CAYMAN ISLANDS LAW BULLETIN

NO. 13
DECEMBER 1995

CAYMAN ISLANDS LAW SCHOOL

Cayman Islands Government

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

Citation:

Cases appearing in this volume should be cited as (1995) 13 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 thirteenth 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 practising attorneys, this edition features two articles by lecturers in law, Mr. Simon Cooper (at p52) and Mr. John Epp (at p59).

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 December 29 1994 to November 30 1995. Also appearing in this edition are summaries of the decisions of the Cayman Islands Court of Appeal, the Labour Law Appeals Tribunal and an important decision of the Summary Court, rendered since the last edition of the Law Bulletin. 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.

December 29 1994 to November 30 1995

ADMINISTRATIVE LAW

Construction of clause in licence - Whether Water Authority has discretion to modify or disapprove increase in base price

Cayman Water Authority v Attorney-General and Water Authority

Grand Court
Smellie J
December 29 1994

Mr Alberga for the plaintiff
Mr Helfrecht for the defendants

The court was faced with the construction of a licence clause relating to the ability of the Water Authority to modify or disapprove any increase in the base water rate by the Cayman Water Authority.

Held: (finding for the plaintiff)

(i) On a proper construction of clause 6.3 of the licence, the discretion of the Water Authority to approve or disapprove an increase on the base price was dependent upon whether an annual adjustment to provide for inflation was to be allowed. The discretion was therefore confined to the mathematical computation of the formula provided for in schedule 5 of the licence. Any dispute referred to the Governor-in-Council must involve a difference between the Cayman Water Authority and the Water Authority as to the exercise of the latter's discretion and only in that context would a ruling of the Governor-in-Council be an absolute rulid. The discretion was therefore confined to the mathematical computation of the formula provided for in schedule 5 of the licence. Any dispute referred to the Governor-in-Council must involve a difference between the Cayman Water Authority and the Water Authority as to the exercise of the latter's discretion and only in that context would a ruling of the Governor-in-Council be an absolute ruling.

(ii) The subclause gave neither the Governor nor the Water Authority absolnterpreted the law

AD

Application for certiorari - Confidential Relationships (Preservation) Law

Ex parte Randall

Grand Court (354/95)
Hare CJ
August 17 1995

Legislation

Confidential Relationships (Preservation) Law

Mr Collins for the applicant

The applicant sought leave to apply for *certiorari* to quash a preliminary enquiry decision made by a magistrate. The application was based on the contention that the Crown had misinterpreted the Confidential Relationships (Preservation) Law and that the magistrate had adopted that erroneous interpretation.

Held: (denying leave)

(i) The Grand Court had jurisdiction to grant an order for *certiorari* to quash the decision of a

lower court or an authority (created by legislation) where the court or authority acted without jurisdiction or had exceeded its jurisdiction; where there had been a failure to comply with the rules of natural justice; where there was an error of law on the face of the record or where an unreasonable decision had been reached which no reasonable authority, properly directed on the relevant law, could have reached.

(ii) The Grand Court in exercising its supervisory jurisdiction, however, was not to act as a 'Court of Appeal' for the court or body concerned. The Grand Court would not interfere with the exercise of any power or discretion conferred on such a body unless it had been exercised in circumstances beyond that body's jurisdiction or otherwise unreasonably.

If the Grand Court were to ascribe to itself the task entrusted to tribunals of first instance by the Law, the Grand Court would, under the guise of preventing an abuse of power, be itself guilty of usurping power. This was the nature of the application to the Grand Court on this occasion. Leave would accordingly be denied.

AD

Administrative law - Judicial review against decision taken by the Governor in Council and the Immigration Board - Whether Grand Court had jurisdiction

In the Matter of an application for leave to apply for judicial review

Grand Court (10/95)
Smellie J
January 12 1995

Legislation

Immigration Law 1992

Authorities referred to

In Re Fedele [1988-89] CILR 155
Re Roper [1980-83] CILR 181

Mr Albega QC for the applicant

The applicant sought leave to appeal against a decision taken by the Immigration Board at first instance and confirmed by the Governor-in-Council on appeal, to refuse an application for a work permit on the ground that the applicants did not satisfy the legislative requirements for the training of suitable Caymanians for recruitment purposes.

The case for the applicants was that the Board and Governor-in-Council had failed to observe the principles of natural justice in not affording the applicants a proper opportunity to meet any concerns of the Board with regard to the legislative requirements. It was further alleged that the Board had failed to elaborate on particulars as to any complaints which the Board may have had about the second applicant's style of management.

Held: (granting leave)

(i) The Immigration Board was a body exercising legal authority to determine questions affecting the rights of individuals and therefore was bound to observe the principles of natural justice when exercising that authority. On the present facts, the applicants had established an arguable case for the granting of leave.

(ii) As to whether the court had jurisdiction to judicially review a decision taken by the Governor-in-Council, it had been established in Re Roper that such prerogative relief did exist to remedy a decision of the Caymanian Protection Board and, further, if the Board's decision was a

nullity, the decision of the Governor-in-Council upholding that decision was equally a nullity.

(iii) This was an appropriate case for the granting of a stay which would enjoin the responsible authorities not to take any action to prevent the continued employment of the second applicant pending the outcome of the proceedings.

AD

BANKING LAW

Duty of bank to its customer to use reasonable care and to honour instructions - Duty of confidentiality - Remedies for breach

Ali Ibrahim v X Bank Ltd

Grand Court (10/92)
Harre CJ
May 31 1995

Legislation

Judicature Law s62(2)

Authorities referred to

Liggett (Liverpool) Ltd v Barclays Bank Ltd [1928] 1 KB 483
Underwood Ltd v Bank of Liverpool and Martins [1924] 1 KB 775
Re Cleadon Trust Ltd [1938] 4 All ER 518
Royal Bank of Canada v LVG Auctions Ltd (1985) LRC (Comm) 95
Esso Petroleum Company Ltd v Mardon [1976] 1 QB 801
DHN Food Distributors Ltd v London Borough of Tower Hamlets [1976] 3 All ER 462
Wadsworth v Lydall [1981] 2 All ER 401

Mr Croxford QC and Mr Giglioli for the plaintiff
Mr Lamontagne QC and Mr Boni for the defendant

The plaintiff was introduced to the defendant bank by B, who was already a customer of the bank. The plaintiff opened individual accounts on 16th February 1990. The mandates in respect of each account authorised the bank to honour only signed withdrawal orders. The plaintiff gave evidence that when he gave instructions to the bank by facsimile ('fax') he also spoke to a bank officer, and that he did not give withdrawal instructions in that way.

On 28th June and on 20th December 1990, the plaintiff instructed the defendant, by fax, to buy certificates of deposit ('CDS'). The fax was sent on the printed paper of Quantum Consulting Network Inc. ('Quantum'). The total sum deposited by way of CD was some US$900,000.

On 9th May 1991, instructions were sent to the defendant by fax, purportedly signed by the plaintiff, directing the defendant to break CD no. 5001697, to transfer US$500,000 to account no. 1081637 and to purchase a further six month CD with the balance. Account no. 1081637 was a joint account of the plaintiff and B which had been opened on 2nd April 1991 and on which either had authority to sign. On 28th May 1991, further instructions were sent by fax, again purportedly signed by the plaintiff, directing the defendant to break CD no. 5001628, to credit account no. 1079052 and to transfer US$400,000 to an account of Quantum in Atlanta.

The plaintiff discovered the two transactions on his return from India in June 1991 and claimed that the faxed instructions had been forged by B. The plaintiff had given no authority to any third party to give such instructions, nor had he given any instructions or authority to the bank to disclose any information to B. A bank official admitted that the defendant had sought unsuccessfully to verify the bogus instructions by telephone and had been fobbed

off by B, and that information had been given to B which enabled her to make up a shortfall of US$14,000 on the plaintiff's account so that the second transaction could be completed. After various broken promises by B to repay, the plaintiff instructed lawyers on 26th June. A settlement was reached with B. and proceedings were issued against the defendant in 1992.

Held: (judgment for the plaintiff)

(i) The plaintiff's mandate required that withdrawal instructions be signed by the plaintiff. It was not his practice to send such instructions by fax. A bogus facsimile signature could easily be appended to a document, and in any event an instruction bearing a facsimile signature could not be described as being signed by the person whose signature it purported to be. The enquiries made by the defendant were insufficient, and it paid out monies on the basis of inadequate and insufficient instructions. The defendant was therefore in breach of its duty to the plaintiff to use reasonable care and to honour his instructions.

(ii) The defendant was also in breach of its duty of confidentiality when it provided B with the information that funds were not available to cover the second withdrawal in full, enabling her to top up the funds from an account over which she had control in the sum of US$14,000 and so enable the transaction to proceed.

(iii) It was concluded by Wright J in Liggett (Liverpool) Ltd v Barclays Bank Ltd that the equitable doctrine, whereby a person who paid the debt of another without authority might be allowed to take advantage of his payment, should apply to a case where a cheque was paid by a banker without authority, so that the bank would be entitled to the benefit of that payment if it was shown that the payment discharged a legal liability of the customer. There was no authority or principle, least of all a principle of equity, which applied where a fraudster extracted money from a bank and subsequently succeeded in retaining some of it as part of a settlement of a disputed claim with the account holder who had been defrauded. The settlement had been arrived at with the knowledge and consent of the plaintiff, but without any acknowledgment of liability, and therefore fell far outside the equitable doctrine. The plaintiff was merely seeking to mitigate his loss. He had been placed in a difficult position by reason of the defendant's breach of duty and acted reasonably in the adoption of remedial measures.

(iv) The plaintiff was entitled to the following relief:

(a) Monies paid out by the defendant without authority and taken by B, less credit for the amount recovered from her; and

(b) Reimbursement of legal expenses in full. There was no reason to believe that the fees related to matters other than the civil dispute between the plaintiff and B. Furthermore, the fact that the plaintiff arranged for his legal fees to be paid by a company (Quantum) was not relevant to the question of establishing the defendant's liability towards him.

(c) An account of the penalty interest charged by the defendant on the purported surrender of the certificates of deposit before maturity and of the interest that would otherwise have accrued to the certificates had they not been broken.

(d) Costs to be agreed or taxed.

(v) There would be no award of pre-judgment interest pursuant to s.62(2) of the Judicature Law.

HRN

CIVIL PROCEDURE

Mareva injunction - Whether material non-disclosure - Whether a good arguable case - Security for costs - Whether injunction could be varied to allow funds for legal fees - Continuation of proceedings as if begun by writ.

In the Matter of A Bankrupt

Grand Court (207/95)
Smellie J
July 7 1995

Legislation

Grand Court Rules 1995 Order 15
Grand Court Rules 1995 Order 29 rule 2
Grand Court Rules 1995 Order 23 rule 1
Rules of the Supreme Court 1965 Order 23 rule 1
Rules of the Supreme Court 1965 Order 62

Authorities referred to

Rahman v Chase Bank (Channel Islands) Ltd
Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074
Brinks-MAT Ltd v Elcombe et al [1988] 3 All ER 188
Cuproquim Corporation v Plate and others (482/93)
American Cyanamid Co v Ethicon Ltd [1975] AC 396
The Niedersachsen [1984] 1 All ER 398
Crozat v Brogdem [1894] 2 QB 30
Maatschappij Voor Fondsenbezit and another v Shell Transport and Trading Company and others [1923] 2 KB 166
Tomlinson v Land and Finance Corporation 14 QBD 539
Namlooze v Bank of England [1948] 1 All ER 465
Cowell v Taylor (1886) 31 ChD 34
Pooley's Trustee v Whetham (1885) 28 ChD 38
PCW (Underwriting Agencies) Ltd v Dixon [1983] 2 All ER 158
In re Evans (dec'd) [1986] 1 WLR 101
National Anti-vivisection Society Ltd v Duddington (1989) The Times November 23
In re Beddoe [1893] 1 Ch 547
Bankers Trust Co v Shapira [1980] 3 All ER 353
A v C [1980] 2 All ER 347

Authoritative works

Underhill and Hayton The Law of Trusts and Trustees

Mr McDonough for the plaintiff
Mr Shea for the second and third defendants
Mr Parkinson for the proposed fifth defendant

The plaintiff had been appointed trustee in bankruptcy of the estate of the first defendant by the Bankruptcy Court of Pennsylvania. The plaintiff, the first defendant and the proposed fifth defendant were United States citizens resident in the United States. The second defendant, Sound Harbour Ltd, was a local land holding company and the third defendant, Beach Harbour Company, an exempt company which held the issued shares of the second defendant. On May 22 1985, the plaintiff obtained *ex parte* orders from the Grand Court restraining the first, second and third defendants from dealing with or disposing of their assets within the jurisdiction and requiring them to make full disclosure of the nature and location of all their assets. The plaintiff claimed that the first defendant was the beneficial owner of the specified assets which were registered or held in the name of the second and third defendants. As trustee in bankruptcy, the plaintiff claimed to be entitled to all the assets of the first defendant, whether held by him legally or beneficially and wherever situated.

In September 1984, the proposed fifth defendant ('the trustee'), a son of the first defendant, had purportedly been appointed trustee of a trust originally established in the Cayman Islands in 1979 at the behest of the first defendant. The trustee was also a beneficiary of the trust.

Although not finally formulated, the plaintiff's claim was that the trust should be regarded as a sham because the first defendant continued to deal with the underlying assets as if they were his own. It was further asserted that his reliance on the validity of the trust was merely a device to hide his assets from his trustee in bankruptcy with intent to defraud his creditors.

In a summons dated June 19 1995 the trustee sought the following relief:

(a) an order pursuant to Grand Court Rules 1995 Order 15 that he be added as fifth defendant;

(b) discharge of the *ex parte* injunction granted to the plaintiff on May 22 1995 on the grounds of material non-disclosure and/or failure to present a good arguable case that his claim for the trust assets would succeed;

(c) alternatively that in his capacity as trustee, he be permitted to withdraw from another trust account (hitherto unknown to the plaintiff), funds for the payment of legal fees to enable him to defend the trust against the claim;

(d) that the plaintiff, as a foreign plaintiff, be required to give security for the fifth defendant's costs in the trial;

(e) that directions be given for the proper conduct of the proceedings.

On June 20 and June 30 1995, the plaintiff filed two cross-summonses, seeking a Mareva injunction and security for his costs from the fifth defendant.

The summons of the second and third defendants sought a variation of the *ex parte* order of May 22 to allow them to withdraw funds to meet their legal fees.

Held: (order as follows)

(i) As the proceedings were at the interlocutory stage, the issues had to be resolved without delving too deeply into the merits of the case of either side.

As regards the continuance of the injunction, the court must not attempt to decide the merits of the claim on the affidavits; it was sufficient if the plaintiff showed that there was a serious issue to be tried (American Cyanamid Co v Ethicon Ltd).

(ii) On an *ex parte* application, a plaintiff must disclose relevant matters which ought to have been within his knowledge (Brinks-MAT Ltd v Elcombe et al). There was no evidence that the plaintiff ought to have known of the trust. It had not been disclosed in the schedule of assets filed by the first defendant in the Pennsylvania bankruptcy proceedings, and the plaintiff only became aware of Cayman Islands assets after obtaining copies of the documents from the Federal Bureau of Investigation who had conducted a search of the first defendant's home. None of those documents suggested that the Cayman assets referred to were held in trust. The plaintiff had brought to the attention of the court at the *ex parte* hearing all the documents he obtained or inspected as a result of the search. He had therefore done all that could reasonably have been expected of him at that time by way of disclosure of relevant material.

(iii) The order obtained by the plaintiff on May 22 1985 was a Mareva injunction, not an interim injunction of the type envisaged in American

Cyanamid Co v Ethicon Ltd which was intended simply to maintain the status quo. For either form of injunction, the plaintiff had to show a good arguable case. There was cogent evidence that the first defendant had continued to treat the underlying trust assets as his own and that he might have revoked the trust. If this were to be established at trial, the plaintiff, as trustee in bankruptcy, might arguably be able to show that the trust was a sham and that the first defendant was at all times the beneficial owner of the putative trust assets, which would thus fall to be treated as part of the estate in bankruptcy. The plaintiff had shown enough of an arguable case to justify the continuance of the injunction to trial.

(iv) Order 23 rule 1 of the Grand Court Rules 1995 conferred on the court a real discretion, which it was bound to exercise, whether or not to require security for costs. Security for costs should not be ordered for a defendant simply because the plaintiff was a foreign plaintiff, but only if it appeared just to do so in the circumstances of the case. The plaintiff's likelihood of success was a major factor to be considered (Porzelack KG v Porzelack (UK) Ltd), and if there was a strong *prima facie* presumption that the defendant would fail, security for his costs might be refused (Crozat v Brogdem).

It was inappropriate to order security for the plaintiff's costs from the fifth defendant. The fifth defendant had no choice but to join in the action (Maatschappij Voor Fondsenbezit v Shell Transport and Trading Co). As trustee of the trust under attack, he was obliged to take all reasonable and appropriate steps to defend the trust and its assets. From the limited examination of the merits thus far, the fifth defendant was no more likely to fail than the plaintiff was to succeed. Furthermore, any order for security against the fifth defendant would require him, as trustee, to meet it out of trust funds. There was no basis for an argument, at this stage, that he should be personally liable to meet the plaintiff's costs. The fifth defendant had been compelled to join in to defend the trust; it was irrelevant that he was an individual resident abroad; and the injunction remained in place to preserve any assets which might be found to belong to the plaintiff.

It was, however, just in the circumstances to require security from the plaintiff. Although the plaintiff had shown a good arguable case sufficient to justify continuance of the injunction to preserve the assets, he had not demonstrated a high probability that he would succeed. The plaintiff was a foreign trustee in bankruptcy seeking to enlarge the bankrupt estate by following assets in the Cayman Islands. Those assets were, at least ostensibly, trust assets. If the plaintiff were not to succeed at trial, the defendants' claim for costs would fall to be taken up by the bankrupt estate, and there was no evidence that the plaintiff was independently funded so as to be able to pay costs incurred in this jurisdiction. The probable insolvency of the plaintiff was not of itself a ground for requiring him to give security for costs (Cowell v Taylor). However, the plaintiff was from a jurisdiction where the concept of being made liable for costs, at least at first instance, was unknown, and he might therefore have overlooked the possibility of becoming liable in costs were he not to succeed at trial.

(v) It was a well-established principle that 'there is a discretion to make an order in terms which ensure that, win or lose, a litigant would be entitled to costs out of the property in dispute before the facts have been fully expounded and before the relevant law has been fully argued. And that discretion is most frequently exercised in favour of trustees and executors'. (In re Beddoe.)

It was inappropriate, on the limited evidence available, to presume a lack of title or bona fides on the part of the trustee, or on the part of the nominees behind the second and third defendants, simply because of the nature of the trust

arrangements.

The objective of the Mareva injunction was not to afford a plaintiff a form of pre-trial attachment of property or to allow him to exert undue pressure, but to prevent the injustice of a defendant removing or dissipating his assets so as to cheat the plaintiff of the proceeds of his claim (PCW Underwriting Agencies Ltd v Dixon). The plaintiff's claim was as yet only a claim, and the balance of fairness and convenience was in favour of allowing the defendants reasonable funds from the assets to be able to mount their defence.

(vi) Although begun on originating summons, the action could no longer properly be pleaded in that form. Now that the trust had come to the attention of the plaintiff, he was required to reformulate the nature and basis of his claim. The proceedings should therefore continue as if commenced by writ, pursuant to Order 28 rule 8 of the Grand Court Rules 1995, the plaintiff to file his statement of claim within the time to be allowed upon further directions to be given.

HRN

Application for leave to appeal against order varying a Mareva injunction to allow access to funds for payment of legal fees

In the Matter of A Bankrupt (No2)

Grand Court (207/95)
Smellie J
July 26 1995

Legislation

Grand Court Rules 1995 Order 29 rule 2
Rules of the Supreme Court 1965 Order 29 rule 2

Authorities referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396
Allsop Wilkinson v Neary and Others (unreported)
National Anti-Vivisection Society Ltd v Duddington (1989) The Times November 23
In re Beddoe [1893] 1 Ch 547
Bullock v Lloyds Bank [1955] 1 Ch 317
The Niedersachsen [1984] 1 All ER 398
In re Evans (dec'd) [1986] 1 WLR 101
The Iran Nabuvat [1990] 3 All ER 9
Re Universal and Surety Company Ltd [1992-93] CILR 157

Mr McDonough for the plaintiff
Ms Bridges for the fifth defendant
Mr Shea for the second and third defendants

The plaintiff sought leave to appeal against the order of the learned judge on July 6 1995, whereby the Mareva injunction granted on May 22 1995 was varied to allow the second, third and fifth defendants access to funds for payment of legal fees.

