeds in unregistered land. A second consequence is the creation of a lien over the Land Certificate in favour of the mortgagee but in respect of the remedies open to the mortgagee, it has been held that the lien merges in the equitable mortgage.[3] The mortgagee's interest can be protected by way of a caution or a notice of deposit.[4] An undertaking that the deeds shall be held to the order of the lender is also sufficient to create an equitable mortgage,[5] but the transaction is not exempt from formality requirements, as discussed below. An equivalent undertaking in respect of a Land Certificate is not expressly permitted by s.66 Land Registration Act 1925, but appears to have been recognised by the courts.[6]

The deposit of the title deeds or Land Certificate must be for the purpose of securing the loan and in order to provide evidence of this purpose the deposit is generally accompanied by a memorandum to indicate the nature of the transaction, which if executed as a deed can furthermore be used to enhance the remedies of the chargee.[7] Since the implementation of the Law of Property (Miscellaneous Provisions) Act 1989 certain formality requirements, which are detailed later, have been imposed which now require the agreement itself to be constituted in writing, a memorandum of the transaction being insufficient.

Contractual Formality

It is widely accepted that the equitable mortgage by deposit arises through either of the following methods:[8] a deposit of title deeds, or in registered land a deposit of the Land Certificate. The formality requirements for an enforceable contract in s.40(1) Law of Property Act 1925 were not satisfied by such a deposit or an undertaking to hold the deeds to order, so the deposit had to be accompanied by a written memorandum and an undertaking had to be in writing or acknowledged by a written memorandum.[9] However, the formality requirements are declared by s.40(2) not to affect the operation of the doctrine of part performance, and it has been held that the deposit is itself also an act of part performance,[10] although merely holding the deeds to order[11] or the Land Certificate to order[12] is not. This contract to create a mortgage, if

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1 Or those deeds which are material evidence of title to the mortgaged land, Lacon v Allen (1856) 3 Drew 579.

2 This security will hereafter be termed a mortgage as the creditor receives the same remedies as a mortgagee by deposit in unregistered land.

3 Re Molton Finance Ltd [1968] Ch 325; Shaw v Foster (1872) LR 5 HL 321.

4 S.54 Land Registration Act 1925 and r.239 Land Registration Rules 1925, respectively. See Re White Rose Cottage [1965] Ch 940, 949-950 per Lord Denning MR.

5 Re Heathstar Properties Ltd [1966] 1 All ER 628.

6 United Bank of Kuwait v Sahib (1994) The Times July 7.

7 Usually by including an attornment clause to enable the creditor to vest the legal estate in itself or a purchaser.

8 See Russel v Russel (1783) 1 Bro.C.C. 269. Holding the Land Certificate to the order of the mortgagee was, before the Law of Property (Miscellaneous Provisions) Act 1989, accepted as evidence of a contract to create a mortgage.

9 Re Leathes (1833) 3 Deac & Ch 112.

10 Russel v Russel (supra n. 8). Bank of New South Wales v O'Connor (1889) 14 App Cas 273, 282.

11 Lloyd v Attwood (1859) 3 De G & J 614.

12 United Bank of Kuwait v Sahib (supra n. 6).

capable of enforcement through specific performance, confers an immediate proprietary interest in the land, in the same way that an agreement for a legal lease confers an equitable lease.[13] on the basis that if the promise to create the mortgage can be enforced by specific performance, equity will regard it as having been enforced.

For contracts to dispose of interests in land executed after 26th September 1989, s.2 Law of Property (Miscellaneous Provisions) Act 1989 declares that the contract can only be made in writing and by incorporating all the terms. It has been held that the section has the effect that without the prescribed formalities, no contract comes into existence, and no security interest will vest in the lender.[14]

Under Cayman law, the formality requirements and the sanction for non-compliance are prescribed by s.37(2) Registered Land Law 1971, as follows:

"Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged..."

