CAYMAN ISLANDS LAW BULLETIN

No 15

DECEMBER 1996

CAYMAN ISLANDS LAW SCHOOL

Cayman Islands Government

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The Cayman Islands Law Bulletin is intended to provide an information and reporting service for attorneys and others who may need to be aware of developments in the law of the Cayman Islands. The 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) 15 Law Bulletin.

Abbreviations:

Abbreviations where used in the Law Bulletin are based on those used in The Digest (formally 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 9497999 Extension 3540.

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EDITORIAL NOTE

The fifteenth 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. This edition features three articles, two by Law School staff. Mr Patrick O'Hagan, an attorney with Conyers, Dill and Pearman, Bermuda, provides (at p.39) a comprehensive account of recent developments in the English law of trusts. This article is naturally of more than mere academic interest with many of the developments likely to fall for consideration in this jurisdiction in the not too distant future. Meanwhile, lecturer in law, Mr Simon Cooper, (at p.66) offers his analysis of equity's jurisdiction to provide relief against forfeiture of contractual and proprietary rights arising under commercial contracts; and Law School Director, Mr. Mitchell Davies, (at p.83) provides his interpretation of the recent Grand Court ruling on the ambit of legal charity in the Cayman Islands (a summary of the Grand Court judgment appears at p.6) suggesting that the decision represents a welcome and justified departure from the often rigid approach adopted by English and other Commonwealth authorities.

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 the 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 seven bound volumes (1952-1979, 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 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 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 current edition contains case summaries of the majority of Grand Court judgments delivered in Chambers and in open court by Harre CJ, Smellie, Murphy and Williams JJ and Douglas (actg J) during the period December 7 1995 - October 22 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 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

CASE SUMMARIES SUBJECT INDEX

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

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CHARITABLE TRUSTS

Trusts - Shifting law clause - Trusts (Foreign Elements) Law 1987 - Charitable objects

Bridge Trust Co Ltd and Another v A-G and others

Grand Court (286/94)
Harre CJ
April 30 1996

Legislation

Trusts (Foreign Elements) Law 1987
Interpretation Law (1995 Revision)
Statute of Charitable Uses 1601

Authorities referred to

A-G for New Zealand v Brown [1917] 393
A-G v National Provincial Bank [1924] AC 262
A-G v Royal Trust Co (1983) 36 WIR 1
Blair v Duncan [1902] AC 37
Brisbane City Council v A-G [1979] AC 411
Camille & Henry Dreyfus Foundation Inc v IRC [1954] 1Ch 672
Chichester Diocesan Fund and Board of Finance v Simpson [1944] AC 341
Cocks v Manners (1971) 12 Eq 574
Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531
Houston v Burns [1918] AC 337
Hunter v A-G [1899] AC 309
Incorporated Council of Law Reporting for England and Wales v A-G [1972] Ch 73
Incorporated Council of Law Reporting of Queensland v Federal Commission of Taxation (1971) 125 CLR 659
Maguire v A-G (1943) IR 238
Mitford v Reynolds (1848) 1 Ph 185
In re Strakosch [1949] 1 Ch 529
Morice v Bishop of Durham (1804) 9 Ves 399
National Anti-Vivisection Society v Inland Revenue Commissioners [1948] AC 31
Re Hawley (1940) IR 109
Re Jacobs (1970) 114 SJ 515
Re Macduff [1896] 2 Ch 451
Re Pardoe [1906] 2 Ch 184
Re Robinson [1931] 2 Ch 122
Re Sir Robert Peel's School at Tamworth (1868) LR 3 Ch App 543
Re Smith [1932] 1 Ch 153
Scottish Burial Reform and Cremation Society v Glasgow Corporation [1968] AC 138
Vagliano v Vagliano [1905] WN 179
Whicker v Hume (1858) 7 HL 124
Williams' Trustees v Inland Revenue Commissioners [1947] AC 447

Mr Etherton QC, Mr Tidmarsh and Mr Foster for the plaintiffs
Mr Hart QC and Mr Helfrecht for the first defendant
Mr Martin QC, Mr Close and Mr Ritchie for the second defendant
Mr Boyle QC, Mr Harrison and Mr Clifford for the third defendant
Mr Smith QC and Mr Barrie for the 24th to 73rd defendants

In 1976 a substantial shareholding in a Panamanian company was settled on the trusts of the Continental Foundation, the trusts being declared in a Memorandum of Agreement dated 20th July 1976. The original law of the Continental Foundation was the law of the Bahamas. The trustees of the Continental Foundation invoked clause 39 of the Memorandum of Agreement in order that the trust should have its *situs* in, and be subject to the laws of, the Cayman Islands. In 1982, pursuant to clause 5 of the Memorandum of Agreement dated 20th July 1976, the assets of the Continental Foundation were resettled on the trusts of the Aall Foundation by a Memorandum of Agreement dated 7th October 1982.

The originating summons was brought to determine whether the trusts declared in the two Memoranda of Agreement were valid or void, although it was conceded that, as a matter of construction, the trusts declared in the Memorandum of Agreement dated 7th October 1982 were valid.

The second defendant argued that the trusts of the Continental Foundation were not charitable and could not exist as private trusts. The second defendant also contended that clause 2 of the Memorandum of Agreement, dated 20th July 1976, was wholly invalid and could not be used to change the governing law from that of the Bahamas to that of the Cayman Islands.

Held: (finding the trusts to be charitable and therefore valid)

(i) Under the Trusts (Foreign Elements) Law 1987 s.4(4), a change of governing law to the law of the Cayman Islands must be recognised by the law of the trust previously in effect. This statutory requirement did not necessarily demand that the trust and the exercise of the change of law clause be valid according to the former governing law; that would require an investigation into whether the trust was valid in both relinquishing and receiving jurisdictions, which was the very mischief which s.4 of the Law was intended to address. It was sufficient that the previous governing law of the trust recognised the principle of a change of law.

The law of the Bahamas did recognise the principle of changing the governing law of a trust and s.4(4) of the Trusts (Foreign Elements) Law 1987 was accordingly satisfied. The governing law of the Continental Foundation was therefore the law of the Cayman Islands from the date of the exercise of the shifting law clause.

(ii) The English law of charitable trusts could be regarded as having been introduced or received into the Cayman Islands before 1728 (the cut-off date provided for in the Interpretation Law) and the court would apply the common law as it had developed in England in the succeeding years: A-G v Royal Trust Co . *Per curiam*: if the court had been asked to take a radical new approach to the law of charity in the Cayman Islands based on policy reasons it would have refused to do so.

(iii) On construction of the Memorandum of Agreement dated 20th July 1976, the trusts contained therein were valid being charitable under the fourth category from Pemsel's case (purposes generally beneficial to the community).

Editor's note: for a discussion of this ruling, see "Charitable Trusts in the Caytman Islands: Goodbye to the Statute of Elizabeth?" at page 83 infra. It is understood that an appeal against the Grand Court's determination of charitable status has been set down for early summer, 1997.

SAAC

CIVIL PROCEDURE

Legal profession - Practice - Affidavits - Counsel acting as deponent - Notice of application

Seaview Hotels Ltd v Johns (T/A as Cayman Dive School)

Grand Court (399/96)
Murphy J
August 1 1996

Counsel sought an injunction, pursuant to an *ex parte* summons, supported by an affidavit, in circumstances where counsel was the deponent.

Held : (order as follows)

(i) It was inappropriate for attorneys-at-law to act both as counsel and deponent, particularly in applications where the remedy sought was serious, as in this case.

(ii) Since there had been prior discussion with the respondent, an *inter parties* application was the appropriate approach.

JE

Editor's note: for related litigation see summary following.

Remedies - Injunctions - Principles to be applied

Seaview Hotels Ltd v Johns (T/A Cayman Dive School)

Grand Court (399/96)
Murphy J
August 1 1996

Authority referred to

American Cyanamid v Ethicon [1975] AC 396

Mr W Da Costa for the applicant

The applicant sought an injunction, pursuant to an *ex parte* summons, supported by an affidavit, to prohibit the respondent from removing an air compressor from the dive shop on the premises.

Held: (application refused)

(i) The principles in American Cyanamid v Ethicon were applicable.

(ii) The application would be refused as it lacked the degree of certainty and urgency appropriate for an injunction. Furthermore, in the event of a conversion of the chattel, damages would be an appropriate remedy.

JE

Procedure - Application to set aside default judgment - Whether defendant was served with writ

I Ltd v R

Grand Court (508/95)
Harre CJ
May 7 1996

Court Rules

Order 13 rule 9 Grand Court Rules

Authorities referred to

Clarke v Harper [1979] 25 WIR
Ebanks v Plain [1988-89] CILR 421
Fiduciary Management Services Ltd v Intermediate Securities Ltd and Another [1992-93] CILR 541

Mr McCann for the plaintiff
Mr Garcia for the defendant

The defendant applied to set aside a default judgment which had been awarded to the plaintiff. The defendant contended that the judgment was irregularly obtained because he had not been served with the Writ of Summons and Statement of Claim. The Director of the plaintiff company had sworn an affidavit to the effect that the documents were served on the defendant. The defendant claimed that he was not on the Island on the date of the alleged service and to support his claim produced a passport bearing an exit immigration stamp. There was however no stamp showing entry to any particular destination.

Held: (dismissing the application)

(i) Having considered the assertions of the two parties, the evidence of the plaintiff would be preferred leading to the conclusion that the documents were served on the defendant in the manner described in the Affidavit of Service and that the default judgment was regularly obtained.

(ii) Under Order 13 rule 9 of the Grand Court rules the court has power to set aside or vary a default judgment on such terms as it thinks just. If an application to set aside a regular judgment was made in circumstances where the defendant had failed to give notice of intention to defend, the application would not be granted except where there existed an affidavit stating facts which showed a defence on the merits. In the present case the defendant had not tendered any such affidavit. Furthermore, the court would normally take into account an explanation of how the default occurred : Clarke v Harper.

Accordingly the application to set aside the judgment would be dismissed.

AD

Procedure - Application to use information obtained in consequence of discovery in a collateral action

L v K

Grand Court (77/96)
Harre CJ
June 6 1996

Mr Jones for the plaintiff
Mr McDonough for the defendant

The plaintiff obtained summary judgment and an order for oral examination of the defendant as well as discovery of documents, records and books which had been removed from the possession of the defendant by the police in connection with extradition proceedings against him. "Special" discovery was permitted because of the exigencies of the situation and the need to identify the defendant's assets. Following the inspection of the documents, the plaintiff commenced another action against the defendant and his wife on the ground that certain transfers made by the defendant to his wife were made with the intention of defrauding creditors. The plaintiff also applied to use the information obtained as a result of the discovery in related proceedings between the same parties in a Florida court.

The defendant opposed the application on the ground that the use of the information in a separate action was an abuse of the process of the court.

Held: (granting the application)

(i) It was well established that a party who obtained discovery could use the documents disclosed to him only for the proper purposes of conducting his case and there was an implied undertaking by him not to use them for any collateral or ulterior purpose. Any misuse of the documents would be restrained by injunction or punished for contempt. An action based on the misused documents would ordinarily be struck out as an abuse of the court's process.

(ii) There existed exceptional circumstances, however, when the rule against the collateral use of documents could be relaxed or modified by the court. From the evidence, it appeared that the judge, when granting the order for discovery, was aware of the intended use of the documents to be obtained. If an application had been made in the earlier action to have the rule against the collateral use of the information relaxed, it was inconceivable that it would not have been granted. The plaintiff was simply seeking to use the order obtained in the Cayman court to support an application in the Florida court. There was no oppression in this and therefore the application would be granted.

AD

Stay of civil proceedings - Risk of prejudice in criminal proceedings

B v G Ltd

Grand Court (245/95)
Williams J
May 16 1996

Authorities referred to

Bank of Jamaica v Dextra Bank and Trust Co Ltd (Unreported, Court of Appeal of Jamaica)
Jefferson Ltd v Bhetcha [1979] 2 All ER 1108
Avalon Tours Ltd v A-G of the Cayman Islands (Unreported, Cause No. 21/94, Grand Court)
R v McGregor [1967] 2 All ER 267
Lawrence v Lord Norreys (1890) 15 App Cas 210

Authoritative work cited

Halsbury's Laws of England Vol 37

Mr Broadhurst for the plaintiff
Mr Hellman for the first, second and fourth applicants
The third defendant did not appear
Mr Watler for the fifth defendant

The fourth defendant sought a stay of the action pending the conclusion of the criminal investigations and any subsequent prosecution against the fourth defendant. The plaintiff alleged that the fourth defendant had fraudulently transferred land belonging to the plaintiff. The fourth defendant had been arrested after the plaintiff reported the matter to the police, and was released on bail.

The fourth defendant argued that there was a real risk that he would suffer prejudice in any criminal trial if the civil trial occurred first and that the publicity generated by the civil proceedings would prejudice potential jurors against him in any subsequent criminal trial. The plaintiff argued that no prejudice would be caused by disclosure of the fourth defendant's defence as this had already occurred and a statement had been given to the police. It was also argued that no concurrent criminal proceedings were taking place and that no charge had been laid against the fourth defendant one year after the matter had been reported. The plaintiff further argued that the Cayman Islands media did not generally focus attention on civil cases.

Held: (refusing to grant a stay)

(i) The fourth defendant had not been charged and there was no indication of if or when he might be charged. The issue at present was merely one of speculation and if he were charged it would be some considerable time before the case would come up for trial. (Bank of Jamaica v Dextra Bank and Trust Co Ltd, Jefferson Ltd v Bhetcha, Avalon Tours Ltd v A-G of the Cayman Islands and R v McGregor distinguished.)

(ii) Although the population of the Cayman Islands was relatively small, not much publicity was given generally to civil matters. The longer the delay in the hearing of any criminal matter, the less the prejudice even if there was eventually to be a criminal charge.

(iii) The Canadian authorities would not be followed as they required a higher standard than the English, Jamaican and Cayman authorities in that the defendant had to show extraordinary or exceptional circumstances before he could obtain a stay.

(iv) Taking all the circumstances into account, there was no real risk of prejudice to the fourth defendant. In the exercise of the court's discretion, balancing justice between the parties, the stay was refused with costs to the plaintiff.

SAAC

Recovery of liquidators' costs incurred through defendants' tort - Whether a need to quantify costs with precision where liquidators' investigation had been lengthy and complex - Whether the costs were costs in preparation of litigation

ICIC and another v L Investments and others

Grand Court (389/92)
Murphy J
October 22 1996

Court Rules

Grand Court Rules, Order 37

Authorities referred to

Tate & Lyle Food and Distribution Ltd v Greater London Council [1982] 1 WLR 149
Chaplin v Hicks [1911] 2 KB 786
Biggin v Permanite [1951] 1 KB 422
British Motor Trade Association v Salvadori [1949] 1 Ch 556

Penvidic Contracting Co Ltd v International Nickel Co of Canada Ltd (1975) 53 DLR (3d) 748
Wood Valley Railroad Co 51 SCR 283

Authoritative work cited

McGregor on Damages 14th Ed

By a judgment dated June 1, 1995, Schofield J found the third, fourth, fifth and seventh defendants guilty of dishonest participation in two separate tortious conspiracies against the plaintiffs. Schofield J ruled that the plaintiffs were consequently entitled to damages to be assessed under several heads including "the costs and expenses of investigating the conspiracy or conspiracies". The matter of assessment fell to be determined by Murphy J in the present proceedings following the service of a notice of appointment on the defendants in accordance with Order 37 Grand Court Rules. The costs to be assessed were those of the liquidators of the first plaintiffs ("the accountants"), who had been appointed by the court in July 1991, and were charged with the responsibility of uncovering, protecting and realising the first plaintiff's assets. The accountants were also responsible for the calculation of their fees attributable to the investigation. The enormity of the accountants' task ensured the dedication of many thousands of man-hours to the four year investigation at a cost estimated by the accountants at U.S.$2,162,231 plus interest. This figure was subsequently amended in *viva voce* evidence in chief before Murphy J. The plaintiffs consequently alleged the joint and several liability of the four defendants for the amended amount. The fifth defendant ("L Investments") was the only party to dispute this assessment of costs.

Counsel for the fifth defendant sought the court's ruling on two preliminary issues:

1. Whether evidence in the nature of an estimation only of costs could be relied upon; and, if so,

2.Whether the lack of precision in calculation would result in only nominal damages being awarded.

Murphy J declined the plaintiff's request to be allowed an adjournment should he rule against them on these preliminary issues. Instead, the plaintiffs were afforded the opportunity to request an adjournment at the outset in the event they felt the need to "buttress" their evidence. No such application was made and the plaintiffs continued with their claim, leading the evidence of one CG, a chartered accountant employed by the accountants who was charged with the responsibility of quantifying the claim. CG put before the court, in the form of affidavit evidence, a statement of hours which he claimed to fairly represent the time spent by him and three of his colleagues, JS, BP and TS, in investigating the conspiracies. JS and BP had given evidence before Schofield J in the form of witness statements which were also referred to in the present proceedings. The totality of the evidence revealed the magnitude of the investigation as confirmed in the statement of JS which estimated that in January 1995 there were some 76,300 boxes of documentation and 335 lever arch files of indexes. The same statement testified to the fact that the international nature of the investigation coupled with the "paucity of original documentation" and the various sources of information all combined to add to the complexity and scale of an investigation which spanned a fifteen year period.

Based on timesheets maintained by the accountant's London and Cayman offices and applying charge-out rates approved by the Grand Court, CG arrived at a figure of U.S.$3,506,640 in respect of fees charged for "work directly or indirectly related to the investigation " in the period 1991-1995. It was acknowledged however that not all of the time expended was "expressly attributable to this head of damage" and therefore, in consultation with JS and BP, CG sought to adjust this figure down to account for time fairly attributable to areas outside this head of damage, for example, work related to U.S. or Pakistan litigation. CG also included a

general description of the work undertaken by the four accountants by way of explanation. CG noted in his affidavit evidence that the resultant figure was conservative and that he had been careful to "err on the side of caution in favour of the defendants" in making the estimations. Both JS and BP agreed with the percentages used to effect these adjustments and the resultant quantification. The issue of apportionment had not been discussed with TS. CG further asserted that to provide a detailed assessment of the actual time expended on matters falling outside the head of damage "would be both extremely time consuming and costly and should in the view of the liquidators be avoided if at all possible".

Murphy J noted that although there were numerous other investigative personnel involved both in London and the Cayman Islands, the claim related only to the work performed by the four specified accountants. His Honour also noted that the claim related purely to fees and did not account for other legitimate disbursements which could properly have been included within the head of damage such as the costs of telephone calls, faxes, photocopying and travel.

Counsel for the fifth defendant objected that the plaintiffs' evidence amounted to no more than an estimation or speculation and argued that an accurate quantum of damage could have been proved by the production of all the accountants' working papers and records and by calling the four to be cross-examined in the present proceedings. It was separately argued that the bulk of the plaintiffs' costs could not be recovered as they related to litigation preparation with such costs being properly recoverable as costs in the litigation rather than as damages.

Held: (finding for the plaintiffs)

(i) CG, the only person to give evidence in person in the present proceedings, was honest, knowledgeable and well-placed to provide an overview of what the four accountants did and the hours which they were obliged to expend on the investigation of the conspiracies. He had used his "best efforts to present the most accurate and fair picture... of the work that was done investigating the conspiracies, bearing in mind the costs involved in the quantification exercise itself". When in doubt, CG had erred on the conservative side.

(ii) The head of damage had been adequately proved by the material filed by the plaintiffs. There was no obligation upon the plaintiffs to "put before the Court absolutely every jot and tittle of evidence relating in any way to the damage issue". Wherever a summary of evidence was relied upon in judicial proceedings the onus of challenge fell squarely upon the defence with the same usually taking place in the course of the discovery process prior to the trial. No application for discovery had been made by the fifth defendant in relation to the present assessment.

(iii) The methodology adopted by CG in quantifying the head of damage, including that employed in calculating deductions in respect of activities not directly relevant to the present inquiry, were reasonable in the circumstances. Resort to the technique of estimation was particularly appropriate where "every dollar spent in gathering additional proof of loss would eat directly into the recovery proceeds in the liquidation": Ratcliffe v Evans applied and McGregor on Damages referred to. Moreover, it was clear that CG was "intimately familiar with the work the accountants had done throughout these investigations." Reliance upon further documentation would not have eliminated the need to resort to estimation: Tate & Lyle Food and Distribution Ltd v Greater London Council distinguished.

The fifth defendant's contentions that there was no evidence of damage, or that the difficulties of quantification necessitated an award of no more than nominal damages would therefore be rejected. Where it was clear that some substantial loss had been incurred the fact that assessment was difficult was no reason for denying the claim for substantial damages. Although "difficulty of proof did not normally dispense with the necessity of proof, the standard

demanded could seldom be that of certainty". Chaplin v Hicks, Biggin v Permanite, British Motor Trade Association v Salvadori and Penvidic Contracting Co Ltd v International Nickel Co of Canada Ltd applied. The *dictum* of Davies J in Wood v Grand Valley Railroad Co was adopted: "Impossibility (of mathematical accuracy) cannot relieve the wrongdoer of the necessity of paying damages ..(the tribunal's) conclusion will not be set aside even if the amount of the verdict is a question of guesswork."

(iv) The "most startling attack" of the fifth defendant was the suggestion that the bulk of the costs were irrecoverable in the present action as they related to litigation preparation. This contention would be rejected. The relief granted by Schofield J was wide enough to cover such costs. Indeed it was hard to envision what else Schofield J could have had in mind in making the ruling. The accountants had not been used as experts at the trial, but were witnesses as to the facts, and as such their costs could not be recovered as costs in the litigation.

(v) The plaintiffs' damages would be certified as the amount estimated by CG as amended in his *viva voce* evidence, with simple interest at the court's prevailing rate attaching. The interest was to run from the end of the calendar year in which the costs were incurred. Costs of the present proceedings would be awarded to the plaintiffs.

MD

COMPANY LAW

Winding up - Just and equitable ground - Quasi-partnership - Striking out petition

In the Matter of B Ltd

Grand Court (295/95)
Smellie J
June 20 1996

Legislation

Companies Act 1985 S549
Companies Law (Revised) S93(d)

Court Rules

Grand Court Rules Order 18 r19(1)
Grand Court (Amendment) No 2 Rules 1995
Grand Court Rules Order 102 r 17
Insolvency Rules 1986 r7.51
Rules of the Supreme Court

Authorities referred to

Re Ring Tower Holdings plc (1989) 5 BCLC 82
Foss v Harbottle (1843) 2 Hare 461
Re Westbourne Galleries [1973] AC 360
Re Saul D Harrison & Sons plc [1994] BCC 489
RCB v Thai Asia Fund Ltd (Unreported, Cause 359/95, Grand Court, December 9 1995)
McKay v Essex AHA [1982] 2 All ER 771
Re Rica Gold Washing Co (1879) 11 Ch D 36
Wenlock v Maloney [1965] 1 WLR 1238
Re Zinotty Properties Ltd [1984] 1 WLR 1249
Re R A Noble & Sons (Clothing) Ltd [1983] BCLC 273
Lock v John Blackwood Ltd [1924] AC 783

Authoritative work cited

Buckley, Companies Act 1948

Mr Locke for B Ltd
Mr Timms for the petitioner

The petitioner had petitioned for the winding up of B Ltd under s93(d) Companies Law (Revised) on the just and equitable ground. The petitioner alleged that it had been a member of a core group of investors in B Ltd who had entered arrangements for the future development and control of B Ltd and other companies such that a form of quasi-partnership had developed; and that the arrangements had been irreparably breached.

The petitioner was a shareholder in B Ltd. All of the shareholdings in B Ltd were twinned with equivalent shareholdings in H SA, a Swiss company. H SA was the parent company of several affiliated subsidiary companies (the "H Group").

The petitioner alleged that it had entered into an agreement with M, a shareholder of H SA and chairman or president of H SA and its subsidiaries, who was acting for himself and as agent for the other core shareholders in B Ltd and H SA. The petitioner contended that the alleged agreement provided that the joint purpose of the core investors was to create a group of shareholders closely involved in the progress of the banking operations of the H Group; that H SA would create a separate division to provide merchant banking services for the petitioner; that a representative of the petitioner could sit on the board of B Ltd and one of the H SA subsidiaries; that the petitioner would increase its involvement in the H Group; and that the petitioner would place its commercial business and customer deposits with the H Group.

The petitioner alleged that the breakdown of the relationship and the alleged agreement stemmed from five matters. (a) The petitioner's representative was refused permission to sit on the boards. The petitioner alleged that the reason given by the H Group was merely a pretext, and that any other representative would not be allowed truly to participate in the affairs of H SA and share information about its affairs with the petitioner. (b) H SA refused to provide information to the petitioner concerning certain activities of the H Group, which activities the petitioner alleged amounted to misconduct. (c) The allegedly oppressive conduct of X, who had *de facto* control of H SA, in relation to the proposed restructuring of the H Group through untwinning the H SA and B Ltd shareholdings. (d) The failure of the H Group to provide a separate merchant banking division for the petitioner. (e) The alleged lack of probity, oppression and lack of confidence in the directors of B Ltd through their participation in certain activities amounting to misconduct, subsequently ratified by the majority, which was not remediable within the context of the corporate relationship through a derivative action, but required to be remedied by liquidation.