Held: (refusing leave to appeal)

(i) The order granted on May 22 1995 was in the nature and form of a Mareva injunction, expressed to bite upon specified assets to prevent their dissipation. It was not an order of the American Cyanamid type, nor was it an order made pursuant to Order 29 rule 2 of the Rules of the Supreme Court. A defendant who had a proper basis for defending a claim would ordinarily be allowed access to the injuncted funds in order to meet reasonable legal fees incurred in defending the claim.

(ii) It was a question of discretion whether the trustee and the second and third defendants should be allowed access to trust funds to enable them to defend the trust (National Anti-Vivisection Society

Ltd v Duddington).

There were special features in the instant case which distinguished it from Allsop, Wilkinson v Neary and others, in which the trustees' application for directions to defend the trust and for an indemnity for their costs was refused. In that case, in refusing the orders sought, the judge had clearly been persuaded by the apparent absence of merit in the trustees' defence of the settlements in dispute and by the presence of a strong *prima facie* case on the merits in favour of the plaintiff, even at that interlocutory stage.

The merits of the instant case would turn upon the resolution of the following issues: whether a settlor might revoke a trust which had been settled much earlier, by the manner of his subsequent dealings with the settled assets; and whether those dealings might have been permissible by virtue of discretionary powers reserved to the settlor through his purported appointment as trust protector. This might yet prove to be an important test case in the Cayman jurisdiction.

The fifth defendant, as trustee, was duty bound to defend the trust, and his joinder had been unopposed by the plaintiff. Refusal of access to funds would clearly operate as a shackle upon the ability of the trustee (fifth defendant, and upon the other defendants, to defend the trust. The amount of those costs, relative to the overall value of the trust assets, should not be such as to severely prejudice the outcome against the plaintiff. Furthermore, it was unlikely that the second and third defendants would require separate legal representation once the pleadings were finally settled. To have denied the trustee the ability and means to defend would severely prejudice the outcome in favour of the plaintiff. The plaintiff had failed to show a good arguable case on appeal against the aspects of the order varying the injunction to allow the defendants certain pre-emptive costs for legal fees from the trust fund.

The plaintiff had not satisfied the test for obtaining leave to appeal (The Iran Nabuvat). His application was therefore refused.

(iii) Issues raised on the trustee's summons at the previous hearing (joinder of the trustee as defendant; security for the trustee's costs; pre-emptive indemnity from the trust fund for the legal costs of defending the trust) might have been more suitably dealt with by way of a trustee's separate application for directions and a Beddoe-type application. Confusion as to the standard of proof applicable to the different issues might thus have been avoided.

(iv) The plaintiff was granted an extension of time for complying with the order of 6th July requiring him to pay security for the fifth defendant's costs. However, it was a matter for concern that the plaintiff, a foreign litigant, might not be fully committed to meeting any order of the Grand Court requiring him to pay the defendant's costs, particularly in view of his unexplained assertion to the United States Bankruptcy Court that he had not submitted to the jurisdiction of the Grand Court. It was therefore appropriate to express the order granting the extension of time in terms of an 'unless order'.

(v) Costs to follow the event.

HRN

Pre-trial determination of question of law - Order 14A

Brown v Green Thumb Nursery and Others

Grand Court (245/95)
Harre CJ
August 11 1995

Authority referred to

Tilling v Whiteman [1980] AC 1

Legislation

Grand Court Rules 1995 Ord 14A r1
Registered Land Law s140(2)

Mr Broadhurst for the plaintiff
Mr Turner for the third defendant
Mr Hellman for the second fourth and fifth defendants

The third defendant sought the determination of a question of law under Order 14A rule 1 of the Grand Court Rules 1995 without a full trial of the action. The question of law was whether a rectification of the Land Register should be made against the third defendant in the light of the Registered Land Law s.140(2), which imposes certain restrictions on the availability of rectification.

Held: (summons adjourned)

(i) The fact that matters of law of some complexity and importance were concerned did not render the procedure under Order 14A inappropriate.

(ii) To take advantage of the protection against rectification provided by Registered Land Law s.140(2), it was necessary that there was no knowledge, neglect or default by the third defendant in relation to the matters set out in that subsection. In order to determine the issue in this case it would be necessary to proceed on the assumption that certain matters of fact (namely, the knowledge, neglect or default for the purposes of s.140(2)) could not become issues as the action unfolded.

(iii) The test to be applied in deciding whether to utilise Order 14A was whether all the necessary and material facts had been duly proved or admitted so that the court was not required to hear evidence or make its own findings of fact. However, the present action was at an early stage of pleading; defences by the other defendants had been filed on the day of judgment, no discovery had taken place, and amendment of the statement of claim was anticipated. Therefore the application for determination of the issue was premature.

Once the pleadings were closed and discovery had taken place, the issue might become suitable for determination under Order 14A. Accordingly the summons would be adjourned sine die with liberty to restore.

SAAC

Mareva injunction - Whether disclosure orders formed part of injunctive relief - Whether leave was required to appeal against the disclosure orders

Grupo Torras SA and Torras Hostench London Ltd v X Bank Ltd and Others

Grand Court (271/95)
Smellie J
September 7 1995

Legislation

Court of Appeal Law s4(f)(ii)

Authorities referred to

Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose) (No2) [1991] 4 All ER 781
House of Spring Gardens Ltd v Waite [1990] 2 All ER 990

The Iran Nabuvat [1990] 3 All ER 9

Mr McLaughlin for the plaintiff
Mr Moses for the 1st - 4th defendants
Mr Murray for the 5th and 6th defendants

The court was called upon to decide whether discovery orders previously made affecting the first to the fourth defendants were an integral part of a Mareva injunction which had been granted against the defendants.

It was argued on behalf of the plaintiffs that if the two provisions were unseverable then no leave was required to appeal against those aspects of the order dealing with discovery since they could be regarded as part of the injunction (Atlas Maritime Co SA v Avalon Maritime Ltd). If the provisions were severable it was conceded that leave would be required.

S.4(f)(ii) of the Court of Appeal Law states:

'No appeal shall lie without the leave of the Grand Court, or of the Court of Appeal, from an interlocutory judgment made or given by a judge of the Grand Court except where an injunction...is granted or refused.'

The matter for determination was whether the present situation fell within the meaning of 'injunction' under section 4.

The plaintiffs also argued that the ambit of the disclosure orders were limited and inconsistent with the injunctive orders and sought leave to appeal.

Held: (leave to appeal dismissed)

(i) Although there was authority for the proposition that disclosure orders could be made for the purpose of policing or monitoring the efficacy of a Mareva injunction (House of Spring Gardens Ltd v Waite), that principle did not provide an answer to the question whether a disclosure order was to be regarded as necessarily a part of an injunctive order for the purposes of determining whether leave to appeal was necessary. Moreover, the discovery order had been granted in this case primarily to assist the plaintiffs' tracing claim and not to police the injunction.

(ii) It could not be correct to hold that for the purposes of determining whether leave to appeal one aspect of an order was required, reference should be made to whether leave was required for another aspect. Accordingly, the reference within section 4 to 'injunction' meant precisely that and did not extend to other types of orders which might be made ancillary to it. The Law contemplated the special nature of an injunctive order and the possible need to seek relief against it by way of appeal on an expedited basis without having first to obtain leave.

(iii) For the above reasons, the discovery aspects of the order were separate and distinct from the injunctive aspects and leave was required in respect of the discovery aspects, they being for all present purposes, interlocutory orders.

(iv) In response to the contention that the disclosure orders should have been tailored so as to be coextensive with the injunctive orders to avoid inconsistency, the separate and distinct principles which governed the exercise of the discretion in each case were to be emphasised. Some important factors which influenced the exercise of that discretion and which served to limit the ambit of the discovery were the absence at that time of a statement of claim, the expiry of the usual time for the filing of the statement of claim and the duty of the court in those circumstances to ensure that its process was not abused by an over-zealous plaintiff seeking information upon which to mount an action. The rules of pleading which served to protect even those

defendants alleged (but not proven) to have acted fraudulently were not lightly to be abused. It was also important to be mindful of the fact that others, besides the alleged fraudster, may be yet able to assert a beneficial interest in the assets and in the confidential information in question.

(v) For the above reasons, an appeal which was to be mounted on the grounds of inconsistency in the order was not arguable within the principles set out in The Iran Nabuvat. Accordingly leave to appeal would be refused.

AD

Editor's note: For related litigation see pages 22 and 23-24 infra.

Expert evidence on foreign law - Presentation

X v Y Trust Co Ltd and Others

Grand Court (296/94)
Harre CJ
June 19 1995

Authority referred to

AG v Royal Trust Co [1983-86] 36 WIR 1

Mr Foster for the plaintiffs
Mr Helfrecht for the first defendant
Mr Alberga QC and Mr McLaughlin for the second defendant
Mr Clifford for the third defendant
Mr Barrie for the twenty-fourth to seventy-third defendants

By an earlier order the parties were given leave to adduce expert evidence on the law of the Bahamas. It was accepted by the parties that in many respects Bahamian law on the issue mirrored English law.

The second defendant presented an affidavit by a member of the Bahamian Bar, which contained an extensive review of the English authorities. The plaintiffs presented an affidavit by a member of the Bahamian Bar, in which the expert gave his opinion on matters in respect of which Bahamian law differed from English law, but in which it was stated that the expert understood that the English authorities would be dealt with by submissions not evidence.

The plaintiffs brought the present summons in which they contended that where a principle of Bahamian law was the same as English law, English law should be presented by submissions and not by expert evidence; and that where English law was presented by way of sworn evidence or written statement, then the evidence should be challenged by submissions not cross-examination.

Held: (summons dismissed)

The fact that sources of law for one forum may apply elsewhere, including the domestic forum, was not significant. Accordingly, the fact that Bahamian law on the relevant issues was the same as English law did not mean that it did not have to be proved to the court. The principles of Bahamian law were therefore to be presented by way of expert evidence not submissions.

SAAC

Editor's note: The succeeding two summaries concern related litigation

Leave to adduce further evidence - When to hear application

X v Y Trust Co Ltd and Others (No2)

Grand Court (296/94)
Harre CJ
July 12 1995

Mr Foster for the plaintiffs
Mr Helfrecht for the first defendant
Mr Alberga QC and Mr McLaughlin for the second defendant
Mr Clifford for the third defendant
Mr Barrie for the twenty-fourth to seventy-third defendants

Following the ruling of June 19, the plaintiffs sought leave on the first morning of the trial for an order that they could adduce further expert evidence on Bahamian law insofar as it was the same as English law. The second defendant contended that the court should hear an application for an order to the opposite effect immediately.

Held: (declining to hear application immediately)

(i) It was necessary to consider the prejudice to the plaintiffs if the application were heard immediately, and the prejudice to the second defendant if the application were heard at trial.

(ii) In this case, the second defendant knew perfectly well what the additional expert evidence would be, if allowed, and would be in a position to deal with it quickly. Work done by the second defendant in preparation for that might be wasted if the application was refused at trial, but such costs would be insignificant because of the huge amounts of money involved in the case and because of the great public interest involved. The application should be heard in the context of the trial itself when all counsel were present, rather than immediately at short notice.

SAAC

Stay of proceedings - Forum non conveniens

X v Y Trust Co Ltd and Others (No3)

Court of Appeal (M2/95)
Smellie J
June 19 1995

Legislation

Court of Appeal Law s16(3)

Authorities referred to

Becker v Bank of Nova Scotia [1986-87] CILR 389
Imbar Maritima SA v Republic of Gabon [1988-89] CLCR
Ashmore v Corp of Lloyd's [1992] 2 All ER 486
Wilson v Church (No 2) (1879) 12 Ch 454
Spiliada Maritime Corporation v Cansulex Ltd [1987] 1 AC 460
Carl Zeiss Stiftung v Rayner and Keeler Ltd [1966] 2 All ER 536
S Ltd v A Ltd [1988-89] CILR n-4

Mr Alberga QC for the appellant
Mr Etherton QC and Mr Foster for the first and second respondents
Mr Helfrecht for the third respondent
Mr Clifford for the fourth respondent

This was an application by the appellant for a stay of the order of the Grand Court, given on 11 April 1995, which dismissed his application for a stay of proceedings.

The appellant was the plaintiff in an English action claiming, *inter alia*, that certain Cayman Islands trusts were void. In cause 296/94 the trustees sought directions from the Grand Court as to how to

proceed, and the appellant was joined as a defendant to the summons. The appellant sought a stay of the action on the ground that the Cayman Islands were not the appropriate forum for the hearing of the cause. On 11 April 1995 the application for a stay was dismissed and the court ordered the trial of two preliminary issues relating to the validity of the trusts; the court gave leave to appeal, but refused a stay pending the appeal.

The appellant then sought an order that the trial of the preliminary issues be not heard until the disposal of his appeal against the decision not to grant a stay. On 12 May 1995 this order was refused by the Grand Court.

The current summons was a further application for a stay of the ruling of 12 May 1995 brought by the appellant before a single judge of appeal.

Held: (refusing to grant stay)

(i) This application was not an appeal against the order of the Grand Court of 12 May 1995, but a separate application to be considered in the court's discretion (Becker v Bank of Nova Scotia). The decision of the Grand Court was an important matter in the exercise of discretion but it was required that the court should have regard to whether the stay would operate to render the appeal, if successful, nugatory (Imbar Maritima SA v Republic of Gabon).

(ii) Following Wilson v Church, the onus lay on the appellant to show that a successful appeal would be rendered nugatory, and therefore that the stay should be granted, unless the refusal of the stay would *prima facie* operate to the detriment or impairment of some substantive right of the appellant.

(iii) To show the impairment of a substantive right it was insufficient to show the following: that the Court of Appeal could be influenced in its decision on the forum question by the fact that the preliminary trials had taken place before the appeal; that even if the Court of Appeal accepted that the Cayman Islands were not the proper forum for the action, the Court of Appeal could nevertheless accept that the Cayman Islands were the proper forum in relation to the preliminary issues, which could prejudice the English action on the basis of *estoppel per rem judicatem;* that the trial of the preliminary issues in the Cayman Islands could influence the decision of the English court on the forum question.

If the Court of Appeal determined that the Cayman Islands were not the proper forum, it could unwind the proceedings, and the appellant had therefore failed to show a substantive right which would be prejudiced in the event of a successful appeal.

(iv) Furthermore, there would be tangible procedural and juridical advantages to the respondents if the trial of the preliminary issues proceeded, and considerable prejudice to each of the respondents if a stay were granted.

(v) The possibility that costs in the trial of the preliminary issues would be wasted if the appellant were subsequently successful in the Court of Appeal, was not a significant factor in the exercise of discretion to grant a stay. The appellant was unlikely to be prejudiced any marginally additional costs.

SAAC

Trustee's application for directions - Filing of affidavits - Exchange of affidavits between protector and beneficiaries

X Bank Ltd v Unyleven Corporation SA

Grand Court (282/95)
Harre CJ

August 22 1995

Authorities referred to

Re Moritz [1960] Ch 251
Re Eaton [1964] 3 All ER 299

Mr Boni for the plaintiff
Mr Foster for the defendant
Mr Paget-Brown for the beneficiaries
Mr Helfrecht for the Attorney-General

The plaintiff was a trustee and the defendant was a protector of that trust. The trustee was preparing an application for directions in the Grand Court as to the conduct of its own case in certain proceedings in New York (which had been brought by the beneficiaries against both the trustee and the protector), and whether it was appropriate for the costs and expenses of the protector to be funded from the trust assets.

In the current summons, the issue concerned the method of presenting the evidence relating to the application for directions. The beneficiaries sought written details of the protector's intended submissions to the court in the application for directions, and the grounds for such submissions, and sufficient time for the beneficiaries to file evidence in response.

The protector declined to furnish in advance of the application for directions the material on which it intended to rely for its submissions, and argued that the supporting affidavits of all parties should be filed and exchanged simultaneously, and not filed by way of reply one to the other.

Held: (ordering simultaneous presentation of evidence)

It was wrong to compel the protector and beneficiaries to exchange affidavits in the application for directions which were brought by the trustee, despite the community of interest existing between the trustee and the protector in defending the New York proceedings. The application for directions should not become a mini-trial of the issues to be raised in the New York proceedings, except to the extent necessary to deal with the trustee's own application. Accordingly, the evidence presented by the parties in response to the application by the trustee should be presented simultaneously.

SAAC

Procedure - Action filed after limitation period - Leave to amend pleading and proceed

B v WE Ltd and Another

Grand Court (116/94)
Harre CJ
September 4 1995

Legislation

Limitation Law Ss 39 and 41(5)
Grand Court Rules O 20 rr 4 and 5(5)

Mr Roy for the plaintiff
Mr Giglioli for the defendants

The plaintiff filed a writ and statement of claim on April 11 1994 within the applicable limitation period. A summons was sought to strike out the claim as disclosing no cause of action. The summons was adjourned to a date to be fixed in order to enable the plaintiff to amend his pleading. A year later, and after the limitation period had expired, the plaintiff applied for leave to amend the pleading and proceed.

Held: (refusing leave)

(i) This was a first amendment, for which leave was not normally required but it was understandable that the plaintiff was seeking leave to proceed at the same time.

(ii) S.39 Limitation Law gave the court a discretion to exclude the limitation provisions of s.13 provided certain listed circumstances existed. No evidence had been adduced as to the existence of any of those circumstances. It was therefore necessary to consider the Rules of the Grand Court, and in particular Order 20 rule 5(5) which reflected s.41(5) Limitation Law. This rule looked for a new cause of action arising out of the same facts or substantially the same facts as were already in issue on any claim made in the original action. In the present application, there were no facts already in issue because nothing had been pleaded in the original statement of claim upon which issue could be joined. Order 20 rule 5(5) could therefore not help the plaintiff.

For the above reasons, leave to amend the statement of claim had to be refused.

AD

Evidence - Request for documents to be used in proceedings in another jurisdiction - Failure to particularise the requested documents

In the Matter of the Ontario Securities Commission and Robinson and Others

Grand Court (405/94)
Smellie J
January 10 1995

Legislation

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

Mr Moses for Ontario Securities Commission
Mr Jones for Robinson
Mr McDonough for X Bank and Trust

The applicants, through the Ontario court, sought an order in the form of a letter of request directed to the Cayman court, for documents to be used in proceedings in Ontario. Upon the Cayman court obtaining the letter of request, it was discovered that it did not identify any particular documents for the purposes of the order.

Held: (denying the request in part)

(i) As presently framed, the request did not meet the standard laid down by s.2(4)(b) of the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978. Although the court was satisfied from the available and admissible evidence that there was likely to be documentation obtainable from witnesses which would be relevant to the proceedings forming the subject matter of the request, those documents had to be specified with sufficient particularity to meet the requirements of the Evidence Order.

(ii) The court was mindful of the considerations of judicial comity to assist in such a request, but on this occasion an attempt on the part of the court to specify particular documents, or classes of documents, would entail in effect, rewriting the request. In this state of uncertainty, the matter was to be referred back to the Ontario court. An aspect of the request seeking oral testimony would be granted subsequent to the resolution of the request for documentary evidence.

(iii) The witnesses against whom the order was sought were entitled to their costs as their

representation before the court was justifiable. They had incurred the costs as a result of errors made by the Commission in the formulation of their request before the Ontario court which had resulted in the reference back to that court.