Accordingly any attempt at creating an informal security by deposit of the Land Certificate[15] should be accompanied by a signed memorandum of the transaction. Without this it would seem that the contract will be unenforceable by action as the proviso to s. 37(2) of the Law concerning a restricted application of the part performance doctrine is incapable of rescuing an informal charge. It should also be noted that the moneys must have been loaned at the time at which the contract is sought to be enforced, as the chargor will not be compelled to take a loan, and the chargee's remedy will lie in damages.[16]

Registration of Charges

There is no Cayman equivalent of s.66 of the English Land Registration Act 1925 expressly recognising mortgages by deposit, nor is there any equivalent in the Kenyan Registration Land Act 1963 from which the Cayman Registered Land Law is derived. Clause 84 of the proposed Kenyan Registered Land Ordinance, later enacted as the Registered Land Act 1963, did however allow for mortgages by deposit, but this clause was not incorporated into the Act.

In the Cayman Islands, a problem with the recognition of informal mortgages by deposit occurs on account of the registration provisions of the Registered Land Law 1971. S.37(1) states that, "no land... registered under this Law shall be capable of being disposed of except in accordance with this Law"; and in s.64(1) concerning charges it is said, "(a) proprietor may, by an instrument in the prescribed form, charge his land... "which is supplemented by the provision in s.64(3) that the charge, "shall be completed by registration". Failure to use the prescribed form and to register would seem to be fatal to a charge of any type, as the charge will not be "in accordance with" the Registered Land Law, and that was the basis for the decision of the Court of Appeal in Paradise Manor Ltd v Bank of Nova Scotia.[17]

Here a debenture was used to charge land belonging to Paradise Manor Ltd, a property development company, in favour of the bank. When the plaintiff company defaulted in repayment of the loan, the bank sought to exercise its right to sell arising under the debenture; the company argued that this was incapable of being exercised through failure to comply with the requirements of the Registered Land Law, as the debenture was not in the prescribed form[18] and was not registered under the Law.[19]

It was held on appeal that the debenture could only operate as a contract, enforceable by applying to the court for specific performance compelling the other party to execute an instrument in the prescribed form: "But it cannot by itself and independently of the Law confer any power affecting the rights of a proprietor of registered land."[20] Accordingly, any purported exercise of the power of sale would be ineffectual to transfer any rights in the land.

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13 Walsh v Lonsdale (1882) 21 Ch D 9.
14 United Bank of Kuwait v Sahib (supra n. 6).
15 Under the English system, the power to create a mortgage by deposit is expressly conferred by s.66 Land Registration Act 1925.
16 Rogers v Challis (1859) 27 Beav. 175.
17 [1984-85] CILR 437.
18 As required by s.105(1) Registered Land Law.
19 As required by s.64(3) of the Law.
20 Per Henry JA at 480.

However, it may be argued that s.64 and the part of the Registered Land Law dealing with charges do not apply to the informal mortgage by deposit for the following reason. The legal effect of a deposit is not the creation of a mortgage but only a contract to create a mortgage,[21] and the statutory definition of "charge" in s.2 of the Registered Land Law is "an interest in land securing the payment of money..." and does not expressly mention an agreement to create a charge.[22] The sole process by which the lender acquires any proprietory right over the mortgagor's property is through the availability of specific performance of the contract and the maxim that equity regards as done that which ought to be done, namely that equity views the position as if the intended future mortgage had been duly executed. The nature of the lender's rights can therefore be regarded as an estate contract, an agreement to convey an interest in land, rather than a species of mortgage or charge.

This reasoning is supported by the decision in Myles v Prospect Properties Ltd[23] in which it was held that an unregistered estate contract existed as an equitable proprietary interest binding on a purchaser - and the only logic by which the estate contract could constitute a proprietary interest is through the availability of specific performance and the equitable maxim, so that the agreement to convey is regarded in equity as having been executed.