B Ltd brought the present summons arguing that the petition was scandalous, frivolous, vexatious or otherwise an abuse of process and should be struck out.

Held:(application refused)

(i) There was no irresistible inference of a vexatious intention on the part of the petitioner.

(ii) In general, shareholders had no legitimate expectation above and beyond the legal rights conferred on them by the contract of incorporation and the Companies Law, but additional rights could be conferred by an understanding between the shareholders or possibly between shareholders and management. In deciding whether to strike out the petition, the test to be applied was whether the cause was so obviously unsustainable that it had no hope of proving the existence of the equitable legitimate expectations arising from the understanding. The scrutiny of the petition and supporting evidence should not be tantamount to a trial on the pleadings. Scrutiny leading to a conclusive view of the merits was likely to be appropriate only in a clear case where the primary facts were not disputed. In this case the primary facts were contested, in particular, whether there was ever a special arrangement was a matter to be resolved at trial. There was therefore no factual basis for striking out the petition.

(iii) The petitioner would need to satisfy the court at trial on a number of preliminary points of law. B Ltd failed to discharge the onus on it by clear authority showing why the petition should be struck out. The legal issues were arguable and were left to trial. The summons to strike out the petition was accordingly dismissed.

SAAC

Liquidation - Approval of liquidators' fees

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

Grand Court (284/91)
Harre CJ
January 29 1996

Mr Clifford for the official liquidators
Ms Brooks for the creditors' committee

The liquidators' applications for approval of their fees and expenses had been delayed in the expectation that a Report ordered by the Luxembourg court in relation to the costs of the provisional liquidation of X SA would be available.

Held: (allowing the applications)

(i) The Report would not seek to deal with the fee structure of the liquidators of another company in the group, X (Overseas) Ltd. That was entirely a matter for the Grand Court. It would be some time before the Luxembourg court process was complete and the Report became available. It would therefore not be right for the Grand Court to leave the liquidators of X (Overseas) Ltd in a state of uncertainty as to their fees and expenses for work already done on the basis of speculation as to the contents of the Report and its relevance, if any. The official liquidators' remuneration and expenses in the amounts of U.S.$5,109,188, U.S.$4,009,010 and U.S.$2,672,029 were approved.

(ii) This did not preclude consideration of the Report, and its relevance, if any, at a later stage of the liquidation.

HRN

Liquidation - Conflict of interests on the part of the liquidators - Application for removal of liquidators - Whether applicants had *locus standi*

In the Matter of OS (in liquidation)

Grand Court (147/96)
Smellie J
August 23 1996

Legislation

Companies Law (1995 Revision) Ss 106, 152, 153, 143
Companies Act 1862 Ss 93, 138, 141
Companies Act 1900 S25
Companies Act 1948 S242
Insolvency Act 1986 Ss 108, 112
Australian Federal Companies Act 1981 Ss 373, 405

Court Rules

Grand Court Rules 1995 Order 102 Rule 17
Insolvency Rules 1986

Authorities referred to

Dyson v Attorney-General [1911] 1 KB 410
South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provincien' NV [1987] AC 24
Re Old Wheal Neptune Mining Company (1864) 2 De GJ & Sm 348
Re Shank Byrne Industries Pty Ltd and the Companies Act [1979] 2 NSWLR 880
Re Adam Eyton Ltd. ex parte Charlesworth (1887) 36 ChD 299
Re Sir John Moore Gold Mining Company (1879) 12 ChD 325
Re Rubber and Produce Investment Trust [1915] 1 ChD 382
Re Oxford Building and Investment Company (1883) 49 LT 495
Re Karamelli & Barnett Ltd [1917] 1 ChD 203
Re Keypak Homecare Ltd (1987) 3 BCC 558
Re Edennote Ltd (1996) The Times June 3

Re A J Adams (Builders) Ltd [1991] 1 BCLC 359
Re New De Kaap Ltd [1908] 1 Ch 589
Re Arrows Ltd (1992) BCC 121
Re Bridgend Goldsmiths Ltd and others [1995] 2 BCLC 208
Re Parkdown Ltd (unreported) June 15 1993 Chancery Division
Re Sankey Furniture Ltd [1995] 2 BCLC 594
Re Intercontinental Properties Pty (in liquidation) 2 ACLR 488
Re Corbenstoke Ltd (No.2) [1990] BCLC 60
Re Rica Gold Washing Co (1879) 11 ChD 36
Re Marseilles Extension Railway and Land Company (1867) LR 4 Eq 692
Re British Nation Life Assurance Association (1872) LR 14 Eq 492
Gooch's Case (1871) 7 Ch App 207
Re Hill's Waterfall Estate and Gold Mining Company [1896] 1 ChD 947
Re 67 Budd Street Pty Ltd and others (1984) 2 ACLC 190
Re International Credit and Investment Company (Overseas) Ltd [1992-93] CILR 83
Re Oriental Credit Ltd [1988] Ch 204
Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] 1 AC 871
Kilderkin Investments Ltd v Player [1980-83] CILR 63
Wenlock v Moloney [1965] 1 WLR 123

Authoritative works cited

Halsbury's Laws (4th ed.) Vol. 7(2)
Macpherson on the Law of Company Liquidation (3rd ed.)

Mr Vos QC for the plaintiff
Mr Hunter QC for the defendants

The first and second defendants were the liquidators of O S Ltd ("the liquidators" and "OS" respectively), a company incorporated in the Cayman Islands. The liquidators were pursuing claims against Deloitte & Touche AG ("D & T") and others in Cause 104/95, alleging breaches of contract and of statutory duty and negligence in relation to the audits of OS' 1988 and 1989 accounts.

D & T sought orders for the removal or restraint of the liquidators under the provisions of the Companies Law ("the Law"), alternatively, pursuant to the inherent jurisdiction of the court, on the basis of an irreconcilable conflict of interest on the part of the liquidators in the conduct of the liquidation. D & T alleged that the liquidators had failed to take any steps against, or to join as defendants in Cause 104/95, the former United Kingdom auditors of certain companies in the worldwide OS group. Those auditors were within the former Deloitte, Haskins and Sells United Kingdom practice, now merged with Coopers and Lybrand in the United Kingdom and known as Coopers and Lybrand UK ("C & L (UK)"), C & L (UK) being the sister firm of the liquidators.

The liquidators sought an order that the action be struck out on the ground that D & T had neither *locus standi* nor any real interest to bring the action.

Held: (refusing to strike out the application to remove the liquidators)

(i) The power to remove liquidators and to appoint others in their stead could only be exercised by virtue of the provisions of the Law. S106 of the Law provided for removal of liquidators "on due cause shown". It was clear that the court should have regard to all the circumstances in deciding whether due cause had been shown: Re British Nation Life Assurance Association. The court had to look beyond whether there was personal unfitness in the liquidator. There were many cases in which liquidators had been removed because they were faced with irreconcilable conflicts of interest and duty. It was at least arguable that the liquidators were faced with such conflicts in the present case.

(ii) Although the interests of those having a positive financial interest in the outcome of the action should be regarded as paramount, the

classes of those having *locus standi* to apply for removal of a liquidator were not restricted to such persons. D & T, as the former auditors of OS, had an interest, although not a positive financial interest, in the outcome of the action which the liquidators had brought against them. They therefore had *locus standi*, as proper persons, to apply to the court for removal of the liquidators.

(iii) This being a voluntary liquidation under the supervision of the court, the liquidators were officers of the court and as such answerable to it. The court had power to restrain the liquidators from acting unconscionably. That jurisdiction, and the discretion of the court to afford *locus* to a proper person to invoke it, was amply illustrated in Re Oriental Credit Ltd. Whether the liquidators were in fact acting under a conflict of interest, and so in an unconscionable manner, in the action in Cause 104/95 was an issue that could only properly be examined at the next stage.

(iv) In a striking out application based on the alleged absence of a reasonable cause of action, the plaintiff's evidence was to be assumed to be correct: Wenlock v Moloney. D & T's allegations of conflict of interests, and the assumed evidence tendered in support, did justify an inquiry by the court. The striking out application by the liquidators would therefore be dismissed.

HRN

CONFIDENTIALITY

Confidentiality - S4 application - Propriety of disclosure - S4 procedure not to be used to provide an automatic stay of a Norwich Pharmacal order where such a stay not otherwise available

In the Matter of the Confidential Relationships (Preservation) Law (1995 Revision) and In the Matter of an Application by E BC

Grand Court (438/96)
Murphy J
September 20 1996

Legislation

Confidential Relationships (Preservation) Law S4

Mr Moses for the applicant
Ms Agard for the Attorney-General
Mr Boni for potential defendants A & B
Mr Nelson for X Co and potential defendant C

The plaintiff in Cause 429/96 had obtained from Smellie J an *ex parte* order, in the nature of a Norwich Pharmacal order, that EBC ("the bank") make disclosure of certain records relating to a bank account in the name of X Co. The order also contained a provision precluding the bank from disclosing the fact that the application had been made and a provision that any application by the defendants under s4 Confidential Relationships (Preservation) Law ("the Law") be filed within 7 days.

The bank applied for variation of the order because funds from the account in question had been transferred to other accounts within the bank. Douglas J made an order which had the effect of freezing all funds in other named accounts and deleted the provision precluding disclosure of the existence of the order of Smellie J.

The bank applied for directions under s4 of the Law, and X Co was granted an adjournment.

X Co and other potential defendants applied for a further adjournment of the s4 application on the ground that they intended to apply to have the order of Smellie J set aside or varied.

Held: (granting the order sought under s4 for disclosure of the information specified in the order of Smellie J and refusing to grant an adjournment)

(i) The s4 application was conceptually distinct from the normal processes of civil procedure, such as, in this case, the granting of *ex parte* orders and proposed applications to set them aside. It was unnecessary to look behind the *ex parte* order for disclosure. It was to be assumed that there was sufficient evidence to justify such an order based on Norwich Pharmacal principles.

(ii) The s4 procedure was not to be used or manipulated to create or provide an automatic stay of an order where there would be no automatic stay otherwise. The matter had already been adjourned, and it was clear from the order of Smellie J that the s4 application should be brought expeditiously. It was necessary to consider the interest of the plaintiff in Cause 429/96 in the present litigation. The object of the *ex parte* order was to allow tracing claims to proceed. The benefits of such an order outweighed any harm which might be caused to unnamed persons other than X Co as a result of disclosure. Anyone who might be affected by the order would have the plaintiff's broad undertaking in damages. Protection was also afforded by s4(5) of the Law.

(iii) The s4 directions were not to apply to further disclosures which the bank might be ordered to make as a result of the initial disclosures. Such an extended order could not be made without knowing what relief was actually being sought and what relief might be granted.

(iv) Costs to be in the Cause in Cause 429/96.

HRN

CRIMINAL LAW

Importation of cocaine - Conspiracy to deal in cocaine

R v Uriah Thomas

Grand Court (42/45)

Smellie J
July 23 1996

Authorities referred to

R v Walters and others (1979) 69 Cr App Rep 115

Authoritative works

Archbold 1995 reissue Vol 1 para 15 - 337

Mr Bonnar for the Crown
Mr Furniss for the defence

The defendant was charged with importation of cocaine and conspiracy to deal in cocaine. The prosecution's case was that he had attempted to import cocaine from Jamaica to Grand Cayman by giving the drugs to a woman to carry in her luggage in false-bottom hairspray bottles. The woman, one Senior, was, according to her evidence, to receive U.S. $800.00 for importing the drugs. Senior had already pleaded guilty to possession of cocaine and admitted to being the defendant's accomplice. The defendant elected to be tried by judge alone.

According to Senior's evidence, on November 25, 1994 the defendant, whom Senior had known for 12 to 18 months, approached her about "wanting her to deal with 'something' for him". Senior testified that she immediately knew that he was talking about cocaine. When she asked about being caught he told her not to worry, "it was something he dealt with all the while". She agreed to import the cocaine, and the next day the defendant purchased two tickets to travel to Grand Cayman on November 27th. Senior testified that at least one of the tickets had her name on it but she did not see the other ticket, both of which were retained by the defendant. It was the defendant's testimony that he did not purchase a ticket for Senior and that he only discovered that she was travelling to Grand Cayman when he met her at the airport. He claimed that a third party, one Campbell, had made his travel arrangements for him. Senior asserted that later that day (November 26th) Campbell, who was known to Senior, came

to Senior's house and gave her a bag of what she assumed were bottles. She did not look in the bag but believed the bottles to contain the cocaine. She believed this to be the case because she had observed Campbell and the defendant in discussion shortly before Campbell entered her house. Senior also testified that she knew that Campbell and the defendant were friends. Senior further stated that the defendant failed to appear as arranged on November 27th but, following a chance encounter with him on November 28th, he arranged to have the tickets changed in order to travel to Cayman that night. He gave Senior $800.00 Jamaican currency for departure tax and taxis and he told her to arrive at the airport on time. Campbell subsequently visited Senior's house and took away the bag she had previously given to Senior. Later that day Campbell returned the bag to Senior at the Norman Manley airport. The defendant arrived shortly thereafter and the two spoke briefly but they did not travel together on the airplane. Upon arrival at Owen Roberts Airport, the Customs official asked the defendant if he and Senior were travelling together. The defendant denied that they were, but Senior admitted that they were together. The defendant told Senior at a later point in the airport to stay away from him. This exchange aroused suspicion and approximately 22 ounces of cocaine was found in liquid form by Customs officials in the plastic hairspray bottles in Senior's carry-on luggage.

The other witness for the prosecution was the travel agent who had sold the plane tickets to the defendant, one Griffiths. Griffiths testified by way of a witness statement that sometime before November 28th he had made reservations for the defendant and Senior to travel to Grand Cayman together. Griffiths had also identified the defendant from a photograph. The evidence of Griffiths was accepted by the court, but with some reservations due to his failure to testify in person.

There was also evidence to show that the defendant had written several letters to Senior while in custody at Northward Prison which sought to persuade her to not testify against him.

Held: (conviction entered on both counts)

(i) The evidence of Senior was corroborated by Griffiths. The defendant had been involved in making the travel arrangements to Grand Cayman.

(ii) The defendant's attempts to dissassociate himself from Senior while at the airport betrayed his guilt.

(iii) The defendant's letters to Senior were inconsistent with his insistence of innocence.

(iv) The evidence offered by the defendant that he had first made arrangements to travel to Grand Cayman on November 28th was clearly an attempt to refute any suggestion of earlier contact with Senior. These lies related to a material issue and pointed to the fact that the truth would have revealed his guilt.

(v) Senior's evidence that the defendant persuaded her to bring the drugs to Cayman was truthful.

(vi) Senior's evidence that there was an agreement between herself, the defendant and Campbell to import the drugs was also truthful.

PL

Crime - Indecent assault - Evidence - Corroboration

R v Wilson

Grand Court (53/95)
Douglas J (Actg)
August 28 1996

Legislation

Penal Code (1995 Revision) S130(1)

Mr Bulgin for the Crown
Mr Samson for the defendant

The defendant was charged with the offence of indecent assault on a female, contrary to s130(1)

Penal Code. It was alleged that the offence occurred on August 15, 1996 in the defendant's bedroom. Corroborative evidence was given by the complainant's younger brother who testified that he heard the complainant say "no, no, no" while she was alone in the bedroom with the defendant.

Held: (order as follows)

(i) The onus was on the Crown to prove beyond reasonable doubt that the defendant assaulted the complainant in circumstances which were of such a nature as would be capable of being considered by right-minded persons as indecent, and that the defendant intended to commit the offence.

(ii) The assault was indecent. Whilst the complainant was on the bed, the defendant had held and kissed her and touched her intimately through her clothing.

(iii) The complainant's report of the incident to the family helper was not evidence of the assault or of the surrounding circumstances, but it was admissible to show that her conduct after the alleged assault was consistent with the evidence of it.

JE

CRIMINAL PROCEDURE

Judicial Review - Statutory interpretation - Interpretation Act - Juveniles

AG v The Magistrate and Justices of the Youth Court

Grand Court (229/96)
Smellie J
July 26 1996

Legislation

Juveniles Law 1990 (repealed)

Youth Justice Law 1995
Interpretation Law (1995 Revision) S25

Authorities referred to

R v Fisher (Charles) [1969] 1 WLR 8
R v Reah [1968] 1 WLR 1508
Yew Bon Ten v Kanderaan Bas Mara [1982] 3 All ER 833
R v Whittaker [1986] CILR 189

Authoritative works

Maxwell on the Interpretation of Statutes

Mr Roberts for the Attorney-General

The Attorney-General applied for judicial review of a decision of the Youth Court by which that court decided to proceed to hear certain charges against three juvenile defendants by way of committal proceedings for trial in the Grand Court. The charges would be justiciable in that manner if they were properly to be dealt with under the new (1995) Law. Counsel for the Attorney-General argued that the charges were to be addressed under the repealed 1990 Law. The juveniles were charged on January 9, 1996, and the 1995 Law came into effect shortly thereafter. The decision under review was made on March 15, 1996.

Different consequences arose under the laws in question. The repealed Law was significantly more favourable to the juveniles involved. The offences alleged included robbery with a firearm. The penalties under the repealed Law were light (approved school orders). The 1995 Law allowed a court to sentence a juvenile convicted on such a charge to imprisonment. The repealed Law provided the right to elect trial by Juvenile Court, while the 1995 Law did not.

The issue raised was whether the new Law took effect from its date of promulgation for all cases involving defendants under the age of 17 years, or whether offences allegedly committed by such persons before that date (and in respect of which

charges were already laid) under the repealed Law continued to be governed by that Law.

Held: (*certiorari* granted)

(i) In the absence of any relevant provisions in the new Law, the issues centred upon the construction of s25 Interpretation Law (1995 Revision). On a plain reading of that section, the provisions of the repealed Law remained alive for the purposes of the adjudication of the charges brought under the repealed Law and in respect of offences allegedly committed while that Law was still in force: R v Fisher (Charles) and R v Reah applied.

(ii). The magistrate's view of s25 (2)(e) Interpretation Law was erroneous. The discretion found in this subsection, allowing the continued investigation and enforcement of a repealed Law (still active pursuant to s25), was a discretion of the prosecuting authority and not of the court: Maxwell on the Interpretation of Statutes (12th Ed, page 18).

(iii) The Attorney-General was entitled to exercise that discretion in the present case.

(iv) Under the repealed Law the juveniles had the right to elect to be tried in the Juveniles Court. This was a right vested in the juveniles. This right was not carried forward in the 1995 Law. S25 (2)(c) Interpretation Law provided that a vested right could only be removed by specific provision. The right was not expressly removed by the promulgation of the 1995 Law . Such Law could not be construed retroactively so as to negate such a right: Yew Bon Ten v Kanderaan Bas Mara and R v Whittaker.

JE

Summary Court - Appeal against conviction - Guilty plea

Carlos Robinson v R

Summary Court of Appeal (16/96)

Murphy J
August 28 1996

Legislation

Criminal Procedure Code (1995 Revision) S165

Authorities referred to

Kilcullen v R [1990-91] CILR. n11
Ramsay v R [1980-83] CILR 48

Mr Bulgin for the Crown
Mr Furniss for the appellant

The appellant, a truck driver, sought to appeal his conviction in the Summary Court after a plea of guilty and a consequent order of suspension of his driving privileges. The appellant pleaded guilty to an offence of permitting an unauthorised person to drive his car. The driver, his son, pleaded guilty, on a later date, to the offence of taking the same car on the same occasion without permission. The convictions were inconsistent.

The appellant took the position that he was under a misapprehension as to the nature of the charge and unaware of a defence open to him, namely that the car was taken by his son without his permission.

Held: (conviction set aside and a not guilty plea substituted)

(i) S165 Criminal Procedure Code (1995 Revision) provided: "No appeal shall be allowed in a case in which the accused person has pleaded guilty and has been convicted by the Summary Court on such plea, except as to the extent or legality of the sentence."

(ii) Malone CJ in Kilcullen v R found that s158 (now s165) did not constitute an absolute bar to an appeal in circumstances where: "(a) the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; and (b) upon the admitted facts he

could not in law have been convicted of the offence charged."

(iii) The court could consider all relevant facts, not just what took place in the original Summary Court appearance: Ramsay v R. Although the circumstances were suspicious, and the affidavits did not present a complete picture, the trial of the charge would provide an opportunity to explore these questions.

JE

Extradition - Application for *habeas corpus* - Authenticity of translation of foreign documents

K and another v The Director of Northward Prison, Government of Switzerland and the Attorney-General of the Cayman Islands

Grand Cayman (306 & 310/96)
Harre CJ
August 15 1996

Legislation

Extradition Act 1870 and 1881 Order in Council made thereunder
Extradition Act 1989
Magistrates Courts Act 1980 S102
Criminal Justice Act 1967 S2
Evidence Law Ss 10, 23 and 26
Summary Jurisdiction Law S25

Authorities referred to

R v Oldham Justices and another ex parte Cawley [1966] 1 All ER 464
Tarling and others v Government of Singapore and others (1977) Crim App R 77
Rees v Secretary of State [1986] 1 All ER 321
Government of Denmark ex parte Nielsen [1984] AC 606
R v Governor of Pentonville Prison ex parte Naghadi [1990] 1 All ER 257
Government of Belgium v Postlethwaite and others [1988] AC 924
R v Government of Pentonville Prison ex parte Herbage (No. 3) (1986) 84 Crim App R 149
R v Governor of Pentonville Prison ex parte Kirby [1979] 2 All ER 1094
R v Bellecontre [1891] 2 QB 122
Rouyer Guillet et Cie v Rouyer Guillet & Co Ltd and another [1949] 1 All ER 244
Re Arton (No. 2) [1896] 1 QB 509
R v Governor of Ashford Remand Centre ex parte Beese [1973] 1 WLR 969
Re Rodriguez (unreported QB November 1994)
R v Attard (1958) 43 Crim App R 90
R v Governor of Gloucester Prison ex parte Miller [1979] 2 All ER 1103
R v Governor of Pentonville Prison ex parte Osman (1990) 90 Crim App R 281
H v Schering Chemical Ltd and another [1983] 1 WLR 13
Oskar v Government of Australia [1988] 1 All ER 183
Chatenay v The Brazilian Submarine Telegraph Company Ltd (1890) 1 Q B 79

Mr Jones for applicants
Mr Turner for respondents

The first applicant, K, was committed to prison in May 1996 to await extradition to Switzerland. His wife was remanded on bail for the same purpose. They were advised of the right to apply for *habeas corpus*. The respondents questioned the applicability of the remedy of *habeas corpus*. That, in turn, raised the question of the effect of *habeas corpus* on the decision of the magistrate that there was a *prima facie* case for the applicants to answer. A large part of the applicants' arguments were directed towards the authenticity of various translated documents. It was also submitted by the respondents that Article VII of the 1881 Order in Council bore an entirely different meaning from both the 1870 and 1989 Extradition Acts in that in general it required the signature of a judge, magistrate or other authorised officer but that authentication by seal was required in respect of warrants and sentences issued by the foreign state.

Held: (granting the application)

(i) In R v Oldham Justices and another, ex parte Cawley the court considered the *habeas corpus* procedure in relation to young offenders who had been imprisoned for non-payment of fines, and it was held that *habeas corpus* was not an appropriate remedy in cases where such offenders challenged their detention as unlawful on the basis of defective warrants. Detention on that ground could only be challenged by judicial review. The court, however, pointed out that in extradition cases *habeas corpus* had become an accepted remedy. The effect of such remedy was to quash the whole committal on all or some of the charges on which an applicant was committed.

The Grand Court, like the English court, had power in such applications not to retry or rehear a case but to decide whether the magistrate was right or wrong in finding on the evidence before him that there was sufficient evidence to justify committal and to ascertain whether he erred in law: Tarling and others v Government of Singapore and others. By virtue of paragraph 6 schedule 1 of the Extradition Act 1989 the magistrate is required to conduct the case as if he was an examining or committing magistrate in his normal jurisdiction. The foreign warrant must be duly authenticated. Foreign documents and copies of documents, if duly authenticated, could be received in evidence in the proceedings. The charges relevant for the magistrate's consideration were charges framed according to domestic law: R v Governor of Pentonville Prison, ex parte Naghdi.

(ii) "Jurisdiction" was not necessarily to be interpreted in the sense in which the term would be interpreted in the foreign state: Government of Denmark, ex parte Nielsen. Article VIII of the 1881 Order in Council, made pursuant to the Extradition Act 1870 stated, *inter alia*, that: "The personal attendance of witnesses can be required only to establish the identity of the person who is being proceeded against, with that of the person arrested."

The magistrate interpreted this paragraph as meaning that no oral evidence other than identification evidence could be admitted. This was an error of law. Evidence that would be admissible under domestic law would be admissible in extradition proceedings for committal, independently of special provisions for authentication of foreign documents under extradition legislation, unless that legislation specifically excluded it: Government of Belgium v Postlethwaite and others. In R v Governor of Pentonville Prison, ex parte Kirby, Croom-Johnson J stated that it was domestic rules of evidence which were to be applied in the course of committal proceedings.

