CAYMAN ISLANDS LAW BULLETIN

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Cayman Islands Government

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CAYMAN ISLANDS LAW SCHOOL

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

Citation:

Cases appearing in this volume should be cited as (1995) 12 Law Bulletin.

Abbreviations:

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

Contributions:

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

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EDITORIAL NOTE

The twelfth edition of the Cayman Islands Law Bulletin, in 'snap shot' form, will convey to the reader the increasingly diverse and complex nature of local litigation, continually advancing the frontiers of Cayman law. Emulating the industry of the judiciary and the local practicing attorneys, this edition features two articles focusing upon aspects of property law, by Mr Simon Cooper (at p55) and Professor Herbert Wallace of The Queen's University of Belfast (at p60).

The Law Bulletin is edited and published by the Cayman Islands Law School. The publication, which was approved by the Legal Advisory Council in October 1989, is intended to have two purposes:

The first and foremost purpose is to bridge a gap which exists in the law reporting system in use in the Cayman Islands. The lack of law reporting was addressed with the publication in 1984 of the Cayman Islands Law Reports by Law Reports International under the editorship of Dr. Alan Milner M.A., LL.M., Ph.D., Fellow of Trinity College, Oxford. That series now comprises six bound volumes (1980-83, 1984-85, 1986-87, 1988-89, 1990-91 and 1992-93). Despite the presence of this excellent reporting series, it was felt that there was scope for an additional series of reports in the form of a Law Bulletin, produced locally and with a minimum of delay between the date of judgment and the report. Discussions were held with Dr. Milner who wholeheartedly endorsed the concept.

The second purpose of the Law Bulletin is to provide a forum in which judges, legal practitioners, academics and law students can express themselves on topics of interest to the legal community. The aim of the Law Bulletin is not to provide a full reporting service but rather to supply sufficient information about a case to allow practitioners and students to determine whether it is of use to them before immersion in its full text.

The current edition contains case summaries of the majority of Grand Court judgments delivered in chambers and in open court by Harre CJ, Schofield and Smellie JJ during the period June 15 1994 - May 17 1995. Also appearing in this edition are summaries of the decisions of the Cayman Islands Court of Appeal rendered since the last edition of the Law Bulletin. In addition, and for the first time, this edition includes a summary of decisions of the Trade and Labour Board for the period July 14 - December 14 1994. Certain transcripts contained insufficient information to be usefully summarized and were therefore omitted. In chambers and other appropriate matters, an attempt has been made to protect the identity of the parties.

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

Any comments and contributions in the form of legal articles, case notes or commentaries are very welcome.

Mitchell C. Davies.
Editor

Case Summaries

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

June 15 1994 to May 17 1995

CIVIL PROCEDURE

Summons to strike out - Whether res judicata - Whether action frivolous vexatious and abuse of process - Whether any reasonable cause of action

Horvat Properties (Cayman Islands) Ltd v Brown

Grand Court (207/94)
Smellie J
March 9 1995

Authorities referred to

Stephenson v Garnett [1898] 1 QB 677
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581
Eden Kensington Cook-Bodden v Kirkconnell Cause 19 of 1993
Jelson (Estates) Ltd v Harvey [1984] 1 All ER 12
Paradise Manor Ltd v Bank of Nova Scotia [1984-85] CILR 437
Mums Incorporated Tiam-Hong Tan v Cayman Capital Trust (in liq) [1988-89] CILR 485
The Moorcock (1889) 14 PD 64
Maas v Pepper [1905] AC 102

This was an application by the defendants to strike out the plaintiff's writ and statement of claim.

The parties had entered into a contract on 22nd April 1992. In Cause 341/93, the present defendant had sought specific performance of that contract. The present plaintiff's defence had been struck out for failure to comply with discovery obligations. On 25th November 1993, the court had awarded specific performance, ordering the transfer of title to certain land from the present plaintiff to a nominee of the present defendant, and ordered the payment of certain sums to the present defendant. The present plaintiff had then applied to set aside the judgment and file a re-amended defence out of time, but this application was dismissed on 27th May 1994. The present plaintiff had then applied for leave to appeal against the decision and for a stay of execution, but on 31st May 1994 this too was rejected.

In the present action, the plaintiff issued a writ and statement of claim which alleged:

a) that the relevant parts of the contract were void,
b) that specific performance of the contract was not possible,
c) that the contract constituted a mortgage and specific performance would not bar the plaintiff's right to redeem, and
d) that there was an implied term of the contract that the plaintiff was entitled to redeem.

The defendants argued that this re-litigated primarily the issues which were raised and found to be without merit in the judgment of 31st May 1994. The defendants accordingly brought the present summons to stay or strike out the writ and statement of claim on the grounds that it disclosed no reasonable cause of action; or it was scandalous, frivolous or vexatious; or it was an abuse of the process of the court; or it had already been adjudicated and determined in Cause 341/93; and that it contained matters that could and should have been put forward in Cause 341/93.

Held: (writ and statement of claim struck out)

(i) In the decision of the court of 31st May 1994, it was held that the proposed re-amended defence had no hope of success, nor was there any relationship of mortgagor and mortgagee arising from the contract. Despite the arguments of the plaintiff that the decision did not preclude redemption, the premises of the current statement of claim were subsumed within the findings of the court in the earlier decisions. Applying Stephenson v Garnett, in which the English Court of Appeal refused to entertain an action which raised questions identical with those already decided upon by the court in an earlier interlocutory application, the action ought to be stayed as frivolous and vexatious and for being an abuse of the process of the court, notwithstanding that the issues were not, in the strict sense, *res judicata*. It was not necessary for the issues to be specifically decided on their merits. Following Yat Tung Investment Co Ltd v Dao Heng Bank Ltd, the doctrine of *estoppel per rem judicatam* applied where reasonable diligence would have caused a matter to be raised in earlier proceedings. In the present case, the issues raised in the statement of claim could readily have been raised in the amended defence in Cause 341/93.

(ii) Furthermore, the statement of claim disclosed no reasonable cause of action. Following Paradise Manor Ltd v Bank of Nova Scotia, there could be no such thing as a secured lending arrangement by way of an equitable mortgage over land, and no mortgage could have arisen from the contract as a matter of construction.

(iii) As a matter of construction, there was no implied term that the transfer was subject to an equitable right to redeem. Extrinsic evidence as to the parties' true intentions on contracting was inadmissible for the purpose of contradicting the plain written words of the contract; following Maas v Pepper, extrinsic evidence may only be adduced to establish the factual matrix of the agreement, not the subjective beliefs or intentions of the parties.

(iv) The plaintiff was *prima facie* in contempt by having failed to comply with the order to pay any of the outstanding judgment debt in favour of the defendant which was required by the order of 25th November 1993. The plaintiff still remained arguably in contempt by not having sought and obtained a ruling that they had fully complied with their discovery obligations in the earlier proceedings. This apparent bad faith would have served as a basis for striking out the claim for equitable relief. Furthermore, the defendant could have suffered severe prejudice if the plaintiff had succeeded in maintaining this action pending its trial; the defendant would be unable to deal with the disputed land, despite having discharged the former charges over the property. Given the plaintiff's demonstrated inability to pay, this would have been without any hope of the defendant recovering any consequential costs or damages resulting from this litigation.

SAAC

(Editor's note: The judgment handed down on May 31st 1994 is summarised in (1994) 11 Law Bulletin 56.)

Evidence - Court or tribunal - Commencement of criminal proceedings

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

Court of Appeal (9/94)
Zacca Pres Georges Kerr JJA
April 20 1995

Legislation

The Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 s1

Authority referred to

Rio Tinto Zinc Corporation and others v Westinghouse Electric Corporation [1978] 1 All ER 434

Authoritative works

Wade Administrative Law 6th ed

Mr Quin for the appellant
Mr Alberga QC for the respondent

Pursuant to Article 97 of the Constitution of Peru, the Peruvian Congress set up an *ad hoc* commission to investigate the conduct of Mr Alan Garcia, the former President of Peru, in relation to a contract entered into between the Peruvian government and an Italian consortium. Evidence given before the Commission indicated that Mr Garcia had received US$840,000 from the consortium by payment into a Cayman Bank. Letters Rogatory were filed in the Grand Court by the commission seeking the examination of the bank manager regarding the deposit in question. The requested order was granted *ex parte*, by the learned judge. The *inter partes* application to set aside the order brought by W, the holder of the account, was refused.

Held: (allowing the appeal)

(i) Section 1 of the 1978 Order provided that a request could be granted to a 'court or tribunal' where proceedings had been 'instituted' by that court or tribunal. The appellant argued that the investigative commission was not a 'court or tribunal'. It certainly was not a court. The Commission's mandate was to investigate. Action could have been taken on the findings of the Commission by the Attorney-General of Peru or the Public Prosecutor, but this was discretionary. The Commission's findings did not bind anyone. In this regard it was distinct from a commission constituted pursuant to Article 99 of the Constitution of Peru.

Wade on Administrative Law states: 'tribunals make judicial decisions, but inquiries are preliminary to administrative or political decisions, often described as quasi-judicial decisions'. Wade's distinction between tribunals and bodies of inquiry would be adopted. The investigative commission was not a tribunal and thus was not eligible to apply for the order given at first instance. The learned trial judge had accordingly erred.

(ii) The Commission was further precluded from applying for the order since the appointment of an investigative body did not constitute the commencement of criminal proceedings as required by s1. The requirement thereunder was for proceedings similar to the investigations of an American Grand Jury: Rio Tinto Zinc Corporation v Westinghouse Electric Corporation.

JE

(Editor's note: For a summary of the decision of Harre CJ, sitting as a single judge of the Court of Appeal, granting a stay of execution pending this appeal, see (1994) 11 Law Bulletin 26.)

Review of discretion of trial judge - Decision must be plainly wrong

GH Ltd v Bould and Phyllisson Ltd

Court of Appeal (20/93)
Zacca Pres Georges Kerr JJA
April 20 1995

Legislation

Grand Court Rules

Authorities referred to

Yat Tung Investment Co Ltd v Dao Hing Bank Ltd [1975] AC 581
Gleason v J Wippell & Co [1977] 1 WLR 510
Henderson v Henderson (1843) 3 Hare 100
Goldrei Foucard & Son v Sinclair [1918] 1 KB 180
King v Hoare (1844) 13 M & W 404
Kendall v Hamilton (1879) 4 App Cas 504
Cayman Arms (1982) Limited v English Shoppe Limited [1990-91] CILR 299
Brinsmead v Harrison (1872) LR7 CP 547
Republic of India v India Steamship Co Ltd [1993] 2 WLR 461

Authoritative works

Spencer Bowen & Turner Res Judicata
McGregor On Damages 15th ed

Mr Alberga QC for the appellant
Mr Leo-Rynie QC for the respondents

GH Ltd appealed against the decision of Schofield J striking out the writ of summons and statement of claim as an abuse of the process of the court and as being vexatious. Schofield J ruled that it was an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings, following Yat Tung Investment Co Ltd v Dao Hing Bank Ltd and Henderson v Henderson.

Held: (appeal dismissed)

(i) The problem raised by 'possible chain defendants' and the need to litigate all issues that properly stand together was too complex to lay down a single rule. Difficult fact patterns were to be decided individually. However this case did not raise a chain of defendants problem as, from the outset, only three parties existed. In omitting to raise the issues and failing to join the last party, the applicant was properly made the victim of an order to strike in the second action.

(ii) Schofield J had correctly distinguished Goldrei Foucard & Son v Sinclair, Republic of India v India Steamship Co Ltd, and Gleason v J Wippell & Co Support for the decision was also to be found in Cayman Arms (1982) Ltd v English Shoppe Ltd and the authoritative works cited.

The trial judge had not applied wrong principles of law, nor had he failed to take into account any relevant material. In considering an appeal from the exercise of discretion of a trial judge, the appellate tribunal would not interfere unless the judge had made one of the foregoing errors. Wherever the discretion exercised was not plainly wrong the appellate tribunal could not substitute its discretion for that of the court below.

JE

(Editor's note: For a summary of the decision of the Grand Court see: (1993) 9 Law Bulletin 13.)

COMPANY LAW

Arrangement approved by sole shareholder and only known creditor - Whether sanction of the court required

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

Grand Court (448/94)
Harre CJ
December 29 1994

Legislation

Companies Law Ss85 and 86
Companies Act 1985 s425

Mr Watler for the petitioner

This was an application to obtain the sanction of the court for an arrangement which had been approved by the sole shareholder and only known creditor of a Cayman company.

Held: (dismissing the application)

(i) It was clear that the real purpose of the application was to obtain consequential orders under s86 of the Companies Law, in particular an order that the Cayman company involved in the arrangement be dissolved without winding up.

Section 86 presupposed that an order sanctioning a compromise or arrangement had been made, and such an order was only properly made in accordance with the procedures set out in s85. The purpose of s85 was to empower the court to order a meeting of creditors or members and to sanction a compromise or arrangement approved by a three-fourths majority so that it became binding on the company, its members and creditors, and any liquidator and contributories.

(ii) It was unnecessary to invoke s85 because all parties had agreed to the proposed arrangement.

HRN

Liquidation - Agreements relating to distribution to creditors - Application for directions by liquidators

In the Matter of Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) and others

Grand Court (284/91)
Harre CJ
January 13 1995

Mr Sheldon and Mr Shea for BCCI (Overseas) and CFC
Mr Paget-Brown and Mr Hellman for ICIC Apex ICIC Holdings ICIC Investments ICIC (Overseas)
Mr Foster for Abu Dhabi majority shareholders
Ms Brooks for BCCI (Overseas) Committee of Creditors

Applications were made by the liquidators of BCCI and the liquidators of the ICIC Group for directions and orders approving in both cases a proposed agreement with the majority shareholders of BCCI Holdings (Luxembourg) SA ('the Revised Agreement') and a proposed Pooling Agreement

between the BCCI and ICIC interests ('the ICIC Pooling Agreement'). Under the Revised Agreement, the Government of Abu Dhabi would make funds available to the Luxembourg, English and Cayman liquidators for distribution to creditors of the principal BCCI and ICIC companies. The Revised Agreement further provided that the principal BCCI and ICIC companies must release or covenant not to sue in relation to all claims of whatever nature against the Government of Abu Dhabi, the majority shareholders and related persons, except for claims arising in the ordinary course of business as shown in the books of the principal BCCI and ICIC companies. Under the ICIC Pooling Agreement, the principal ICIC companies would participate in the Pooling Agreement (an agreement initialled by the BCCI liquidators with the majority shareholders in February 1992, whereby the assets of BCCI and its subsidiaries would be pooled and distributed rateably amongst the creditors). The assets of the principal ICIC companies would then be pooled with the assets of the principal BCCI companies and distributed rateably amongst the creditors of those companies.

Reports supporting their applications were submitted by the BCCI and ICIC liquidators. The liquidators concluded that the terms of the Revised Agreement were at least as favourable, and also less complex than the terms of a previous agreement which had been approved by the English and Cayman courts, but disapproved by the Luxembourg Court of Appeal ('the Original Agreement'). As regards the ICIC Pooling Agreement, the overall effect would be beneficial to all creditors, as this was the most efficient way of carrying out the liquidations, given the extent of the commingling of the affairs of the BCCI and ICIC groups. A main objective of the ICIC Pooling Agreement was to avoid the difficulties, delay and expense of separating the affairs and property of the BCCI and ICIC groups and to avoid litigation between them. If the agreements were not implemented, prolonged litigation, involving proceedings in a number of jurisdictions, was the only alternative.

In a letter to the court from the BCCI Campaign Committee, a group which had been represented at the English hearing at which the Vice-Chancellor approved the agreements, but which had not sought to oppose such approval, it was argued that the proposed agreements should be rejected on the ground that they would not achieve the best result for the ordinary creditors of BCCI.

Held: (granting the directions sought)

(i) For the reasons given in their reports, the recommendations of the liquidators were to be preferred. The directions sought in respect of the Revised Agreement and ICIC Pooling Agreement would be given.

(ii) The matter of provision for disputed claims, future costs of the liquidation and litigation would be addressed in England.

(iii) Costs of the liquidators and of the Cayman Creditors Committee were to be expenses in the liquidation.

HRN

CONFLICT OF LAWS

Interlocutory injunctions - Discharge - Principles to be applied by an appellate court in reviewing the discretion of a judge in relation to interlocutory applications

I Ltd v VPG Inc and F Inc

Court of Appeal (5/93)
Zacca Pres Georges Kerr JJA
April 20 1995

Authorities referred to

Hadmor Productions Ltd v Hamilton [1982] 1 All ER 1042
Aerospatiale v Lee Kui Jak [1987] 3 All ER 510
Bushby v Munday [1821] 5 Madd 297
Re North Carolina Estate Co [1889] 5 TLR
Cohen v Rothfield [1919] 1 KB 410
Castanho v Brown & Root Ltd [1981] AC 557
McHenry v Lewis [1882] 22 Ch D 397
Pick v Manufacturers Life Insurance Co [1958] 2 Lloyd's Rep 93
DuPont De Nemours & Co and Endo Laboratories Inc v IC Agnew KW Kerr and others [1987] 2 Lloyd's Rep 585
Peruvian Guano Co v Bockwoldt (1883) 23 Ch D 233

Mr Henriques QC for the appellant
Mr Paget-Brown and Mr Quin for the 1st and 2nd respondents

The appellant, an insurance company incorporated in the Cayman Islands, which had taken over the insurance business, assets and liabilities of A Ltd, had brought proceedings in the Cayman Islands against the respondents, VPG Inc. and its wholly-owned subsidiary, F Inc. both of which were companies incorporated in Texas under Texas law. The appellant filed a writ on October 31, 1991 seeking, *inter alia*, a declaration that it was entitled to avoid certain policies of insurance which had been issued to the respondents by I Ltd and its predecessor, A Ltd, and an order for rescission of those policies.

On November 8 1991, VPG Inc., together with F Inc. as co-plaintiff, filed an action in Texas against A Ltd and I Ltd. This action rested on underlying actions against VPG Inc. as a result of damage to property from the escape of injurious substances produced by VPG Inc.'s processing plant and equipment, which were leased to and used by a chemical company in Texas, and the refusal of I Ltd and A Ltd to indemnify VPG Inc. in accordance with the terms of the relevant policies.

On December 19 1991, I Ltd filed a motion claiming that the Texas court lacked personal jurisdiction, and on February 6 1992 applied to the Grand Court for an *ex parte* injunction to restrain VPG Inc. from prosecuting the action in Texas or instituting proceedings for similar causes outside the jurisdiction of the court of the Cayman Islands. On February 7 1992 an injunction was granted by Sir Denis Malone CJ in the terms sought. The respondents subsequently obtained an order from Harre CJ discharging the injunction.

On the first working day after discharge of the injunction, VPG Inc. obtained default judgment in the Texas action without notice or warning to the appellant. A motion filed on March 12 1993 to set aside the default judgment was struck out as a result of a counter-motion by VPG Inc. on the basis that the appellants had not entered into a bond as security for the payment of any final judgment. The default judgment was eventually set aside by the Texas Court of Appeal on June 8 1994 on the ground

that there was an error on the face of the record.

It was nevertheless submitted on behalf of I Ltd that the judgment had the following oppressive consequences: (1) the Texas Court of Appeal held that A Ltd and I Ltd having appeared to attack the default judgment were presumed to have entered an appearance, thus virtually putting an end to their challenge to the jurisdiction of the Texas court; and (2) in order to defend the action in Texas, I Ltd would be required to enter into a bond that was likely to be an amount equivalent to the amount in the default judgment.