AD

Mareva injunction - Application to vary terms - Seeking disclosure of information relating to trust assets

Grupo Torras SA and Torras Hostench London Ltd v X Bank and Others

Grand Court (271/95)
Smellie J
August 7 1995

Authorities referred to

Bankers Trust Co v Shapira and others [1980] 1 WLR 1274
Hytrac Conveyors Ltd v Conveyors Ltd v Conveyors International Ltd and others [1982] 3 All ER 416
Re Cayman Capital Trust Co [1992-93] CILR n-17
Banque Belge pour L'Estranger v Hanbrouck [1921] 1 KB 321
Initial Services Ltd v Putterill [1968] 1 QB 396
Re Hallett's Estate [1879] Ch 696

Mr Jones for the plaintiffs
Mr Moses for the 1st - 4th defendants
Mr Beltrami for the 5th - 6th defendants

The 5th and 6th defendants, BS and MS, applied to discharge or vary a Mareva injunction granted against them *ex parte*. The first defendant was a trustee for a trust set up by a settlor who was not named as a party to the proceedings in Cayman. The second third and fourth defendants also held part of the trust assets. The settlor was the primary beneficiary and his wife and son were contingent beneficiaries.

The plaintiffs' writ filed in Cayman made a claim to all the assets of the trust which had hitherto been set up in the Bahamas. The plaintiffs were also seeking discovery of matters relating to the trust in the Cayman Islands. An action for fraud involving millions of dollars had been commenced against the settlor in England. Two hundred million dollars of the proceeds of the alleged fraud remained unaccounted for. The Cayman writ was unaccompanied by a statement of claim and the period for filing such statement of claim had expired. It was submitted on behalf of the plaintiffs that the statement of claim would be based on two primary grounds namely: (i) a proprietary tracing claim for known and specified assets; and (ii) a restitutionary claim for monies of the plaintiffs in the possession of the trustees.

The basic questions facing the court were: (i) whether the plaintiffs could continue to be entitled to the Mareva injunction; (ii) whether they were entitled to early orders for disclosure of affairs about the trust; and (iii) how far the court should be influenced in making any orders by evidence of a *prima facie* case of fraud against the settlor in England in the absence of a statement of claim.

Held: (allowing disclosure)

(i) The first defendant had to hold itself neutral to the rival claims of the trust assets and was to ensure that nothing was done to dissipate or divest the funds until the claims had been resolved. The first defendant, according to the original terms of the Mareva injunction, had to maintain full control of the other defendant trust companies.

(ii) The court was duty-bound to assist a plaintiff who had established a strong *prima facie* case of fraud by ensuring that assets still at the behest of the fraudster were preserved to meet a proper claim to be established. That was the rationale of the injunctive powers vested in the court when it was shown that there existed a risk of dissipation. The court was also duty-bound to assist such a plaintiff by way of disclosure orders to trace and recover the proceeds of the fraud. This was to be done in an appropriate case even at the interlocutory stages (Bankers Trust Co v Shapira and others).

(iii) It mattered not whether the party holding the information did so as a fiduciary of the fraudster or as a neutral and innocent person. The power was Draconian and invasive and the court had a duty to ensure that the process was not abused, even by a plaintiff who had shown a strong *prima facie* case of fraud, in order to obtain unwarranted advantages in the conduct of the litigation. In particular, the court was to be alive to the danger of allegations of fraud being used to facilitate plaintiffs in 'fishing expeditions' (Re Cayman Capital Trust Co). Early discovery should only be ordered if necessary to enable the assets to be traced and to enable justice to be done (Bankers Trust v Shapira).

(iv) The court's decision therefore had to reflect the balance to be struck having regard to the foregoing principles, in particular, the early stage of the proceedings at which such applications were made. Even if a *prima facie* case of fraud had been established against the defendants, they were entitled to expect that the rules of the court would not be abused to their disadvantage. They stood to be prejudiced by the unwarranted early disclosure of confidential information about the trust.

In response to objections based upon the loss of confidentiality: a plaintiff who has been defrauded has a right in equity to follow the money. He is entitled to lift the latch of the banker's door: Banque Belge pour L'Estranger v Hanbrouck.

(v) For the above reasons, the injunction would not be set aside. The evidence suggested that the funds in the trust in Cayman represented a portion of a larger sum in the possession of the settlor. Having regard to the fact that the plaintiffs had yet to plead their case, any order of the court was to reflect the extent to which disclosure of the trust assets should reasonably be required at this early stage. The decision also had to reflect the removal of urgency as a basis for early disclosure consequent upon the granting of injunctive relief.

Whilst the orders contained in the injunction would be varied, the first defendant was nevertheless required, within 7 days, to disclose all corporate records of the 2nd, 3rd and 4th defendants within their possession, custody and control, and records of assets held by the said defendants in respect of which any part of the sum of $2.4 million (mentioned in the settlor's affirmation in England) may have been used in addition to information relating to $3 million said to have been paid into the account of a company in the Bahamas.

AD

CONFIDENTIALITY

Attorney - Conflict of interest - Duty of confidentiality to client - Firm acting for client against former client - Information obtained from former client relevant to subsequent litigation against him - Whether injunction should be granted to restrain firm from acting against former client

AS v A Law Firm and Others

Grand Court (313/95)
Smellie J
August 15 1995

Legislation

Confidential Relationships (Preservation) Law
Legal Practitioners Law s7

Authorities referred to

Re a Firm of Solicitors [1992] 1 All ER 353
Rakusen v Ellis Munday and Clarke [1911-13] All ER Rep 813
Re a Firm of Solicitors (1995) The Times May 9
Bricheno v Thorp (1821) Jac 300
Pavel v Sony (unreported)

Mr Beltrami for the plaintiffs
Ms Bridges for the first second and third defendants
Mr Moses for the fourth fifth sixth and seventh defendants

This was an application by the first and second plaintiffs ('the applicants') for an injunction to restrain the first defendants from continuing to act as attorneys for the second and third defendants.

The first defendants (X) were a firm of attorneys who were representing the second and third defendants, G SA ('G') and T Ltd ('T') in Cause 271 of 1995, a tracing action which had been commenced in the Cayman Islands and in which G and T were the plaintiffs. The tracing action was related to other proceedings in England and in five other jurisdictions. An order obtained in the English proceedings required F, one of the defendants in the global action, to disclose details of his assets. It came to light that he had settled or funded various trusts, including the C trust, a trust domiciled in the Cayman Islands. The applicants (the wife and son of F), who had been joined as defendants in Cause 271 of 1995, brought this application for an injunction in their capacity as contingent beneficiaries of the C trust.

The fourth defendant, B Ltd, was trustee of the C trust and had been advised by X, through its trust attorney, as to its potential duties as trustee. Over a period of some three weeks in January 1993, X obtained confidential information concerning assets of the C trust, as well as extensive background information about the affairs of the trust, the settlor and the beneficiaries.

X were now acting for G and T, the plaintiffs in Cause 271 of 1995, who claimed that money stolen from them was traceable to all the assets of the C trust. G and T had obtained *ex parte* orders in Cause 271 of 1995 restraining the assets of the C trust and requiring full disclosure of its assets. The applicants' objections to these orders were to be heard at inter partes hearings on August 2 and 3. The applicants maintained that there was a continuing risk of disclosure or abuse of confidential information so long as X represented G and T in Cause 271 of 1995.

Held: (order as follows)

(i) It was necessary to strike a balance between the public policy of: (a) allowing persons to be represented by attorneys of their choice and allowing attorneys to accept clients of their choice; and (b) preserving confidence in attorney-client relationships and avoiding the possible embarrassment which conflicts of interests might present. The approach of the majority of the English Court of Appeal in Re a Firm of Solicitors, endorsing the rules contained in the Law Society's Guide to the Professional Conduct of Solicitors on conflicts of interest, provided a salutary model for the balance to be struck between the two competing public interests.

(ii) The proceedings in Cause 271 of 1995 could

properly be treated as divisible into two separate stages. Applying the test adopted by the Court of Appeal in Re a Firm of Solicitors, there was no real risk of divulgence of confidential information during the first stage (up to and including the hearing of the application to discharge the *ex parte* orders): the file of X would be secured; the trust attorney of X was on leave in Europe; undertakings had been given by counsel of the litigation department of X that they would not seek to obtain divulgence of confidential information and would immediately resign from the case should such information come to their attention; further undertakings had been given that members of the auxiliary staff who might have had access to such information would be advised of the importance of not discussing the matter with other members of staff. G and T would suffer undue hardship if required to change their representatives at very short notice, therefore X would not be restrained from acting for them during the first stage.

(iii) If anything less than full disclosure of confidential information about trust assets were to be ordered by the court following the hearing on August 2, the conflict of interest faced by X would be of the most acute kind. They would be acting against a former client in an action, the subject matter of which was the very same matter on which they had advised the former client. The erection of a 'Chinese wall' could not entirely eliminate the real risk of a breach of the duty of confidentiality during the second stage of the action. The trust attorney and his support staff occupied the same premises as the litigation department; in this case the conflicts check relied upon by X as a safeguard against the acceptance of briefs against former or existing clients had not been effective as the firm had failed to recognise the conflict before accepting the brief to act against the trustee; furthermore, the trust attorney might be called as a witness.

Against this background, a reasonable client might still anticipate a risk of mischief or prejudice, irrespective of the level of confidence the court reposed in the integrity of the firm. There was no evidence to suggest that G and T were unable to obtain other suitable representation for the second stage of the proceedings. X was therefore to be restrained from further acting on behalf of G and T in Cause 271 of 1995, so long as the disclosure of confidential information belonging to their former clients remained an issue. X was also to be restrained from disclosing to G and T any information concerning the assets and affairs of the C trust which had been obtained as a result of their prior representation of the fourth defendant.

HRN

Disclosure of confidential information - Application for directions - Whether a strong prima facie case was shown to exist - Whether a °°fishing expedition' - Public policy

In the Matter of the Confidential Relationships (Preservation) Law

Grand Court (123/95)
Smellie J
July 14 1995

Legislation

Confidential Relationships (Preservation) Law Revised Ss 3 and 4

Authorities referred to

Bankers Trust Co v Shapira [1980] 1 WLR 1274
Cuproquim Corporation v Plate and Others (482/93)
UJB Financial Corporation v Chilmark Offshore Capital Fund Ltd [1992-93] CILR 53

In the Matter of Bank America Trust and Banking Corporation (Cayman) Limited [1992-93] CILR 574
In the Matter of ABC Ltd [1984-85] CILR 130
Attorney-General v Bank of Nova Scotia [1984-85] CILR 418
In the Matter of Bank of Credit and Commerce International (Overseas) (in liquidation) [1994-95] CILR 56

Mr Alberga QC for the applicant
Mr Murray for the liquidators of X Bank Ltd (in liquidation)
Mr Jackson *amicus curiae*

This was an application for directions under s.4 of the Confidential Relationships (Preservation) Law (Revised).

X Bank Ltd ('X Bank') was named as tenth defendant to an action brought by Hill Samuel Bank Ltd in the English High Court. The other defendants were six named individuals, a firm and three corporate entities. The plaintiff bank alleged against a number of the individuals that, as a result of misrepresentations made by certain defendants and aided and abetted by others, it had been induced to extend credit or loan facilities to one or other of the defendants. It was also alleged that certain defendants had been clients of X Bank.

An order was made by the English High Court on March 19 1993, (a) requiring X Bank to disclose confidential information about other defendants, (b) granting leave to the plaintiff to serve the pleadings and the order out of the jurisdiction and (c) granting a Mareva injunction restraining X Bank from disposing of or otherwise dealing with any assets within the jurisdiction of the High Court on behalf of other named defendants. X Bank (not then in liquidation) was served in the Cayman Islands. F, at that time a director of X Bank acknowledged service on its behalf. F also filed an affidavit deposing that X Bank held no deposit or account in the names of any of the persons named in the order, that X Bank held no assets for them anywhere and that none of the parties was a shareholder or held any beneficial interest in X Bank. F did not consider these negative averments to have involved the disclosure of confidential information and therefore did not seek the leave of the Grand Court before responding to the High Court order.

F subsequently discovered that his affidavit was incorrect and alerted the High Court to this fact, but without divulging the confidential information of which he now had actual knowledge. F then applied to the Grand Court for directions pursuant to s.4 of the Confidential Relationships (Preservation) Law.

Held: (refusing to order disclosure)

(i) Although the principles of judicial comity required the Grand Court to assist the English court by honouring its orders in this jurisdiction, for the following reasons it appeared improper to do so in this case:

(a) Where a strong *prima facie* case was shown to exist, a plaintiff bank was entitled to early discovery in wide terms in aid of a Mareva injunction and to enable it to trace and recover its assets (Bankers Trust v Shapira). Information about the nature of the English proceedings was scanty. It was submitted on behalf of the applicant that X Bank had been joined as a defendant solely for tof other defendants. There was insufficient evidence to justify directions which would allow X Bank to respond in terms of the order.

(b) Furthermore, the order of the English court was so wide as to amount to 'fishing'. In particular, the order required disclosure of confidential information about the affairs 'of any other person' with whom or on whose behalf any of the defendants held or had held any assets. Such disclosure might unfairly affect persons who were complete strangers to the

allegations raised in the English proceedings. The order also sought full disclosure of the identities and addresses of all persons who had been directors of X Bank or who had any legal or beneficial interest in the bank. There was nothing to suggest that X Bank or its officers had acted knowingly in concert with the principal alleged wrongdoers. The allegation appeared the ordinary course of conduct of that business was not a proper basis for the order.

(c) There was no evidence of any wider allegations against X bank, but in that case there were more appropriate ways of obtaining evidence in aid of foreign proceedings. For example, a request by letters rogatory would afford the Grand Court the opportunity to assess whether the information sought should be divulged for the purpose of the English proceedings. This would afford both the requesting and the requested court the means by which to meet the obligations of judicial comity.

(d) Issues of public policy arose whenever an order of a foreign court sought directly to compel the divulgence of information deemed confidential by local confidentiality laws. In exercising its discretion under s.4, the Grand Court sought to strike the proper balance between (a) the public interest in enabling the just resolution of disputes between parties and (b) the public interest in preserving confidentiality of information obtained in the course of professional relationships (In the Matter of ABC Ltd).

(ii) The bank's possible exposure to sanctions for contempt of the foreign court's order, should it fail to comply, did not of itself justify disclosure. Once served with an order requiring it to give confidential information in evidence, a bank was required to seek directions from the Grand Court, unless the principal had clearly and appropriately consented to disclosure. It was then the duty of the bank to comply with the court's directions (Attorney-General v Bank of Nova Scotia).

(iii) It was not submitted that X Bank wished to disclose the confidential information in order to defend itself, therefore it did not seek to rely on s.3(2)(b)(v). Furthermore, the apparent consent of some of the named defendants to the divulgence of certain information was not unqualified consent and could not be acted upon by X bank as authority to disclose information which might also affect third parties.

HRN

CRIMINAL LAW

Construction of statutory offence - Whether an offence of strict liability - Principles to be applied

R v Columbus Ltd

Summary Court (3630/94)
Jackson Mgr
November 30 1995

Legislation

The Labour Law Ss 41 66 68 72 73 74
The Interpretation Law (1995 Revision) s43

Authorities referred to

Lord Cloncurry v Fenton [1926] 1 Ch 992
Allard v Selfridge and Co Ltd [1925] 1 KB 129
Sherras v De Rutzen [1895] 1 QB 918
Gammon Ltd v AG of Hong Kong [1985] 1 AC 1
Haughton v Smith [1973] 3 All ER 1109
Customs and Excise Commissioners (ex parte Claus) (1987) 86 Crim App R 189

Mr Bulgin for the Crown
Mr Helman for the defence

Columbus Ltd was charged with refusal to comply with an order of the Director of Labour, contrary to s.68(1) Labour Law. Specifically, it was alleged that the defendant had failed to comply with an order of the Director, made pursuant to s.41 Labour Law, to make severance pay to several ex-employees by June 22 1994.

Counsel for the defence, whilst admitting that no payments had been made, sought to argue that the offence charged was not one of strict liability in that the word 'refusal' within s.68(1) indicated a requirement of *mens rea* in keeping with its ordinary everyday meaning.

Held: (s.68(1) Labour Law is an offence of strict liability)

(i) Whilst a presumption of *mens rea* attached to all offences, both common law and statutory, account was to be taken of the relevant severity of the offence under consideration (Sherras v De Rutzen).

(ii) In determining whether the employment of the word 'refusal' within s.68(1) connoted a requirement of *mens rea*, regard was to be had to its context. It was not appropriate to import definitions of the term rendered at common law, where strict liability probably never arose.

(iii) The definition to be applied by the court to the term 'refusal' within s.68(1) did not imply any element of volition, in the sense of 'unfettered free choice'. The word in the present context meant no more than non compliance with a statutory duty.

(iv) in reaching this conclusion the court adopted the criteria laid down by Lord Scarman in Gammon Ltd v A.G. for Hong Kong. In particular, the following principles, therein expressed, were germane to the present case:

(a) the presumption of *mens rea* is particularly strong in relation to those offences which are 'truly criminal' in character. The refusal to comply with the Director's order was best described as 'quasi criminal' or a regulatory transgression with penal sanctions attaching. Such sanctions, for a first summary conviction, were expressed in s.73 (1) Labour Law as being a fine not exceeding $500 or a term of imprisonment of six months, or both. Where the likely penalty was a limited pecuniary one (as here, where the defendant was a corporation which could not be incarcerated) the conclusion of strict liability was favoured (Customs and Excise Commissioners (ex parte Claus), as was also the case where the offence was summary in nature. A comparison with s.74(1) Labour Law was also instructive where the *mens rea* terms of 'wilfully' and 'knowingly' were, by contrast, employed thereby providing further indication of the strict nature of the present offence.

(b) The presumption of *mens rea*, common to both statutory and common law offences, was only to be displaced if this was clearly or by necessary implication the effect of the statute. The language of the present offence did not 'clearly and unambiguously' import words of *mens rea*. Furthermore, the proscribed activity was not criminal in itself but was activity which, in the public interest, had been prohibited under penalty.

(c) In order that the presumption of *mens rea* be displaced it was also necessary for the statute to relate to a matter of social concern. Both the content of the Labour Law and the debate on its provisions when before the Legislative Assembly testified to it satisfying this criterion.

(d) The offence was not to be construed as one of strict liability, even if the foregoing considerations were satisfied, unless the imposition of strict liability would be effective in promoting the objects of the statute.

A successful complainant had a right to receive the sums awarded by the Director within a reasonable time. If s.68(1) were construed as an offence requiring proof of *mens rea* it would not only give rise to unacceptable delays but would also render the prosecution of non compliant employers more difficult, thereby encouraging them to disregard the decisions of the Director and the objectives of the Labour Law.

Conversely, by construing s.68(1) as an offence of strict liability, employers made subject to an order of the Director would know that any failure to comply with such order would quickly give rise to criminal sanctions.

(v) For the foregoing reasons, the offence under s.68(1) Labour Law was one of strict liability.

MD

CRIMINAL LAW - SENTENCING

CRIM. APP. NO.	CASE NO.	OFFENCE	SENTENCE
14/94	1221/93	Causing G.B.H.	7 years Imp.
28/94	1551/93	Causing G.B.H.	5 years Imp. (Conc. with 1221/93).
18/94	3648/93	Burglary	6 months Imp. + $20.00 Compensation order within 1 month of release
19/94	3648/93	Burglary	6 months Imp. + $20.00 Compensation order within 1 month of release
22/94	3168/93	Possession of ganja with intent to supply	2 years Imp. (Consec. to 3362/93).
22/94	3362/93	Unlawful wounding	12 months Imp.
22/94	1828/93	Common assault	9 months Imp. (Consec. to 3168/93).
22/94	2184/93	Damage to property	3 months Imp. (Conc. with 3362/93).
22/94	2248/93	Failure to provide urine specimen	6 months Imp. (Conc. with 3168/93).
22/94	4311/92	Assault occasioning A.B.H.	3 months Imp. (Conc. with 3362/93).
25/94	316/93	Arson	3 years Imp.
25/94	317/93	Attempt to destroy property by explosives	3 years Imp. (Conc.)
35/94	316/93	Arson	2 1/2 years Imp.

