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CAYMAN ISLANDS LAW BULLETIN

MAY 1996

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 case summaries which appear in the Law Bulletin are 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 (1996) 14 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 fourteenth 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 Law School staff which focus upon criminal law and procedure. Law School Director, Mr. Mitchell Davies, (at p51), examines recent English theft cases and charges the English judiciary with being overly proactive in securing convictions under theft legislation whose provisions are repeated almost verbatim in Cayman's Penal Code; whilst Lecturer in Law, Mr. John Epp, (at p65), undertakes a comparative study of the rules extant in England, Canada and the US in sanctioning the release by a third party of confidential records in a criminal case.

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 and Schofield, Smellie, Bingham and Williams JJ during the period June 15 1995 to May 3 1996. Also appearing in this edition are summaries of the decisions of the Cayman Islands Court of Appeal and the Labour Law Appeals Tribunal. 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.

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BANKING LAW

Powers of appointee under the Banks and Trust Companies Law S14 - Failure to seek directions - Power of Governor to give an indemnity - Reimbursement by the company

In the Matter of the Banks and Trust Companies Law 1989 and In the Matter of the Companies Law (Revised) and In the Matter of the Bankruptcy Law (Revised)

Grand Court (40/94)
Schofield J
October 24 1995

Legislation

Banks and Trust Companies Law S14
Bankruptcy Law S18

Authority referred to

Owen v Tate [1967] QB 402

Mr Helfrecht for the Crown
Mr Turner for the respondents

B, a chartered accountant, was appointed by the Governor in Council ('the Governor') to assume control of the affairs of X Bank and Trust Company ('the company') pursuant to s.14(1)(d)(v) Banks and Trust Companies Law.

Following presentation of two reports to the Governor by B and revocation of the company's licence on the advice of B, an order was made appointing J and S ('the respondents') joint official receivers and managers of the company. B's fees were met in accordance with an indemnity issued by the Governor, but the proof of debt served on the respondents by the Solicitor-General was rejected for the following reasons:

1. B's actions were unauthorised and improper because he had failed to seek directions from the Grand Court as to the powers to be exercised on his appointment.

2. The Governor had no power to give directions to B. Such powers as the Governor purported to grant were void and of no legal effect.

3. In paying B's fees and expenses the Governor had acted as a volunteer and was therefore barred from recovering the sum paid from the company.

The Solicitor-General applied for an order that the respondents' decision to reject the proof of debt be reversed or varied.

Held: (granting the application and ordering the respondents to pay the fees incurred)

(i) B had acted in error in failing to seek the directions of the court. It was clear from the wording of s.18 Bankruptcy Law that a person appointed by the Governor as a receiver or manager under s.14 Banks and Trust Companies Law derived his powers in the same manner as a trustee in bankruptcy. He could not act, or indeed enter upon his appointment, without seeking the directions of the court. There was no conflict between the duty to act under the directions of the court under s.18 Bankruptcy Law

and the duty to report back to the Governor on issues relevant to the revocation of the licence under s.14 Banks and Trust Companies Law.

(ii) Any directions issued by the Governor in regard to the performance of B's functions were void and of no effect. The Governor's function was limited to matters relating to the licence of the company. The court exercised control over the performance of the functions of any person appointed receiver or manager under s.14 Banks and Trust Companies Law.

(iii) The Governor must not be placed in a position where a potential appointee under s.14 could not take up his duties because of financial constraints. It was therefore necessary for the Governor to have the power to give an indemnity in a case such as this. Given the statutory duties imposed on the Governor in this situation, the Governor could not be said to be an officious volunteer.

(iv) The respondents were to pay the fees incurred by B. Although B had erred in failing to seek the directions of the court, the work he had done had provided the Governor with sufficient material to justify revocation of the company's licence. His appointment appeared to have been justified and there was no evidence that he had performed his functions otherwise than properly and in good faith. Had he made prior application to the court, there was no suggestion that he would not have been given the powers he had exercised; had he made immediate retrospective application for ratification, there was no suggestion that the court would not have ratified his actions.

HRN

CIVIL PROCEDURE

Mareva injunction - Variation of terms - Principles to be applied in exercise of court's discretion

X Co v Y and Others

Grand Court (482/95)
Harre CJ
January 18 1996

Authorities referred to

Cala Cristal SA and Others v Emran Al-Borno and Others (1994) TLR 251

Mr Boni for the plaintiff
Mr McDonough for the defendant

The plaintiff bank alleged that the first defendant stole US$1.2m from it by transferring this sum to its company account maintained in the Cayman Islands. US$400,000 had subsequently been transferred by the first defendant to an account held with the third defendant. On an *ex parte* application, the plaintiff successfully obtained a worldwide Mareva injunction on December 6th, 1995, basing its application upon affidavit evidence of 'unusual transactions' relating to funds which were paid to a company beneficially owned by the first defendant. The first defendant denied all wrongdoing asserting that the money was derived from the redemption of a bearer bond given to him by his grandfather shortly before his death.

An application to discharge the Mareva injunction was pending. In the meantime, the Grand Court was asked to vary its terms to allow: (a) the first defendant to withdraw US$30,000 from the account with the third defendant to meet legal expenses and (b) US$1500 per month for living expenses.

The plaintiff asserted that it expected shortly to have evidence unequivocally establishing the first defendant's guilt. It further claimed that the first defendant had some US$300,000 at his disposal for the funding of his defence. Justice, according to the plaintiff, would be done sooner rather than later by dismissing the application for variation.

Held: (allowing the application)

(i) The court had discretion to grant or dismiss the defendant's application to vary the terms of the injunction. The purpose of a Mareva injunction was to prevent the dissipation of assets. *Prima facie* the payment of legal costs would not amount to dissipation: Cala Cristal SA and others v Emran Al-Borno and others. A Mareva injunction was not imposed in order to afford a plaintiff priority or to allow him to exert pressure on the defendant; neither was it the purpose of such an injunction to prevent the defendant from paying his debts or to otherwise punish him.

(ii) It would be wrong in principle to accept the plaintiff's allegation of the availability to the first defendant of US$300,000 in the light of the first defendant's statement on oath that he possessed no assets beyond those disclosed to the court.

(iii) The plaintiff's attempt to stifle a defence by use of a Mareva injunction would lead to the possibility of obtaining what, in effect, would amount to a summary judgment. This had consistently been held by the courts to be a wrong use of this powerful remedy.

(iv) The variation sought in paragraph (a) would be granted subject to the requirement that the US$30,000 was to be placed directly in the control of the attorneys and was not to come under the control of the first or second defendants, directly or indirectly. Whilst there was no suggestion that the attorneys had or would charge excessively for their services, in the event that the plaintiff succeeded in its proprietary claim it would have the opportunity to challenge the extent of the assets used to meet the legal costs.

(v) The variation sought in paragraph (b) would also be granted. Assuming the first defendant's statement in his affidavit of means to be true, he would continue to be living quite modestly.

Costs in the cause.

MD

Application to strike out action as abuse of court's process - Whether proceedings were the enforcement of a foreign penal law or seeking of private law remedy

MGC v MC Ltd and Others

Grand Court (446/94)
Harre CJ
November 2 1995

Authorities referred to

Canadian Arab Finance Corporation and Kilderkin Investment Ltd v Player [1984-85] CILR 63
Stutts v Premier Benefit Trust [1992-3] CILR 605
Huntington v Attrill [1893] AC 150

Security and Exchange Commission v First Financial Group of Texas (5 Cir 1981)
Securities and Exchange Commission v Florida Bank Fund Inc (1978) WL 1131 (MD Fla 1978)
Securities and Exchange Commission v R J Allen & Associates Inc (1974) 386 F 866 (SD Fla)
Securities and Exchange Commission v Manor Nursing Centres Inc (1972) 458F 2d 1082 (2d Cir)
Commodity Futures Trading Commission v American Metals Exchange Corp (1993) 991 F 2d 71 (3d Cir)
Raulin v Fisher (1911) 2 KB 93
Securities and Exchange Commission v Elliott (1992) 953F 2d 1560 (11th Cir)
Securities and Exchange Commission v Spence & Green (1980) 61 F 2d 896 903 (5th Cir)
US v Inkley [1989] QB 255

Mr McLaughlin for the plaintiff
Mrs Corbett for the first defendant

The first defendant (MC Ltd) applied to strike out a claim brought by the plaintiff (MGC) as an abuse of the process of the court and, subject to any counterclaim, to have the action dismissed. A United States District Court had appointed a receiver to manage the assets of MGC on the application of the Securities and Exchange Commission (SEC). The receiver had power to institute any action deemed necessary and appropriate. A further order was made by the District Court authorising the receiver to intervene in an interpleader action relating to funds held by a Cayman bank in which the competing parties were MC Ltd and the SEC and to file an independent action in the Cayman Islands to obtain an injunction preventing dissipation of the funds. The receiver's claim was for money had and received by MC Ltd Corporation to the use of MGC or alternatively money payable on demand as money lent.

The receiver's action was challenged on two grounds namely:

1. that he did not have the authority to commence the action at this time; and
2. that the receiver had not made an application for recognition in the Cayman Islands and that if he had he would have failed since the proceedings were designed to give extra territorial effect to the penal laws of a foreign jurisdiction.

Held: (dismissing the application)

(i) The Grand Court had the same jurisdiction to recognise a receiver appointed by a foreign court as is exercised by English courts: Canadian Arab Finance Corp and Kilderkin Investment Ltd v Player.

(ii) Even on the assumption that there was a connection between the company over whose assets the receiver had been appointed and the Cayman Islands, recognition would not be granted to the receiver if the effect of his action was to give effect to the penal laws of a foreign jurisdiction: Stutts v Premier Benefit Trust.

It was for the court being asked to enforce the law to determine whether the relevant foreign law was penal. The view of the foreign jurisdiction was irrelevant: Huntington v Attrill.

(iii) The proceedings in Florida alleged violations of United States Federal securities laws by MGC. The proceedings were not of a kind which would lead a Cayman court to recognise a receiver appointed in connection therewith: Stutts v Premier Benefit Trust.

(iv) The central issue was whether the action by the receiver had been brought on proper authority. The receiver had not sought recognition in the Cayman Islands and was simply suing in the name of the

entity having the title to recover. This was a case brought by a corporate plaintiff seeking legal remedies recognised by the laws of the Cayman Islands. The receiver had been appointed by the District Court to stand in the shoes of the company for the benefit of the company and its investors and creditors.

(v) Although the disgorgement provisions in the U.S. securities legislation had been found by the Grand Court to be penal in nature (Stutts v Premier Benefit Trust) and the SEC which was the regulatory body under whose legislation the proceedings in Cayman were instigated and which led to the appointment of the receiver, the present proceedings were about a claim by a corporation asserting a good arguable case in respect of rights available to private litigants. It was not the enforcement of a sanction by a state in its sovereign capacity. In Stutts v Premier Benefit Trust there was an undertaking that the assets to be received were to be applied to compensate investors in the disgorgment proceedings. This case was distinguishable on the grounds that the assets to be recovered would form part of the receivership.

(vi) For the above reasons the application of the first defendant that the plaintiff's claim be struck out as an abuse of the process of the court would fail.

AD

Interpleader summons - Inherent jurisdiction of the court to invite representations by counsel as amicus curiae - Whether summons should be heard in open court or in Chambers - Whether summons should be heard summarily

X Bank v K Ltd and Others

Grand Court (239/95)
Smellie J
September 26 1995

Legislation

Confidential Relationships (Preservation) Law S4

Court Rules

Grand Court Rules Order 17 rule 8
Grand Court Rules Order 17 rule 5

Authorities referred to

Government of India v Taylor [1955] AC 491
S v X Trust (Cause 447/93)
Fredericks and Pelhams Timber Buildings v Wilkins [1971] 1 WLR 1197
Davis (PBJ) Manufacturing Co Ltd v Fahn [1967] 1 WLR 1059

Mr Murray for the plaintiff
Mr Quin for the first defendant
Mr Nelson for the second and third defendants
Mr Timms for the Securities Exchange Commission of the United States (the SEC)

The plaintiff had applied for relief, by way of interpleader summons, from competing claims relating to monies in accounts in the name of the first defendant. The SEC applied to be heard on the interpleader summons and requested that the matter be dealt with in open court. All parties requested the court to hear the summons summarily pursuant to Grand Court Rules Order 17 rule 5.

Held: (granting the SEC's application to be heard as *amicus curiae* and directing that the interpleader summons be dealt with summarily in Chambers)

(i) The SEC was a party to a civil action pending before a United States court which had ordered, on the basis of a *prima facie* finding of fraud, that monies be 'repatriated' from an account in the Cayman Islands to the jurisdiction of that court. The SEC thus had an interest in the outcome of the Cayman proceedings even though that interest was simply that of a foreign regulator seeking to enforce foreign penal laws. The Grand Court lacked jurisdiction to enforce the order of the US court as this would amount to the enforcement of foreign penal legislation, but there appeared to be no authority for the proposition that the Grand Court lacked jurisdiction to invite the SEC to make representations on matters which might be relevant to the interpleader action. The SEC might have important information to bring to the attention of the court on the interpleader summons. The confidentiality of information not yet divulged to the SEC could be protected by an undertaking by counsel for the SEC that no information coming to his attention during the course of those proceedings would be divulged to the SEC, or used for any purposes other than for the making of representations to the Grand Court in those proceedings. In the exercise of its inherent jurisdiction, the court would therefore invite counsel for the SEC to make representations on matters relevant to the interpleader action.

(ii) Any adjournment for the purpose of bringing the matter on for trial in open court would result in further delay and expense, and there was no overriding public interest in having the matter heard in open court. The first defendant had been ordered by the US court to divulge confidential information for use in evidence there, and its application under s.4 Confidential Relationships (Preservation) Law was still pending. A hearing in open court would give rise to the further complication of having to address the manner in which that evidence was to be given and dealt with. It was therefore appropriate that the matter should be heard in Chambers.

(iii) Although all claimants against the plaintiff had been served with notice of the interpleader action, only the present defendants had chosen to join in. It was inappropriate to adjourn the matter simply to afford those claimants a further opportunity to join in. The legal issues were common to all potential claimants, including those not presently joined as parties. The facts were largely agreed and uncomplicated, and the issues, which appeared to be largely common throughout, could be resolved by reference to the ample affidavit evidence already filed. A speedy resolution would be of assistance to all parties, claimants and the US court, and would avoid unnecessary expense. Any issue of fact which could not be resolved on the basis of the available affidavit evidence could be resolved by further affidavits being filed. It was therefore appropriate that the interpleader summons be dealt with summarily.

(iv) The following issues were to be determined:

1. Whether the Bank was obliged to honour the instructions from its account holder (the first defendant) in the light of the competing claims.

2. If so, whether the Bank, being on notice of the claims of the second and third defendants, would be liable in damages if it were to honour the instructions of the first defendant.

3. Whether the first defendant was bare trustee for the second and third defendants, and if so, whether it was obliged to pay over sums held in trust for them.

4. Whether on the application of the first defendant, the matter should be stayed on the grounds of

forum non conveniens pursuant to Grand Court Rules Order 17 rule 7 or other powers vested in the court.

HRN

Interpleader summons - Competing claims to funds in bank account - Whether account holder a bare trustee - Whether bank obliged to honour account holder's mandate - Whether bank a constructive trustee - Stay of proceedings

X Bank v K Ltd and Others (No 2)

Grand Court (239/95)
Smellie J
October 6 1995

Legislation

Grand Court Law (Revised) Ss 11 and 16

Court rules

Grand Court Rules Order 17

Authorities referred to

Ex parte Mersey Docks and Harbour Board [1899] 1 QB 546
JRP Plastics Ltd v Gordon Rossall Plastics Ltd [1950] 1 All ER 241
Spiliada Maritime Corp v Cansulex Ltd [1986] 3 All ER 844
Stutts v Premier Benefit Capital Trust [1992-93] CILR 605
S v X Trust (Cause 447/93)
Schemmer and others v Property Resources Ltd and others [1974] 3 All ER 451
Sinclair v Brougham [1914] AC 398
In re Hallett's Estate (1880) 13 Ch D 696
In re Diplock [1948] Ch 465
Selangor United Rubber Estates Ltd v Cradock and others (No 3) [1968] 1 WLR 1555
Karak Rubber Co Ltd v Burden (No 2) [1972] 1 WLR 602
Royal Brunei Airlines Sdn Bhd v Tan Kok Wing (1995) The Times May 29

Authoritative works

Snell's Equity (29th ed)
Atkin's Court Forms Vol 22 1991 Issue
Underhill and Hayton's Law of Trusts and Trustees (14th ed)
Halsbury's Laws (4th ed) Vol 3(1)

Mr Murray for the plaintiff
Mr Quin for the first defendant
Mr Nelson for the second and third defendants
Mr Timms for the SEC (as *amicus curiae)*

This was an application by the plaintiff ('the Bank') for relief, by way of interpleader summons, from competing claims by the first defendant (K Ltd), the second defendant (ET), the third defendant (HL) and ten other persons or entities. The claims related to monies in accounts in the name of K Ltd ('the account').

K Ltd was a company incorporated in the Cayman Islands. It had approached various investors within and outside the United States, inviting them to invest with it and offering to place the pool of investment capital, through a standard form joint venture agreement, into 'offshore trading programs'. The joint venture was promoted as offering potentially

exorbitant returns. A total of twelve investors, including ET and HL, entered into the standard form agreement and deposited funds in the account at the Bank. These funds were now in an interest-bearing suspense account, pursuant to an order of the Grand Court of July 10, 1995, pending the outcome of the Bank's interpleader summons.

ET and HL contended that K Ltd was a bare trustee of the funds pending investment, that the Bank was a constructive trustee of their deposits remaining in the account, and that the constructive trust in their favour overrode the contractual obligations owed by the Bank to K Ltd in respect of their funds.

The SEC had been invited to make representations as *amicus curiae*. The SEC had brought a claim to the funds in the account in the context of proceedings before the Washington District Court in which it alleged that K Ltd's solicitation of the investments was in breach of SEC regulations and amounted to *prima facie* regulatory fraudulent conduct. The US court had directed K Ltd and its principals to 'repatriate' all funds in the K Ltd account to a bank account within the jurisdiction of the US court. The SEC had assured investors that the objective of its action in the US court was to ensure their full compensation, and although a number of investors had expressed a wish that K Ltd should comply with the US court's order, a majority in nominal terms (although not in terms of value) required their money to be returned directly to them. Of those requiring direct reimbursement, ET and HL were the only investors who had chosen to join in as parties to the Cayman proceedings. Both ET (a company incorporated in the British Virgin Islands) and HL (a company incorporated in the Bahamas) refuted any real connection with the United States and consistently objected to any transfer of their deposits to the US court.

Held: (refusing to grant a stay, declaring that K Ltd was a bare trustee of the funds in the account, that ET and HL were entitled to trace into the mixed fund, that the Bank was not in a position to honour the instructions of its account holder, and barring further claims against the Bank in respect of the subject-matter interpleaded)

(i) The court had a wide discretion when determining an interpleader summons, as governed by the Grand Court Rules. That discretion was to be exercised when the court was satisfied that in the circumstances of the case it was just and proper that relief should be granted.

(ii) There was no proper basis for a stay. It was a fundamental principle that the court should choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice: Spiliada Maritime Corp v Cansulex Ltd. The facts of the instant case showed a stronger connection with the Cayman Islands than with any other jurisdiction. The joint venture agreements were expressed to be governed by Cayman Islands law. K Ltd was a Cayman Islands company and the money remitted to its bank account was being held in the Cayman Islands. The majority of the investors (in nominal terms) wished to have their claims resolved in Cayman. The case before the Grand Court was more advanced than that before the US court and the parties could come expeditiously and properly before the Grand Court on the basis of the Bank's interpleader summons. The claims could be more conveniently dealt with before the Grand Court and the costs would be much less. Availability of witnesses was not an issue as all the relevant factual material had already been filed by way of affidavit evidence. There were no clear assertions of fraud by way of charges against any person, the restraining order made by the US court being a matter only of a *prima facie* finding of regulatory fraud. A further reason which militated against ordering a stay on the ground of *forum non conveniens* was the fact that the proceedings brought by the SEC

were to be regarded by the Grand Court as penal in nature, and orders deriving from such proceedings were not recognisable or enforceable in Cayman as this would involve enforcement of the penal laws of a foreign state.

It was not appropriate to grant a stay pursuant to Grand Court Rules Order 17 rule 7. That provision appeared to address a situation where a defendant applied for interpleader relief during the pendency of an action. It did not address an application for a stay on grounds of *forum non conveniens*.