One counter-argument is that the equitable mortgage by deposit can be seen as a "distinct and well-recognised transaction which leads not to a legal mortgage but ultimately to foreclosure";[24] or in the words of Emmet on Title, "more properly regarded as a sui generis equitable charge rather than an agreement to create an equitable charge."[25] However, the former view was only propounded in order to fill a gap left by an English statute on registration of incumbrances (while acknowledging the opposite conclusion to be logically strong). The latter view was put arguendo and ultimately rejected by the authors. The interpretation of the transaction as creating a sui generis charge was furthermore rejected recently in United Bank of Kuwait v Sahib,[26] where it was said that the courts had "consistently treated the rule that a deposit... operated, without more, as an equitable mortgage or charge as contract-based."

The Estate Contract

Once it is established that the lender's proprietary rights arise by virtue of an estate contract rather than a charge, it is clear that s.64 Registered Land Law, relating only to charges, does not govern those proprietary rights. It remains to be seen whether the rights contravene any other provision of the Law.

In Myles v Prospect Properties Ltd[27] a purchaser who had concluded an enforceable contract to purchase the land, but in whose favour a transfer had not been executed, was held to have an estate contract as an equitable interest which, despite non-registration, was nevertheless binding on a subsequent chargee who did not give valuable consideration for his charge. In relation to estate contracts, which are not specifically provided for in the Registered Land Law, it was said by the learned judge at first instance, "the Registered Land Law recognises equitable claims and interests unless they are inconsistent with the Law."[28] This statement was approved on appeal. It was held that the existence of an unregistered estate contract was not inconsistent with the Act; reliance was placed on s.164 which states:

"Any matter not provided for in this Law or in any other Law in relation to land, leases and charges registered under this Law and interests therein shall be decided in accordance with the principles of justice, equity and good conscience."

From this it seems clear that any contract to create a proprietary interest should also be capable of existing as an equitable estate contract off the register, conferring proprietary rights capable of affecting third parties.

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21 Russel v Russel supra n.8 ; Thames Guaranty Ltd v Campbell [1985] QB 210; Re Earl of Lucan (1890) 45 Ch.D 470; "The Law of Real Property" 1984, 5th ed., Megarry & Wade, p.997.

22 Whereas the definition of a "transfer" in s.2 does specifically include an agreement to transfer.

23 (Unreported, Appeal No. 12 of 1989, Court of Appeal).

24 "The Law of Real Property" 1984, 5th ed., Megarry & Wade, p.998; see also (1940) 7 CLJ 250 (Megarry).

25 Emmet on Title, 19th ed., Farrand, para. 25:116.

26 Supra, n.6.

27 Infra n.28.

28 [1988-89] CILR 306 per Schofield J at 311.

There appears to be some degree of conflict between Paradise and Myles. The former held that a charge which is required to be in the prescribed form and registered[29] operated to create a contract when the formalities were not observed; whereas the latter held that a transfer, which is also required to be in the prescribed form and registered,[30] will nonetheless operate to create an equitable proprietary interest when those formalities are not observed. Both cases involve a contract to create an interest in land but only one recognises the proprietary consequences of such a contract, although the formality requirements are similar.

One possible ground to justify the distinction between the cases is the difference in the relevant formality requirements. Registration of a statutory charge as an incumbrance is essential for its completion;[31] whereas the registration of a caution to protect an equitable estate contract is: "discretionary at the instance of the person holding the interest."[32] However this reasoning is, with respect, circular, as the application of the rules relating to lodging a caution pre-supposes the existence of the equitable interest it is protecting. The optional nature of lodging a caution would not explain why the law recognises the proprietary element of an estate contract to transfer land but does not recognise an estate contract to create a charge. If it is possible to lodge a caution to protect a contract to transfer land, should it not also be possible to lodge such a caution in respect of a contract to create a charge? S.127 of the Law, which specifies the rights capable of protection by caution, does not solve the problem as a caution may be lodged to protect an unregistrable interest in both land and charges alike.

The only substantial ground of distinction between the two cases is that one of them concerned the existence of a trust. In the case of the grant of an estate contract, the creation of the equitable interest divides the ownership of the land into the legal and beneficial ownership, vesting in different persons, and establishing a qualified trusteeship of the land pending completion; and it is plain that trusts are recognised by the Registered Land Law.[33] In contrast, in the case of the grant of an equitable mortgage, no trusteeship arises on the part of the mortgagor. However, this distinction can hardly justify the difference in treatment: whether an interest in land is enhanced by fiduciary duties imposed on the owner should not be fundamental in determining whether that interest also has proprietary status. Fiduciary duties merely impose supplemental, personal obligations on the owner and in general would justify no further consequences for third parties.[34] Accordingly it is submitted that this distinction is immaterial and the two cases must be regarded as inconsistent.