On August 10 1994, following an appeal by the appellant against the order of the Grand Court discharging the injunction, the Cayman Islands Court of Appeal ordered a restoration of the injunction pending hearing of the appeal.

Held: (upholding the discharge of the injunction on terms)

(i) The guiding principles relevant to the grant of an injunction restraining a party from pursuing his action in a foreign court had been reviewed and restated by Lord Goff in Aerospatiale v Lee Kui Jak. To justify the grant of an injunction, it must be shown: '(a) that the English court is the natural forum for the trial of the action to whose jurisdiction the parties are amenable and (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.'

(ii) The general approach of a Court of Appeal in reviewing the discretion of a judge in relation to interlocutory injunctions was as stated by Lord Diplock in Hadmor Productions Ltd v Hamilton.

It could not be said that in discharging the injunction the learned Chief Justice erred in any of the ways described by Lord Diplock or that he was 'so aberrant that it (his decision) should be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it'.

The following factors had been considered by the learned Chief Justice in reaching his decision to discharge the injunction: the proper law of the contract, the concurrent proceedings, the issues (and the related question of witnesses to be called) and the juridical advantage to VPG Inc. in litigating the action in the Texas court.

As regards the proper law of the contract, the correct approach of the Cayman court was as stated by Lord Diplock in Pick v Manufacturers Life Insurance Co However, since it was implicit from that statement that a foreign court might apply its own test and come to a different conclusion to the Cayman court, the proper law of the contract might depend on the forum of trial, and it was therefore not necessary to decide this question. Neither was the question of witnesses to be called a matter of weighty consideration, since it seemed unlikely that numerous foreign witnesses would be required in either court.

(iii) The important factors in favour of restoring the injunction were: (1) the stage reached in the Cayman proceedings and the expensive and costly pre-trial procedures to be incurred if the proceedings in Texas were not stayed; and (2) the existing onerous consequences of the default judgment, and in particular, the requirement for the entry of a bond by the appellants as a precondition to defending the action in Texas. In favour of upholding the discharge of the injunction were: (1) the juridical advantage to the respondents in litigating in the Texas court the important causes of action founded on Texas legislation; and (2) the fact that in the absence of a proper assignment of the policies it would be

manifestly unjust by injunction to prohibit VPG Inc. from pursuing its claim against A Ltd which was not a party to the proceedings in Cayman, but as a distinct and separate entity had been properly joined in the Texas proceedings.

Except for the factors arising from the events subsequent to the order for discharge of the injunction, all other factors were before the learned Chief Justice for his consideration. As regards the subsequent events, the most onerous factor was the requirement on the appellant to post a bond (which might have been the amount of the default judgment) as a pre-condition to defending the action in Texas.

(iv) It was quite clear that in a proper case the court could discharge an injunction on terms: Aerospatiale v Lee Kui Jak. It was sufficient in the present case to alleviate the substantial detriment and burden to I Inc. by granting a discharge of the injunction upon the condition that the respondents waive the requirement for the bond from the defendants in the Texas proceedings.

HRN

CONTRACT

Loan to shareholders - Paid into company account - Nature of loan - Whether shareholder liable personally or as guarantor

X Bank v R

Grand Court (110/93)
Smellie J
Oct 27 1994

Authorities referred to

Felthouse v Bindley (1862) 11 CB 869
Rust v Abbey Life Insurance Co [1979] 2 Lloyd's Rep 335
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank [1985] 2 All ER 947

Mr Turner for the plaintiff
Mr Lamontagne QC for the defendants

In May 1990, the plaintiff made a loan of CI$50,000 to the first and second defendants. The defendants were shareholders in a local company. The loan was for the purpose of maintaining the company. The cheque representing the sum loaned was indorsed by both first and second defendants and paid into the company's account. In September 1994, the second defendant executed a document guaranteeing the debts of the company to the plaintiff in the sum of CI$50,000.

The plaintiff claimed that the loan of May 1990 was a personal loan to the first and second defendants, and that the guarantee of September 1994 imposed an additional liability on the second defendant.

The second defendant claimed that at the time the loan of May 1990 was made, it was the intention of the plaintiff that the subsequent guarantee executed by the second defendant in September 1994 would relate specifically to that loan and not to the company's general indebtedness.

The plaintiff alternatively claimed that the second defendant should be estopped from denying personal liability on the loan of May 1990 because she had notice of the personal nature of her liability on the loan and she had acquiesced in it. Notice allegedly arose because the payments made by the plaintiff

pursuant to the loan were paid into a personal loan account in the joint names of the first and second defendants, despite the fact that the account statements were sent to the postal address of the company. Furthermore, the guarantee of September 1994 was expressed to relate to the company's general indebtedness, not to the personal loan of May 1990.

The second defendant denied estoppel on the basis that she had no notice, as she had never received any statement, and in the ordinary course of things such statements would have been retained by her husband at the place of business, and she had nothing to do with the repayments.

No written agreement existed between the parties which recorded the defendants' assumption of personal liability for the loan. The first defendant negotiated with the plaintiff on behalf of the second defendant, and the second defendant signed the loan agreement without anyone explaining to her that she would incur personal liability.

Held: (declaring the second defendant's contingent liability)

(i) When the second defendant executed the guarantee of September 1994, she believed it merely guaranteed the sum loaned in May 1990. Accordingly, there was no *consensus ad idem* between the plaintiff and second defendant in respect of personal liability on the loan of May 1990.

(ii) The plaintiff's claim of estoppel failed as there was no clear evidence of notice and acquiescence on the part of the second defendant.

(iii) The second defendant was therefore not personally liable on the loan, but was contingently liable on the guarantee of September 1994.

SAAC

Guarantee - Cancellation of underlying contract - Whether guarantee terminated - Whether condition precedent

Phillips Petroleum Company v Quintin

Grand Court (200/93)
Schofield J
April 26 1995

Authorities referred to

Re Duke of Wellington [1947] Ch 506
Rouger Guillet et Cie v Rouger Guillet & Co Ltd [1949] 1 All ER 244

Mr Turner for the plaintiff
Mr Alberga QC and Mr Ritchie for the defendants

The plaintiff sought to recover money from the defendants under a guarantee.

The plaintiff supplied petroleum products to Max Oil Company on credit. The defendants executed a guarantee of certain indebtedness of Max Oil Company to the plaintiff. A transfer of the business of Max Oil Company to SJW Oil Company Inc. was negotiated. The plaintiff and SJW Oil Company Inc. executed a new supply contract and terminated the existing supply contract with Max Oil Company, to take effect from January 1 1993. It would have been advantageous for the plaintiff, the defendants and the SJW Oil Company Inc. to have obtained a federal tax exemption licence, but one was not obtained.

The plaintiff claimed that the termination of the

existing supply contract and its replacement by the new supply contract did not take effect on January 1 1993 because it was subject to a condition precedent, namely the grant of the federal tax exemption licence, rendering the guarantee unaffected by any changes in the underlying contract. The defendants claimed that there was no such condition precedent, and that the termination and replacement of the supply contract had the effect of cancelling the guarantees.

The contracts were governed by the law of the State of Colorado.

Held: (allowing recovery on the guarantee)

The evidence clearly showed that the transfer of the business of Max Oil Company to SJW Oil Company Inc. was to be put 'on hold' pending the grant of the federal tax exemption licence. This was to be construed as a condition precedent. Under Colorado law an oral agreement as to a condition precedent was enforceable. It was not ousted by the express written term of the replacement supply contract; that contract was to take effect on January 1 1993. The termination and replacement of the supply contract therefore never took effect, and the joint and several liability of the defendants on the guarantee was unaffected.

SAAC

Contractual dispute - Credibility of witnesses

Mahogany Estates Ltd v Gonzales

Grand Court (220/91)
Harre CJ
March 13 1995

Mr Broadhurst for the plaintiff
Mr Roy for the defendant

The defendant entered into an agreement with the plaintiff for the use of the plaintiff's bulldozer for a consideration of one lorry load of marl for every hour that the bulldozer was used.

A dispute had arisen as to the number of hours the bulldozer was used. The defendant maintained that it was used for 22 hours during the November 19 1990 to January 4 1991 whilst the plaintiff asserted the bulldozer was used for 200 hours. Three witnesses gave evidence for the plaintiff to the effect that the bulldozer was heavily used during the period in question. The defendant asserted that he only used it as a heavy duty backup for his own bulldozer.

Held: (judgment for the defendant)

(i) The evidence given by witnesses for the plaintiff as to the fuelling of the bulldozer and the recording of the time when it was in use were inconsistent and unreliable in many respects. The totality of the evidence showed that the bulldozer had been supplied fuel by the defendant hirer and not the plaintiff company's manager as asserted by the latter. There was nothing in the agreement requiring the manager of the plaintiff company to supply fuel.

(ii) The evidence supported the assertions of the defendant that the bulldozer had only been used as a heavy duty backup for the defendant's own bulldozer and had not been used throughout the period of hire. The bulldozer operator testifying for the plaintiff had recorded the total number of hours he worked for the defendant rather than the number of hours he used the bulldozer in question. From the evidence, the events were more likely to be as asserted by the defendant than by the plaintiff's witnesses. The plaintiff had failed to prove on the balance of

probabilities that the bulldozer was used for more than 22 hours.

AD

CRIMINAL LAW

Theft and falsification of accounts - Misdirection by judge - Effect of character evidence on a case involving dishonesty

Ebanks v R

Cayman Islands Court of Appeal (29/93)
Zacca Pres Georges Collett JJA
April 20 1995

Authorities referred to

Noon v Smith [1964] 1 All ER 1450
R v Sharp [1993] 3 All ER 225

Mrs Lever and Mrs Reid for the appellant
Mr Clarke for the Crown

The appellant was employed in a Government department. His duties included receiving payments from members of the public and giving receipts for the money paid. The receipts were prepared in duplicate and the payer was normally given a copy. Vouchers were also prepared for the revenue paid. The vouchers were prepared by the appellant but typed by another employee. The revenue collected was eventually lodged in a Government bank account.

During an internal audit, two receipts in the sums of $60 and $40 were found which did not appear on any revenue voucher. The receipt for a cheque in the sum of $1,900 had also been altered to read $1,800. The auditor concluded that there had been underbanking and falsification of accounts, the falsification being the destruction or concealment of the relevant receipt vouchers.

Four counts of theft and four counts of falsification were brought. A submission of no case to answer was successfully made in relation to two counts of theft and two counts of falsification. The judge held that the mere absence of receipt vouchers and lodgement slips did not lead to the irresistible inference that there had been theft and falsification. The documents may have been misplaced or lost. On the other four counts, the judge ruled that there was enough evidence to go to the jury.

With regard to those four counts, it was admitted that there had been alterations but these were explained as oversights and mistakes which had later been rectified. There was no evidence that there was a particular sum available to be stolen. There was however evidence of unexplained overbanking of a particular sum in one instance and evidence of underbanking in another instance. The appellant contended that to prove falsification it had to be shown not only that the document had been falsified but that the falsification was with a view to gain for oneself or another or to cause loss to another. If there was no cash to be stolen there could be no gain to the appellant and no loss to the Government.

Held: (allowing the appeal)

(i) On one count of theft and a falsification count relating thereto, the evidence did not establish the existence of any cash to be stolen. All the cheques paid had been deposited. The appellant should not

have been called upon to answer these counts. Both the theft and falsification counts therefore were to be quashed despite the alteration of the figure on the duplicate receipt.

(ii) On the two remaining counts of theft and falsification involving $790 there was enough evidence to go to the jury. However the use of the word 'falsify' by the judge in his summing up was a misdirection to the jury. The defendant had not admitted 'falsifying' any receipt with the intention of retaining the difference between the carbon copy as altered and the original receipt in the higher amount as the judge had stated. 'Falsify' connoted conscious change for the purpose of deception whereas the appellant had admitted only to alteration in that having made a mistake when entering a receipt he admitted that he had 'altered' the receipt to show a lesser amount when the mistake had been discovered.

(iii) The appellant further contended that since he had made his character an issue in the case, the judge ought to have given a good character direction to the jury. In R v Sharp the court ruled that a judge has a discretion whether or not to direct the jury that a man who has a previously good character is less likely to commit an offence of dishonesty. The present was a case, however, in which the discretion should have been exercised in the appellant's favour. The credibility of the appellant was crucial in assessing the weight to be attached to his explanation.

(iv) The absence of such a character direction and the misdirection in relation to the appellant's evidence made it unsafe to uphold the conviction. Accordingly, the appeal would be allowed and the conviction quashed.

AD

Official corruption - Standard of proof - Credibility of witness

Pinto v R

Grand Court (1/94)
Schofield J
June 15 1994

Legislation

Penal Code s78(a)
Gambling Law Ss 2 and 17

Mr Clarke for the Crown
Mr Alberga for the defendant

The accused, a police officer, was charged with official corruption, contrary to s78(a) of the Penal Code.

He had persuaded C, a friend who was in Grand Cayman on a visit from Jamaica, to assist him in catching N, who had been involved in the illegal sale of lottery tickets. N had at least one conviction for an offence in connection with this activity. N had also been arrested by the accused in 1992 for a suspected offence but was released by the accused's superior due to insufficiency of evidence.

The accused, together with C and M, another police officer, went to the vicinity of N's house. C went to the house, purchased a lottery ticket from N and gave it to the two police officers. The three men then went to N's door, were allowed to enter, and the officers conducted a search of the house. The accused was in the company of N during most of the search, whilst M was searching other parts of the house. N's daughter and brother were also in the house.

During the search, the accused found some lottery tickets in the laundry room. M found a large sum of money in a bedroom drawer, and in the bathroom a note pad with impressions of numbers on it. No arrest was made. N subsequently alleged that the accused agreed not to arrest her if she gave him $1000.

Held: (acquitting the accused)

(i) The prosecution case rested on the truth and reliability of N's evidence. However, N had every reason to lie given the nature of her business and the fact that she had been arrested by the accused before. Furthermore, there were inconsistences in her evidence.

No one present in the house witnessed the alleged soliciting for or taking of a bribe.

No one present in the house complained at the time or at the first available opportunity of any suspicious behaviour on the part of the accused.

(ii) The accused's explanations for his actions, which were stated unhesitatingly at the time of interview and were adhered to steadfastly throughout his testimony, were not unreasonable: in particular, he could not use C, his informant, as a witness, C having been assured he would not be involved in any court proceedings, and if C failed to testify there would be no case against N.

In the circumstances, the prosecution had failed to meet the required standard of proof.

(iii) Although it was not necessary to decide the point for the purposes of this case, there was a strong argument for holding that expired lottery tickets were not lottery tickets for the purposes of the Gambling Law. An expired lottery ticket did not entitle, or purport to entitle, the holder to receive any money or money's worth and was arguably not within the definition in s2.

HRN

CRIMINAL LAW - SENTENCING

Crim. App. No.	Case/Ind No.	Offence	Sentence
40/93	5929/91	Refusing to supply urine specimen	9 months Imp.
40/93	5930/91	Possession of cocaine	9 months Imp. (Conc.)
43/93	1/93	8 counts of theft	2 1/2 years Imp. (Conc. with other sentences of max of 2 1/2 years Imp.)
43/93	31/93	Obtaining property by deception	3 months Imp. (Conc.)
17/94	29/93	Attempted robbery	2 years Imp. (1 year suspended)
21/94	3491/93	Possession of cocaine with intent to supply	2 years Imp. + $325 fine or 10 days Imp.
21/94	3492/93	Possession of cocaine with intent to supply	2 years Imp. (Conc.) + $325.00 fine or 10 days Imp.
13/94	3686/93	Causing GBH	2 years Imp.(1 year suspended) + compensation order of $500.00.
24/94	1857/93	Assaulting police	3 months Imp. (Consec. to 4418/93 below).
24/94	2863/93	Consuming cocaine	3 months Imp. (Conc.)
24/94	2864/93	Consuming ganja	1 month Imp. (Conc.)
24/94	3650/93	Theft	6 months Imp. + compensation order of $60 or 7 days Imp.(Consec.)
24/94	4417/93	Attempted burglary	12 months Imp. (Conc. with 4418/93).

Crim. App. No.	Case/Ind/No.	Offence	Sentence
24/94	4418/93	Burglary	18 months Imp. (Consec. to 3650/93.) Compensation order of $300 or 35 days Imp. Consec. to 3650/93. Total Imp. 27 months.
26/94	2953/93	Possession of cocaine with intent to supply	18 months Imp.
26/94	2954/93	Possession of cocaine with intent to supply	18 months Imp. (Consec.)
26/94	2952/93	Failing to give urine specimen	3 months Imp. (Conc. with 2953/93).
29/94	2956/93	Possession of ganja with intent to supply	9 months Imp.
29/94	2957/93	Possession of ganja with intent to supply	9 months Imp. (Consec. to 2956/93.)
29/94	2959/93	Failing to give urine specimen	3 months Imp. (Conc.) + compensation order of $35 to RCIP or 7 days Imp.
30/94	4008/93	Theft	6 months Imp.
30/94	4009/93	Burglary	12 months Imp. (Consec. to 4008/93).
30/94	4010/93	Burglary	12 months Imp. (Conc. with 4009/93.)
30/94	1089/94	Theft	6 months Imp. (Consec. to 4009/93.)

Crim. App. No.	Case/Ind No.	Offence	Sentence
30/94	411/94	Consumption of cocaine	3 months Imp. (Conc. with 4008/93.)
32/94	3327/93	Possession of ganja with intent to supply	3 years Imp.
33/94	3323/93	Being conc. in the possession of ganja with intent to supply	2 years Imp.
34/94	3382/93	Assaulting police officer	3 months Imp. (Consec. to 3384/93 below.)
34/94	3384/93	Possession of cocaine with intent to supply	4 years Imp.
34/94	3385/93	Possession of cocaine with intent to supply	4 years Imp. (Conc. with 3384/93).
38/94	1147/93	Consumption of ganja	3 months Imp. (Conc. with 1150/93 below).
38/94	1149/93	Consumption of cocaine	6 months Imp. (Conc. with 1150/93).
38/94	1150/93	Possession of cocaine with intent to supply	3 years Imp. + $500 fine (of which $308 was to be applied from cash found on D.) 14 days Imp. in default.
40/94	1369/94	Possession of ganja with intent to supply	4 1/2 years Imp. Drugs and vessel confiscated.
41/94	2944/93	Possession of cocaine with intent to supply	2 years Imp.

Crim. App. No.	Case/Ind No.	Offence	Sentence
41/94	2945/93	Failing to give urine specimen	6 months Imp. (Conc. with 2944/93).
41/94	2948/93	Possession of cocaine	6 months Imp. (Consec. to 2944/93.)
41/94	2946/93	Consumption of ganja	3 months Imp. (conc. with 2948/93.)
41/94	2947/93	Consumption of cocaine	3 months imp. (conc. with 2948/93.)
41/94	3462/93	Consumption of cocaine	6 months imp. (conc. with 2944/93).
41/94	3463/93	Possession of utensil used in the consumption of drugs	6 months imp. (conc. with 2944/93).
41/94	3465/93	Consumption of ganja	3 months Imp. (Conc. with 2944/93). +
41/94	3651/93	Theft	1 month Imp. (Consec. to 2944/93 2948/93).
42/94	2504/93	Consumption of cocaine	6 months Imp. (Conc. with 2506/93 below).
42/94	2505/93	Consumption of ganja	3 months Imp. (Conc. with 2504/93).