(iii) As a matter of construction of the joint venture agreement, which expressly provided for an express trust over the respective deposits pending investment, K Ltd was clearly a bare trustee of the funds deposited. Devolution of the funds on express trusts gave rise to a proprietary tracing claim to the funds in K Ltd's bank account, despite the fact that the deposits of ET and HL had been mixed with those of other depositors. It followed that the right of tracing into the mixed fund gave ET and HL priority over K Ltd itself: In re Diplock. K Ltd was therefore obliged to accept the claims of ET and HL, despite the claims of others to the mixed fund, and to meet their claims *pari passu* and pro-rated with the others.

(iv) It was not necessary to decide whether ET and HL had a separate claim against the Bank as constructive trustee. When it filed its interpleader summons, the Bank became subject to the jurisdiction of the Grand Court and was obliged to comply with any orders of that court. It was not presently in a position to honour K Ltd's instructions, against the wishes of the other parties, to transfer all the funds to the US court, as its contractual relationship with K Ltd had been suspended by virtue of an order of the Grand Court that the funds be kept in an interest-bearing suspense account. This would also suspend any duties of constructive trusteeship which the Bank might owe to any depositor.

(v) As the account represented a mixed fund, and as all depositors were to rank *pari passu*, the Bank was to pay all other claimants who were known to require payment in the Cayman Islands, as well as those who had not expressed a clear intention that their deposits be sent to the US court, all payments to be pro-rated according to their respective deposits and to reflect rateable deductions. As to the remainder of the funds on deposit, K Ltd and the Bank were at liberty to fulfil their obligations by honouring the request of depositors to transfer their deposits (pro-rated) to the US court. The Bank was then at liberty to pay any funds remaining to K Ltd.

(vi) Upon compliance by the Bank with the above order, all depositors and K Ltd would be forever barred from prosecuting their claims against the Bank in respect of the subject-matter interpleaded in this action.

(vii) The Bank was to render an account to the court within 30 days, copied to all claimants, in respect of all payments out.

(viii) The Bank's costs of this application were to be taxed. There was no authority for ordering costs on an indemnity basis.

(ix) The Bank would be allowed to deduct from the account the administrative costs involved in pro-rating and accounting for the deposits.

HRN

Application to strike out writ and statement of claim - Res judicata - Abuse of process

C Inc v SI Ltd and Another

Grand Court (71/95)
Smellie J
June 15 1995

Authorities referred to

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581

Ms Bridges for the plaintiff
Mr Turner for the first defendant

The plaintiff ('C Inc') was a Canadian company which had been placed into receivership by the Canadian court at the petition of SP Ltd as judgment creditor. SP Ltd had brought proceedings in Canada and Cayman alleging fraudulent breach of its patents by C Inc and by the second defendant, who at that time controlled C Inc. It was alleged that some of the proceeds of the breach had been paid into accounts held by C Inc prior to receivership and, *inter alia*, that some had been transferred to affiliated companies including the first defendant, a Cayman Islands company. The second defendant was the ultimate beneficial owner of the first defendant.

SP Ltd had discontinued earlier proceedings in Cayman (Causes 316/88 and 318/89) on the basis that C Inc would furnish security in the Canadian proceedings. Security was ordered by a judge of the Federal Court of Canada on condition that SP Ltd terminated the Cayman proceedings then underway and that a judgment which had already been secured in SP Ltd's favour in the Canadian proceedings be suspended. That order had been made on the basis of misinformation given to the court to the effect that C Inc at that time held funds which could satisfy the order for security. C Inc failed to comply with the order for security. SP Ltd's claim was now brought on the strength of a later judgment in its favour in Canada which was pending on appeal.

This was an application by the first defendant for an order striking out the plaintiff's writ and statement of claim which had been filed at the instance of its receiver. The first defendant asserted that the plaintiff's claim was barred as being *res judicata*, alternatively that the pleadings should be struck out as an abuse of process.

Held: (refusing the application)

(i) The first defendant's contention that there had been a final determination, on the merits, of the issues joined in Cause 316/88 or in Cause 318/89 could not be accepted. SP Ltd. the plaintiff in those actions, had elected to discontinue those proceedings in deference to the conditions imposed in the Canadian proceedings. Those conditions had been imposed and accepted by SP Ltd because of misinformation given in the Canadian proceedings. It was irrelevant that the present plaintiff was the vehicle and channel of that misinformation.

(ii) Although the receiver of C Inc could have raised the present claim in Cause 430/92, he had been advised not to do so until determination of the appeal in Canada, on which the claim depended. Those circumstances did not amount to an abuse of process as contemplated in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd.

(iii) The now concurrent set of proceedings in Cause 430/92 and this Cause could properly be consolidated to avoid inconvenience to the defendants.

HRN

Proof in summons - Affidavit evidence - Mareva injunction - Security for costs

Gosman Ltd v Wagner

Grand Court (255/93)
Schofield Ag CJ
November 17 1995

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

Editor's note: For a summary of the earlier decision see: (1995) 12 Law Bulletin 52.

In an earlier summons the court had ordered the removal of a caution lodged by the defendant against the plaintiff's land on condition that the plaintiff paid a sum to the defendant and paid the sums of US$15,000 and CI$13,570 into an *escrow* account. The sum of CI$13,570 was to indemnify the defendant for a possible stamp duty liability but the claim for stamp duty was not pursued. The sum of US$15,000 was to repay the defendant for sums which he claimed to have expended on the land.

In the present summons the defendant alleged by way of affidavit that his expenditure had been greater than the sum of US$15,000, but this was not supported by invoices or other documents. The plaintiff did not answer the affidavit but argued that the case should go to strict proof as there had been no defence and counterclaim in the earlier action.

The defendant also sought a Mareva injunction to secure costs.

Held: (allowing the application)

(i) As the claim for stamp duty had not been pursued, the CI$13,570 would be returned to the plaintiff.

(ii) The earlier order that the plaintiff pay the two sums into an *escrow* account was a proper order in the exercise of the court's discretion to meet the justice of the case and save the parties a great deal in costs, despite the plaintiff's argument that there was no defence and counterclaim in the action. The current application was properly brought on a summons and the manner of proving facts on such an application was by way of affidavit. On that evidence the defendant had established his entitlement to US$15,000, and that sum would be paid from the *escrow* account to him.

(iii) The director of the plaintiff company was lacking in funds apart from the proposed sale from the disputed property. He lived in the United States and from his past involvement in the case there was every reason to believe that once he transferred the proceeds out of the Cayman Islands he would not be prepared to meet his responsibilities. The defendant would therefore be granted the Mareva injunction and supporting orders.

SAAC

Bankruptcy proceedings in another jurisdiction - Bankrupt now residing in Cayman - Plaintiff commencing action to recover loans granted to bankrupt - Seeking of summary judgment a Mareva injunction and discovery

L v K

Grand Court (77/96)
Williams J
May 3 1996

Legislation

Swiss Bankruptcy Law Article 208
Judicature Law (1995 Revision)

Court Rules applied

Rules of the Supreme Court Order 14

Authorities referred to

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and another [1975] A C 581
Henderson v Henderson (1843) 3 Hare 100

Mr Jones for the plaintiff
Mr McDonough for the defendant

The plaintiff entered into three written agreements with the defendant in Switzerland by which the plaintiff advanced three separate sums of SFr.23,000,000, SFr.10,000,000 and SFr.6,770,673 to the defendant, all repayable by instalments with interest thereon. The repayments were to be commenced on specified dates. The repayments and the interest on the first loan fell due. The defendant failed to make the payments, whereupon the plaintiff commenced proceedings and obtained judgment in Switzerland.

The defendant was declared bankrupt and left Switzerland to take up residence in the Cayman Islands in August 1993. As a result of the defendant's bankruptcy, the instalments which had fallen due under the first agreement (totalling SFr.6,061,916, for which judgment had been obtained) became payable pursuant to Article 208 Swiss Bankruptcy Law. The plaintiff commenced an action in the Cayman Islands to recover the various loans and to enforce the Swiss judgment. The plaintiff, in earlier proceedings, had been granted a Mareva injunction to obtain, *inter alia*, orders for the prevention of any mortgaging, assignment or disposal of the defendant's assets. The defendant was further restrained from parting with possession of or destroying or amending any document or record containing information about his assets.

The plaintiff in the present proceedings, in part relying upon the Swiss judgment, sought summary judgment in respect of all three loans. The plaintiff also applied for 'special' discovery following the granting of the Mareva injunction by which he sought to inspect and take copies of books and records removed from the defendant's home by the Cayman Islands police in relation to extradition proceedings initiated by the Swiss Government for the defendant to face charges in Switzerland. The plaintiff contended that if the defendant was extradited the relevant documents would be sent to the Swiss authorities. If, on the other hand, the defendant succeeded in avoiding extradition, the documents would be handed back to him and he would destroy or dispose of them to avoid giving a true picture of his assets.

With regard to the application for summary judgment, the plaintiff contended that an affidavit filed on behalf of the defendant did not raise any triable issue with respect to the first agreement for which judgment had been given by the Swiss court. The plaintiff argued that the defendant was now raising issues which were not raised in the Swiss court and was therefore shifting his position. The plaintiff submitted that the principle of *res judicata* applied with regard to the first loan agreement and accordingly that the matter could not

be re-litigated. In regard to the second agreement, the plaintiff argued that although *res judicata* did not apply, an issue estoppel existed, it being an abuse of the court's process to allow the defendant to re-litigate the same issue. The defence sought leave to defend on the ground that there was a triable issue and sought to challenge the validity of the judgment of the Swiss court with regard to the first agreement. The defence submitted in the alternative that issue estoppel only applied in relation to the first agreement for which judgment was obtained in the Swiss court. The defence further contended that the proper plaintiff in the case was the trustee in bankruptcy and not the present plaintiff.

Held: (granting the plaintiff's application)

(i) The defendant owed millions of dollars to his creditors following his bankruptcy. He was resisting extradition to Switzerland to face his creditors and was claiming to have no assets. It was therefore critical that some means be found to determine the true extent of his assets. As asserted by the plaintiff, the outcome of the extradition proceedings was of vital importance. Accordingly, discovery would be allowed, *inter alia*, on the following terms:

1. that the defendant attend before the judge in Chambers to be orally examined about the debts owed and properties owned by him;

2. that the defendant produce all the books and records in his possession or power relating 1. above including books and records relating to certain named companies owned or controlled by the defendant;

3. that the plaintiff's attorney be permitted to inspect and take copies of all books and records removed from the possession of the defendant and now in the custody of the Cayman Islands police that were relevant to the proceedings. The same to be done at the plaintiff's expense.

(ii) The Swiss bankruptcy laws did not have extra-territorial application and therefore the trustees in bankruptcy could not commence an action in Cayman. It was however clear that any monetary benefit gained by the plaintiff in the Cayman proceedings would benefit all the creditors.

(iii) The judgment on the first agreement was final and conclusive. The argument that issue estoppel applied only in relation to the first loan was unsound. The second loan formed part of the first agreement. The only reason why judgment was not given upon that sum by the Swiss court was that the relevant repayments had not fallen due at that time. Issues which were not raised in those proceedings could not be raised now.

The defendant would not be granted leave to defend with respect to the first two agreements on the basis that they were *res judicata*: Yat Tung Investment Co. Ltd v Dao Heng Bank and another and Henderson v Henderson.

(iv) In order to grant the defendant leave to defend where summary judgment had been applied for, it was necessary to ascertain whether the defendant's defence was credible and whether there was a reasonable probability of the defendant having a real or *bona fide* defence. There was no need to show that there was a complete defence to the action. The defence only needed to show a triable issue. Having balanced the various considerations, the defendant would be permitted to defend the third agreement by reason of it not having been litigated in the Swiss court.

(v) Accordingly, there would be judgment for the plaintiff on the following terms:

1. A summary judgment in the amount of the loan granted under the first agreement plus interest to be calculated.

2. The judgment of the Swiss court plus interest, costs and court fees would be enforced.

A further order would be made in the form of an inhibition restricting any dealing with a particular parcel of land, and the Mareva injunction would continue until the judgment had been satisfied in full or the court had ordered otherwise. Other persons affected by the order were at liberty to apply for variation or discharge.

AD

Application to strike out proceedings as disclosing no cause of action - Statement of claim not identifying subject matter of intended tracing action

Grupo Torras SA and Another v X Bank and Others

Grand Court (271/95)
Smellie J
November 23 1995

Court Rules

Grand Court Rules Order 18 rule 19

Authorities referred to

McKay v Essex Area Health Authority [1992] 2 All ER 771
Lancaster v London and North Western Railway Co (1892) 3 Ch 273
Dyson v Attorney-General [1911] 1 KB 410
Schmidt v Secretary of State for Home Affairs [1969] 1 All ER 904
Riches v DPP [1973] 2 All ER 935
Drummond - Jackson v British Medical Association [1970] 1 All ER 1094
CH Limited v F [1988-89] CILR 516
Borden (UK) Ltd Scottish Timber [1981] CL 25
Lipkin Gorman v Karpnale [1991] 2 AC 548
Norwich Pharmacal v Customs and Excise Commissioners [1973] 2 All ER 943
Arab Monetary Fund v Hashim and Others (No 2) [1995] 1 All ER 673
Bankers Trust v Shapira [1980] 1 WLR 1274
Smith Kline and French Laboratories Ltd v Global Pharmaceutics Ltd [1986] R P C 394

Mr Popperwell for the plaintiffs
Mr McQuarter for 1st to 4th defendants
Mr Beltrami for 5th and 6th defendants

The present application related to earlier proceedings brought before the Grand Court by the plaintiffs. In the earlier proceedings the plaintiffs had sought a Mareva injunction to prevent the dissipation of assets in the amount of US$2.4m forming part of a trust investment under the control of the first defendant and other trust companies. The plaintiffs also sought orders for early disclosure of information relating to the trust assets. Related proceedings had been commenced in England alleging the appropriation of several millions of dollars by the settlor of the trust in Cayman. The US$2.4m was said to form part of the alleged appropriated funds. The settlor was the Chief Executive of the first plaintiff company. He was, however, not a party to the proceedings in Cayman. The fifth and sixth defendants were the beneficiaries of the Cayman trust fund. At the time of the application for injunctive relief, the plaintiffs had filed a writ in Cayman without a statement of claim. An application was granted for a statement of claim to be filed. The statement of claim contained specific

pleadings relating to the US$2.4m and an additional clause 'in respect of further receipt of the plaintiffs' monies'. The latter clause contained no further particularisation of the further monies alleged to be in the possession of the defendants. The present proceedings related to an application by the defendants to strike out the non-particularised clause on the ground that it asserted a bare tracing claim and a bare claim of unjust enrichment. The defendants contended that there was no evidence to support the wider claim. The application took the form of two separate summonses. One by the first four defendants and the other by the fifth and sixth defendants (the beneficiaries).

Held: (dismissing the application)

(i) Under Grand Court Rules Order 18 r 19 the court could strike out any pleadings which, *inter alia*, disclosed no reasonable cause of action or defence. The defendants claimed that the part of the statement of claim in question disclosed no cause of action as it failed to identify any property which the plaintiffs sought to trace. It was stated in McKay v Essex Area Health Authority that to succeed in striking out a claim, the defendants had to show that the case was 'obviously unsustainable' or 'obviously and almost incontestably bad' or 'hopeless'. It was also well settled that in considering such an application, the court was not to look beyond the allegations of fact put forward by the plaintiff in the pleadings and should assume that those allegations of primary fact were capable of being proved at the trial. Assuming that those allegations were capable of being proved, the court then proceeds to the examination of the issues to determine whether it was nonetheless plain and obvious that the pleadings were unsustainable and would fail if the case went to trial: CH Limited v F. The defendants cited Borden v Scottish Timber and Lipkin Gorman v Karpnale to support their assertion that a plaintiff must be able to identify and specify the property which he seeks to trace and by which he alleges that a defendant has been unjustly enriched. Given the relevant background to the pleadings, the evidence necessary to prove those inferences to the appropriate standard had not been established.

(ii) For the following reasons, the part of the statement of claim in question invited inferences which were reasonable and, as a matter of meeting the formal requirements of pleadings, sufficient to disclose a cause of action:

1. The settlor, as chief executive officer of the plaintiffs, was the plaintiffs' fiduciary. Thus fiduciary obligations attached to all of the plaintiffs' money stolen by him and passed by him to any person or entity: Borden v Scottish Timber.

2. The settlor was alleged and *prima facie* shown to have been the pivotal figure in the sophisticated and elaborate scheme by which the plaintiffs had been defrauded of enormous sums of money.

3. Although $22.5m of the money had been traced directly to the settlor, approximately $337m remained unaccounted for. The settlor had repeatedly failed to give complete and frank disclosure of the assets of his trusts. The plaintiffs, as victims of the fraud, should be given all reasonable assistance in tracing their claim. The court would not be a by-stander to its own proceedings, allowing the rules of pleadings to be abused. The rules were intended to serve the ends of justice. Upon application at the appropriate time the plaintiffs would be given assistance by way of full and frank discovery. The plaintiffs would then be better informed so as to be able to fully particularise their case in the wider claim. If they were then unable to do so, it would at this time be appropriate to hear the complaint of litigants who had become mixed up in the fraud against the plaintiffs. Until then, the wider claim should stand if only on the basis of the reasonable inferences available: Arab Monetary

Fund v Hasshim and Others. The reasonable inference was already established that a trail of discovery wider than that of the sum of $2.4 m existed.

(iii) The defendants' obligation to assist was not lessened in any way by the fact that they were named as defendants (and thus engaged in the adversarial process) and because there was not a separate 'bill of discovery' action of the sort revived in the Norwich Pharmacal case.

For these reasons the defendants had failed to discharge the onus on them to show that no reasonable cause of action in respect of the wider claim existed.

AD

COMPANY LAW

Petition to wind up a company on the just and equitable ground - Grounds for striking out

In the Matter of the Companies Law (Revised) Section 93(d)

Grand Court (359/95)
Smellie J
December 9 1995

Legislation

Companies Law (Revised) Ss 88 93 95

Companies Act 1985 S 459

Court Rules

Grand Court Rules Order 18 rule 19
Grand Court Rules Order 1 rule 2
Grand Court Rules Order 102

Rules of the Supreme Court Order 18 rule 19

Authorities referred to

Re Bolton (HL) Engineering Co Ltd [1956] Ch 577
Wenlock v Moloney [1965] 1 WLR 1238
Re Saul D Harrison & Sons plc [1994] BCC 475
McKay and another v Essex Area Health Authority and another [1982] 2 All ER 771
Foss v Harbottle (1843) 2 Hare 461
Re Anglo-Greek Steam Company (1866) LR 2 Eq 1
Re Haven Gold Mining Company (1881) 20 Ch D 151
Re Ringtower Holdings plc (1989) 5 BCC 82
Loch v John Blackwood Ltd [1924] AC 783
Re a Company (No 004475 of 1982) [1983] Ch 178
Ebrahimi v Westbourne Galleries Ltd [1973] AC 360
Re Wondoflex Textiles Ltd [1951] VLR 458
Tay Bok Choon v Tahansan Sdn Bhd [1987] BCLC 472
Ashmore v British Coal Corporation [1990] 2 All ER 981
Reichel v Magrath (1889) 14 App Cas 665
Metropolitan Bank v Pooley (1885) 10 App Cas 210

Authoritative works

Halsbury's Laws (4th ed) vol 7(2)

Mr Turner for the petitioners
Mr Mowschenson QC for the company

This was an application by TAF Ltd ('the company')

to strike out a petition for its winding-up on the grounds set out in Grand Court Rules Order 18 rule 19 or, alternatively, under the court's inherent jurisdiction.

The company had been incorporated in the Cayman Islands in 1989. It issued a prospectus inviting investment as a closed-end mutual fund company, the investment objective being long-term capital appreciation by means of investments in Thai securities. The company was required to be closed-end until at least 1999, and in order to become open-ended (whereby shareholders had a right to redeem the value of their shares by selling them back to the company), the approval of the Bank of Thailand was required. In 1989 the company obtained the right to list its shares on the Hong Kong Stock Exchange.

In 1991 the company's articles were amended to authorise purchase of its shares. As its shares had consistently been trading on the open market at significant and widening discounts to net asset value, it was thought that the repurchase of shares might stimulate market interest in the shares and thus help to narrow the margin of discount. The company started its 'buy back' programme in October 1992, but failed to achieve its objective of reducing the discount, and suspended the programme in March 1994. At that time, H, the company's largest shareholder, held approximately 24.5% of the issued share capital.