(iii) Under s26 of the 1989 Act, "duly authenticated" meant authenticated by the oath of a witness, and in any case documents would be deemed duly authenticated if they purported to be signed by a judge, magistrate or an officer of the foreign state where they were issued and if they purported to be certified by being sealed with the official seal of the Minister of Justice or some other Minister of State of the foreign country. Judicial notice would be taken of such certification. Documents authenticated by such certification would be received in evidence without further proof. The respondents' submission that authentication by seal only applied in respect of warrants and sentences or copies thereof issued in the foreign state was wrong. Article VII was relevant for the purpose of the documents before the court and it specified the official seal of the Chancellor of the Swiss Confederation as the requirement for authentication purposes. There was no requirement that the foreign warrant authorizing the arrest of a fugitive criminal accused of an extradition crime must be duly authenticated.

The original documents in the present case were authenticated but were in German. The translations bore the seal of the Special Investigation Judges but bore no signature and gave no indication of the identity or competence of the translator or even that the document was the translation of the original text. The Crown had argued *inter alia* that the warrant need not be

translated because it was not evidence and did not contain any evidence; and that all that had to be shown in this jurisdiction was that it existed. The Crown further argued that the documents were admissible as a business record.

The latter argument would be rejected as the conditions of s23 Evidence Law could not be satisfied in relation to the translator. The purpose of s23 was to create an exception to the hearsay rule in relation to business records: H v Schering Chemicals Ltd and another. The requirements of s26 of the Evidence Law (setting out the conditions of admissibility of a written statement in criminal proceedings and, in particular, the requirement that the statement be signed by its author) were also not satisfied in relation to the translation. A translation without any signature was not sufficient authorization. The fundamental applicable principle was that the court did not have to take notice of a foreign document in a foreign language. The requesting state, without translated documents, had nothing of any worth before the court, not because a document in a foreign language was for that reason inadmissible but because the court, without understanding what was in the evidence, could not say that it was satisfied that there was a *prima facie* case on that evidence.

While the court was prepared to use a modicum of knowledge of the German language to deal with the warrant of arrest, that knowledge was quite inadequate to go further. Where a matter was not in issue, translations could be referred to without any formality relating to them. Where, on the other hand, matters were in issue, translations must be shown on the record to have been sworn: Re Rodriguez . Terms of a treaty fell into the former category. The magistrate was, however, not concerned with compliance with the terms of a treaty. Translations appeared to be *sui generis* in relation to evidential law and practice.

The respondents referred to s25 Summary Jurisdiction Law which permitted a magistrate to appoint a suitable person as an interpreter and record the name of the person. The court pointed out that an interpreter in such a situation could give oral evidence on oath. Contrary to the respondents' contention, the requirement of giving oral evidence on oath by an interpreter in relation to oral or written evidence was a matter of law and not practice. The present situation, however, involved translated material: R v Attard.

The magistrate was wrong in admitting documents which had not been duly authenticated. No evidence was presented to the magistrate in admissible form. Without such evidence the magistrate could not have found that there was sufficient grounds to warrant a committal.

(iv) Extradition procedures had the effect of depriving defendants of the right of cross-examination of materials contained in properly admitted foreign documents. In return for that advantage a requesting state had to comply strictly with the law. For the reasons given, an order of *habeas corpus* would issue and the applicants would be released from custody or bail conditions, as appropriate.

AD

Editor's note: for related litigation see summary following.

Foreign proceedings - Request for documents by foreign investigating authorities - Status of requesting authority - Lack of specificity of documents

In the Matter of the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978 and In the Matter of a request for international judicial assistance from Special Investigating Judges for the Canton of Berne

Grand Court (408/96)
Murphy J
September 13 1996

Legislation

Evidence (Proceedings in Other Jurisdictions) Act 1975 S5
Evidence (Proceedings in Other Jurisdictions)(Cayman Islands) Order 1978
Criminal Justice (International Cooperation) Act 1990
Interpretation Act 1889
Interpretation Act 1978

Authorities referred to

Re Imacu Ltd (1989) JLR 17
Zingre Wuest and Reiser v The Queen (1981) 127 DLR (3d) 223
District Court of the US Middle District of Florida v Royal American Shows Inc et al (1982) 134 DLR (3d) 32
Re Norway's Applications (Nos 1 and 2) [1989] 1 All ER 745
Worldwide v CITEL [1994-95] CILR 391
Voluntary Purchasing Group Inc v Insurco International Ltd (unreported Grand Court)
Re Asbestos Insurance Coverage Cases [1985] 1 All ER 716
Panayiotou v Sony Music [1994] 1 All ER 755
US v Carver [1980-83] CILR 297
Radio Corporation of America v Rauland Corporation [1956] 1 All ER 549
Trust Houses Ltd v Postlethwaite (1944) 109 JP 12
R v Governor of Pentonville Prison ex parte Osman [1990] 1 WLR 277
Ghani v Jones [1969] 3 All ER 1700
Rio Tinto Zinc v Westinghouse [1978] 1 All ER 434

Ms Agard for the Attorney-General (applicant)
Mr McCann for PK, respondent
Mr Hellman for BK, respondent

The applicant applied *ex parte* by way of originating summons seeking judicial assistance on behalf of investigating judges for the Canton of Berne, Switzerland, following the judges' issuance of a Letter of Request relating to charges pending in Switzerland against the respondents. The order requested that the Royal Cayman Islands Police Force produce to the Clerk of the Courts all documents in their possession seized from the home of the respondents in connection with extradition proceedings. Various listed documents and electronic data were included in the request as well as information relating to specified foreign partnerships and corporations which contained details of bank accounts and the recent income of the accused. The court adjourned the hearing of the application pending the outcome of extradition proceedings against the respondents. Following the extradition hearing,(see summary preceding) the court determined to hear the application *inter partes* instead.

The Crown sought to have certain files in the possession of the police sent to the Swiss authorities. The pending Swiss proceedings asserted the respondents' involvement in fraud, forgeries, receiving stolen goods and fraud in the context of bankruptcy. The Swiss authorities had also sought the extradition of the respondents from the Cayman Islands to Switzerland to face the charges. A warrant was issued for the arrest of the respondents in the Cayman Islands for the purpose of the extradition. Some two hours following the arrest, the respondents' home was searched by the police. About eighty items including a computer and computer disks were seized. There was no search warrant. During the extradition hearing the magistrate directed that the seized items remain in the custody of the RCIP and be accessed with the approval of the Legal Department. The magistrate committed the respondents for extradition but, upon application for *habeas corpus*, the Chief Justice ordered that the necessary writ should issue and that the respondents be released from custody on the grounds that the evidence presented to the magistrate was inadmissible. The Crown construed the magistrate's directions with regard to the documents seized as a "court order" giving the Crown control over the documents.

Held: (dismissing the application)

(i) The court was concerned as to its jurisdiction to act under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978

because s5 Evidence (Proceedings in other Jurisdictions) Act 1975 (UK) (which was extended to Cayman by Order in Council) had itself been repealed by the Criminal Justice (International Cooperation) Act 1990. The Crown's application was based on s5 of the 1975 Act. The 1990 Act established a different regime for the gathering of evidence for use in overseas criminal proceedings. For the purpose of interpreting the 1978 Order, reference was to be made to the Interpretation Act 1889. The 1889 Act had also been repealed, by the Interpretation Act of 1978. There was therefore scope for the argument that s5 of the schedule to the 1978 Order had been repealed by necessary implication. The 1978 Order granted the Grand Court power to make an order specifying that a person named in the Order be examined orally or in writing or produce documents for the purpose of assisting a foreign jurisdiction in a criminal case where that jurisdiction had made a request. A Grand Court judge had a discretion whether or not to make the order sought.

(ii) The court's duty was not to examine the necessary evidence but rather to consider the nature of the request. There were two conditions precedent for the grant of the request:

1. the application must be made by a court or tribunal exercising jurisdiction in a country or territory outside the Cayman Islands; and

2. the evidence to which the application related must be obtained for the purpose of criminal proceedings which had been instituted before the requesting court.

There was no expert evidence before the court as to the nature of the Swiss proceedings (R v Imacu Ltd). The office of the investigating judges from whom the Letter of Request derived was referred to as "a judicial authority specializing in cases of financial crime and organized crime". It appeared from the relevant documentation that the investigating judges were merely responsible for the investigation and were not going to try the case against the respondents. The available material indicated that the Swiss process took the form of an investigation preliminary to a court proceeding. There were, however, references throughout the Letter of Request to the respondents having been "charged". Based on the material before the court, it was concluded, not without some doubt, that criminal proceedings had been instituted in Switzerland.

(iii) In order to preclude a "fishing expedition", the words "particular documents specified in the order" were to be strictly construed. It was permissible to have a compendious description of several documents provided evidence of the same was produced to satisfy the court of their existence: Re Asbestos Insurance Coverage cases, Panayiotou v Sony Music and US v Carver.

It was conceded by the Crown that certain requests made by the Swiss authorities exceeded the jurisdiction of the court, such as requests for the examination of public registers and bank records. It appeared that the Swiss authorities were under the misapprehension that the Grand Court was in a position to order a far-ranging dragnet of limitless proportions in order that possible evidence and proceeds of crimes be secured. The Crown was also under a misapprehension as to the degree of specificity required. The framing of the request in such a general way was clearly tantamount to "fishing" in an application of this nature. The Crown had taken the view that because the Letter of Request contained narrative of alleged offences involving concealment of assets, the court was obliged to order production *ipso facto* of any material belonging to the respondents that might conceivably contain evidence relating to their assets. That approach ran contrary to the authorities.

There was a difference between, on the one hand, specific evidence in the nature of proof to be used for the purpose of a trial and, on the other, evidence in the nature of pre-trial discovery to be used for the purpose of commencing a chain of enquiry which might produce direct evidence for the trial. The Letter of Request was a "discovery

request": Radio Corporation of America v Rauland Corporation.

Another important consideration was whether the documents requested were actual documents or merely "conjectural": Re Asbestos Insurance Coverage cases. It was a requirement that there be admissible evidence that the documents sought were in the possession, custody or power of the person from whom they were sought. The Crown and the Swiss authorities had access to the documents in question and in fact extracted some of them for use before the magistrate. Yet they failed to make a precise document identification before bringing the application. The lack of specificity and the apparent conjectural nature of the request on its face lead to the conclusion that the exercise was merely a fishing expedition of the grossest kind.

(iv) Subsection 3 (1) (a) of the schedule to the 1978 Order provided that a person should not be compelled by virtue of an order to give any evidence which he could not be compelled to give in criminal proceedings in the Cayman Islands. The court could therefore not compel the respondents to give evidence against themselves by way of production of documents: Trust Houses Ltd v Postlethwaite.

(v) The Crown's argument that a power of seizure of documents in extradition cases was implicit in Article XVI of the Order in Council could not be sustained. The arrest warrant by which the respondents were arrested contained no express right of search or seizure. There was no evidence that the respondents' consent was given for the taking of documents from their home. The Article only dealt with delivery up of seized documents to the requesting State after extradition orders had been made. The seizure of the documents from the home of the respondents could not be regarded as a lawful seizure. There was no court order for search or seizure and there was no warrant. Consequently the documents were to be regarded as having been in the possession of the respondents at all material times. It was not appropriate to order production.

(vi) The Crown had sought to persuade the court that in bankruptcy proceedings, such as those levelled against the respondents, the accused lost the protection against self-incrimination. An analogy was made with English bankruptcy proceedings. The Crown was, however, unable to identify any Cayman Islands' legislation containing any express provision in support of this assertion. In the absence of such enactment, the common law right could not be lost.

(vii) Also rejected was the Crown's argument that the "order" of the magistrate, made in the course of the extradition hearing, was never discharged and that the documents should be deemed to have remained in the possession of the police. The writ of *habeas corpus* did away with the magistrate's order for committal, together with any ancillary aspects including directions as to the preservation of the documents. Any such "order" of the magistrate was thereupon vacated by necessary implication. The documents were therefore to be deemed to have been in the possession of the respondents at all material times or at least since the *habeas corpus* issued. That being so, there was no impediment whatever to the respondents taking the position that they ought not be compelled to give evidence against themselves by producing documents in criminal proceedings.

(viii) In all the circumstances it would not be appropriate to grant the order sought. Taking account, in particular, of the timing of the application, (it being on the eve of the hearing of the *habeas corpus* application before the Chief Justice), and the fact that the application was made *ex parte* initially, it was to be regarded as an abuse of the court's process: Rio Tinto Zinc v Westinghouse.

The application would therefore be dismissed with costs to the respondents.

AD

FAMILY LAW

Jurisdiction - Renewed application for ancillary relief - Change of circumstance

LWF v JHF

Grand Court (58/91)
Harre CJ
January 16 1996

The parties appeared in person

The applicant sought an order to restrict the removal from the jurisdiction of the child of the marriage. The application was dated December 22, 1996. A similar motion was argued unsuccessfully before Schofield J in December 1995.

Held: (application denied)

It was not open to a party to come again before another judge of similar jurisdiction to have matters reheard unless there was a material change of circumstance. As there was no change of circumstance the second judge lacked jurisdiction.

JE

Ancillary Relief - Variation

W v W

Grand Court (20/95)
Harre CJ
June 5 1996

Legislation

Matrimonial Causes Law

Mrs Nervik for the petitioner
Mr Roy for the respondent

The parties, who had married and had four children, separated in 1992. Since that time the petitioner had held two jobs, earning C.I.$1750 per month. The respondent earned C.I.$1900 per month. The respondent paid C.I.$700 per month for the maintenance of the children. The petitioner lived with her parents and the four children and contributed C.I.$300 per month rent. She had purchased a piece of land with the assistance of a loan.

The petitioner was a member of staff at a private school which charged approximately C.I.$6000 per year for the education of the four children. She wished to have the children remain at the school, but sought a court order requiring the respondent to pay the full amount of the fees. He voluntarily paid one-half.

Held: (application dismissed)

(i) The petitioner was in a better financial position than the respondent.

(ii) Payment of the full school fees would represent an impossible burden to the respondent. The government school presented a viable option but no order to change schools would be made. The respondent would continue to pay one-half of the fees as long as the children remained in the private school.

JE

Guardian ad litem - Appointment of attorney

C Ltd v L and others

Grand Court (153/95)
Smellie J
June 18 1996

Court Rules

Rules of the Supreme Court, Order 80
Grand Court Rules, Order 80
Family Proceedings Rules and Practice Directions (UK), r.4.11

Authorities referred to

Foster v Cautley (1853) 10 Hare App 1127
Loorham v Loorham 5/5/1948 Australian Weekly Notes
Lemos v Coutts & Co Ltd [1992-93] CILR 5
In re Ojjeh Trust [1991-3] CILR 348
Duffy v O'Connor (1868) 1 Ch Chan Rep 393
Hoskins v Harty (1876) VI Ch Chan Rep 200

Mr Ritchie for the plaintiff
Mr Timms for the first and second defendants
Mr Moses for the third defendant
Mr Giglioli as *guardian ad litem* for the fourth defendant
Mr Helfrecht for the fifth defendant

By originating summons the trustee sought directions, *inter alia*, as to how to deal with certain allegations made by or on behalf of the third defendant. The allegations were that there had been a breach of fiduciary duty by the trustee or the trust's management committee in relation to amendments to the trust instrument and in relation to distribution of capital from the trust. Underlying the proceedings was the issue of the validity of certain amendments to the trust, including amendments by which the capital was distributed to the second defendant. The allegations were raised by the third defendant on her own behalf as a contingent income beneficiary and on behalf of the fourth defendant who was her son and a contingent capital beneficiary.

In the current application, the third defendant sought to revoke the appointment of the fourth defendant's attorney as *guardian ad litem* of the fourth defendant and to replace him with a relative of the minor. The fourth defendant was represented on his own behalf and on behalf of all minor and remoter beneficiaries of the trust. The third defendant argued that it was wrong in principle that the *guardian ad litem* should himself be the attorney of the minor.

Held: (refusing to revoke the appointment)

(i) The principles stated in the notes to Order 80 of the Rules of the Supreme Court, which provide guidance to the application of the Grand Court Rules Order 80, stated that it was advisable to appoint a person who was "a relation, connection or friend of the family and not a mere volunteer." Those characteristics were important since the personal circumstances of the infant might need to be considered by the guardian or canvassed before the court. However, the circumstances of this case dictated that the usual practice should not be followed. Nothing about the personal circumstances of the fourth defendant or the remoter beneficiaries was likely to be relevant to the issues.

(ii) The family members available to act as *guardian ad litem* could not be relied upon in this case to impartially or objectively guide and advise the actions to be taken on behalf of the fourth defendant. The reason for this was that the dispute over the trust had resulted in deep and bitter divisions between different sides of the family.

(iii) In the absence of a suitable family member or other close connection, the guardian had to be someone upon whom the court could rely impartially, objectively and independently to perform his functions. In the present case the current *guardian ad litem* was to take independent advice on the more important issues and was subject to the direction of the court. As well as saving on the costs of dual appointments, as an attorney, he was well placed to decide how to act on senior counsel's advice. The court could not in this case anticipate a situation in which the guardian's interests could conflict with his duties. The appointment would therefore not be revoked.

SAAC

Breach of order - Committal

McLean v McField

Grand Court (485/95)
Murphy J
July 26 1996

The parties appeared in person

The applicant sought to have the respondent committed to prison for failure to comply with the schedule of periodic payments ordered by the Grand Court in February 1996. The order included the provision that: "any failure on his part to make payment will result in the judgment-creditor having liberty to restore the notice of motion for his committal to prison."

Held: (order as follows)

(i) The respondent admitted that he was aware of the order and that he was in breach of the order. He offered no credible excuse.

(ii) The respondent would be committed to prison for seven days.

JE

LABOUR LAW

The following is a decision of the Labour Law Appeals Tribunal initiated pursuant to S70(1) Labour Law 1987.

In The Matter of an Appeal by Ansbacher (Cayman) Ltd v Florett Dixon

Chairman Ms JC Smellie
January 4 1995

Legislation

Labour Law Ss 9, 44 and 48

Mr Garcia for the appellant employer
Ms Brooks for the respondent employee

This was an appeal against the decision of the Director of Labour that the appellant had unfairly dismissed the respondent and against the consequential awards of C.I.$ 6,719.90 as compensation for unfair dismissal and C.I.$ 8,399.88 for severance pay.

The respondent had been employed with the appellant for nineteen years, her latest duties being those of Investment/Security Officer. Following the appointment of a Mr Day, who was younger than the respondent, as her immediate supervisor, the respondent testified to increasing problems at work, culminating in her submission of a letter of resignation on March 24, 1994, expressed to be effective on May 18, 1994. The CEO of the appellant company accepted the letter of resignation at 3.00 p.m. on March 24 and allowed the respondent one hour in which to leave the premises. She was subsequently paid her salary up until April 30, and also received all her accrued pension benefits.

Subsequent to Mr Day's promotion, the respondent expressed her unhappiness at the situation to two senior officers of the appellant company and made it clear that she was not prepared to report to him. Both officers advised her that the decision was final, but in an effort to accommodate her protests the CEO indicated that she could report to him instead of Mr Day.

A senior officer of the appellant testified that the respondent's resignation was accepted with immediate effect for security reasons and that she had been paid up until April 30 as this was the date which represented the period of 30 days' notice as required by s9 Labour Law.

The Director of Labour found that the respondent had been unfairly dismissed on the basis of the conduct of the appellant which formed the background to her letter of resignation. In the Director's determination, the appointment of a younger and apparently less experienced non-Caymanian as the respondent's immediate supervisor was the pivotal factor in the breakdown of the employer/employee

relationship. In the Director's view such appointment demonstrated: "the employer's lack of understanding and appreciation for the extremely sensitive matter of Caymanian versus non-Caymanian and age versus youth."

Counsel for the appellant appealed against the Director's decision on two grounds:

1. That the Director had misdirected himself by considering that the main issue was the appointment of a non-Caymanian as the respondent's supervisor when the real issue was whether or not the appellant should have paid the respondent her salary up until May 18, the effective expiration date of her notice. Counsel conceded that the appellant should have paid the respondent until the expiration of the notice period, but urged that the other factors considered by the Director were irrelevant, and further maintained that the respondent had resigned of her own accord and had not therefore been dismissed.

2. In the alternative, even if the Director was correct in his finding of unfair dismissal, he had nonetheless erred in making an award of 80% of the maximum compensation allowed under s48(3) Labour Law. In arriving at this award the Director had taken into account various matters set out in s48(2), in particular, the degree of unfairness of the dismissal, the length of the respondent's service, her salary prior to dismissal, the fact that she remained unemployed despite having submitted approximately 52 employment applications and the loss of her pension entitlement. Counsel for the appellant objected that the latter two factors should not have been taken into account as in his submission the respondent had resigned and these were the natural consequences of this decision. Having heard argument from counsel on both sides, the Tribunal allowed new evidence showing the amount of the pension entitlement which the respondent had received. Counsel for the appellant contended that the Director should have taken into account this sum in determining the appropriate compensation award for unfair dismissal and that in all the circumstances the sum which had been awarded was exorbitant.

Counsel for the respondent asserted that the real issue was whether the respondent had been unfairly dismissed and that the appointment of a younger and less experienced individual as the respondent's supervisor was a matter properly taken into account by the Director. In counsel's submission, it was essential to have regard to the background to the letter of resignation with such inquiry showing that the respondent had been constructively dismissed by the appellant. There had been no justification provided by the employer to the appointment of Mr Day and in all the circumstances the treatment by the appellant amounted to a severe injustice to the respondent. Moreover, counsel contended that the appellant had acted unreasonably in giving the appellant only one hour's notice and in considering her to represent a security risk. Whilst conceding that the release of accrued pension benefits to the respondent was a relevant factor, counsel noted that this sum represented an entitlement which the respondent would have legitimately expected to continue had her employment not been unfairly terminated. In counsel's submission, the Director had properly taken account of all the relevant factors as reflected in his award of only 80% of the maximum allowable.

The Tribunal noted that two essential matters fell to be determined: firstly, whether the Director was correct in his finding that the respondent had been dismissed, and secondly, whether he was correct in characterising the dismissal as unfair.

Held: (dismissing the appeal)

(i) Although the respondent had submitted a letter of resignation, the appellant's termination of the employment relationship prior to the expiration of the notice period brought about her dismissal.

(ii) The background to the letter of resignation required careful examination and revealed it to be the product of several months of problems at

work as noted in the letter itself. It was not surprising that the respondent had been unhappy at the appointment of a younger and less experienced officer as her supervisor in the light of the failure to explain the reason for the appointment. Matters were compounded by the fact that the respondent had also been asked to provide an unascertained level of training for Mr Day. Furthermore, there was nothing to suggest that the respondent had not been performing her duties properly.

(iii) In all the circumstances of the case the respondent had been constructively dismissed by the appellant. As the word "dismissal" has no definition within the Labour Law, contrary to counsel for the appellant's submissions, the concept of constructive dismissal was not excluded from consideration thereunder.

(iv) The dismissal did not fall within any of the subsections of s44 Labour Law and was accordingly unfair.

The Director's decision and his consequential awards of compensation for unfair dismissal and severance pay would therefore be upheld.

MD

LANDLORD & TENANT

Proof of rent owing - Proof of exceptional wear and tear - Interest on arrears of rent

Jackson v Ebanks

Grand Court (349/95)
Smellie J
September 25 1996

Mr Roy for the plaintiff
The defendant in person

The plaintiff had let the property to the defendant. The plaintiff sought to recover from the defendant arrears of rent and compensation for excessive wear and tear and missing items of furniture. The plaintiff kept records of rent payments made during the period of dispute but these had been made in reliance on statements of the plaintiff's brother who collected the rents on behalf of the plaintiff.

The arrears for 1991 were the subject of correspondence between the parties. The sum of C.I.$5600 was acknowledged as having been paid in the correspondence, leaving arrears of C.I.$1600.

The arrears for 1992 were not so recorded. The defendant had made payments to the bank and the plaintiff's lawyer totalling C.I.$3100. He also claimed that he had made payments to the plaintiff's brother for several months without receiving a receipt.

The arrears for 1993 were also not recorded in correspondence. Payments totalling C.I.$4700 had been made to the bank and plaintiff's lawyers. The defendant was unable to assert any payment to the plaintiff's brother in 1993.

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

(i) The arrears for 1991 were as indicated by the correspondence at C.I.$1,600. For 1992, the plaintiff's own record could be relied on as a faithful and accurate record of those payments. For the remainder of the 1992 rent, on the balance of probabilities, the defendant had paid one-half to the plaintiff's brother without receiving or retaining proof of payment. For 1993, in the absence of any clear assertion to the contrary, the defendant had made no payment to the plaintiff's brother.

(ii) The evidence as to the state of the premises when the defendant vacated was entirely hearsay and the claim failed.