Crim. App. No.	Case/Ind No.	Offence	Sentence
42/94	2506/93	Possession of cocaine with intent to supply	2 years Imp. (Conc.) + $50.00 or 7 days Imp.
42/94	41/94	Consumption of cocaine	6 months Imp. (Conc. to 2504/93).
42/94	43/94	Consumption of ganja	3 months Imp. (Conc. with 41/94).
42/94	42/94	Possession of utensil used in Consumption of drugs	3 months Imp. (Conc. with 41/94) Total Imp. 2 years.
47/94	2168/93	Possession of ganja with intent to supply	4 years Imp.
48/94	2172/93	Possession of ganja with intent to supply	2 years Imp.

MD

CRIMINAL PROCEDURE

Judicial review - Order of certiorari to quash decision of the Summary Court made during course of trial - Use of document to refresh memory - Right of inspection and cross-examination

In the Matter of an application by Michael A Miller for judicial review of a decision of the Summary Court made during the course of his trial

Grand Court (42/95)
Smellie J
May 17 1995

Legislation

Grand Court (Application for Orders of Mandamus Prohibition Certiorari and Habeas Corpus) Rules

Authorities referred to

Howard v Canfield 5 Dowl 417
Beech v Jones 5 CB 696
R v Gibson [1988-89] CILR 336
Berry v R [1992] 3 All ER 881
Senat v Senat [1965] 2 All ER 505
Gregory v Tavisnor (1836) 6 C & P 280
Wharam v Routledge (1805) 5 Esp 205
Palmer v Maclear and M'Grath (1858) 1 Sw & Tr 149
Owen v Edwards (1983) 77 Cr App R 191
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147
R v Governor of British Prison ex parte Armah [1968] AC 192
Re Racal Communications Ltd [1981] AC 374
O'Reilly v Mackman [1983] 2 AC 237
R v Manchester Coroner ex parte Tal [1985] QBD 67
R v Surrey Coroner ex parte Campbell [1982] QB 661
R v Wells Street Metropolitan Stipendiary Magistrate ex parte Seillon [1978] 3 All ER 257
R v Stipendiary Magistrate ex parte the Attorney General [1993] 4 LRC 140
R v Bradford Justices ex parte Wilkinson [1990] 2 All ER 933
R v Bow Street Metropolitan Stipendiary Magistrate ex parte Noncyp Ltd [1988] 3 WLR 827

Authoritative works

Phipson on Evidence (14th ed)
Archbold's Criminal Pleading Evidence & Practice (1995 edition)
Halsbury's Laws of England (4th ed) Vol 1(1)

Mr Lamontagne QC for the applicant
Mr Clarke for the respondent

This was an application for: (a) an order of *certiorari* to quash a decision of the learned magistrate in the course of the Summary Court trial denying defence counsel's application that he be afforded sight and inspection of the statement of a witness from which that witness had refreshed his memory prior to giving evidence; and (b) an order of *prohibition* forbidding the further conduct of the trial until the applicant was allowed to cross-examine on the statement used by the witness.

The application was based on two grounds:

1. The Summary Court, in making the decision, exceeded its jurisdiction and/or abused its powers in that it made an error of law while purporting to act within its jurisdiction, and that error was apparent on the face of the record of the proceedings; and

2. The decision amounted to a breach of the rules of natural justice and of the duty to act fairly in that the applicant was denied his right to cross-examine fully and effectively the said witness, that witness being a chief prosecution witness and the virtual complainant.

The applicant contended that he had been denied the right to a fair trial.

Held: (granting the order for *certiorari*)

(i) This application required consideration of the well-established rule of evidence that a document used by a witness to refresh his memory must be made available in order that the opponent may have the benefit of cross-examination upon it. This rule was to be distinguished from the rules of practice which govern discovery in criminal cases, in particular the duty of the prosecution to give discovery of relevant material.

(ii) The learned magistrate had misdirected himself on the law. He concluded that as the witness, before coming to court, had used a document to refresh his memory, defence counsel had no right of inspection. This was too narrow an application of the rule. The rule was summarised in Senat v Senat, and there was no suggestion in that case that the use of a document to refresh memory must take place in the context of court proceedings in order to give rise to the right of inspection. Had the full report of the decision in Owen v Edwards and the commentary in Archbold been brought to the attention of the learned magistrate, this narrow application would have been avoided.

(iii) It was for the fact-finding tribunal to determine how much earlier than the actual giving of evidence would the use of a document as an aide memoire give rise to the right of inspection and to the application of the rule: Owen v Edwards. Regard should be had, *inter alia*, to whether the memory-refreshing exercise was so long before as to make reference to the document no longer operable on the mind of the witness at the time of giving evidence. The onus was on the party so contending to prove that the memory - refreshing exercise was no longer operable on the mind of the witness.

(iv) There was clearly an error of law which was apparent on the face of the record. Such an error was one committed in excess of jurisdiction and thus subject to judicial review by way of prerogative writ.

It was irrelevant whether the decision of the court below was an error committed within its jurisdiction or whether it was one going to the court's jurisdiction: O'Reilly v Mackman. The presumption was that the court had no jurisdiction to make an error of law upon which its decision depended: Anisminic Ltd v Foreign Compensation Commission.

(v) Where an error of law operated potentially to deny the applicant a fair hearing (as in this case, where cross-examination had been precluded), the error of law might amount to a breach of the rules of natural justice, and for that an order of *certiorari* would lie: R v Bradford Justices ex parte Wilkinson.

(vi) There was ample authority that the Grand Court had jurisdiction to intervene even at the interlocutory or part-heard stage of proceedings before the magistrate. Following a comprehensive review of the authorities in R v Stipendiary Magistrate ex parte the Attorney-General, the Gibraltar Court of Appeal had concluded that, as a matter of principle, the Supreme Court had jurisdiction to enter upon the inquiry by way of review, and to intervene at the interlocutory stage if it considered that the point in issue concerned a matter of jurisdiction. It was not within the jurisdiction of the Summary Court to preclude the

adduction of relevant and admissible evidence which could be crucial to the defence and hence to the fair disposition of the matter on trial. The Grand Court therefore had jurisdiction to intervene even while the trial was part-heard.

(vii) The learned magistrate's adjournment of the proceedings below to enable the application to be brought was a proper exercise of his discretion. Although there were many good reasons why the court should be slow to entertain applications for review while proceedings were still underway in the court below (R v Bow Street Metropolitan Stipendiary Magistrate ex parte Noncyp Ltd) in this case the error could be remedied and the proceedings below could continue to a proper conclusion as a result of the application for review. This was more sensible than awaiting the final outcome of the trial, only to have any conviction set aside on appeal by virtue of the procedural evidential irregularity, with the possibility of a subsequent re-trial.

(viii) The order of *prohibition* was not granted, there being no further concern that the evidential irregularity would not be remedied when the matter resumed before the learned magistrate.

HRN

Sentencing - Appeal by Attorney-General - Power of Grand Court to vary an unduly lenient sentence

R v Williams

Grand Court (4194/93) (4195/93)
Schofield J
February 10 1995

Legislation

Criminal Procedure Code s156
Misuse of Drugs Law s3(1)(m)
Penal Code s23A

Authority referred to

Ritter and Faltz v R [1986-87] CILR 430

Mr Bulgin for the Crown
Mr Furniss for the respondent

The respondent had pleaded guilty to a charge of possession of ganja with intent to supply and a sentence of 180 hours community service had been imposed by the magistrate. The Attorney-General appealed under s156 of the Criminal Procedure Code on the ground that the sentence was unduly lenient.

Held: (dismissing the appeal)

(i) On an appeal by the Attorney-General under s156 of the Criminal Procedure Code, the Grand Court had power to vary a sentence imposed by the Summary Court.

(ii) The sentence imposed by the learned magistrate was wrong in principle and should not be followed. Possession with intent to supply large quantities of ganja usually attracted a sentence in the region of eighteen months to two years immediate imprisonment. The quantity involved in this case was 72 lbs.

There were no mitigating factors. Instead, all the factors pointed to a custodial sentence:

1. The respondent pleaded guilty at the eleventh hour, not as an act of contrition, but because she felt

there was nothing to be gained from continuing to deny the offence.

2. The respondent had a bad record (including a conviction for possession of cocaine with intent to supply).

3. The respondent had previously breached the conditions of a probation order and was regarded by the social worker as unsuitable for community service. Furthermore, despite admitting that she had a cocaine problem, the respondent had failed to attend appointments for counselling.

4. The respondent was in breach of a suspended prison sentence imposed on October 11 1992, less than one year prior to the commission of this offence. The learned magistrate failed to activate the suspended sentence and to record his reasons for such failure in accordance with s23A of the Penal Code. The fact that the respondent had never been offered community service in the past was an inadequate reason for choosing a sentence which, in all the circumstances of the case, was inappropriate.

(iii) Had the appeal come on for hearing a month or so after sentencing, the court might have been minded to impose a sentence of imprisonment. However, the community service order had been imposed on October 5 1994 and a substantial portion of it had been fulfilled, therefore although the sentence was in error and the appeal was a proper one to bring, it was unjust, at this stage, to vary the sentence.

HRN

Guilty plea - Discretion of the court to discharge the accused with or without recording a conviction

R v Evans

Grand Court (617/93)
Schofield J
September 2 1994

Legislation

Criminal Procedure Code Ss 163 165 and 71
Traffic Law 1986 (Revised) s66
Evidence Law s25

Authorities referred to

Woods v Richard (1977) Cr App Rep 300
R v Lundt-Smith [1964] 3 All ER 225

Mr Helfrecht for the Crown
Mr McField for the respondent

The respondent, a detective constable on duty, had crashed the car he was driving whilst in legitimate pursuit of another car. He pleaded guilty to a charge of careless driving. The learned magistrate refused to convict the respondent. The Crown appealed by way of case stated.

Held: (setting aside the order of the magistrate)

(i) The learned magistrate did not purport to acquit the respondent, but discharged him pursuant to s71 of the Criminal Procedure Code. The Crown's argument that s71 could only be invoked in the case of a not guilty plea was rejected.

(ii) Before exercising his discretion under s71, the magistrate was simply required to hear all that was sought to be put before him, therefore even if no evidence was called, as in the case of a guilty plea, he could discharge an accused without convicting him.

(iii) However, in exercising his discretion not to convict the respondent, the learned magistrate did not apply the proper principles. He failed to appreciate that the respondent's driving was subject to the same standard of care as that of any other driver. It was wrong to require a lower standard of care in driving from police officers engaged in emergency operations. On the respondent's admission that he drove carelessly, and on the facts of the case, a conviction should have been recorded. If a charge was proved, it was only in the most minor of cases, or where the culpability of an accused person was minimal, that no conviction should be recorded. An order convicting the respondent of the charge laid would be substituted for the order of the learned magistrate.

(iv) It was not expedient to inflict punishment on the respondent, therefore the appropriate order was that he be discharged absolutely and that his driving licence be not endorsed.

HRN

Juvenile offender tried together with adult - First time offender - Whether immediate prison sentence appropriate

Diaz v R

Grand Court
Schofield J
February 24 1995

Legislation

Juveniles Law 1990 Ss9 18 28(3)
Misuse of Drugs Law s3(1)(m)

Appellant in person

Mr Roberts for the Crown

The appellant was 16 years old when he was charged together with an adult with possession of ganja with intent to supply contrary to s3(1)(m) of the Misuse of Drugs Law.

The juvenile had accompanied an adult woman to Northward prison where the woman's boyfriend had been imprisoned. Apparently at the instigation of the woman, the appellant had thrown some ganja and cigarette papers over the prison fence to the prisoner.

The juvenile was tried together with the adult in the Summary Court under s18 of the Juveniles Law instead of being tried in the Juvenile Court under s28(3) of the same Law. He pleaded guilty, was sentenced to six months imprisonment and fined $250. He was 17 at the time of the trial and sentencing. He appealed against sentence.

Held: (allowing the appeal against sentence)

(i) The Summary Court had jurisdiction to try the juvenile together with the adult under s18 of the Juveniles Law. Had the juvenile committed the offence by himself and been tried in the Juvenile Court, the method of dealing with him would have precluded a sentence of imprisonment. At the time of the trial he was not a juvenile and having been tried in the Summary Court, the magistrate had the power to deal with him in any manner provided by law, including sentencing him to imprisonment.

(ii) The imprisonment although lawful, was not correct in principle. The appellant was a first time offender and taking into account the fact that he committed the offence under the influence of an adult, a prison sentence should have been a last

resort. Whilst the offence was serious, the circumstances of its commission had to be taken into account. Introduction of the young offender to prison life was inappropriate in all the circumstances. Although the law draws a line between a sixteen-year-old and a person who has just become seventeen, the appellant's life could have been ruined by introduction to prison life and imprisonment was only to be imposed for the most compelling reason.

In the circumstances, a prison sentence was inappropriate and an alternative sentence was called for.

AD

Drugs - Possession of ganja - Whether quantity enough to give inference of intent to supply - Whether motor car of appellant was rightly forfeited

Walton v R

Grand Court (72/93)
Schofield J
July 27 1994

Legislation

Misuse of Drugs Law s3(1)(m)

Mr Hampson for the appellant
Mr Helfrecht for the Crown

The appellant was convicted of possession of ganja with intent to supply contrary to s3(1)(m) of the Misuse of Drugs Law after a packet of 7.6 grams of ganja was found inside his underpants and a juice bottle containing 0.8 lb of ganja had been discovered in a bag in his car.

The appellant admitted to being a heavy user of ganja and stated that the entire quantity was for his personal consumption. He said the contents of the bottle were to be kept in Grand Cayman for future use. The appellant claimed that he purchased the large quantity from a dealer because of its discounted price.

In the estimation of the Summary Court, the quantity was more than that required for personal consumption and was intended for supply.

Held: (dismissing the appeal)

(i) Concern was expressed as to the amount of the drug which, in the estimation of the lower court, would have lasted the appellant some forty weeks.

(ii) In certain cases where an individual was in possession of a large quantity of drugs, the amount of drugs in his possession could, without more, entitle the court to infer that he intended to supply.

(iii) The appellant's heavy use of ganja caused the magistrate to conclude that what he had in his possession (without what was contained in the bottle) would not have been enough to meet his habit during a planned three week visit to Cayman Brac. In the circumstances, the magistrate concluded that the appellant intended to take the contents of the bottle with him for the purposes of supplying the drug in Cayman Brac. Matters such as the availability of money to purchase such a large quantity at short notice and whether such a cache could keep for the length of time that personal use only would require, drove the Grand Court to the same conclusion.

(iv) The appellant had served a portion of the sentence imposed and paid a fine of $500. The only issue was whether the magistrate was right in impounding the appellant's motor vehicle on the grounds of it having been used to 'render easier',

'promote' or 'help forward' the appellant's possession with intent to supply the ganja. In the circumstances there was not enough evidence to suggest that the vehicle had been put to such use. The ganja was merely in the vehicle in advance of the appellant's intended supply at an unknown time and place. This indicated incidental use only of the vehicle. The forfeiture order would accordingly be set aside.

AD

Unrepresented defendant - Guilty plea - Whether accused understood ingredients of the offence

Green v R

Grand Court (33/94)
Schofield J
November 4 1994

Legislation

Misuse of Drugs Law (revised) s3(1)(m)
Criminal Procedure Code s63

Authority referred to

Rankin v R (SCA 18/91)

Mr Collins for the appellant
Mr Hefrecht for the Crown

The appellant was charged with two counts of possession of ganja *simpliciter* and a third count of possession of ganja with intent to supply after a large quantity of ganja had been found in his residence and in his car.

The appellant was unrepresented at the time of the arraignment and pleaded guilty to the charges. It was unclear from the court records whether he entered a plea on each of the counts and whether the ingredients of the offences were explained to him.

He appealed against the two year sentence of imprisonment imposed.

Held: (dismissing the appeal)

(i) Section 63 of the Criminal Procedure Code placed a duty on the court to ensure that an unrepresented accused admits each and every ingredient of the charge and that he has entered a separate plea on each of the charges. Any pleas in mitigation should be heard before a conviction is recorded to ensure that the accused is not putting before the court anything which could amount to a defence to the charge.

(ii) In the circumstances the court was satisfied that the plea was properly tendered and accepted. The sentence imposed, although severe taking into account the fact that the accused was a person of previous good character and with a family, was not manifestly excessive nor wrong in principle.

AD

Alibi defence - Whether the prosecution or defence bears the legal burden of proof

Dixon v R

Grand Court (25/94)
Schofield J

February 10 1995

Legislation

Misuse of Drugs Law s3(1)(m)

Authoritative works

Archibald Criminal Pleading Evidence and Practice 1992

Mr Furniss for the appellant
Mr Bulgin for the Crown

The appellant was convicted on two counts of possession of cocaine with intent to supply contrary to s3(1)(m) of the Misuse of Drugs Law. His defence was that of mistaken identity, namely that he must have been mistaken for his brother. He provided an alibi.

His ground of appeal was that the learned magistrate misdirected himself that the defendant bore the legal burden of proving his alibi on the balance of probabilities.

Held: (allowing the appeal)

(i) The legal burden of proof remained throughout with the Crown. The misdirection had tainted the learned magistrate's judgment and it was impossible to say that no miscarriage of justice had been caused by the shifting of the burden onto the defendant.

(ii) The offence had occurred 18 months prior to the time of the appeal. It would be difficult for witnesses to testify as to their recollection of the identity of the perpetrator of the offence. It would also take time to organise a new trial and in all the circumstances it was not in the interests of justice to remit the matter for retrial. The appeal would be allowed and the conviction quashed.

AD

Application for certiorari to quash legal aid condition - Prohibition order sought to adjourn Summary Court proceedings

R v The Magistrate

Grand Court (92/95)
Harre CJ
March 13 1995

Applicant in person

Civil and criminal proceedings had been brought against the applicant in relation to the same subject matter. An injunction had been obtained in the civil proceedings to freeze the applicant's assets. A variation order allowed the applicant to draw his living and legal expenses from a special account to comprise his future earnings. The applicant applied for legal aid for two counsel. The application was granted by the magistrate subject to an undertaking by the applicant to disclose and reimburse such sums (if any) as were found by the court to have become available to him following the Grand Court order.

The applicant applied to the Grand Court for the orders of *certiorari* and *prohibition* to quash the legal aid condition and sought an adjournment to the proceedings before the magistrate to give his counsel sufficient time for preparation.

Held: (refusing the orders sought)

(i) The applicant had been granted full legal aid for one counsel and was not in peril of being unrepresented at the criminal hearing. If he instructed two counsel, the undertaking in the legal aid certificate was implicit.

(ii) The legal aid condition related only to what could be reimbursed from the special account and did not require the applicant to turn over everything in that account to reimburse the legal aid fund.

(iii) Matters concerning adjournment of a Summary Court hearing were properly to be raised in those proceedings. It was inappropriate for the Grand Court to make orders in that regard.

AD

Drugs - Possession of ganja with intent to supply - Constructive possession - Validity of confiscation order

Powery v R

Cayman Islands Court of Appeal (26/93)
Zacca Pres Georges Kerr JJA
April 20 1995

Legislation

Misuse of Drugs Law Ss 3(1)(i)(m) 7 16A 16D 16E
Misuse of Drugs (Amendment) Law 1988 s6
Misuse of Drugs (Amendment) Law 1989
Penal Code Ss24 & 25
Drug Trafficking Offences Act 1986 s7A
Criminal Justice Act 1993

Authorities referred to

R v Cavendish [1961] 1 All ER 856
R v Baskerville (1916) 12 Cr App R 81
DPP v Hester [1972] 2 All ER 1065
A-G of Hong Kong v Wong Muk-Ping [1987] 2 All ER 488 (PC)
R v Dickens [1990] 2 All ER 626

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

The appellant was convicted in the Summary Court of possession of ganja with intent to supply and sentenced to three years imprisonment. He was also fined $5,000 and his vessel used in transporting the drugs from Jamaica was forfeited. The court also made a confiscation order in relation to two parcels of land which had been sold by the appellant.