The petitioners, who held 19.69% of the issued share capital, petitioned for a winding-up on the just and equitable ground. The petition was based on three main grounds. Firstly, the petitioners alleged that the directors had acted in bad faith by seeking to prefer the interests of H, the majority shareholder, over the interests of the minority. In particular, the petitioners were concerned by the Board's decision to suspend the buy back programme. H's shareholding had meanwhile risen to 34.99%. If the company were to buy back more shares, the relative size of H's shareholding would have been increased, and a major shareholder having 35% or more of the shares was required by the Hong Kong Code on Takeovers and Mergers and the Listing Rules to make a bid to take over the company. This was not a course desired By H. The petitioners alleged that, in suspending the buy back programme, the directors were seeking to prefer the interests of H, and it was therefore just and equitable that the company be wound up.

The second ground related to the employment of H's son-in-law by the present investment managers of the company, IA Ltd. He had previously been employed by the company's former investment managers. The petitioners alleged bad faith on the part of the directors in that the transfer of employment was the main reason for deciding to employ IA Ltd. They alleged that they had lost confidence in the management of the company and that it was just and equitable that the company be wound up for this reason also.

The third ground was that, in seeking to prefer the interests of the majority shareholder, the directors, by suspending the buy back programme, had acted in a manner oppressive to the minority shareholders who had a legitimate expectation that the repurchasing programme would be continued and that the directors would act *bona fide* in the best interests of the company and would not prefer the interests of any single shareholder.

Held: (striking out the petition)

(i) On an application to strike out on the basis that the petition disclosed no cause of action, the court would so order only in a plain and obvious case. The court would not ordinarily attempt to resolve factual issues, which should usually be left to the trial, by means only of the available affidavit evidence. Grand Court Rules Order 18 rule 19(2) prohibited

adduction of evidence where the application rested on Order 18 rule 19(1)(a).

(ii) The petition disclosed no reasonable cause of action. No reasonable court could conclude from the undisputed facts that the directors had acted in bad faith with the improper motive of preferring H's interest in not being placed in the position of having to make a take-over bid. The original decision to suspend the buy back programme was some 10 months before H acquired the shares which took him to the critical 34.99% threshold. There was an obvious commercial reason for the decision: the programme had been but a temporary success. The continued suspension of the programme was due to warnings by the regulators about the consequences of further repurchases. Permission had been sought for the company to resume repurchases but this had been refused. At an extraordinary general meeting to hear the petitioner's complaints, a resolution that the directors be instructed to recommence the buy back programme was defeated by a significant margin. This decision was reaffirmed by a clear majority at the annual general meeting.

(iii) Even if the directors had acted in bad faith or with improper motive, the shareholders at the EGM and AGM had implicitly endorsed the earlier decisions of the directors. The petitioners had not sought to have the directors removed. This was a course open to shareholders who felt aggrieved at perceived misconduct by directors, but if the actions of the directors had been sanctioned by a majority, thus preventing their removal, the court would not intervene: Foss v Harbottle. If the petitioners were of the view that there had been a fraud on the minority, in the sense that the decisions had not been taken '*bona fide* for the benefit of the company as a whole', then they could have pursued any remedies available to them under this exception to the rule in Foss v Harbottle. However, the court would not allow them to succeed in a petition to wind up a company (in this case a solvent and viable company) because of perceived wrongs said to have been committed by the directors, but ratified by the majority as being in the best interest of the company as a whole: In re Anglo-Greek Steam Company.

(iv) The same principles applied to the alleged improper appointment of H's son-in-law by IA Ltd. The evidence fell far short of showing any breach of duty. Even if such a breach had been established, no prejudice had been shown. Neither the competence of the appointee nor the suitability of IA Ltd was in question. In the absence of prejudice, any action of the directors, even if taken for an improper motive, could properly be ratified by the shareholders, in which case there would be no basis for a winding-up. Nor was the mere possibility of some prejudice in the future enough on which to base the petition: Re Ringtower Holdings plc.

(v) Denial of a legitimate expectation of the petitioners could give rise to a loss of confidence which would justify a winding-up on the just and equitable ground: Loch v John Blackwood Ltd. As a matter of law, the petitioners had no legitimate expectation that the buy back programme would continue. The relationship between the company and its members was contractual, as defined by the articles. Before equity would superimpose upon the legal contract some legitimate expectation of a right not therein defined, there had to be something more, outside the contractual relationship, which gave rise to that expectation: Ebrahimi v Westbourne Galleries Ltd. Here there were no circumstances giving rise to a legitimate expectation that any member would be entitled to insist on the company repurchasing its shares. The power given to the directors was largely discretionary and was to be exercised in a way that they genuinely believed would be in the best interest of the company as a whole. The complaint was all the more misconceived because the shares had been acquired in the knowledge that the company would be closed-end until at least 1999.

(vi) As regards the complaint regarding the

appointment of H's son-in-law, all the petitioners could show was a subjective loss of confidence arising from dissatisfaction about the conduct of the domestic policy of the company. The authorities were clear that that was not enough to justify a just and equitable winding-up.

(vii) As there was no right to expect the directors to repurchase or redeem shares, no oppression could be shown from their decision not to do so.

(viii) The facts presented in the affidavits did not substantiate the petitioners' complaints, but there was evidence suggesting that the petition was vexatious. The petition had originally been filed by RFM Ltd, the corporate investment manager of the petitioners. RFM's declared philosophy was one of 'fund-raiding', whereby it bought into fund companies, then embarked upon a campaign of harassment in order to force the company to buy back or redeem its shares at a premium. A petition brought for the purpose of harassment of the respondent company was unarguably frivolous and vexatious and an abuse of the process of the court. Further, RFM had continued to sell and acquire shares in the company despite the alleged loss of confidence. It was difficult to resist the inference of an ulterior purpose behind the petition.

(ix) Although not a primary reason for striking out the petition, it was noteworthy that a decision to wind-up the company would not be capable of practical effect, as the company would not be allowed to terminate the fund until 1999 at the earliest.

(x) Striking out and dismissal of the petition was justified under Order 18 rule 19 or under the inherent jurisdiction of the court. The inherent powers given at common law to dismiss actions which were frivolous, vexatious or an abuse of process were not diminished but expanded by the Grand Court Rules.

HRN

CONFIDENTIALITY

Norwich Pharmacal order - Confidentiality - Conditions limiting discovery

In the Matter of the Confidential Relationships (Preservation) Law (1995 Revision)

Grand Court (488/95)
Smellie J
December 9 1995

Legislation

Confidential Relationships (Preservation) Law (1995 Revision) S4

Authorities referred to

Norwich Pharmacal Co v Commissioner of Customs and Excise [1973] 3 WLR 164
Bankers Trust Co v Shapira [1980] 1 WLR 1274
Societe Romannaise de la Chaussure SA v British Shoe Corp Ltd [1991] FSR 1
Dubai Bank Ltd v Galadari (No 6) (1992) The Times October 14
Home Office v Harman [1983] AC 280
Distillers Co v Times Newspapers Ltd [1975] QB 613
Alterskye v Scott [1948] 1 All ER 469
Church of Scientology v DHSS [1979] 1 WLR 723

Mr Jones for the applicant
Mr Helfrecht for the Attorney-General
Mr Ritchie for C Co

Civil proceedings (Cause 468/95) were brought in Cayman by C Co to trace and recover money of which it had been defrauded. C Co presented strong *prima facie* evidence in favour of its application for a Norwich Pharmacal order against D Bank. This evidence disclosed that one of C Co's senior executive officers was the central figure in a fraudulent conspiracy perpetrated against it and that others, including D Bank, had become involved.

The court was satisfied that D Bank had become involved, albeit innocently, and that, although the identities of some wrongdoers were known, there were others whose identities were not yet known. An *ex parte* order was granted and served on D Bank. D Bank applied to the court for directions pursuant to s.4 Confidential Relationships (Preservation) Law which would enable it to comply with the order, but with certain conditions and restrictions to safeguard the public interest in confidentiality.

Held: (granting the application and imposing conditions)

(i) At this stage of the proceedings it was appropriate that full disclosure of all known information should be made, but in the form of affidavit evidence in order to preserve confidentiality. An attempt at redaction of the sensitive information from the documents involved would not have been a practicable means of preserving confidentiality.

(ii) The equitable relief afforded by the Norwich Pharmacal order was subject to judicial discretion which was to be exercised according to the circumstances of the case. In order to preserve confidentiality and to ensure that information obtained would not be abused elsewhere, conditions would be imposed on the manner and extent to which discovery was to be given.

(iii) The first condition required a written undertaking from the plaintiff that the information obtained would be used only for the purpose of these proceedings or other proceedings specifically authorised by the court. The second condition was that the plaintiff would not seek discovery against D Bank in respect of the same information contained in the affidavits. This condition was imposed to prevent any attempt to circumvent the order by seeking orders for discovery of the same information against D Bank in some other jusrisdiction. However, the condition was not intended to preclude an application, or appropriate orders in this jurisdiction, for full production of the underlying documents at a later and more appropriate stage.

HRN

CONTRACT

Sale of real property - Clause allowing forfeiture of deposit and sums paid in the event of default by purchaser - Recovery action commenced 13 years after forfeiture

Jared Properties Ltd v the Personal Representatives of Simpkins and Others

Grand Court (323/93)
Harre CJ
November 2 1995

Authorities referred to

Workers Trust and Merchant Bank Ltd v Dojap Investment [1993] 2 All ER 370
Howe and Another v Smith (1881-5) ALL ER 201
Stockloser v Johnson [1954] 1 QB 476
Beach Club Enterprises Ltd v Horizon Management Ltd [1980-83] CILR 223
Steadman v Drinkle [1916] AC 275
Re Gagenham (Thames) Dock Co (1873) LR 8 Ch 1002
Mussen v Van Diemen's Land Co [1938] 1 Ch 253
Galbraith v Mitchenhall Estates Ltd [1965] 2 QB 473
Campbell Discount Co Ltd v Bridge [1961] 2 All ER 97
Windsor Securities Ltd v Loreldal Ltd and another (1975) The Times 9th September

Mrs Corbett for the plaintiff
Mr Parkinson for the first and second defendants
Mr McLaughlin for the third defendant

The first defendants were the personal representatives of the deceased husband of the second defendant. The second defendant, together with her husband, had entered into a contract for the sale of land with a company called Great Beach Ltd in 1981. The agreement provided for the payment of a deposit and part payment of US$65,000 towards the purchase price. The balance of US$585,000 was to be paid by four instalments of US$146,250 at six monthly intervals. A clause in the agreement stated that in the event of failure to complete the agreement or default in the instalment payments the vendors would serve a notice on the purchaser making time of the essence. If the notice was not complied with within 28 days the agreement would be terminated and the deposit and all sums paid up to that point would be forfeited.

The purchasers defaulted in the instalment payments. They sought extension of time to pay. The extension ran into 1987 when the vendors finally served the notice to complete. It appeared that the purchasers were in the meantime trying to sell the property at an excessive profit in order to complete their own purchase. They found no buyer at the price offered and were not in a position to complete the agreement. After the service of the notice, the vendors forfeited the deposit and all sums paid up to that stage. The plaintiff sought, *inter alia*, a declaration that the clause in question was a penalty and that the sum of US$357,000 (or such other sums as the court determined) retained by the first and second defendants be repaid to them. The present plaintiff was the assignee of the original purchaser.

Held: (dismissing the claim)

(i) There was no doubt that the plaintiff was in breach of contract. The initial down payment of 10% of the purchase price was by long established usage an indication that the purchaser was earnest and could be validly forfeited as an exception to the general rule against penalty clauses in contracts which are not a genuine pre-estimate of loss: Workers Trust and Merchant Bank Ltd v Dojap Investment.

(ii) The difficulty in the present case arose in connection with the two instalment payments of US$146,750 each made before the exercise by the vendors of their right of forfeiture. It was necessary to determine on the present facts whether there should be equitable relief against the forfeiture clause. The relevant English authorities were reviewed.

In Stockloser v Johnson, which contained an identical

clause, the court was divided on the issue of equitable relief of forfeiture clauses (as opposed to penalty clauses) and stated that at the most such relief could only be used to give the purchaser time to complete the transaction. In Steadman v Drinkle, where a vendor had served notice to exercise a forfeiture clause and the purchaser (already in occupation of land he was paying for by instalments) had tendered the payment, the court had applied equitable principles to prevent forfeiture. In Mussen v Van Diemen's Land Co. Farwell J. held that the whole basis of the decision in Steadman v Drinkle was that the purchasers were ready and willing to perform the contract. In Stockloser v Johnson, Denning and Somervell LJJ had expressed the view that the equitable jurisdiction was wider, but required it to be shown that retention of the instalment was unconscionable in all the circumstances. Romer LJ took a narrower view. In Galbraith v Mitchenhall Estate Ltd Sachs J. followed the view of Romer LJ that there was no equity in favour of a purchaser who had failed to complete his contract through no fault of the vendor.

(iii) Whilst agreeing in principle with the view expressed by Romer LJ, central to the outcome of the instant case was the fact that there had been undue delay in commencing the action. The plaintiff had commenced the action thirteen years after the breach in question on the eve of the expiry of the limitation period. In Stockloser v Johnson Denning LJ had stated that delay may be a material factor in such situations. Even on the wider view adopted in Stockloser v Johnson, the plaintiff's claim would still fail on the basis of the delay.

AD

Construction contract - Plaintiff claiming outstanding payment - Defendant counterclaiming for works completed by another contractor

Boosie Arch Builders Ltd v Roulstone-Hall and Another

Grand Court (192/94)
Bingham J
December 6 1995

Mrs Nervik for the plaintiff
Ms O'Connor for the defendants

The plaintiff and the defendants contracted for the construction of a dwelling house at a cost to the defendants of CI$250,000 with the purchase being financed by a bank. The plaintiff completed the house in April, 1994, at which time the amount due on the contract price was CI$13,750. A final loan payment was made by the lending bank to the defendants who paid over only CI$4,000 to the plaintiff, leaving a balance under the contract of CI$9,750. After several unsuccessful demands for payment, the plaintiff offered to revise his claim to CI$8,362. This claim formed the subject matter of the present dispute. The defendants, by way of counterclaim, alleged that it had been necessary to use the balance to engage another contractor, Woods, to finish the floor tiling at a cost of CI$12,500. The first defendant alleged that the contract with Woods was entered into with the consent and approval of the plaintiff whom she regarded as responsible for meeting the expense of this additional work. The plaintiff denied awareness of the agreement with Woods asserting that the cost of their work was the sole responsibility of the first defendant.

The evidence further indicated that the plaintiff had to complete some additional work over and above the contract price before the bank would release the loan to the defendants. The additional work was

estimated at CI$16,000. The plaintiff's revised claim was further disputed by the first defendant on the basis that the plaintiff had failed to provide invoices for the work done.

Held: (finding for the plaintiff)

(i) It did appear that the first defendant was responsible for the payment of the separate contract with Woods. Even assuming that the payment of the work done by Woods was to be deducted from the contract price payable to the plaintiff, the plaintiff had done extra work over and above the contract price estimated at approximately CI$16,000. A deduction of CI$12,500 payable to Woods would still leave the defendants owing the plaintiff a sum greater than the CI$8,362 demanded by him.

(ii) The defendant's contention as to the non provision of invoices was unreasonable since the entire transaction had been based on oral agreements. Given the admissions of the first defendant regarding the extra work done by the plaintiff, it was unreasonable for the first defendant to suggest that the plaintiff had inflated the cost of the construction. The plaintiff had been accommodating in his approach to a compromise. Having seen and heard all the witnesses, the plaintiff's account was to be preferred. Had the plaintiff not completed the extra work and absorbed part of the cost, the final payment of CI$13,750 would not have been obtained from the bank. It was common ground that more work was accomplished to the benefit of the defendants than was called for in the initial written contract and more also in monetary terms than the balance requested by the plaintiff. On the totality of the evidence, the plaintiff had established its claim for the balance remaining due on the contract price. The final claim of $8,362 was reasonable in all the circumstances of the case and the defence and counterclaim would be rejected.

AD

CRIMINAL LAW – SENTENCING

Crim App No.	Case No.	Offence	Sentence
4/95	3551/94	Theft	2 years Imp. (15 months susp.)
6/95	2224/92	Aggravated burglary	2 years Imp.
11/95	4514/93	Handling stolen goods	2 years Imp. + 2 months Imp. (contempt)
17/95	4052/93	Robbery	2 years Imp. (18 months susp. -compassionate grounds)
19/95	4052/93	Robbery (3 counts)	3 1/2 years Imp. + Comp. order of CI$1785.00-1 year to pay following release from prison (or 4 1/2 months Imp.)
20/95	2693/95	Causing G.B.H.	2 years Imp.
27/95	2221 & 2222/95	Importation of ganja	
27/95	2224 & 2225/95	Possession of ganja with intent to supply	2 years Imp. (total)
28/95	4341/95	Possession of unlicensed firearm (2 counts)	18 months Imp. on each count (conc.)
32/95		Defilement of girls under age of 16	2 years Imp. on each count (conc.) video camera + tapes confiscated. Deportation matter postponed
3/96	203/95	Possession of cocaine with intent to supply	
3/96	204/95	Possession of cocaine	2 years Imp. (total)
4/96	16/95	Robbery (2 counts)	3 years Imp (conc.)
7/96	2/95 (Ind)	Possession of forged currency /obtaining property by deception	18 months Imp. (9 months susp.)

CRIMINAL PROCEDURE

Sentencing - Crown seeking increase of prison sentence

R v Guardiola (C)
R v Guardiola (J)

Grand Court (51/95)
Schofield J
November 22 1995

Authorities referred to

Blackman v R [1984-85] CILR 55
Hurlstone v R [1986-87] CILR 93

Mr Roberts for the Crown
Mr Furniss for the respondents

The Crown sought the increase of sentences imposed on the respondents who had been found in possession of 109.5 lbs of ganja.

The two respondents had been convicted on their 'guilty' pleas to the offences of importation of ganja. They each received sentences of two years' imprisonment with twelve months suspended. Two women involved pleaded guilty to charges of being concerned in the importation of ganja.

Held: (allowing the appeal)

(i) The Criminal Procedure Code was silent on the test to be applied when the Grand Court was asked to increase a sentence imposed by the Summary Court. In England, the Attorney-General could only appeal the sentence of the Crown Court if it appeared to him that the Crown Court had been unduly lenient. There was no similar provision in the Cayman Code. However this did not mean that the Grand Court would merely substitute its own view of what was an appropriate sentence. In the case of an appeal by a convicted person against sentence, the Grand Court would only interfere with the sentence if such were found to be wrong in principle or manifestly excessive. Similarly, in the case of an appeal by the Crown the court would only interfere with a sentence if such were wrong in principle or manifestly lenient or inadequate.

(ii) The sentences imposed on the two respondents were in effect twelve months in each case. It was wrong in principle to suspend part of a sentence where after the service of the immediate term the defendants would be sent to their country of origin. The suspended period of the prison sentence then became an ineffective or token punishment. The suspended sentences were inappropriate given the nature and seriousness of the offences. There was little that could be said in mitigation. The respondents were moving drugs on a large scale and in an organised way. The fact that some of the drugs were destined for another country did not lessen the gravity of the offence: Blackman v R.

(iii) The Grand Court was referred to a case in which sentences of 4 years and 3 1/2 years' imprisonment were imposed for offences involving importation of 307 lbs ganja. Based on this, one could understand why the learned magistrate arrived at the figure of two years. However to reduce the sentence by half by suspending twelve months not only meant that he erred in principle but that the sentences were manifestly inadequate.

(iv) In the circumstances, the appeal would be allowed and the sentences imposed by the magistrate set aside. In substitution, a sentence of two years' imprisonment would be imposed on each

respondent.

AD

Defilement of girls under age of 16 - Sentencing principles - Need to balance mitigating and aggravating factors

Gee v R

Court of Appeal (33/95)
Zacca Pres, Georges, Collett JJA
April 15 1996

Legislation

Penal Code S 132(3)

Authorities referred to

Attorney-General's Reference (R v McLennan) (1994) 16 Cr App R 578
R v Richards (1980) 2 Cr App R 119

Mr Hampson for the appellant
Mr Bulgin for the Crown

The appellant had been convicted on his own plea of guilty before the Grand Court of two counts of defilement of a girl under the age of 16 contrary to s.132(3) Penal Code (Revised). The appellant received concurrent prison sentences of three years' imprisonment in respect of each count.