(iii) Judgment would be entered for the arrears of rent due and payable plus interest at 8% simple interest to be calculated from the end of 1993 until fully paid.

PRIVATE INTERNATIONAL LAW

Foreign judgment relating to land situated in the Cayman Islands - Whether the Grand Court would enforce the foreign judgment - Jurisdiction of the foreign court

T v Colonial Development Corp and another

Grand Court (158/96)
Harre CJ
June 25 1996

Mr Parkinson for the plaintiff
Mr McDonough for the defendant

Pursuant to an order of the Circuit Court of Florida dated 6 April 1995 directed to the plaintiff's husband, the husband was required to convey an apartment in Cayman to the plaintiff. Two complications followed from this order. Firstly, the owner of the property was the first defendant who, according to the wife's evidence, had contracted to sell the apartment to the husband and wife but who had failed to transfer the property to either party. Secondly, and equally fundamentally, the present application amounted to an application to enforce the Florida judgment in respect of real property located in the Cayman Islands.

In a related matter, cause 112/95, an order in favour of the husband against the wife in respect of other immovable property in Cayman had been made. In that cause an affidavit had been sworn (falsely) by the husband which stated that he had executed all documents necessary to comply with the Florida judgment.

Held: (dismissing the application and adjourning the summons *sine die*)

(i) The essence of the present application was to enforce and not merely to recognise the foreign judgment.

(ii) A declaration of a foreign court as to the title to immovable property in the Cayman Islands was not enforceable in Cayman by reason of the absence of the foreign court's jurisdiction over the subject-matter. Neither could it be said that the wife was relying upon the title created by the foreign judgment, rather than the foreign judgment itself, because the judgment had created no title in her.

(iii) In the circumstances, the terms of the earlier order made in favour of the husband were unfortunate. It was nevertheless necessary to reject the wife's claim on the basis upon which it had been brought. The summons would not be dismissed however, but rather adjourned *sine die* in order to afford the wife's advisers the opportunity to consider whether any principles of equity could be called in aid based upon the terms of the deed itself.

MD

PUBLIC LAW

Judicial review - Application for *mandamus* and *certiorari* - Liquor Licensing Board allegedly applying irrelevant principles

M and H v Liquor Licensing Board and the Attorney-General of the Cayman Islands

Grand Court (534/95)
Harre CJ
September 26 1996

Legislation

Liquor Licensing Law S9(1)

Authorities referred to

Sharpe v Wakefield and others [1886-90] All ER 651
R v Sussex Confirming Authority ex parte Tamplin [1937] KB 106

R v Torquay Licensing Justice ex parte Brockman [1951] 2KB 784
R v Torbay Licensing Justice ex parte White
Graham Thompson and Associates v Liquor Licensing Board and the Attorney-General
[1988-89] CILR 31

Mr Broadhurst for the applicants
Mr McMillan for the defendant

The applicants applied to the Grand Court for an order of *certiorari* to quash a decision of the Liquor Licensing Board refusing them permission to relocate their liquor store to other premises and to add the second applicant as a joint licence-holder of the company. The applicants also sought an order of *mandamus* to compel the Board to reconsider its decision.

The first applicant had previously been granted a licence to manage a duty-free liquor store for cruise ship passengers. An application was subsequently made to relocate the shop to premises directly opposite the present site. At the hearing before the Liquor Licensing Board, two objections were made by the first applicant's competitors. One objector complained that the first applicant already had three duty-free stores and that the intended relocation site was only a hundred feet from his own duty-free liquor store. He said that, unlike the applicant, he could not afford to advertise aboard cruise ships. The second objection was to the effect that the applicant already owned too many duty-free shops and that the applicant's advertisements, which claimed Cayman origin of certain rums and spirits, were inaccurate.

The Liquor Licensing Board's reason for refusal was that the proposed site which was previously occupied by a duty-free package store was not going to be of service to the public.

The two applicants' ground for review was that the Board had made an error of law and exceeded its jurisdiction. The Board had relied on s9 of the Liquor Licensing Law which states *inter alia*:

" A Board shall not grant a licence unless satisfied that the premises in respect of which the application is made ... are situated at a location where they will be of service to the public."

Held: (allowing the application)

(i) There was nothing to prevent the issue of a licence in terms restricted to a class or section of the public: R v Sussex Confirming Authority ex parte Tamplin.

(ii) The Board was under a duty to consider the general public interest when determining the question of service to the public. There was a wide discretion vested in the court to review any decision of the Board to determine the validity of the principles it had applied in reaching its decision. The Board was at liberty to consider the character and necessities of the locality and neighbourhood in which the premises were situated and to use its local knowledge: Sharp v Wakefield and others. There was, however, a distinction to be drawn between such considerations and matters of pure business economics: Graham Thompson and Associates v Liquor Licensing Board and the Attorney General. It was held in R v Torbay Licensing Justice ex parte White that a licensing board may lawfully adopt and apply a general policy with regard to the granting or withholding of licences, but that in order to be valid that policy had to relate to the purpose for which the discretion was conferred by the applicable statute. It followed that it was not part of the function of the Board, exercising a discretion under the Liquor Licensing Law, to have regard to the desirability or otherwise of restricting the exercise of free competition in the provision of intoxicating liquor by retail to the public between persons who qualified for the grant of the appropriate licence. That would be an economic and social, but not a public order purpose which lay outside the ambit of the discretion vested in the Board.

(iii) It followed as a matter of logic that, as in the case of a transfer of an existing licence to a new licensee, the relocation of licensed premises within the same area was likely to involve

narrower consideration than an application for the grant of a licence for an additional outlet. It did not follow that the closure of an existing licensed business at the proposed relocation site justified the conclusion that the new business would not be of service to the public. In purporting to make that connection, the Board was regulating for an economic purpose.

(iv) The matter would accordingly be remitted to the Board for reconsideration in accordance with the principles herein expressed.

AD

TORT - MALICIOUS PROSECUTION

Applications for search warrants - Whether procured maliciously and without reasonable and probable cause - Suspected involvement in drug trafficking

Rea v Gibbs and others

Court of Appeal (6/94)
Zacca P, Kerr and Collett JJA
December 7 1995

Legislation

Misuse of Drugs Law Ss 16L & M, Police Law S27(1)

Hope v Evered (1888) 17 QBD 338
Inland Revenue Commissioners v Rossminster Ltd [1980] 1 All ER 80
Lea v Charrington (1889) 23 QBD 272
Reynolds v Matropolitan Police Commissioner [1984] 3 All ER 649
George v Rockett 93 ALR
G v S 1992-93 CILR 203
Everett v Ribbands [1952] 1 All ER 823
Abrath v North Eastern Ry Co (1886) 11 App Cas 247
Tempest v Snowden [1952] 1 KB 130
Taylor v Williams (1831) 2 B & Ad 845
Glinski v McLever [1962] 1 All ER 696
Abbott v Refuge Assur Co Ltd [1962] 1 QB 432
Cotton v James (1830) 1 B & Ad 128
Russell v Macnamara 9 East 361
Rhesa Shipping Co SA v Edmunds, The Pope [1985] 2 All ER 712
Brown v Hawkes [1891] 1 QB 718
Elsee v Smith (1922) 2 Chit 304
Conway v Rimmer [1968] AC 910
Shaaban Bin Hussien v Chong Fook Kam [1969] 3 All ER 1626
R v McLean (Cause 15/74)
Young v Nichol [1885] The Ontario Reports Vol. IX 363

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Feldman, Law of Entry, Search and Seizure
Clark and Lindsell on Torts 1982, 5th Ed.
Halsbury's Laws of Engand 4th Ed., vol 45
Clayton and Tomlinson, Civil Actions against the Police, 1992

Mr Alberga QC and Mr McCann for the appellant
Mr Lamontagne QC and Mr Archie for the respondents

The plaintiff/appellant had brought an action for damages against the defendants /respondents for maliciously and without reasonable cause procuring a search warrant and/or for trespass and unlawful seizure of goods. The learned Chief Justice had dismissed the action for the following reasons:

1. The first defendant/respondent was merely required to have had objectively reasonable grounds for suspecting the plaintiff to be carrying on or benefiting from drug trafficking, and the onus was on the plaintiff/appellant to prove that there were no reasonable grounds.

2. The plaintiff had not discharged the burden of proving that the first defendant had no reasonable grounds or that he had acted maliciously.

3. S16M Misuse of Drugs Law did not require that the materials sought be specified in the search warrants. It was therefore not illegal to

seize items not specified in search warrants. Nor were the warrants invalidated by discrepancies between what was asked for in the informations and what was granted in the warrants.

The plaintiff appealed.

Held: (allowing the appeal)

(i) If Hope v Evered suggested that the granting of the warrant by the Grand Court judge was a complete answer to the appellant's claim based on absence of reasonable and probable cause, it ought not to be regarded as good law. If a search warrant was obtained maliciously and without reasonable and probable cause, then an action would lie: Everett v Ribbands.

(ii) The learned Chief Justice had erred in relying on the case of Inland Revenue Commissioners v Rossminster Ltd. The Rossminster case could be distinguished from the instant case. In Rossminster, judicial review had been sought while criminal investigations were in progress. The refusal to disclose grounds for suspicion was therefore justified on the basis of public interest immunity. In the instant case, the criminal investigations had been terminated and no criminal charge had been made against the appellant. There was no public interest claim.

The first respondent could not rely on the presumption of regularity at the stage of the civil action and was obliged to state the grounds for his belief that the appellant had been engaged in or had benefited from drug trafficking.

The burden of proving no reasonable and probable cause in an action for malicious prosecution lay upon the plaintiff: Abrath v North Eastern Ry Co. The appellant's evidence taken as a whole was sufficient to place the onus on the first respondent of showing that he had acted with reasonable and probable cause. No grounds for suspicion were stated in the informations. The first respondent had failed to give evidence and no documentary evidence had been produced to indicate the reasons for his suspicion. No oral evidence or affidavits were on record to assist the first respondent and there had been no prosecution of the appellant.

(iii) The only reasonable conclusion based on the evidence was that the first respondent had no reasonable grounds for suspecting the appellant and had therefore acted without reasonable and probable cause.

(iv) The onus was also on the appellant to show that the first respondent had acted maliciously. In this case, malice could be inferred from the absence of reasonable and probable cause. The declaration sought by the appellant would therefore be granted.

The first respondent had acted without reasonable and probable cause and with malice in invoking the process of the court in obtaining the search warrants, therefore the appellant was entitled to damages.

(v) The real reason for the appellant's dismissal from his employment was the obtaining of the search warrants and subsequent search, not his involvement with other companies.

Special damages had been agreed at C.I.$566,281.00. In assessing general damages, it was necessary to take into account the appellant's loss of reputation, as he would have been unable to obtain employment in banking in the Cayman Islands as a result of the search and the ongoing investigations. The respondents persisted in their allegations for a considerable time, yet did not produce any evidence in support. There had been no retraction or apology from the respondents. In the light of these aggravating circumstances it was appropriate to award aggravated damages. The sum of C.I.$50,000 would be awarded for general damages.

(vi) Costs of the trial below and the appeal to be agreed or taxed.

HRN

TORT - NEGLIGENCE

Motor vehicle collision - Negligence of both parties - Apportionment of liability - No liability arising from ownership of vehicle

Watson v Morris and Miller

Grand Court (294/96)
Smellie J
October 7 1996

Legislation

Law of Torts Reform Law S8

Authority referred to

Caswell v Powell Duffryn and Associated Collieries Ltd [1940] AC 152

Mr McField for the plaintiff
Mr Collins for the first defendant
Second defendant in person

This action arose from a motor vehicle collision which occurred on June 29, 1995 between vehicles driven by the plaintiff and the first defendant. Both vehicles were written off in the collision although there were no physical injuries. The second defendant was the owner of the car driven by the first defendant and a passenger in it at the time of the collision. The plaintiff was driving along a major road when the second defendant pulled out of a minor road across the plaintiff's path. The collision occurred in the defendant's correct lane after she had completed the manoeuvre. Although the first defendant testified to not having seen the approach of the plaintiff's vehicle, both the plaintiff and the second defendant acknowledged having seen the other's vehicle prior to the accident. According to the plaintiff's evidence, the car driven by the first defendant suddenly pulled out in front of him and as he swerved in an attempt to avoid her they collided in the defendants' lane. Smellie J observed that he would "have regarded this as a most straightforward matter" but for the evidence of the second defendant which alleged that the plaintiff had been talking on his cellular telephone at the time of the impact. This was denied by the plaintiff who claimed to have used it only after the accident in order to phone his father to seek his advice. The first defendant testified to having seen the plaintiff on the telephone only after the impact.

The plaintiff claimed damages attributable to the first defendant's negligence in the sum of C.I.$ 4,900 being the replacement cost of his vehicle in addition to C.I.$585 representing the costs of a rental car for 13 days. The defendants counterclaimed the sum of C.I.$4,000 being the replacement cost of the second defendant's vehicle in addition to C.I.$524 being the cost of a rental car for 12 days. The second defendant had been joined to the action on the basis that she was the owner of the vehicle.

Held: (dismissing the claim against the second defendant and otherwise apportioning liability between the parties)

(i) The action against the second defendant was misconceived. Ownership of the vehicle was not a sufficient basis of liability.

(ii) There was no reason apart from inattentiveness on the plaintiff's part as to why his vehicle would have collided as it did with the second defendant's vehicle on her correct side of the road. The finding of fact was therefore that the failure to avoid the collision, which would have been avoided by an attentive and reasonably skilled driver, was due to the plaintiff being distracted by being engaged on his cellular telephone. The first defendant had therefore discharged her duty of showing contributory negligence on the part of the plaintiff: Caswell v Powell Duffryn Collieries Ltd.

(iii) These findings of fact did not serve to exonerate the first defendant from liability however as the situation would not have arisen but for the first defendant's inattentiveness. In

keeping with s8 Law of Torts Reform Law, liability would be apportioned between the parties as to 60% to the first defendant and 40% to the plaintiff. By way of set-off the net award to the plaintiff would therefore be in the sum of C.I.$1481.40. Each side would bear their own costs of the action.

MD

RECENT TRUST DEVELOPMENTS

This article reviews recent trust developments in England and Wales. Parts of what follows are derived from a chapter by the same author on "Equity and Trusts" in the Third Annual Review of Property Law, edited by Shena Gratten (1996, SLS Publications).

Trustees Powers and Duties

The power of a court to control the exercise of trustees' discretion is very limited. According to the current edition of Hanbury & Martin "the cases are not even clear on whether the courts will look into the exercise of a discretion that appears to be wholly unreasonable".[1] Discretion may be dispositive discretion (under a discretionary trust or a power of appointment or maintenance) or administrative discretion (under a power of investment for example)[2]. A court will intervene in trustees' exercise of discretion if/when the rule, in *Re Hastings-Bass*[3] comes into play. Succinctly stated the rule in that case is as follows:

" ... [W]here a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account."[4]

In *Re Duxbury's Settlement Trusts,*[5] Rattee J may have limited the application of this important rule to dispositive discretion in refusing to extend it to administrative discretions. The facts of the case can be briefly stated. An *inter vivos* discretionary settlement was made in 1959 for the benefit of the settlor's children and issue. Originally, the trustees had been three individuals. When they retired in 1978, however, they appointed Barclays Bank Trust Co. Ltd. in their place. At the time, neither the retiring trustees nor Barclays seems to have realised the impact of cl 16 of the settlement, which provided:

"PROVIDED ALWAYS and IT IS HEREBY EXPRESSLY DECLARED that notwithstanding anything hereinbefore contained no discretion or discretionary power hereby or by law conferred on the trustee (other than the statutory power of appointing new trustees applicable hereto) shall

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[1] Hanbury & Martin, *Modern Equity* 14 ed. 496; c.f *Tempest v Lord Camoys* (1882) 21 ChD 571, 580, where Cotton LJ observed :"No doubt [the Court] will prevent trustees from exercising their discretion in any way which is wrong or unreasonable. But that is very different from putting a control upon the exercise of the discretion which the testator has left to them." However, Moffat, *Trust Law, Text and Materials,* 2nd ed. at 398 discerns the "outline of judicial discretion". For a full list of authorities see: Underhill and Hayton, *Law of Trusts and Trustees,* 9th ed. 586 fn 11.

[2] Hayton & Marshall, *Cases and Commentary on the Law of Trusts,* (9th ed.) at 712.

[3] [1975] Ch 25,41.

[4] As stated by Warner J in *Mettoy Pension Trustees Ltd. v Evans* [1995] 3 All ER 145, 147e-f. See: Underhill and Hayton, *supra.* at 587 for a more comprehensive definition of the rule.

[5] February 17 1994, *sub nom. Public Trustee v. Benjumean and Others*, Lexis Transcript, unreported.

be exercisable at any time when there are less than two Trustees of whom at least one is not a discretionary object."

With a minor exception relating to trustees' removal, the deed went on to state that the statutory power to appoint new trustees in the Trustee Act 1925, section 36, was to apply.[6] When Barclays Bank retired in favour of the Public Trustee in 1984 doubts were expressed which lead to the application in this matter. The court was asked to determine the validity of the appointment of Barclays (as a single trustee) and of course the validity of the exercise of Barclay's discretion including the appointment by it of the Public Trustee as a successor. Rattee J held that both the appointments were valid but that the sole trustee - the public trustee at the time of the hearing - could not validly exercise the discretions conferred on the trustees of the settlement. Overturning Rattee J's decision on the second point the Court of Appeal[7] held that the sole trustee, the Public Trustee *could* exercise discretions.

Re Hastings-Bass

Before Rattee J it was argued that since the original trustees, in purporting to appoint Barclays, had clearly failed to take account of the effect of cl 16 on its capacity to act effectively as sole trustee, the appointment cannot have been a proper exercise of the statutory power. Likewise, with the appointment of the Public Trustee, who could not in any event have been validly appointed if Barclays' appointment was invalid. The judge effectively held that it did not matter that the respective appointors had failed to take account of the effect of cl 16. The Court of Appeal added nothing to Rattee J's bald assertion that *Re Hastings-Bass* was inapplicable. It remains uncertain whether *Re Duxbury* is merely authority for the proposition that Re *Hastings-Bass* does not apply to section 36 appointments or that the rule in that case is inapplicable to all administrative acts by trustees. Clearly, limitation of the rule is to the clear advantage of third parties who deal with trustees.[8]

Public Trustee Act 1906

Rattee J held that dispositions by the Public Trustee were invalid. In the Court of Appeal the Public Trustees prayed in aid s 5(1) of the Public Trustee Act of 1906 which, so far as material, reads:

" The public trustee may ... be appointed to be trustee of any will or settlement or other instrument creating a trust ... and either as an original or as a new trustee, or as an additional trustee, in the same manner, and by the same persons or court, as if he were a private trustee, with this addition, that though the trustee originally appointed were two or more, the public may be appointed sole trustee."

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[6] The Trustees Act 1925, s 36, so far as relevant, provides: "Where a trustee ... desires to be discharged from all or any of the trusts or powers reposed or conferred on him ... then ... the person or persons nominated for the purpose of appointing new trustees by the instrument ... creating the trust ... may in writing appoint one or more other persons to be a trustee or trustees in the place of the trustee ... desiring to be discharged ."

[7] [1995] 3 All ER 145. Noted: [1996] Conv. 50 (J Snape).

[8] This was the reason cited by Rattee J for refusing to extend the rule. See: J. Snape, *Ibid.* at 53.

Following the interpretation of the above section in *Re Moxon*[9] the Court of Appeal concluded that if the Public Trustee can be *appointed* as sole trustee then necessarily he can also *act* as a sole trustee. Nourse LJ stated:

"It would be idle to appoint a trustee who was unable to act. Appointment and action are for this purpose inseparable. Here the prohibition, although expressed as one against the sole exercise of discretions and discretionary powers, is effectively a prohibition against acting as sole trustee. Why should that prohibition be any less susceptible to being overridden by the addition of s 5(1) than a prohibition against appointment as a sole trustee? I can see no answer to that question. The point is as simple as it is short."[10]

It may be that *Re Duxbury* will be confined to an interpretation of the application of s 5 Public Trustee Act. Alternatively, the decision may have a wider significance; c16 in *Re Duxbury* is commonly found in discretionary trusts of the period. It has been suggested that this makes it possible to argue that any sole trustee appointed under a deed containing the wording in this clause is free to exercise the discretions conferred by the trust deed alone.[11]

Duty to Invest

A trustee is under a duty to invest trust assets in all trusts which are not expressly holding trusts of designated property.[12] A well drafted trust will invariably contain express terms upon the investment powers and duties of trustees. A common investment clause is one which purports to permit to the trustee an 'absolute discretion' in matters of investment. The meaning of such a provision and the protection it affords to a trustee was considered by Murphy J in *Stacey v Branch*[13] in March 1995, in the High Court in the Republic of Ireland. In this case a father in July 1982, by deed, settled two properties containing dwelling houses on the defendant on trust. In relation to one of the dwelling houses the deed provided that pending the attainment of 21 years by the son of the settlor, the defendant trustee would have full power to deal with the property "as he in his absolute discretion shall think fit to include leasing the land on such conditions as the trustee shall think fit and if necessary to sell the aforesaid land." At the time of settlement the settlor's son was an infant and the premises were unoccupied. Some months later the trustee put a caretaker into occupation. The caretaker was to protect and keep up the dwelling house; to pay all outgoings thereon and to deliver up possession when required by the trustee to do so. It was envisaged that possession would be delivered up when the beneficiary attained his twenty first birthday. The caretaker was not required to pay rent or mesne rates.

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[9] [1916] 2 Ch 595.
[10] [1995] 3 All ER 145, 148f-g.
[11] See J Snape in [1996] Conv 50, 54.
[12] Moffat, *supra.* at page 344.
[13] [1995] 2 ILRM 136.

Evidence was heard by Murphy J that the property could have been let out to tenants and it was suggested that a sum of approximately £20,000 could have been so raised, which sum could in turn have been invested on the plaintiff's behalf. The plaintiff was claiming £46,960 as damages for breach of trust.

Counsel for the defendant asserted that the absolute discretion granted to the trustee ensured that, provided such discretion was exercised honestly, it was not open to review by the court or capable of giving rise to an action for breach of trust. This approach was not accepted by the learned judge who confirmed that the test is a higher one than *bona fides*. In giving an extempore judgment Murphy J stated:

"[W]ords such as 'absolute discretion' would not necessarily relieve a trustee from his duty to exercise the degree of care and prudence which would otherwise be inferred (see *Gisbonre v Gisborne* (1877) 2 App Cas 300 and *Tabor v Brooks* (1878) 10 ChD 273). At the end of the day the extent of the obligations imposed on a trustee or the degree to which he is relieved from responsibilities ordinarily assumed is a matter of the construction of the terms of the document under which the trustee is appointed."

Was it the settlor's intention that the trustee would be at liberty not to realise a profit from the property? The trust deed placed an extraordinary emphasis on the discretion conferred on the trustee to deal with the property which was originally settled. It was only in relation to the house that absolute discretion was conferred; cash investments were expressly limited to trust securities and the sale of the house was permitted only if it was established that the sale was 'necessary'. A further relevant consideration was that in respect of the trust of another house in the same settlement it was expressly provided that that property should be kept in a reasonable condition. Such a provision was absent so far as the house in question was concerned. Most significantly, however, was the learned judge's conclusion that the settlor's basic intention was that the house should be kept by the trustee and ultimately transferred to his son:

"In my view, the settlor meant what he said. He intended the trustee to have and to exercise his own honest but absolute discretion as to how this basic objective should be achieved. I am satisfied that the decision of [the trustee] to put the premises in the occupation of [the caretaker] was a decision made bona fide in pursuance of that discretion."[14]

This conclusion without more, it is suggested, was sufficient to put paid to the plaintiff's case. Murphy J effectively found that he was dealing with a holding trust with a power of sale. In such a case no duty to invest arises and the other points arising from the construction of the deed are interesting but otiose.

Trustees' Costs

Are the trustees subject to a duty to defend if a trust is under attack by the settlor's creditors? Furthermore, if they decide to defend are they entitled to be indemnified for their costs out of the

[14] [1995] 2 ILRM 136, 144.

trust fund? These questions arose before Lightman J in *Alsop Wilkinson v Neary.*[15] In this case a solicitor had defalcated considerable sums from his firm's client account during the period May 1990 to December 1992. In the midst of the defalcations, the settlor made two settlements, the first on the 7 September 1990 and the second on the 27 December 1990. After the losses were discovered the solicitors brought proceedings under s 423 of the Insolvency Act 1986 seeking a declaration that the transfer of property into the settlements were void as transactions entered into for the purpose of putting assets beyond the reach of the settlor's creditors. It was during these s 423 proceedings that the trustees of the settlements issued a summons seeking the courts directions upon, inter alia, whether they ought to defend.