The appellant had loaned the vessel in question to others who had used it to travel to Jamaica to transport ganja. Upon arrival in Grand Cayman, the appellant had gone to meet the vessel. There was evidence that the appellant was present when a bucket of ganja taken from the vessel was weighed.

Two of the crew members pleaded guilty and testified for the Crown. The appellant was convicted and his appeal to the Grand Court against conviction and sentence was dismissed. He appealed to the Court of Appeal on the grounds, *inter alia*, that the judge had erred in law in holding that the magistrate had sufficient circumstantial evidence to find him guilty of the charge; that the judge erred in law in finding that the magistrate applied the law on accomplice evidence correctly; and that the judge erred in law in holding that the magistrate applied the proper standard of proof and correct principles for the confiscation order.

It was further argued on behalf of the appellant that mere ownership of the vessel was not enough to establish control over its cargo.

Held: (allowing the appeal in part)

(i) The Crown submitted that the appellant had constructive possession of the drugs by relying on R v Cavendish. In that case it was held that for a man to have possession of goods found on his premises, he must be shown either to be aware of the goods and exercise some control over them or to have arranged for the goods to be delivered to his premises. In the present case the appellant had gone to meet the vessel and the cargo was weighed in his presence.

(ii) The parties had made lengthy submissions on circumstantial evidence in the courts below and in the Court of Appeal. The probative value of circumstantial evidence rested on the cumulative cogency of the circumstances. The eventual verdict would rest upon the totality of the evidence. The present case, however, did not rely on circumstantial evidence but rather on direct evidence from which certain inferences could be drawn. It was open to the magistrate, based on the facts before him, to find a *prima facie* case of constructive possession. An inference of pre-arrangement could be reasonably drawn from the facts.

(iii) The magistrate recognised, with regard to the accomplice evidence, the need for the tribunal of fact to be mindful of the dangers of convicting on the uncorroborated evidence of an accomplice. As to the appellant's argument that the magistrate should not have accepted the accomplice evidence for lack of veracity (DPP v Hester), it was stated in A-G of Hong Kong v Wong Muk-Ping that the purpose of seeking corroboration for certain witnesses was to give credence to evidence which on its own appeared suspect.

(iv) The custodial sentence of three years imprisonment was not manifestly excessive in the circumstances.

(v) The confiscation order was made pursuant to the Misuse of Drugs (Amendment) Laws of 1988 and 1989. The provisions set out jurisdiction and procedure and were similar to the English Drug Trafficking Offences Act 1986.

Pursuant to the aforementioned provisions, following conviction the court is required to determine whether, and to what extent, a person has benefitted from the proceeds of drug trafficking. If a person has been the transferee of real property within six years of the institution of proceedings, he is deemed, to that extent, to have benefitted from drugs.

The amount in the confiscation order was to be treated as a fine in accordance with Ss24 and 25 of the Penal Code. The prison term in default of payment should generally be consecutive to the sentence imposed.

(vi) In making the confiscation order, the court is required to follow the three-stage procedure laid down in R v Dickens. The prosecution is required to tender a statement containing transactions and income liable for confiscation and serve a copy thereof on the defence. If the defendant does not accept the content of the statement, the prosecution must adduce evidence to establish the facts. The court should make an assessment, based on all the evidence, of the sum liable for confiscation and make the order accordingly.

In R v Dickens Lord Lane stated that the criminal standard of proof applied. However, the Drug Trafficking Offences Act 1986, as amended by the Criminal Justice Act 1993, has now made it clear in the UK that the standard of proof for the confiscation order is the civil one. The Cayman legislation, however, uses the more onerous (criminal standard) language of 'appearing to the court'.

In the present case the magistrate had failed to follow the procedure correctly and accordingly the confiscation order would be set aside.

AD

Possession of unlicensed ammunition - Mode of trial - Duplicitous count - Separate offences

McNeese v R

Grand Court (7/95)
Smellie J
April 26 1995

Legislation referred to

Firearms Law Ss 2 & 15(1)
Criminal Procedure Code Ss 4 5 Schedule I

Mr Furniss for the defendant
Mr Jackson and Mr Clarke for the Crown

The indictment charged the defendant with the offence of possession of an unlicensed firearm contrary to the Firearms Law, s15. The count related to two shotgun cartridges alleged to be in the possession of the defendant, ammunition being included in the definition of 'firearm' for the purposes of the Firearms Law, s2.

A ruling was sought as to what mode of trial was to be ascribed to the allegations of offence pursuant to the Firearms Law, s15.

Held: (order as follows)

(i) In the absence of specific guidance, the mode of trial was to be determined by reference to the Criminal Procedure Code. Schedule I of the Code states that when the maximum punishment exceeds ten years imprisonment the offence is triable upon indictment. Section 15 Firearms Law prescribes a maximum sentence of twenty years imprisonment, therefore the offence was triable upon indictment.

(ii) The single count alleged the possession of two rounds of ammunition. This was an allegation of two separate offences, and counsel for the Crown were to ensure that the indictment reflected the separate counts.

SAAC

FAMILY LAW

Jurisdiction - Matrimonial Causes Law - Ordinary residence

MW v DW

Grand Court (2/95)
Smellie J
February 13 1995

Legislation

Matrimonial Causes Law s5

Authorities referred to

Regina v Barnet London Borough Council Ex parte Nilish Shah [1983] 2 AC 309
Levene v Inland Revenue Commissioners [1928] AC

217
Inland Revenue Commissioners v Lysaght [1928] AC 234
Stransky v Stransky [1954] 2 All ER 536
Hopkins v Hopkins [1951] P 116

Authoritative works

Halsbury's Laws of England (4th ed) Vol 8

Mr Boni for the petitioner
Mr Alberga for the respondent

The parties, American citizens, were married in Florida in 1990. Prior to the marriage the husband had spent significant time in Cayman over the years. He had acquired substantial assets locally, including properties which he held through local companies. He continuously maintained and occupied a large home in Cayman held by his company since it was built in 1985, but he also owned other homes elsewhere. After the marriage his wife lived with him in Cayman when he was on the Island.

The husband had owned an equally substantial and established residence in North Carolina since its construction in 1993. Since November 1993 it had been occupied by the parties for periods longer, and with greater regularity, than the Cayman home. However the Cayman home was used often. The husband applied to strike out his wife's petition for divorce and an earlier *ex parte* order restraining him from disposing of assets and using a local matrimonial home. It was argued that the court had no jurisdiction as the wife was not 'ordinarily resident' within the meaning of the Matrimonial Causes Law s5.

Held: (application dismissed)

(i) The basic rule of statutory interpretation required the consideration of the natural and ordinary meaning of the words in question. The argument that the legal context required a different interpretation, one akin to domicile without the factor of permanence, was rejected: Stransky v Stransky, and Regina v Barnet LBC.

(ii) On its plain meaning, 'ordinary residence' connoted a place with a degree of continuity: Levene v IRC; and was the converse of 'extraordinary': IRC v Lysaght. The term indicated a degree of habit and normalcy; it could not be defined by time alone but in contrast to other factors: Regina v Barrnet LBC. A person could be 'ordinarily resident' in two jurisdictions simultaneously, *ibid*. Halsbury at para 445 was doubted.

(iii) Legislative history was also relevant. A trend towards assisting female petitioners was therein apparent.

(iv) The wife's evidence that she regarded Cayman as her place of ordinary residence would be accepted. She had social and cultural ties on the Islands, including membership of a church and a service club. Furthermore, the Cayman home was equipped for her gardening hobby, the fruits of which were occasionally donated to charity. It was also accepted that the parties had planned to retire to Cayman.

(v) The petitioner's state of mind was relevant to show that residence had been voluntarily adopted, with a degree of settled purpose: Regina v Barnet LBC. Judging the (objective) facts by reference to the subjective state of mind of the wife, it was evident that she was ordinarily resident in Cayman, or at least simultaneously 'ordinarily resident', which satisfied the requirement of the Matrimonial Causes Law s5. The fact that title to the property was in a company was not significant. The Cayman home had

been occupied a significant amount of time in contrast to the various other matrimonial homes.

JE

Ancillary relief - Custody - Access - Court meeting child - Financial provision

CJB v JCB

Grand Court (21/94)
Schofield J
October 7 1994

Legislation

Matrimonial Causes Law s21

Mr Collins for the petitioner
Respondent in person

The parties, American citizens, were married in 1978 in Michigan. In 1984 they moved to Grand Cayman and in July 1986 their daughter was born. In 1987 they returned to the USA and bought a home in Florida. The parties separated in 1991, with the wife returning to Grand Cayman to work. He returned to Grand Cayman to live with her shortly thereafter, until their final separation in June 1993, when he returned to Michigan.

Held: (custody to mother with maintenance)

(i) Each spouse earned approximately enough to cover their expenses although the husband had saved some money due to an interim arrangement of living in his parents' home. The husband had not paid child maintenance consistently.

(ii) Having met with the daughter with the agreement of both parents, she was found to have adjusted well to living with a single mother (with whom she had lived for all but a few months of her eight years) and to life in Cayman and was generally happy and well adjusted.

Whilst the equipment and facilities in the schools in Michigan were shown to be superior, there was no evidence to indicate that the quality of education offered locally was substandard.

(iii) There was a degree of danger in taking an eight year old away from a proven stable situation. The mother would accordingly be awarded sole custody of the child. The husband was to be allowed reasonable access including one-half of vacation periods, at his expense. Reasonable telephone access was also ordered.

(iv) Each party was entitled to keep their own personal possessions and furnishings. The home was to be sold with any profit or loss divided equally.

(v) Maintenance for the wife was set at $US1 per annum. The cost of living in Cayman would continue to be higher than in the United States. The husband was ordered to pay US$800 per month for the maintenance of the daughter, excepting the months when she would be living with him, when maintenance would be set at US$400 per month. The continuing payment addressed fixed expenses and, to a limited degree, the husband's failure to pay maintenance in earlier periods.

JE

Divorce petition - Leave to file cross-petition

Barnet v Barnet

Grand Court (125/94)
Harre CJ
February 27 1995

Legislation

Matrimonial Causes Rules R 11(c)

Authorities referred to

Collins v Collins [1972] 2 All ER 658
Spill v Spill [1972] 3 All ER 9

Mrs Nervick for the petitioner
Ms Brooks for the respondent

The respondent husband was served with a petition for divorce. He did not indicate on the form whether he intended to defend or not. Negotiations regarding ancillary relief for the petitioner eventually broke down. The matter was set down for trial on the uncontested divorce list without objection from the respondent. On the trial date the respondent sought leave to file an answer and cross-petition.

Held: (application dismissed)

(i) Matrimonial Causes Rules R 11(c) was not applicable to the application in question. The application was brought on the day of trial not 'prior to' the date fixed for trial. Applications such as the present should not be brought on the day set for trial, it being a waste of the resources of the court.

(ii) The court had the inherent discretionary power to give leave to file an answer out of time: Collins v Collins; Spill v Spill. The respondent sought leave on the basis that the allegations in the petition, if left uncontested, would adversely affect the ancillary relief order. The respondent's fears were groundless as the court would not consider irrelevant material during ancillary relief hearings.

(iii) The additional expense that would be incurred by granting the respondent's request was also a relevant factor.

JE

Ancillary relief - Short childless marriage

C v C

Grand Court (89/88)
Harre CJ
March 2 1995

Legislation

Matrimonial Causes Law s18

Mrs Nervik for the petitioner
Mr Collins for the respondent

The petitioner (wife) was a Jamaican national who had lived in Cayman for a number of years before marrying the respondent in 1986. At the date of the trial the petitioner, aged 43 years, was employed at the hospital earning CI$2000 per month. Her expenses exceeded her income by approximately $750 per month. The respondent, aged 55, was a jobber painter and a part-time fisherman. Due to his failing health his income was more modest. The marriage lasted only a few months and did not produce children. An interim order of CI$25 per month was made in favour of the petitioner in

February 1989. The marriage was conditionally dissolved by the Court of Appeal later in 1989 on the basis that the decree would not be pronounced until ancillary matters were finalised.

The respondent did not obey the interim order. He was $6,900 in arrears when the petitioner brought an application for the issuance of a commitment summons.

Held: (application dismissed: final order given)

(i) The respondent had been confused to a certain extent by his former attorney regarding his obligations. He was not without blame, however, for disobeying a court order. The petitioner took no steps for four years to enforce the interim order. She was apparently not in any hurry to have her marriage dissolved. It would be unjust to expect the husband to spend his advancing years guarding his former spouse against uncertainty in her future.

(ii) The Matrimonial Causes Law s18 was applicable. The key factors that were present included the extremely short length of the marriage, the absence of children, the husband's unstable health and the ages, as well as the incomes, of the parties.

(iii) The husband was to pay $1500 to the wife as final settlement of ancillary matters. Payment was to be made at the rate of $25 per week to the Courts' Office.

JE

Ancillary Relief - One third - Clean break not possible - Maintenance

S v S

Grand Court (111/89)
Harre CJ
January 6 1995

Legislation

Matrimonial Causes Law Ss 18 and 21

Mr Furniss for the applicant
Mrs Messer for the respondent

The applicant (wife) brought an application for final determination of ancillary relief under the Matrimonial Causes Law. The parties were married in December 1983 and they seperated in October 1989. They had three children born in 1985, 1986 and 1987. The applicant gave up her employment to raise the children. The respondent had one child by his first marriage, but his obligations to his first wife were ending in the near future. Under the interim order, the respondent paid maintenance of $2500 per month plus the children's school fees. The husband owned a restaurant from which he paid himself $8500 per month. This was, however, encumbered to a high degree. The applicant earned $1200 per month post separation.

Held: (judgment for the applicant)

(i) Whenever possible the court would attempt to provide a clean break for the parties. However a clean break was not appropriate in this case due to the ages of the children and the husband's inability to provide a large capital sum to the applicant. The court would not place in jeopardy the respondent's ability to maintain the business.

(ii) The applicant, through caring for the children and the home, had earned an interest in the matrimonial home and the respondent's business,

both of which were held in the respondent's name alone. The applicant's interest was set at one-third of the capital value. Maintenance for the applicant was based on one-third of the joint gross income of the parties. The actual amount awarded was slightly more than one-third since the respondent was given sole possession of two expensive motor cars and a boat.

(iii) The applicant was to have exclusive use of the matrimonial home with the children. However, due to the encumbrances on the remaining properties held by the respondent it would not be just to divide them at the date of the hearing. Determination of final title to the matrimonial home and other properties would be deferred to a future date. The respondent was to make every endeavour to free various parcels of land from encumbrances in order that an equitable sharing of these parcels could occur by further order.

(iv) Maintenance for the children would be set at CI$480 per month per child until each reached the age of 17 years or ceased full time education. The respondent was further to pay the children's school and medical expenses.

JE

INSURANCE LAW

Insurance - Policy interpretation - Person insured under the policy

Jackson v Cayman Insurance Co Ltd

Grand Court (106/94)
Harre CJ
January 19 1995

Legislation

Motor Vehicle Insurance (Third party) Risks Law 1964 s16
Traffic Law (Revised) Ss 32 33 40

Authorities referred to

Jackson v Smith (1993) 10 Law Bulletin 40
Rendleshan v Dunne [1964] 1 Lloyds List Law Reports 192
Edwards v Griffiths [1953] 2 All ER 874
Kerridge v Rush [1952] 2 Lloyds List Law Reports 305
Leggate v Brown [1950] 2 All ER 564

Mr Ritchie for the plaintiff
Mr Hill QC for the defendant

Mr Smith obtained a provisional driving licence in September 1988 and then hired a motorcycle, insured by the defendant. The following day Mr Smith, whilst riding the motorcycle, was involved in an accident with the plaintiff cyclist. The plaintiff was severely injured. He commenced an action against Mr Smith and notice was given to the defendant insurer pursuant to the Motor Vehicle Insurance (Third party) Risks Law 1964 s16(2)(b). At the trial fault was divided equally between the plaintiff and Mr Smith leaving an award in favour of the plaintiff in the amount of CI$124,106.69 plus costs of CI$10,888.

The plaintiff then commenced the present action against the defendant asserting that if Mr Smith was insured by the defendant, but was in breach of that policy, then the defendant was liable to pay the plaintiff under s16. The insurers argued that Mr Smith was not insured (as opposed to being insured and in breach) and therefore it was not liable to the

plaintiff under s16. In support of their position the insurers cited two clauses of the insurance certificate: (1) a prohibition against 'racing or pacing'; and (2) exclusions operative where the insured failed to comply with restrictions of a provisional licence, specifically, carrying a passenger and not displaying an 'L' plate, as required by s40A of the Traffic Law (Revised).

Held: (judgment for the plaintiff)

(i) The Grand Court had already determined in Jackson v Smith that there was no illegal enterprise between the parties to the accident nor was there any racing or pacemaking. That conclusion would be adopted.

(ii) The main issue raised by the present proceedings was the effect of Mr Smith having driven contrary to the terms of the provisional licence. The defendant argued that because Mr Smith was not complying with the provisions of s40 Traffic Law (Revised), he was a person who did not hold a licence. The plaintiff asserted that a person who is in breach of the terms of a licence still holds that licence with the breach not invalidating it but rather rendering the offender liable to certain penalties.

(iii) The *dicta* of Herbert J in Rendleshan v Dunne were not determinative of the issue. The local statute and the wording of the insurance certificate were relevant considerations. Where an ambiguity arose in the certificate it would be construed against the drawer, in this case the insurer: Edwards v Griffiths; Kerridge v Rush.

(iv) After considering Ss 32, 33 and 40 of the Traffic Law (Revised) it appeared clear that Mr Smith was not licensed or authorised to drive but he nonetheless held a licence to drive. Since Mr Smith had permission from the owner to drive on the basis of his provisional licence and he held a 'licence to drive', he was covered by the insurance. Mr Smith was not insured against the consequences of breaching the Traffic Law, but he was insured against liability arising by his negligent driving: Leggatte v Brown. Therefore the plaintiff was entitled to recover against the defendant insurer pursuant to s16.

JE

LABOUR LAW

The following are summaries of the majority of the decisions of the Trade and Labour Board reached between July 14 and December 1 1994. An appeals procedure, to an Appeals Tribunal, is provided for in Ss 69 and 70 Labour Law. Pursuant to s71(1) of the Law, an appeal to the Grand Court lies from decisions of the Appeals Tribunal on a point of law only.

Summary No: 1/94

Date of hearing: July 14 1994

Nature of primary claims: Severance pay - Compensation for unfair dismissal

Length of service: Six months and eight days

Held: (employee unfairly dismissed)

(i) Contradictions in the evidence of the employer cast doubt on the accuracy of those of his submissions which were inconsistent with those of the complainant.

(ii) Allegations by the employer of work permit transgressions were irrelevant to the present proceedings.

(iii) On the present evidence, there was nothing which justified the employee's dismissal.

(iv) Pursuant to s36(1) Labour Law the employee was entitled to one week's severance pay ($200).

(v) Having regard to the considerations of s48(2) Labour Law, the employee would be awarded a further $252.94 in respect of unfair dismissal this representing 50% of the maximum sum which could be awarded.