CRIM. APP. NO.	CASE NO.	OFFENCE	SENTENCE
35/94	317/93	Destroying property by explosives	2 1/2 years Imp. (Conc.)
36/94	2936/93	Possession of cocaine	6 months Imp. susp. for 2 years
36/94	2937/93	Possession of ganja with intent to supply	2 years Imp. + $100.00 fine or 7 days Imp. in default.
36/94	2938/93	Possession of ganja with intent to supply	2 years Imp. (Conc. with 2937/93) + $100 fine or 7 days Imp. in default.
36/94	2939/93	Failure to provide urine specimen	6 months Imp. (Conc. with 2937/93).
36/94	3224/93	Failure to provide urine specimen	6 months Imp. (Conc. with 2937/93).
36/94	3225/93	Consumption of ganja	6 months Imp. (Conc. with 2937/93).
37/94	10/94	Possession of ganja with intent to supply	4 years Imp. + forfeiture order of $560.80.
51/94	1369/93	Burglary	2 years Imp.
51/94	1370/93	Burglary	18 months Imp.
51/94	1375/93	Theft	6 months Imp. (Conc.)
51/94	1376/93	Burglary	2 years Imp. (Consec.)
51/94	1298/93	Theft	6 months Imp. (Conc.)
51/94	1368/93	Burglary	2 years Imp. (Conc.)

CRIM. APP. NO.	CASE NO.	OFFENCE	SENTENCE
52/94	1371/93	Burglary	2 years Imp.
52/94	1374/93	Burglary	2 years Imp. (Consec.)
52/94	1901/93	Theft	3 months Imp. (Conc. with 1374/93).
52/94	1298/93	Theft	6 months Imp. (Conc. with 1374/93).
52/94	1372/93	Theft	6 months Imp. (Conc.)
52/94	1373/93	Burglary	2 years Imp. (Conc.)
1/95	2036/94	Causing G.B.H.	6 years Imp.
1/95	2434/94	Theft	2 years Imp. (Conc.)
1/95	1974/94	Theft	2 years Imp. (Conc.)
2/95	659/93	Burglary	18 months Imp.
2/95	1256/93	Burglary	18 months Imp. (Conc. with 659/93).
2/95	823/93	Burglary	18 months Imp. (Conc. with 659/93).
2/95	3671/92	Handling stolen goods	12 months Imp. (Consec. to 659/93).
2/95	2032/93	Consumption of ganja	3 months Imp. (Conc. with 3671/92).
2/95	2033/93	Consumption of cocaine	6 months Imp. (Conc. with 3671/92).
2/95	2034/93	Possession of utensil used in cons. of controlled drug	6 months Imp. (Conc. with 3671/92).

CRIM. APP. NO.	CASE NO.	OFFENCE	SENTENCE
2/95	923/93	Theft	6 months Imp. (Conc. with 3671/92).
2/95	942/93	Taking conveyance w'out authority	6 months Imp. (Conc. with 923/93).
2/95	940/93	Theft	6 months Imp. (Conc. with 923/93).
2/95	941/93	Consumption of cocaine	6 months Imp. (Conc. with 923/93) (Total Imp. 30 months)
3/95	1729/94	Causing G.B.H.	7 years Imp.
5/95	2564/94	Possession of ganja with intent to supply	6 months Imp. + forfeiture of motor car.
7/95	3937/94	Burglary	12 months Imp.
7/95	4095/94	Handling stolen goods	3 months Imp. (Consec. to 3937/94).
8/95	3937/94	Burglary	6 months Imp.
12/95	6/94	Possession of ganja with intent to supply	3 1/2 years Imp.
14/95	2340/94	Indecent assault	9 months Imp.

MD

CRIMINAL PROCEDURE

Sentencing - Wrong in principle to award compensation where defendants unable to pay - Partly suspended sentence inappropriate where defendants are liable to be deported

York and Others v Attorney-General of Cayman Islands

Grand Court (SCA 8/95)
Smellie J
August 4 1995

Legislation

Penal Code s23

Mrs Banks for the Crown
Mr McField for York
Mr Furniss for Tater and Dubash

The three defendants had each been given a maximum prison sentence in the Summary Court with part thereof suspended. Compensation orders had additionally been made. It transpired that despite desperate efforts to meet the compensation order, the defendants had been unsuccessful and were therefore liable to serve prison sentences in lieu. In spite of the fact that all the defendants were foreign nationals, liable to be deported after serving their immediate prison terms, parts of their sentences had been suspended.

Held: (allowing the appeals in part)

(i) The sentences imposed were the maximum that the Summary Court could impose. The learned magistrate had given no reduction to account for the amounts of restitution and compensation ordered. The orders for compensation assumed that the defendants could pay, with significant terms of imprisonment imposed in default. No proper enquiry was made into the defendants' ability to pay. The evidence before the Grand Court was that the defendants were financially destitute.

(ii) It was wrong in principle to make a compensation order when its inevitable result was that the prisoner would be caused to serve a longer period of imprisonment due to his lack of means. Such an order was intended to compel an offender to disgorge the proceeds of his crime to prevent him from benefitting from it. Persons defrauded would normally have recourse to the civil courts to recoup their loss. It followed that the order for compensation and the terms of imprisonment in default were wrong in principle and would therefore be set aside.

(iii) The imposition of a partly suspended sentence was predicated upon the possibility of further offences being committed. On this occasion, the essence of the practice was lost since the offenders were foreign nationals liable to deportation after serving their immediate sentences. A partly suspended sentence was here wrong in principle since a recommendation for deportation was clearly appropriate. Accordingly, the suspended sentences imposed in each case would be set aside. The deportation of each appellant would be recommended upon completion of his sentence of imprisonment. In all other respects the appeals against sentence would be dismissed.

AD

Road traffic - Driving whilst disqualified - Making a false declaration to obtain provisional driving licence - Whether 'guilty' plea properly accepted

R v Smith

Grand Court (17/95)
Schofield J
June 19 1995

Legislation

Traffic Law Ss 69(1) and 79(c)
Motor Vehicle Insurance (Third Party Risks) Law 1974 s3(1)

Mr Furniss for the appellant
Mr Roberts for the Crown

Counsel sought to appeal against sentence only, the defendant having pleaded guilty to offences of driving whilst disqualified, driving without insurance and making a false declaration to obtain a provisional driving licence. It was then noted that the appellant, having filed the appeal in person, wished to appeal against conviction. It was also noted from the records that when the charge of making a false declaration was put to the appellant, his response was to 'plead guilty with explanation'.

The appellant had been disqualified from driving for two years. During that period he was stopped by the police whilst driving a motor car without insurance. He had produced a provisional driving licence. The appellant's explanation to the magistrate was that he had become confused believing that he had been disqualified for one year only and had consequently applied for the provisional driving licence at a time when he believed himself to be no longer disqualified.

Held: (allowing the appeal in part)

(i) The appellant's explanation to the charge of 'making a false declaration' amounted to a denial of an essential element of that charge, namely the intent to deceive. The magistrate ought not therefore to have proceeded on the basis of a 'guilty' plea.

(ii) In relation to the other two charges, the appellant was clearly guilty and the 'guilty' pleas were properly recorded.

(iii) The appellant had served more than half of the prison sentence imposed and with remission was due for release one month later. He had been sentenced on the basis of facts which had not been proved as far as the charge of 'making a false declaration' was concerned. If the matter were to be sent for a retrial, and the prosecution were able to prove their case, it was unlikely that the sentence would be substantially greater than that already served. In the circumstances, justice did not demand that the matter be remitted for retrial. The appeal would therefore be allowed on the charge of 'making a false declaration'. The appeal against sentence in respect of the other two charges would, however, be dismissed as they had not been shown to be manifestly excessive. The disqualification order would stand.

AD

Summing up - Misdirection to jury as to item capable of corroborating evidence - Existence of other corroborating evidence - Whether decision should stand in the absence of substantial miscarriage of justice

Graham v R

Cayman Islands Court of Appeal (14/95)
Zacca Pres Kerr Collett JJA
August 11 1995

Legislation

Court of Appeal Law s6

Authorities referred to

R v Baskerville (1916) 12 Cr App R 81
Hamid v Hamid (1979) 69 Cr App R 324

Mr Murray for the appellant
Mr Roberts for the Crown

The appellant was convicted of indecent assault upon a girl under the age of 16 and sentenced to 18 months' imprisonment of which 6 months was suspended.

The complainant had alleged among other things that the appellant had lured her into a room and offered her $100 for a kiss which she had refused and after which the appellant had sexually assaulted her. The complainant had later narrated this story to her aunt. In an interview with the police, the appellant had admitted luring the girl into a room and pushing her onto a bed. He denied however offering her $100 for a kiss or sexually assaulting her.

The trial judge in summing up had directed the jury that the offer of $100 was capable in law of amounting to corroboration of the complainant's evidence. He also directed them that the appellant's admissions during the police interview were capable of amounting to corroboration.

The appellant appealed against conviction on the ground that the trial judge had misdirected the jury that the evidence relating to the $100 was capable of amounting to corroboration. He also appealed against sentence on the grounds that as a foreign national married to a Caymanian, the sentence of 18 months imprisonment would result in his deportation, leading to the break up of his family and resultant hardship, in particular, to his young child.

Held: (dismissing appeal against conviction but varying sentence)

(i) The disputed corroboration direction was erroneous as the evidence of the alleged $100 offer was not independent within the meaning of R v Baskerville. The trial judge had however properly directed the jury that the appellant's admissions were capable of amounting to corroboration. It was therefore to be decided, having reviewed the summing up in its entirety, whether the proviso to s.6 Court of Appeal Law could be applied. (Investing the Appeal Court with the discretion to uphold a conviction, where this would not lead to any substantial miscarriage of justice, notwithstanding the fact that a point on appeal has been decided in the appellant's favour.) On the present facts, in the absence of the misdirection, the jury would have come to the same conclusion and therefore no miscarriage of justice had occurred (Hamid v Hamid). The appeal against conviction would therefore be dismissed.

(ii) Regarding the sentence of 18 months' imprisonment with 6 months suspended, it was accepted that deportation would result in the break up of the family and consequent hardship. The sentence would accordingly be varied with substitution of an immediate term of nine months' immediate imprisonment.

AD

Criminal Procedure - Mode of trial when none is specified by the statute - Offence carrying twenty years' imprisonment - Duplicity - Count

alleging possession of two rounds of ammunition - Indictment to contain two separate counts

McNeese v R

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

Legislation

Firearms Law (Revised) Ss2-17
Criminal Procedure Code Ss4 and 5

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

The defendant was charged with possession of an unlicensed firearm contrary to s.15(1) Firearms Law. The count related to two shotgun cartridges alleged to be in the possession of the defendant. S.2 of the Law defines 'firearm' to include...'any ammunition capable of being used in any firearm...' The section thus brings the penalty for the unlicensed possession of ammunition into line with the penalties provided for firearms offences under s.15(3) of the Law (as amended) imposing a fine not exceeding $100,000 or a term of imprisonment not exceeding 20 years, or both. The major question before the court was the mode of trial to be followed since the Law made no provision for it. The same statute made provision for less serious offences to be tried summarily. There was also a contention from the defence of duplicity.

Held: (order as follows)

(i) In the absence of specific provision for the mode of trial under the Firearms Law, such was to be determined by reference to Ss 4 and 5 of the Criminal Procedure Code. S.5 classified offences into three categories namely indictable, summary and hybrid offences. According to schedule 1 of the Criminal Procedure Code, when the maximum sentence for an offence exceeded ten years' imprisonment, the mode of trial was to be by indictment.

(ii) The indictment charged a single count of possession of two rounds of ammunition. There was an allegation of two separate offences as the unlicensed possession of each round capable of being used in any firearm was an offence. If the Crown intended to proceed with the indictment, it would be advised that the counts be separated. This would afford the defendant the opportunity, if he so decided, to contest each count separately.

AD

FAMILY LAW

Ancillary relief - Division of matrimonial assets - Failure to establish equitable interest

GJC v MMC

Grand Court (93/92)
Smellie J
September 5 1995

Legislation

Matrimonial Causes Law

Authorities referred to

Campbell v Campbell [1977] 1 All ER 1
Cumbers v Cumbers [1975] 1 All ER 1
Dew v Dew [1986] 2 FLR 341

Johnson v Johnson (CICA 317/85)
Martin v Martin [1977] 3 All ER 762

Mrs Nervik for the petitioner
Mrs Thompson for the respondent

The parties were married in October 1985 and the divorce petition was proved in October 1994. Custody, care and control of the two children of the marriage was agreed to be vested in the respondent mother, with reasonable access to the petitioner. One child had special needs due to its disabilities. Maintenance for the children was agreed at $1600 per month plus one-half of medical, dental, optical and educational expenses.

The petitioner contributed to the matrimonial assets by providing a forty per cent share of a company, company A, which owned a commercial building, a variable business income (from $1000 to $6000 per month) which covered one-third of the household expenses, and minor repairs to the matrimonial home. He also incurred a large debt during the course of the marriage. He opened a new business after the marriage breakdown and drew a moderate income.

The home was fully owned by the respondent prior to the marriage. The respondent provided income from a business which she developed during (though started prior to) the marriage, and a sixty per cent share in company A which owned a commercial building. She also owned a second commercial property, which was purchased immediately before the marriage by her company, company B, and paid for during the marriage. The respondent provided two-thirds of the household income by drawing a salary of $4000 per month from her business. She continued in her business after the marriage breakdown and drew the same income.

A piece of property was acquired jointly after the marriage, which had a net equity of $US 30,000.

The court was asked to determine the division of the matrimonial assets in the light of the maintenance agreement in favour of the children.

Held: (judgment for the petitioner)

(i) A home owned by one party prior to marriage could be taken into account as a family asset. The division of that asset depended on all the circumstances including the contribution made to its value by the non-owner spouse (Cumbers v Cumbers). Campbell v Campbell distinguished.

(ii) Where one party's business income was dependent on the location of the business, and the business was located in a building owned by one party, that building was a potential source of liquid assets for division. However, it should not be sold if alternative satisfactory arrangements could be made.

(iii) The approach taken in the division of the assets was the 'net effect' approach, a 'test by which to determine whether the results of the disposition and apportionment of the assets were just and fair' having regard to all the circumstances of the case (Dew v Dew and Johnson v Johnson).

The petitioner's contribution to the upkeep of the matrimonial home was no more than would be expected of any man of the house. His efforts did not increase its value to any appreciable extent. No equitable interest was acquired in the property. The respondent was entitled to it absolutely. Nor did his contributions to the household income amount to a level which assisted in the financing of the respondent's business and therefore no equitable interest in such business arose in the petitioner's favour. His contribution of non- professional advice, and supervision of the construction in his spare time of the second property owned by company B, was insufficient to entitle him to an equitable interest in that property.

Company A, of which the petitioner held a forty per cent interest, was the vehicle through which payment for the second property and the construction thereon was effected. The second property was valued at US$ 1.4 million. However, the petitioner's questionable business practices had led to a large debt of approximately US$ 1 million. The respondent shouldered that burden to allow the petitioner to start anew after the marriage breakdown, buying his shares in a proper manner. Taking into account the assumption of debt and the interest to be paid thereon, the petitioner had no claim to the second property through his former holdings in company A.

The jointly held property with a net value of $US 30,000, was to be transferred to the respondent upon payment of half its net value to the petitioner. This was to be done within two years to assist the petitioner in acquiring suitable accommodation for himself and the children on occasions of their visits to him (Martin v Martin).

JE

Ancillary relief - Maintenance - Trust for sale

DMW v ADW

Grand Court (D118/91)
Smellie J
June 2 1995

Legislation

Matrimonial Causes Law

Mr Sweetnam for the petitioner
Mr Furniss for the respondent

The parties had three children, the eldest twelve years old and the youngest one year old. The respondent earned $1400 per month more than the petitioner. On the parties' separation, it was agreed that the petitioner should occupy the matrimonial home with the children of whom she had custody, care and control, and that she would continue to pay the mortgage instalments. The court was asked to determine maintenance for the children and the division of the matrimonial assets which included a home and bare land.

Held: (judgment for the petitioner)

(i) The respondent was ordered to pay $1020 per month to maintain the children, until the eldest reached the age of eighteen years, whereupon the payment would be reviewed by the court if necessary.

(ii) The respondent's share of the equity in the matrimonial home was $14,000. Occupancy of the home was granted to the petitioner until the youngest child reached the age of eighteen, with the right to buy out the respondent's share, at a fixed value, within three years of the judgment date. If the petitioner was unable to meet the deadline, the value of the respondent's share would be reviewed. In the event that the petitioner did not buy out the respondent before the youngest child reached the age of eighteen, the net equity in the home was to be divided on the basis of sixty per cent to the petitioner and forty per cent to the respondent.

(iii) The bare land, which was almost fully encumbered, would be awarded to the respondent.

JE

Maintenance - Interim maintenance - Termination - Divorce petition

NB v MB

Grand Court (D155/93)
Harre CJ
April 10 1995

Legislation

Maintenance Law
Matrimonial Causes Law Ss 18 and 19

Mr Collins for the petitioner
Mr Levy for the respondent

The parties separated in 1987 and an interim maintenance order was made by the magistrate in favour of the respondent (wife) and the adopted child of the parties pursuant to the Maintenance Law. (The child was the biological child of the respondent's child by an earlier union.) The petitioner was ordered to pay $50 per week for the child and $40 per week for the respondent. In May 1991, a divorce petition was filed by the respondent, and the magistrate ordered that the maintenance order be suspended. The arrears under the maintenance order stood at $11,330. No enforcement steps were taken until the current application. After filing the divorce petition, the respondent returned to Jamaica, and the child began living with her natural parents. The petitioner earned $1800 per month. He had a new relationship and a young child to support at the date of the application.

The respondent sought a declaration that the magistrate had no power to suspend the maintenance order. It was argued that upon filing of the divorce petition in Grand Court the magistrate lost jurisdiction with the consequence that the arrears continued to accrue. The respondent also sought to enforce the arrears.

Held: (application granted in part)

(i) The magistrate did not lose jurisdiction over the maintenance dispute before the Magistrates' Court simply by the commencement of a divorce petition in the Grand Court.

(ii) Unless stated otherwise, an order to suspend a maintenance payment order did not waive the arrears accrued before that date.

(iii) The court did not condone the action of the petitioner in failing to make his payments. Nor did it condone tardy enforcement applications. The petitioner was ordered to pay the respondent $100 per week in disbursement of the arrears of $11,330.

JE

Ancillary relief - Maintenance - Relevance of third party resources - Matrimonial Causes Rules - When silent

JLF v RDF

Grand Court (261/90)
Schofield J
August 15 1995

Legislation

Matrimonial Causes Law Ss 4 18 and 21
Evidence Law s30
Grand Court Rules 1995 O 1 and O 38
Matrimonial Causes Law s4
Matrimonial Causes Rules 1986
Jamaican Matrimonial Causes Rules 1989 R 48

Authorities referred to

Milburn v Milburn (Unreported English CA October 3 1979)
E v E (Financial Provision) [1990] 2 FLR 233

Mr Lamontagne QC for the petitioner
Mr Turner for the respondent

The parties were married in 1980 and separated in 1990. The union produced two sons, aged 14 and 12 years. The parties agreed that the petitioner should continue with custody, care and control of the two children, but requested the court to decide the balance of the ancillary matters. As a preliminary point, the issue of which procedure rules applied was argued.

The petitioner, a U.S. qualified nurse, worked throughout the marriage. She assisted in the day-to-day operation of the respondent's dive business and contributed, at least equally, to its success. She also assisted in a hotel business until it ended in 1988. The dive business suffered serious decline, partly due to the parties' strained relations, and in 1990 it was relinquished to its main creditor. Under that agreement, the respondent undertook to refrain from re-entering the industry for five years. The respondent's father effected payments under deed of $400,000 to each party, paid in weekly instalments of $1,000, to assist in the transition to self-sufficiency. The respondent earned $1100 per month in his new business but was found to have positive income earning potential at the expiration of the non-competition agreement. He had two vehicles worth $32,000.

The parties lived rent free in a home owned by the respondent's father (the 'owner') during the marriage. The owner agreed to allow the petitioner continued rent free use of the home so long as she did not bring another man into it. He also supplied the respondent with a rent free home. The owner provided the petitioner with extra funds to ensure that she and his grandchildren lived comfortably. He also gave her $60,000 to start a new business to encourage her to keep the children in the Cayman Islands. Her business and other employment income was found to be $30,000 per annum. The respondent paid $44,240 in maintenance for the children in the first four years of separation.

Held: (for the respondent)

(i) S.30 Evidence Law provided for exceptions found in the 'rules of court'. The Grand Court Rules provided that they did not apply to proceedings which were governed by the Matrimonial Causes Rules (except in Order 38 matters). Any questions not covered by those rules were, according to the Matrimonial Causes Law, to be addressed under the Jamaican Matrimonial Causes Rules. Since the question before the court was not addressed by the local rule, the Jamaican Rules were applicable.