In *Ideal Bedding Co Ltd v Holland*[16] Kekewich J held that a trustee had a duty to defend the trust, and was therefore entitled to obtain costs. In that case judgment creditors obtained an order against the trustees of the settlement declaring the settlement void on the grounds that it defrauded those creditors. Lightman J declined to follow this authority observing:

" I do not think that the view expressed by Kekewich J in the *Ideal Bedding* case that in a case of trust dispute (as was the dispute in that case) a trustee has a duty to defend the trust is correct or in accordance with modern authority. In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary ...) offer to submit to the court's directions, leaving it to the rivals to fight their battles."[17]

Trustees are entitled to defend 'third party disputes' when it is necessary to protect or defend the trust estate. In doing so they have a right to an indemnity and a lien in respect of costs properly incurred in such proceedings.[18] However, they are clearly not entitled to such indemnity in an action by a beneficiary claiming that the trustees have taken or omitted to take some form of action. In such 'beneficiary disputes' their liability is personal and if they defend and lose such proceedings the trustees must carry the costs. Disputes about the nature of the trust - 'trust disputes' - can take one of two forms; first, 'friendly' trust disputes concerning the true construction of the trust instrument or questions concerning the administration of the trust. Secondly, 'hostile trust disputes' comprising a challenge in whole or in part to the validity of the trust. *Alsop Wilkinson v Neary* indicates that trustees should not enter the fray in such cases nor will they be indemnified if they do. The learned judge observed:

"If the trustee does actively defend the trust and succeeds, for example in challenging a claim by the settlor to set aside for undue influence, he may be entitle to his costs out of the trust, for he has preserved the interests of the beneficiaries under the trust. ... But if he fails, then ... ordinarily the trustee will not be entitled to an indemnity."

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[15] [1995] 1 All ER 431.
[16] [1907] 2 Ch 157.
[17] [1995] 1 All ER 431, 435g-j.
[18] [1995] 1 All ER 431, 434j.

In practice, if trustees are considering taking action on behalf of the trust they will need to obtain the leave of the court for otherwise they will be at personal risk of the costs unless they can subsequently establish that the costs were properly incurred.[19] Such a direction was sought by the trustees in this case, however, they made a fundamental procedural error. The summons seeking directions should have been issued in wholly separate proceedings and all the beneficiaries should have been included as defendants. Because these requirements had not been met Lightman J was not prepared to give definitive advice to the trustees.

Do Beneficiaries have their own Cause of Action?

If trustees initiate proceedings against a third party, but decline to continue with the action, can the beneficiaries apply to be substituted as plaintiffs? This question arose before Judge Paul Baker Q.C. sitting as a High Court judge in *Bradstock Trustee Services LTD v Nabarro Nathanson.*[20] In this case trustees of a pension scheme issued proceedings against solicitors alleging *inter alia* negligence and breach of contract in advising the trustees to make payments out of the fund and loans to the scheme employers which thereby rendered the fund insufficient to meet the potential needs of members. The action got as far as the close of pleadings at which point the trustees were advised that the costs of the action on both sides might exceed the total assets of the scheme. The trustees would therefore have been exposed to a personal risk in respect of costs. They were told that they were not obliged to run that risk and, understandably, decided not to do so. Several member beneficiaries obtained legal aid to proceed but faced limitation difficulties should they attempt to start proceedings anew. Hence their application to be substituted as plaintiffs.

Paul Baker Q.C. held that the beneficiaries could not be substituted. The applicant beneficiaries had no cause of action against the allegedly negligent solicitors because they were "at one remove in that any cause of action is that of the trustees". The Rules of the Supreme Court, in particular Ord. 20, r. 5, do not give an independent power to add beneficiaries whether ascertained or not.

If A contracts with B that the latter should carry out some benefit for C, it is trite law that C has no right of action against A. In such a case only B can enforce the agreement. However, there have been cases in which courts have been prepared to hold that the *right to sue* - the chose in action- is held by B on trust for C. It follows that, because it is his *beneficial* property, C can enforce the agreement (if need be by joining B as a defendant). The court declined to follow this line of authority in the instant case as the cause of action lay in negligence. Such a claim could not be held on trust. The learned judge stated:

"Where the action sounds in tort there can be no question of the trustees constituting themselves as trustees of a chose in action right from the moment they first consulted the solicitors. As I see

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[19] *Re Beddoe* [1983] 1 Ch 547; *Re Yorke* [1911] 1 Ch 370 ; Underhill & Hayton, 14th ed, *supra.* 131.
[20] [1995] 1 WLR 1405.

it the claim cannot be regarded as part of the trust property, though doubtless any damages which may be recovered would be."[21]

In any event 'special circumstances' are required before a third party to a contract can step in and take over proceedings, namely, that the trustee has committed 'a breach of trust or is involved in a conflict of interest.' The decision of the trustees not to put the entire fund at risk in prosecuting proceedings was not a failure in the performance of their duty to protect the trust estate.

The key factor in this application was that the applicants had obtained legal aid to prosecute the action. Had they been permitted to proceed they would have carried on not solely for themselves, but for all the beneficiaries, so that the action would have become a 'derivative action'. Had such a derivative action been permitted, the beneficiaries would ultimately be entitled to obtain their costs out of the assets of the pension fund. Because the plaintiffs were legally aided any costs ordered against them would not be enforceable. However, that would not preclude an order being made against the trustees, who would remain parties to the action. Thus the application would not protect the trust against the risk of being resorted to for the defendants' costs in the event of the failure of the action.

Limitation of Action and Laches

Actions by beneficiaries against trustees for misappropriation of trust property have been excluded from the imposition of a limitation period. The courts and legislature have treated trustees as bearing a special responsibility to the trust property and the beneficiary's interest in it. The beneficiary's right to complain of breach of trust has been treated as persisting indefinitely unless the doctrine of laches applies so that in all the circumstances it would be inequitable to allow him to enforce his rights.

Questions of limitations and laches were considered by Laddie J in *Nelson v Rye*[22] in November 1995. Willie Nelson, a popular musician and song writer, entered into an oral contract with Mark Rye in August, 1980, whereby the latter agreed to become Mr. Nelson's manager in return for 20% of his gross profits.[23] The agreement or its terms were never committed to writing. Indeed the informal nature of the agreement was carried over into other aspects of the operation of Mr Nelson's management by Mr Rye. The learned judge found that throughout the ten year subsistence of the agreement Nelson never sought a financial account of his affairs. From the Chancery Bench Laddie J painted a vivid picture of the entertainer's approach to his affairs:

"He was happy to drive his Rolls Royce, live in a mansion and take far more out ... than could be justified on the basis of ... receipts, but he did not want to know the details of how the sums added up - or failed to add up. He rejected all advice. He knew or suspected that working out any

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[21] [1995] 1 WLR 1405, 1411 G.
[22] [1996] 2 All ER 186.
[23] There was some dispute in the case whether this percentage was to be taken out of gross or net profits, see: [1996] 2 All ER 186, 191d-j.

figures would merely confirm that he was living beyond his means. That was something he preferred to ignore."[24]

Having parted company with his manager in October 1990, Mr. Nelson issued proceedings against him seeking, inter alia, an account of the moneys received by him on behalf of Mr. Nelson while acting as his business manager during the period 1980 to 1990. In his defence, Mr. Rye argued that Mr. Nelson could only seek an account for a period not exceeding the six year limitation period applicable in contract actions.

The Limitation Act 1980 prescribes limitation periods for certain causes of action. Causes of action which are not expressly covered by the Act are not subject to a period of limitation. There is no specific limitation period stipulated in the Act for actions for breach of a fiduciary relationship. So far as other breaches of trust are concerned, s 21(1) of the 1980 Act provides that no limitation period prescribed by the Act shall apply to an action by a beneficiary under a trust in either of two circumstances:

"(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
(b) to recover from the trustee trust property or the proceeds of the trust property in the possession of the trustee, or previously received by the trustee, or previously received by the trustee and converted to his use."

Laddie J accepted Mr. Nelson's argument that no limitation period was applicable in this case. Had Mr. Nelson chosen to sue for breach of contract alone, then the limitation period for contractual claims would apply. However, whilst there was a contract between the parties there was also a fiduciary relationship and, so far as a claim in respect of breach of the latter was concerned, no limitation period applied. Furthermore, the cause of action also fell within s 21(b). If Rye failed to pay over any money he obtained on Mr. Nelson's behalf, he held this money as a constructive trustee. The subsection applies to remove claims of a constructive trust as well as claims of breach of express trust from the operation of the Limitation Act.

Having decided that no limitation period was applicable in the case Laddie J went on to consider whether the equitable defence of laches was open to the defendant. He rejected the suggestion that a precisely defined test was applicable when determining the operation of the doctrine:

"The courts have indicated over the years some of the factors which must be taken into consideration in deciding whether the defence runs. Those factors include the period of delay, the extent to which the defendant's position has been prejudiced by the delay, and the extent to which that prejudice was caused by the actions of the plaintiff. I accept that mere delay alone will almost never suffice, but the court has to look at all the circumstances ... and then decide whether the balance of justice or injustice is in favour of granting the remedy or withholding it. If substantial prejudice will be suffered by the defendant, it is not necessary for the defendant to

[24] [1996] 2 All ER 186, 203b-d.

prove that it was caused by the delay. On the other hand, the plaintiff's knowledge that the delay will cause such prejudice is a factor to be taken into account".[25]

The judge concluded that there had been unreasonable delay in commencing proceedings. Mr. Rye had by now discarded or destroyed many documents relating to the period in question and would find it impossible to recall the minutiae of many transactions he had undertaken on Mr. Nelson's behalf. The defence of laches or acquiescence had thus been made out.

Agency and Trusts

In *Nelson v Rye*[26] the court determined that Rye was an agent, a fiduciary *and also* a trustee. The question whether an agent held money received on his principal's behalf on trust for the principal is of particular importance upon the insolvency of the principal. The position was recently outlined by Sir Peter Millet writing in an extra judicial capacity:[27]

"An agent who receives money from his or for his principal is not necessarily a trustee, even though he is a fiduciary at law the relationship between the agent and his principal is that of debtor and creditor. In equity, however, the relationship of trustee and beneficiary may be superimposed...In other cases the question whether an agent is a trustee depends on all the circumstances and in particular the intention of the parties, express or inferred."

The question of whether an agent who received monies for his principal was also a trustee was considered in *Re Fleet Disposal Services Ltd.*[28] In this case Fleet Disposal Services Ltd acted as a selling agent for major car leasing companies. An arrangement between the company and one of its principals provided that the company would pay the proceeds of any sale into a designated bank account - the agency account - and remit the proceeds less commission and costs within five days of receipt, repayment to be by separate cheques. The company went into creditors' voluntary liquidation at a time when there was a credit balance in the agency account. The question arose whether the principal had a proprietary claim to this sum.

Although the agreement between agent and principal contained no express term whether the proceeds of sale should be held on trust, Lightman J attached great importance to the existence of the separate account. The requirement for payment of the proceeds of sale within five days were, in the view of the learned judge, "inapposite to a mere accounting relationship".

As Sir Peter Millet has stated, all such cases turn on their facts, however, it is with respect suggested, that there are several curious aspects to the instant decision. First, the court accepted the validity of an implied term or common intention that the agent-trustee could take the interest on the money in the account. It is difficult to see how anything but a clear express provision could achieve such a deviation from orthodox trust principles. Secondly, the intention of the

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[25] [1996] 2 All ER 186, 201b-d.
[26] Ibid.
[27] 'Bribes and Secret Commissions' [1993] RLR 7. See: *Nelson v Rye* [1996] 2 All ER 186, 196e-h.
[28] [1995] 1 BCLC 345.

parties as to the nature of the relationship they had established seems to have been largely irrelevant. Perhaps the most interesting aspect of the decision was Lightman J's dismissal of the absence of intention on the part of the officers of the company to create a trust. In concluding his judgment the learned judge stated:

"[The senior manager of Support Services of the principal] did not appreciate that the agency contract and the arrangements regarding the agency account might give rise to a trust relationship between the company and [the principal]. He saw the practical value in the arrangement for a separate banking account, but (being a non-lawyer) he did not appreciate or have in mind the legal consequences of a proprietary claim. I do not think this matters. His subjective impression and his unexpressed analysis (or lack of analysis) of the arrangements cannot prejudice the rights of [the principal]."

On its face we find in this case an express trust created between agent and principal *without intention* to so create on either part. It is not significant that certain technical words were not used; it is trite law that technical expressions are not required. Rather, it seems to have been accepted that the intention to retain an interest *in rem* was neither present nor required. Can this be correct?

Similar issues arose before Robert Walker J in *Re Lewis of Leicester Ltd.*[29] After the retailers Lewis's Group Ltd went into receivership at the beginning of 1991, Lewis's of Leicester was bought over by a company formed by staff and management. The buyout was not successful; the new company made a trading loss in 1992 and 1993 and went into administration in early 1994. In 1993, in an attempt to deal with its cash flow problems, the company decided to grant floor space to concessionaires. Although most concessionaires sold their own products it was agreed with Lewis's that all money would be paid into Lewis's tills. In some instances this money was paid into separate accounts and in others mixed with the money in Lewis's general account. The court was asked to decide, inter alia, whether the money paid into separate account was trust money or whether it could go to satisfy general creditors.

Again, great importance was attached to the existence of separate accounts. Although the learned judge stated that this fact was not by itself conclusive, he was able to find other evidence of an intention to protect the concessionaires. This satisfied the court of an intention that a proprietary interest should not pass to Lewis's.

Causation and Breach of Trust

At common law a successful plaintiff must show that it was the wrongful act of the defendant which *caused* the harm complained of and, in assessing the quantum of damages, so far as possible, the plaintiff should be put in the same position as he would have been but for the wrong of the defendant. There is thus a *causation* requirement at common law. In *Target Holdings Ltd. v Redferns (a firm) and another*[30] a novel point arose for decision by the House of

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[29] [1995] 1 BCLC 428.
[30] [1995] 3 All ER 785. See (1995) 9 Tru.L.I. 86 (J. Ulph).

Lords on the liability of a trustee who commits a breach of trust to compensate beneficiaries for that breach. Is the trustee liable not only for losses caused by the breach but also for losses which the beneficiary would, in any event, have suffered *even if there had been no such breach?*

The Facts of *Target Holdings v Redferns*

Target Holdings v Redferns involved a complex mortgage fraud the salient facts of which can be briefly stated. The defendant solicitors acted, as is commonly the case, for both the plaintiff building society (the mortgagee) and also for the purchaser (the mortgagor), in the purchase of commercial property in central Manchester. The purchasers, who turned out to be fraudsters, had contracted to buy the property for £775,000 but succeeded in borrowing £1,525,000 from the plaintiffs on foot of a negligent valuation putting the worth of the premises at £2m. The fraud was carried out utilising several companies incorporated or purchased for the purpose. These companies were strictly speaking third parties so far as the purchase of the property was concerned, although wholly owned by the fraudster purchasers. Several days before completion, the building society transferred £1,525,000 into the defendant solicitors' account.

The action in this matter arose because the solicitors, on the purchaser's instruction, transferred monies *before completion and execution of the building societies charge* to these third party companies among others. When eventually the mortgagee building society sought possession and sale of the property they only succeeded in contracting to sell the property for £500,000. The building society brought an action for breach of trust against their solicitors, arguing that the breach occurred when the solicitors transferred trust monies to the third parties.

Such a transfer was clearly a breach of trust as the solicitors only had authority to pay over the purchase monies to the purchasers on completion. The solicitors, founding their defence on the principle that liability for breach of trust is restitutory, claimed that the plaintiff had suffered no loss due to the breach because the loss would have happened if there had been no breach; had the solicitors not paid the monies over upon the fraudsters instructions to third parties, but rather paid it over to the fraudsters themselves, as instructed upon completion, the same loss would have resulted. The fraud was going to cause a loss in any event.

On hearing a motion for summary judgment pursuant to Order 13, Warner J gave leave to Redferns to defend Target's claim for breach of trust on condition that Redferns pay the sum of £1 m by way of interim payment. Warner J did not expressly decide whether there was a triable issue as to whether the whole action would have fallen through had it not been for the breach of trust. The solicitors appealed to the court of appeal seeking unconditional leave to defend whilst Target cross-appealed claiming the right to summary judgment.

In considering this matter, the Court of Appeal[31] assumed that the breach of trust had left Target in exactly the same position as it would have been if there had been no breach; Target advanced the same amount of money, obtained the same security and received the same amount on the

[31] [1994] 2 All ER 337. Reported in the *First Annual Review* at 99. See: JD Heydon, 'Causal Relationships between a Fiduciary's Default and the Principal's Loss' (1994) 110 LQR 328, *329 et seq.*

realisation of that security. Notwithstanding this assumed fact, however, the majority of the Court of Appeal found for Target. Peter Gibson LJ, with whom Hirst LJ concurred, held that the basic liability of a trustee in breach of trust is not to pay damages but to restore to the trust fund that which has been lost to it or to pay compensation to the beneficiary for what he has lost. Where the trustees have paid away trust moneys to a stranger and there is an immediate loss to the trust fund the common law rules of causation do not apply; in such a situation the trustee comes under an immediate duty to restore the trust fund.[32] Target was granted permission to appeal to the Judicial Committee of the House of Lords.

Lord Browne-Wilkinson, delivering the judgment of the House, divided the plaintiff's arguments in two. The first argument ('Argument A') was to the effect that Target, as a trust beneficiary, was currently (i.e. at the date of judgment) entitled to have the trust fund restored. Lord Browne-Wilkinson doubted whether, even applying the traditional rules, Target was entitled to restoration of the fund as such. Such rules were, in his view, specialist rules developed in relation to traditional family trusts containing successive interests and should not be 'lifted wholesale' and applied to trusts arising in a commercial setting. In the instant case where the conveyancing transaction had been completed it would be artificial to require the 'trust fund' to be restored afterwards.[33] The second argument ('Argument B') was the argument accepted by the majority of the Court of Appeal to the effect that once money is wrongly paid away to a stranger, there is an immediate and continuing obligation to compensate the trust fund and subsequent events do not have to be taken into account. This was described by Lord Browne-Wilkinson as the 'stop the clock' approach. The defendant is not automatically liable for loss where the evidence in retrospect suggests that the beneficiary would have suffered such loss anyway. The 'clock' is therefore not stopped for all time by the breach.[34] Observing that the common law principles fundamental to an award of damages are as applicable in equity, Lord Browne-Wilkinson continued:

"Under both systems liability is fault based; the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same. On the assumptions that had to be made on the present case until the factual issues are resolved (i e that the transaction would have gone through even if there had been no breach of trust), the result reached by the Court of Appeal does not accord with those principles. Redferns as trustees have been held liable to compensate Target for a loss caused otherwise than by the breach of trust. I approach the consideration of the relevant rules of equity with a strong predisposition against such a conclusion."

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[32] The Court of Appeal relied on *Alliance & Leicester Building Society v Edgestop Ltd* (unreported), 18 January 1991; *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1994] 1 All ER 261.

[33] [1995] 3 All ER 785, 796a.

[34] It was further held that the date for fixing the quantum of damages is the date of judgment, when the facts of a case can be considered with the benefit of hindsight; [1995] 3 All ER 785, 799e-f.

In large part the underlying text of the decision of the House in *Target Holdings* is the ready adaptation of trust law to accommodate the increasing use of trusts in the commercial sphere in the latter half of this century. Lord Browne-Wilkinson expressly observed in *Target Holdings* that the trust has become a valuable device in commercial and financial dealing[35] which would be rendered "commercially useless" unless distinctions are drawn between "basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind". Whilst it is suggested that the outcome of this case accords with good sense and will be broadly welcomed, especially by solicitors, the emergence of divergent rules of equity for 'traditional' (family) trusts and commercial trusts can only lead to unfortunate uncertainty in the future.

Asset Protection

In England and Wales insolvency legislation enables a trust to be set aside if the settlor becomes bankrupt within 5 years (or 2 years in some circumstances) of creating the trust. However, without any time limit and without the need to make the settlor bankrupt, his trust can be set aside if entered into for the purpose of putting assets beyond the reach of or otherwise prejudicing the interest of creditors. Creditors may be actual, contingent or unascertainable future creditors. Section 423 of the Insolvency Act 1986 provides that a gift such as a settlement can be set aside if:

"[I]t was entered into for the purpose-

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."[36]

Midland Bank v Wyatt[37] concerned an attempt to defeat a creditor. Mr. and Mrs. Wyatt owned their house jointly. Mr. Wyatt was employed in the textile industry but intended to go into business on his own account with another. Over Sunday lunch he mentioned to a solicitor friend that he would like to ensure that if he did go into business his family would be protected from what he described as "long term commercial risk". The solicitor drew a declaration of trust, executed in June 1987, in which Mr. and Mrs. Wyatt declared themselves trustees for sale of the proceeds of the house as to one half for Mrs. Wyatt and as to a quarter each for their two minor daughters. Mr. Wyatt put the declaration in the safe. Whilst the house was the couple's only real asset of substance there was no doubt that at the time of the declaration Mr. Wyatt was solvent and had no creditors nor had he even set up in business.

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[35] [1995] 3 All ER 785, 795d-e.
[36] s 423(1)(3).
[37] [1995] 1 FLR 696. Noted [1994] 3 JIntP 178.

Some seven or eight months later Mr. Wyatt formed a company with his associate, borrowing money from the bank in order to do so on the footing that it would be secured on 'his' house. In the event, no security was in fact taken. The bank was not told that he had parted with all beneficial interest in the house. Within three years the company had foundered and Mr. Wyatt found himself in serious financial difficulties. When the bank started charging order proceedings in respect of the sum borrowed from it, Mr. Wyatt produced the declaration of trust from the safe and attempted to resist the charging order proceedings on foot that that he had no beneficial interest capable of being charged. It emerged on discovery and on taking witness statements that Mr. Wyatt had held himself out not only to the bank but also to his business partner and to his own and his wife's solicitors in divorce proceedings as having a beneficial interest in the house.

John Mowberry QC, sitting as a deputy judge of the High Court, found for the bank. Although Mr. Wyatt had given evidence that he had executed the declaration for the dual purpose of safeguarding his family against commercial risk and making a gift to his children, it was held that the *dominant motive* was the former and accordingly Mr. Wyatt had a 'fraudulent' motive within s 423.

The bank succeeded on a second ground. The declaration of trust was a 'sham' not intended to have any real effect. It was in the safe only for a rainy day and was intended only to create the illusion of transferred beneficial interests. The concept of the sham[38] trust is, perhaps, the most alarming facet of this decision from the prospective of the trust and estate planner. Of shams, Professor David Hayton has commented:

"If, despite the form of the trust instrument, the trust is a sham, apparently having legal effect but not really intended to have any legal effect, the settlor having real dispositive control over capital and income, then the trust is not a true trust but a bare trust where the whole equitable ownership remains in the settlor."[39]

Legal Professional Privilege

Often parties seek legal advice before entering into a transaction which may subsequently be set aside pursuant to s 423 or because it is a sham. A client's desire to put his assets beyond the reach of potential future creditors is not infrequently encountered by those in practice. In England and Wales an advising lawyer must exercise extreme caution in this area for several reasons. First, an advisor may face *criminal liability* as an accessory to fraud or by virtue of s 357 of the Insolvency Act 1986. Secondly, the legal adviser could find himself facing *civil liability* as a constructive trustee under the principles outlined by the Privy Council in *Royal Brunei Airline v Tan*[40].

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[38] *Snook v London & West Riding Investments Ltd* [1967] 2 AC 786, *Gisbone* v Burton [1988] 3 All ER 760, *Antoniades v Villiers* [1988] 3 All ER 1058, *Aslan v Murphy* [1989] 3 All ER 130, *Fitzwilliam v IRC* [1990] STC 65.

[39] 'When is a Trust not a Trust?' [1992] 1 JIntP 3,6.

[40] [1995] 3 All ER 97. See the discussion of this case in the *Second Annual Review* at 97-98. See also: (1995) 9 TruLI (G McCormick); (1995) Conv. 338 (M Halliwell).

Fortunately, in the United Kingdom, legal advisers are rarely themselves parties to fraud. However, it is common for a client to "consult his solicitor about an intended course of action, in order to be advised whether it is legitimate or not".[41] Generally, such a client seeks advise on how he may *avoid* civil liability or a crime and not the opposite. If a lawyer has advised in such a case, the papers held by him help, along with other evidence, to build a case that the *dominant intention* of a settlement was to avoid creditors or enter into a sham. Clearly, it is to the advantage of the other side in litigation to obtain such communications or compel the lawyer to give evidence. Can a plaintiff obtain such evidence or are these matters protected by legal professional privilege?

The scope of privilege in such a situation was recently considered by the English Court of Appeal in *Barclays Bank v Eustice.*[42] The Eustice family had farmed in Cornwall for some 170 years. In 1992 Paul Eustice was farming in partnership with his mother Inez Eustice. Part of the land they farmed was held by Mr. Eustice and his mother under a tenancy whilst other farm land was held by Mr. Eustice as freeholder.