The offences had taken place at the appellant's residence with two High School pupils aged 14 and 15 who had consensually taken part in sexual intercourse with him on a number of occasions. On certain of the occasions the appellant had video recorded the events for his subsequent sexual gratification. On all occasions the appellant provided the girls with substantial payments of money.

The appellant appealed against sentence.

Held: (allowing the appeal against sentence)

(i) Some of the observations of the learned judge showed that he had taken an excessively rigid approach in the exercise of his sentencing discretion.

(ii) Whilst the considerations of deterrence focused upon by the learned judge were relevant factors in sentencing, they were not the only ones: Attorney-General's Reference (R v McLennan) per Lord Taylor CJ.

(iii) The maximum sentence permitted for an offence by law was reserved for the worst instances of perpetration; rarely would it be considered as even the starting point in sentencing.

(iv) The powerful mitigating factors present in the case needed to be balanced against the obligation to protect 'precocious adolescents...against their own instincts'. Such mitigating factors included the appellant's hitherto unblemished character as a successful chartered accountant and special constable. His conviction would of itself bring to a premature end his successful career with subsequent financial hardship, and was likely to lead to the break up of his family, his wife having already petitioned for divorce. The appellant had also brought great disgrace upon himself in a community where he had lived for some 22 years. All the foregoing factors were proper considerations to be taken into account in sentencing: R v Richards, per Lord Lane CJ. Further in the appellant's favour was that he had

admitted his guilt and had co-operated with the police. His pleas of guilty, in protecting the complainants from having to give evidence at a public trial, had properly been considered by the learned judge to afford him substantial sentencing discount.

On the other side of the balancing process was to be considered, in particular, two factors which aggravated the offences; the video taping of the events and the substantial gifts of money were both likely to further cheapen the act of sexual intercourse in the eyes of the young complainants.

(v) Taking all factors into consideration, a sentence of two years' imprisonment on each count to run concurrently would meet the justice of the case. Any time spent in custody prior to arraignment was to be taken into account.

MD

Theft - Sentencing principles - Parity of sentence in similar circumstances subject to public interest in the individual case

McLaughlin v R

Court of Appeal (47/94)
Zacca Pres, Georges, and Kerr JJA
December 6 1995

Authorities referred to

R v Rivers and Powery (Cause 40/94)
R v Barrick (1985) 81 Cr App R 78

Mr Archie for the Crown

Mr Furniss for the defendant

The appellant had pleaded guilty to three counts of theft from her employer involving a total of CI$7,622.00. The offences were alleged to have occurred in February and March 1995 whilst the appellant was a clerk at Cayman Islands Trust Company Ltd. On the three occasions, the appellant had initiated transfers of funds from clients accounts without authorisation. In each case the moneys had been used by the appellant to meet pressing financial claims upon her. Her family later repaid all sums taken. Upon discovery of her activities the appellant was found to be in need of psychiatric help and she attempted suicide.

In sentencing the appellant, the learned judge had stressed the need to uphold the Cayman Islands as a reputable financial centre with employees in the financial sector who could be relied upon to be honest. Employees who breached this standard would, save in the most exceptional circumstances not here present, face an immediate prison sentence. Accordingly, a two year term of imprisonment was imposed with 15 months being suspended to reflect the circumstances of the case.

An apparently more lenient sentence had been imposed by the same judge in similar circumstances and on the same day in R v Rivers and Powery. Here a larger amount of money (CI$37,000) had been stolen by two defendants who each received a nine month sentence of imprisonment, suspended for two years. Counsel for the appellant urged the present court that in the interests of consistency the present two year sentence should be wholly suspended.

Held: (dismissing the appeal)

(i) Much of the evidence raised by the appellant on appeal had already been raised and given due weight

by the learned judge at first instance.

(ii) Whilst concerned to learn of the decision in Rivers and Powery, that decision not being the subject of the present appeal warranted no further comment.

The sentencing principles applied by the learned judge in the instant case were demonstrably correct and were in accordance with the guidelines laid down in the Court of Criminal Appeal in R v Barrick. This being so, the principle that in general there should be reasonable parity between sentences imposed in similar cases would not be allowed to distort the sentencing policy applied in an individual case.

MD

Mutual Legal Assistance Treaty - Request for assistance - Power of Grand Court to grant injunctions against bank accounts

In the Matter of the Grand Court Law (1995 Revision) Section 11 and In the Matter of the Mutual Legal Assistance (United States of America) Law 1986

Grand Court (56/96)
Harre CJ
January 9 1996

Legislation

Mutual Legal Assistance (United States of America) Law Section 6(1)

Authorities referred to

Government of India Ministry of Finance (Revenue Division) v Taylor and another [1955] AC 491
Director of Public Prosecutions v Doot and others [1973] AC 807
Chief Constable of Kent v V and another [1983] QB 34
R v Commissioner of Metropolitan Police ex parte Blackburn [1968] 2 QB 118

This was an application by the Solicitor-General pursuant to a certificate issued by the Cayman Mutual Legal Assistance Authority for injunctive orders restraining persons named from dissipating directly or indirectly the funds in two bank accounts, particulars of which had been requested by the US Department of Justice in accordance with the Mutual Legal Assistance Treaty ('the Treaty'). Article 1 paragraphs 1 and 2, and Article 5, paragraphs 1-3 of the Treaty were relied upon in support of the application.

Held: (dismissing the application)

(i) With regard to the scope of mutual assistance, 'assistance' included 'immobilizing criminally obtained assets': Article 1(2)(g) of the Treaty. This was to be interpreted as a means of assisting in the implementation of other Articles of the Treaty, for example by imposition of an injunction of the kind sought in this case. Articles 14 and 15 related to the seizure and return of 'articles' and clearly did not apply to balances in bank accounts. For Article 16 to come into play, proceedings relating to forfeiture, restitution or the collection of fines, in which assistance was to be given to the extent permitted by Cayman law, had to be in place. There was no evidence that any such proceedings were in place, nor was there any legal basis under Cayman law under which they could be put in place at that time. It was not necessary to grant an injunction of the kind sought to facilitate implementation of the

request for production of records. To go further by granting an injunction against the bank accounts, without any evidence of the prospect of proceedings whereby those accounts could be seized under Cayman law, would be at best premature. Article 16 limited the more general words of the other provisions relied upon in support of the application and indicated that assistance relating to seizure of the proceeds of crime was to be given only in accordance with the respective domestic laws of the parties to the Treaty.

(ii) It was unfortunate that an attempt had been made to support submissions of counsel by means of an Attorney-General's certificate, which stated *inter alia* that it was 'in the public interest and an obligation under the MLAT Treaty to facilitate the immobilization of criminally obtained assets pursuant to the said request for assistance notwithstanding the fact that the court of the Cayman Islands may have no powers to order the forfeiture of the said assets'. This smacked of political interference with the courts.

(iii) It would be wrong to permit the Attorney-General to act in aid of foreign criminal proceedings by freezing the alleged proceeds of the crime in a Cayman bank account. The reasoning of Lord Denning in Chief Constable of Kent v V and another was based on the power of the English court to make a restitution order. To extend this to a situation where no legal basis had been shown for a restitution order, and where the injunction was sought in aid of the penal law of a foreign power, would clearly be wrong.

(iv) Wider statutory provisions relating to forfeiture of criminally obtained assets were already at the drafting stage. Once these were in place, the results of such an application might well be different.

HRN

Liability under the Animals Law - Conflicting evidence - Meaning of 'effective measures'

Wilks v Waller

Grand Court (363/92)
Schofield J
June 30 1995

Legislation

Animals Law 1976 S31

Mr Sweetnam for the plaintiff
Mr Collins for the defendant

The plaintiff alleged that whilst driving her motor car she had collided with the defendant's cow which had wandered into her path. After the collision she photographed the animal and reported the accident to the police. The photograph was not available at trial. The plaintiff sought to recover the cost of repair of her vehicle. The court was asked to determine whether the animal involved in the collision was one of the animals owned by the defendant, and if so, whether the defendant had taken proper and effective measures to prevent the animal from escaping onto the road.

Held: (judgment for the plaintiff)

(i) The plaintiff's evidence detailing her conversation with the defendant's neighbour regarding the similarity between the photographic image and the defendant's bull was inadmissible.

(ii) The plaintiff's evidence detailing the telephone conversation she had with the defendant was admissible. The plaintiff testified that the defendant stated 'It is not my cow mash up your van, it is your van that hit my cow.'

(iii) The defendant did not deny that the conversation had taken place but disputed that he had acknowledged that his animal was involved. He did admit that he found his bull in the neighbour's pasture the next day and was at a loss to explain how his bull was able to escape from a pasture that was fenced with four strands of barbed wire.

(iv) S.31 Animals Law states that it is the 'responsibility of the owner of any livestock...to take proper and effective measures to prevent such livestock from trespassing onto...any road or place normally used by the public for the passage of vehicular traffic, and ...such owner shall be responsible in damages for any injury done by such livestock in so trespassing'. The word 'effective' meant 'having a definite or desired effect'. Since the measures that the defendant took did not have the definite or desired effect of keeping the animal in the pasture and off the road, he was liable to the plaintiff.

JE

Attempted murder - Evidence - Hearsay rule - Res gestae exception - Identification evidence of unreliable witness

Rankine v R

Cayman Islands Court of Appeal (9/95)
Zacca Pres, Georges, Kerr JJA

April 12 1996

Authorities referred to

Ratten v R (1972) 56 Cr App R 18
Nye and Loan v R (1978) 66 Cr App R 252
R v Turnbull (1985) 80 Cr App R 104
R v Andrews (1987) 84 Cr App R 384

Mr Furniss for the appellant
Mr Helfrecht for the Crown

In March, 1995, the appellant was convicted by a 5:2 majority verdict of the attempted murder of one Simon Newball with the events having taken place on the evening of June 8, 1994. The appellant was sentenced to 15 years' imprisonment.

Newball's evidence was that at about 11 p.m. on June 8 he had been driving his brother's car along Goring Avenue. At about 50 yards distance, Newball had seen the figure of the appellant and as he got within about 4 feet of him he saw that the appellant was aiming a shotgun at him. It was at this time, according to Newball's evidence, that he recognised the figure as that of the appellant. Upon seeing the gun pointing at him Newball ducked down in the car. The medical evidence was consistent with Newball's contention that the injuries to his head and shoulder were caused after he had passed his assailant. Newball lost control of the car which careered off the road. He then ran to the main road where D.C. White, in a passing police patrol car, picked him up and took him to hospital.

Whilst at the hospital Newball, in response to D.C. White's question, stated that the appellant had shot him. Other witnesses, however, gave conflicting evidence, with three witnesses stating that Newball had told them that his assailant had not been the appellant. Newball admitted that he had made this assertion to a fourth witness but he sought to dismiss it as a lie.

Evidence was led by the Crown that some five nights prior to the shooting, Newball had driven two associates, Hurlstone and Smith, to a location near to the Zodiac Club where the associates set upon the appellant. A prosecution witness, Dwight Wright, testified that two hours prior to the shooting he had heard the appellant, whilst in the proximity of the Zodiac Club, state that he had three shots in his shotgun, one for each of Hurslstone, Smith and Newball. Further significant evidence was led by Detective Inspector McKay who described the lighting in the area of the shooting as not very good, and the area where the spent shotgun cartridges were recovered as poorly lit.

The appellant's main defence at trial was that he was in the West Bay area both at the time of the shooting and at the time of his alleged statement outside the Zodiac Club. Statements of Crown witnesses were relied upon to substantiate this alibi.

Counsel for the appellant raised two main issues on appeal:-

1. that the identification of the appellant by Newball could not be relied upon with him only having seen his assailant fleetingly and in a poorly lit area. Newball's subsequent conflicting statements as to the identity of his assailant were also relied upon; and

2. that the statement made by Newball to D.C. White in the hospital emergency room was inadmissible as hearsay evidence, with the learned trial judge having erred in allowing this evidence to go before the jury.

D.C. White's evidence was that the statement was made to him about one to two minutes after he had heard the gun shots. The learned trial judge ruled that the statement was admissible by application of the *res gestae* exception to the hearsay rule. The real issue according to the trial judge was whether the lapse of time between the shooting and the making of the statement afforded sufficient time for Newball to have concocted a story. The learned judge concluded:

'I am of the view that the witness would have naturally been so preoccupied with the anguish of his own predicament as to remove any real concerns (of concoction). I am also of the view that there is sufficient association in time, place and circumstances between the crucial events and the statement in question as to bring the statement within the exception.'

Held: (allowing the appeal)

(i) After an extensive review of the English authorities on the application of the *res gestae* exception to the hearsay rule (in particular Ratten, Turnbull and Andrews) it was clear that the reasoning of the learned trial judge in admitting this evidence was unimpeachable. No criticism either could be levelled at the way in which the learned judge had left the evidence to the jury.

(ii) The crucial issue, however, was that of identification, for if the identification of the assailant was unreliable, the statement made by Newball to D.C. White carried little weight. The strength of the prosecution's case rested principally on the identification of the assailant by Newball. The rest of the evidence, including that given by Dwight Wright, was not of itself sufficient to found a conviction. Furthermore, there existed conflicting evidence as to whether Wright could have seen the appellant near to the Zodiac Club at the time stipulated; or whether the appellant was in the West Bay area at the time of the shooting.

Newball was himself not of unblemished character. He was a reluctant and unreliable witness who had given conflicting evidence. Taking the evidence in its entirety the possibility of a mistake could not be ruled out. The verdict of the jury was therefore

unsafe and unsatisfactory and the conviction would be set aside with a verdict of acquittal entered.

MD

FAMILY LAW

Ancillary relief - Maintenance - Variation

LF v JF

Grand Court (58/91)
Schofield J
December 20 1995

Legislation

Matrimonial Causes Law

Both parties appeared in person

A consent order was made by the Court of Appeal in November 1993. Pursuant to that order, real property of the parties in a foreign jurisdiction was to be transferred to the sole name of the former wife (the petitioner). Additionally, the former husband (the respondent) was ordered to make a lump sum payment to the petitioner in full satisfaction of her maintenance requirements. In addition to paying for the child's education, extra-curricular activities and health insurance, the respondent was ordered to pay US$800 per month for the maintenance of the child.

The petitioner sought an increase in the child maintenance, an order that the child not be removed from the jurisdiction without leave of the court or prior written consent of the parties; and a direction requiring the respondent to establish a trust or other fund for the child.

The former husband consented to an increase in the maintenance for the child to $US1000.

Held: (order as follows)

(i) Although there was no evidence of irresponsible behaviour on the part of either party, the restriction sought regarding removal from the jurisdiction was of no harm and would be granted.

(ii) There was no precedent for an order requiring the respondent to make a settlement on the child by means of a trust through a variation application. The order sought was inappropriate and would be denied.

JE

Ancillary relief - Variation

RG v BG

Grand Court (148/94)
Smellie J
April 12 1996

Legislation

Matrimonial Causes Law

Authoritative works

Halsbury's Laws of England (4th ed) vol 9

Mrs Cowan for the petitioner
Mr Lamontangne QC for the respondent

Ancillary matters were settled by way of a consent order in August, 1995. The petitioner was the sole shareholder of companies A and B. Company B was used by the respondent to conduct business. The order directed the respondent to transfer a lump sum, plus an unspecified amount to cover a business debt, to the petitioner. In return, the petitioner was ordered to transfer the matrimonial home and ownership of company B to the respondent. The parties were unable to agree on the amount of the debt and the petitioner unilaterally removed money from the account of company B. The parties sought the court's determination.

Held: (order as follows)

(i) No formal contractual arrangement existed between the companies used by the parties as trading vehicles. Services had been supplied by the petitioner to the respondent through the companies.

(ii) There was no disagreement that a debt was due. It was appropriate to apply *quantum meruit* principles, as noted in Halsbury's Laws. The profit element in the petitioner's claim was not allowed, as it could not have been the parties' intention at the time the services were performed, in light of their relationship of husband and wife, that any amount other than actual expenses would be charged.

(iii) The unilateral action of the petitioner in debiting the bank account of company B was ill-conceived and inflammatory.

Costs to the respondent to be taxed if not agreed.

JE

INSURANCE LAW

Insurance - Policy interpretation - Consequences of driver breaching terms of provisional licence

Jackson v Cayman Insurance Co Ltd

Court of Appeal (2/95)
Zacca Pres, Kerr, Collett JJA
December 7 1995

Legislation

Traffic Law (Revised) Ss 32 33 39 40 43

Authorities referred to

Edwards v Griffiths [1953] 2 All ER 874
Rendlesham v Dunne and Pennine Insurance Co [1964] 6 Lloyds List Law Reports 192

Mr Hill QC for the appellant
Mr Ritchie for the respondent

Editor's note: For summary of the

Grand Court judgment see: (1995) 12 Law Bulletin 40.

Mr Smith obtained a provisional driving licence in September 1988 and then hired a motorcycle, insured by the appellant. The following day whilst riding the motorcycle Mr Smith was involved in an accident with the respondent cyclist. The respondent was severely injured. He commenced an action against Mr Smith and notice was given to the appellant insurer pursuant to the Motor Vehicle Insurance (Third Party) Risks Law 1964 s.16(2)(b). At the trial fault was divided equally between the respondent and Mr Smith, leaving an award in favour of the respondent in the amount of CI$124,106.69 plus costs of CI$10,888. The appellant insurers contested their liability citing policy breaches of Mr Smith.

The respondent then commenced an action against the appellant asserting that if Mr Smith was insured by the appellant, but was in breach of that policy, then the appellant was liable to pay the respondent under s.16. The appellant argued that Mr Smith was not insured (as opposed to being insured and in breach) and therefore it was not liable to the respondent under s.16. In support of their position the appellant cited two clauses of the insurance certificate: (1) a prohibition against 'racing or pacing'; and (2) exclusions operative where the insured failed to comply with restrictions of a provisional license, specifically, carrying a passenger and not displaying an 'L' plate, as required by s.40A Traffic Law (Revised).

Harre CJ, at first instance, ruled in favour of the respondent, holding that whilst Mr Smith was not insured against the consequences of breaching the Traffic Law, he was insured against liability arising by his negligent driving. The insurers appealed against this decision.

Held: (for the respondent)

The Court of Appeal considered anew the arguments put forward by counsel at trial and affirmed the decision of the learned Chief Justice.

JE

LABOUR LAW

The following is a decision of the Labour Law Appeals Tribunal initiated pursuant to s.70(1) Labour Law 1987.

In the Matter of an Appeal by Island Supply Company Ltd Against the Decision of the Director of Labour in the Matter of Elsworth Grant v Island Supply Company Ltd

Labour Law Appeals Tribunal (4(1)(96))

April 2 1996

Legislation

Labour Law SS 6(4), 44(b), 44(c), 44(f), 45(2), 45(3), 46(2)

Mr McField for the appellant employer
Respondent in person

This was an appeal against the decision of the Director of Labour awarding the respondent CI$3,483.63 as severance pay and compensation for unfair dismissal.

Counsel for the appellant applied to have the appeal hearing adjourned on the basis that his previous commitments with a Grand Court trial and subsequent illness had prevented him from properly preparing his client's case. The Tribunal refused this application noting that the appeal hearing had been postponed from the date originally set down in February. To further protract the proceedings would be prejudicial to the respondent who had not been paid the award of the Director of Labour.

Counsel for the appellant submitted that the decision of the Director of Labour should be overturned for the following reasons:

1. That the Director had erred in finding that the dismissal was not reasonable with there being clear evidence of the respondent's absenteeism, such constituting misconduct within s.45(3) Labour Law and justifying dismissal under s.44(b); and

2. that the dismissal was justified under s.44(c) and s.46(a) Labour Law - the failure of the employee to perform his duties in a satisfactory manner following the receipt of a written warning.

<u>Held</u>: (dismissing the appeal)

(i) S.44(b) Labour Law provided that a dismissal would not be unfair if, within s.45(3), the reason assigned by the employer was that of misconduct while in receipt of a written warning. S.45(2) required the written warning to describe the misconduct in respect of which the warning was given and to state the intended action of the employer in the event of further misconduct. S.45(4) made plain that misconduct included absenteeism.

It was clear from both the respondent's timesheet and the appellant's evidence that the respondent had been repeatedly absent from work without authorisation and that he had failed to show satisfactory reasons for these absences or that they had been communicated to the appellant in a timely manner. However, whilst counsel for the appellant sought to rely upon the appellant's warning letters to the respondent as satisfying the requirements of s.45(2), it was clear that the latest such letter, that of May 1995, was deficient in that it specified no date, failed to identify the misconduct complained of and only in a non-specific way referred to the taking of further action should the misconduct be repeated. The procedures required by Ss 45(2) and (3) were not adhered to and the dismissal could not therefore be justified under s.44(b).