(ii) Even though the rent-free home was the matrimonial home, the petitioner gained no interest in it.

(iii) A large award against the respondent was likely to be satisfied by the respondent's father. This did not mean that the generosity of the respondent's father should be turned into a legal obligation. The award was determined on the basis of actual resources of the parties, subject to the reality that the respondent's father was likely to assist the respondent financially from time to time (Milburn v Milburn.) E v E (Financial Provision) distinguished.

(iv) It was in the best interests of the children that they attend boarding school in the United States. The respondent was ordered to pay the children's school and travelling expenses, their medical insurance premiums and $800 per month for their maintenance. The children's best interests required that they reside in the Cayman Islands on a permanent basis, excepting school terms.

(v) The interests of the petitioner in relocating to another jurisdiction were tenuous and were in any event subservient to the interests of the children. The respondent was to pay the petitioner $200 per

month in maintenance.

JE

Ancillary relief - Division of assets - Access - Unsupervised long term access

VAE v KIE

Grand Court (D142/94)
Smellie J
October 27 1995

Legislation

Matrimonial Causes Law

Mrs Nervik for the petitioner
Mr Collins for the respondent

The parties were married in 1986 and had two children, now aged five years and two years. The petition for divorce was proved in April 1995. During the first few years the parties each had substantial incomes, and enjoyed a lavish life-style. The petitioner contributed financially in an amount equal to the respondent until the birth of the second child. A decline in the construction industry resulted in the failure of the respondent's company.

The respondent undertook treatment for alcoholism which was a contributing factor to earlier occasions of violence against the petitioner. The petitioner and the children live in the United States in her parents' home. Her expenses exceed her income. An earlier order requiring the respondent to pay $600 per month maintenance for the children was in arrears due to lack of income from his current unsuccessful business, but new employment was anticipated.

The court was asked to decide the division of the proceeds of the sale of the matrimonial home and to determine whether the respondent was entitled to unsupervised access to the children during vacation periods.

Held: (for the petitioner)

(i) The matrimonial home was sold pursuant to a court order. The respondent argued that the petitioner should accept a small portion of the sale proceeds in order to share his indebtedness, and account for both the value of his labour in building an addition to the home and the value of the land upon which the house was built. The land was gifted to him before the marriage. The petitioner contributed to the payment of the mortgage and some business debts during the marriage. An equal division of the sale proceeds was therefore appropriate.

(ii) The expert evidence indicated that the eldest daughter had experienced emotional difficulties as a result of witnessing the respondent's violence towards the petitioner. Access was necessary to foster the children's relationship with the respondent, but this was to be balanced against the reasonable concern for their overall well-being. Access in Cayman for one month per year during vacations, under the supervision of the petitioner, would be ordered. The cost of the children's flights and accommodation was to be met by the respondent. Liberal access in the United States was ordered by agreement.

(iii) The respondent was ordered to pay maintenance for the children in the amount of $600 per month.

JE

INSURANCE LAW

Insurance - Fraud - Burden of proof

McLaughlin v American Home Assurance Company

Grand Court (55/87)
Harre CJ
July 13 1995

Authorities referred to

Midland Insurance Co v Smith (1891) 6 QBD 561
Iorgulescu v Swiss Bank and Trust Co (CICA No 3 of 1983)
Re Dellow's Will Trusts [1964] 1 WLR 454
Pan American Insurance Co v Pine Top Insurance Co [1994] 3 All ER 581

Mr Parkinson for the plaintiff
Mr Murray for the defendant

The plaintiff, a widow, entered into a policy of insurance with the defendant whereby it provided coverage against accidental loss by fire to the plaintiff's home. The plaintiff possessed business skills and was not in financial difficulties. In early 1986 the plaintiff's home was damaged by fire. The cost of repairs was bourn by the plaintiff and no report was made to her insurer. In June, 1986, on the advice of her son, an insurance executive, the plaintiff increased the policy coverage from $70,000 to $90,000. In August, 1986, during the life of the policy, a fire heavily damaged the plaintiff's home. She was in the process of moving into a new home when the fire occurred.

The defendant denied liability on the alternative grounds of fraud by arson and material non-disclosure.

Held: (for the defendant)

(i) The expert evidence proved the fire was an act of arson. The insured was only disentitled to recover under the policy if she or someone acting with her consent deliberately lit the fire (Midland Insurance Co v Smith).

(ii) The burden of proof shifted to the defendant after the plaintiff made a *prima facie* case of loss within the policy. The onus on the defendant was higher than on the balance of probabilities, commensurate with the seriousness of the allegation (Iorgulescu v Swiss Bank and Trust Co and Re Dellow's Will Trusts). The onus of proof had here been satisfied.

(iii) The failure of the plaintiff to disclose the minor fire was not a material non-disclosure, as no underwriter would have been affected by this material fact (Pan American Insurance Co v Pine Top Insurance Co).

JE

Insurance - Carrying on an insurance business

Brandon v Proprietors Strata Plan No 30

Grand Court (435/94)
Schofield J
August 4 1995

Legislation

Insurance Law (1995 Revision)
Strata Titles Registration Law 1973 s6
Grand Court Rules 1995 Order 14A

Authorities referred to

Phoenix General Insurance Co v Halvanon Insurance Co [1988] 1 QB 216
Cox v Army Council (1962) 46 Cr App R 258

Mr Murray for the plaintiff
Mr Lamontagne QC for the respondent

The plaintiff owned one condominium unit in Strata Plan No. 30, Island Club ('the strata'). The strata was required to insure the buildings against certain perils pursuant to the Strata Registration Law 1973. In 1993, twenty-three of the twenty-six proprietors in the strata voted and amended the bye-laws to allow the strata to insure off-island, specifically with the Islands Club Insurance Group Ltd ('the group'), a company registered and licenced to carry on business in the British Virgin Islands. Beginning in 1993, the buildings were insured under a policy issued by the group. It was thought that the proprietors would thereby obtain insurance at a reduced rate.

Each year the strata paid the annual premium and then assessed a levy on each proprietor to recoup the money. The plaintiff did not pay the annual levy for insurance to the strata during 1994. The strata threatened to assume control of his unit pursuant to the powers contained in the strata bye-laws. The plaintiff brought an action seeking a declaration that the strata had no such authority and that the insurance policy issued by the group was illegal and void as the group was not licensed to carry on insurance business in the Cayman Islands. The first point was conceded by the strata. The court was asked to decide the remaining issue as a preliminary point of law pursuant to Grand Court Rules Order 14A.

Held: (finding for the defendant)

(i) Grand Court Rule Order 14A was used appropriately, as the preliminary issue would resolve the main issue between the parties.

(ii) S.2 Insurance Law defined 'insurance business' but the definition did not address the issue of what was encompassed by the concept of 'carrying on' an insurance business. S.3 created the relevant offence. Applying principles of statutory interpretation, an 'offence-creating' section, in the absence of specific language to the contrary, was not intended to make conduct taking place outside the Cayman jurisdiction an offence triable within the jurisdiction (Cox v Army Council). S.3 did not attempt to make it an offence for an insurance company registered and carrying on business in a foreign jurisdiction to underwrite risks locally. The elements considered in determining whether the company carried on the business of insurance within this jurisdiction included whether the insurer had a physical presence locally (in the form of offices and personnel), the extent of the transactions (a single transaction or service to the general public), and the location of the subject matter of the policies. This was consistent with the scheme of the Law, specifically s.4. Section 7(9) of the Law regulated insurance brokers and not individuals who wished to place insurance with external insurers.

(iii) Policies issued by a company that did not possess a license as required under the Insurance Law s.3 were illegal and void (Phoenix General Insurance Co v Halvanon Insurance Co).

(iv) The Strata Titles Registration Law, whilst giving power to the defendant to establish a fund for the payment of insurance premiums and providing for their recovery by an action in debt, did not permit the strata to assume control of the plaintiffs unit. s.6(2) and (3).

JE

LABOUR LAW

The following are decisions of the Labour Law Appeals Tribunal initiated pursuant to s.70(1) Labour Law 1987.

In the Matter of an appeal by Hurlstone Construction Ltd against the decision of the Director of Labour in the Matter of Floyd Edwards v Hurlstone Construction

Labour Law Appeals Tribunal (9(1) 95)

September 7 1995

Legislation

Labour Law 1987 Ss37 70 and 76

Authoritative Works

Halsbury's Laws of England Vol 1(1)

Ms Brooks for the respondent
Appellant not in attendance

On 7th April 1995, the Director of Labour had awarded the respondent $3,135.00 respecting severance pay and interest thereon as provided for by s.37(2)(b) Labour Law.

The present appeal had been originally scheduled to be heard on July 6 1995 but was postponed until August 10 1995 due to the lack of a quorum. No representative of the appellant appeared at the rescheduled hearing and, having made telephone contact with such representative, the appellant subsequently sought a further adjournment of the appeal on the grounds that it had been unable to retain legal representation for the rescheduled hearing.

Counsel for the respondent submitted that the appeal should be dismissed both for lack of appearance by the appellant and through its failure to file notice of the appeal within the time limits laid down in s.70(1) Labour Law.

Held: (refusing a further adjournment and dismissing the appeal)

(i) S.70 Labour Law governed appeals to the tribunal. There existed no express provision dealing with non appearance by the appellant. S.70(7) provided that in the absence of procedure being prescribed by the Governor, the procedure to be followed was to be determined by the exercise of the Chairman's discretion.

(ii) In exercise of this discretion, the Chairman, guided by principles of natural justice, would decide whether or not to grant an adjournment based on the non appearance of the appellant. In particular, regard was to be had to the audi alteram partem rule. This rule of natural justice had here been complied with, it being clear that the appellant had received prior notice of the adjourned hearing date in accordance with s.76(1) of the Law. Accordingly, no further adjournment of the hearing would be granted.

(iii) Whilst the Labour Law did not expressly provide the tribunal with the power to dismiss an appeal for want of prosecution, the tribunal, in exercise of its power to regulate the procedure, was able to dismiss an appeal in such circumstances.

(iv) The appeal would be dismissed for the following reasons:

(a) the appeal had not been lodged within the 14 day period prescribed by s.70(1) Labour Law;

(b) there had been prejudice caused to the respondent by the appellant filing an appeal and then failing to proceed with it. Such prejudice arose as the notice of appeal operated to stay the award of the Director of Labour.

(v) The award made by the Director of Labour would accordingly be upheld.

MD

In the Matter of an appeal by Cayman Construction Co Ltd against the decision of the Director of Labour in the case of Ray Bush v Cayman Construction Co Ltd

Labour Law Appeals Tribunal (9(2) 95)
September 12 1995

Legislation

Labour Law 1987 Ss 44(f) and 70(1)

Mr. Furniss for the appellant employer
Respondent in person

This was an appeal against the decision of the Director of Labour that the respondent had been dismissed (fairly) from his employment (within s.44(f) Labour Law) and against the consequential award of $1425 respecting severance pay. The respondent had been employed with the appellant company from April 1989 until August 1994 at which time he was laid off. The parties met with the Deputy Director of Labour on October 5th when a representative of the appellant had made statements which called into question the respondent's competency as a carpenter. The appellant also requested at this meeting that the Deputy Director calculate the benefits due to the respondent. Unpleasantries were exchanged between the parties. However, by letter dated October 18th 1994, the appellant invited the respondent to resume his employment. The respondent, having already secured alternative employment, did not return to work with the appellant and in December 1994 filed a complaint of unfair dismissal against it.

The Director of Labour, upholding the contention of the respondent, determined that the employment relationship had been terminated by the meeting of October 5th. However, the Director concluded that by this time the employment relationship had deteriorated to such an extent that it would not be productive to allow it to continue. The Director therefore ruled that the termination was justified under s.44(f) Labour Law.

Counsel for the appellant asserted that the meeting of October 5th was outside the framework of the Law and that the matters arising therefrom should not be regarded as binding the parties. Counsel further maintained that in sending the letter of October 18th the appellant indicated that he had not regarded the meeting as having terminated the employment relationship.

Held: (dismissing the appeal)

(i) In reviewing the Director's finding it was necessary to consider the effect of the 5th October meeting. It was accepted that such meetings were outside the scope of the Labour Law. As parties could become confused as to the nature of such meetings, the practice of conducting them was to be discontinued.

(ii) In the circumstances of this case, it being clear that the meeting had affected the minds of the parties, it was imperative to take it into account in determining the issues raised on appeal. In this regard, the appellant's actions in seeking to determine the extent of the benefits due to the respondent, coupled with the remarks as to competency, indicated that the appellant regarded

the employment relationship as at an end. In seeking alternative employment after the date of the meeting, the respondent had also shown that he regarded the employment relationship to have been terminated as of October 5th.

(iii) It was clear from the evidence that the termination of the employment relationship was justified under s.44(f) Labour Law and the decision and award of the Director would be upheld.

MD

In the Matter of an appeal by Caymania Freeport against the decision of the Director of Labour in the case of Olive Bush v Caymania Freeport

Labour Law Appeals Tribunal (9(3) 95)
October 12 1995

Mrs Hernandez for the appellant
Mr DaCosta for the respondent

The appellant appealed against the decision of the Director of Labour that it had unfairly dismissed the respondent from her employment with them, and against the consequential awards of $2,046.38 and $2,520 for unfair dismissal and severance pay respectively.

The respondent had been employed by the appellant for over nine years when, on February 1 1995, a meeting between the parties took place at which the respondent was given a cheque for $736.40 representing two weeks' pay and one day's vacation. It was common ground that the respondent was not employed by the appellant thereafter.

The evidence of the parties as to what transpired at the meeting of February 1 was in conflict. The respondent alleged that at this time Mrs X, an agent of the appellant, had handed to the respondent a letter of resignation for her signature and a proposed letter of reference, neither of which were accepted by the respondent.

At the hearing before the Director, an envelope with the handwritten words 'copy of reference - resignation' was admitted into evidence. Mrs X accepted that the writing on the envelope was hers but denied that she had given it to the respondent. Mrs X's account of the meeting was that she had merely wanted to have 'a chat' with the respondent concerning allegations that the respondent had been sending customers to competitors of the appellant. Mrs X's evidence was that upon putting this allegation to the respondent the latter had flown into a rage and had told Mrs X to send her home with 2 week's pay. Counsel for the appellant accordingly contended that the respondent had left the employment voluntarily. She further argued that in the absence of its purported contents, the Director had attached undue significance to the envelope.

Held: (dismissing the appeal)

(i) The Director, as the tribunal of fact, had the opportunity to hear and assess the credibility of the witnesses. His finding that the appellant's explanation of the meeting of February 1st (to have 'a chat') was not plausible, would be upheld.

(ii) Contrary to the Director's view, the envelope was not to be regarded as conclusive evidence of unfair dismissal. It was, however, probative evidence that the appellant's agent had prepared the contents described on its face.

(iii) As the allegation made against the respondent remained unproved, her dismissal had been unfair. The decision, and consequential awards made by the Director, were therefore upheld.

MD

In the Matter of an appeal by the Cayman Islands Government against Karleen Scott

Labour Law Appeal Tribunal (9(4) 95)
November 16 1995

Legislation

Labour Law Ss 38 35(1) and 43
Employment Protection (Consolidation) Act 1978 S 55(2)(b) (UK)

Authorities referred to

British Broadcasting Corporation v Ioannou [1975] 2 All ER 999
Dixon and Another v British Broadcasting Corporation [1979] 1 QB 546
R v Secretary of State for Social Services ex parte Khan [1973] 2 All ER 104
Terry v East Sussex County Council [1977] 1 All ER 567
North Yorkshire County Council v Fay (1985) 1 RLR 247

Authoritative Works

Volume 16 Halsbury's Law of England (4th ed)

Mr Roberts for the appellant

The Government of the Cayman Islands appealed against the decision of th Director of Labour that the employment of the respondent had been terminated by the appellant and against the consequential award of $4,047.24 for severance pay.

The respondent was not present at the hearing of the appeal having returned to Jamaica. She had been duly served with notice of the present proceedings.

A preliminary point taken by the tribunal, which had not been taken before the Director, was whether the Labour Law applied to employees of the Cayman Islands Government. Counsel for the appellant contended that common law rules relating to contracts of employment were applicable. The tribunal determined that it was not clear by reference to s.3 Labour Law, that the Law did not apply to this particular case. The case would be considered on its merits.

The undisputed facts were that the respondent, who had been employed by the appellant as a dental nurse on three consecutive two year contracts, had applied for, but had been refused, a fourth contract. The respondent filed a complaint at the Labour Board asserting that her employment had been terminated by the appellant and sought severance pay relying upon the provisions of s.35(1) Labour Law.

The appellant contended that as the respondent had been employed pursuant to a fixed term contract, her employment had been brought to an end by effluxion of time with the consequence that there had been no termination by the appellant as contemplated by s.35(1) Law. (Citing para 280 of Vol 16 Halsbury's Laws of England 4th ed.)

The two inter-related issues forming the basis of the Director's decision were: (i) whether the respondent's employment had been terminated by the appellant; and (ii) whether (as contended by the appellant) the respondent's contract of employment was a fixed term contract, notwithstanding the incorporation therein of a notice provision.

Held: (allowing the appeal)

(i) In finding that the respondent's employment had been terminated by the appellant, the Director had relied upon a number of English authorities which were based upon s.55(2) Employment Protection (Consolidation) Act 1978 (UK) (which deems termination by the expiry of a fixed term contract to

be a dismissal). No similar statutory provision existed, however, in the Cayman Islands.

The Director had also relied on part of the decision of the Court of Appeal in BBC v Ioannou which had been expressly over-ruled by the same court in Dixon v BBC. In this respect, Dixon had ruled that a contract of employment remained a fixed term contract notwithstanding its provision for determination by notice. This later Court of Appeal decision would be adopted by the tribunal, with the result that the notice provision within the present contract of employment did not affect its validity as a fixed term contract.

(ii) The Director, having reviewed paragraph 25 of Chapter 2 of the General Orders, concluded that the procedures outlined therein placed upon the appellant the need to take positive action in order for non renewal of the contract to result. Counsel for the appellant contended that irrespective of the provisions of paragraph 25, the respondent's contract had come to an end due to effluxion of time with no positive act of termination by the appellant occurring (R v Secretary of State for Social Services ex parte Khan.) Counsel further contended that the appellant had a genuine need for using such contracts (which overseas officers entered into freely) in order to facilitate the employment of Caymanians as the need arose. Provided such genuine reasons existed, and provided the employee had knowingly been employed temporarily for a particular period, counsel asserted that English authority conferred upon the employer the protection of fixed term contracts. (Terry v East Sussex County Council and North Yorkshire County Council v Fay.)

(iii) Having reviewed the foregoing authorities fully, in this particular case the respondent's contract was a fixed term contract which came to an end at the expiration of the term of engagement. Accordingly, the employment had not been terminated by the appellant and the Director's award would be set aside.

MD

LAND LAW

Contract for sale - Vendor financing - Remedies for non-payment

Whittaker v Robinson

Grand Court (55/95)
Schofield J
August 11 1995

Mr Roy for the plaintiff
Mr Broadhurst for the defendant

The plaintiff entered into a contract for the sale of a house and land to the defendant. The plaintiff was the vendor and the defendant the purchaser. Under the contract the vendor agreed to finance the purchase. The purchaser was required to pay three deposits totalling $13,840 and subsequently to make monthly payments to the vendor for four years, and then to repay the balance of the purchase price.

The purchaser paid the first two deposits, but failed to pay the third deposit of $8,840, and also failed to pay some of the monthly repayments, totalling $12,000. The vendor had already taken possession of the property pursuant to a court order, and now sought to obtain, in addition to retaining the deposit and part payments, an assessment of damages for breach of contract, being the sum of the third deposit and the arrears of $12,000 plus interest.

Clause 10 if the contract enabled the vendor, on the purchaser's default, to serve a notice on the

purchaser requiring payment of all sums owed. If the purchaser failed to comply, the vendor was entitled to retain the deposit and any part payments which had been made as 'liquidated damages in lieu of rent', and the contract was terminated with both parties expressed to be precluded from bringing any action or claim in respect of the agreement. In his statement of claim and at the hearing, the plaintiff indicated that he had exercised his right to retain the deposit and part payments under clause 10.