Total Award to complainant: $452.94.

Summary No: 2/94

Date of hearing: August 2 and 24 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay

Length of service: Seven Years +

Held: (employee unfairly dismissed)

(i) The complainant appeared a calm and even tempered individual. Evidence given on behalf of the employer that the complainant had yelled and screamed at her colleagues in front of customers, if true, suggested extreme provocation in the light of a previously unblemished seven year employment history with the employer.

(ii) The evidence supported the complainant's claim that the assistant manager had uttered or mouthed obscenities towards her.

(iii) The employer's position was that he had not dismissed the appellant but had merely directed her to go home for the remainder of the day. Even if this version of the facts were to be believed, the employee was owed a duty of evenhandedness by the employer (the assistant manager received no reprimand from the employer) and the breach of this duty entitled the employee to treat herself as having been constructively dismissed.

(iv) Pursuant to s36(1) Labour Law, the employee was entitled to seven week's severance pay ($2,800).

(v) Having regard to the considerations of s48(2) Labour Law, and in particular to the fact that at the time of the incident the employee had already served notice of her intention to leave the employment, the compensation for unfair dismissal would be set at 25% of the maximum award permissible ($729.36).

Total Award to complainant: $3529.36.

Summary No: 3/94

Date of hearing: September 1 and 7 1994

Nature of primary claims: Compensation for unfair dismissal

Length of service: Thirteen months four days

Held: (employee unfairly dismissed)

Alleged letters of complaint of condominium owners concerning the conduct of the employee (formerly employed at those condominiums) would be disregarded: (a) because the first letter was unsigned: and (b) because the 2nd-5th letters were not produced at the date of the first hearing (September 1), but only at the hearing of September 7. It could only be concluded that these documents had been manufactured during the period of recess between hearings. All evidence presented on behalf of the employer would accordingly be regarded with great skepticism. Having regard to the considerations of s48(2) Labour Law, and in particular the non specificity of the employer's written warnings, compensation at 100% of the maximum permissible award would be made ($294.13).

Total Award to complainant: $294.13.

Summary No: 4/94

Date of hearing: August 23 1994

Nature of primary claims: Severance pay - Compensation for unfair dismissal

Length of service: Various

Held: (employees fairly dismissed)

(i) In all the circumstances of this case, where the restaurant/bar at which the complainants all worked changed ownership, with three of the complainants being immediately re-employed by the new establishment and the other two being retained in a different capacity by the former employer, there had been no unfair dismissal pursuant to s44(d) Labour Law.

(ii) Pursuant to s36(1) Labour Law, severance pay at the rate of one week's wages for each completed period of 12 month's employment (up to a maximum of 12 week's compensation) was to be paid by the employer to the two employees who had been re-employed by the previous employer.

(iii) The previous employer was morally obliged to make severance payments on the scale provided by in s36(1) Labour Law to those three employees taken on by the successor employer. If no such payment was made, the legal responsibility to do so in full would rest with the successor employer upon the termination of their employment with the successor employer.

Summary No: 5/94

Date of hearing: August 16 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay.

Length of service: Three years 11 months and 24 days

Held: (employee unfairly dismissed)

(i) The employer's reasons for terminating the complainant's contract of employment had led to two written warnings, one specifically limited to a period of 30 days and each had been written in excess of six months prior to the date of termination. Subsequent to the second letter there had been no further allegations of misconduct and it followed that there was no justification for dismissal in accordance with Ss45(3) or 46(2) Labour Law. Accordingly, the complainant had been unfairly dismissed.

(ii) The primary reason for the complainant's termination of employment was to facilitate the

recruitment of an overseas worker on a work permit. Because of this, and as the complainant was unable to secure alternative employment as she was three month's pregnant, a maximum award of compensation for unfair dismissal would be awarded ($3,032.57).

(iii) Pursuant to s36(1) Labour Law, the complainant was also entitled to three week's severance pay ($2,284.59).

Total Award to complainant: $5,317.16.

Summary No: 6/94

Date of hearing: September 13 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay.

Length of service: 19 years

Held: (employee unfairly dismissed)

(i) In the light of the complainant's long and satisfactory service, the employer had acted with insensitivity in employing a much younger employee, on a work permit basis, and requiring the complainant to report to him. Unable to tolerate the situation, the complainant had furnished the employer with eight week's notice of her resignation. Had matters gone no further, the complainant may well have had a sustainable case of unfair dismissal.

(ii) Whilst the employer's argument that employers should not be placed in a situation of having to pay employees to work out excessively long periods of notice was a valid one, a period of 56 days notice in the circumstances of this case was not excessive.

(iii) Pursuant to s36(1) Labour Law, the complainant was entitled to the maximum 12 week's severance pay provided for thereunder ($8,399.88).

(iv) Taking into account the considerations of s48(2) Labour Law and in particular the fact that the termination of this employment relationship was primarily attributable to the employer's insensitivity towards the predictable labour relations implications of his decision, 80% of the maximum allowable compensation would be awarded ($6,719.90).

Total Award to complainant: $15,119.58.

Summary No: 7/94

Date of hearing: June 23 and September 15 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay

Length of service: 12 years +

Held: (employee fairly dismissed)

(i) Following three written warnings (two of which satisfied the requirements of a written warning within s45(2) Labour Law) the employment relationship was terminated by the employer on December 2 1993, following the complainant's hostile written response to the first of the formal written warnings. Whilst the complainant's written response would not be considered 'misconduct' within Ss 44(a) and 45(1) Labour Law, in all the circumstances, s44(f) Labour Law had been satisfied.

(ii) The dismissal of the complainant was accordingly justified and fair notwithstanding the fact that the first of the employer's written memoranda was written only ten weeks prior to the date of

termination.

(iii) In accordance with s36(1) Labour Law, the complainant was entitled to twelve week's severance pay ($5,952.46).

Total Award to complainant: $5,952.46.

Summary No: 8/94

Date of hearing: September 20 1994

Nature of primary claims: Compensation for unfair dismissal

Length of service: 16 months

Held: (employee fairly dismissed)

(i) The decision of the employer to terminate the employment relationship due to the persistent absenteeism of the complainant was justified and fair, a properly constituted written warning having preceded the termination.

(ii) The employee had a duty, pursuant to s16(5) Labour Law, to properly inform the employer of her illness by submitting a proper doctor's certificate in a timely fashion. This she had failed to do making the employer's decision fair in all the circumstances.

Total Award to complainant: Nil.

Summary No: 9/94

Date of hearing: October 11 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay

Length of service: Five years +

Held: (employee unfairly dismissed)

(i) The complainant, a seasonal entertainer on a work permit, who worked in excess of 6 months of the year for the employer was, within Ss2 and 37 Labour Law continuously employed by the present employer for in excess of five years.

(ii) The complainant was, within s2 of the Labour Law, an employee and not an independent contractor. Factors of importance in this determination were the following: (a) the complainant had been selected by his employer; (b) he worked six days a week during the season; (c) he had regular working hours; (d) he had a fixed place of employment; (e) he received a fixed remuneration paid at regular intervals; (f) the contract between the parties specified a 30 day notice period on either side; (g) the complainant worked under a work permit and had never sought a Trade and Business Licence.

(iii) The complainant was not a casual employee within the meaning of s2 Labour Law. This conclusion was manifest due to the existence of the yearly work permits.

(iv) It being common ground that the employment relationship had been terminated by the employer due to pressure brought to bear upon him by a third party, and despite sympathy being felt for the employer's unenviable position, the relationship had been unfairly terminated by his action.

(v) Taking into account the considerations of s48(2) Labour Law and in particular the lack of likelihood of the complainant securing comparable employment

in his native country where he had returned, together with the degree of unfairness of the dismissal (the employer had been entirely happy with the complainant's performance) a maximum compensation award of US$4,866.69 would be made.

(vi) In accordance with the provisions of s36(1) Labour Law, the complainant having been continuously employed for in excess of five years with the present employer, was entitled to five week's severance pay (US$4,500).

Total Award to complainant: US$9,366.69.

Summary No: 10/94

Date of hearing: October 14 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay

Length of service: one year

Held: (employee fairly dismissed)

In terminating the complainant's employment after she had telephoned alleging illness, but refusing to obtain a medical certificate, and in circumstances where the employee made no further contact for a period of eleven days despite being told someone else was known to be interested in her position, the employer had acted fairly. Accordingly, the dismissal being predicated upon the actions of the employee, was not unfair.

Total Award to complainant: Nil

Summary No: 11/94

Date of hearing: October 14 1994

Nature of primary claim: Compensation for unfair dismissal

Length of service: Ten months and 23 days

Held: (employee unfairly dismissed)

(i) In closing the establishment at which the employee worked without notice to her and in subsequently employing staff on a work permit basis in her place, the employer was precluded from making any claim of redundancy.

(ii) In failing to attend the Labour Hearing the employer showed a general lack of regard for the Labour Law.

(iii) Having regard to the considerations of s48(2) Labour Law and in particular that the employee remained unemployed at the date of the hearing and whose prospects of employment in similar work were bleak, a maximum award of compensation would be ordered ($251.11).

Total Award to complainant: $251.11

Summary No: 12/94

Date of hearing: November 1 1994

Nature of primary claims: Compensation for unfair dismissal

Length of service: Five months, three weeks

Held: (employee unfairly dismissed)

(i) In failing to attend the Labour Hearing the employer displayed a general contempt for the provisions of the Labour Law.

(ii) The employer's suggestion that the employee had been made redundant was untenable in the light of the employer having hired two additional employees around the time of dismissal to positions which the complainant, as the senior employee, was capable of performing.

(iii) There was no evidence of any lack of satisfaction by the employer of the complainant's work which added credence to the complainant's allegation that she had been dismissed due to her complaints to the Labour Board and others that illegal deductions from her salary had been made. The complainant had, accordingly, been unfairly dismissed.

(iv) Having regard to the considerations of s48(2) Labour Law and in particular that the complainant's only 'fault' was succumbing to the dictates of her conscience, a maximum compensation award would be made ($209.47).

Total Award to complainant: $209.47.

Summary No: 13/94
Date of hearing: October 18 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay

Length of service: Four years +

Held: (employee fairly dismissed)

(i) The complainant's version of events, that the employer had terminated the employment relationship, was to be preferred to that of the employer that the complainant had left without notice with the employer having no means of making contact. The nature of the complainant's position (aeroplane pilot) rendered it necessary for him to be readily reachable at short notice. The employer's assertion was therefore untenable.

(ii) A serious error of judgment of the complainant rendered any decision to terminate the employment relationship fair within s44(f) Labour Law. This was so notwithstanding an almost complete absence of employment documentation extending to the absence of any written notice of termination.

(iii) The employer's position was not compromised by his offer of alternative employment rather than summary dismissal. This offer, having been rejected by the complainant, left the employer with the option of fairly dismissing him. This had occurred.

(iv) In accordance with s36(1) Labour Law, four week's severance pay was due to the complainant in the sum of $2,027.36

Total Award to complainant: $2027.36.

Summary No: 14/94

Date of hearing: October 27 1994

Nature of primary claims: Compensation for unfair dismissal -
Severance pay -

Length of service: Four years seven months

Held: (employee unfairly dismissed)

(i) The complainant's allegation that she had been

constructively dismissed from her employment would be sustained. The veracity of the employer's evidence was thrown into doubt by his cynical abuse of the work permit system in that an overseas replacement had been secured within the period of one week without having satisfied the requirements of the Immigration Law by making a sincere attempt to fill the position locally.

(ii) The evidence of both of the employer's witnesses came from other employees and in the circumstances was self serving to those witnesses and would be disregarded. Furthermore, there existed no other documentation brought to the Labour Board's attention which could justify the determination to dismiss. Accordingly, the complainant's dismissal was unfair.

(iii) Having regard to the considerations of s48(2) Labour Law, in particular the degree of unfairness to the complainant, in compelling her to leave the employment, and the fact that as a non Caymanian she would have difficulty securing alternative employment in Cayman, an award of 80% of the maximum available compensation would be made ($2,200).

(iv) In accordance with s36(1) Labour Law, four week's severance pay was legally due to the complainant ($2,400)

Total Award to complainant: $4,600.

Summary No: 15/94

Date of hearing: September 25 1994

Nature of primary claims: Compensation for unfair dismissal

Length of service: Three months eighteen days

Held: (employee unfairly dismissed)

(i) Despite the contention of the employer to the contrary, it was clear that the complainant had been dismissed having completed her 3 month probationary period and was therefore afforded the protection of Part 5 Labour Law. Given the number of days beyond the three month period which the records showed the complainant to have worked, the employer's argument that these should be discounted as representing a preliminary assessment period, was untenable.

(ii) The complainant's assertion that the employment relationship had been terminated due to the employer having discovered that she was in the early stages of pregnancy when she was first employed was reinforced by the evidence. Whether or not the complainant knew of this fact when recruited, she was under no obligation to make disclosure to the employer, unless directly questioned.

(iii) Having regard to the considerations of s48(2) Labour Law and in particular the degree of unfairness to the complainant whose treatment had been tantamount to sexual discrimination contrary to s72 Labour Law, a 100% award would be made ($86.34)

Total Award to complainant: $86.34.

Summary No: 16/94

Date of hearing: November 9 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay

Length of service: Three years six months

Held: (employee unfairly dismissed)

(i) Contrary to the assertions of the employer, the complainant had been employed and was not an independent contractor for the duration of their relationship. In support of this conclusion was:

(a) the existence of a contract of employment between the parties;

(b) the existence of a document executed to terminate the employment contract which the complainant had refused to sign; and

(c) the existence of a work permit renewal application, dated September 1993, which described the relationship of the parties as that of employer and employee.

(ii) The employer had terminated the employment relationship as illustrated by the payment of a sum to the complainant which was to include notice and severance pay.

(iii) The only suggestion of wrong doing on the part of the complainant was her having taken two days leave without permission. However, as she had worked a full two months without time off immediately preceding this period, she was entitled to take such leave. In compelling an employee to work in excess of six Consecutive days, the employer committed an offence contary to s22 Labour Law. Accordingly the complainant had been unfairly dismissed.

(iv) Having regard to the considerations of s48(2) Labour Law, in particular that the complainant remained unemployed for 3 1/2 months subsequent to the dismissal and that no reasonable justification for the termination of the employment relationship existed, an award of 90% maximum permissible would be ordered ($787.50).

(v) In accordance with s36(1) Labour Law, the complainant was entitled to three week's severance pay ($750).

Total Award to complainant: $1,537.50.

Summary No: 17/94

Date of hearing: November 10 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay.

Length of service: 4 years +

Held: (employees unfairly dismissed)

(i) X and Y (the complainants) had both been unfairly dismissed from their employment with the employer. X's dismissal had arisen when he had refused to follow the instructions of a supervisor. The evidence supported X's assertion that his refusal was due to his following the employer's prior directions. Adherence to such directions, in the face of the supervisor's contrary request, did not amount to misconduct sufficient to justify dismissal. The same facts had been cited, in part, to support the dismissal of Y. The evidence indicated, however, that on completion of other duties Y had followed the supervisor's instructions.

The conduct of X and Y at most warranted a written warning and did not justify dismissal. Accordingly each had been unfairly dismissed.

(ii) The failure to attend the Labour Hearing by

both complainants was ill advised and precluded the Board from establishing such matters as their current employment status.

(iii) Having regard to the factual considerations of s48(2) Labour Law of which the Board was apprised, both employees would be awarded 50% of the maximum compensation which could be awarded ($772.90 and $700 respectively).

(iv) In accordance with s36(1) Labour Law each complainant was entitled to four week's severance pay ($1400).

Summary No: 18/94

Date of hearing: December 1 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay

Length of service: Three years five months

Held: (employee unfairly dismissed)

(i) The employer's reliance on Ss 45(1)(c) and (d) Labour Law as the reason for terminating the employment relationship was not well founded. The company policy which was to dismiss employees for drug or alcohol abuse, could not be cited as a sufficient reason for termination where the employer lacked concrete evidence of the same. Moreover, there was no evidence to indicate that the complainant had consumed alcohol or drugs whilst at work to justify the employer's reliance on sub-section (1)(d).

(ii) The employer's failure to attend the Labour Hearing did not assist its case. In particular, the issuance of a letter to the complainant three days after the letter of dismissal requiring that he submit to a drugs test, looked suspiciously like a belated attempt to lay the proper basis for a fair dismissal. A dismissal based upon rumours and unsubstantiated allegations was unfair.

(iii) Having regard to the considerations of s48(2) Labour Law, 60% of the maximum permissible award would be made ($1,093.89).

(iv) In accordance with Ss 36(1) and 37(2)(b) Labour Law, severance pay and interest thereon (calculated from the date of original termination to the date of payment at 10%) was payable to the complainant in the sum of $1,689.68.

Total Award to complainant: $2,783.57.

Summary No: 19/94

Date of hearing: November 22 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay.

Length of service: 10 years +

Held: (employee fairly dismissed)

(i) There had been no break in the complainant's employment at the time of change of ownership of the original employer's business, rendering the present employer the successor employer within the meaning of Ss 2,38 & 39 Labour Law.

(ii) Contrary to the assertions of the employer, the employment relationship had been terminated by him as indicated by the frequent return of the complainant to the work place to establish his status. It was plain that the employer could have prevented

the termination and equally plain that the employer was not unhappy to see the relationship come to an end.

(iii) According to the complainant's own testimony, he had previously been told that he was not to continue his practice of taking retail products from his employer without making proper record. A continuation of this practice, however, is what had brought matters to a head shortly prior to the termination. It was generally in the best interests of the parties in all the circumstances for the employment relationship, in this deteriorated state, to be terminated and the dismissal was accordingly justified under s44(f) Labour Law.

(iv) In accordance with Ss 35(1) & 36(1) Labour Law the complainant was entitled to ten week's severance pay from the successor employer ($2,100).

Total Award to complainant: $2,100.

Summary No: 20/94

Date of hearing: November 30 1994

Nature of primary claims: Compensation for unfair dismissal - Severance pay

Length of service: 2 years +

Held: (employee fairly dismissed)

(i) The employer's failure to follow through with allegations of cash shortages attributable to the complainant and his conduct in reneging on undertakings to provide the Labour Board with relevant documentation, went to his reliability. The complainant's conduct on the night in question had also been less than professional and she had acted improperly.

(ii) There was no evidence to support the employer's contention that the complainant had abandoned her job. She had been dismissed by the employer.

(iii) In all the circumstances, the dismissal was fair within s44(f) Labour Law. Whilst the attitude of both parties had been unprofessional, the attitude of the complainant in storming out of the work premises when challenged by the employer, leaving cash unattended, demonstrated that the dismissal was fair.

(iv) In accordance with Ss 35(1) and 36(1) Labour Law the complainant was entitled to two week's severance pay ($405.00).

Total Award to complainant: $405.00.

MD

LAND LAW

Contract for sale of land - Return of deposit - Notice in correct form

Riley v Grand Cayman Golf Resorts Ltd

Grand Court (465/93)
Harre CJ
November 21 1994

Legislation

Judicature Law s62

Mr Griffin for the plaintiff
Mr McField for the defendant

This was a claim for the return of a deposit (plus interest and costs) paid by the plaintiff to the defendant under a contract for the purchase of a parcel of land. It was alleged by the plaintiff that the contract required the plaintiff to deliver a registrable title with planning permission for subdivision by January 1, 1993. The defendant did not comply with this and the plaintiff wrote to the defendant requesting the return of the deposit.