If Myles were followed, so that a mortgage by deposit were held to create an equitable proprietary interest, it would certainly appear that it could be protected by lodging a caution, in the same way as the estate contract in Myles v Prospect Properties Ltd[35] itself should have been protected. By s.127(1) Registered Land Law, a caution against the registration of any new dispositions may be made by any person who: "(a) claims any unregistered interest whatsoever, in land or a lease or a charge." However, if the mortgage is created by the deposit of the Land Certificate with the mortgagee, a caution should be unnecessary as any prospective purchaser or chargee or incumbrancer will be unable to register any instrument due to the absence of the Land Certificate.[36]

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29 Ss.105(1) and 64(3) Registered Land Law respectively.
30 Ss.83(1) and 83(2) Registered Land Law respectively.
31 S.64(3) Registered Land Law.
32 Supra n.28 at 315.
33 See ss.38(2), 121 Registered Land Law.
34 By way of exception, it has been held that the breach of a fiduciary relationship is a precondition for a restitutionary tracing action in equity - e.g. Re Diplock [1948] Ch 465, Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd [1981] Ch 105, Agip (Africa) Ltd v Jackson [1990] Ch 265; but this requirement has been extensively criticised e.g. "The Law of Restitution" 4th ed. Goff & Jones at p.72, Hanbury & Martin "Modern Equity" 14th ed. at p.648.
35 Supra n. 28.
36 S.32 Registered Land Law 1971; Manual of Registry Practice para. 11.2.

Conclusion

It appears that the theoretical analysis of the equitable mortgage by deposit of the Land Certificate is a contract to create a mortgage in the proper form. Under Cayman law, Paradise Manor Ltd v Bank of Nova Scotia[37] shows that such a mortgage will confer no equitable proprietary rights until drawn up in the prescribed form and registered. Conversely, it has been suggested that this is inconsistent with the subsequent decision of the Court of Appeal in Myles v Prospect Properties Ltd.[38] which recognises equitable proprietary interests off the register. If the informal mortgage by deposit is accepted, the Land Register provides a suitable structure to protect such mortgages as cautions if desired.[39]

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37 Supra n.17.
38 Supra n. 28.
39 Simon Cooper. Lecturer in Law, Cayman Islands Law School.

SIGNALS OF SYMMETRY IN RECKLESS ATTEMPTS

Two recent references to the Court of Appeal have been initiated by the Attorney General seeking clarification of the Criminal Attempts Act 1981. In Attorney General's Reference (No 1 of 1992)[1] the Court of Appeal eschewed a rigid interpretation of the actus reus of an attempt in welcome contrast to notable contemporary rulings on appeal.[2] In Attorney General's Reference (No 3 of 1992)[3] their Lordships were requested to clarify the mental element of the offence.

Since the post-Act confirmation in Pearman[4] of the common law's injunction that in crimes of attempt: "..the intent is the essence of the crime..."[5] the mental element of the offence has troubled the courts little.[6] The meaning to be ascribed to the term intention, according to the Court of Appeal in Pearman, was that applied in Mohan,[7] requiring proof on the part of the accused of: "a decision to bring about, (the consequence) in so far as it lies within the accused's power...no matter whether the accused desired that consequence of his act or not". Mohan has subsequently been recognised as the universal gauge of direct intent,[8] bringing to this mens rea limb a simplicity notably absent from its more troublesome sibling, recklessness, where definitional plurality continues to flourish.