Held: (dismissing the claim)

It was not unconscionable for the defendant to recover the property and retain the deposit and part payments. Once the vendor had exercised his right to retain the deposit and part payments, he was no longer entitled to pursue a claim for further damages.

SAAC

SUCCESSION

Personal representatives of estate - Who should act

In the Estate of A Deceased

Grand Court (33/89 35/89 W95)
Harre CJ
May 26 1995

Mr Parkinson for the applicant
Mr Hill QC for the other personal representatives

This was an application by D, currently a personal representative of the estates of LW and JW for an order that she have the administration of the estates entrusted to her alone. The other parties to the action, who were also personal representatives of both estates, sought an order that the estates be administered separately and be represented by an independent attorney at law.

Held: (order as follows)

In view of the dispute between the personal representatives in their capacity as beneficiaries under the estates, which afforded little hope of satisfactory progress, it was in the best interests of all to protect the estates in the event of further dispute by being represented by an independent attorney.

SAAC

TORT

Action for false imprisonment - Arrest on suspicion of theft - Whether arrest and detention unlawful

Young v Gordon

Grand Court (511/93)
Schofield J
July 12 1995

Legislation

Police Law (1995 Revision) Ss 24(4) and 33(a)

Authorities referred to

Shaaban Bin Hussien v Chong Fook Kam [1970] AC 942
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Dumbell v Roberts [1944] 1 All ER 326
Cedeno v O'Brien (1964) 7 WIR 192
R v Spragg (1975) 23 WR 371

McLean v R (CA 15/79)
Rea v Gibbs (164/92)
G v S [1992-93] CILR 203

Authoritative works

Clayton and Tomlinson Civil Actions Against the Police 2nd edition 1992

Mr Lamontagne QC and Mr Hampson for the plaintiff
Mr Helfrecht for the defendant

The plaintiff had been arrested by the defendant, a police officer, on suspicion of theft. He brought an action for false imprisonment against the defendant on the ground that his arrest and subsequent detention were unlawful.

Held: (dismissing the action with costs)

(i) The statutory provisions conferring powers of arrest on police officers were so similar to the English provisions, which were based on common law powers which had been imported to other parts of the Commonwealth, that English and Commonwealth authorities could be used for guidance (Shaaban Bin Hussien v Chong Fook Kam).

(ii) Having established that a suspect had been arrested for an arrestable offence, three questions had to be considered:

(a) Did the arresting officer suspect that the person arrested was guilty of the offence?

It could not be seriously contended that the defendant did not suspect that the plaintiff had committed the offence alleged. He had acted upon the word of the complainant and there was no evidence that he had acted other than honestly and in good faith.

(b) Was there reasonable cause for the officer's suspicion?

The authorities showed that suspicion was less than *prima facie* proof, but that an officer had to show more than mere suspicion to justify exercising his power of arrest. He had to show that the suspicion, objectively viewed, was reasonable. There was nothing in the West Indian authorities which conflicted with the principles enunciated in Hussien v Chong Fook Kam. Taking into account all the information which was known to the defendant at the time of the arrest and viewing that information objectively, the defendant did have reasonable cause for his suspicion.

(c) Had the discretion to arrest been exercised according to the principles laid down in Associated Provincial Picture Houses Ltd v Wednesbury Corporation?

The discretion to make an arrest must be exercised in good faith and the defendant must not take into account any matters which ought not to be considered or disregard any matter which ought to be considered.
The onus of proving that the discretion to make an arrest had been exercised improperly was on the plaintiff. The plaintiff had failed to establish that the defendant had fallen foul of the Wednesbury principles. The arrest was therefore lawful, and the defendant did not commit the tort of false imprisonment.

HRN

EQUITABLE ESTOPPEL AND PURCHASERS OF LAND

Preliminary.

The law of the Cayman Islands recognises equitable estoppel, otherwise known as proprietary estoppel, as both a defence and cause of action in claims relating to land. But the precise impact of a proprietary estoppel claim on subsequent purchasers of the land is an issue on which there is little clear guidance in the Cayman Islands or England.

Proprietary Status of the Inchoate Estoppel Equity.

Proprietary estoppel arises through representation or acquiescence. When an owner of land makes a representation that a claimant has, or will acquire, rights in the land and the claimant in reliance on that representation acts to his detriment, an "equity" arises in favour of the claimant which will be vindicated by the court as it sees fit in its discretion. Such a "representation" may take the form of the owner's tacit acquiescence in the claimant's detrimental reliance. Although the two manifestations of proprietary estoppel are based on the same underlying principle of preventing the owner's unconscionable conduct in attempting to deny his earlier representation, it seems that the two forms retain a certain separate identity.[1]

The equity that is generated by the estoppel is an inchoate claim that cannot easily be categorised into one of the established interests in land, or other recognised personal or proprietary right, until the court makes its declaration as to the appropriate remedy. It is therefore necessary to summarise the conflicting views as to the status of the claim.

Certain dicta of the English courts propose that an equity is not capable of enforcement against purchasers of the land to which the claim relates. The cases supporting this proposition include *National Provincial Bank Ltd v Ainsworth*.[2] Here the equity in question was the right of a wife to occupation of the matrimonial home, which was held to be purely personal, exercisable only against the husband. It is submitted that the decision can be distinguished from estoppel claims on the ground that a wife's equity to occupy bears little relation to the equity arising from proprietary estoppel: the wife's equity is never more than a merely personal claim against the husband, deriving solely from her marital status, and unlike an estoppel equity it does not represent an embryonic claim to a proprietary interest in specific property. Lord Upjohn said that a mere equity would not bind a purchaser unless it was "ancillary to, or dependent on, an equitable estate or interest in the land"[3] and it is submitted that the estoppel equity should fall within this description.

The English courts have in several cases allowed an inchoate equity to be enforced against personal representatives of the representor.[4] However, it must be noted that these cases in which the personal representatives were held to be bound do not provide strong authority for proprietary characterisation of the estoppel equity, as the Court of Appeal has said that the cases may be regarded as examples of a personal representative being bound in his capacity as "a privy of the representor"[5] rather than by virtue of any proprietary quality of the equity.

Re Sharpe[6] extended liability to the trustee in bankruptcy of the representor, who takes over the property of the bankrupt and assumes its concomitant liabilities. The position of the trustee in bankruptcy is unlike that of a personal representative, for the trustee has the power to terminate the bankrupt's contracts and force the claim for damages to prove in the bankruptcy. The fact that the trustee in *Re Sharpe* was bound by the estoppel claim may suggest that the estoppel equity does not represent a merely personal right which can be denied by the trustee in the same way as a contract, but rather that the estoppel equity has a certain proprietary quality which makes it binding on the trustee even where there is no privity of estoppel. A prior case,[7] allowing enforcement of a deserted wife's equity against a trustee in bankruptcy, was overruled by the House of Lords in *National Provincial Bank Ltd v Ainsworth*;[8] the criticism was incurred because the prior case had involved a personal equity, which the House held could never affect a trustee in bankruptcy. Yet the House of Lords' judgments are compatible with the view that a trustee in bankruptcy will nevertheless be bound by those equities which have a proprietary nature. This view is supported by the recent case *Voyce v Voyce*[9] in which the Court of Appeal held as ratio that a donee of the land to which an estoppel related took the land subject to the estoppel equity. This is clearly not the case with purely personal rights such as contracts affecting the land.

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[1] *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 2 WLR 576.
[2] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472.
[3] At 489.
[4] *Inwards v Baker* [1965] 1 All ER 446, *Errington v Errington* [1952] 1 All ER 149, *Jones v Jones* [1977] 2 All ER 231, *Greasley v Cooke* [1980] 3 All ER 710.
[5] *Ashburn Anstalt v Arnold* [1989] 1 Ch 1, 17 *per* Fox LJ giving the judgment of the court.
[6] [1980] 1 All ER 198.
[7] *Bendall v McWhirter* [1952] 1 All ER 1307.
[8] *Supra* n.2.
[9] (1991) 62 P&CR 290.

The decisions imposing liability on personal representatives, trustee in bankruptcy and donee of the land are consistent with the view either that the inchoate estoppel claim is binding merely on transferees not giving valuable consideration, or that it is an equity of a proprietary nature which, according to authority from other areas, is binding on all persons except a bona fide purchaser for value of any interest in the land, legal or equitable, without notice of it.[10] In *Re Sharpe*[11] the Vice-Chancellor tentatively suggested that, although the trustee in bankruptcy took subject to the equity, a purchaser for value of the land from the trustee might only be bound if he had actual notice of the equity, constructive notice being inadequate to impose liability in these circumstances. This would appear to be a novel formula for binding a purchaser. On one view it could simply be a proposal that inchoate equities are governed by the doctrine of notice in a slightly modified form so that the category of persons being equity's darling is slightly restricted; but it is here suggested that the new formula could have been an early attempt at establishing a crude basis for the exercise of the *in personam* jurisdiction to prevent fraud, operating independently of the doctrine of notice.[12] Since that case, the English Court of Appeal in *Ashburn Anstalt v Arnold*[13] has clarified the nature of the *in personam* jurisdiction, so that the following propositions can be made: (1) a purchaser acting fraudulently in denying the rights of another will be subjected to a personal liability to give effect to those rights, for example by the imposition of a constructive trust. (2) fraud in these circumstances encompasses equitable fraud, so that unconscionable conduct is a sufficient ground to impose liability. (3) the fact that a purchaser has notice of another's rights at the time of purchase does not *ipso facto* cause the subsequent denial of the rights by the purchaser to be regarded as fraudulent. (4) this personal liability takes effect even if the right claimed against the purchaser is not proprietary in nature.

If the dictum in *Re Sharpe*[14] is taken to be an attempt at justifying the imposition of an *in personam* liability on the purchaser, then it has been severely curtailed by the subsequent restrictions on the circumstances in which such liability will be imposed. The subsequent requirement of equitable fraud means that it is only in the most exceptional cases that the liability can be invoked, and the purchaser's knowledge of the claim is only one relevant factor to be considered.

A further alternative acknowledged by the cases is that the inchoate equity should be regarded as a full equitable interest in land so that it binds purchasers in accordance with the doctrine of notice or the relevant statutory rule for normal interests in land. This was the approach taken in the Cayman case *Denson v Bush*[15] in which it was said that the purchaser was liable as he was not equity's darling, and the English cases *Duke of Beaufort v Patrick*[16] and *E.R.Ives Investments Ltd v High*[17] in both of which the court held that an inchoate equity was binding on a purchaser for value according to the doctrine of notice.[18] Other cases have indicated that the equity is not a true interest in land: for example, in *Plimmer v Mayor of Wellington*[19] and *Pennine Raceway Ltd v Kirklees MBC*[20] the courts held that although an equity claimant was a person "interested in land" for the purposes of compensatory statutes, he did not necessarily have an interest in land in the strict sense. Both judgments may have been influenced on this point by the remedy awarded, which was a personal licence, and would therefore not have constituted a proprietary interest in land anyway.

Whatever the status of the inchoate equity, once the court makes its declaration as to the appropriate remedy, thereby crystallising the inchoate estoppel equity, the resultant right is regarded in the same way as if it had been created formally by consensual act of the parties, so that if an interest in land is awarded, it will subsequently bind third parties according to the normal rules of priority governing that type of interest in land.

Transmission of Burden.

(a) General Principles

If it is accepted that the inchoate equity is merely personal and incapable of having proprietary consequences for subsequent purchasers of the land to which it relates, then the claimant cannot use the statutory rules for priority of interests in land to overcome this limitation. For example, a personal claim cannot be converted into an overriding interest by virtue of actual occupation under s.28(g) of the Registered Land Law;[21] and if a personal claim is protected on the register then it does not by virtue of that fact acquire proprietary status.[22] Conversely, if an equity is regarded as

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[10] *Phillips v Phillips* (1861) DeGF&J 208, 218; 45 ER 1164, 1167; *Westminster Bank Ltd v Lee* [1956] Ch 7.
[11] *Supra* n.6.
[12] See "Estoppel Licences and Third Party Rights" [1981] Conv 347, 357 (P.N.Todd); "Licences: Questioning The Basics" [1983] Conv 50, 56; Correspondence [1983] Conv 471 (M.P.Thompson).
[13] *Supra* n.5.
[14] *Supra* n.6.
[15] [1980-83] CILR 41.
[16] (1835) 17 Beav 60.
[17] [1965] 1 All ER 357.
[18] An alternative *ratio decidendi* provided by Lord Denning MR and Danckwerts LJ was that the doctrine of mutual benefit and burden applied.
[19] (1884) 9 App Cas 699.
[20] [1983] QB 382.
[21] See *National Provincial Bank Ltd v Ainsworth*, *supra*; *Ashburn Anstalt v Arnold*, *supra*; *Paddington Building Society v Mendelsohn* (1985) 50 P&CR 244.

proprietary, it still remains to be considered whether the equity does in fact bind a purchaser under the relevant rules for the order of priority of interests in land. To this there is a variety of possible answers given the uncertain nature of the inchoate equity.

First, if the claimant of the equity is in actual occupation of the property to which the estoppel relates at the time when the purchaser's transfer is executed, it is arguable that the equity constitutes an overriding interest under s.28(g) of the Registered Land Law as it is a "right" which "affects" the land which is occupied. The present author is unaware of any local decision on the meaning of the statutory wording, but the corresponding phraseology in the English Land Registration Act 1925, namely, rights "subsisting in reference" to the land[23] which "affect the estate transferred or created",[24] has been interpreted widely so as to cover rights and claims which are not interests in land *in strictu sensu*, and has been held specifically to include an equity to claim rectification of a filed plan: *Blacklocks v J.B.Developments (Godalming) Ltd*,[25] in which *National Provincial Bank Ltd v Ainsworth*[26] was distinguished on the ground that the claim to rectification was not a "naked" equity, but was ancillary to an interest in land[27] and therefore of a proprietary nature. Furthermore, it was held that a discretionary claim to rectification constituted a "right" within the section.[28] On the basis of this decision, it is submitted that the burden of an estoppel equity would be capable of passing under s.28(g), despite a recent dictum of Dillon LJ to the contrary.[29]

Secondly, the claimant of an estoppel equity should not be able to procure substantive registration of his equity as an incumbrance under Divisions Two (leases), Three (charges) or Five (easements, profits, restrictive agreements) of Part V of the Registered Land Law, because until the court gives its ultimate decision as to what right should be awarded to the claimant in satisfaction of the equity, the claim remains inchoate and is incapable of being ascribed to any of these particular classes of interest in land. However, despite the limited types of interest which under Part V of the Law are expressly registrable, Part V may not constitute an exhaustive list of what may be registered in the incumbrances section of the land register, as the wider provision in s.9(2)(c) of the Law declares that the incumbrances section of a register shall contain "a note of every incumbrance *and every right adversely affecting the land.*" The inclusion of adverse rights clearly implies that the incumbrances of Part V are not the sole rights registrable in the incumbrances section of the register, and so the incumbrance section may include an estoppel equity notwithstanding that the equity is not an incumbrance within Part V. Even if it is accepted that an equity is in theory capable of registration in the incumbrances section of the register, the claimant is in practice unlikely to obtain registration without the co-operation of the purchaser of the land, since such registration requires the filling out of an instrument "in the prescribed form"[30] which requires the signature of the person creating the incumbrance.[31]

The claimant may, however, in appropriate cases protect his estoppel equity by way of restraint on disposition under s.127(1)(a) of the Registered Land Law; this subsection permits a person to register a caution against the name of the proprietor in order to support an "interest in land." The consent of the licensor is not required for the registration of the caution.[32] Despite the foregoing discussion showing the inadequacy of the authorities concerning the nature of the inchoate equity, the Grand Court in *Gosman Ltd v Wagner*[33] readily accepted the proposition that an estoppel claim could be registrable as a caution: Schofield J said, "By acquiescing in the defendant's entry into the property and by acquiescing in his doing work upon it, the plaintiff left the defendant with an interest in the land sufficient to justify the lodging of a caution."[34] The fact that the claim amounts to an interest in land for the purposes of s.127 Registered Land Law suggests that the claim will also amount to a right affecting the land for the purposes of s.28, thereby allowing the claim to constitute an overriding interest in appropriate circumstances.

If the estoppel equity does not in fact satisfy the requirements of an overriding interest, and no registration has taken place, it may nevertheless be possible to allege that the equity remains viable against a new proprietor under the following principles.

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[22] *Cator v Newton* [1939] 4 All ER 457.
[23] Land Registration Act 1925, s.70(1).
[24] Land Registration Act 1925, s.20(1)(b).
[25] [1982] Ch 183. See "Misreading Reports" [1983] Conv 169 and "Rectifying Reports" [1983] Conv 257 (Wilkinson).
[26] *Supra* n.2.
[27] See the comment in *National Provincial Bank Ltd v Ainsworth*, *supra* n.2, at 489 *per* Lord Upjohn.
[28] The decision is criticised in both of these aspects in "Rectification, Trusts and Overriding Interests" [1983] Conv 361 (D.G.Barnsley), but supported in "Contractual and Estoppel Licences as Proprietary Interests in Land" [1991] Conv 36, 45 n.40 (G.Battersby).
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[30] *Canadian Imperial Bank of Commerce v Bello* (1991) 24 HLR 155.
[31] Registered Land Law ss.46, 64(1), 92(1) respectively.
[32] Registered Land Rules (Revised), Third Schedule, Forms R.L. 8, 9, 12, 13.
[33] Registered Land Rules (Revised), Third Schedule, Form R.L. 20.
[34] (1995) 12 CILB 52.
It should be noted that although the Grand Court decided that a caution would have been supported by the plaintiff's estoppel claim, the caution was actually registered on the basis of the plaintiff's interest as purchaser of the land pursuant to a transfer form executed by both parties. This fact does not affect the validity of the Grand Court's statement concerning the registrability of the estoppel equity.

A third possibility is that the equity falls outside the ambit of the Registered Land Law concerning registration, and is binding according to the doctrine of notice. This proposition may seem unappealing in a system of registered land which has as its vital tenets certainty and simplicity. Reverting to the doctrine of notice for one category of rights relating to land, although perhaps permissible by virtue of s.164 of the Registered Land Law, would of course introduce another source of uncertainty into titles.[35] There is some degree of judicial support for this view in the local case of *Denson v Bush*,[36] and academic support in England.[37]

In *Denson v Bush*, the father of the plaintiff permitted the defendants to move into his dilapidated house, and through his agent encouraged the defendants to believe that they could remain there for life. In reliance upon that belief, the defendants took possession and renovated the house. In 1979 the father of the plaintiff transferred the ownership of the land by registered disposition to the plaintiff, who sought to evict the defendants. The defendants counterclaimed for a declaration that they were entitled to occupation for their joint lives. The Grand Court accepted that the defendants obtained a licence coupled with an equity to remain on the property, and added that this right bound the plaintiff on the ground that he "was not a bona fide purchaser for value without notice of that licence coupled with an equity so as to destroy the defendant's equitable right in the property."[38] The clear implication is that the doctrine of notice is the governing principle, yet the judgment did not address the Registered Land Law at any stage, and no authority was given for the proposition that proprietary estoppel claims are exempt from the statute. The judgment does not make explicit the particular ground on which the purchaser failed the doctrine of notice; presumably it was on the basis that as a member of the family he had notice of the earlier claim, but if, on the other hand, it was because he was a volunteer the result of the case is reconcilable with s.27 of the Registered Land Law, discussed below.

However, it seems unlikely that the view in *Denson v Bush* will be perpetuated in the Cayman Islands in the light of *Myles v Prospect Properties Ltd*[39] in which the Court of Appeal expressed a strong *obiter dictum* that notice was irrelevant to the system of registered land and could never be a ground for affecting a purchaser. That statement, made after argument on the matter by counsel, with the benefit of the judgment of the court below, and given extensive consideration in the judgments of the Court of Appeal, would appear to be the more authoritative.

Even if the doctrine of notice does not apply, an estoppel equity may at least bind a transferee of the land who does not provide valuable consideration. This is supported by s.27 of the Registered Land Law which declares that such a transferee holds the land subject to "any unregistered rights or interests subject to which the transferor held it." Rights and interests are not defined in the Law, but it seems that the terms are capable of applying to an estoppel equity on the authority of *Blacklocks v J.B.Developments (Godalming) Ltd.*[40] even though they are technically not "rights" but claims to the exercise of discretion.