The defendant alleged that the date of January 1, 1993, was inserted into the contract by the plaintiff without the defendant's knowledge, acquiescence or consent. The defendant also alleged that the plaintiff's request for the return of the deposit did not comply with clause 11 of the contract which required any notice served thereunder to be addressed to the vendor or the attorneys of the vendor at the addresses specified in the contract. The defendant also counterclaimed that the plaintiff was in breach of contract by failing to accept title and pay the balance with interest and costs.

Held: (returning deposit with interest and costs)

(i) The date for completion of the contract had been inserted before the contract was signed by the controlling director and shareholder of the defendant company. The fact that this date appeared in manuscript form did not raise a legal requirement that it should be initialled; it was not a deletion or alteration but something which had to be there to give the clause any meaning at all.

(ii) Construing the contract, it was necessary for a notice requesting the return of a deposit to comply with the requirements of clause 11.

(iii) The letter from the plaintiff requesting the return of the deposit complied with clause 11. It was sent by registered mail to the correct postal address. Although it was addressed to the controlling director and shareholder of the vendor company, and did not mention the corporate name, notice to the company was sufficiently given if addressed to its controlling director and shareholder.

(iv) Accordingly, the plaintiff would succeed in the action for return of the deposit. Interest was payable at 7.5 per cent in accordance with the Judicature Law, s62(1). Costs in favour of the plaintiff.

SAAC

Caution on Land Register - Removal of caution on terms

Gosman Ltd v Wagner

Grand Court (255/93)
Schofield J
March 6 1995

Legislation

Registered Land Law Ss 127 129

Authorities referred to

Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1981] 1 All ER 897
Willmott v Barber (1880) 15 Ch D 96
Shaw v Applegate [1978] 1 All ER 123

Mr Parkinson for the plaintiff
Mr Lamontagne QC and Mrs Nervik for the defendant

This was an application by the plaintiff, which was the registered proprietor of a parcel of land, to remove a caution which had been entered by the defendant on the Land Register for the plaintiff's parcel.

The plaintiff had acquired the land and began constructing a building on it, but was unable to complete the building due to cash flow problems. The plaintiff then entered negotiations for the sale of the land to the defendant, but no contract was ever concluded. The defendant nevertheless entered onto the premises and recommenced building work, for which the defendant paid approximately US$15,000. The defendant also paid to the plaintiff a sum of US$26,952.38 as a deposit for the purchase of the property, although there was no concluded contract in existence.

The plaintiff executed a transfer form and submitted it to the Land Registry, stating the transfer to be in consideration of CI$128,000, although this sum had not been paid. The plaintiff requested the Registrar of Lands not to send the transfer form to the defendant for countersigning without the plaintiff's written authority, and the transfer form was never sent for the defendant's signature. Nevertheless, the defendant incurred a potential liability to stamp duty on the document computed at CI$13,570.

The plaintiff subsequently contracted to sell the land to BC. The defendant applied to the Registrar of Lands to lodge a caution against the plaintiff's title, claiming an interest in the land as a beneficiary under a trust for sale. This was altered unilaterally by the Registrar and the caution was registered indicating that the defendant's interest was as contracting purchaser.

The plaintiff sought the removal of this caution in order to proceed with the sale to BC. The plaintiff argued that the caution was unjustified as the defendant had merely an action against the plaintiff personally for the return of the deposit and for the money expended on construction work. The defendant argued that the caution was justified as the defendant had done work on the land acquiesced in or encouraged by the plaintiff. This, the defendant asserted, gave rise to a proprietary estoppel which constituted an unregisterable interest in land for the purposes of lodging a caution under the Registered Land Law, s127. The defendant argued that the caution should not be removed unless the plaintiff repaid the deposit to the defendant, reimbursed the defendant's building costs, and secured the defendant against the potential stamp duty liability.

Held: (allowing the application on terms)

(i) The defendant had expended considerable sums of money on the property with the acquiescence of the plaintiff. This raised a proprietary estoppel, following Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, and conferred a sufficient interest for the defendant to justify the lodging of a caution pursuant to the Registered Land Law, s127.

(ii) The court had an unfettered discretion to remove the caution under the Registered Land Law, s129. It was accepted by the parties that conditions could be attached to the removal of the caution. It would be unjust and wasteful to permit the plaintiff to sell the land and force the defendant to seek his remedy in damages when an adequate remedy already lay in the hands of the court, which was to attach conditions to the removal of the caution. There was no reason to hold the defendant out of the deposit, which was accepted as paid.

(iii) However, to hold the plaintiff out of the contract of sale to BC and to force the plaintiff by means of the caution to pay an amount which was not adequately proved and was disputed would be unjust. Accordingly the defendant would be held out of the

money which he alleged to have been expended on the land, and could not claim the amount due under the potential liability to stamp duty. However, the defendant had to be secured for those amounts in case he proved his claim.

(iv) The order would accordingly be that the caution be removed on payment by the plaintiff to the defendant of the deposit and on payment into an escrow account, pending further orders, of the sums of US$15,000 and CI$13,570.

SAAC

TRUSTS

Breach of trust - Entitlement to interest which would have been earned had sums been properly invested

L and another v EF AF and X Bank Ltd

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

Authoritative works

Halsbury's Laws of England (4th ed.) Vol 32

Mr Turner for the plaintiffs

The matter was brought to trial against the first defendant ('EF') only, the proceedings against the second and third defendants having been dismissed.

The second plaintiff, A and D Investments ('A and D'), was incorporated on 8th March 1988. The first plaintiff, who resided in the United States of America, was the beneficial owner and a director of A and D. F was appointed a director of A and D, whose registered office was F's office. Shares were issued to F to keep the first plaintiff's interest in A and D confidential. An account was opened at X Bank Ltd by F in the name of A and D. F and his wife, the second defendant, were the signatories to the account. The first plaintiff made various credits to the account of A and D, his intention being to debit the account from time to time and invest in certificates of deposit. Any interest earned on these deposits would be credited to the account of A and D.

From 14th February 1989 to 28th June 1991 F debited a total of US$466,962.83 from the account. This money was applied for his own benefit or for the benefit of his own companies. None of the debits was authorised by the first plaintiff.

Held: (ruling for the plaintiffs)

(i) It was clear that F had misapplied the sum of US$466,962.83 fraudulently and in breach of trust. The plaintiffs were entitled to recover that amount.

(ii) The plaintiffs were entitled to recover from F the interest they would have earned had the credits to the account of A and D been properly invested in certificates of deposit in accordance with the first plaintiff's instructions: Halsbury's Laws (4th ed) Vol 32.

(iii) Judgment was entered for the plaintiffs, against the first defendant, in the sum of US$508,753.72, together with interest at court rates to run from 30th April 1994, until payment in full.

(iv) The plaintiffs were entitled to their costs.

HRN

PURCHASER REMEDIES FOR UNDISCLOSED OVERRIDING INTERESTS

Preliminary.

As with most systems of land registration, the land law of the Cayman Islands provides for overriding interests which will bind any purchaser of the land to which they relate, without requiring registration and irrespective of whether the purchaser has any other form of notice. They are an exception to the principle of indefeasibility for registered titles. This paper will consider what remedies may be available to a purchaser who is caught out by an undisclosed overriding interest.

Post-Completion Remedies.

The purchaser may wish to rescind or claim damages. Normally after completion in England, the first consideration is an action for breach of the covenants for title which are implied into the transfer by virtue of the Law of Property (Miscellaneous Provisions) Act 1994.[1] Under the local Conveyancing Law of 1888, section 9, similar covenants for title were implied into the conveyance if the formula "the vendor conveys as beneficial owner" was used in the conveyance. However, the current form of transfer submitted to the Land Registry to procure registration as new proprietor contains no such wording, and according to the Registered Land Law, section 150, the Conveyancing Law has no application to any land, lease or charge which has been registered.[2] In the light of this omission, the remainder of this paper will examine the purchaser's ability to recover damages from the vendor for breach of contract in order to compensate the purchaser for the existence of an overriding interest.

(a) The Doctrine of Merger.

The general rule for English unregistered land is that after completion neither party to a contract for the sale of land may sue for a breach of the contract as their relationship has become governed by the deed of conveyance. The contract is said to merge in the deed, and thereafter the appropriate action for either party is to sue for breach of the covenants in the deed, not for breach of the moribund contract. The doctrine of merger applies to all of the terms of the contract except those terms which the parties did not intend to be extinguished by the conveyance.[3] The usual example of a contractual term which survives completion without merging is a collateral promise unrelated to the obligation to transfer good title, for example, a term that the vendor will construct a particular building on the land prior to completion;[4] this is a collateral contract, albeit included in the same document, and certainly would not be intended to be fulfilled by the drawing up of a conveyance which makes no reference to it. However, terms relating to the vendor's ability to transfer a good title may also survive, one case deciding that the contractual obligation to give vacant possession could be enforced after completion despite the absence of an equivalent covenant in the conveyance.[5]

The doctrine has also been applied to registered land by the Privy Council in Knight Sugar Company Ltd v Alberta Railway and Irrigation Company[6] in which Lord Russell of Killowen, delivering the opinion of the board, stated that it is the registered transfer which takes the place of the contract in governing the rights of the parties. It is submitted that in the interests of finality, certainty and simplicity, the same rule should apply in the Cayman Islands so that as far as possible it is the Land Register which is conclusive as to the purchaser's rights (excepting of course the right to sue for breach of collateral contractual terms) and that from the moment of registration onwards it should be the Registered Land Law provisions on indefeasibility, rectification, indemnity, and so forth, which supersede the contract.[7] If this is accepted, then the right of the purchaser to recover compensation for the defective title will only subsist in respect of unmerged contractual terms.

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[1] Formerly Law of Property Act 1925, sections 76, 77.
[2] Quaere whether this means the Conveyancing Law has no application after first registration of the land, rather than that the Conveyancing Law still applies to all instruments affecting the land pending the registration of the instrument.
[3] Clarke v Ramuz [1891] 2 QB 456, per Bowen LJ at 461.
[4] Hancock v B.W.Brazier (Anerley) Ltd [1966] 2 All ER 901.
[5] Hissett v Reading Rooling Company Ltd [1970] 1 All ER 122.
[6] [1938] 1 All ER 266.
[7] See D.G. Barnsley, Conveyancing Law and Practice, 3rd ed, p.594.

(b) The Duty of Disclosure.

Under an open contract, the vendor is presumed to sell the absolute ownership of the land[8] (equivalent to the English fee simple) registered with title absolute, and subject only to those incumbrances of which the purchaser has notice.[9] Incumbrances include overriding interests, so if the purchaser concludes a contract and finds that he will be bound by an overriding interest, he may rescind the contract for fundamental breach or alternatively complete and claim a price abatement.[10] But it seems that the right to rescind will be lost by proceeding to completion even when the purchaser is unaware of the incumbrance at completion, and the contractual term requiring vendor disclosure probably merges so the right to damages for breach will no longer exist. This view is supported by Emmet[11] and Barnsley;[12] but the alternative view put by Gibson,[13] Storey[14] and Kenny[15] has little support from the cases.[16]

Conversely, if the vendor does not disclose an overriding interest affecting the property when he knows of its existence, the open contract position is that the purchaser may elect to rescind the entire transaction after completion,[17] or recover damages; so there is a vital difference between failing to disclose an unknown interest and failing to disclose a known interest - the former attracts no liability, the latter admits rescission.

(c) "Errors and Omissions" Clauses.

Under an open contract, an error in or omission from the contract will merge on completion and the purchaser will have no right to sue for the error or omission. If the parties have specified in the contract a term expressly dealing with liability for errors and omissions, this term may be regarded as enduring beyond completion, allowing the purchaser to recover damages in accordance with the compensation clause.[18] In Palmer v Johnson,[19] the contract gave a misdescription of the rental income of the land which the purchaser only discovered to be false after the conveyance had been executed. The conveyance contained no covenants relating to the rental income, so it was necessary for the purchaser to establish a claim on the contract for compensation pursuant to the errors and omissions clause, which read:

> "The property is believed and shall be taken to be correctly described, but if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale but compensation shall be allowed by the vendor or purchaser as the case may require."

The Court of Appeal held, following earlier case law, that the clause should be interpreted so as not to merge in the deed of conveyance, but so as to permit the purchaser to sue even after execution of the conveyance. It is possible that such a clause governing liability for errors and omissions may extend to the purchaser a post-completion cause of action in respect of undisclosed overriding interests.

A typical modern clause is:

> "1. If any plan or statement in the contract, or in the negotiations leading to it, is or was misleading or inaccurate due to an error or omission, the remedies available are as follows.
> 2. When there is a material difference between the description or value of the property as represented and as it is, the injured party is entitled to damages."

This is taken from the English Standard Conditions of Sale (Second Edition), condition 7.1. The clause is not limited in the type of omissions to which it applies, and would appear to include an omission stemming from failure to disclose an overriding interest; elsewhere in the same standard conditions the vendor is required to disclose all overriding interests

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[8] See Registered Land Law, section 23.
[9] Timmins v Moreland Street Properties Ltd [1958] Ch 110.
[10] Phillips v Caldcleugh (1868) LR 4 QB 159; Beyfus v Lodge [1925] Ch 350; Rudd v Lascelles [1900] 1 Ch 815.
[11] J.T. Farrand, Emmet on title, 19th ed., paragraph 4.030.
[12] D.G.Barnsley, Conveyancing Law and Practice, 3rd ed, p.594.
[13] Gibson's Conveyancing. 31st ed, pp. 134-5, citing no cases.
[14] I.R.Storey, Conveyancing, 4th ed, p.266, citing no cases.
[15] P.N.Kenny, Conveyancing Practice, paragraph 13-035.
[16] The cases cited as authority by Kenny, loc. cit. at footnote 15, are in fact cases on pre-completion remedies.
[17] Edwards v McLeay (1818) 2 Swan 287, 36 ER 625; Wilde v Gibson (1848) 1 HL 605.
[18] Palmer v Johnson (1884) 13 QBD 351, following Re Turner and Skelton (1879) 13 ChD 130, Bos v Helsham LR 2 Ex 72 and Cann v Cann 3 Sim 447.
[19] Supra.

except those discoverable by inspection and those the vendor does not and could not know about.[20] Of course, if the vendor actually knew of the overriding interest and failed to disclose it, he would be liable post-completion for damages and the contract would be subject to rescission.[21] The extra scope for damages under condition 7.1.2, in contrast with the open contract position, occurs when the vendor is unaware of an overriding interest which he could know about; obviously there will be difficulties in determining what standard to apply when considering what adverse rights a landowner could know about.

However, the exact terms of each set of standard conditions should be perused carefully as certain standard conditions of sale may require no disclosure of overriding interests at all. Yet the validity of such a clause may be extremely precarious for it apparently contravenes the well-established "no-disclosure, no-reliance" rule,[22] rendering the clause unenforceable in those cases when the vendor knew of the undisclosed overriding interest,[23] and even when the vendor merely ought to have known of it.[24] The rule declares that the vendor will not be permitted to conceal known defects in title behind a general condition of sale;[25] for example, a general condition that property is sold subject to any rights affecting it "whether disclosed or not", does not relieve the vendor from the obligation to disclose, but "simply protects him if it should afterwards turn out that the property is subject to some burden or right in favour of a third person of which he is unaware."[26]

The overall result of this rule is that the vendor can never contract out of his duty to disclose known overriding interests (except by selling whatever title he has, "if any"); and if there is an "errors and omissions" liability clause, this will allow the purchaser to sue for damages even after signing and registering the transfer.

(d) Misrepresentations.

The vendor will incur liability for both false statements contained in the contract (misdescriptions) and false statements which induced the purchaser to enter into the contract (misrepresentations), whether or not they are subsequently incorporated as terms of the contract.[27] A statement by the vendor in reply to preliminary inquiries before contract as to the absence of an overriding interest may be a misrepresentation, and this will provide an alternative remedy for a purchaser in respect of undisclosed overriding interests; it is common to make inquiries of the vendor concerning persons in actual occupation who may have overriding interests under section 28(g) of the Registered Land Law, or even to ask if the land is subject to "any overriding interests".[28] The stock answer is that there are none so far as the vendor is aware (if this answer is untrue it will amount to fraud) but since the decision in William Sindall plc v Cambridgeshire County Council[29] it is clear that such a qualified response nevertheless implies that the vendor has made reasonable inquiries before answering. If an overriding interest is subsequently discovered by the purchaser, the vendor will be liable for misrepresentation if his answer is tainted by a failure to carry out reasonable investigations to determine the true position.

The remedies for misrepresentation are prescribed by the Contracts Law, which specifically pronounces that a misrepresentation remains actionable after the contract has been performed[30] by execution and registration of the transfer, thus abolishing the restriction in Wilde v Gibson[31] that post-completion rescission for misrepresentation was available only in the case of fraud. In the case of an innocent misrepresentation by the vendor, and a misrepresentation

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[20] Condition 3.1.2.
[21] Either under condition 7.1 of the Standard Conditions of Sale or, if open contract, then following Edwards v McLeay (1818) 2 Swan 287, Wilde v Gibson (1848) 1 HL 605, 36 ER 625.
[22] See C.Harpum [1992] CLJ 263, 298-305; J.T.Farrand, Contract and Conveyance, 4th ed, pp.73-74.
[23] Nottingham Patent Brick and Tile Company Ltd v Butler (1886) 16 QBD 778.
[24] Heywood v Mallalieu (1883) 25 ChD 357.
[25] Re Banister, Broad v Munton (1879) 12 ChD 131; Nottingham Patent Brick and Tile Company Ltd v Butler (1885) 15 QBD 261, (1886) 16 QBD 778; Faruqi v English Real Estates Ltd [1979] 1 WLR 963; Walker v Boyle [1982] 1 WLR 495; Rignall Developments Ltd v Halil [1988] Ch 190.
[26] Re Scott and Alvarez's Contract, Scott v Alvarez [1895] 2 Ch 603, per Lindley LJ at 613, author's emphasis.
[27] Contracts Law, section 13(a).
[28] Eg. inquiries 7(B) and (C) of the standard form "Conv 29 (Long)" by Oyez.
[29] [1994] 3 All ER 932.
[30] Contracts Law, section 13(b).
[31] (1848) 1 HL 605, 36 ER 625.

which the vendor did not have reasonable grounds to be believe to be true, the purchaser may seek rescission of the entire transaction post-completion, but the court has a general discretion to award damages in lieu if equitable to do so.[32] If the misrepresentation has been made fraudulently, the purchaser is entitled to rescission subject to the usual bars to rescission in equity. Additionally, for fraudulent and negligent misrepresentations, the purchaser is entitled to damages.[33]

The vendor will normally seek to exclude liability for misrepresentation in both replies to the preliminary inquiries and in the contract; whether these can be effective depends on the no-disclosure, no-reliance rule and the general test under the Contracts Law for the validity of any term purporting to exclude liability. In England Walker v Boyle[34] decided that any disclaimer of liability for the accuracy of the replies to the preliminary inquiries is ineffective, at least in relation to those replies which the vendor knows are likely to be relied upon by the purchaser. For exclusion of liability through the contract's "errors and omissions" liability clause, the same case held that the no-disclosure, no-reliance rule applied so as to prevent the vendor from escaping liability for undisclosed defects of which the vendor was aware, and moreover the clause which prevented rescission for misrepresentations was too wide and therefore ineffective under the English equivalent of the Contracts Law section 15.[35] The English standard conditions accordingly contain a very limited no-rescission clause, which only denies the purchaser's right to rescind where the error or omission is insubstantial and does not result from fraud or recklessness.[36]

It is however possible for the vendor to escape liability by one device: the vendor may absolutely refuse to answer any enquiries, the purchaser directing his preliminary inquiries to the real estate agent. If the contract then specifies that the real estate agent has no authority to make representations on behalf of the vendor, the purchaser will not be permitted to sue the vendor in the vendor's capacity as principal of the real estate agent, because the agent is not acting within the scope of his authority. This device has been accepted by the courts.[37] The purchaser in these cases will not be entirely without remedy, as he will be entitled to sue the real estate agent in negligence[38] (providing the real estate agent has not attempted to exclude his own liability); but it is doubtful whether the same right of action in negligence will be available against an attorney acting on behalf of the vendor.[39]

In summary, a post-completion action in misrepresentation is available in respect of a pre-contract statement of the vendor which comprises a negligent inaccuracy or negligent non-disclosure of an overriding interest; and, as with contractual misdescriptions, the vendor has very little scope to contract out of the liability using traditional methods of disclaimer.