The discussion, thus far, would suggest that the required mens rea of a statutory attempt is settled in favour of a mental state, itself unambiguous, and as such this area would not appear to be an obvious candidate to warrant a reference to the Court of Appeal. Challenges to the traditional premiss that proof of intention be the sine qua non of a prosecution for attempt have, however, gradually gained momentum. Indeed, the common law had latterly recognised that residual classes of offence existed where proof of recklessness would be relevant. Whether this continued to be the case post 1981 was, in short, the question posed to the Court of Appeal.

The residual relevance of recklessness to crimes of attempt was first canvassed by Professor Glanville Williams in the first edition of his work.[9] Professor Williams argued that although all crimes of attempt require an intended result, it did not follow that there existed a need to establish intention with regard to the material circumstances of the offence. Accordingly, the argument runs, where a substantive offence is capable of commission upon proof of recklessness with regard to circumstances it would be paradoxical to deny this result where an attempt at that offence is charged. A case in point is the offence of rape which, according to s.1(1)(b) Sexual Offences (Amendment) Act 1976, requires proof of either knowledge or recklessness that the woman is not consenting. The proponents of the Williams approach[10] argue that for the purposes of attempted rape it is sufficient for the Crown to establish: (i) an intention to have sexual intercourse with the woman: and (ii) recklessness as to the issue of her consent. These arguments were belatedly confirmed, without argument, in the context of the common law of attempt in the aptly named authority of Pigg.[11]

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1 [1993] 1 WLR 274.

2 See: Davies (1994) 58 (1) JCL 78. The Cayman provision is to be found in s.289(1) Penal Code which expresses the actus reus of an attempt in terms that the accused who: "begins to put his intention into execution by means adapted to its fulfilment and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence... is deemed to commit the offence." This somewhat Delphically worded definition appears to be a throwback to Stephen's common law "series of acts" test as explicated by the "equivocality theory" and rejected by the 1981 Act. See, further: Hope v Brown [1954] 1 All ER 330.

3 [1994] 2 All ER 121.

4 (1985) 80 Cr App R 259.

5 Per Goddard LCJ in Whybrow (1957) 35 Cr App R 141 at 147.

6 Indeed, that intention is the hallmark of attempted crime is manifest within s.1(1) of the Act, which opens: "If, with intent to commit an offence to which this section applies...". This is equally true of Cayman law: Ss 289(1) & (2) Penal Code.

7 [1975] 2 All ER 193 at 200 per James LJ.

8 Belfon [1976] 3 All ER 46.

9 The Criminal Law, The General Part (1953).

10 Notably, the authors of Smith & Hogan's Criminal Law.

11 [1982] 2 All ER 591.

It is clear, however, from the Law Commissioners' Report No 102[12] which led to the 1981 Act, that the Commissioners regarded the maintenance of a distinction between circumstances and results to be unworkable and emphasised[13] the need to establish intention in relation to all elements of the offence attempted, even if the full offence were one of strict liability.[14] Undeterred by the fact that the 1981 Act had failed to expressly incorporate this recommendation, the Law Commissioners returned to this theme in the first version of the Draft Criminal Code.[15] Thereunder, Cl.53(2) testified to the need to show, in cases of attempt, "an intention in respect of all the elements of the offence". In the revised version of the Code,[16] however, the Commissioners indicated a change of heart, having been persuaded by the arguments of their Scrutiny Group to jettison the line formerly maintained, on the grounds that it was overly restrictive of liability. Accordingly, tacit approval for Pigg (supra) appears in Cl.49(2) which declares: "..an intention to commit an offence is an intention with respect to all the elements of the offence other than fault elements, except that recklessness with respect to a circumstance suffices where it suffices for the offence itself."

A dearth of case law in this period belied the frenetic energy of those involved in law reform with the result/circumstances issue not being given further judicial consideration until 1986, when the Court of Appeal in Millard v Vernon[17] advocated, obiter, the recognition of two classes of offence; i) those where one state of mind was prescribed in relation to one prohibited result; in such cases, where attempt was charged it was necessary to establish intention as to that result;[18] and ii) those offences where, additionally, a further state of mind directed to circumstances was included. Attempted rape was expressly mooted as an example within the second class, but their Lordships were content to leave open the question of whether the victim's lack of consent should be required to be within the accused's knowledge or whether recklessness in this regard should suffice.