(ii) Counsel's assertion that the letter of May 1995 identified poor work performance and failure to comply with instructions as a further reason for the dismissal within s.46(2) was rejected. The respondent had been provided with a new position but, contrary to s.6(4) Labour Law, had not been provided with a written job description. The respondent had, therefore, understandably been left with an imperfect understanding of his duties. The appellant had failed to establish unsatisfactory work performance; moreover neither of the warning letters relied upon by the appellant identified the unsatisfactory nature of the employee's performance, as required by s.46(1) Labour Law.

(iii) Counsel's contention that notwithstanding the failure to comply with the procedural requirements of Ss 45 and 46 it was open to the employer to rely upon s.44(f) ('some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position the employee held') was misconceived. S.44(f) referred to a reason, different in nature, from those enumerated in paragraphs (a) to (e). Paragraph (f) was not a back door capable of being opened by an employer who had failed to comply with the procedural requirements of Ss 45 and 46 in order to justify dismissal.

(iv) In all the circumstances, the appellant had not

acted reasonably. It had not made good its promise of an internal transfer made at a conciliation meeting with the Director of Labour and no other initiative was taken to address the grievance of the respondent that he was being 'ousted' by the appellant. These factors, taken together with the failure of the appellant to comply with s.6(4) Labour Law, led to the conclusion that the appellant had not acted reasonably.

The decision and award of the Director of Labour would be confirmed.

MD

PRIVATE INTERNATIONAL LAW

Stay of action - Forum non conveniens

X Trust Co Ltd v Attorney-General of the Cayman Islands and Others

Grand Court (296/94)
Harre CJ
Nov 2 1995

Legislation

Trusts (Foreign Element) Law

Authorities referred to

Spiliada Maritime Corporation v Cansulex [1987] 1 AC 469
Societe Generale de Paris v Dreyfus Brothers (1885) 29 Ch D 239
Tyne Improvement Commissioners v Armement Anversois S/A (The Brabo) [1949] AC 326
De Dampierre v De Dampierre [1988] 1 AC 72
The Abidin Daver [1984] AC 398
Carl-Zeiss Stiftung v Herbert Smith [1969] 1 Ch 93

Mr Etherton QC and Mr Foster for the plaintiffs
Mr Hart QC and Mr Helfrecht for the first defendant
Mr Martin QC Mr Ritchie and Mr McLaughlin for the second defendant
Mr Boyle QC Mr Harrison and Mr Clifford for the third defendant
Mr Barrie for the twenty-fourth to seventy-third defendants

This was an application by the second defendant for a stay of the proceedings in the Cayman Islands on the ground that England was the more suitable forum.

The second defendant was the administrator of a Norwegian estate who claimed that certain assets belonging to the deceased had been misappropriated. The assets had been settled on two allegedly charitable entities, the C Foundation and then the A Foundation, on trust. The second defendant alleged that the purported settlement and subsequent transfer of the assets were void, and brought an action for breach of trust.

The second defendant claimed that England, where proceedings had already been commenced, was a more appropriate forum because the underlying facts had a closer and more substantial connection with England: in particular, the following matters were relied upon: (a) the long association with a merchant bank in London which performed a strong advisory and administrative function throughout, (b) the claims related to assets in England, (c) a finding that the settlement on C Foundation was void would

remove any Cayman connection, (d) the roles of various defendants allegedly in breach of trust, (e) for full resolution of the dispute the English proceedings would have to determine further matters, including whether the deceased was owner of the assets and whether his title had been subsequently extinguished. All of these matters were in issue in the English proceedings.

The Attorney-General, representing the interests of charity, and the plaintiffs, claimed that the Cayman Islands was the most appropriate forum and that the stay should be refused. The following arguments were asserted in support of this position: (a) the trustees of the A Foundation and the plaintiffs in this action were resident in the Cayman Islands; and the situs of the A Foundation was the Cayman Islands, and all assets were in the hands of Cayman companies; (b) the governing law of the A Foundation was Cayman law if the provision governing its situs was valid; (c) the Attorney-General's role as guardian of the interests of charity in the Cayman Islands underlined the factors pointing to Cayman as the most natural forum for resolving doubts about the validity of the A Foundation and its trusts.

Held: (refusing the application to stay)

(i) The broad question to be asked was whether the issues in the proceedings could be more suitably tried in the Cayman Islands or in England for the interests of all the parties and for the ends of justice: Spiliada Maritime Corporation v Casulex. The fact that proceedings had been commenced elsewhere was not determinative, but would be significant if the proceedings were developed to such a stage that they had a continuing impact on the dispute between the parties: De Dampierre v De Dampierre. In this case, the English proceedings were still at an early stage.

(ii) *Prima facie*, issues common to both the Cayman and English proceedings should be tried in the Cayman Islands. But it was necessary to determine if the remaining issues were so connected with England, and so interwoven with the Cayman issues and so determinative of matters as a whole, as to make England the appropriate forum.

(iii) The factors in favour of Cayman as the proper forum included: (a) the action could not have been brought in England (b) the trusts of the C and A Foundations would only be valid if charitable and it should be for the Cayman court to decide questions of charity law in the light of local policy considerations; (c) the determination of the governing law of the C and A Foundations involved consideration of the Cayman Trust (Foreign Element) Law and was a question best suited for resolution by the Cayman court; (d) the A Foundation and the Attorney-General would have the advantage of not becoming embroiled in the lengthy English allegations of breach of trust and tracing claims which related to assets vested in other persons, and would be likely to get a speedier answer in Cayman; (e) the second defendant might be disadvantaged in the matter of costs but this was insufficient to outweigh the foregoing reasons that the Cayman Islands was the more appropriate forum. The stay was therefore refused.

SAAC

TORT

Duty of care - Relevance of the Road Code of the Cayman Islands - Contributory negligence - Ownership of negligently driven vehicle no basis of liability

Bodden and Bodden (Executors of the Estate of AD Bodden dec'd) v Andy's Rent-a-Car and Williamson

Grand Court (20/92)
Schofield J
January 16 1996

Legislation

Traffic Law Ss 52 and 55

Authorities referred to

Rover International Ltd v Cannon Film Sales Ltd (No 2) [1987] 3 All ER 986
Croston v Vaughan [1938] 1 KB 540
Baker v Willoughby [1969] 3 All ER 1528

Authoritative works

The Official Road Code of the Cayman Islands

Mr Lamontagne QC and Mr Boni for the plaintiffs
Mr Parkinson for the defendants

The late Mr Arthur Bodden (the deceased) owned a store on North Church Street and opposite it was located his home. The deceased was a vigorous octogenarian who, on the wet afternoon of August 19th, in attempting to cross North Church Street from his store, came into collision with a truck driven by the second defendant, sustaining fatal injuries. When stepping out into the road, the deceased had been using a soft drinks box as a barrier to protect his head from the rain. At the time of the collision, the second defendant had with him three co-workers, two of whom were in the front of the truck and the third in the rear. The evidence indicated that at the time of the collision the truck was travelling at no more than 15 m.p.h. as the second defendant had been asked by one of his co-workers to stop at the deceased's store to purchase cigarettes. There was also evidence that the second defendant had turned on his indicator signalling his intention to pull over.

The second defendant gave a witness statement to a police constable on the day of the accident and he also gave evidence to the subsequent coroner's inquest. Both were admitted into evidence in the present proceedings. Of significance was the second defendant's assertion that the deceased had first stopped at the edge of the road with the box over his head, looking in the opposite direction. This was in general confirmed by the other eye witnesses.

The plaintiffs had called an expert witness, Miles Moss, who specialised in the analysis of vehicular and pedestrian accidents. The summation of the expert's detailed analysis was that on the assumption that the truck was travelling at 15 m.p.h., with due diligence, the second defendant should have stopped the truck in time to avoid any impact with the deceased with a safety margin of between 5 and 70 feet.

Held: (finding for the plaintiffs against the second defendant subject to a 75% contribution on the part of the deceased, but dismissing the claim against the first defendant)

(i) The only substantive issue for lengthy consideration was whether the second defendant was in breach of his duty of care owed to the deceased and, if so, the proportion of responsibility to be attached to each party.

(ii) The expert's calculations were based upon various unsubstantiated assumptions, (such as that the deceased had been crossing the road at a 90 degree angle and that he had started his dash from beneath the eaves of the shop and not from the edge of the road), and for this reason the evidence of the eye witnesses would be preferred.

(iii) The weight of the evidence indicated that the deceased had first stopped near to the edge of the road and had commenced his fatal dash across it when the truck driven by the second defendant was very close to him.

(iv) A breach of the standard of care laid down in s.52 Traffic Law, as amplified by paragraph 4(j) of the Road Code of the Cayman Islands, would not automatically render a driver negligent even though the duty to follow the Code was set higher in Cayman by virtue of s.55 (o) Traffic Law than was the case in England with regard to the Highway Code: Croston v Vaughan. Every breach of the 'counsel of perfection' contained in Paragraph 4 of the Code would not constitute unreasonableness for the purposes of an action in negligence.

(v) Applying these principles to the facts as found, the second defendant on his own evidence had first seen the deceased as he was sheltering under the eaves of his store. He was observed by the second defendant to have a box over his head and to be concentrating upon the traffic coming from the opposite direction. The second defendant should have seen the deceased move to the side of the road and should have foreseen the danger of the deceased crossing the road in front of him. There had been a want of reasonable care on the part of the second defendant in not reacting to the hazard which he should have kept in his sight. It was also clear from the evidence of eye witnesses and the weather conditions at the time, that the deceased had contributed to the accident by dashing out into the road into the path of the truck. Liability would be apportioned at 25% to the second defendant and 75% to the deceased (the facts of Baker v Willoughby contrasted).

(vi) The first defendant was being sued solely on the basis that he was the owner of the truck driven by the second defendant. With no other basis of liability being alleged, mere ownership was insufficient to establish liability. The first defendant's costs would be borne by the plaintiffs.

(vii) The question of quantum would l ft to be determined at a future date.

(viii) An order as to costs would fol'

MD

Purported seizure of imported vehicles - Alleged violation of Traffic Law relating to height of vehicle - Whether vehicles lawfully seized

Avalon Tours Ltd and Others v The Attorney-General of the Cayman Islands and Others

Grand Court (21/94)
Schofield J
December 6 1995

Legislation referred to

Customs Law 1990 Ss 9(h) 28(4) 59(1) 64
Traffic Law 1986 s 12A (as amended)
Customs (Amendment) Law 1993

Mr Alberga QC and Mr Pa inson for the plaintiffs
Mr Helfrecht for the defen s

The plaintiffs, Avalon Tours L Peter Savill and Sound Financial Management td, commenced an action against the Cayman Isl ads Government for a purported seizure of three coaches imported by the plaintiffs from the United Kingdom.

Avalon Tours runs coach tours in Grand Cayman for passengers on cruise ships. Avalon Tours arranged with Savill, a businessman who arranges excursions for cruise ship passengers, for the purchase of four coaches from England to increase their fleet of coaches. Savill assisted Avalon Tours to negotiate the financing for the purchase with Barclays Bank.

The Traffic Law (as amended) only permitted the importation of coaches not exceeding 10 feet in height.

It was agreed that Savill would pay for the coaches and would then be reimbursed on his return to the Islands. Four coaches were purchased, three of which were eventually sent to Cayman. Savill then discovered that they were not air-conditioned and since the windows could not be opened, they were unsuitable for a tropical climate. Savill paid a total of L94,000 (sterling) for the three coaches for Avalon. A further L40,750 had been spent at Savill's expense to install air-conditioning and to make other modifications. Savill made these disbursements from the account of Sound Financial Management (the third plaintiffs) with whom Savill had financial dealings. The three coaches were shipped to Cayman from the United Kingdom via Jacksonville and Miami in Florida. The total freight charges were US$24,091.20. The Department of Customs mistakenly calculated the freight charge to cover only the Miami-Cayman leg of the journey, thus substantially under-assessing the custom's duty payable. The cost of the modifications to the coaches in England was not declared. The evidence indicated that the representative of Avalon Tours who dealt with the customs clearance did not at the time know of any additional works done on the coaches and thus stated only the purchase price as contained in the invoices.

Local taxi drivers demonstrated outside the Legislative Assembly building protesting that Government's decision to allow the large coaches into the Islands created unfair competition to their disadvantage. Avalon Tours believed the coaches were within the permissible height and had not therefore sought prior permission from the Government as required by the Traffic Law. Importation of coaches which exceeded the permissible height without the Government's permission was illegal under s.12(A) Traffic Law. The coaches in question were slightly over 10 feet high. The Solicitor-General gave instructions for the coaches not to be released by Customs. Avalon Tours's attorneys demanded to know the basis of the detention by Government and objected that if the coaches had been seized pending forfeiture their clients were entitled to receive appropriate notices under the Customs Law. The attorneys asserted further that their clients sought access to the coaches in order to effect minor modifications in order to satisfy the Traffic Law.

The Solicitor-General indicated by subsequent letter that the buses, having been imported in contravention of s.12(A) Traffic Law (revised), were subject to seizure under s.59(1)(b) Customs Law. The letter also indicated: 1) that no formal action had yet been commenced under the Law; and 2) that Avalon Tours had committed a criminal offence under s.54 Customs Law (revised) by failing to declare the cost of shipping the coaches from the United Kingdom to Miami.

The plaintiffs then formally applied to the Government for permission to import the coaches. The application was rejected.

Some weeks after the purported seizure of the coaches, no formal notice had been served on Avalon Tours as to the grounds for seizure or detention of the coaches. Avalon Tours commenced proceedings to challenge the legality of the seizure and to claim damages. Criminal proceedings were commenced against Avalon Tours for evading the duty payable on the coaches by failing to declare the full dutiable value on the Customs import form. The Grand Court ordered a stay of those proceedings pending

the outcome of the civil action. The Crown maintained that the buses were lawfully seized or detained under s.9(h) Customs Law as being goods liable to forfeiture under s.59(1) of that Law.

Held: (declaring the seizure unlawful and awarding damages)

(i) The main question before the court was whether the seizure and detention of the three coaches was lawful. S.9(h) Customs Law empowered any officer or any authorised person to detain any vessel or goods believed to be liable to forfeiture and to hold such vessel or goods subject to the right of appeal conferred by s.64 of the Law. S. 59(1) Customs Law gave the power of forfeiture in various listed circumstances including where goods were imported contrary to any prohibition or restriction. The Collector of Customs thus had the power to seize and detain the coaches on the grounds of the breach of importation restrictions and the (innocent) misrepresentation as to the full cost of freight from the UK to Cayman.

The evidence from the various pieces of correspondence did not however indicate that the coaches were seized under the above provisions. The Solicitor-General had not specifically indicated to Avalon Tours the statutory power under which the coaches were being held. The Solicitor-General's letter had stated that the coaches were liable to seizure under s.59(1)(b) Customs Law. No formal action was however taken under that provision to forfeit the coaches. No notice of seizure had been served on Avalon Tours as required by s.64 Customs Law. This section provided that service of notice would not be required if the seizure took place in the presence of the owner of the goods or the person connected with the offence leading to the seizure. Neither condition had here been satisfied. Under the circumstances, Avalon could not exercise its right to appeal against the seizure in the Summary Court under s.64. Normally if no appeal had taken place the item would be forfeited and sold. The coaches were thus not seized under the Customs Law and yet Avalon Tours was denied access to them. The denial of access to the coaches was thus unlawful.

(ii) Avalon Tours sought a declaration th[illegible] the coaches did not exceed the height restriction set out in s.12A Traffic Law (as amended). The court was not satisfied that that was the case. If the roof extractor was included in the overall height of the coaches then the coaches well exceeded 10 feet in height. The maxim *de minimis non curat lex* would not be applied as suggested by the plaintiffs. It was unclear from the evidence by what fraction the height restriction had been exceeded. A declaration would be made that had the roof extractor been removed, the coaches would have come within the statutory limit. Consequently, no declaration could be made that the coaches were imported legally into the Islands. It was clear, however, that the Crown had unlawfully seized the coaches on or about November 26, 1993, and that they were thereafter unlawfully detained. An order would be made for the delivery up of the coaches to Avalon Tours. Avalon Tours was entitled to damages based on the loss of profit calculated on the total number of passengers they would have taken per day on excursions from the time of the seizure of the coaches to the date of the hearing, amounting to US$134,960.

(iii) The defendants contended that since Avalon Tours would have paid inter[illegible]t on their loan which would have reduced their op[illegible]ting profits, that interest ought to be deducted [illegible] the court from any damages awarded. This argume[illegible] was rejected. As Avalon Tours had not claimed [illegible] interest against the Government, the Governm[illegible] was precluded from claiming a deduction of th[illegible] same.

An order for costs would follow the event.

TRUSTS

Beddoe order - Disputed title to land - Hostile litigation

In the Matter of the Trusts Law (Revised)

Grand Court (381/95)
Smellie J
Nov 10 1995

Legislation

Act for Registering Deeds and Patents 1681
Cayman Islands Government Law 1893

Court Rules

Grand Court Rules O 34 r 10(1)(e)

Authorities referred to

In re Ojjeh Trust [1992-93] CILR 348
Re Rose (decd) Rose v IRC [1952] 1 All ER 1217
Lambert v Caldeira [1971] 18 WIR 15
Cook-Bodden v Kirkconnell [1992-93] CILR 89
Ebanks v Clarke [1992-93] CILR 33
Cook-Bodden v Kirkconnell [1994-95] CILR 27
Assets Co Ltd v Roihi [1905] AC 204
Evans v Evans [1985] 3 All ER 290
In re Beddoe [1893] 1 Ch 547
National Anti-Vivisection Society Ltd v Duddington (1989) The Times November 23
Re Biddencare Ltd [1994] BCLC 160
Alsop Wilkinson v Neary [1995] 1 All ER 431
Frank v Hall (Cause 207/95)
Lloyds Bank International (Cayman) Ltd v Byleven Corp SA (Causes 281/95 and 282/95)
Dagnell v J L Freedman [1993] 2 All ER 161
Walters v Woodbridge [1877-78] 7 Ch D 504

Mr Turner for the appellant
Mr Lamontagne QC for the respondent

This was an application by the administrator of an estate by way of a Beddoe summons seeking directions as to whether he should continue to defend another action (Cause 236/91), and if so, an order was sought that his past and future costs be indemnified from the estate. The other action was hostile litigation involving a dispute as to ownership of land of the estate in which the plaintiff claimed that the administrator held the land on trust for the plaintiff and others.

Held: (indemnifying administrator from estate)

(i) The relative merits of the parties' claims in the other action were not weighted overwhelmingly in favour of one side. Legal title to the disputed land was vested in the estate which was *prima facie* in a defensible position and there may be public policy reasons why the title should not be upset by a disputed deed which was propounded in the land adjudication process; conversely, the proviso to Registered Land Law s.23 and case law clearly established that a valid trust would survive adjudication and first registration with absolute title.

(ii) It may not be the proper course for an administrator to defend an action where the adverse claim was to the corpus of the estate itself: Alsop Wilkinson v Neary and National Anti-Vivisection Society Ltd v Duddington; especially if the beneficiaries were *sui juris* and able to decide for themselves whether to resist the claim: Evans v Evans. Many of the beneficiaries in the present case

were *sui juris* and able to decide for themselves whether to defend the other action, although there was no evidence as to whether they were able or willing to fund the litigation from their own pockets.

(iii) In the event of the administrator losing the other action, the administrator's costs could be met from other assets of the estate. There was therefore no risk that the successful plaintiff would have to pay the costs of the unsuccessful trustee out of the disputed land: Evans v Evans and National Anti-Vivisection Society Ltd v Duddington distinguished.

(iv) In the circumstances it was therefore proper to afford the administrator means to defend. As administrator it was his duty to protect the assets of the estate. However, conditions would be attached so as not to prejudice the outcome of the other action to the disadvantage of the plaintiff and so as to allow a majority of the adult beneficiaries of the estate a further opportunity to object.