(e) The Vacant Possession Term.

Some of the rights which constitute overriding interests under section 28 of the Registered Land Law involve occupation of the land by the owner of the adverse interest or some limitation on the purchaser's right to occupation or possession. Contracts will normally expressly require the vendor to give vacant possession on completion; this term does not merge and so remains enforceable after completion.[40] Breach of this specific contractual term therefore gives the purchaser another possible route to sue the vendor for damages in respect of the existence of an undisclosed overriding interest.

The term requiring vacant possession is implied into an open contract although it will be rebutted by inconsistent terms or the fact that the purchaser knows there is an irremovable overriding interest.[41] In the standard form contracts the term is an express condition, and a breach will have occurred even if the occupier is apparent on inspection or known to the purchaser before the contract,[42] despite the fact that this would absolve the vendor from any liability arising from his duty to disclose latent defects in title.[43]

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[32] Contracts Law, section 14(2).
[33] Contracts Law, section 14(1).
[34] [1982] 1 WLR 495.
[35] Misrepresentation Act 1967, section 3, incorporating the Unfair Contract Terms Act 1977 definition of reasonableness.
[36] Standard Conditions of Sale (Second Edition), condition 7.1.3.
[37] Overbrooke Estates Ltd v Glencombe Properties Ltd [1974] 3 All ER 511; Collins v Howells Jones (1981) 259 EG 331.
[38] McCullagh v Lane Fox & Partners [1994] 8 EG 118, noted [1994] Conv 299.
[39] Gran Gelato Ltd v Richcliff (Group) Ltd [1992] Ch 560.
[40] Hissett v Reading Roofing Company Ltd [1970] 1 All ER 122.
[41] Cook v Taylor [1942] 2 All ER 85.
[42] Hissett v Reading Roofing Company Ltd [1970] 1 All ER 122; Sharneyford Supplies Ltd v Edge [1987] Ch 305 per Parker LJ at 325.
[43] Supra.

The requirement of vacant possession would plainly be breached by the presence of a tenant claiming an overriding interest under section 28 paragraph (d),[44] or by the rights of a person in actual occupation under paragraph (g). The ambit of the vacant possession term however goes wider than merely ensuring the property is free from occupiers; the existence of overriding interests under paragraph (c) may constitute a breach, as it has been held that the vendor is in breach when the land is requisitioned,[45] or is subject to regulations preventing occupancy by the purchaser.[46] Furthermore, it should not be necessary to show that an occupier has a claim which could be enforced against the purchaser: it is sufficient to show that there is a de facto occupier without a claim of right.[47] Consequently an overriding interest of a squatter under paragraph (f) will be in breach of the term, despite the fact that the purchaser will be entitled to bring possession proceedings before twelve years of adverse possession are completed. This is only of real benefit if discovered prior to completion as it then renders the contract voidable at the option of the purchaser; after completion rescission is lost, the remedy merely damages, which may be low or nominal if the adverse claim is unenforceable and the occupier can be evicted immediately.

It seems improbable that the term for vacant possession will be breached by the existence of any of the overriding interests mentioned in paragraphs (a), (b), (e) and (h). Even overriding interests which confer a right to go onto the land for particular purposes, profits a prendre for instance, will not interfere with the purchaser's possession to a degree sufficient to breach the term for vacant possession.[48]

In relation to vacant possession, as with all other aspects of title, the no-disclosure, no-reliance rule applies so the vendor cannot claim that his contractual liability for failing to give vacant possession is excluded by a general "errors and omissions" clause in the contract. Any exclusion of liability must make full and frank disclosure of the particular impediment which may prevent vacant possession.[49]

Conclusion

Despite the purchaser's apparent inability to take advantage of implied covenants for title in the Cayman Islands, the purchaser's other remedies for the vendor's failure to disclose an overriding interest are still quite extensive. The purchaser cannot sue for non-disclosure per se in the absence of fraud, yet the non-disclosure may fall within a separate head of liability under the contract.

In relation to several of the classes of overriding interest, the existence of such an adverse right will amount to a breach of the vendor's obligation to provide vacant possession on completion; and as this term does not merge, the purchaser can sue on it after completion. There is also the liability for pre-contract misrepresentations as to the existence of overriding interests, which, according to the Contracts Law, remains actionable after completion. The purchaser's right in this case is enhanced by the requirement in William Sindall plc v Cambridgeshire County Council that the vendor must make reasonable investigations to support his replies, and cannot rely on his own ignorance. For any inaccurate statement as to the existence of overriding interests which forms part of the contract itself, it is quite possible that the purchaser will be able to sue on an unmerged "errors and omissions" clause. This is strengthened by the ethos of protecting the purchaser from general contractual exclusion clauses through the no-disclosure, no-reliance rule. The lesson for the vendor is either to disclose or to give the fullest and clearest details of the particular risk which the purchaser runs.[50]

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[44] Hissett v Reading Roofing Company Ltd [1970] 1 All ER 122.
[45] James Macara Ltd v Barclay [1945] KB 158.
[46] Toplell Ltd v Galley Properties Ltd [1979] 1 WLR 446.
[47] Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264, 270-1; see C.Harpum [1988] Conv 324, 328.
[48] Horton v Kurzke [1971] 1 WLR 769 per Goff J at 771.
[49] C.Harpum [1988] Conv 324 at 331, 400.
[50] Simon Cooper, Lecturer in Law, Cayman Islands Law School.

SOME RECENT DEVELOPMENTS IN CONVEYANCING

This article concentrates on three recent cases which have excited some interest in the United Kingdom, namely Pitt v PHH Asset Management Ltd;[1] Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd;[2] and William Sindall plc v Cambridgeshire County Council.[3]

Pitt v PHH Asset Management Ltd.

Most lawyers have at least second hand experience of the disappointment felt by an intending purchaser of land when he discovers that a seller with whom he has been negotiating suddenly announces that he has sold, or intends to sell, to someone else. Of course, sometimes a purchaser who finds himself in this situation is the architect of his own misfortune; but more often than not he has been negotiating in good faith with a vendor who has been lucky enough to receive a more attractive offer for his property from someone else. Typically (and understandably), the vendor capitalises on his good fortune either by immediately accepting the more attractive offer from the third party or by playing the new prospective purchaser off against the old one so as to achieve an even better price. Either way, the prospective purchaser is likely to feel let down and exploited.

Of course an intending purchaser can reduce the risk of such misfortune by entering into a binding contract as expeditiously as possible but undue haste may expose him to unacceptable risks.[4] There are usually a number of matters about which he needs to satisfy himself before committing himself to buy, not all of which can be adequately guarded against through the mechanism of a conditional contract.[5] Another solution is to buy an option from the vendor but that will involve an outlay which he may be unable to afford or which he regards as an unjustifiable expense.

A third possibility is now suggested by the decision of the English Court of Appeal in Pitt v PHH Asset Management Ltd[6] - the conclusion of a so called "lock out agreement". This development was in fact foreshadowed in the decision of the House of Lords in Walford v Miles in 1992 in which Lord Ackner, speaking for the whole House said:

> "There is clearly no reason in English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B agrees for a specified period not to negotiate with anyone except A in relation to the sale of his property."[7]

This statement was put to the test in Pitt v PHH Asset Management Ltd.

Mr. Pitt had made an offer of L190,000 stg for a house which the vendors, who were selling as mortgagees in possession, had accepted "subject to contract". However, a higher offer was subsequently made by a Miss Buckle and, as a result Mr. Pitt was forced to increase his original offer. When Miss Buckle again bettered that offer the vendors again withdrew their acceptance of Mr. Pitt's second offer. This time Mr. Pitt's response was more aggressive. He told the vendors that he intended to seek an injunction to prevent the sale to Miss Buckle and that he would also inform her that he was withdrawing, thus leaving her as the only prospective purchaser in the field, and would advise her to now lower her offer. As a result, the vendors (through their agent) orally agreed that they would not consider offers from Miss Buckle or anyone else if Mr. Pitt exchanged contracts within two weeks of receiving a draft. Despite this undertaking the vendors subsequently indicated that they were going to accept a new and higher offer from Miss Buckle unless Mr. Pitt further increased his price. He refused to do so and the property was eventually sold to Miss Buckle.

Mr. Pitt then sued for damages for breach of his lock out agreement with the vendors. He succeeded at first instance. The vendors appealed on three grounds. These were -

(i) The lock out agreement was "subject to contract" (and therefore unenforceable) because it was concluded as part of a continuum of "subject to contract" negotiations.

(ii) It was unenforceable because it was not in writing.

(iii) It was unenforceable because it was not supported by consideration.

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1 [1993] 4 All ER 961.
2 [1993] 2 All ER 370.
3 [1994] 3 All ER 932.
4 Some of the reasons for delay were discussed by Lord Ackner in Walford v Miles [1992] 1 All ER 453, 461.
5 See generally, Wallace, Conditional Contracts for the Sale of Land (1977).
6 [1993] 4 All ER 961.
7 [1992] 1 All ER 453, 461.

The Court of Appeal rejected the first contention on the grounds that the lock out agreement had an independent existence of its own which was separate from the negotiations for the sale of the property. Thus there was no reason why it should fall under the "subject to contract" umbrella covering the parallel negotiations for the sale.

This conclusion also disposed of the second argument that the agreement was unenforceable for lack of writing. Since the lock out agreement was a free standing contract and neither obliged the vendors to sell their land nor the purchaser to buy it, it was not a contract for the sale of land and, accordingly, its enforceability was not dependent on writing.

The argument that the agreement was not supported by consideration was dealt with less convincingly. Mr. Pitt had not committed himself to do anything for the vendors' benefit. Nor had he abandoned any enforceable right in return for the vendors' undertaking to negotiate only with him. He had agreed to withdraw his threat to seek an injunction to prevent a sale to Miss Buckle. But an application for such an injunction would inevitably have failed because he had no right to prevent such a sale.[8] Nonetheless the Court of Appeal saw the removal of this threat as the provision of consideration. Peter Gibson LJ, with whom Mann LJ and Sir Thomas Bingham MR agreed, said:

> "I accept that the threat of an injunction only had a nuisance value in that I cannot see how the plaintiff could have succeeded in any claim. Nevertheless, that nuisance was something which the defendant was freed from by the plaintiff agreeing to the lock out agreement."[9]

It is a little surprising that the court should have regarded the dropping of a claim, which if pursued, ought surely to have been regarded as "vexatious" as capable of rendering an otherwise unenforceable undertaking binding.

The other matters which the court saw as constituting consideration are equally suspect. These were the withdrawal of the threat of "causing trouble" with the only other purchaser in the field, Miss Buckle (which might be better classified as "blackmail") and the unenforceable "promise by the plaintiff to get on by limiting himself to just two weeks if he was to exchange contracts".[10]

It is true to say that in recent times English courts have exhibited a somewhat relaxed approach to the doctrine of consideration. For example, in Williams v Roffey Brothers Contractors Ltd[11] a promise by a sub-contractor to complete work according to a time schedule which he was already bound to meet was held to be good consideration. This has led one commentator to suggest that:

> "If the court wants to enforce a promise consideration can [always] be found to support it".[12]

Despite this, it is suggested that future purchasers wishing to obtain the benefit of a lock out agreement with a vendor would be well advised to furnish a more conventional form of consideration than Mr. Pitt did. It seems that in practice this is normally done. Precedents for such agreements are beginning to emerge and typically they require the prospective purchaser to instruct surveyors within a defined period or to accept liability for surveyors' fees by making a mortgage application.[13]

Nonetheless, professional advisers consulted by clients claiming that they have been "gazumped" might profitably spend a little time inquiring carefully about any discussions which have passed between their clients and the vendor. When vendors believe that interest in their properties is limited they are inclined to promise all sorts of things to potential purchasers including, perhaps, that they will not negotiate with others and, depending on the course and form of the discussions (and given the relaxed approach to consideration exhibited in Pitt), a valid lock out agreement may well have been concluded. If so, the purchaser may still not get the property he hoped for but his disappointment may be tempered by the possibility of recovering damages. Mr. Pitt recovered not only expenditure which he had incurred in reliance on the lock out agreement but also compensation for mental distress.[14]

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[8] Day v Brownrigg (1878) 10 ChD 294; Paton v Trustees of British Pregnancy Advisory Service [1979] QB 276.
[9] Op cit, 966.
[10] [1990] 1 All ER 512.
[11] Capper, "Good Faith, Gazumping and Lock-Out Agreements" (1994) 45 NILQ 408, 412.
[12] See the precedent available from The Publications Department, Nabarro Nathanson, 50 Stratton St, London W1X 5FL.
[13] The Independent, 25 September 1993. The correctness of the award for mental distress has been queried. See Capper, n 11 supra at 415.

Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd.

Another case which has excited considerable interest is the opinion of the Privy Council in Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd.[14] It dispelled much of the confusion and doubt about the extent, if any, to which the equitable jurisdiction to relieve against penalties applies to a vendor's right to forfeit a deposit paid by a defaulting purchaser of land.

Equity's power to relieve against penal clauses in contracts is of ancient origin.[15] It appears that the jurisdiction was first invoked by Sir Thomas More in the reign of Henry VIII.[16] A modern formulation was provided by Lord Diplock in Photo Productions Ltd v Securicor Transport Ltd when he explained that a contractual provision:

> "... must not offend against the equitable rule against penalties, that is to say, it must not impose on the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation."[17]

It will be noted that Lord Diplock's formulation envisages a situation in which the obligation imposed on the defaulting party is to pay over money[18] only when default occurs.[19] For this reason the Cayman Court of Appeal, in Beach Club Enterprises Ltd v Horizon Management Ltd[20] in 1982 held that an express or implied[21] contractual term providing for the forfeiture of money already paid over by a defaulting purchaser of land, whether as a deposit or otherwise, could not be a penalty in the strict sense. For reasons amplified below it is arguable that that analysis is flawed. In any event, no such distinction was made by the Privy Council in Dojap. Lord Browne-Wilkinson said:

> "In general a contractual provision which requires one party in the event of his breach of the contract to pay or to forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages, being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach."[22]

Dojap involved a contract concluded by auction under which a mortgagee bank in Jamaica agreed to sell the mortgaged premises to a purchaser for $J11,500,000. As required by the conditions of sale, the purchaser paid a deposit of 25% of the purchase price. When the purchaser was unable to complete the bank purported to forfeit its deposit.

On behalf of the Board, Lord Browne-Wilkinson immediately confirmed that the equitable jurisdiction to relieve against penalties does not normally apply to deposits paid under contracts for the sale of land. But he went on to point out that this immunity could lead to abuse if "by attaching the label 'deposit' to any penalty" a vendor could "escape the general rule which renders penalties unenforceable".[23] He therefore drew a distinction between "true deposits" and what he called "plain penalties" masquerading as deposits.

In the opinion of the Privy Council a "true deposit" can always be forfeited if the purchaser defaults, even if it overcompensates the vendor for his loss. Thus in the words of his Lordship, even a true deposit "may take effect as a penalty, albeit one permitted by law."[24] The essential question therefore is when is an advance payment which is described as a "deposit" to be treated as a permitted penalty. And when is such a payment to be regarded as an impermissible penalty. According to the Privy Council, a true deposit involves the provision of "reasonable earnest money" by a purchaser. An argument advanced on behalf of the vendor in Dojap was that it was common practice for

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[14] [1993] 2 All ER 370.
[15] See generally, Law Commission Working Paper No. 61: Penalty Clauses and Forfeiture of Moneys Paid (1975).
[16] See Wyllie v Wilkes (1780) 2 Doug KB 519, 522-3 per Lord Mansfield. In Widnes Foundry (1925) Ltd v Cellulose Acetate Silk Co. Ltd [1931] 2 KB 393, 405 Scrutton LJ said that there is "a good deal of disagreement" as to how the jurisdiction developed.
[17] [1980] 1 All ER 556, 567. See also the authoritative exposition provided by Lord Dunedin in Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79, 86-88.
[18] Or, according to Jobson v Jobson [1989] 1 All ER 621, to hand over other property.
[19] A right to withhold payment of moneys otherwise payable under the contract has also been categorised as a penalty: Gilbert-Ash (Northern) Ltd v Modern Engineering Bristol Ltd [1973] 3 WLR 421.
[20] [1980-83] CILR 223.
[21] A vendor's implied right to retain a deposit in the event of default by his purchaser may be excluded by express provision to the contrary. See Palmer v Temple (1939) 4 AD & E 508, explained in Howe v Smith (1884) 27 ChD 89. See also Hall v Burnett [1911] 2 Ch 551. There is normally no implied right to forfeit instalments of the purchase price. See n 36 post.
[22] Op cit, 373.
[23] This distinction had already been made by Lord Hailsham in Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, 94.
[24] Op cit, 374.

banks in Jamaica selling property at auction to demand deposits of between 15% and 50% and what constituted a reasonable demand in this context should therefore be judged according to this practice. This argument was rejected. His Lordship said:

> "To allow the test of reasonableness to depend upon the practice of one class of vendor, which exercises considerable financial muscle, would be to allow them to evade the law against penalties by adopting practices of their own."[25]

Thus some other test was required for determining what could reasonably be required as a "true deposit". As to this Lord Browne-Wilkinson said:

> "...the correct approach is to start from the position that, without logic but by long continued usage both in the United Kingdom and Jamaica, the customary deposit has been 10%. A vendor who seeks to obtain a larger amount by way of a forfeitable deposit must show special circumstances which justify such a deposit."[26]

Consequently a deposit of more than 10% will now be subject to the law on penalties unless the vendor can show that there are special circumstances making a larger one permissible. And, as the Privy Council pointed out, once a so called "deposit" is classified as an impermissible penalty the entire sum deposited must be returned to a defaulting purchaser with interest, less only any amount required to compensate the vendor for actual loss occasioned by the default. The lesson is obvious. A vendor of land for say $500,000 who requires his purchaser to deposit $50,000 as earnest money will be entitled to retain that entire sum if the purchaser fails to complete, even if the land can immediately be resold to another for the same or a greater price. But if, in otherwise identical circumstances, the vendor asks for a deposit of more than 10% he will be allowed to keep only so much of the sum deposited as is required to compensate him for costs incurred in deducing title etc.[27]

That would seem to be the position in jurisdictions such as the Cayman Islands where there are no provisions giving the court a statutory power to return deposits. The position in England may be different. There, section 49(2) of the Law of Property Act 1925 stipulates that:

> "...in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit."