In December 1992, it was agreed between Barclays Bank and Mr. Eustice that he should borrow £55,000 on a 20-year loan with a separate overdraft facility of £100,000. The bank took charges over the freehold land. By November 1993, the bank was prepared to increase the overdraft facility to £150,000, but only on terms that the 20 year loan was converted into a 12-month facility and that agricultural charges were given over all the agricultural assets. This loan facility was subsequently increased to £200,000 by the bank. In November 1994, the Inland Revenue distrained goods on the farm to cover amounts due for PAYE and national insurance. Shortly afterwards, having sought advice from agricultural consultants, Mr. Eustice and his mother entered into three transactions:(i) they assigned the leasehold lands to Mr Eustice's sons, (ii) they granted a lease of the charged freehold lands to the sons, (iii) they agreed to sell various agricultural assets to the same sons.

The bank subsequently brought proceedings against the Eustices seeking, inter alia, declarations that these agreements were void pursuant to s 423(a) of the Insolvency Act 1986, in that they were transactions entered into by the defendants at an undervalue for the purpose of prejudicing the interests of persons making a claim against them. In the course of those proceedings the bank successfully sought an order for disclosure of all documents containing or evidencing communications between the Eustice family and their legal advisers relating to the transactions. The family appealed to the Court of Appeal against the order for discovery.

On the facts the court held that there was clearly a strong prima facie case that all three agreements had been entered into at an undervalue for the purpose of prejudicing the bank's interests. Therefore, the court agreed that there was a strong prima facie case that the preconditions for making an order under s 423 were fulfilled and turned to the question of general interest in relation to the law governing discovery.

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[41] *O'Rourke v Darbishire* [1920] AC 581, 613 per Lord Sumner.
[42] [1995] 4 All ER 511.

Upon an examination of the scope of the doctrine of legal privilege Schiemann LJ, giving the judgment of the court, proffered two discernible rationale for refusing to extend legal professional privilege to the documents in question. First, the transactions about which advice was given were in themselves fraudulent and iniquitous and privilege should not attach to advice sought or given for the purpose of effecting iniquity. In this it matters not whether the solicitors are unwitting agents.[43] The learned Lord Justice rejected arguments that dishonesty or criminal intent is required before the privilege is lost.[44] An element of 'sharp practice'[45] on the client's part is sufficient to forfeit privilege. Whilst attempting to put one's assets outside the reach of one's creditors is not necessarily dishonest,[46] effecting transactions at an undervalue for this purpose can be regarded as 'iniquity'.[47] In any event, the matter is not one of semantics. Ultimately, according to the Court of Appeal, it is a policy question whether the documents in question should be left uninspected. In the instant case, discovery followed by inspection would not here result in "an unjustified interference with the defendants' property or right to privacy". Presumably, on these "difficult problems of policy"[48] there must, be scope for a balancing exercise. The Court of Appeal did point out that each case turns on its own facts.[49]

The second rationale for disclosure is effectively tied to the first. Schiemann LJ stated:

"One of the factors which the court will often find relevant is the purpose for which the advice is sought. Is it sought to explain the legal effect of what has already been done and is now the subject of existing or imminent litigation? Or is it sought to structure a transaction which has yet to be carried out? In the former class of case the court will be more hesitant to lift the cloak than in the latter."

This, it is suggested, is the most significant aspect of the decision. If advise is not sought in anticipation of litigation then, presumably subject to the public policy test discussed above, such advice is not privileged. The repercussions for all engaged in preparation of trust and estate planning is obvious. A substantial subsidiary aim of most fiscal, commercial and property advice is to *avoid* litigation. Lawyers in such fields spend their working lives *structuring transactions* which [they hope] will never see the light of a court room. Strictly speaking the decision in *Eustice* is limited to transactions which have as their aim the protection of assets against *existing* creditors. Legal advice given in relation to such transactions is not privileged. Of course, s 423 affords protection to future unascertained creditors. Presumably the rule stated in *Eustice* applies to such creditors as well. But the decision has alarming scope for extension. Any transaction between lawyer and client which will result in 'iniquity' may no longer be privileged.

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[43] [1995] 4 All ER 511, 524g -h.
[44] [1995] 4 All ER 511, 523 j - 424f.
[45] [1995] 4 All ER 511, 525c.
[46] *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* [1991] 1 All ER 591 *per* Scott J discussed by Schiemann LJ at [1995] 4 All ER 511, 522j.
[47] [1995] 4 All ER 511, 521g.
[48] [1995] 4 All ER 511, 524h-j.
[49] Ibid.

Some doubt has been cast upon *Eustice* by the decision of the House of Lords in *R v Derby Magistrates' Court, ex p B.*[50] In this criminal case, Lord Taylor stated that a person must be able to consult his lawyer in confidence and feel sure that what he says in confidence will never be revealed. If the law were otherwise a client might hold back half the truth. Lord Taylor would not accept exceptions to this fundamental condition on which the administration of justice as a whole rests. He stated[51]:

"But the drawback...is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had 'any recognisable interest' in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined."

Judgment in *Eustice* came too late to be considered by the House in *R v Derby Magistrates' Court, ex p B*[52]. However, it seems obvious that *Eustice*, if correct, will have the effect of deterring clients from disclosing the entire truth to their advisers. The ability to consult fully and candidly is nothing less than a "fundamental condition on which the administration of justice as a whole rests".[53] If the law is unsatisfactory Parliament can change it. Furthermore, there is in this decision of the House important *obiter dicta* which goes to indicate that the Court of Appeal in *Eustice* may have erred. Lord Taylor quoted with approval from *Greenough v Gaskell*[54] where Lord Brougham held that privilege was not confined to cases where legal proceedings were already in contemplation. Having referred to the same case, Lord Nicholls observed:[55]

"[S]ubject to recognised exceptions, communications seeking professional legal advice, *whether or not in connection with pending court proceedings*, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence." (Emphasis added)

Presumptions of Advancement

A common means of attempting to protect one's assets from creditors is to transfer the assets to a spouse or to children. This often involves a gratuitous transfer hidden behind a purported transfer for value. A transfer made for no consideration will, subject to one exception, give rise to a presumption of a resulting trust in favour of the grantor. The exception arises when a man transfers property to his wife or to a child with whom he stands in *loco parentis*. Of course, the

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[50] [1995] 4 All ER 526.
[51] [1995] 4 All ER 526, 541 g-j
[52] [1995] 4 All ER 526.
[53] [1995] 4 All ER 526, 541a.
[54] (1833) 1 My & K 98, [1824-34] All ER Rep 767.
[55] [1995] 4 All ER 526, 544b.

presumption of a gift in such cases is rebuttable. However, in *Tinsley v Milligan*[56] the House of Lords held that a man who makes a gratuitous transfer of property to another for an illegal purpose is not allowed to rely on his purpose in making the transfer in order to rebut the presumption of advancement. In *Tribe v Tribe*[57] the English Court of Appeal had to decide whether there is an exception to this principle where the transferor withdraws from the transaction before any part of the illegal purpose has been carried into effect.

Briefly stated, the pertinent facts of *Tribe v Tribe* were that a father held 459 of 500 shares in a company. In 1987 the father faced large potential claims against him arising from the failure to repair and maintain premises which he had leased. As the shares were the father's major asset he sought their protection by transferring them to one of his sons. However, as matters turned out, the father was able to settle with his lessors without any reference being made to the transfer of the shares. When he subsequently sought a return of the shares the son refused, contending that the presumption of advancement applied and that the father was prohibited from adducing evidence of illegality in rebuttal. The Court of Appeal rejected this argument. Giving the judgment of the court both Millett and Nourse L.JJ found in favour of an exception which applies when the illegal purpose has not been carried into effect. On this point Nourse LJ stated:

"The judge found that the illegal purpose was to deceive the plaintiff's creditors by creating an appearance that he no longer owned any shares in the company. He also found that it was not carried into effect in any way. [Counsel], for the defendant, attacked the latter finding on grounds which appeared to me to confuse the purpose with the transaction. Certainly the transaction was carried into effect by the execution and registration of the transfer. But *Wright's*[58] case shows that that is immaterial. It is the purpose which has to be carried into effect and that would only have happened if and when a creditor or creditors of the plaintiff had been deceived by the transaction. The judge said that there was no evidence of that and clearly he did not think it appropriate to infer it. Nor is it any objection to the plaintiff's right to recover the shares that he did not demand their return until after the danger had passed and it was no longer necessary to conceal transfer from his creditors. All that matters is that no deception was practised on them. For these reasons the judge was right to hold that the exception applied."[59]

Having stated that it is open to a transferor to withdraw from a transaction before an illegal purpose has been carried out and, having done so, give evidence of that illegal purpose to rebut a presumption, Millett LJ asked a second question. Is it sufficient for the transferor to withdraw simply because it is no longer necessary and without repenting of his illegal purpose? On this point the learned Lord Justice of Appeal concluded:

"...I would hold that genuine repentance is not required. Justice is not a reward for merit; restitution should not be confined to the penitent. I would also hold that voluntary withdrawal from an illegal transaction when it has ceased to be needed is sufficient."

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[56] [1993] 3 All ER 65. See the *First Annual Review of Property Law* 108-112.
[57] [1995] 4 All ER 236.
[58] *Perpetual Executors and Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185, Aust HC.
[59] [1995] 4 All ER 236, 247j - 248b.

A possible interpretation of the decision of the House in *Tinsley v Milligan*[60] is that a party who transfers property for an illegal purpose in circumstances which give rise to a resulting trust can invariably enforce the trust and recover the property even though the illegal purpose has been carried into effect. However, commenting *obiter* in *Tribe v Tribe,* Millett LJ did not accept such a proposition. He stated:

"In *Tinsley v Milligan* [the transferor][61] recovered even though the illegal purpose had been carried out. It does not, however, follow that the transferor will invariably succeed in such circumstances ... A resulting trust, like the presumption of advancement, rests on a presumption which is rebuttable by evidence (see *Standing v Bowring*[62]). The transferor does not need to allege or prove the purpose for which the property was transferred into the name of the transferee; in equity he can rely on the presumption that no gift was intended. But the transferee cannot be prevented from rebutting the presumption by leading evidence of the transferor's subsequent conduct to show that it was inconsistent with any intention to retain a beneficial interest. Suppose, for example, that a man transfers property to his nephew in order to conceal it from his creditors, and suppose that he afterwards settles with his creditors on the footing that he has no interest in the property. Is it seriously suggested that he can recover the property? I think not. The transferor's own conduct would be inconsistent with the retention of any beneficial interest in the property. I can see no reason why the nephew should not give evidence of the transferor's dealings with his creditors to rebut the presumption of a resulting trust and show that a gift was intended. He would not be relying on any illegal arrangement but implicitly denying it. The transferor would have to give positive evidence of his intention to retain a beneficial interest and dishonestly conceal it from his creditors, evidence which he would not be allowed to give once the illegal purpose had been carried out."[63]

The Australian Perspective

People put property into the name of another for a variety of illegal purposes; to protect assets from creditors as in *Tribe v Tribe;* to make a party to a matrimonial cause seem less affluent; to make an objection to a planning application at a hearing seem to come from someone who is disinterested,[64] or to obtain sums to which one is not entitled at all from a social security fund.[65] In *Nelson v Nelson*[66] the High Court of Australia recently considered a case of attempting to obtain a subsidy to which the claimant was not entitled. The case presented an opportunity to consider whether *Tinsley v Milligan* is good law in Australia.

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[60] [1993] 3 All ER 65.
[61] The term 'transferor' is that of the writer. Millett LJ states 'she'. It is not strictly accurate to describe Ms X as a 'transferor' as she did not originally own the property but was a co-purchaser in equity, however, her position was analogous to that of transferor for the purposes of this discussion.
[62] (1885) 31 Ch D 282, 287.
[63] [1995] 4 All ER 236, 254a-e.
[64] *Blackburn v Y.V. Properties* [1980] V.R. 290.
[65] *Tinsley v Milligan* [1993] 3 All ER 65.
[66] Unreported decision of the High Court of Australia, November 1995.

As a widow of a war veteran Mrs. Nelson was entitled to a loan to purchase a home at a very advantageous rate of interest. However, the loan would not be available if a residential property was already owned by her. With this limitation in mind Mrs. Nelson transferred a house to her daughter who refused to transfer the property back to her mother after the loan had been received. The trial judge's decision that Mrs. Nelson's false statement in her application form for the loan disentitled her from claiming her beneficial entitlement to the transferred property was upheld by the New South Wales Court of Appeal.[67] The presumption of advancement was equally applicable in transfers from mothers to their children and Mrs. Nelson could not adduce evidence of illegality to rebut the presumption. However the High Court, giving judgment in November 1995, overturned this decision. In doing so, the senior Australian appellate court did not follow *Tinsley v Milligan.*

"The Court is unanimous in holding that *Tinsley v Milligan* was misguided in making the outcome in the case dependent on the presumptions. The matter is one of policy, and not to be approached on such a technical basis. It is disingenuous to ignore the underlying illegal element in the case of the presumption of resulting trust, but not in the case of the presumption of advancement. Arguments concerning who has to give evidence of what, and when a party has to rely on an illegal aspect in a transaction, then lose their significance. The Court is also unanimous in thinking that it is not appropriate to adopt a rigid rule to deal with the varied questions of entitlement and enforcement that can arise when transactions contain an illegal element. Quite a number of matters need to be taken into consideration before a decision is reached, and the minority in *Tinsley v Milligan* was being simplistic in treating the matter as if it were just one of clean hands."[68]

The advantage of *Tinsley v Milligan* is that the law outlined in the case is easy to understand and apply. Consideration of a host of policy matters in the light of the facts of any given case will, it might be thought, lead to discretion and its ever present friend uncertainly. But is this necessarily true? In many areas judges must consider an extensive list of factors in coming to a decision; one need only cite the matters which need to be taken into account when considering ancillary relief. This has not caused family law to degenerate into discretion. However, needless to say, whilst not followed in the antipodes, *Tinsley v Milligan* remains the law of England and Wales.

Rebutting the Presumption

There is, given the above discussion, little doubt about the importance of the presumptions of resulting trust and advancement in cases of illegality. At first blush this seems to fly in the face of well known judicial pronouncements on the minor significance in modern times of these presumptions. However, that the renewed importance of the presumptions is in all probability confined to cases of illegality has been demonstrated by the English Court of Appeal in *McGrath v Wallis.*[69] In this case a father sold his former home and bought a smaller (but more expensive)

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[67] (1994) 33 N.S.W.L.R. 740; (1995) 132 A.L.R. 133.

[68] This synopsis of the judgment is a direct quotation from an unpublished paper given by J.D. Davies at the *Trends in Contemporary Trust Law Conference*, University of Cambridge, January 1996.

[69] [1995] 2 FLR 114

house for himself and his son to live in. The new house was conveyed into the son's sole name as the father was unemployed and it was considered that he would not obtain a loan to discharge the balance of the purchase price. After the father's death his daughter claimed to be entitled to a substantial share of the value of the new property arising by way of resulting trust to the father's estate.

At first instance the presumption of advancement was applied and the son was granted absolute beneficial ownership of the property. Giving the sole judgement of the Court of Appeal, Nourse LJ, overturned this decision. Of most significance was his Lordship's observations on the presumptions:

"Ever since the decision in *Pettitt v Pettitt,*[70] it has been my understanding that, in its application to houses acquired for joint occupation, the equitable presumption of advancement has been reclassified as a judicial instrument of last resort, its subordinate status comparable to that of the *contra proferentem* rule in the construction of deeds and contracts: ... For myself, I have been unable to recollect any subsequent case of this kind in which the presumption has proved to be decisive, even where one of the parties has since died. But here in a contest between a son and the estate of his deceased father, the decision below has been squarely based on a presumed intention of the father to make a gift of the house to the son."[71]

The view of their Lordships in *Pettitt* applies equally to a case of father and son and in the instant case the presumption could be rebutted by comparatively slight evidence.[72]

Resulting Trusts

It is now well established that in order to claim an interest in property, a non legal title holder must show that there was agreement between or 'common intention' shared by himself and the legal title holder as to the existence and extent, of his beneficial ownership.[73] Common intention may be manifested by oral representations of the legal title holder.[74] In the absence of a *constructive trust* arising from such express agreement, a claimant who has made money contributions at the time of purchase of the property, or shortly thereafter, may set up an interest in reliance on these payments. In *Lloyds Bank v Rosset,* Lord Bridge of Harwich indicated that it was extremely doubtful that *indirect contributions* by themselves, in the absence of bargain or

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[70] [1970] AC 777.
[71] [1995] 2 FLR 114, 115a-c.
[72] [1995] 2 FLR 114, 122a-c.
[73] *Lloyds Bank v Rosset* [1990] 1 All ER 1111; *Pettitt v Pettitt* [1969] 2 W.L.R. 966; *Gissing v Gissing* [1970] 3 W.L.R. 255.
[74] *Lloyds Bank v Rosset* [1991] A.C. 107, Such express agreement will be enforced in the case of land in the absence of formalities if the claimant has acted to his detriment in reliance on of the representation or bargain. In such cases detriment need not entail a direct monetary contribution to the purchase of the property although the type of behaviour which qualifies as detriment remains unhappily uncertain. See: Gray, *Elements of Land Law* (2nd ed, 1993) at pages 425 - 432. Moffat *Trusts Law Text and Materials* (2nd ed, 1994) at pages 453 - 456.

agreement, would be sufficient.[75] Although, Lord Diplock in an oft-quoted passage in *Gissing v Gissing*[76] disavowed the significance of the distinction between resulting, implied or constructive trusts, if the dictum of Lord Bridge in *Rosset* is good law,[77] it seems that conduct, in the absence of discussion, can only be taken into account under an orthodox purchase money resulting trust[78]. In *Midland Bank v Cooke*[79] the English Court of Appeal examined whether, in the absence of any actual 'agreement' as to the extent of the beneficial interest, the resulting interest must be proportional to the contribution to the purchase of the property by the non legal title holder.

In this case the husband and wife had purchased their home at the time of their marriage in 1971 for £8,500 of which £6,540 was provided by way of mortgage from a building society. The balance of the purchase price and costs was paid in cash provided as to £1,000 by the husband out of his savings and the remainder of £1,100 as a gift to the couple by the husband's parents. Legal title to the property was vested in the husband's sole name. In June 1978, the husband replaced the building society mortgage by a general mortgage in favour of the Midland Bank to secure repayment of the money outstanding on the original mortgage and to secure repayment on demand of the business overdraft of his small company. The bank sought the wife's waiver of any equitable right she may have had in the property. It was common ground before the Court of Appeal that in signing such waiver she was subject to her husband's undue influence.

Throughout the marriage the wife had worked full-time as a teacher save for brief spells of part-time work at the time of the birth of her children and, whilst she did not directly discharge any mortgage instalments, her income went to defray household expenses. Evidence was heard that at the time of acquisition or shortly afterwards the couple had not discussed or agreed the terms upon which the property was to be owned.

At the trial of the mortgagee's action for possession, the County Court Judge held that the wife had made a direct contribution to the deposit arising from her half share in the gift of her parents in law at the time of the wedding[80]. On this basis she was held to be entitled to a beneficial interest of 6.4% of the value of the property, that being the proportion borne by her half of the wedding gift (£550) to the total cost of £8,500. The wife appealed, claiming a larger share, and the bank cross-appealed.

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[75] *Lloyds Bank plc v Rosset* [1991] 1 A.C. 107, 133. [1990] 1 All E.R. 1111, X . Hanbury & Martin *Modern Equity* (14th ed) 266; *Ivin v Blake* [1995] 1 FLR 70, 83; *McFarlane v McFarlane* [1972] NI 59.

[76] [1970] 3 W.L.R. 225, 207E-F; [1970] 2 All E.R. 780, 790a-b. See also: *Tinsley v Milligan* [1993] 3 W.L.R. 126, 148; [1993] 3 All E.R. 65, 87 *per* Lord Browne-Wilkinson.

[77] For the view that Lord Bridge failed to acknowledge earlier authorities recognising the fact that non-direct financial contributions are often vital to enable the legal owner to purchase the property see: Graham Moffat, *Trusts Law Text and Material* (2nd ed) 465. See also: (1991) 54 M.L.R. 126, (Gardner).

[78] See: Gray *Elements of Land Law*, 2nd ed, at 431; [1991] N.I.L.Q. 238 (P.O'Hagan).

[79] [1995] 4 All E.R. 562.

[80] *McHardy & Sons (a firm) v Warren* [1994] 2 FLR 338.

In *Midland Bank v Cooke* the court was asked to determine whether the proportion of the wife's beneficial interest should to be fixed solely by reference to the percentage of the purchase price which she *directly* contributed, so as to make all other conduct by her irrelevant.

In giving the sole judgment of the court, Waite LJ held that having shown *some* direct contribution it was open to the court to calculate the extent of her beneficial interest otherwise than in proportion to that direct initial contribution. In such a case the court must scrutinise the whole course of dealings between the parties. Waite LJ stated:

"That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that search proves inconclusive does the court fall back on the maxim that 'equality is equity'."[81]

This is a significant decision as the preponderance of previous English authority had indicated that the resulting interest *is* proportional to the cash sum contributed[82] as any other way would require the court to give an opinion as to what the property interest *should be* in all the circumstances rather than to make a finding on the evidence as to what they were.[83]

In Cooke, there was evidence that there had never been any agreement or common intention between the husband and wife. Can an agreement be attributed by inference of law to parties who have expressly stated that they have reached no agreement? Was the court at liberty to infer agreement in its declared absence? Deciding this question on policy grounds, Waite LJ indicated that the court could infer such agreement. The learned Lord Justice of Appeal observed:

"There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous against that background, to create a range of home-buyers who were beyond the pale of equity's assistance in formulating *a fair presumed basis* for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it."(emphasis added).

This is perhaps the most controversial aspect of Waite LJ's decision. In *Pettitt v Pettitt* the minority opinions of Lords Reid and Diplock that a fair intention could be imputed in its absence

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[81] [1995] 4 All ER 562, 574d-f.

[82] *Pettitt v Pettitt* [1969] 2 W.L.R. 966B-C, [1969] 2 All E.R. 385, 406d, *per* Lord Upjohn: *Gissing v Gissing* [1970] 3 W.L.R. 255, 259H-260B, [1970] 2 All E.R. 780, 782j to 783a *per* Lord Reid; *Williams & Glynn v Boland* [1980] 3 W.L.R. 138, 141E-G, [1980] 2 All E.R. 408, 411c-d *per* Lord Wilberforce; *Walker v Hall* [1984] FLR 126, 135-136: *Turton v Turton* [1987] 3 W.L.R. 622, 630G - 631A., [1987] 2 All E.R. 641, 648 d-f; *Springette v Defoe* [1992] 2 FLR 388. *Bernard v Joseph* [1982] Ch. 391, [1982] 3 All E.R. 162. However, Professor Kevin Gray has stated that "[t]he extent of the beneficial interest earned by [the claimant's] contribution is not necessarily proportional to the size of the contribution." See: *Elements of Land Law* (2nd edn, 1993) at page 391; see also: *Efstratiou, Glantschnig and Petrovic v Glantschnig* [1972] NZLR 594, 598; *Pearson v Pearson* [1961] VR 693, 699; *Re Whiteley and Whiteley* (1975) 48 DLR (3rd) 161 at 170 all cited by Professor Gray at page 391, fn 6.

[83] *Turton v Turton* [1987] 3 W.L.R. 622, 630F-H, [1987] 2 All E.R. 641, 648c *per* Nourse LJ.

were rejected by the majority. There is thus clear authority that courts are not at liberty to infer a common intention as to the *existence* of an interest in the non legal title holder.[84] Unfortunately Waite LJ did not discuss the issue and the absence of discussion will, it is suggested, provide scope for doubt in future cases.

Charity

For a gift to be charitable the purpose of it must come within one of the four heads of charity listed by Lord Macnaghten in *Income Tax Special Purposes Comrs v Pemsel,*[85] namely, 'trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement religion; and trusts for other purposes beneficial to the community'. The purposes of the particular trust must also be exclusively charitable in nature. In *Re Le Cren Clarke (decd)*[86] decided in November 1995, the High Court examined issues of exclusivity and had to determine whether faith healing came within the ambit of charity in equity.

Prior to her death in January 1992, Miss Le Cren Clarke, the testatrix, had been associated with the activities of a small religious healing movement, the centre of whose activities was her home. The activities of the group fell into two classes; healing sessions and religious services. The healing sessions took place twice or three times a week in a room which was set aside in Miss Le Cren Clarke's house and were public meetings in that anyone who had heard of the group and had been introduced was welcome to attend. The religious services, which were held weekly, were mostly confined to the working members of the group.