SAAC

Beddoe order - Trustee defending proceedings - Defence benefiting trust protectors

X Bank Ltd v B SA

Grand Court (281/95 282/95)
Schofield J
October 20 1995

Authorities referred to

Re Eaton dec'd [1964] 1 WLR 1269
Alsop Wilkinson v Neary [1995] 1 All ER 431
Merry v Pownall [1898] 1 Ch 306
Ideal Bedding Co Ltd v Holland [1907] 2 Ch 157
Re Holden ex parte Official Receiver (1887) 20 QB 43
Bullock v Lloyd's Bank Ltd [1954] 3 All ER 726
National Anti-Vivisection Society Ltd v Du[illegible]dington (1989) The Times November 23
Re Dallaway dec'd [1982] 1 WLR 756
In re Evans dec'd [1986] 1 WLR 101
In re Beddoe [1893] 1 Ch 547
In the Matter of Lemos [1992-93] CILR 291

Mr Patten QC and Mr Bergstrom for the plaintiff
Mr Mowscheson QC and Mr Foster for the defendants
Mr Briggs QC and Mr Quin for the beneficiaries of the estate
Mr Helfrecht for the Attorney-General

The plaintiff was a trustee of two trust funds. It brought a summons to seek directions as to whether it should defend certain New York proceedings, and if so, in what manner. If leave to defend was granted, the plaintiff sought an order that it should be indemnified for the costs involved out of the trusts.

The settlor had settled property on two trusts, each trust having a corporate protector. 96% of the shares in each protector company were owned by two acquaintances of the settlor, the remaining 4% were held by the settlor's law firm. The protector of the 'U' trust had a hybrid power of appointment over the 'U' trust property whereas the protector of the 'B' trust had a more limited role in resp[illegible]t of the 'B' trust.

The New York proceedings were bro[illegible] by the estate of the settlor. The estate sough[illegible] investigation as to the nature and whe[illegible]bouts of assets which may have formed part of the estate, and the removal of the current shareholders in the protector corporations on the grounds of alleged

breaches of duty by those shareholders in, *inter alia*, improperly influencing the settlor to create the two trusts with a view to acquiring control of the assets and disinheriting the settlor's family.

The protectors argued that the trustee should be given leave to defend the New York proceedings and that the trustee should be indemnified as to costs from the trusts. The protectors sought to adduce a legal opinion as to the merits of the claim made by the estate. However, the protectors did not wish the opinion to be shown to the beneficiaries of the estate lest they gained a tactical advantage in the New York proceedings. The estate claimed that the opinion should not be shown to the court unless the estate was also shown it. It was argued by the estate that although a trustee was permitted in certain circumstances to give an opinion to the court without disclosure to the claimants, in this case it was the protectors who were seeking to give the opinion. The estate accepted that a trustee was in such cases bound to give a full and frank account of the strengths and weaknesses of the litigation, but alleged that since there was no such duty on a protector it was inappropriate for the protector to be allowed to submit the opinion to the court confidentially.

The trustee argued that it should be permitted to defend the action and contest jurisdiction in order to protect the interests of those beneficiaries of the trusts who were not also beneficiaries of the estate. This was supported by the Attorney-General who argued that the trustee should also be enabled to protect the interests of various charities which were beneficiaries of the trusts.

The beneficiaries of the estate argued that the New York proceedings amounted to hostile litigation between persons who were *sui juris* and who were neither beneficiaries nor fiduciaries of the trusts, and that even if the parties to the New York proceedings resembled beneficiaries and fiduciaries of the trusts, that merely rendered those proceedings akin to a beneficiaries' dispute in which a pre-emptive costs order was inappropriate. Moreover, the persons alleged to be in breach of duty were professional advisers to the trusts, and therefore had the strongest commercial motive for defending the New York proceedings without the costs order.

<u>Held:</u> (allowing the trustee's application)

(i) The legal opinion as to the merits of the New York proceedings was a matter proper for consideration in determining the application without disclosure to the estate. There was sufficient identity of interest between the trustee and protectors to justify the court considering the application confidentially.

(ii) The trustee had a duty to protect the interests of the potential beneficiaries of the trusts. The New York proceedings did not amount to a 'beneficiaries dispute' in which costs followed the event and did not come out of the trust fund.

(iii) The claim by the beneficiaries of the estate in the New York proceedings was an attack on the trusts and a defence of those proceedings was for the benefit of the trusts. There could be no attack on the honesty of the trustee nor was the reasonableness of the trusts meeting the costs of the defence in doubt. The trustee had every cause to defend the New York proceedings, even though the shareholders of the protector corporation would benefit from the defence. The trustee owed fiduciary obligations to the trusts and it would be the trustee controlling the defence and not the shareholders of the protector corporation. Following <u>In the Matter of Lemos</u>, it was possible to empower a trustee to give support to persons jointly defending a trust fund; this was not limited to persons who were themselves entitled to an indemnity from the fund. The present case was an

appropriate case in which to authorise the trustee to defend and, in the best interests of that defence, to assist and receive the assistance of the protector corporations.

(iv) The costs already incurred in defending the New York proceedings together with any costs properly incurred in the future were to be indemnified by the trusts. Likewise, the costs incurred in the current summons of the trustee, the protector corporations and the Attorney-General were to be indemnified.

(v) On the material before it, the court was unable to determine the merits of a *forum non conveniens* application by the trustees. The court would grant an order which would cover such an application in the event of the trustee receiving professional advice that it would be a proper application to make.

SAAC

Editor's note: the following article, which assesses the impact of the celebrated Barlow Clowes litigation, is shortly to appear in the English publication, The Journal of Criminal Law. Whilst it focuses upon the provisions of the English theft legislation (the 1968 Theft Act), its relevance locally is ensured due to the propinquity of the relevant provisions of The Penal Code to the English Act. References to the relevant sections of the Penal Code (1995 Revision), together with any notable differences of language or scope have been included as appropriate.

After R v Clowes No2:[1]

An Act of Theft Empowered - A Jury Impoverished?

The key elements characterising the current definition of theft are a testimony to the success of the Criminal Law Revision Committee's 8th Report [2] in producing a blueprint for a scheme of theft legislation capable of comprehension by the lay panel entrusted thereunder with the duty of determining liability. According to section 1(1) of the resultant Theft Act 1968,[3] the offence of theft is made out if the jury[4] is satisfied that the accused dishonestly appropriated property belonging to another intending to make permanent deprivation thereof. The ingredients of the offence are, therefore, both simply expressed and (at least under English law) avowedly for the jury's determination. A troubling development explored in this article is the increasing tendency of the English judiciary, illustrated most graphically by the judgment of Phillips J in R v Clowes (No2) (supra), to effectively remove the essential elements of the offence from

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[1] *[1994] 2 All ER 316.*

[2] *1966, Theft and Related Offences, Cmnd 2977.*

[3] *See, in identical language, s.223(1) Penal Code (1995 Revision).*

[4] *It is noteworthy that in Cayman, pursuant to s.127 (1) Criminal Procedure Code (1995 Revision), the accused is afforded the right in any criminal trial before the Grand Court to elect a trial by judge alone if he is "of the opinion that, due to the nature of the case or of the surrounding circumstances, a fair trial with a jury may not be possible.."*

the jury's consideration by ascribing legal character to matters of actus reus in terms which colour the whole of the offence and which may amount to little other than thinly veiled directions to convict.

The improvements effected by s.1(1) 1968 Act are at once apparent when a comparison is drawn with its predecessor, s.1 Larceny Act 1914, the abstruse language of which had, in part, proved to be its undoing. The former provision charged the jury with the unenviable task of determining, inter alia, whether the accused had, "without the consent of the owner fraudulently and without claim of right made in good faith, take[n] and carrie[d] away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof...".

A further principal objective of the 1968 legislation was to broaden the law of theft which, under the larceny acts, had shown itself at times to be woefully limited: Moynes v Coopper.[5] This, (together with the statutory reversal of Moynes v Coopper), was achieved primarily by the introduction of the new actus reus requirements of "appropriation" and "property belonging to another". These revisions, however, had their own price: the diverse nature of the property protected by the new legislation, coupled with the propinquity to the civil law raised by the legislation's inquiry as to ownership, of itself gives rise to unavoidable technicality. The most, therefore, that can be aspired towards is that by dint of skilled drafting the complexity of theft legislation will be limited to a level permitted by the myriad circumstances of its commission. A statute which deems property to belong to one who retains in it a "proprietary right or interest";[6] or to one who is owed "an obligation..to retain and deal with (the) property or its proceeds in a particular way;[7] or to one whose mistake of fact gives him a legal right to "restoration..of the property";[8] incorporates, by reference, a developing and complex tranche of the civil law which, as it evolves, carries the criminal law with it.[9] It is not here

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[5] *[1956] 1 All ER 450.*

[6] *S.5(1). The Cayman provision, to be found in s.222 Penal Code, although differently phrased uses the same essential language and is of like effect.*

[7] *S.5(3). See s.227(2) Penal Code in identical language.*

[8] *S.5(4). See s.227(3) Penal Code in identical language.*

[9] *See, for e.g., Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd [1980] 2 WLR 202 which, in extending the reach of s.5(1), has seemingly rendered redundant s.5(4): R v Shadrokh-Cigari [1988] Crim LR 465; and A-G for Hong Kong v Reid [1994] 1 All ER 1 where the Privy Council, by imposition of a constructive trust, have seemingly (and unwittingly) extended the offence of theft to the case of the dishonest employee who makes a secret profit from the employment relationship. C.f Lister v Stubbs (1890) 45 ChD 1 and A-G's Reference (No1 of 1985) [1986] 2 All ER 219.*

suggested that technical questions such as what amounts to property belonging to another for the purposes of theft legislation should be other than a legal question for the judge to rule upon, provided that he is sufficiently circumspect in his direction to ensure that the mens rea aspects of the offence remain live issues for a jury not subjugated by a protracted legal debate on the meaning of the actus reus elements. It should be clear, however, that a legal direction to the jury to the effect that if they find facts X and Y to exist they should hold an element of the offence to be made out, would not represent an unwarranted incursion into its territory. Recent authority supports this premise. In the context of s.5(3), the Court of Appeal in R v Mainwaring,[10] R v Dubar,[11] R v Williams and Lamb [12] and R v Hallam[13] have roundly rejected the assertion of Lord Widgery CJ in R v Hayes[14] that such a direction would offend the principle that "a conviction based on s5(3)..should be based upon a verdict of the jury and not some pre-conceived notion of the judge.."

Accordingly, contemporary English authority has come to acknowledge that a theft charge may become inextricably entangled with complex questions of the civil law which require a legal ruling from the judge binding the jury where their findings of fact so demand. Whilst the need for judicial guidance in these circumstances is self evident, the lesson of the recent cases which follow is that the impact of such guidance will rarely be limited to the legal issues directly in its spotlight and may be so diffuse as to cause the jury's fact finding role to become little more than perfunctory.

R v Clowes and another (No2)

A leading example of the emasculation of the lay panel in this way is R v Clowes (No2) which also warns of an increasing tendency of the criminal courts to liberally construe civil law principles in order to facilitate a conclusion that the actus reus of theft is satisfied.

It is submitted that the direction of Phillips J in R v Clowes (No 2) is principally objectionable in that it encouraged the

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[10] *(1981) 74 Cr App R 99.*

[11] *[1995] 1 All ER 781.*

[12] *[1995] Crim LR 77.*

[13] *[1995] Crim LR 323.*

[14] *(1976) 64 Cr App R 82 at 87 affirming R v Hall [1972] 2 All ER 1009.*

technical legal aspects of the case to predominate, effectively shifting the determination of the accused's guilt to the Bench. In his expansive direction to the jury that, as a matter of law, an appropriation of another's property had occurred, it would appear that the learned judge traversed the line between law and fact and virtually issued the direction to convict warned of in R v Hayes (supra). Whilst there can be little quarrel with the result in Clowes, the apparent manipulation of the jury, most graphically represented in the conviction of Clowe's cohort, Dr. Naylor, produces grounds for grave concern.

Clowes and Naylor were the leading protagonists behind a massive fraud whose chief beneficiary was Clowes himself. In short, between the years 1983-88 it was alleged that the Barlow Clowes partnership (BC) and Clowes group of companies, having induced investors to lodge millions of pounds with them with the promise of security (through exclusive investment in gilt edged securities) and high returns, applied substantial amounts of the funds to the personal benefit of Clowes in the purchase of houses, yachts, antiques, and shares in public and private companies. Very few investments were applied to the purchase of gilt edged securities but instead were commingled in offshore client accounts. Investors were kept content by the payment of regular monthly returns financed, not through the gilts market, but from new investment business.

Clowes was convicted, inter alia, of ten offences of theft (of sums ranging between L1m and in excess of L3.5m) and was sentenced to ten years' imprisonment; Naylor was convicted of one offence of theft of L19,000 taken from a client account and was sentenced to eighteen months' imprisonment. Clowes and Naylor both appealed, challenging various of Phillips J's directions to the jury.

Clowes' main basis of appeal was that the client investment brochures and application form, properly construed, demonstrated that the appellant had not at any time appropriated property belonging to another with the whole proprietary interest in the invested funds having passed to BC on the occasion of each investment. Counsel for Clowes asserted that the only obligation incumbent upon BC was of a contractual nature requiring the partnership to pay a guaranteed rate of return to its clients and to repay to them an equivalent sum to that invested upon demand. The construction placed upon the same brochures by the prosecution, however, was that BC was a trustee of the funds invested with it, causing the funds to remain those of the investors pursuant to Ss 5(1), (2) and (3) Theft Act 1968.

A pivotal matter at first instance therefore was the nature of the relationship between BC and its investors. Phillips J determined that the answer to this question was one of law for the court to determine by reference to the whole of the BC brochure and not, as asserted by the appellant, just the application form thereon. On this premise, the learned judge

concluded that the salient clauses of the BC brochure which led irresistibly to the conclusion that the clients were cestuis que trust to whom the funds still belonged for the purposes of the Theft Act, were the following:

1. "All moneys received are held in a designated clients account and the clients are the beneficial owners of all securities purchased on their behalf."

2. "Barlow Clowes (are authorised) to buy and sell British government stock on the investors' behalf."

3. "Investor's cheques are to be made payable to Barlow Clowes International Clients Account."

In support of the appellant's contention that notwithstanding the foregoing the relationship between BC and its clients was a contractual one, it was asserted that the authorities established that:

1. There exists a judicial reluctance to construe the intricate relationship of trust out of everyday commercial transactions: Neste Oy v Lloyds Bank plc;[15] and

2. where a transaction contemplates the mixing of funds and requires the transferee to hand over an equivalent sum of money upon demand (as here) the relationship is not one of trust but that of debtor - creditor: Henry v Hammond[16]
If, contrary to this primary assertion, the relationship between BC and its clients was found to be that of trustee and beneficiary, the appellant, relying upon the following clause in the application form, contended that the terms of that relationship conferred upon BC an unfettered discretion to invest in any corporate or unincorporated body extending to BC itself:

"Barlow Clowes (is authorised) to place any uninvested funds with any bank, local authority, corporation or other body on such terms and conditions as you (BC) see fit whether bearing interest or not."

Phillips J ruled that the foregoing clause, read in the context of the whole brochure, only permitted investment in non-British government stock on an ancillary and strictly temporary basis whilst awaiting investment in gilts.

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[15] *[1983] 2 Lloyds Rep 658.*

[16] *[1913] 2 KB 515.*

The final and most germane (for present purposes) argument of the appellant was that even if Phillips J had been correct in ruling that as a matter of law the relationship between BC and its clients was one of trustee (with limited powers of investment) and beneficiary, he had erred in communicating this determination to the jury. In so doing, it was asserted, the judge had resolved a contentious issue in favour of the Crown to the consequent prejudice of the defence. In particular, counsel argued, the jury had been precluded from impartially assessing the appellant's claim that he believed himself entitled to use the invested moneys in a variety of ways and had therefore not acted dishonestly. On this reasoning, it was urged that Phillips J ought to have left it to the jury to decide whether an honest person could have reasonably concluded that no trust existed with the jury being directed that it was not necessary for them to determine the complex legal question of the extent of investment powers, a matter in regard to which a layman could be expected to err.

Watkins LJ, delivering the ruling of the Court of Appeal, expressed agreement with the whole of Phillips J's reasoning. In particular, applying his own decision in R v Spens,[17] Watkins LJ determined that Phillips J had been correct in ruling that the relationship between BC and its investors gave rise to a legal question. Furthermore, the Court of Appeal found the judge's direction as to the law and the extent of BC's investment powers to be unimpeachable. In particular, the fact that a transaction contemplated the mingling of funds would not be fatal to the existence of a trust if, from all the circumstances, such a relationship was indicated. Finally, Watkins LJ, approving Stephens v R,[18] noted (at 331) that in conveying his ruling on the legal matters to the jury, the judge had rightly stressed that his direction resolved only the actus reus elements of the theft charge, leaving the jury alone to determine the remaining issues of fact, in particular whether the accused had acted dishonestly.

Two objections may be levelled at the reasoning of the Court of Appeal both of which were apparently anticipated by Watkins LJ in his assertion (at 330-331) that:

"..in one sense it might be argued that whether (Clowes) was dishonest depended upon whether he knew that in law he was trustee of the investors' funds...however dishonesty...does not necessarily depend upon a correct understanding by an accused of all the legal implications...In the recent case of R v Lightfoot (1992) Times 3 November this court emphasised the clear distinction between an accused's knowledge of the law (and dishonesty)."

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[17] *[1991] 4 All ER 421. Holding that the construction of a contract is a matter of law for the judge to determine.*

[18] *(1978) 139 CLR 315 (Aus).*

The foregoing dictum, with respect, comes perilously close to repeating the error asserted at first instance in Lightfoot, and repeated on appeal, that: "The defendant's knowledge of the law, whether the criminal law or the law of contract is irrelevant." As far as the law of theft is concerned, it is plain from the face of s.2(1)(a) Theft Act 1968[19] that a mistake as to the effect of the civil law will excuse on the grounds of lack of dishonesty if the accused's subjective belief (however unreasonable) is that he has a legal right to deal with the property as he did. Whilst Phillips J made a passing reference to s.2(1)(b)[20] in directing the jury: "You are not guilty of theft if you take someonelse's property in the mistaken belief that he has authorised you to do so", the jury were nowhere informed of the independent significance of paragraph (a). The need to apprise the jury of the mandatory terms of this paragraph was critical, for if the accused had genuinely believed that the effect of his legal relationship with investors was to pass entire proprietary interests to BC, this mistake as to the effect of the civil law would operate to remove the essential ingredient of dishonesty.

It should be clear therefore that Clowes' honesty depended upon whether he was aware of the legal effect of the transfer of client funds to BC; in the absence of the prosecution satisfying the jury that Clowes did not believe all proprietary interests to have passed to BC, the accused had not acted dishonestly. The understatement of Watkins LJ (at 330) that such matters made it arguable "in one sense" that Clowes lacked dishonesty was therefore, with respect, both inaccurate and pernicious to the defence case. Watkins LJ's apparent failure to appreciate the significance of the s.2(1)(a) defence gives rise to the further concern that such failure caused his Lordship not to recognise the straightjacket into which the jury had effectively been placed by Phillips J's legal directions. One such particularly powerful direction was the following:

"(Clowes) recognised, did he not that what he was entitled to do with the money depended upon the legal..contracts spelt out in the brochures? I have told you what the legal effect was - the contracts required Barlow Clowes to use investors' money to buy and sell gilts."

It would be a very bold jury indeed which, in the face of such a legal direction, felt able to isolate the question of the accused's mental state so as to conclude that Clowes' misapprehension of the legal effect of the relationship with his clients rendered him honest. A further obstacle to reaching this conclusion was Phillips J's frequent allusions to the Ghosh test of dishonesty.[21] Whilst technically embracing the (subjective) s.2 defences, this test is so couched in the

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[19] *The Cayman provision, in identical language, is contained within s.224(1)(a) Penal Code.*

[20] *See s.224(1)(b) Penal Code in identical language.*

[21] *R v Ghosh [1982] 2 All ER 689.*

objective language of the "reasonable intelligent businessman", that it was very likely the failure to conform to this standard, coupled with the thinly disguised judicial opprobrium for the accused's conduct, which rendered his conviction a fait accompli from the onset of the trial.

There can be no quarrel with the determination that the civil law issues in Clowes were for the judge to rule upon; it is submitted, however, that the direction given on dishonesty was both flawed, in the absence of any specific reference to s.2(1)(a); and sequentially redundant, having been given only after the proverbial horse (and jail door) had bolted. In order to ensure that the impartiality of the jury was not compromised, it is suggested that the judge ought properly to have reserved his legal rulings on the actus reus of the offence until any jury finding of dishonesty had been reached. In this regard, it would not have been unreasonable for Phillips J, as urged by counsel for Clowes, to inform the jury that the measure of a fiduciary's investment powers posed difficult legal questions which a layman could be expected not to fully comprehend and upon which even legal opinion might differ.[22] Whilst the respect accorded to the civil law by the Court of Appeal is therefore to be applauded, the increasing judicial desire to proselytize jurors into quasi lawyers, so apparent in Clowes, must be resisted or else the more complex fraud trials risk becoming little more than exercises in judicial puppeteering. If it is agreed, however, that such concerns should have provided Clowes with a sound basis of appeal, the dismissal of his co-accused's appeal is, by the same token, the more objectionable.