In Khan[19] the Court of Appeal supplied an answer consonant with both the position at common law[20] and the wider principle enshrined in Cl.49(2) Draft Criminal Code Bill 1989 (supra). On a charge of attempted rape their Lordships ruled that it was sufficient that the Crown establish: i) an intention to have sexual intercourse; and ii) recklessness as to whether the woman consented, in circumstances where in fact she had not.[21]

Russell LJ, giving the judgment of the Court of Appeal, observed[22] that in both rape and attempted rape the mens rea of the accused was identical, comprising an intention to have intercourse combined with knowledge or recklessness as to a material circumstance - the victim's absence of consent. Accordingly, the attempt relates to only the physical activity of the accused for which intention must be proved: "A man does not recklessly have sexual intercourse, nor does he recklessly attempt it." In both the substantive and inchoate crimes, his Lordship concluded, the accused's intention to do that which he failed to achieve (have intercourse) must be established in circumstances where consent had been withheld and, further, in either case the accused must know or be reckless as to this last fact.

The decision in Khan marks a welcome retreat from the overly restrictive view advanced by the Law Commission in the first Draft Criminal Code. It is clear, however, that the decision is limited to the crime of rape and is not declaratory of a general principle, unlike Cl.49(2) of the 1989 Code. Indeed, Russell LJ was at pains to point out the limits of his judgment, specifically noting that it had no bearing on crimes whose hallmark was recklessness, such as reckless arson, involuntary manslaughter, and the abrogated offence of reckless driving[23] where allegations of attempt would be manifestly inept. His Lordship gave no indication, however, as to the wider application of the Khan principle to like offences, such as attempting

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12 Attempt, And Impossibility In Relation To Attempt, Conspiracy And Incitement.
13 At para.2.15.
14 For example, s.5 Sexual Offences Act 1956.
15 Law Com. No.143 (1985).
16 Law Com. No.177 (1989).
17 [1987] Crim LR 393.
18 The present case was within this principle, being a charge of attempted "simple" criminal damage, contrary to s.1(1) Criminal Damage Act 1971.
19 [1990] 2 All ER 783.
20 Pigg supra n.11.
21 It is submitted that where the woman, unknown to the accused, has in fact consented, the accused, being reckless in this regard, will have a defence of impossibility on account of his recklessness not being enough to invoke the deeming provisions of s.1(3)(b) 1981 Act which focus only upon matters of belief.
22 Supra n.19 at 787-788.
23 See now, The Road Traffic Act 1991.

to obtain property by deception, contrary to s.15 Theft Act 1968[24] or attempted aggravated arson contrary to s.1(2) Criminal Damage Act 1971.[25]

The Attorney General's Reference (No 3 of 1992),[26] applying Khan, confirmed, in the context of aggravated arson, where the accused intended to cause damage by fire, being reckless as to whether life would be thereby endangered, that an attempt could properly be laid. As a result, it can be confidently predicted that any case which is assigned to the second category espoused in Millard v Vernon (supra), will be amenable to a like conclusion. In other words, recklessness as to attendant circumstances is no bar to the prosecution of an attempt provided intention is established in relation to that element of the proscribed physical activity whose absence separates the activity from the realm of substantive crime.

In the facts leading to the Attorney-General's Reference, the complainants had maintained a night-time vigil in a motor car outside their home following a series of attacks upon it. In the early hours of the morning, four of the complainants were in the vehicle when the defendants arrived on the scene in their car. The prosecution's case was that the defendants had thrown a petrol bomb at the complainants' vehicle which missed, hitting the garden wall of a house a short distance from them; the defendants then left at high speed. At trial, the defendants were charged with attempted aggravated arson, contrary to s.1(2) Criminal Damage Act 1971. The particulars of the offence specified (inter alia), an intent (without lawful excuse) to damage property by fire, being reckless as to whether the life of another would be thereby endangered. The trial judge directed the jury to acquit, holding Khan to be distinguishable and asserting that an accused could not be held guilty of attempted aggravated arson in the absence of establishing intent as to all the elements of the offence.