By cl 6 of her will dated 27 February 1991, the testatrix left her residuary estate, including her home, to the first two members of the movement and directed them to use the property 'to further the Spiritual Work now carried on by us together'. The executors and trustees of the will sought the court's determination of whether cl 6 of the will created a valid charitable trust. It was common ground that, lacking the requisite element of public benefit, the private services in themselves were not charitable and it was argued, on behalf of those who stood to take on failure of the charitable trusts, that the 'work' referred to in cl 6 included non charitable activities. Furthermore, it was contended that for faith healing to be regarded as charitable in law it must be shown to be in the public benefit. The 1923 decision of Russell J in *Re Hummeltenberg, Beatty v London Spirtualistic Alliance Ltd*[87] was relied on for the proposition that the requirement of public benefit could be fulfilled only if there were evidence that that the healing itself actually

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[84] *Pettitt v Pettitt* [1969] 2 W.L.R. 966, 992C-D, [1969] 2 All E.R. 385, at 408 c-d *per* Lord Upjohn, *Gissing v Gissing* [1970] 3 W.L.R. 255, 261B-C, [1970] 2 All E.R. 780, 784 a-b *per* Lord Morris, [1970] 3 W.L.R. 255, 263C-D, [1970] 2 All E.R. 780, 786 a-b *per* Viscount Dilhorne, [1970] 3 W.L.R. 255, 266H-267A, [1970] 2 All E.R. 780, 789 d-e *per* Lord Diplock. In *McFarlane v McFarlane* [1970] NI 59, Lord MacDermott L.C.J. in the Northern Ireland Court of Appeal would not allow inclusion of indirect contributions, observing: "If the indirect contributions of a spouse for family purposes were to be put on an equality with direct contributions in order to ascertain the resulting beneficiary proprietary interests it would result ... [in] the now discredited doctrine of family assets." See also: *Re Densham* [1975] 1 W.L.R. 1519, 1524E-F, [1975] All E.R. 726, 731h *per* Goff J.

[85] [1898] AC 531 at 583.

[86] [1996] 1 All ER 715.

[87] [1923] 1 Ch 237 esp at 341.

worked. The testatrix's belief that it worked is, it was contended, irrelevant. Hazel Williamson QC sitting as a deputy judge of the High Court did not accept either argument. The private element of the religious services were ancillary or subsidiary to the public faith healing part of the group's work, which was the predominant function. The raison d'être of the group was the spiritual healing work it did for members of the community. The mere existence of a non-charitable purpose, even as an object of an organisation which is claiming to be a charity, does not necessarily render the objects non charitable. The test is whether the non charitable element exists for the furtherance of the charitable purpose.[88]

The learned deputy judge went on to consider whether faith healing is in itself charitable. Counsel for the Attorney General, 'appearing in favour of charity'[89] had argued that faith healing had become recognised as a charitable purpose without any religious element being included.[90] The most noteworthy aspect of this decision is the learned judges' acceptance of this argument. Hazel Williamson QC stated:

"I accept [Counsel's] argument that it is charitable, and I so hold either on the basis that faith healing has by the present time (although this would not necessarily have been the case in 1923 when *Re Hummeltenberg* was decided) become a recognised activity of public benefit, or in any event, on the basis that the religious element in the present case, and the religious nature of the faith healing movement in question, renders this work a charitable purpose within which a sufficient element of public benefit is assumed so as to enable the charity to be recognised by law as being such unless there is contrary evidence. There is no such contrary evidence."

Election

The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the several remedies sought are alternative and inconsistent such as a claim for an account of the profits made by a defendant in breach of his fiduciary obligations and damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss. When faced with alternative and inconsistent remedies the plaintiff cannot have both and must elect between them. In *Tang Man Sit (decd.) v Capacious Investments Ltd.*[91] the Privy Council on an appeal from Hong Kong handed down an important dictum as to the time and circumstances when election must be made by a plaintiff.

Mr. Tang, by deed of March 1982, had agreed with the plaintiff company that he would transfer 16 houses to the plaintiff. No assignment was executed, however, it was not disputed that from the date of agreement the plaintiff was the equitable owner of the houses. In breach of trust, Tang

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[88] See *A-G v Ross* [1985] 3 All ER 334, where there was a clearly non-charitable element in the constitution of a students' union which otherwise could claim to be a charity.
[89] [1996] All ER 715, 719a-b.
[90] The Report of Charity Commissioners 1975 was cited to the court as was *Re Kerin (decd)* (1966), *The Times* 24 May 1966, *per* Goff J.
[91] [1996] 1 All ER 193.

had let out the properties over several years and by the early 1990's the houses were not in a good state of repair due to the "extraordinary over-use"[92] of the development. Houses intended for two or three people had been occupied by up to thirteen people; the houses had not been designed for such use and had deteriorated badly.

In 1991, the plaintiff commenced proceeding against Tang's personal representative claiming, inter alia, (i) an account of all secret profits in respect of the use and letting of the houses, and, (ii) damages for breach of trust. On 25 August 1992, the plaintiff obtained order for summary judgment of its claim for an account of all secret profits. In addition, *at the same time,* the trial judge made an order for "damages for breach to be assessed." In June 1993, the defendant paid the plaintiff more than HK$1.8m. Meanwhile the plaintiff had been taking steps to proceed with the assessment of damages. The plaintiff's claim was made under two heads; head A was for damages for loss of use and occupation of the houses, comprising loss of market rental. As later amended the amount claimed was almost HK$8.6m. The amount paid in respect of accounts of profits HK$1.8m was then deducted. Head B was a claim for HK$14m as damages in respect of loss caused by the diminution in value of the property due to the wrongful use and occupation and for the property having been wrongfully encumbered by the tenancies. At a hearing in July 1993, a Master of the High Court of Hong Kong assessed damages, under both heads A and B in a sum just short of HK$17m.

The Court of Appeal of Hong Kong held on appeal that, having received payment of in excess of HK$1.8m on account of the profits from the letting of the houses, the plaintiff could not thereafter claim compensation for being kept out of possession of the houses as it had made its election between two inconsistent remedies. The defendant appealed to the Privy Council and the plaintiff cross-appealed.

Giving the Opinion of the Board, Lord Nicholls observed that as a basic principle the plaintiff is required to choose when judgment is given in his favour and the judge is asked to make orders against the defendant *but not before.* Lord Nicholls stated:

"A plaintiff is not required to make his choice when he launches his proceedings. He may claim one remedy initially, and then by amendment of his writ and his pleadings abandon that claim in favour of the other. He may claim both remedies as alternatives. But he must make up his mind when judgment is being entered against the defendant ... In the ordinary course, by the time the trial is concluded a plaintiff will know which remedy is more advantageous to him. By then, if not before, he will know enough of the facts to assess where his best interests lie. There will be nothing unfair in requiring him to elect at that stage. Occasionally this may not be so. This is more likely to happen when the judgment is a default judgment or a summary judgment than at the conclusion of the trial. A plaintiff may not know how much money the defendant has made from the wrongful use of his property. It may be unreasonable to require the plaintiff to make his choice without further information."[93]

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[92] [1996] 1 All ER 193, 202j.
[93] [1996] 1 All ER 193, 197j, 198 b-c.

Therefore, whilst justice borne of finality will usually require the decision to be made when judgment is entered the principle is not rigid and unbending and will depend on all the circumstances. "Election though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity."[94] In the instant case 'matters went awry' at the time of summary judgment on 25 August 1992, because the plaintiff had not been required at that time to elect. Because the matter had not occurred to either the judge or the parties the order had given the plaintiff both remedies when the plaintiff should have been required to choose which it would take. If it chose an account of profits, it could have damages only so far as, on the facts of this case, an award of damages was not inconsistent. In fact no discussion had taken place on the point and there was not therefore an election. As Lord Nicholls observed:[95]

"In these unusual circumstances it would make no sense to treat receipt of [the $1.8m] as an election by the plaintiff for an account of profits and against damages. To treat receipt of this payment as an election would lack a rational basis [and]...would also be extremely unfair to the plaintiff."

The Effect of an Election for an Account

The letting by Tang of the 16 houses, in breach of trust, involved an intensive use of these properties with an unusually high degree of wear and tear. This loss was sued for under head B in the plaintiff's claim. Before the Privy Council the defendant argued that the plaintiff's election to accept the remedy of account of profits and take the defendant's receipts meant that it could not at the same time complain of the lettings and obtain damages in respect of the adverse incidents of the lettings. In short, the plaintiff might take the financial return from the lettings, accepting everything inherent in the letting, or reject the tenancies and claim damages. However, it could not have the profits without the drawbacks attendant on the means whereby the profits were earned. Since the plaintiff had elected to take an account of profits, it was barred from pursuing any claim for capital damages based on the existence of the lettings or the terms of the lettings or on the inevitable consequences of the lettings. This argument was not successful before the Hong Kong Court of Appeal which, although holding that the plaintiff had elected for account and could not therefore claim damages under head A, nonetheless did permit damages for 'capital loss' under head B. Because the Privy Council found that there had not been an election, no view was expressed on the validity of the argument that a claim for account precluded a claim for damages for capital loss. The decision of the Court of Appeal for Hong Kong thus remains good law and persuasive authority on the point.[96]

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[94] *Johnson v Agnew* [1979] 1 All ER 883, 894 *per* Lord Wilberforce, quoted with approval by Lord Nicholls [1996] 1 All ER 193, 198f-g.

[95] [1996] 1 All ER 193, 201-202.

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Equitable Relief in Security Transactions

Restitution, Contract and Relief

In the case of money paid under a contract where there is a total failure of consideration, as may occur in the case of a contract discharged for breach,[1] the party paying over the money has an action in restitution to recover the money paid, whether paid to the other party, his agent or a stakeholder. The clearest example would be when an intending purchaser pays one instalment of the price but is unable to make the remaining payments and the contract is validly rescinded by the other party: the instalment may be recovered in an action for money had and received, although the innocent party retains his contractual action in damages for breach of contract.[2] The parties may contract out of the restitutionary remedy by specifying that the sums already paid over cannot be recovered in the event of default; this is effective to bar restitution but the provision may be attacked through equitable principles of contract law allowing relief to the party in breach of contract, discussed below. An alternative view[3] is that if there is a contractual provision barring restitution the consideration does not fail and there is therefore no ground for restitution. It has also been suggested[4] that the equitable relief is itself a restitutionary measure, "triggered by the unjust factor of inequality or a miscellaneous policy ground."[5] If no money is paid over but the contract gives as a security the right for the creditor to demand the transfer of money, no action in restitution is appropriate and the creditor may bring an action in contract for enforcement of the term, once again subject to the equitable principles of contract law giving relief to the debtor. The remainder of this paper will consider examples of the type of transaction to which that equitable relief applies and the nature of the equitable relief in particular cases, with specific reference to the conditional option to purchase.

1. Equitable Right to Redeem

At common law, if a mortgage provided an appointed time for fulfilment of the obligation secured, then on non-payment at the specified time, the estate or interest vested in the mortgagee ceased to be capable of redemption at law. Because of the obvious scope for the creditor to obtain a windfall when the estate far exceeded the value of the fulfilment of the obligation, equity provided relief for the obligor; the purpose of the mortgage was regarded by equity as merely the provision of security for the obligation and so

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[1] The Fibrosa [1943] AC 32, Rover International Ltd v. Cannon Film Sales Ltd (No.3) [1989] 1 WLR 912, overruling Chandler v. Webster [1904] 1 KB 493.
[2] Eg. Dies v. British and International Mining and Finance Corpn [1939] 1 KB 724.
[3] P.Birks "An Introduction to the Law of Restitution" pp.235-8.
[4] Ibid., pp.213-6; contra A.Burrows "The Law of Restitution" p.204 n.18, preferring to regard relief as based on contractual doctrine.
[5] A.Burrows "The Law of Restitution" p.273, n.20.

redemption of the estate or interest was permitted even after the contractual date had passed, although the relief would only be available on terms to safeguard the mortgagee, which in the case of a monetary obligation would be that the mortgagor pay interest from the contractual date until actual redemption.

At any time after the day appointed for redemption by the contract, the mortgagee may bring an action for foreclosure to determine the mortgagor's right of redemption. It is long established that equity will not make a foreclosure decree absolute until the mortgagor has had a reasonable time after the contractual date of redemption to remedy his default. After making a foreclosure decree nisi the standard period of time before making the decree absolute is six months, the mortgagor having liberty to apply for an extension.[6] The six months is reckoned from the date of the Master's certificate determining the amount of the debt; on the application of the mortgagor that period may be extended at the discretion of the court.[7] Once the final date for redemption has arrived without payment, foreclosure is made absolute but even after the decree absolute is made, it is susceptible to re-opening in favour of the mortgagor in a redemption action. Several applications for consecutive extensions may even be entertained if good cause is shown.[8]

If the mortgagee refuses to accept performance of the mortgagor's obligations after the contractual date of redemption, the mortgagor may bring a redemption action which will be successful in equity if the delay of the mortgagor has not been unreasonable; in the absence of special circumstances, six months is the appropriate period[9] as in foreclosure actions. In redemption actions, there appears, however, to be no further relief beyond the six month period allowed, unlike foreclosure.[10]

In England, a further form of statutory relief is available under s91 Law of Property Act 1925 (but only available if the mortgage secures money or money's worth):[11] in foreclosure proceedings, the court has a discretion to direct a sale instead of foreclosure so the creditor only receives the value of the debt out of the proceeds, the remainder being held in trust for the mortgagor. This jurisdiction is generally exercised if it would prevent a windfall occurring to the mortgagee at the expense of the mortgagor[12] but declined when the property will not cover the debt.[13]

In the exercise of other remedies under a mortgage, including sale, taking of possession in order to carry out a sale, and appointment of a receiver, the mortgagee attempts to realise the security merely to recover the debt due or the monetary value of the obligation owed by the mortgagor, so no question arises of the mortgagee obtaining any advantage over

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[6] Fisher & Lightwood "Law of Mortgage" 10th ed., E.L.G.Tyler, p.428.
[7] Campbell v. Holyland (1877) 7 Ch D 166.
[8] Anon (1740) Barn Ch 221, Edwards v. Cunliffe (1816) 1 Madd 287.
[9] Platt v. Mendel (1884) 27 Ch D 246, 248 per Chitty J.
[10] Novosielski v. Wakefield (1811) 17 Ves 417; Faulkener v. Bolton (1835) 7 Sim 319.
[11] S.205(1)(xvi) Law of Property Act 1925.
[12] Twentieth Century Banking Corpn Ltd v. Wilkinson [1977] Ch 29.
[13] Lloyd's Bank Ltd v. Colston (1912) 106 LT 420.

the value of the obligation owed. Relief against enforcement of the security in these cases is therefore limited and based on other matters, such as protection of residential occupation[14] and ensuring that the mortgagee acts in good faith and reasonably.[15]

In Santley v. Wilde[16] Sir Nathaniel Lindley MR gave the classical description of a mortgage as a "conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given." It is clear that a legal mortgage requires a transfer of title in the land to the mortgagee and, according to Fisher & Lightwood,[17] an immediate right to possession. Even if it appears from the face of the instrument that the conveyance is absolute, equity will nevertheless provide relief if the true bargain of the parties was that the transfer of title was only intended as a security and that the estate should be reconveyed on redemption.[18] Equitable mortgages, by contrast, arise when a person enters into a contract to create a legal mortgage over his property, or, being entitled to only an equitable interest in property, assigns that interest with a proviso for cessser on redemption.[19] The remedies are similar to those available to a legal mortgagee except for the right to possession, and the forms of relief available are the same.

The equitable charge has been described as an appropriation of specific property to the discharge of some debt or other obligation without there being any transfer of possession or ownership at law or in equity.[20] If land is expressly charged with a fixed sum of money, payable on an appointed day, the chargee is enabled to use the land as security for the recovery of that sum alone. Since the chargee does not have ownership in any sense of the property, there can be no remedy analogous to the termination of the proviso for cesser on redemption, and the main remedy for a chargee is to apply to the court for sale of the property charged.[21]The absence of foreclosure as a remedy explains why a chargor does not receive the same equitable relief against redemption as a mortgagor. The reduced relief for the chargor is as follows: the court's order in a sale action pursuant to an equitable charge generally specifies only three months for the chargor to comply with his obligations,[22] although immediate sale may be ordered if the property is of low value and inadequate to cover the debt,[23] and no possibility of reopening a proper sale is

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[14] Eg. Hinckley and South Leicestershire Permanent Benefit Building Society v. Freeman [1941] Ch 32; s.36 Administration of Justice Act 1970.
[15] Eg. Cuckmere Brick Co Ltd v. Mutual Finance Ltd [1971] Ch 949.
[16] [1899] 2 Ch 474.
[17] Fisher & Lightwood "Law of Mortgage" 10th ed., E.L.G.Tyler, p.5.
[18] Re Watson ex parte Official Receiver in Bankruptcy (1890) 25 QBD 27; England v. Codrington (1758) 1 Eden 169, 28 ER 649.
[19] Megarry & Wade "The Law of Real Property" 5th ed., pp.926-7; Swiss Bank Corpn v. Lloyd's Bank Ltd [1980] 2 All ER 419, 426 per Buckley LJ.
[20] London County and Westminster Bank v. Tompkins [1918] 1 KB 515, 528; Fisher & Lightwood "Law of Mortgage" 10th ed., E.L.G.Tyler, p.4; Megarry & Wade "The Law of Real Property" 5th ed., p.929.
[21] Matthews v. Goodday (1861) 31 LJ Ch 282, Tennant v. Trenchard (1869) 4 Ch App 537, Garfitt v. Allen (1888) 37 Ch D 48, In re Owen [1894] 3 Ch 220.
[22] Green v. Briggs (1885) 52 LT 680.
[23] Oldham v. Stringer (1884) 33 WR 251.

admitted. The relief available to a debtor should not be based solely on the type of security granted, but should also depend on the remedy sought by the creditor; in the case of foreclosure, accompanied by the possibility that the value of the property exceeds the debt, it is right to permit a greater degree of relief than in the case of a sale where the creditor must account for the surplus.

2. The Equitable Rule Against Penalties

The rule is stated in Photo Productions Ltd v. Securicor Transport Ltd:[24] a contract "must not impose on the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation." A transaction which purports to impose on a debtor an obligation to transfer property to the creditor in default of payment of the debt falls precisely within the definition of penalty if the value of the property transferrable or retainable on breach is not a "genuine pre-estimate of the loss which the innocent party will incur by reason of the breach."[25]

The rule against penalties applies not only to monetary payments on breach but also other transfers of property on breach. In Jobson v. Johnson[26] the vendor agreed to transfer company shares to the defendant in return for an immediate payment of £40,000 plus six subsequent instalments of £51,948. If the defendant defaulted on the payment of the second or any subsequent instalment, he was required to transfer the shares back to the vendors for the sum of £40,000. The defendant did default in the payments after having paid a total of £140,000, and the vendor's assignee sought specific performance of the agreement to retransfer the shares for £40,000. The Chancery Division held that there was no distinction between a penalty which required the payment of money and a penalty which required the transfer of property, and the retransfer clause was a penalty. This part of the decision was not challenged on appeal but the Court of Appeal approved it and held that appropriate relief be given to the defendant. "The defendant was to be punished for any default by being bound to retransfer the shares to [the plaintiff] at a fixed price which was bound to be less, and could have been much less, than the defendant had paid."[27]

In England, the appropriate relief in the case of a penalty is not further time for the defaulter to comply with his obligations as in the case of the equitable right of redemption, but rather the court "must refuse to enforce the penal part of the sum and must give judgment for the claimant merely for the actual damages suffered by the

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[24] [1980] 1 All ER 556, 567 per Lord Diplock.
[25] Workers Trust and Merchant Bank Ltd v. Dojap Investments Ltd [1993] 2 All ER 370, 373. See also Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd [1915] AC 79.
[26] [1989] 1 All ER 621.
[27] Per Dillon LJ at 628.

claimant, with, as appropriate, interest and costs."[28] It is suggested that the doubts expressed by Kerr LJ have little foundation in the cases.[29] This view was shared by the Privy Council in Workers Trust and Merchant Bank Ltd v. Dojap Investments Ltd.[30] Here, a contract for the sale of land went off due to the purchaser's default, the deposit of 25 per cent. paid by the purchaser was held to be a penalty, and it was ordered that the deposit be returned in full except for a sum sufficient to cover the vendor's actual losses. This rule against penalties was held in Jobson v. Johnson to be automatic rather than discretionary, not being dependent on hardship, unreasonableness or unconscionability, a feature which was said[31] to differentiate it from the distinct principle of equitable relief against forfeiture.[32]

One of the difficulties with the rule against penalties is the nature of the relief in cases where the property is not money. If it is money which forms the subject matter of the penalty it is simple enough to order the return of the money with a deduction for actual losses flowing from the breach of the primary obligation. If the subject matter is other property, the appropriate order is to be found in the majority decision of the Court of Appeal in Jobson v. Johnson. The court here made available to the innocent party two alternative forms of relief: (a) an order for the sale of the property by the court and payment out of the proceeds of sale to be made to the innocent party to the extent of his actual losses, or (b) an inquiry into the value of the property and if the value did not exceed the amount of the innocent party's actual losses (deducting the consideration payable on exercising the right to demand retransfer) then an order for specific performance of the retransfer of the property. If the innocent party declined to accept either form of relief then no specific performance would be granted by the court and he would be left to sue for damages for breach of the primary obligation.

3. Equitable Treatment of Collateral Advantages and Unconscionable Bargains

Aside from any question of an unlawful security, equity had refused to enforce any part of a contract for the loan of money which stipulated for the benefit of the lender a "collateral advantage which would make his remuneration for the loan exceed a proper rate of interest."[33] The rule was that "a man shall not have interest for his money and a collateral advantage besides for the loan of it"[34] and so redemption would be allowed without the borrower's compliance with the terms bestowing the further advantages. Even after the Usury Laws Repeal Act 1854, this strict rule influenced the policy of equity so that unconscionable bargains and all collateral advantages were struck down, and it was

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[28] Per Dillon LJ at 627.
[29] See "Equitable Relief: Penalties and Forfeitures" [1989] 370, 372 (C.Harpum).
[30] [1993] 2 All ER 370.
[31] Per Dillon LJ at 627.
[32] Discussed below.
[33] Kreglinger v. New Patagonia Meat and Cold Storage Co Ltd [1911-13] All ER Rep 970 at 974 per Viscount Haldane LC.
[34] Jennings v. Ward (1705) 2 Vern 520; 23 ER 406.

not until Kreglinger v. New Patagonia Meat and Cold Storage Co Ltd[35] that the House of Lords, confirming Biggs v. Hodinott[36] in the Court of Appeal, departed from the strict rule and allowed enforcement of collateral advantages unless there was some separate reason to prevent enforcement. The present rule against collateral advantages in its attenuated form was developed in the context of collateral advantages included as terms of a mortgage, but the cases show that the same principle applies to a loan agreement where no security is involved.

In Kreglinger there was a floating charge in favour of the lenders to secure the repayment of money and further provision that the lenders had a right of pre-emption over certain goods of the borrowers and a commission of one per cent on all of such goods sold to anyone else. The House of Lords stated that the rule of equity against collateral advantages in securities originated in the public policy against usury[37] and that after the shift in policy away from the old law of usury, there was no longer a justification for holding collateral advantages always unenforceable. It was therefore held that mortgages to secure money should be put on the same footing as mortgages to secure other obligations which had never been subject to the policy against usury; in the latter type of mortgage, the collateral advantage would be enforced unless it was impeachable for other reasons, in particular on one of the following three grounds: the advantage was unconscionable, the advantage was a clog on the mortgagor's right to redeem, or the advantage was otherwise inconsistent with or repugnant to the right to redeem.

Although enforcing a collateral advantage to the lender which would formerly have been unenforceable for usury, the House felt there remained adequate safeguards in equity for a debtor: "Borrowers of money were fully protected from oppression by the pains always taken by the Court of Chancery to see that the bargain between borrower and lender was not unconscionable"[38] and this principle was not affected by the change in policy made by Kreglinger. Even after the decision, the courts refused to uphold a collateral advantage which it would be unconscionable for the lender to enforce. The later cases show that the principle of unconscionability is as applicable to unsecured monetary loans as it is to mortgages to secure a loan of money, although the other two grounds on which a collateral advantage is unenforcable, namely for repugnancy or clogging the right to redeem, can only be applicable in the cases of a security being taken. Since Kreglinger, collateral advantages in unsecured loans have been considered in the cases, but only seldom, since the equitable rule has been substantially superseded in England by statutory powers, principally under the Consumer Credit Act 1974 and, formerly, the Moneylenders Acts.

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[35] Kreglinger v. New Patagonia Meat and Cold Storage Co Ltd [1911-13] All ER Rep 970.
[36] Biggs v. Hodinott [1898] 2 Ch 307.
[37] Chambers v. Goldwin 9 Ves 254. New Patagonia Meat and Cold Storage Co Ltd [1911-13] All ER Rep 970, 984 per Lord Parker.
[38] At 984.