Naylor had been charged with the theft of L19,000 from a BC account with the indictment alleging that the property belonged to clients of BC. The difficulty for the prosecution, which had been refused leave to amend the indictment, was that the account from which the funds had admittedly been taken was a mixed account which contained funds deriving from both investors and non investors. It being common ground that at the time of the transfer the non investors' funds exceeded L19,000, defence counsel's seemingly irrefutable argument was that whilst the property undoubtedly belonged to another it could not be established, as alleged in the indictment, that it belonged to investors of BC as opposed to BC beneficially.

Phillips J relied upon the equitable tracing authorities of Sinclair v Brougham[23] and Re Oatway[24] for the proposition that a trustee, having mixed his own funds with those of the trust, causes the whole fund to be impr[illegible]ed with a first

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[22] *As evidenced by the fact that solicitors acting for the Board of Trade in civil proceedings against BC [illegible]d sp[illegible]fically represented in a questionnaire to aggrieved investors: "In some portfolios Barlow Clowes had a discret[illegible] to place money in any body they chose and not simply in government gilt-edged stocks."*

[23] *[1914] AC 398.*

charge in favour of the beneficiaries. The jury were accordingly directed, as a matter of law, that the investors possessed an equitable proprietary interest in the withdrawals sufficient to satisfy s.5(1) Theft Act 1968. There being little to rebut a conclusion that the transfers were effected dishonestly, the jury quickly convicted. Watkins LJ cursorily dismissed Naylor's appeal concluding (at 336) that the L19,000 fell "four square within the definition of property belonging to another under s5(1) of the 1968 Act." Whilst this was no doubt so, the issue, as already noted, was whether the money belonged to the investors as alleged in the indictment. The answer to this question depended not directly upon s.5(1) but upon the construction of an ill-defined equitable principle arguably imported into the law of theft by s.5(1).

As has been stated, any conviction of Naylor was necessarily predicated upon a finding that the investors be rewarded with a charge upon the whole amount of the mixed fund, which in turn depended upon a finding that the mixing in the trustee's account was wrongful. In accepting both the foregoing propositions it is suggested that Phillips J was in error for the following reasons:

i) The basis of equity's generosity in awarding a charge upon the whole fund was to punish the defaulting trustee by conferring upon the beneficiary a greater interest than that represented by the converted property. Contemporary authority indicates, however, that this windfall principle is no longer appropriate to modern commercial conditions where it would work to the detriment of unsecured creditors. The dominant view therefore is that the trust should receive a charge on the mixed funds limited to the value of the trust property involved. The need for a proportionate response of equity when faced with a defaulting trustee was asserted by Ungoed-Thomas J in Re Tilley's WT[25] who reasoned that the: "beneficiary will be entitled to every portion of the blended property which the trustee cannot prove to be his own." Applying this dictum to the prosecution of Dr. Naylor, it is clear that the onus of establishing the extent of the non-investors' (trustee's) property fell upon the appellant with any doubt being resolved in favour of the investors (beneficiaries). It would appear that the task of ascertaining the separate contributions of investors and non-investors would have here been a relatively easy matter leading to the inevitable conclusion that more than L19,000 in the BC account was free from any proprietary claim of the investors and therefore could not be described as property belonging to them for the purposes of s.5(1).

ii) More fundamentally, in order for the equitable tracing remedy to apply it is necessary for those to whom the fiduciary duty is owed to establish that the mixing of the funds by the trustee was effected wrongfully. On the facts of Clowes

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[24] *[1903] 2 Ch 356.*

[25] *[1967] Ch 1179.*

where there was no obligation upon the trustee to keep the funds segregated, it would appear at least arguable that this condition of the remedy was absent thereby contradicting the conclusion that the investors had a proprietary interest in the BC account at all: Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahama Ltd.[26]

R v Williams and Lamb.[27]

The dismissal of the second appellant's appeal against conviction for theft in R v Williams and Lamb likewise called for an expansive interpretation of the civil law in determining that the property belonged to the party cited in the indictment, this time in applying s.5(3) Theft Act. Lamb, who acted as Williams' solicitor, had arranged with a building society to consolidate Williams' liabilities by a remortgage of Williams' property to the society. Lamb applied the funds to extinguish Williams' first mortgage and all but L3000 was applied in reduction of his second mortgage with a bank. This amount Lamb retained for himself. He was subsequently charged with the theft of L3000 from the bank. The judge, applying s.5(3), directed the jury that the property belonged to the bank on the basis of a legal obligation owed to it by Lamb which required him to hold the whole balance of the funds on the bank's account. Finding the other ingredients of the offence present, the jury convicted Lamb as charged.

The analysis of the judge, although upheld by the Court of Appeal, is with respect highly questionable. How could it be said that the L3000 belonged to the bank within s.5? S.5(1), requiring the "loser" to have retained a proprietary right in the property, was clearly of no avail to the prosecution with the whole of such right manifestly vested in Williams. S.5(3) was therefore critical, but without examining in any detail the nature or circumstances of the obligation owed to the bank - in particular what consideration moved from it to Lamb and whether there existed an intention between these parties to create legal relations - the jury was legally directed that s.5(3) was satisfied and, impelled by the general atmosphere of dishonesty, convicted the accused as a direct consequence of the judicial failure to analyse these centrally important questions.

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[26] *[1986] 1 WLR 1072.*

[27] *[1995] Crim LR 77.*

R v Dubar.[28]

The judicial desire to extend the actus reus of the theft offence has also been seen to operate closer to home by expansively construing the meaning in the criminal law of the definitional elements of the theft offence. This tendency manifested itself recently in the direction of the Judge Advocate in R v Dubar who sought to ascribe to "appropriation" and "property" a breadth that would significantly contribute to the merger of the theft and deception offences initiated by the decision of their Lordships in R v Gomez.[29] The Courts-Martial Appeal Court however, showing greater circumspection, ruled that on the instant facts the life span of the theft offence was very much shorter then the four and a half months accorded to it by the Judge Advocate.

The appellant, a leading seaman with the Royal Navy, had suggested to a young naval rating serving on the same ship, (S), that a car S had been seeking to purchase could be more cheaply obtained through the appellant and his contacts. The court found that on or about January 21 1992, S had given the appellant L1800 in cash for the purposes of purchasing a specific Ford Orion motor car. The appellant, "as security", had given S a postdated cheque for the same sum. When the appellant failed to produce the car, S attempted to cash the cheque only to have it returned unpaid by the bank. The evidence indicated that by January 28 the accused had dissipated the whole of the L1800 largely on the payment of personal bills.

With S having been deprived of both the motor car and the money, the appellant was charged with obtaining property (L1800) by deception (between January 1 and 31 1992) and with the theft of the L1800 between January 1 and May 15 1992. The judge directed, inter alia: (i) that if (as was the case) the court found the appellant not guilty of obtaining the money by deception it was open to them to hold that sometime after January 21 and before May 15 he had kept the money to use it as his own, thereby appropriating it; (ii) that "regardless of the way (the money) changed its form subsequently, the value of that L1800 remained property for the purposes of the Theft Act"; and (iii) that if the court was sure that S and the appellant had agreed that the latter should purchase a specific car for S or otherwise return his money then "as a matter of law...Dubar was under a legal obligation (within s.5(3)) to deal with the money in a particular way and accordingly the money did belong (to S)."

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[28] *[1995] 1 All ER 781.*

[29] *[1993] 1 All ER 1.*

McKinnon J, giving the judgment of the Courts-Martial Appeal Court, allowed the appeal. The directions in (i) and (ii) above were flawed in the appeal court's view in that they gave rise to a real danger that the appellant had been convicted on the basis of the court finding a dishonest appropriation of S's property to have occurred sometime after uary 28, although such date was in law the latest time any such appropriation could have taken place. This date ma the limit of S's ownership of identifiable property, it having been dissipated thereafter in the payment of bills in a er preventing it from being traced into proceeds for the purposes of s.5(3).[30]

It is suggested that in both the foregoing matters the appeal court was correct. The Judge-Advocate's reference to the "value" of S's property remaining after January 28 is, with respect, not sanctioned by s.5(3) and, contrary to the conclusion below as to the timing of an appropriation, would suggest that theft is not only a continuing but an almost boundless offence. One is tempted to go further than McKinnon J in observing that subsequent to January 28 it appears that there existed no identifiable property, far less any belonging to another. It would seem to follow, rather troublingly however, that if the appellant had dissipated the money ten minutes after S had handed it to him, an allegation of theft at any time thereafter would be unsustainable, with the prosecution seemingly being forced to fall back upon the lesser charge of evading liability by deception, contrary to s.2 Theft Act 1978.[31]

The prospect of so limited a time-frame in which it is possible to commit theft, revealed by Dubar, does therefore betray an inherent weakness in the definitional elements of the crime of theft which would be ameliorated if reference to the value of the loser's property, as asserted by the Judge-Advocate, and as utilised by The American Penal Code (s.223.0

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[30] *C.f R v Hallam and Blackburn (supra) holding, however, that it is immaterial, where identifiable proceeds do exist, that the prosecution cannot establish whether the accused stole the original property or its proceeds.*

[31] *The equivalent provision in Cayman is contained within s.236(2)(a) Penal Code. It is noteworthy, however, that the English offence exactly corresponding to the Penal Code offence (s.16(2)(a) Theft Act 1968) was repealed by s.5(5) 1978 Act pursuant to the recommendations of the 13th Report of Criminal Law Revision Committee (CLRC, CMND 6733) and replaced by s.2, inter alia, in the interests of clarity. It is also noteworthy that the CLRC were in part ivated by the concern that paragraph (a) was too broad following the decision of the Court of Appeal in DPP v Turn '1974] AC 357 which held it to be an offence under this sub-section for a debtor to temporarily evade his creditor by st ig h by telling lies, even though he intended to make eventual payment. The undesirable scenario postulated by the C mmittee in their following example would appear to represent the position in Cayman as a result of the continuing efficacy of s.236(2)(a): It would amount to an "offence for a housewife to tell the tallyman that she cannot pay this week because her husband has been off work sick, when this is not true."*

(6)), was made by s.5(3). This of itself would not resolve the problem as it is difficult in general to conceive of an act of appropriation subsequent to the dissipation of the loser's property. It is submitted with some diffidence, however, that a lesson may be learned from Clowes (No 2) in off-setting such definitional limitations by resort to equitable principles of tracing. The solution is a limited one, however, and requires the accused, unlike Mr. Dubar, to have applied the loser's funds in payment of existing debts with which specific assets have been purchased. Thus, let us suppose that on January 15 the appellant had purchased a motor cycle on credit and on January 21 had paid off that loan with the L1800 received that day from S. In these circumstances, it would appear that S is able to trace the L1800 into the previously acquired motor cycle which would become proceeds for the purposes of s.5(3) Theft Act, thereby preserving the integrity of a theft charge for the duration of any appropriation of those proceeds.[32]

In relation to (i) above, it is apparent in the light of the ruling of the House of Lords in Gomez[33] that the original receipt by the appellant of the L1800 on January 21 itself amounted to an appropriation of S's funds, the presence of S's consent at this time being immaterial. It is of interest to note, however, that both courts in Dubar continued to construe the term "appropriation" in its pre-Gomez sense in language recalling Lord Roskill's aggressive ascription in R v Morris and Anderton v Burnside[34] and Lord Lowry's dissentient judgment in Gomez (supra). In emphasising the point in time when the appellant used the money "as his own", both the Judge-Advocate and McKinnon J (at 785b and j) appeared disinclined to apply the neutral Gomez connotation of an appropriation, in itself tending to delay the completion of the actus reus. It is of course necessary for the prosecution to be able to point to coincident dishonesty and an intention to permanently deprive S of his property, but the appellant's subsequent conduct would appear to leave these issues in little doubt.[35] It is tacitly assumed in the foregoing discussion that an appropriation has a finite "shelf life", a conclusion confirmed by Gomez and implicit within s.3(1).[36] Whenever its exact point of determination - and as noted by the Court of Appeal in R v Atakpu[37] this ought properly to be regarded as a question of fact for the jury - it had clearly occurred by January 28 in the instant case.

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[32] *See further L. Smith, "Tracing Into The Payment Of A Debt" 54(2) (1995) Camb LJ 290.*

[33] *Supra n.29.*

[34] *[1983] 3 All ER 288.*

[35] *C.f R v Fritschy [1985] Crim LR 745 which it is submitted would now be decided on this basis.*

[36] *S.225(1) Penal Code (Revised) is in identical terms.*

[37] *[1993] 4 All ER 215 at 224.*

In preferring the judgment of the Court of Appeal in R v Mainwaring (supra) over the decisions in R v Hall and R v Hayes (supra), the appeal court went on to endorse the Judge-Advocate's ruling in (iii) above. The decision on this point in Dubar has subsequently been confirmed by the Court of Appeal in R v Hallam and Blackburn, mercifully laying to rest the overly solicitous 1970's rulings. Accordingly, it would now seem clear that the question of whether or not a legal obligation within s.5(3) has arisen is a matter of law for the judge to rule upon subject to the caveat, noted by McKinnon J in Dubar (at 789), that the judge must "fully and fairly (leave) it to the jury to decide the facts which give rise to (a s.5) obligation." To this statement might be added the need for the judge to be alive to the danger of his direction appearing tendentious against the accused. As Clowes (No 2) in particular teaches, it is often impossible for a judge to provide a legal direction on the actus reus of the offence which does not colour other aspects of it, in particular the question of dishonesty. For this reason, it is incumbent upon the judge to resist all urges to indulge in legal didactics in order to preserve the lay quality of the jurors who must be allowed to complete their fact finding journey as far as possible unaided by a legal compass.

Conclusion:

Although few would argue that the existing definition of the actus reus of theft is perfect, it is clear that the response of the English judiciary has been to create an offence much wider than that intended by Parliament in 1968. Whilst there is no doubt much public support for the actions of judges calculated to prevent those (judicially) perceived as dishonest from securing technical acquittals, Gomez, Clowes and Dubar illustrate that such results are far more likely to be attributable to defects in the drafting of indictments than defects in the theft legislation itself. The need for punctiliousness at the initial stages of the criminal process must not be compensated for by departure from orthodoxy in its latter stages and cannot justify the emergence of an expansive law of theft which, it is suggested, is as undesirable as the unduly restrictive law of larceny which it replaced. To the contrary, the authorities, having correctly identified much of the actus reus of theft as giving rise to legal issues, beget a judicial duty to keep the offence within reasonable bounds. To this end, it is to be hoped that the opinion of the Privy Council in A-G for Hong Kong v Reid (supra) will not be embraced by the criminal courts in reversal of The A-G's Reference Case (No 1 of 1985) (supra) until its status in the English civil courts is settled. It is one matter for the criminal law to keep in step with an evolving civil law but quite another for the criminal Bench to attempt to re-write it.[38]

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[38] Mitchell C Davies, Director of Legal Studies at the Cayman Islands Law School.

A COMPARATIVE STUDY OF THE PRODUCTION OF CONFIDENTIAL RECORDS HELD BY A THIRD PARTY IN CRIMINAL CASES

A. Introduction

Criminal courts in England continue to attempt to define the circumstances in which it is appropriate to order production of confidential records held by a third party for its inspection and, subsequently, disclosure to the defence. Tangled in the web of public interest immunity (PII), recent English decisions evidence the need for a thorough review of this issue. The Criminal Procedure and Investigations Bill 1995-96 now before the English Parliament does not address many of the current concerns. This situation can be contrasted with the common law of Canada and the United States, which appears to have arrived at a reasoned position.

Cayman is at the cross-roads. The Attorney-General, or the Grand Court, is positioned to choose the most suitable route for local needs, forewarned of the misadventures of England. It will be suggested that the recent decision of the Supreme Court of Canada in R v O'Connor [1] provides the way forward for Cayman.

PII restricts potential evidence from being disclosed or adduced.[2] It operates as follows: where there is a confidential relationship and "disclosure would be a breach of some ethical or social value involving public interest, the court has a discretion to uphold a refusal to disclose relevant evidence, provided it considers that, on balance, the public interest would be better served by excluding such evidence".[3] Within the ambit of PII it is prudent to distinguish between class immunity, e.g. national security,[4] and contents immunity, e.g. Police Complaints Authority complaints.[5] The House of

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[1] *(1996) 103 C.C.C.(3d) 1.*

[2] *R v Chief Constable of the West Midlands Police ex p Wiley [1995] 1 Cr.App.R. 342 (per Lord Templeman at 344). (Hereinafter "Wiley").*

[3] *D v NSPCC [1978] A.C. 171 245 per Lord Edmund-Davies. This principle applies equally to the criminal law, Wiley, ibid., R v Governor of Brixton Prison ex p Osman, (1990) 93 Cr.App.R. 202.*

[4] *Asiatic Petroleum Co v Anglo-Persian Oil Co [1916] 1 K.B. 822.*

Lords have indicated a preference for limiting recognition of new classes of PII, and a willingness to review previously recognised classes, preferring instead to recognise contents immunity for certain documents.[6] This trend was noted by Harre C.J. in Watler v Whittaker.[7]

Third parties who receive matters in confidence and may be subject to PII include, inter alia, liquidators,[8] the Department of Social Services, the court when sitting in Chambers (as well as the participating attorneys)[9] e.g. for wardship or care applications,[10] doctors and sexual assault therapists, or complaint bodies, e.g. Police Complaints Authority of England.[11] Third parties, for present purposes, do not include those who enjoy a blanket privilege independent of PII, such as attorneys[12] or mediators.[13]

B. Production of Confidential Third Party Records in England

Some issues relating to the production and disclosure to the accused of confidential records held by third parties under

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[5] *Wiley, supra.*

[6] *Ibid., J.A. Coutts, "Immunity of Material Derived From Police Complaints Procedure", [1996] Jo. Crim. Law 66.*

[7] *Grand Court (149/94).*

[8] *Re Barlow Clowes Bilt Managers Ltd [1992] Ch. 208 (Liquidators of a company are under no duty to assist its directors, in defending criminal charges, by providing them with information obtained by the liquidators from third parties in circumstances of confidentiality and by assurances, express or implied, that it would be used only for the purpose of the liquidation.)*

[9] *Solicitors are prohibited from revealing confidences arising therefrom under s.12 Administration of Justice Act 1969 or simply by the inherent jurisdiction of the court, Re A (Criminal Proceedings: Disclosure [1996] 1 F.L.R. 221. Locally, attorneys are similarly restricted under the Judicature Law (1975 Rev) s. 63 (1)(b) or the common law.*

[10] *In England, r 4.23 of the Family Proceedings Rules 1991, S.I. 1991/1247 governs when the court will disclose documents used in the care proceedings to either party in a criminal proceeding, see Re A (Criminal Proceedings: Disclosure, ibid., following Re D (Minors) Wardship: Disclosure) [1994] 1 F.L.R. 346. Locally, the Children Law 1995, s.72 (not yet in force) provides for confidential care proceedings. No rules have been drafted to address the use of confidential matters in other proceedings.*

[11] *Wiley, supra.*

prima facie PII relating to criminal proceedings are settled in England. There is no obligation on the Crown to obtain confidential documents from third parties during criminal proceedings.[14] Therefore the developments in Crown *disclosure stemming from R v Ward*[15] and R v Davis, Johnson and Rowe[16] do not apply.[17] The Crown Court, as opposed to the Family Division, is the appropriate court in which to raise the question of production and disclosure of confidential third party evidence.[18] The application should not be instituted as a collateral proceeding such as judicial review.[19] Ex parte defence applications are inappropriate,[20] and examining justices are not to address the issue.

The process of production and disclosure of confidential documents held by third parties involves two distinct steps. The first step addresses the process by which the confidant or records are brought before the court. If the criterion in the first step are satisfied then, as the second step, the court balances interests in deciding whether to order disclosure to the accused of all, or a portion of, the confidential material. In the first step, the records, and their custodian, are to be served with a witness summons.[21] If the custodian maintains the claim of privilege, the judge is to read the impugned records, and hear arguments on whether the public interest in maintaining the confidential status of the document defeats the criteria required for a valid summons. The Crown is to be represented at the argument to set aside the summons.[22]

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[12] *R v Derby Magistrates Court ex p Brooks, [1995] 4 All ER 526. (Hereinafter "Brooks").*

[13] *D v NSPCC supra at p 236 (per Lord Simon).*

[14] R v Reading Justices, ex p Berkshire County Council [1996] 1 Cr.App.R. 239. (Hereinafter Reading Justices), applied in Brooks, supra. This is also the position in Canada, O'Connor, supra at para. 19.