Schiemann J determined that the trial judge had fallen into error in her direction. In so holding, the Court of Appeal supplied an affirmative answer to the question posed to them: the ingredients of attempted aggravated arson are made out where no more than recklessness with regard to endangering life is alleged, always providing an intention to damage property by fire is first established.

In a judgment notable for its clarity, Schiemann J emphasised the parallels to be drawn with Khan. He noted that what was missing from the full offence in Khan was the act of intercourse; whereas absent from the facts before him was damage to the complainants' vehicle. In each case it was apparent therefore that the defendants possessed the mens rea for the completed offence and there was no justification to reserve for the present charge; "...a graver mental state than is required for the full offence."[27] The principle applicable to such cases was succinctly put:[28] "In order to succeed in a prosecution for an attempt, it must be shown that the defendant intended to achieve that which was missing from the full offence" coupled with any additional state of mind required to be established by the offence. On the present facts this principle translated into a need to show:

i) intention to cause damage to the complainants' motor car; and
ii) either intention or recklessness as to whether life would thereby be endangered; and
iii) acts of the accused which were more than merely preparatory to the commission of the offence.

It is difficult to disagree with the conclusion of Schiemann J[29] that the above formula has the attributes of: "[according] with common sense and [doing] no violence to the words of the statute." His Lordship was perhaps too modest to identify his opinion's principal significance as lying in its rendering the quietus to the universal intent theory.[30] It should be clear from the foregoing, therefore, that a conviction for attempting to obtain property by deception, contrary to s.15 Theft Act 1968, will be made out upon proof of:

i) an intention to obtain; and
ii) either a deliberate or reckless misrepresentation; and
iii) acts going beyond mere preparation.

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[24] Where an intention to dishonestly obtain is required but recklessness as to the representation suffices.
[25] Assuming an intention to cause damage by fire has been established, coupled with recklessness by the accused as to whether life would be thereby endangered.
[26] Supra n.3.
[27] Ibid at 127.
[28] Ibid at 128.
[29] Ibid.
[30] His Lordship noted (ibid): "It is right to say that at one time it was proposed that intention should be required as to all the elements of an offence, thus making it impossible to secure a conviction of attempt in circumstances such as the present. However, this proposal has not prevailed, and has been overtaken by R v Khan, and a formulation of the draft code which does not incorporate the proposal."

This principle must, a fortiori, be applicable to offences requiring less than recklessness in relation to material circumstances: for example, s.20 Sexual Offences Act 1956 where strict liability as to the age of the girl is maintained.[31]

It is submitted, therefore, that the common law has succeeded in overcoming the obfuscations of the 1981 Act and is to be commended for securing for the law of attempt the sensible principle embodied in Cl. 49(2) Criminal Code (supra). Celebrations will be mooted, however, when it is recognised that whilst a uniform principle has been engineered in relation to reckless attempts, unlike the provisions of the code[32] no conceptual harmony has been achieved in relation to the other inchoate offences. This is the product of such provisions as s.1(2) Criminal Law Act 1977 which prevails in the context of statutory conspiracy.[33] S.1(2) prescribes that the required mental element of the offence is either intention or knowledge of the facts necessary for completion of the full offence, regardless of any lesser requirement which suffices if the substantive offence is achieved. However the term "reckless" is to be defined[34] in the context of attempts, it is clear that even advertence to a risk is very far removed from knowledge and as such there is no room for the application of recklessness within the context of statutory conspiracy.[35] Similarly, it is suggested that the mental element required to secure a conviction for incitement - knowledge or wilful blindness[36] - prevents recklessness from having any role to play in the third of the inchoate offences.