A final basis on which an equity could be made to bind the purchaser of land affected by the equity is through the exercise of the *in personam* jurisdiction to prevent fraud. For example, where a purchaser takes property expressly subject to a particular third-party claim, and accordingly pays a reduced purchase price while intending to be bound, the courts have accepted that the purchaser will not be permitted to deny the enforceability of the claim, irrespective of whether the claim is of a type that will normally endure through changes of ownership of the property. This includes for example a contractual licence[41] and an otherwise unenforceable contract to purchase.[42] Another example of imposing liability under this head may be the benefit and burden reasoning adopted by Lord Denning MR and Danckwerts LJ as an alternative ratio in *E.R.Ives Investments Ltd v High*[43] by which an unregistered land charge was made to bind a purchaser.

(b) Equities Satisfied by Irrevocable Licence.

In many of the English cases concerning proprietary estoppel in the context of the family home the remedy awarded by the court has been an irrevocable licence to occupy. An example is *Inwards v Baker*.[44] The owner of the land invited his son to build a house on the land for the son's residence, and the son duly constructed a bungalow in the expectation that he would be entitled to reside there for life. On the father's death it was discovered that the land had been left by will to

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[35] But a purchaser should already make pre-contractual enquiries concerning the rights of persons in occupation of the land and other unregistered adverse rights: Registered Land Law, s.28.
[36] *Supra* n.15.
[37] Eg. "The Fall and Rise of the Remedial Constructive Trust" [1989] Conv 418, 428-9 (P.T.Evans); *contra* "The Law of Real Property" R.E.Megarry & H.W.R.Wade, 5th ed., p. 210.
[38] At 47 *per* Summerfield CJ.
[39] [1994-5] CILR 1.
[40] *Supra* n.25.
[41] See the judgment of Lord Denning MR in *Binions v Evans* [1972] Ch 359, 368, approved by the Court of Appeal in *Ashburn Anstalt v Arnold* [1989] 1 Ch 1, 23, 26 *per* Fox LJ giving the judgment of the court.
[42] *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044.
[43] *Supra* n.17.
[44] *Supra* n.4.

trustees for the benefit of other family members. The trustees sought possession against the son but the Court of Appeal accepted that the son had a right such as to entitle him to stay, and the court described the right as "a licence coupled with an equity."[45] That terminology has also been adopted by the judiciary of the Cayman Islands in *Denson v Bush*[46] and *Seymour v Ebanks*.[47] It is suggested that the use of the word "licence" in this context was intended to mean that the estoppel claimant was in lawful possession of the property, and was not intended to be the comprehensive description of his rights. The nature of the rights conferred is to be found in the phrase "coupled with an equity." One possibility is that the equity spoken of refers to a personal licence which is irrevocable by the representor and his personal representatives; another is that the equity refers to a life interest in the property and is an interest in land.[48] It was not necessary for the decision in that case to make the distinction whether the right was a personal licence or an interest in land, and the judgments are quite unclear on the point. Similar ambiguous decisions were given in *Errington v Errington*, *Jones v Jones* and *Greasley v Cooke*.[49]

If an estoppel equity does give rise to a mere licence, albeit irrevocable by the representor for some period, then it is submitted that the fact that it was generated by estoppel should not affect the substantive rights arising under the licence, that is, the licence should remain personal and not obtain proprietary status. Lord Denning MR in *Inwards v Baker*[50] felt that the licence coupled with the equity in that case would be binding in the same way as an equitable interest,[51] and the same statement was made in *Denson v Bush*;[52] if it was intended in each case that the claimant's right was a life interest, then each decision is unexceptionable, but if an irrevocable licence was intended then it is submitted that the dicta cannot stand after *Ashburn Anstalt v Arnold*[53] declared that licences do not affect purchasers. This is supported by *Pascoe v Turner*[54] in which the English Court of Appeal refused to declare a licence and ordered a transfer of the fee simple instead, as the court was concerned that a purchaser of the land would take the land free from the licence.

If the equity is satisfied by the declaration of a licence in favour of the estoppel claimant, irrevocable for some period, then although an equity is capable of affecting purchasers, it must surely be the case that the potentially proprietary effect of an equity is negated where the equity is in fact satisfied by a non-proprietary right. The result should accordingly be that in the absence of fraud the claimant is unable to enforce any such claim against a purchaser of the land, whether the purchaser obtains the land before or after the equity has been crystallised by the declaration of the court. Once sale has taken place, the only relief available to the estoppel claimant is an action for compensation against the representor, as permitted by the Cayman Court of Appeal in *Seymour v Ebanks*.[55] Here the representor had promised the claimant a right to occupy land for an undefined period, and the claimant, after having been evicted, alleged that the equity arising from his expenditure on the land was not satisfied by the period for which he had in fact occupied the property. The court found it impossible to calculate the value of the representor's failure, because the duration of the claimant's right to occupy the land had never been specified with any accuracy; the compensation was therefore assessed as the amount expended by the claimant in reliance on the representation. Conversely, in *Wayling v Jones*,[56] where a representor promised to transfer a hotel to the claimant but died before formalising the gift, the English Chancery Division was able to award the claimant the full value of the hotel against the representor's estate after the executors had sold it.

(c) Equities Satisfied by Constructive Trust.

One source of contention is the relationship between constructive trusts and proprietary estoppel, in particular, whether there is and should be a distinction between the constructive trust as a remedy imposed by the court on the owner of a legal estate in land in satisfaction of a proprietary estoppel claim, and the constructive trust as a right arising from the unconscionable conduct of the legal owner.[57] The current state of Cayman[58] and English authorities certainly indicates that there is a distinction between substantive constructive trusts and proprietary estoppel claims, although there are occasional judicial comments advocating the assimilation of the two concepts.[59]

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[45] At 448 *per* Lord Denning MR.
[46] *Supra* n.15.
[47] [1980-83] CILR 252.
[48] See "Contractual and Estoppel Licences as Proprietary Interests in Land" [1991] Conv 36, 43-44 (G.Battersby).
[49] *Supra* n.4.
[50] *Supra* n.4.
[51] At 449.
[52] *Supra* n.15.
[53] *Supra* n.5.
[54] [1979] 1 WLR 431.
[55] *Supra* n.47.
[56] (1995) 69 P&CR 170; [1995] Conv 409 (J.E.Martin).
[57] See particularly "Equitable Rights of Cohabitees" [1990] Conv 370 (D.J.Hayton); "Constructive Trusts - A Note of Caution" (1993) 109 LQR 114 (P.Ferguson); "Constructive Trusts of Homes - A Bold Approach" (1993) 109 LQR 485 (D.J.Hayton).
[58] *Solomon v Solomon* [1988-89] CILR 144; *Ebanks v Ebanks* [1988-89] CILR 1.
[59] For example, *Grant v Edwards* [1986] Ch 638, 654-658 *per* Sir Nicolas Browne-Wilkinson V-C.

If the constructive trust is regarded as a separate institution to be recognised outside the ambit of proprietary estoppel, despite being founded on the same concept of unconscionability, there is an important consequence for the nature of the claimant's interest. Imagine that the registered proprietor of land invites a female relative to share occupation of his house and says that he wants her to regard herself as half owner of the property. On those facts, once detrimental reliance has been shown, the relative may claim that a substantive constructive trust arose at the date of her detrimental reliance, or alternatively that at the date of detrimental reliance there arose an inchoate estoppel equity which could appropriately be satisfied by the imposition of a constructive trust on the owner. The same result of securing a beneficial interest for the claimant is achieved under either solution. But if the proprietor transfers his land before the claimant comes to court, then the nature of the claim determines whether the purchaser is affected: if she claims a substantive constructive trust, she will use the rules of priority for fully-fledged trusts, whereas if she claims proprietary estoppel she will have to show that the equity is proprietary in nature and then use the rules of priority for equities. The priority rules for each type of claim will now be considered.

The Registered Land Law recognises co-ownership of land through registration of two or more persons as registered proprietors,[60] but local law also acknowledges that constructive trusts can be used to impose equitable co-ownership on a registered proprietor.[61] In the English system of equitable co-ownership, a trust for sale is imposed,[62] and provided a purchaser pays the purchase money to two or more trustees the beneficiaries' rights are converted into the proceeds of sale and the beneficiaries are prevented from asserting any rights against the purchaser.[63] In Cayman, no trust for sale is imposed, but it appears that the beneficiaries' rights are nevertheless overreached on a sale to a purchaser in good faith for valuable consideration, and furthermore there is no requirement that the purchase money be paid to two trustees.[64] The result therefore is that a beneficiary is limited to a proprietary claim against the proceeds of sale and a personal claim against the trustee.

Following this protection of the purchaser in the case of a substantive constructive trust, it would be irrational for the purchaser to be bound by an inchoate estoppel equity which is satisfied by the imposition of a constructive trust only after the purchase takes place. On those facts, despite the general possibility of an inchoate equity having proprietary status, it is submitted that on account of the specific legislation concerning trusts, the claimant is in the exceptional position of not being able to enforce his equity against the purchaser in good faith for value, and so the only claim would be against the proceeds of sale or the former owner personally.

Where the claimant is entitled to an inchoate equity which is protected by way of a caution or where the claimant is in actual occupation, a purchaser may nevertheless take the land free from the equity if in subsequent proceedings the equity is satisfied by a constructive trust. In the case of an equity which is supported by the claimant's actual occupation of the land to which it relates, it seems that overreaching may still occur. There is a conflict between s.28(g) of the Registered Land Law allowing enforcement of the rights of a person in actual occupation against purchasers, and s.121(3) of the Law which protects a purchaser from rights arising under trusts: perhaps the most convenient way to resolve this is to regard the beneficial interests as overreachable even if they are supported by actual occupation, so that a bona fide purchaser for value is still protected from the beneficiaries.[65] If this analysis is adopted then the protection of the interest by way of a caution would be superfluous because a purchaser without valuable consideration would take the land subject to the beneficial interest anyway under s.27 of the Law, and a purchaser for value would be able to take advantage of the overreaching powers conferred by s.121(3) as the overreaching of the beneficial interest occurs as soon as the trustee deals with the purchaser (i.e. before the purchaser is registered) and so at the time when the purchaser is registered as the new proprietor the beneficiaries' rights have already been overreached and the caution no longer protects any enforceable right.[66]

Co-ownership of the equitable title to the property is not the only type of beneficial interest capable of arising under a constructive trust: it is also possible to establish interests in succession, the commonest example being the owner's promise to permit a person to have a life interest in the land. This type of interest is a beneficial interest under a trust and in many respects is subject to the same rules as those governing co-ownership trusts. The additional feature of this type of interest is that it may attract the provisions of the Settled Land Law. The Law applies to any "deed, will, agreement for a settlement or other agreement, covenant to surrender, Act of the Imperial Parliament, or Law of the Islands or other instrument... under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession."[67] Although this section does not state that informal trusts arising from conduct are to be caught by the Law, the English courts have held that the

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[60] Registered Land Law, Part V, Division 6.
[61] *Solomon v Solomon*, *supra*; *Ebanks v Ebanks*, *supra* n.58.
[62] Law of Property Act 1925, ss.34, 36.
[63] Law of Property Act 1925, ss.2, 27; *City of London Building Society v Flegg* [1988] AC 54.
[64] Registered Land Law, ss.121(3), 38(2); Trusts Law, s.20.
[65] This is the solution of the House of Lords under the corresponding English legislation: *City of London Building Society v Flegg*, *supra* n.63.
[66] See "Dispositions by Trustees for Sale" [1988] Conv 108, 116-7 (M.P.Thompson).
[67] Settled Land Law, s.2(1).

Settled Land Act 1925, which is identical in the relevant terms, does apply to such constructive trusts.[68] All of these decisions were however criticised *obiter* in *Griffiths v Williams*,[69] and it may be that the better approach is to view the Act as limited to express settlements,[70] or that reliance on a representation does not constitute an "agreement for a settlement."[71]

If it is accepted that the Settled Land Law does apply to informal trusts, then it seems that the position of purchasers is not prejudiced. Once the trust arises, the claimant gains an equitable life interest in the land and becomes the statutory tenant for life with wide powers over the land, including the right to sell the land.[72] The tenant for life is enabled to obtain registration of himself as the new registered proprietor of the land,[73] and perhaps it would be appropriate to permit him to register a caution until he does so, but for the efficient operation of the Registered Land Law it would seem necessary that the tenant for life be barred from exercising his dispositive powers under the Settled Land Law pending registration of himself as proprietor.[74] And if the settlor sold the land prior to the tenant for life becoming the new registered proprietor (or protecting by caution his right to do so) it is suggested that the purchaser should take the land free from the trust by virtue of s.121(3) of the Registered Land Law, leaving the beneficiary to claim against the settlor.

After registration of the tenant for life as the proprietor of the land, the settlor would then presumably be entitled to protect his reversionary interest by registration of a caution restraining the tenant for life from disposing of the land without complying with the requirements of the Settled Land Law, in particular, ensuring payment of capital moneys to two or more trustees of the settlement.[75]

Conclusion.

Firstly, there is some authority for the proposition that an inchoate estoppel equity has a proprietary nature and may be enforceable against at least some categories of purchaser of the land to which the estoppel relates. Secondly, if an inchoate equity is capable of affecting persons outside of privity of estoppel, the Registered Land Law, coupled with the equitable *in personam* jurisdiction of the court, provides certain rules for the transfer of the burden of the equity to purchasers of the land. However, for the burden to pass, the equity must be of such a nature as to generate an interest in land and consequently, if the equity is subsequently determined by the court to be an overreachable right which is confined to the proceeds of sale of the land, or a personal licence over the land, then the purchaser cannot be affected by the estoppel claims.[76]

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[68] *Bannister v Bannister* [1948] 2 All ER 133; *Binions v Evans* [1972] Ch 359; *Ungurian v Lesnoff* [1989] 3 WLR 840. Also *Dodsworth v Dodsworth* (1973) 228 EG 1115, *obiter*.

[69] *Griffiths v Williams* [1978] EGDC 919. See also the criticism in "Tenancy for Life or Licence" (1977) 93 LQR 561 (Hornby).

[70] This was the decision of Lord Denning MR, dissenting, in *Binions v Evans*, *supra* n.68.

[71] This was the view of Goff LJ in *Griffiths v Williams*, *supra* n.69.

[72] Settled Land Law, ss.3(a), 2(3) following English Settled Land Act 1882, ss.3(i), 2(5).

[73] Registered Land Law, s.123(1).

[74] This problem is solved under the modern English equivalent, the Settled Land Act 1925, by giving the claimant a right to call for a vesting transfer allowing him to become the new registered proprietor of the land, without which any disposition of the land is ineffective except in favour of a purchaser of a legal estate without notice of the settlement: Settled Land Act 1925, ss.9(2), 13.

[75] See Registered Land Law, s.127(2)(b); Settled Land Law, ss.23, 46.

[76] Simon Cooper, Cayman Islands Law School. I am indebted to Mr C. Buchanan, Director of the Lands and Survey Department and Registrar of Lands, who provided helpful comments on an earlier draft of this article.

ENGLAND UPDATES THE SALE OF GOODS ACT

The law regarding the domestic sale of goods in England, and those countries who followed its lead, is regarded as being reasonably sound. The original statute, the Sale of Goods Act 1893,[1] has withstood the test of time, remaining basically intact through to today. The reasons for its longevity are found in its simple wording and its achievement of reflecting hundreds of years of common law.[2] Of course the English provisions regarding the domestic sale of goods have been modified somewhat over the years by statute and judicial pronouncements. Three statutory revisions are of particular note. First, the addition in 1973 of a statutory definition of 'merchantable quality'.[3] Second, the restrictions on contracting out of the protection provided by implied terms, first seen in the 1973 Act[4] and then refined in 1978.[5] Finally, the consolidating enactment, which remains as the core legislation, the Sale of Goods Act 1979.[6]

In 1994, the Sale of Goods Act 1979 was amended to address three main points.[7] The defining word in the implied term regarding quality of goods has been changed from 'merchantable' quality to 'satisfactory' quality. The question of acceptance is clarified, and the buyer's remedies have been altered.[8] In the following pages the details of, and motivation for, the three main 1994 amendments will be addressed. Then the question of whether Cayman should follow suit will be canvassed.

1. The Standard of Quality

For over a century English statute law has made provision for the addition to each domestic contract of sale of goods made in the ordinary course of business of an implied term that the goods supplied meet a certain level of quality. This provision, according to P.S. Atiyah, "is in many respects the most important part of the law of sale of goods."[9] The original standard of quality implied by the 1893 Act was described as 'merchantable' quality. For three-quarters of a century the definition of this standard was left to the courts. Not surprisingly then, with most of the cases coming before the courts being commercial disputes, the meaning of merchantable quality reflected commercial expectations.[10] Accordingly, it was reasonable to suggest that the primary meaning of the standard was 'commercially saleable',[11] or "were the goods of such a quality that one merchant buying them from another, would have regarded them as suitable?"[12] Little, if any, attention was given to the impact that this definition would have on the protection afforded to consumers of products purchased for domestic or non-commercial use.

The first statutory definition of the term 'merchantable' quality was implemented by the 1973 Act. However, due to the

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[1] 56 & 57 Vict. (hereinafter referred to as 'the 1893 Act').

[2] Law Commission Report, Sale and Supply of Goods (1987 No. 160, Cmnd. 137)(hereinafter referred to as 'Law Com'), para. 1.5.

[3] Supply of Goods (Implied Terms) Act 1973, (hereinafter referred to as 'the 1973 Act') s. 7(2) adding s. 62(1A) to the 1893 Act. Section 1 of the 1973 Act revised s. 12 of the 1893 Act regarding the implied undertaking as to title. Section 2 of the 1973 Act revised s. 13 of the 1893 Act regarding sale by description. Section 3 of the 1973 Act revised s. 14 of the 1893 Act regarding undertakings as to quality and fitness for purpose.

[4] Section 4 revised s. 55 of the 1893 Act. Section 55(3), as revised, prohibited the contracting out from the obligation under s. 12 (title) of the 1893 Act while s. 55(4), as revised, prohibited the contracting out of the obligations placed on the seller in consumer sales under s. 13 (description), s. 14 (quality and fitness for purpose) and s. 15 (sample) of the 1893 Act. In the case of non-consumer sales, the revised s. 55(4) subjected attempts to limit liability under ss. 13, 14 and 15 to a reasonableness test. The test was found in s. 55(5).

[5] Unfair Contract Terms Act 1977, (hereinafter referred to as 'the 1977 Act') s. 6. Section 6(1) prohibits the contracting out of the obligation under s. 12 of the 1893 Act while s. 6(2), addressing consumer sales, prohibits avoiding the obligations placed on the seller under ss. 13, 14 and 15 of the 1893 Act. Section 6(3), addressing non-consumer sales, subjects attempts to limit liability under ss. 13, 14 and 15 to a reasonableness test. The reasonableness test is found in s. 11. The onus to show the test is satisfied was placed on the party wishing to rely on the clause, s. 11(5). The latter provision was new.

[6] (Hereinafter referred to as 'the 1979 Act') effective January, 1980.

[7] Sale and Supply of Goods Act 1994, (hereinafter referred to as 'the 1994 Act'), effective January 3, 1995.

[8] Another change that is worthy of mention is the replacement of the references to 'conditions' and 'warranties' by 'term' in the main portions of ss. 12 to 15 of the 1979 Act, and the insertion of an additional subsection in each affected section to define the effect of certain breaches, pursuant to schedule 2 of the 1994 Act.

[9] *The Sale of Goods*, (London:Pitman, 1990) (8th ed.) p. 142.