[15] *(1993) 96 Cr.App.R. 1.*

[16] *(1993) 97 Cr.App.R. 110.*

[17] *This is the position in Canada also, O'Connor, supra at para. 6.*

[18] *Re D (Minors) (Wardship: Disclosure) [1994] 1 F.L.R. 346.*

[19] *Wiley, supra at p 372 (per Lord Woolf).*

[20] *R v Turner [1995] 2 Cr.App.R. 94.*

[21] *Summons are issued pursuant to either s.97 Magistrates' Courts Act 1980, or s.2 Criminal Procedure (Attendance of Witnesses) Act 1965.*

[22] *R v Trevor Douglas K (1993) 97 Cr.App.R. 342. R v Reading Justices, supra.*

In Reading Justices,[23] the accused attempted to summon the Director of Social Services with a view to production of confidential child care records. The summons was set aside on the basis that the accused failed to demonstrate that the documents were "likely to be material evidence", the key phrase in s.97 of the Magistrates' Courts Act 1980[24] The phrase "likely to be material evidence" was interpreted to mean both relevant and admissible.[25] Therefor where the document is hearsay, and no exceptions to the exclusionary rule against hearsay apply, then the impugned document is inadmissible, and the summons will be set aside. There is no need to move to stage two if stage one is not satisfied. It is not appropriate to issue and serve a witness summons on a third party merely to ascertain whether the third party has material documents.[26] Inappropriate applications will attract a wasted costs order.[27] The Criminal Procedure and Investigations Bill 1995-96 proposes that applicants for a third party witness summons be required to provide a supporting affidavit. The third party witness will then be allowed to address the appropriateness of the application before the decision to order a summons is made.[28] Theses changes are consistent with the scheme suggested by the Supreme Court of Canada in R v O'Connor.[29]

During the second stage, the court will address the PII issues. Having found that the impugned record is both relevant and admissible under stage one, the court must determine whether the document's probative value for the due administration justice out-weighs the prejudicial or harmful effects of a breach of the victim's confidence, and the societal interest in confidential relationships. Further it will consider the negative impact on the custodian, both in terms of loss of reputation and extended resources.[30] Many other considerations can be taken into account, as will be discussed in part D.

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[23] *Ibid.*

[24] *Similar provisions apply in the Crown Court, Criminal Procedure (Attendance of Witnesses) Act 1965, s. 2(2). Cf Cayman law as found in the Criminal Procedure Code (1995 Rev) s. 36, "material evidence can be given".*

[25] *Reading Justices, supra at p 246 (per Simon Brown L.J.), approved in Brooks, supra at p 535 (per Lord Taylor C.J.).*

[26] *Reading Justices, supra. Re A (Criminal Proceedings), supra.*

[27] *Re Ronald A Prior & Co (Solicitors), [1996] 1 Cr.App.R. 248.*

[28] *R. White, "Family Practice" [1996] N.L.J. 680.*

[29] *Supra. See discussion in part F (2).*

[30] *Reading Justices, supra at p 246.*

C. The Cayman Position

The Criminal Procedure Code (1995 Rev), s. 36, governs the issuance of witness summons in Cayman. The operative wording of this section differs from the English provisions. S.36 contains the following key phrase: "material evidence can be given". This can be contrasted with the parallel English phrase: "likely to be material evidence".[31] As the key word in each section is "material", it is open to argument that the English interpretation of material ("relevant and admissible") may apply. However, it is submitted that it is equally valid to use the distinct wording found in the phrase as a basis for the proposition that a different phrase signals, at a minimum, a willingness to consider other interpretations - if not a sign to actually jettison the precedents surrounding the English interpretation. There are no reported cases interpreting s.36 or its predecessor, s. 34 Criminal Procedure Code (1976), to assist in this discussion. Practical experience reveals that witness summons are rarely, if ever, challenged locally. It is possible, therefore, for local jurisprudence to develop independent of the English experience. In light of the problems arising from English authorities interpreting the provisions governing the issuance of witness summons[32] it is submitted that justice would be better served if this was the course adopted.

D. Matters Yet to be Settled in England

Two important points remain unsettled in English law. First, whether the impugned records should be disclosed to counsel during the application to quash the summons, thereby facilitating in camera argument regarding their relevance and admissibility.[33] Second, once it is determined that the summons is valid, and the court begins the process of balancing the interests (societal, privacy and due administration of justice) there exists a lack of guidance regarding which specific elements are to be put on either edge of this triangular balance.

With regard to the first point, at least one English Crown Court decision takes the position that the impugned records can be given to counsel, as officers of the court, in order that they might prepare arguments on the validity of the summons.[34] This approach shows little or no regard for the privacy interest of the subjects of the record, often the

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[31] *Magistrates' Courts Act 1980, s 97.*

[32] *The problems referred to are discussed in part E.*

[33] *This issue is not addressed in the current provisions of the Criminal Procedure and Investigations Bill 1995-96. It would arise during the argument regarding the issuance of the summons.*

victim of the crime. Contrast the approach of Lord Taylor C.J. who, being sensitive to the confidences of a group therapy session, felt that it was inappropriate to allow counsel to view the impugned video tape.[35] However, this example cannot be taken as a definitive precedent, given the context of the decision.

With reference to the issue of the elements to be included in the balance under the general headings of public interest, e.g. societal and individual interests and the interest in the due administration of justice, English courts have not provided an abundance of guidance. It is appropriate to acknowledge that the elements included in the balancing process can have an important impact on the outcome. For example, if one element to be included is the societal interest in the prosecution of sex offences, then the weight and significance of the defendant's right to put forward a full answer and defence, along with the victim's and society's privacy interest, exert less impact on the disclosure decision. Further, a detailed analysis assists practitioners and the courts.[36] General statements are found throughout the relevant authorities.[37] More appropriate guidance, that is, the explicit recounting of the elements considered, is seen in Science Research Council v Nasse[38] and, more recently, in Re A (Criminal Proceedings: Disclosure).[39] In the latter case, Bulter-Sloss L.J. stated, in determining an application to extract family proceedings records for use by the defence in a criminal trial, that the factors to be considered included the importance of maintaining confidentiality in family proceedings, and specifically, in the particular case before the court. Also considered was the purpose for which the information is required, e.g. whether it is addressing an issue in the case or witness credibility. If credibility is the

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[34] *The Chester Crown Court ordered disclosure of confidential child care records to counsel to enable them to prepare argument, R. White [1995] N.L.J. 1537. An attempt to have the Divisional Court review the Chester Crown Court decision was refused as ex-juris, R v Chester Crown Court ex p Cheshire County Council [1995] The Times October 23; [1996] 1 F.L.R. 651.*

[35] *Trevor Douglas K., supra at p 347.*

[36] *It also draws praise from the Law Lords: Re L (a minor) (police investigation: privilege), [1996] 2 All ER 78 at 87 (per Lord Jauncey).*

[37] *For example Turner, supra note 20, at p 97 (per Lord Taylor C.J.); Trevor Douglas K., supra note [illegible] at p 345 (trial judge) and p 346 (per Lord Taylor C.J.); R v Clowes (1992) 95 Cr.App.R. 440 at 453; A-G v Mulholla[illegible] 1963] 2 Q.B. 477 at 489-90 (per Lord Denning M.R.) approved in British Steel Corp v Granada Television Ltd [1981] A[illegible] 1096 at 1168 (per Lord Wilberforce).*

[38] *[1980] A.C. 1028 at 1065E (Per Lord Wilberforce).*

[39] *[1996] 1 F.L.R. 221 at 224 (per Bulter-Sloss L.J.), following Re D (Minors) Wardship: Disclosure) supra at p 350.*

purpose, one must consider the weight and significance of the information, and the importance of the witness himself. The gravity of the charge facing the accused must be considered.[40] Even though this list is helpful, one might argue that other elements should have been included. For example, the effect of disclosure on siblings or other relatives,[41] and the negative impact on the custodian, both in terms of loss of reputation and extended resources, appear to be valid considerations.[42]

It is respectfully submitted that appropriate consideration should be given to the elements to be included in balancing interests, and that explicit reference should be made to the elements included as well as the reason for the inclusion of any element.

E. Problems Arising From the "Admissibility" Criteria

It is respectfully submitted that the inclusion of the issue of admissibility in the threshold test[43] creates unjustifiable difficulties. First, this formation leaves the defendant in the classic "Catch 22" situation of requiring access to the records to meet the onus which must be satisfied to bring the records properly before the court. Sir Thomas Bingham, M.R., stated recently "[u]nder the law as it stands, for which I cannot conceal my distaste, it is for the party applying to adduce the documents to show that the documents, if adduced, are likely to help him, a somewhat Gilbertian task in relation to documents he has not seen."[44] Second, frequently hearsay evidence is the topic of argument regarding admissibility. Yet, the law regarding the exceptions to the hearsay rule and admissibility is unsettled.[45] Often the issue of whether a written statement will be admissible cannot be settled until trial. What may be an inadmissible written statement due to hearsay may become admissible when a witness is intimidated, ill or outside the country.[46] Therefore, the defendant cannot properly attempt to summons the third party until the trial is underway, and he is hiding, ill or outside the

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[40] *Ibid.*

[41] *R. Langdale and S. Maskrey, "Public Interest Immunity: Disclosure of Social Work Records" [1994] Fam. Law 513, 514-15.*

[42] *Reading Justices supra at p 246.*

[43] *Reading Justices, ibid., at p 247 (per Simon Brown L.J.), approved Brooks, supra at p 535 (per Lord Taylor C.J.).*

[44] *"Confidentiality Address" [1996] Fam. Law 315 at 316.*

[45] *J.N. Spencer, "The Current Hearsay Rule and Proposals For Reform" [1996] 60 J0. Crim. Law 83.*

jurisdiction.

Another problem is demonstrated by Brooks.[47] Counsel for the defence, in attempting to obtain a confidential statement for the purpose of cross-examination to impugn the credibility of a witness (the stepson who had been acquitted of the same crime) under Ss 4 and 5 Lord Denman's Act[48] the equivalent of the Evidence Law (1995 Rev) s. 4, was frustrated by a circulus inextricabilis. Entitlement to the statement was contingent on admissibility. Admissibility was contingent on the witness's refusal in cross-examination to distinctly admit his prior inconsistent statement. Before challenging the witness on his statement, counsel was required to have the statement in hand. As Lord Taylor C.J. conceded, justice may be defeated by a technical obstacle.[49]

Finally, a threshold criteria consisting of both relevance and admissibility has the collateral effect of barring incidental discovery of the contents of the third party's file. Lord Taylor C.J. was satisfied with this result.[50] But informal disclosure on a counsel to counsel basis was encouraged by Lord Woolf in similar circumstances.[51] Limiting incidental discovery has the effect of undermining the defendant's right to make full answer and defence.

F. Model of R v O'Connor

The Supreme Court of Canada's decision in O'Connor[52] provides well reasoned guidance on many of the foregoing issues including disclosure to counsel for the purpose of argument during the challenge to the witness summons, the

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[46] *Criminal Justice Act 1988 s. 23, R v Case [1991] Crim. L.R. 192, R v Cole [1990] 1 W.L.R. 866, R v Dragie [1996] The Times March 7. Similar provisions are found locally, Criminal Procedure Code (1995 Rev) s.133.*

[47] *Supra.*

[48] *Criminal Procedure Act (Law of Evidence and Practice on Criminal Trials) 1865.*

[49] *Brooks, supra at p 534F. This did not concern their Lordships as the same result was inevitable on the grounds of solicitor-client privilege.*

[50] *Supra at p 534G.*

[51] *Wiley, supra at 372.*

[52] *Supra.*

appropriate threshold criteria, and the elements to be considered in the balance in sexual assault cases. It also acknowledges the benefit of limited incidental discovery of third party files. By way of clarification, O'Connor did not address situations of absolute privilege.[53]

1. O'Connor Facts

It was alleged that Bishop H.P. O'Connor, while the headmaster of a residential school during the mid-1960's raped or sexually assaulted four students. In 1992, almost a year after being committed to stand trial, O'Connor applied for, and obtained, an order from the British Columbia Supreme Court requiring disclosure by the Crown of the complainants' entire medical, counselling and school records. The Crown did not possess the files of those who had treated the complainants. The complainants and the custodians of the records did not receive notice of the application. After initially refusing to produce the confidential records, one psychologist reluctantly produced his records to the Crown, who forwarded them to the newly appointed trial judge. The judge reviewed the records and provided the contents to the defence. A month later, another psychologist produced his records to the Crown with assurances from the court that the records would not be released to the defence before the Crown had the opportunity to argue that the records were protected by PII. However, only partial argument, focusing on relevance, was completed before the impending trial date motivated the judge to order production of the records to the defence. The important question of the victims' privacy interest was lost.

At trial it was revealed that the Crown had not complied with its disclosure obligation, inspite of undertakings and orders. Upon a defence motion, the trial judge delivered a judicial stay of proceedings, reasoning that the Crown's conduct had created an aura of mischief that had pervaded the case, such that allowing the case to proceed would tarnish the integrity of the court.[54] The British Columbia Court of Appeal allowed the Crown's appeal and directed a new trial.[55] The Supreme Court agreed, in a majority decision divided six against three. All members of the Court agreed that under certain circumstances the privacy interest of the complainant in confidential records in the possession of a third party would give way to the greater interest of the accused to present a full answer and defence.

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[53] *Had the Supreme Court of Canada considered the Brooks scenario on the question of solicitor-client privilege, it would have concurred with the Lords in reasoning and result, see R v Seaboyer (1991) 66 C.C.C. (3d) 321.*

[54] *(1992) 18 C.R. (4th) 98.*

[55] *(1994) 29 C.R. (4th) 20.*

The disagreement rested in the factors to be balanced and the process, with the minority placing greater emphasis on the complainants' privacy interest, while the majority emphasised the defendant's right to provide a full answer and defence. On these points the joint decision of Lamer C.J. and Sopinka J., supported by three others comprised the majority. L'Heureux-Dube J. wrote the main dissenting judgment.

2. Majority Decision

The Chief Justice outlined the following two stage process for this type of defence application. Initially, the defence must file a written motion directed to the trial judge to be served on the custodian of the record, the Crown and the person whose privacy interest is in issue, often the complainant. Additionally, the custodian and the impugned records must be subpoenaed,[56] and the defence must submit an affidavit in support of the motion. The affidavit must address the primary issue of the first stage, which is whether the impugned document is "likely to be relevant" thereby justifying an examination of the material by the court. This threshold test is not to be construed too strictly, as it is designed only to prevent speculative or frivolous applications.[57] Relevant information is defined for the purpose of this stage as information that may be useful to the defence, either directly or indirectly.[58] The question of the admissibility of the produced record is a matter to be determined at a later point in the trial.[59] Leaving the question of admissibility until trial is consistent with current American jurisprudence.[60] Massachusetts State courts have addressed the issue of production and disclosure of third party records often of late. The Supreme Judicial Court of Massachusetts settled on a process very similar to that set out by the majority in O'Connor,[61] as did the United States Supreme Court in a decision last decade.[62]

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[56] *The issuance of a subpoena is governed by the Criminal Code s. 698 which provides, "(1) Where a person is likely to give material evidence in a proceeding ... a subpoena may be issued in accordance with this Part."*

[57] *O'Connor, supra at para 19.*

[58] *Ibid., at para 22.*

[59] *Ibid., para 33 (per Lamer C.J.) and para 164 (per L'Heureux-Dube J.).*

[60] *E.M. Crowley, "In Camera Inspections of Privileged Records in Sexual Assault Trials: Balancing Defe[illegible]nt's Rights and State Interests Under Massachusetts's Bishop Test" (1995) 50 Am. J. Law & Med. 131, 152.*

[61] *Commonwealth v Bishop, 617 N E. 2d 990 at 997 (1993).*

[62] *Pennsylvania v Ritchie, 480 U.S. 62, 107 S.Ct. 989 at 1003 (1987).*

The defendant's right to put forward a full answer and defence must not be rendered meaningless. It is quite possible that a key piece of evidence will be in the possession of the confidant. The evidence of a rape victim who described her assailant as white to her therapist months after the incident, but as black to the police on an earlier occasion, could not be more critical to the presentation of a full answer and defence to a black accused. No court would ever be apprised of this key piece of evidence under the English model. If the judge feels that argument from counsel would assist in determining whether the threshold test has been satisfied, he is free to provide a summary of the records to counsel so that submissions are efficient, bearing in mind the privacy interest.[63] If the threshold test is satisfied, an order to disclose the documents to the judge will follow. It is respectfully submitted that this approach is more favourable to the one adopted in Chester Crown Court.[64] Without some regard for the victim's privacy interest, victims, in the case of sexual assault, and confidants, in the case of liquidator's investigations, will refuse to either seek assistance or cooperate. The American experience is instructive also. The approach suggested by the Supreme Judicial Court of Massachusetts is similar to that taken in Chester Crown Court, as the Courts of Massachusetts are to provide counsel, in their capacities as officers of the court, with the relevant records, allowing them a full opportunity to prepare submissions on whether the judge should order production.[65] This was justified by the strong statement of the rights of the accused under the State Constitution.[66] Slightly softer wording is found in the federal constitution,[67] which enabled the United States Supreme Court to adopt a more privacy oriented approach when addressing the accused's rights under the document. That court unanimously ruled that counsel are not to be allowed access to the impugned record, though they were entitled to address the judge before the production ruling is made.[68]

Returning to O'Connor, upon production of the documents to the court, the second stage, the judge is to examine the documents to determine whether, and to what extent, they should be produced to the defence. In determining this issue,

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[63] *O'Connor, supra note 1 at para 30.*

[64] *Supra.*

[65] *Commonwealth v Bishop at p 997.*

[66] *Massachusetts' Declaration of Rights, Article XII, "[A]nd every subject shall have a right to produce all proofs, that may be favourable to him, to meet the witnesses against him face to face, and to be fully heard in his defence by himself...".*

[67] *Sixth Amendment, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favour". This was applied to State criminal prosecutions pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution.*

[68] *Pennsylvania v Ritchie, supra at p 1003.*

a higher standard is to be applied. The judge "must be satisfied that there is a reasonable possibility that the information *is logically probative to an issue at trial or the competence of a witness to testify" (emphasis in original).*[69] The majority held that, if satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify, then the judge must balance the public interests - the accused's right to make full answer and defence against the privacy and security interests - to finally determine what is to be given to the defence. If the material produced is admissable, privacy interests can be addressed further through publication bans and the removal of spectators.[70]

The following factors are to be considered in sexual assault cases when striking the balance of public interests in the second stage of the test: "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question".[71] Further, consideration should be given to the societal interest in the reporting of sexual crime,[72] and the relatively simple process by which the Crown can obtain production of third party records.[73] It is respectfully submitted that this list is comprehensive but not exhaustive. However, it does provide an important model for sexual assault cases. In other circumstances a myriad of other elements will have to be considered. It is instructive to notice also, that the Court, in choosing the elements to be considered in the balancing of interests, took great care to explain the decision to include some of the not so obvious elements, e.g. whether production of the record would be premised upon any discriminatory belief or bias. L'Heureux-Dube J. was thorough in explaining the improper impact of assumptions reflected in past statutory provisions. Provisions requiring corroborative evidence before women or children could bring sexual assault charges, now repealed, reflected the bias of presuming their "uncreditworthiness". Similarly routine exposure of complainants' personal backgrounds reflected a built-in bias in the criminal justice system against those most vulnerable to repeat victimization.[74]

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[69] *O'Connor, supra at para 22.*

[70] *Ibid., para 32.*

[71] *Ibid., para 31.*

[72] *Ibid., para 33.*

[73] *Ibid., para 34.*

[74] *Ibid., paras 123 and 124.*

G. Conclusion

O'Connor provides important guidance on the question of the production and disclosure of confidential records held by third parties. This model is preferable to the dual threshold requirements of relevance and admissibility currently in use in England. As has been demonstrated, a dual threshold criteria creates unjustifiable problems and unduly inhibits a restricted, but legitimate, collateral discovery opportunity. The O'Connor decision also lends support to the proposition that the elements to be considered in the balancing process should be carefully chosen and reported in detail. Further, the decision provides a model list of considerations in sexual assault cases. Local provisions allow the adoption of a model from either England, Canada or one of the American jurisdictions. It is respectfully submitted that the adoption of the O'Connor model is appropriate.[75]

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