It is submitted that the meaning to be ascribed to recklessness in the attempt cases will necessarily vary depending upon the offence attempted. In the context of indecent assault and rape, the objective element of the Caldwell/Lawrence test[37] has been excluded, with recklessness being interpreted as meaning "indifference".[38] This notwithstanding, the accused who displays a "couldn't care less attitude" in relation to the woman's consent remains reckless. This state of mind is nevertheless more restrictive than the objective limb of Lawrence and in most cases will be accompanied by an appreciation, however fleeting, that the woman may not be consenting. Lord Goff, in Reid,[39] however, has observed that indifference, "..does not necessarily involve awareness of risk.." Implicit in this statement, it is submitted, is a recognition that this mental state embraces the accused who has given no thought to the risk but who would have appreciated it had he troubled to think.[40] Ex hypothesi, narrower Cunningham, recklessness must also suffice in cases of attempted rape or indecent assault.

By contrast, Schiemann J expressly recognised[41] that in the context of reckless attempts under the Criminal Damage Act, the model direction from Caldwell applied. Different again, would be an attempt at the s.15 offence; the requirement here of dishonesty necessarily excludes Caldwell and indifference, leaving the purely subjective test of Cunningham to govern alone.

It is apparent from the foregoing discussion that the thorny problem of reckless attempts has proved soluble by virtue of the ingenuity of the common law, albeit some forty years after Professor Williams opened the debate. The final challenge for English Criminal jurisprudence must be to achieve necessary consistency in the related inchoate offences of conspiracy and

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31 Prince (1875) LR 2 CCR.

32 See Cl. 48(2).

33 C.f. s.292 Penal Code which appears to avoid this problem: "Whoever conspires with another to commit any offence or to do any act in any part of the world which if done in the Islands would be an offence punishable with imprisonment and which is an offence in the place where it is proposed to be done is guilty of an offence..."

34 Infra.

35 C.f. conspiracy to defraud at common law where although the "sometimes artificial" distinctions between intention and recklessness were eschewed by Lord Goff in Wai Yu-tsang v R [1991] 4 All ER 664, it is implicit in his Lordship's opinion that Cunningham recklessness (coupled with dishonesty) as to the imperilling of another's economic interests will provide good evidence that the offence is made out. C.f. R v Allsop [1976] Crim LR 738.

36 Of all the circumstances which would make the incited act criminal, including the knowledge/belief that the person incited will act with the mens rea required for the offence. C.f. Curr [1967] 1 All ER 478.

37 Respectively, [1981] 1 All ER 961 and [1981] 1 All ER 974.

38 Kimber [1983] 3 All ER 316; Satnam S, Kewal S (1983) 78 Cr App Rep 149.

39 [1992] 1 WLR 793 at 810.

40 See, for example, Stone and Dobinson [1977] 2 All ER 341 and West London Coroner ex p Gray [1987] 2 All ER 129 each recently approved by the House of Lords in Adomako [1994] 3 All ER 79 at 87. Cf. Caldwell / Lawrence.

41 Supra n.3 at 124.

incitement. The prospects in Cayman of securing a regime of mens rea for inchoate crime which reflects that prescribed for the substantive offence, appear to be good. Notwithstanding the focus within s.289(1) Penal Code[42] upon the term "intention", the English decisions on the 1981 Criminal Attempts Act, itself couched in the language of specific intent, are ripe to be embraced. Furthermore, the absence from s.292 Penal Code of any direct requirement of intention in relation to the kindred offence of conspiracy,[43] will, it is suggested, facilitate consistency of principle locally. One may conclude, therefore, that a combination of the 1975 Penal Code and the importation of recent English case law will produce for the Cayman Islands a uniform treatment of the mental element of inchoate crime which, in keeping with the dictates of logic, mirrors that which suffices for the substantive offence. The achievement of such symmetry will be in the hands of the judiciary when, inevitably, they are confronted with such arguments as those advanced in Khan et al. This, it is submitted, is a much preferable position to that obtaining in the mother jurisdiction whose aspirations rest upon the enactment of a Criminal Code[44] which, twenty years after the codification of Cayman criminal law, appears no closer to realization.[45]

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42 Supra n.2.
43 Supra n.33. C.f. R v Anderson [1986] 27.
44 Supra n.16 and text. See also clause 48(2).
45 Mitchell C. Davies. Director of Legal Studies. Cayman Islands Law School.