[10] *Ibid.*

[11] Law Com para 3.7.

almost infinite situations that such a definition was required to cover, the wording used needed to be very general.[12] The difficulty in finding a suitable definition made it tempting to simply consolidate the concepts found within the case law, rather than making any overt attempt to redefine the concept. In the end result, the 1973 definition was considered a consolidation of the earlier law. As a consequence, the earlier case law continued to play a very significant role in the interpretation of the quality standard.[13]

In the following years, as those interested in enhancing the rights of the ordinary consumer became more organised and vocal, attention was turned to revising the definition of the quality standard.[14] Defective automobiles provided the catalyst for embarking on a campaign of reform. In 1977 the Consumers' Association took on board the complaint of Mr. Summerfield regarding the 29 separate faults in his Reliant Scimitar.[15] Several counsel were retained independently to provide opinions on the meaning of merchantable quality in this context. Since the opinions were in conflict, it was concluded that the state of the law was clearly unsatisfactory. Feeling that the legal community would benefit from a seminar to 'thrash out' the meaning of merchantable quality, the Consumers' Association hosted such an event in June 1978. From this seminar came an agenda for reform.[16]

At the suggestion of the Consumers' Association, the Supply of Goods (Amendment) Bill 1978 was introduced in Parliament as a Private Member's Bill. One of the significant features of the Bill was its aim of altering the definition of merchantable quality. Although it was not passed, the Bill did spark enough debate to have the issue referred to the Law Commission.[17] The consolidation of the law in the 1979 Act did not address any of the issues before the Law Commission. Therefore it was not until their report in 1987 that reform became a real possibility. However, to enhance the chances of reform, both the Consumers' Association and the National Consumer Council kept the issue in the public eye. As a result of their studies and the constant efforts of consumer advocates, the Law Commission recognised in its 1987 Report that the term 'merchantable' quality was no longer appropriate as the description of the implied standard of quality. It reasoned that the term was tied too closely to an era without consumer protection law,[18] and the term concentrated too exclusively on fitness for purpose at the expense of other aspects of quality such as finish and appearance.[19] Further, the concept 'merchantable' quality did not make it clear that goods were to be reasonably safe and durable.[20] In contrast to the English position, which had placed a good deal of emphasis on the maxim caveat emptor, the Law Commission were impressed by the Scottish common law which placed much more emphasis on priceworthiness and good faith.[21]

In place of the term 'merchantable' quality the Law Commission recommended that the standard of quality be described as 'acceptable' quality, supplemented with an expanded definition containing a list of criteria to be considered.[22] The basic principle of the recommended implied term was that "the quality should be such as would be fully acceptable to a reasonable person" given the price and the circumstances.[23] Included in the expanded list of criteria to be considered were fitness for all purposes for which the goods are commonly used, state or condition, appearance and finish, freedom from minor defects, safety and durability. To ensure flexibility, the list of factors was non-exhaustive.[24]

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[12] Section 7(2) adding the definition, "(1A) Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances...." This definition appears in s. 14(6) of the 1979 Act.

[13] *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1 C.A.; *C.f. Rogers v Parish (Scarborough) Ltd* [1987] QB 933 C.A. (departing from the usual position).

[14] The Consumers' Association considers the Sale of Goods Acts as a basic charter of rights for consumers, personal correspondence from Ashley Holmes, Head of Legal Affairs, 22 June 1995.

[15] Other automobile cases which fuelled the call for reform are summarised in Gray, A., "*Merchantability and Motor Cars: Caveat Venditor*" [1987] L.S. Gazette 2589.

[16] Correspondence from Ashley Holmes.

[17] On January 25, 1979 the Law Commission was asked to consider the standard of quality, acceptance and the right of rejection. It reported eight years later in The Sale and Supply of Goods Report No. 160.

[18] Law Com para 2.10.

[19] Law Com para 2.11. The Commission did recognise that two lines of authority regarding the meaning of 'merchantable' existed, one focusing on the utility of the goods, *Henry Kendall and Sons v William Lillico and Sons* [1969] 2 AC 31, and a second, slightly more consumer friendly, included more aspects of acceptability of the goods, *Australian Knitting Mills v Grant* [1936] AC 85.

[20] Law Com paras 2.14 - 2.16.

[21] Law Com para 2.6.

[22] Law Com paras 3.9 and 3.28.

[23] Law Com paras 3.19-3.20.

[24] Law Com paras 3.29-3.60.

A short comment regarding the addition of safety and durability is called for. These issues appeared to be somewhat established within the concept of merchantable quality at common law. Safety was listed as a factor in determining whether an automobile was merchantable in *Bernstein v Pamson Motors*,[25] while durability was also a factor to be considered according to Lord Reid in *Lambert v Lewis*.[26] However, the Law Commission was properly concerned that these important factors be enshrined, and made more prominent, in the new scheme.[27]

Overall, the Law Commission felt that the change would bring real content to the seller's duty to provide goods of appropriate quality and provide guidance for those in the marketplace.[28] The Consumers' Association was generally pleased with the recommendation and supported its implementation.[29] Further, signs of a more consumer friendly approach by the courts to the interpretation of the term 'merchantable' quality added to the climate of change.[30] Yet, it was not until December 1993 that the Sale and Supply of Goods Bill was introduced as a Private Member's Bill.[31] The Bill was based on the Law Commission Report, subject to a few modifications arising from the 1978 seminar. The most significant deviation from the Law Commission's recommendations was the choice of the term defining the implied standard of quality. In place of the term 'acceptable' quality the Bill used the term 'satisfactory' quality. Supporters of the change felt that the term 'satisfactory' quality encompassed all of the concepts included in the term 'acceptable' quality, without suffering from similarity to the term 'accept' or 'acceptance', the operative word in defining remedies. Further, as the Law Commission acknowledged, the term 'acceptable' would in effect be the test of 'reasonable acceptability' that was used in one line of authority in the cases before 1973.[32] The danger in using this test was, due to its close association with the case law interpreting 'merchantable', that it might not give a clear signal of the change intended. The term 'satisfactory' would more clearly signal a break from the past. The change in terms also signalled that the buyer was entitled to demand more than just acceptable quality, but rather a slightly higher standard in the quality of the goods delivered.[33] For example, a buyer who takes delivery of a new washing machine which has a dent in its front panel might be convinced that it is of acceptable quality, as it functions as a new washing machine; however the machine would not be satisfactory in the eyes of a reasonable buyer, as he is entitled to a machine that is closer to perfect.[34]

Other legislation relating to the supply of goods was similarly amended as part of an improved consumer protection package. Those provisions include s. 10 of the Sale of Goods (Implied Terms) Act 1973[35] regarding hire-purchase agreements, and ss. 4 and 9 of the Supply of Goods and Services Act 1982[36] regarding hire and most other contracts for the supply of goods.

There are as yet no reported cases on the new standard of implied quality. One would expect that it might be many years before any court will be asked to rule on its scope. It is likely that sellers of goods will, if not adjust their quality control standards, adjust their approach to dispute resolution to respond more quickly to consumer complaints given the signal sent by the new definition of standard of quality and the revised right of rejection discussed below.[37]

2. Acceptance of Goods and Opportunity to Examine

Acceptance by the buyer of goods delivered by the seller is an important act in determining the remedies of the buyer. The buyer's acceptance terminates his right to reject the goods and claim return of the price, though his right to claim damages remains intact.[38] Rarely will there be a ceremony where the goods are presented and inspected, and

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[25] [1987] 2 All ER 220.
[26] [1982] AC 225.
[27] Law Com paras 3.44-3.47.
[28] Law Com para 3.22.
[29] Correspondence from Ashley Holmes. The National Consumer Council agreed change was needed but suggested an alternative route. Dobson, A.P., "Consumer Guarantee" [1990] JBL 139.
[30] *Rogers v Parish (Scarborough)* [1987] QB 933; *Business Application Specialists v Nationwide Credit Corporation* [1988] RTR 332.
[31] The government added its full support in the House of Lords, Hansard, 12 October 1994, Col. 960 per Minister of State, Department of Trade and Industry (Earl Ferrers). The Bill was passed into law November 3, 1994, effective January 3, 1995.
[32] Law Com para 3.23; *Grant v Australian Knitting Mills Ltd* [1936] AC 85.
[33] Hansard, 11 February 1994, Col. 633, *per* David Clelland MP.
[34] The rights of the buyer are subject to the usual exclusion of previous notice of the dent or examination by the buyer, in
[35] 14(2C) 1979 Act as amended by the 1994 Act s. 1.
[36] C. 13.
[37] C. 29.
[38] It has been suggested that the 1994 Act should have contained some alternative dispute resolution mechanisms so that consumers could more easily enforce their rights without going to court. Willet, C., "The Unacceptable Face of the Consumer Guarantees Bill" (1991) 54 MLR 552, 558.
1979 Act s. 11(4).

then accepted by an unequivocal indication. In most scenarios the buyer does not have an immediate convenient opportunity to examine the goods delivered, and often is deemed to have accepted the goods through his (in)action. Under the former version of section 34 (1979 Act), the buyer, upon request, was entitled to a reasonable opportunity to inspect the goods before he would (potentially) be deemed to have accepted the goods by (in)action. However, if that request was not made, or if his right lapsed due to a failure to exercise it within a reasonable time, section 35 of the 1979 Act operated to deem the acceptance of the buyer. This could occur in the following ways. Acceptance was deemed through intimation of acceptance. For example, a dismissive waive of the hand by the buyer when he was invited by the seller to open packaging. Further, it could occur when a junior clerk signed a standard form acknowledgment of delivery note which also contained an acknowledgment of acceptance clause.[39] Acceptance was deemed when the buyer completed acts inconsistent with the ownership of the seller; that is, anything which does not allow the goods to be returned in their original form (physical and proprietary). Inconsistent acts include resale, partial consumption and incorporation into other goods. It may even occur when a buyer takes the goods to be repaired, even under a manufacturer's warranty. Acceptance can also be deemed due to a lapse of time. Perhaps the most memorable example[40] was the decision in *Bernstein* where the buyer was said to have accepted the automobile after only three weeks.

The Law Commission felt that the ease with which the buyer could lose his right to reject in many situations was unsatisfactory. A set time frame for rejection was debated and dismissed as too rigid given the wide range of goods governed by the Acts.[41] The recommended solution to the problem was multifactorial, and eventually implemented into law.

Where the buyer would have been deemed to accept the goods by intimation under the then current law, the Commission proposed that the buyer would not be deemed to have accepted the goods until a reasonable time had elapsed, presumably within which there would have been a reasonable opportunity to inspect.[42] Therefore, as in the earlier example, the initial dismissal of an invitation to open the package at the store would not amount to acceptance and preclude rejection the following week, after the unpacking at the buyer's home revealed the defect. Many factors would need to be considered to determine what was a reasonable time. For non-consumer contracts it was thought commercially prudent to allow the parties to contract out of this protection.[43] This is reflected in the new section 35(3).[44]

Some acts which were seen as being inconsistent with the seller's ownership under the old regime were clarified in the Law Commission's recommendations[45] and the subsequent amendments. Section 35(6) specifies that the congenial step of taking defective goods in for repair or adjustment does not, in and of itself, amount to an act inconsistent with the seller's ownership of the goods.[46] This is especially practical when the seller is most anxious to have a minor repair completed to preserve the sale contract and retain customer satisfaction.

The new provisions provide additional assistance to the buyer who is also a retailer. When a retailer receives returned goods from a customer who was not satisfied with the quality, the fact of the subsale no longer has the effect of signalling the retailer's acceptance under his contract with the manufacturer.[47] Subject to the provision of a reasonable time within which to act, the retailer would also be in a position to reject the goods and claim a refund.

3. Modification of Remedies

The Law Commission also addressed the remedies of the buyer, including the right of partial rejection and breaches which are so slight as to make it unreasonable for non-consumer buyers to reject. With respect to the buyer's right of partial rejection it noted that the 1979 Act did not provide the buyer with a general right of partial rejection. A buyer who accepted some of the goods delivered under a contract was treated as if he had accepted them all even if some were defective.[48] One exception was found in s. 30(4), which gave the buyer a right to accept the portion of the goods delivered which met the contract description and reject non-conforming goods. Therefore if the complaint was lack of conformity to description as opposed to a defect in quality then the buyer could accept a portion of the goods delivered

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[39] Law Com para 2.45.
[40] *Bernstein v Pamson Motors* [1986] 2 All ER 220.
[41] Law Com para 5.16, from bicycles to submarines to perishable food.
[42] The National Consumer Council complained that the right to reject should not be lost until a reasonable opportunity to inspect has passed, relegating the lapse of time to the status of one factor to be considered rather than being the test, Cranston, R., and Dehn, G., "The Right to Reject" [1990] JBL 346, 349.
[43] Law Com para 5.23, subject to the reasonableness test in the 1977 Act. The definition of 'consumer' in the 1977 Act is incorporated by reference into the 1979 Act by sch. 2, s. 5 of the 1994 Act.
[44] 1994 Act, s. 2.
[45] Law Com para 5.6.
[46] 1994 Act, s. 2.
[47] 1994 Act, s. 2 adding s. 35(6).
[48] Law Com para 6.6.

and reject the rest. The Commission found that there was no justification for the distinction in the remedies. Further encouragement for reform was also found in looking to the position of a buyer under the laws of the United States and Canada where a general right of partial rejection existed.[49]

In response to the recommendation of the Law Commission, section 35A(1) was inserted by the 1994 Act,[50] to address this concern. As long as the buyer has not lost his right to reject through the other rules of acceptance, a buyer can now accept any portion of the goods (whether they conform or not)[51] without losing his right to reject all or a portion of the non-conforming goods, regardless of the nature of the breach.[52] Therefore, if a buyer orders 100 bricks and, following delivery, finds 20 of them to be of the wrong colour and another 10 to be cracked, he would have the following options:
(1) accept all goods which conform and reject the balance;
(2) accept all goods which conform and some of the non-conforming goods, whether their defect is to description or quality, and reject the balance;
(3) accept all goods which conform and all but the most defective;
(4) accept all the goods;
(5) reject all the goods.
The buyer's right to claim damages after acceptance remains intact.

It is possible for the parties to contract out of this provision, even when the buyer is a consumer,[53] as recommended by the Law Commission.[54] The right of partial rejection also extends to instalment contracts.[55]

In its review, the Law Commission also considered the question of the effect of a slight breach of an implied term and whether the right to reject should be tempered by the *de minimis* principle. It noted that breach of an implied condition, regardless of its gravity, entitled the buyer to terminate the contract and claim damages. This could lead to an injustice against a seller who was prepared to repair or replace the goods. It also was counterproductive in some cases, in that the harshness of the remedy in the case of a slight breach may have led the court to find that there was no breach at all, simply to avoid having to order the drastic remedy.

The lack of flexibility in the law on this point was seen as undesirable, at least in the case of non-consumer buyers.[56] Since a consumer is usually buying goods for domestic, as opposed to resale, purposes, his goal is to have perfect goods. A reduction of the price may be fair in commercial terms, but it does not assist the consumer in getting what he wanted. Nor would the consumer have any bargaining power when trying to determine compensation for a minor defect if he does not have the ultimate power to reject in all cases.[57] However these concerns are not fully applicable to non-consumer buyers. That class of buyer is in a position to dispose of defective goods through various sub-buyers, and the amount of damage is thereby readily calculated. Further, the motivation for rejection due to slight defects in some cases may have been a drop in the market price, a motive which was seen as unjustifiable.[58]

Therefore the Law Commission recommended that the non-consumer buyer be restricted in his right of rejection.[59] This is given effect to by the addition of s. 15A to the 1979 Act.[60] Now, where goods are supplied in breach of the implied terms found in ss. 13, 14 and 15 of the 1979 Act, but the breach is so slight as to make rejection unreasonable, the non-consumer buyer will only be entitled to damages. This restriction applies unless a contrary intention appears in, or is to be implied from, the contract.[61] The onus of proof regarding the insignificance of the breach is on the seller.[62]

The same reasoning[63] and action was taken in respect of a slight breach in the quantity of goods delivered. This was accomplished by adding to section 30 of the 1979 Act the provisions of s. 30(2A)(2B).[64] Henceforth, a non-consumer buyer will not be entitled to reject the whole on the basis that the wrong quantity was delivered where the excess or

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[49] Law Com para 6.8.
[50] Section 3.
[51] 1994 Act, s. 3 adding s. 35A(3). This is subject to the restriction on non-consumer buyers found in s. 15B, added by s. 5 of the 1994 Act, discussed below.
[52] 1994 Act, s. 3 adding s. 35A(4).
[53] Law Com para 6.9.
[54] 1994 Act, s. 3 adding s. 35A(2).
[55] Law Com para 4.1.
[56] Law Com para 4.4.
[57] Law Com para 4.5. For example *Cehave N.V. v Bremer Handelsgesellschaft, The "Hansa Nord"* [1975] 3 All ER 739 C.A.
[58] Law Com para 4.7.
[59] Added by s. 4 of the 1994 Act.
[60] 1994 Act, s. 4 adding s. 15A(2).
[61] 1994 Act, s. 4 adding s. 15A(3).
[62] Law Com para 6.20.
[63] Added by 1994 Act, s. 4(2).

shortfall was so slight that it would be unreasonable to do so. The buyer is entitled to reject the excess as it simply represents a proposal for a new contract.[64]

4. Should Cayman follow suit?

The current legislation addressing the domestic sale of goods in the Cayman Islands is found in the Sale of Goods Law, 1979.[65] It was modelled generally after the 1893 Act, as amended by the 1973 Act, although the 1979 Act was only seven months away from coming into force in England.[66] One important distinction between the two pieces of legislation is seen in the definition of the concept of an agreement to sell. The 1979 Law provides a wider definition than the 1893 Act (and the 1979 Act) in that hire-purchase agreements are included in the Cayman definition of agreement to sell. This was necessitated by the lack of any other legislation on point.[67] The 1979 Law is the only consumer protection legislation in the Cayman Islands.

It is submitted that the Cayman Islands should follow the lead of England in amending the law. The fact that the 1979 Law is the only consumer protection legislation in the Cayman Islands is of itself sufficient reason to follow the amendments achieved by the 1994 Act. The 1979 Law suffers from the same maladies that were identified by the Law Commission of England in relation to the definition of the standard in the implied term of quality, the question of inspection and acceptance, and remedies.

It can be safely concluded, without a review of all the arguments considered by the Law Commission and Parliament, that the concerns and recommendations stated by those bodies apply equally to Cayman. In fact, the strength of the argument in favour of the a change from 'merchantable' quality to 'satisfactory' quality is increased by local conditions. In addition to enhancing consumer protection generally, the adoption of the change in the standard of quality would make it clear that safety is an important concern in the implied protection. This is of particular importance as local law does not embody the protective provisions found in the English Consumer Protection Act 1987.[68] The specific inclusion of durability in the list of factors to be considered in determining whether the good meets the implied standard of quality under the new English regime[69] is also of particular importance to consumers in Cayman. The high cost of standard consumer goods, combined with a certain lack of availability and selection in some product lines, brings an increased need to see durability as part of the implied standard of quality locally.[70]

Apart from the foregoing specific needs it is advisable for Dependent Territories and other members of the Caribbean community to keep pace generally in commercial law. It is important for traders to compete on an equal footing. Further, by enacting similar provisions in the Caribbean community, there will be a larger number of countries from which to draw case precedent and constructive academic comment.

5. Conclusion

After careful consideration by the Law Commission, the law of England regarding various aspects of the sale and supply of goods has been revised. The implied term regarding the quality of goods supplied has changed from 'merchantable' quality to 'satisfactory' quality, signalling an increase in consumer protection. The revision of the sections governing acceptance and inspection have provided much needed clarification of buyers' rights. In a similar vein, the modification of the right of rejection has introduced sensible and balanced changes. It is hoped[71] that the wisdom of these changes will be recognised in the Cayman Islands by appropriate amendments to the local law.

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[64] Law Com para 6.23.
[65] Law 12 of 1979, hereinafter referred to as 'the 1979 Law'.
[66] Placement of the definitions at section 2 in the 1979 Law has altered the numbering pattern vis-a-vis the 1893 Act.
[67] Cayman law does not have all of the protections found in the Sale of Goods (Implied Terms) Act 1973, or the Supply of Goods and Services Act 1982.
[68] C. 43. Part I assigns liability for damage caused by defective products beyond the seller to the producer, supplier and importer. Part II contains a general safety requirement for goods sold, providing criminal sanctions against those who breach those requirements. The seller, and all others in the distribution chain, are responsible to ensure that consumer goods are reasonably safe.
[69] 1994 Act, s. 1 adding s. 14(2B)e.
[70] Durability is specifically required in goods bought for a particular purpose under ss. 16(3) and (6) of the Sale of Goods Act, 1983 of Trinidad and Tobago.
[71] John A. Epp, Lecturer, Cayman Islands Law School.