It is at least arguable that that provision ousts any pre-existing equitable jurisdiction for in Official Custodian for Charities v Parway Estates Development Ltd Dillon LJ, in a similar context, said:

> "When the legislature steps in with particular legislation in a particular area, effect must be given to that legislation, and in that particular area any wider equitable jurisdiction is ousted."[28]

It is now appropriate to return to the Cayman Court of Appeal and the Beach Club case. In that case the question was whether or not the court ought to order the return of two sums of money, which together represented 10% of the agreed purchase price and which had already been paid by the purchaser prior to his default, in the face of a contractual provision providing for their forfeiture in the event of default. The majority of the court[29] regarded one of these sums as a deposit and the other as an instalment of the purchase price.[30] However, the court was unanimously of the view that the provision for forfeiture of both sums was not vulnerable as a penalty in the strict sense since the jurisdiction over penalty clauses applies only to payments to be made after breach and does not permit the making of an order for the return of moneys already paid. The court took the view that an order for the return of moneys already paid could only be made under the separate equitable jurisdiction to relieve against forfeiture and that for this jurisdiction to be exercised it had to be shown not just that the disputed sums were not a genuine pre-estimate of the damage likely to be caused by a breach but also that it would be unconscionable for the vendor to be allowed to retain them. The court did not find the latter test to have been satisfied.[31]

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[25] Ibid.

[26] Ibid. In Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, 93 Lord Hailsham said "there is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land".

[27] Plus, perhaps, an amount to compensate him for the delay involved in completing with the other purchaser.

[28] [1985] 1 Ch 151. See also Smith v Metropolitan City Properties Ltd (1985) 277 EG 735; Billson v Residential Apartments Ltd [1991] 3 All ER 265 (reversed on other grounds by the House of Lords: [1992] 1 All ER 141). Note that these cases concerned the equitable jurisdiction to relieve against forfeiture and the statutory provisions regulating the forfeiture of leases in the Law of Property Act 1925, s146. For further discussion of the relationship between Dojap and s49(2) see Wallace, "Deposit or Penalty? - The Price of Greed" (1993) 44 NILQ 207, 212 et seq.

[29] Carey JA and Robinson P.

[30] Carberry JA treated them both as a single deposit.

[31] This was not surprising as the total amount of all payments to be forfeited, including both the deposit and the instalment of the purchase price, did not exceed 10% of the full price.

I would suggest that, at least in relation to the sum found to have been paid as a deposit, even prior to Dojap there was room for disagreement with the conclusion of the court that the law on penalties was inapplicable. Let us envisage a situation in which, despite the requirement of the contract, the deposit has not in fact been paid at the date when the vendor legitimately rescinds the agreement on account of default by the purchaser.[32] It is well settled that in such situations a vendor is normally entitled to recover the entire amount of the unpaid deposit as damages without proving equivalent loss.[33] But in such a case (notwithstanding ancient authority to the contrary[34]) it seems entirely appropriate that if the unpaid deposit which the vendor sought to recover exceeded reasonable earnest money his attempt to recover it should be treated as an attempt to enforce a penalty. If the jurisdiction to strike down penalties can be enforced in respect of an attempt to recover an unpaid deposit of an unreasonable amount it seems inconceivable that it could not also be invoked in respect of a deposit which has already been paid. A contrary conclusion would lead to a purchaser who had at least complied with his contractual obligation to pay the deposit being treated less favourably than one who had failed to comply with even that obligation.[35]

However, it may be that the Cayman Court of Appeal was on stronger ground when it held that the equitable jurisdiction to relieve against penalties should not apply to stipulations for the forfeiture of instalments of the purchase price which have already been paid[36] for there appears to be no authority which suggests that a vendor can automatically recover unpaid instalments from a defaulting purchaser where they exceed his actual loss. Therefore there are clearly conceptual difficulties in granting relief under the jurisdiction preventing the enforcement of penalties to a defaulting instalment purchaser who stands to lose instalments which he had already paid. In the Beach Club case the court was of the view that equity's alternative jurisdiction to relieve against forfeiture could result in an order for the return of the instalments to a defaulting purchaser if it would be unconscionable for the vendor to be allowed to retain them. However, this opinion was based largely on dicta of Lord Denning and Somervell LJ in the English Court of Appeal in Stockloser v Johnson in 1954.[37] In the same case Romer LJ had taken a different view and had said that the only relief which could be granted to a defaulting purchaser who stood to lose instalments which he had already paid was to grant him additional time to remedy his default. In other words, relief had to be against forfeiture of the purchaser's equitable interest in the land rather than against forfeiture of his money.

Although the Privy Council in Dojap said that it found it unnecessary to decide which of the conflicting views expressed in Stockloser v Johnson was correct,[38] the balance of authority favours the line taken by Romer LJ.[39] In all but one of the commonly cited cases decided by English judges[40] in which a purchaser by instalments has been granted relief, that relief has taken the form of additional time to perform his obligations rather than an order for the return of instalments already paid.[41] The one case which goes against this trend is the decision of the Privy Council in Steedman v Drinkle[42] in 1916, but on close examination it might well be regarded as one in which the court ordered the return of a deposit rather

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[32] Rescission in this context meaning "an acceptance by the vendor of a repudiation of the contract by the [purchaser], leaving the vendor's rights under the contract which had already matured at the date of acceptance of the repudiation intact": Buckland v Farmer and Moody [1978] 3 All ER 929, 938 per Buckley LJ. See also Beach Club Enterprises Ltd v Horizon Management Ltd [1980-83] CILR 223, 236 per Carberry JA.

[33] Howe v Smith (1884) 27 ChD 89; Damon Cia Naviera SA v Hapag-Lloyd International SA [1985] 1 All ER 475; Millichamp v Jones [1983] 1 All ER 267.

[34] Hinton v Sparkes (1868) LR 3 CP 161.

[35] In Bridge v Campbell Discount Co Ltd [1962] AC 600, 629 Lord Denning, in a related context, referred to the "absurd paradox" of granting relief "to a man who breaks his contract [and penalising] the man who keeps it".

[36] It is well established that there is no implied term for forfeiture of instalments of the purchase price which have already been paid at the time of default and that such a forfeiture can only occur under an express contractual term (Mayson v Clouet [1924] AC 980) unless the instalments are designed to meet expenditure incurred by the vendor in performing the contract (Hyundai Heavy Industries Co Ltd v Papadopoulos [1980] 1 WLR 1129).

[37] [1954] 1 All ER 630.

[38] Thereby indicating that the passage quoted above (see n 22 supra and associated text) in which Lord Browne-Wilkinson said that the equitable jurisdiction to relieve against penalties extended to the forfeiture of sums already paid is not necessarily as all-embracing as it appears on its face.

[39] Express support for the views of Romer LJ was provided by the English Court of Appeal in Campbell Discount Co v Bridge [1961] 2 All ER 97 and by Sachs J in Galbraith v Mitchenhall Estates Ltd [1964] 2 All ER 653.

[40] The position may be different in Australia. See eg, Real Estate Securities Ltd v Kew Golf Links Estate Pty Ltd [1935] VLR 114 and McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457, 478 per Dixon J. See more generally, Harpum, "Relief Against Forfeiture and the Purchase of Land" [1984] CLJ 134.

[41] See eg, Re Dagenham (Thames) Dock Co, ex parte Hulse (1873) 8 Ch 1022; Kilmer v BC Orchard Lands Ltd [1913] AC 319; Mussen v Van Diemans Land Co [1938] Ch 253; Starside Properties Ltd v Mustapha [1974] 1 WLR 816.

[42] [1916] 1 AC 275.

than of an instalment of the purchase price[43] and it has, in any event, been subsequently criticised by commentators[44] and judicially described as a decision "of no general application" which "turned upon particular circumstances"[45] and as one which "cannot be regarded as a satisfactory authority".[46]

In recent times in Sport International Bussum BV and others v Inter-Footwear Ltd[47] the English Court of Appeal reviewed a number of relevant authorities, including Stockloser v Johnson and concluded, in the words of Oliver LJ, that:

> "...historically, the availability of equitable relief from forfeiture has been confined to cases where the subject matter of the forfeiture is an interest in land."[48]

If that historical position is to be maintained and we assume that the equitable jurisdiction to relieve against penalties is inapplicable, it follows that the only relief available to a purchaser of land who, as a consequence of default, risks losing instalments of the purchase price which he has already paid is an order allowing him additional time to complete and that in deciding whether or not to make such an order the court ought not only to take into account the same kind of factors which it considers when, for example, deciding whether or not to exercise its inherent jurisdiction to relieve against forfeiture of a lease for non-payment of rent[49] but also to be mindful of the recent decision of the English Court of Appeal in Hedworth v Jenwise Ltd[50] which demonstrated a marked reluctance to contemplate granting relief against forfeiture to a purchaser of land in all but the most exceptional circumstances.[51]

William Sindall plc v Cambridgeshire County Council.

The third case to be considered is the decision of the English Court of Appeal in William Sindall plc v Cambridgeshire CC.[52] Such are the vagaries of our system of law reporting that, although an outline of the judgment appeared in the London Times in June of 1993, a full report of this case did not appear in any of the main law reports until September 1994. In 1988 William Sindall plc had contracted to buy certain school playing fields from Cambridgeshire County Council for housing development at a price of just over L5,000,000 stg. This was a decision which the firm subsequently regretted. It had borrowed the entire purchase price at a high rate of interest but almost immediately faced a dramatic slump in the housing market, leaving it with a building site which was no longer viable and which was now worth less than half of what it had paid for it.

The directors of the firm must have sighed with relief when they were advised that it might be possible to have the purchase rescinded on the grounds of misrepresentation. This possibility came to light when it was discovered that the site was traversed by a foul water sewer through which neighbouring landowners enjoyed an easement of drainage. Before the original contract to purchase had been formalised Sindall had raised a pre-contract inquiry with the vendor asking:

> "Is the vendor aware of any rights...specifically affecting the property, other than any disclosed in the draft contract or immediately apparent on inspection, which are exercisable by virtue of an easement...?"

and the vendor had replied:

> "Not so far as the vendor is aware."

This reply was literally true but conveyancers were somewhat taken aback when the Court of Appeal reminded them that, in the words of Hoffman LJ, such a reply:

> "represents not merely that the vendor has no actual knowledge of a defect, but also that [before replying] they

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[43] Even on that basis the decision is difficult to justify since the sum deposited represented only 1/16 of the full purchase price.
[44] See eg, Harpum, loc cit.
[45] Mussen v Van Diemans Land Co [1938] Ch 253 per Farwell J.
[46] Stockloser v Johnson [1954] 1 All ER 630, 644.
[47] [1984] 1 All ER 376.
[48] Op cit, 383.
[49] See eg, Howard v Fanshawe [1895] 2 Ch 581 and the authorities therein cited.
[50] [1994] EGCS 133.
[51] Australian courts appear to be more flexible in this respect: Legione v Hateley (1983) 46 ALR 1.
[52] [1994] 3 All ER 932.

> have made such investigations as could reasonably be expected to be made by or under the guidance of a prudent conveyancer."[53]

It was therefore necessary to examine the circumstances to see if the vendor would have replied differently had it conducted appropriate investigations before responding to the inquiry. Fortunately for the vendor, the court eventually concluded that, even applying the stringent rule which it had previously enunciated, there had been no actionable misrepresentation.[54]

The disappointment for the directors of the purchasing company must have been acute. No doubt they had seen rescission of the contract as the answer to all of their problems. However, their disappointment might have been even more acute had they won on the misrepresentation point because all three members of the court indicated that had a misrepresentation been established they would not in fact have granted rescission but would instead have exercised their statutory discretion under section 2(2) of the English Misrepresentation Act of 1967 (of which the Cayman equivalent is section 14(2) of the Contracts Law, 1979) to award damages in lieu and, significantly, they were unanimously of the opinion that, contrary to previously received wisdom, damages in lieu of rescission for a non-fraudulent misrepresentation under section 2(2) ought not to be assessed in such a way as to put a plaintiff in the same financial position as he would have been in had rescission been granted but rather to compensate him for the property not being as it had been represented to be. In this case the difference in result would have been quite dramatic. Damages assessed on the former basis would have involved compensating the plaintiff for the loss involved in not being allowed to hand back land now worth less than L2,000,000 and to receive in return a refund of its original purchase money of over L5,000,000 plus interest. Damages awarded on the latter basis would have entitled the purchaser to recover only the cost of re-routing the sewer (which was put at around a mere L18,000) plus incidental costs and expenses.

Of course if the County Council had been found to have made a misrepresentation it would also have been liable for damages under section 2(1) of the 1967 Act (or in the Cayman Islands, section 14(1) of the local Contracts Law, 1979) unless it positively proved that it had reasonable grounds for believing that its reply to the purchaser's pre-contract inquiry was true. And damages under section 2(1), and the local equivalent, appear to be assessable on the same basis whether the misrepresentation complained of is positively established as fraudulent or merely not proven to be reasonably believed to be true.[55] This led both Hoffman and Evans LJJ to concede that if they had concluded that the vendor's reply to the purchaser's pre-contract inquiry would have been different had he taken appropriate care before responding, the purchaser might have been able to recover the loss arising from the decline in the market value of the land as damages under subsection (1). However, I would suggest that it is far from clear that that loss would have been recoverable. Even if it is beyond dispute that when damages are awarded under subsection (1) they must be assessed on the same basis as for fraudulent misstatement (and that consequently foreseeability of loss is not a limiting factor)[56] it remains arguable that there must be some causal link between the offending statement and the loss for which compensation is provided.[57] In Doyle v Olby Ltd Lord Denning, when stressing the wide scope of recoverable loss in this sphere, was nonetheless careful to say that:

> "[t]he defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement."[58]

It requires a considerable extension of logic to say that he must also indemnify the plaintiff in respect of his own improvidence.

It is submitted that the loss which William Sindall plc sustained due to the collapse in the property market was in no way

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[53] Ibid, 942.

[54] Nor was there any scope for an action on the contract or one based on mistake because the purchaser had agreed to buy the land subject to all patent easements and all latent easements of which the vendor was not aware. The court took the view that although references to the sewer were included in old minutes and files which the vendor had inherited from a predecessor local authority, and in other old records which it had destroyed, it could not have been reasonably expected to peruse these before replying to the purchaser's inquiry.

[55] In Shepheard v Broome [1904] AC 342, 346 Lord Lindley said: "To be compelled by Act of Parliament to treat an honest man as if he were fraudulent is at all times painful ... but the repugnance which is naturally felt against being compelled to do so will not justify...refusing to hold the appellant responsible for acts for which an Act of Parliament clearly declares he is to be held liable."

[56] Royscot Trust Ltd v Rogerson and another [1991] 3 All ER 294; East v Maurer [1991] 2 All ER 733.

[57] See eg, Beer v Stevenson (1874) 30 LT 177, 180 per Sir Barnes Peacock.

[58] [1969] 2 All ER 119, 122 (emphasis added). See also Clarke v Urquhart [1930] AC 28, 68 per Lord Atkin.

connected with any statement made by the vendor. On the contrary, it might readily be considered attributable to the firm's own misjudgment of market trends and, as Winn LJ said in his analysis of recoverable loss for fraudulent misrepresentation in Doyle v Olby:

> "[T]he proper starting point for any court called on to consider what damages are recoverable by the defrauded person is to compare his position before the representation was made to him with his condition after it, brought about by that representation, always bearing in mind that no element in the consequential position can be regarded as attributable loss and damage if it be too remote a consequence: it will be too remote not necessarily because it was not contemplated by the representor but in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense or can in any way be said to have been the author of his own misfortune."[59]

Thus the judgment of Winn LJ in Doyle v Olby Ltd suggests that the plaintiff in Sindall would have faced an uphill task in seeking to recover the loss which it sustained because of the slump in property prices as damages for any misrepresentation relating to the easement of drainage.

On the other hand, one cannot lightly dismiss numerous judicial pronouncements to the effect that in an action for fraudulent misrepresentation (and consequently, after the enactment of section 2(1) of the 1967 Act and section 14(1) of the local Contracts Law, 1979, any other misrepresentation not proved to be innocent) a purchaser is prima facie entitled to recover the difference between the real value of the thing bought and the price which he actually paid for it.[60] So the critical question may be: "As of what date is the real value to be determined? " Contrary to the impression created by the judges in Sindall, virtually all the relevant cases seem to assume that it is the date on which the purchase is made and not the later dates of the issue of a writ or the delivery of judgment.[61] Yet only if one of the latter dates is the relevant one could the calculation take account of a subsequent decline in value. Therefore it is contended that in Sindall the Court of Appeal was wrong to suggest that had the plaintiff succeeded in establishing a claim under section 2(1) of the 1967 Act he might have been able to shift the burden of the post contract depreciation onto the defendant. Indeed such a conclusion would be in direct conflict with the views expressed by the Court of Appeal a century earlier in the classic case of Derry v Peek.[62] In that case the Court of Appeal held that a plaintiff had been induced to purchase certain shares by virtue of a fraudulent misrepresentation on the part of the defendant. Although that finding was subsequently overturned by the House of Lords,[63] the views expressed by the Court of Appeal on the assessment of damages remains highly relevant because the question of the appropriate date of valuation was addressed directly. Cotton LJ said that although the relevant figure is the "real value" of the asset purchased and that this may well differ from its "market value", the relevant date for making the valuation is the date of acquisition and the plaintiff "cannot get the benefit of any loss or depreciation" caused by subsequent events.[64] Sir James Hannan agreed and Lopes LJ added that in such cases the "true measure" of the plaintiff's loss is:

> "the difference between the [sum he actually paid] and the real value of the shares after they were allotted. Any damage occurring after the discovery of the fraud when the plaintiff might have rescinded the contract, and which would not be attributable to his acting on the misrepresentation, but to other causes, in my opinion would not be recoverable."[65]

In the later case of Broome v Speak[66] Buckley J used the terminology "fair value" rather than "real value" and referred to

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[59] [1969] 2 All ER 119, 123 (emphasis added). Winn LJ's reminder that the loss claimed must be brought about by the misrepresentation is particularly significant when one recalls that a misrepresentation may found a cause of action even if it is only one of a number of factors inducing a representee to commit himself to a bargain (Walker v Boyle [1982] 1 WLR 495; Edgington v Fitzmaurice (1885) 29 ChD 459). This makes it even more difficult to accept that the representor should be liable automatically for all loss resulting from the transaction.

[60] See eg, Cachett v Keswick [1902] 2 Ch 456, 468 per Farwell J; Broome v Speak [1904] AC 586, 606 per Buckley J.

[61] See eg, Cemp Properties (UK) Ltd v Dentsply Research & Development Corp (Denton Hall and Burgin, third party) [1991] 34 EG 62 (which was referred to in Sindall) and Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd and another (Roberts, third party) [1994] 4 All ER 225. See also the decision of Costello J in the High Court of the Republic of Ireland in McAnarney v Hanrahan [1994] 1 ILRM 210.

[62] (1888) 37 ChD 541.

[63] (1889) 14 App Cas 337.

[64] Op cit, 592.

[65] Op cit, 594.

[66] [1904] AC 586.

the difficulty of arriving at the appropriate figure but he too was quite clear that the appropriate date for calculating it was the date of acquisition of the asset purchased.

Thus it would seem that much of the dicta in Sindall concerning the assessment of damages under section 2(1) of the Misrepresentation Act (and section 14(1) of the Cayman Contracts Law) should be treated with extreme caution.[67]

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[67]The edited text of a lecture delivered at George Town on 11 January 1995 by Herbert Wallace, Professor of Property Law at The Queen's University of Belfast.