One of the types of collateral advantage considered by the courts in secured and unsecured loans has been the premium or bonus, Cityland & Property (Holdings) Ltd v. Dabrah[39] providing the clearest recent example. Dabrah borrowed £2,900 from the plaintiff company to purchase the freehold of his home which he had previously leased from the same company. He covenanted to repay £4,553 in monthly instalments over six years and there was no provision for the payment of interest. An acceleration clause was included in the agreement.[40] When Dabrah defaulted in repayment, the company sought possession and sale to recover the covenanted sum; Dabrah's defence was that the premium was an unconscionable collateral advantage to the company. Some earlier cases concerning penalties were considered by the court, but to the extent that they suggested that a premium could never be maintained those cases were regarded as conflicting with the more recent decision of their Lordships in Kreglinger.[41] Applying the principle enunciated in Kreglinger, the Chancery Division held that there was no absolute rule striking down premiums as a form of collateral advantage, but on the facts the premium was unconscionable and the company could only recover the sum actually loaned and interest at a fair rate (fixed at 7%) minus the repayments already made. In reaching the conclusion that the agreement was unconscionable or unreasonable, the court considered the following matters. Dabrah was a man of obviously limited means seeking to buy his own house. The rate of interest equivalent to the premium was high; spread over six years, the equivalent rate was 19% per annum. If the acceleration clause was operated on the date of Dabrah's default, as the company contended, the full premium was payable; the equivalent interest rate in that case being 38% per annum. Furthermore, the security was insufficient to cover the covenanted sum, but if the property was sold to recover only the sum actually loaned with fair interest, there would have been a surplus for Dabrah.

Other cases have shown that a premium is unlikely to be unconscionable or unreasonable[42] if there is equality of bargaining power, the premium is merely an approximate capitalisation of a fair interest rate,[43] the security is hazardous,[44] or if the lender is hedging against inflation by index-linking repayments to a foreign currency[45] or the cost of living.[46] If the borrower is borrowing in a personal and not commercial capacity, equity may be especially sensitive to premiums; if the lender knows that the borrower, being a minor at the time of the first loan, cannot repay the loans, but lends in anticipation of the borrower's father discharging the debts to avoid the borrower's bankruptcy, the premiums are unlawful.[47]

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[39] [1968] Ch 166.
[40] Not in itself a penalty or forfeiture: Protector Loan Co v. Grice (1880) 5 QBD 529. Aliter if it accelerates interest on the outstanding sum: The Angelic Star [1988] 1 Lloyd's Rep 122.
[41] At 176 per Goff J.
[42] Although Goff J in Cityland & Property (Holdings) Ltd v. Dabrah [1968] Ch 166 used "unreasonable", the correct test was held to be unconscionability in Multiservice Bookbinding Ltd v. Marden [1979] Ch 84.
[43] Cityland & Property (Holdings) Ltd v. Dabrah [1968] Ch 166, Mainland v. Upjohn (1889) 41 Ch D 126.
[44] Potter v. Edwards (1857) 26 LJ Ch 468.
[45] Multiservice Bookbinding Ltd v. Marden [1979] Ch 84.
[46] Nationwide BS v. Registrar of Friendly Societies [1983] 1 WLR 1226.
[47] Nevill v. Snelling (1889) 15 Ch D 679.

At first sight it may appear that the premium should be governed by the rule against penalties as the premium prescribes that the sum payable to the lender is greater than the sum taken by the borrower, which would be advantageous to the borrower in that the premium would be struck down without reference to unconscionability. The reason why the premium is not regarded as a penalty is because the payment of the premium is not a secondary obligation with which the borrower must comply on non-fulfilment of a primary obligation: payment of the premium is itself the primary obligation. The equity to have a collateral advantage set aside "is an equity which arises ab initio, and not only on failure to exercise the contractual right to redeem... It has nothing to do... with relief from penalties."[48]

4. Equitable Relief against Forfeiture

A possible conceptual distinction between penalties and forfeits is that property transferred as a security prior to breach is subject to relief against forfeiture whereas property that only becomes transferrable on breach is subject to the rule against penalties.[49] The mortgage may be seen as an example of forfeiture.[50] In the Cayman Islands the point seems to have been settled in favour of this simple conceptual dichotomy: in Beach Club Enterprises Ltd v. Horizon Management Ltd[51] the purchaser had entered into a contract to purchase a hotel and paid a deposit of $25,000 and a first instalment of $235,000 towards the purchase price. By clause 10 of the contract the vendor had an express power to forfeit and retain both deposit and first instalment. The purchaser committed a repudiatory breach, accepted by the defendant, and the purchaser sought to recover the first instalment. The Court of Appeal held that the first instalment did not constitute part of the deposit despite the forfeiture clause and the fact that the deposit and first instalment together amounted to ten per cent of the purchase price. Nevertheless, clause 10 enabled the vendor to forfeit both sums. The Court of Appeal drew a distinction between penalties and forfeitures, following Stockloser v. Johnson[52] in which Lord Denning MR had held that different principles applied to appropriation of moneys belonging to another party and retention of money paid over as a part payment. The sum forfeited in Beach Club was held not to have been a penalty since it had been paid prior to breach, therefore the only relief that could be claimed by the vendor was relief against forfeiture not relief against a penalty.[53]

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[48] At 983 per Lord Parker.
[49] Stockloser v. Johnson [1954] 1 QB 476; see G.H.Treitel "The Law of Contract" 8th ed., p.891.
[50] Shiloh Spinners Ltd v. Harding [1973] 1 All ER 90, Kreglinger v. New Patagonia Meat and Cold Storage Co Ltd [1911-13] All ER Rep 970; cf. Nicholls LJ in Jobson v. Johnson suggesting mortgages were a form of penalty.
[51] [1980-83] CILR 223.
[52] [1954] 1 All ER 639.
[53] Per Carey JA at 246-7, with whom Robinson P agreed. Criticised on this point in "Deposits as Penalties" [1993] CLJ 389, 391 (C.Harpum) and "Some Recent Developments in Conveyancing" (1995) 12 CILB 60, 63-64 (H.Wallace).

Other sources suggest that the definition of forfeiture is wider than that propounded in Stockloser; the House of Lords has said that forfeiture "has not been confined to any particular type of case"[54] and elsewhere forfeiture has been defined to include the "loss or determination"[55] of the guilty party's interest, implying that there need not necessarily be a retention of property already transferred to the party forfeiting. Furthermore, there is no need to draw a line between forfeitures and penalties since a contractual provision can be subject to both relief against forfeiture and the rule against penalties. In Jobson v. Johnson for example, the Court of Appeal said that a clause could be both a penalty and a forfeiture and relief would be available accordingly;[56] the equitable jurisdiction to give automatic scaling down of the penalty was not ousted and so the court was not limited to giving further time as relief against the forfeiture.[57] On the facts of Jobson v. Johnson, however, the plea for relief against forfeiture had been struck out and it had been accepted on appeal that the clause was a penalty. Nicholls LJ thought the clause to be "something of a hybrid" possessing features resembling a forfeiture[58] and indicated that since the arrangement was intended to operate as a security for the payment of money, relief would normally be available on terms that the party in breach pay the sums due plus interest within a reasonable time;[59] but the availability of this further time for compliance should not deprive the claimant of scaling down relief if the forfeiture also amounted to a penalty.[60] A similar statement was made by Dillon LJ.[61] More recently there is Workers Trust and Merchant Bank Ltd v. Dojap Investments Ltd[62] in which Lord Templeman, giving the advice of the Privy Council, said that a sum of money paid over prior to breach, which was susceptible to forfeiture, but more than a reasonable sum by way of earnest money, was a penalty and relief would be available in the same manner as for all penalties, namely an order for the restitution of the money with deduction for actual loss;[63] a similar decision in Commissioner of Public Works v. Hills[64] was expressly followed.

The only types of forfeiture which are not also relieved as penalties are where the money (or other property) paid over represents the proper consideration for the benefits already

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[54] Shiloh Spinners Ltd v. Harding [1973] 1 All ER 90, 100 per Lord Wilberforce; "Relief Against Forfeiture and the Purchaser of Land" [1984] CLJ 134, 140 (C.Harpum); Lord Goff & G.Jones "The Law of Restitution" 3rd ed., pp.471-475, G.H.Treitel "The Law of Contract" 8th ed., p.893.
[55] Legione v. Hateley (1983) 57 ALJR 292, 307 per Mason and Dean JJ. See "Forfeiture of Interests in Land" (1984) 100 LQR 427, 427-8 (A.G.Lang).
[56] Jobson v. Johnson [1989] 1 All ER 621 at 629 per Dillon LJ, at 634 per Nicholls LJ.
[57] In Jobson it was said that this had been applied in Commissioner of Public Works v. Hills [1906] AC 368.
[58] At 635.
[59] At 636.
[60] At 634.
[61] At 629.
[62] [1993] 2 All ER 370.
[63] At 708.
[64] [1906] AC 368.

taken, such as rent[65] or hire payments,[66] where the money or property is used to cover costs incurred by the innocent party,[67] and where the value of the property forfeited does not exceed the actual losses of the innocent party. On this basis, to interpret the statements in Beach Club Enterprises Ltd v. Horizon Management Ltd[68] and Stockloser v. Johnson[69] as deciding that relief against forfeiture is limited to cases in which the property is transferred prior to breach, and penalties are limited to property transferrable after breach, would be a departure from the current state of law in England. Following the English authorities, the right to demand transfer of property on breach is clearly a type of forfeiture; this is seen in the right of re-entry under the lease in Shiloh Spinners Ltd v. Harding and the obiter dicta concerning the option to purchase in Jobson v. Johnson. Further authority is provided by the decision of the Court of Appeal in Richard Clarke Ltd v. Widnall[70] in which, on non-payment of rent, the lessor had the choice of exercising either a right of re-entry or an option to terminate the lease on three months' notice. The court held that relief against forfeiture was available when the lessor exercised the option since the purpose of the option in these circumstances was merely a security for the payment of rent.

One limitation that has been imposed on the jurisdiction to relieve against forfeiture is that the relief is only available when the item forfeited is a proprietary or possessory right[71] contrary to the wider views of Lord Simon in Shiloh Spinners Ltd v. Harding[72] who argued that "equity has an unlimited and unfettered jurisdiction to relieve against contractual forfeitures and penalties." One illustration is the forfeiture of the interest in land which arises from a contract for the sale of land which is capable of specific performance. On breach of contract by the purchaser, for example by failing to pay the purchase money on time when time is of the essence, the contract may be rescinded by the vendor's acceptance of the purchaser's repudiatory breach; until the rescission occurs, and possibly afterwards also,[73] the court may grant relief against the forfeiture of the purchaser's equitable interest and permit the purchaser further time to make the payments with interest. This discharges the breach and re-opens the possibility of the purchaser

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[65] Shiloh Spinners Ltd v. Harding [1973] 1 All ER 90.
[66] The Scaptrade [1983] 2 All ER 763.
[67] Eg. Hyundai Heavy Industries Co Ltd v. Papadopoulos [1980] 1 WLR 1129, Hyundai Shipbuilding & Heavy Industries Co Ltd v. Pournaras [1978] 2 Lloyd's Rep 502, (1981) 97 LQR 389 (J.Beatson).
[68] [1980-83] CILR 223.
[69] [1954] 1 QBD 476.
[70] [1976] 3 All ER 301.
[71] The Scaptrade [1983] 2 All ER 763, BICC plc v. Burndy Corp Ltd [1985] Ch 232, Sport International Bussum BV v. Inter-Footwear Ltd [1984] 2 All ER 321, Crittall Windows Ltd v. Stormseal (UPVC) Window Systems Ltd [1991] RPC 265. See "The Scope of Equity's Jurisdiction to Relieve against Forfeiture of Interests in Property other than Land" [1994] JBL 372 (M.Pawlowski).
[72] [1973] 1 All ER 90, 104.
[73] Legione v. Hateley (1983) 46 ALR 1; Stern v. McArthur (1988) 62 ALJR 588; Kilmer v. British Columbia Orchard Lands [1913] AC 319 as interpreted in McDonald v. Dennys Lascelles Ltd (1933) 48 CLR 457; the proposition is supported in "Forfeiture of Interests in Land" (1984) 100 LQR 427, 447 (A.G.Lang), "Relief against Forfeiture in Australia" (1990) 106 LQR 39 (K.Nicholson) and "Relief Against Forfeiture and the Purchaser of Land" [1984] CLJ 134, 140 (C.Harpum). Contra Steedman v. Drinkle [1916] AC 275, Brickles v. Snell [1916] 2 AC 599.

obtaining specific performance. Although the cases do not usually analyse the loss of a claim to specific performance in terms of forfeiture, the loss of the purchaser's equitable interest has been expressly recognised as a variety of forfeiture in Australia[74] and some of the English cases do provide relief of a nature which reflects the relief available in the case of forfeiture.[75]

Under a contract for the sale of chattels the position differs from the sale of land as specific performance is not generally awarded; the purchaser therefore has no basis to claim an equitable interest in the chattels which is subject to forfeiture if the vendor rescinds the contract on the ground of the buyer's repudiatory breach, and the forfeiture is accordingly over a personal, contractual right not a proprietary or possessory right. However, if the rescission is accompanied by the forfeiture of something other than the personal right to enforcement of the contract (such as property handed over to the innocent party), then the party in breach may claim relief against the forfeiture of the property, and the consequence of this relief is that the guilty party obtains relief against the termination of his personal right to performance of a contract. A typical example is a contract for the sale of chattels which provides for the purchase price to be made in instalments, time being of the essence, and confers on the vendor a right to recover the chattels and retain the instalments in the event of default; if there is a failure to pay on time, the purchaser may have relief against forfeiture of the instalments, and be permitted to pay the outstanding price in exchange for the chattels. In such a case the rescission of the contract accompanied by retention of the instalments will amount to a relievable forfeiture provided the money (or other property) is given to the vendor essentially as a penalty to secure performance of primary obligations[76] and is not a payment for services, nor utilised to cover costs incurred by the vendor.[77] It has been suggested that relief ought to be available in the case of any specifically performable contractual right to use property, since the distinction between a possessory right and a contractual licence can be a fine one; for instance, in BICC plc v. Burndy Corp Ltd[78] relief was available against a clause demanding an assignment of a patent but no relief was available against the termination of a licence to use a trademark in Sport International Bussum BV v. Inter-Footwear Ltd.[79]

The nature of relief in the case of a forfeiture is quite different from relief against a penalty. The surplus value of the property forfeited beyond the actual loss to the forfeiting party is not returned to the party in breach as with penalties, but if relief is

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[74] Legione v. Hateley (1983) 46 ALR 1, "Specific Performance and Deposits" (1984) 4 OJLS 137 (K.Hodkinson).

[75] Re Dagenham (Thames) Dock Co ex parte Hulse (1873) LR 8 Ch App 1022, Starside Properties Ltd v. Mustapha [1974] 1 WLR 816. Contra Steedman v. Drinkle [1916] AC 275, Brickles v. Snell [1916] 2 AC 599, Sport International Bussum BV v. Inter-Footwear Ltd [1984] 2 All ER 321, doubted in "Relief against Forfeiture in Commercial Cases" (1984) 100 LQR 369 (C.Harpum).

[76] Shiloh Spinners Ltd v. Harding [1973] 1 All ER 90, Jobson v. Johnson [1989] 1 All ER 621.

[77] See footnote 67.

[78] BICC plc v. Burndy Corp Ltd [1985] Ch 232.

[79] See Pawlowski, op. cit., p.381; G.H.Treitel, "The Law of Contract" 9th ed., pp.682.

granted it takes the form of further time for fulfilment of the obligations due from the party in breach.[80] Furthermore, if the sum of money or item of property forfeited is a penalty in the sense that it is not a genuine pre-estimate of the damage suffered on breach of the primary obligation, then relief follows automatically; but in the case of forfeiture it would appear that, unlike the jurisdiction to relieve against penalties, relief can only be granted if the retention of property under the forfeiture clause is also unconscionable.[81] In this way the jurisdiction is available in the same circumstances as relief against collateral advantages. A competing idea is that the jurisdiction cannot even be invoked in these circumstances but equity will only intervene to relieve against a forfeiture if there has been some fraud, sharp practice or other unconscionable conduct as there is "nothing inequitable per se in a vendor, whose conduct is not open to criticism in other respects, insisting on his contractual right to retain."[82] In the Cayman Islands, the Court of Appeal has declined to decide which is the correct principle to follow.[83]

5. Retention of Title

The retention of title clause is a device used for the purpose of protecting the vendor of chattels from the purchaser's insolvency before payment for the chattel has been made in full. Here the vendor traditionally retains legal and equitable title to the chattels, the purchaser is given power to dispose at market value in the normal course of business, the purpose of retaining title being to provide security for the vendor who provides the chattels on credit. A distinction must be made between cases where the arrangement is intended as a security for the moneys owed, in which case a clause may be treated as a charge void against a subsequent purchaser or liquidator for lack of registration in accordance with the Companies Acts,[84] and cases where the arrangement properly retains all title to the vendor and the arrangement is not merely a security. Under such clauses the vendor usually confers no interest on the purchaser, and retains an express power to dispose of the chattels even if there has been no default in payment on the part of the purchaser. As this right of ownership is vested in the vendor without awaiting any breach, it is difficult to see the arrangement as a species of mortgage since the purchaser has no right to redeem particular chattels of which he was formerly owner, but merely a right to dispose of the seller's chattels if not previously sold. Similarly, the seller's right is not merely a right to have the chattels appropriated to the discharge of a debt, so it would seem that the retention of title clause creates no equitable charge over the chattels. According to the House of Lords, the retention of title clause could not be seen as

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[80] Eg. Shiloh Spinners Ltd v. Harding [1973] 1 All ER 90, Re Dagenham (Thames) Dock Co ex parte Hulse (1873) LR 8 Ch App 1022, Starside Properties Ltd v. Mustapha [1974] 1 WLR 816, Jobson v. Johnson [1989] 1 All ER 621. See Pawlowski, op. cit., pp.380-1.

[81] Shiloh Spinners Ltd v. Harding [1973] 1 All ER 90, Jobson v. Johnson [1989] 1 All ER 621, Stockloser v. Johnson [1954] 1 QBD 476 per Lord Denning MR and Somervell LJ.

[82] At 501 per Romer LJ.

[83] Beach Club Enterprises Ltd v. Horizon Management Ltd [1980-83] CILR 223, 246-7 per Carey JA with whom Robinson P concurred.

[84] Ss.395, 396 Companies Act 1985; In re Bond Worth Ltd [1980] Ch 228.

"amounting to the creation by the purchaser of a right of security in favour of the vendor. Such a provision does in a sense give the vendor security for the unpaid debts of the purchaser. But it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the purchaser."[85] A similar view was expressed by Oliver LJ in Clough Mill Ltd v. Martin,[86] who commented that the liquidator of a purchaser company would have no right to provide the vendor with the sums due in order to redeem the chattels, or to demand the surplus proceeds after a sale of the chattels by the vendor following a default in repayment.

Disputes over retention of title clauses have commonly arisen between the vendor and the other creditors of the purchaser, or the liquidator of the purchaser. Because such clauses are commonly used in respect of assets which are used in the manufacturing process or resale, the assets themselves are frequently only held by the purchaser for a short period prior to disposal; most of the cases therefore deal with the vendor attempting to trace into new products or the proceeds of sale. There is accordingly little authority on the exercise of the seller's paramount power of sale, on default or otherwise. For the same reason, it is common in the contract of sale of the chattels to provide that the purchase price be payable by a certain date, rather than demanding a structured payment of purchase price instalments over a longer period. Once more, there is little authority on the nature of the seller's obligations, if any, when the vendor repossesses the chattels and sells elsewhere, and the proceeds of sale exceed the debt due from the original purchaser after the original purchaser has made part payments.

It has been said that where the vendor retains full title until some condition has been satisfied, usually payment of the price of the chattels or all moneys owing, the vendor who repossesses and sells the chattels "is not obliged to account to the purchaser for any part of the value of the goods,"[87] a rule which was thought to apply not only to clauses retaining title until payment of the price of the specific chattels, but furthermore to clauses retaining title until payment of all debts due under other contracts. However, in Armour v. Thyssen Edelstahlwerke AG,[88] the issue of partial payment by the debtor was left open, the House refusing to comment on statements of the Court of Appeal in Clough Mill Ltd v. Martin. In the latter case, Robert Goff LJ had suggested,[89] without deciding the point, that there may be an implied term that during the running of an "all debts" contract the vendor could only sell such of the chattels as was necessary to recover the sums due. But if the contract was determined, for example by the vendor accepting the buyer's breach, the vendor could sell elsewhere uninhibited by any contractual restrictions. Any part payments made would be recoverable by the purchaser on the ground of total failure of consideration, subject to set-off arising from the seller's cross-claim for damages for breach of contract. Presumably a clause which purported to forfeit

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[85] Armour v. Thyssen Edelstahlwerke AG [1990] 3 All ER 481, 485, per Lord Keith of Kinkel delivering the only speech in the House.
[86] [1985] 1 WLR 111, 122.
[87] Armour v. Thyssen Edelstahlwerke AG [1990] 3 All ER 481, 485.
[88] [1990] 3 All ER 481.
[89] [1985] 1 WLR 111 at 117-8.

the part payments would be treated according to the normal rules on forfeitures, discussed above.

The exercise of the power of disposition by the vendor to a third party pursuant to the retention of title clause does not obviously represent a relievable forfeit or penalty. As seen above, the rule against forfeiture also applies to forfeiture of the purchaser's equitable interest in land arising under a contract for sale. It is very doubtful that the same rule applies in the case of a vendor of chattels selling to a third party under a retention of title clause. Firstly, the purchaser of goods generally has no equitable interest in the goods arising from the contract of sale, since specific performance of such a contract is usually unavailable; secondly, if there is a retention of title clause, the effect of the clause is that no title whatsoever passes to the purchaser, at least pending the full payment to the vendor. If the purchaser has no equitable interest in the chattels generated by the contract, he has no proprietary rights susceptible to forfeiture but only a personal contractual right for the forfeiture of which there is probably no relief. This denial of relief is supported by Oliver LJ in Clough Mill Ltd v. Martin who thought that a liquidator had no right to tender sums after breach and demand transfer of the chattels, that is, there was no right to relief by means of late performance.

6. The Option to Purchase as a Security

In B v. H Ltd,[90] a decision of the Grand Court, the plaintiff company had defaulted in repaying a loan to a bank which was secured by a first legal charge over certain land. The plaintiff entered into an agreement with the defendant, B, by which B agreed to guarantee the bank loan for a period of 90 days. H Ltd agreed to release B from the guarantee within the 90 day period and granted B an option to purchase the land which became exercisable if H Ltd failed to release B from the guarantee within the period. H Ltd also gave B a promissory note which would be cancelled if the option was exercised.

B made payments to the bank under the guarantee. H Ltd failed to release B from the guarantee within the 90 day period and B brought an action to recover from H Ltd the sums paid under the guarantee and to seek specific performance of the option. The defence was struck out and final judgment was given on 25th November 1993; specific performance was awarded, the court ordering that H Ltd sell and transfer the land to B and that B pay off the bank loans charged on the land. The subsequent attempt by H Ltd to set aside the judgment and file a new defence failed.[91] In H Ltd v. B,[92] H Ltd argued that the agreement operated as a secured lending facility whereby B advanced to the bank such funds as were necessary to service H Ltd's debt for 90 days upon security of the option to purchase. Consequently, H Ltd argued, the agreement constituted an equitable

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[90] Unrep., Cause 341 of 1993, Judgment 25/11/93.
[91] B v. H Ltd., (Unrep., Cause 341 of 1993, Judgment 27/5/94)
[92] [1994-5] CILR 343.

mortgage or charge over the land, in respect of which there was, as a matter of law, a right of redemption in favour of H Ltd.

The Grand Court struck out the claim on the basis that it was the same or very similar to that which had failed in the earlier cause, and therefore the matter was res judicata. The significance of the decision lies in the finding that in any event the claim to a right of redemption on these facts disclosed no reasonable cause of action. Smellie J held that the agreement could not create a legal or equitable mortgage with associated right of redemption as "in no sense could there be said to have been a conveyance or assignment by H Ltd of title to B by virtue of the agreement"[93] and there was no provision in the Registered Land Law for the disposition of land by way of mortgage. No claim was made that the agreement constituted an equitable charge, but the court indicated that the possibility of such a claim had been rejected in the earlier proceedings in which the court had ruled that the agreement constituted "no form of secured lending agreement such as could comprise a security over the properties."[94]

It is suggested that if an option to purchase property is granted for the purpose of providing a right which is exercisable only on default in the performance of a contractual obligation, then the option can be regarded as a security and the relevant form of equitable relief is available. This is not necessarily inconsistent with the decision in H Ltd v. B[95] as it may be that on the facts of that case the option should not have been regarded as a security, or that the claim to equitable relief had been barred or was inappropriate.

It is clear that the security option, being conditional and conferring no interest prior to default on the optionee, does not fulfil the established prescription for a legal mortgage, and certainly no legal title is transferred prior to default. The option to purchase is a contract to transfer a legal interest in land as a form of security but does not fall within the description of a contract to create a legal mortgage for the simple reason that the security cannot be seen as a legal mortgage since it confers no proprietary interest on the optionee unless there has been a default. Pending the fulfilment of the condition on which the option becomes exercisable, namely the default, the optionee has no claim to specific performance and consequently no proprietary interest[96] and the option operates "only as an unsecured personal obligation."[97] Had the security consisted of an unconditional option to purchase exercisable immediately without default then this would have conferred on the optionee an immediate equitable interest in the property with a right to call for the legal title. In this event, however, the option could not be regarded as a security as it would be exercisable without default on the part of the optionor. Under a security option, the optionee has no legal or equitable ownership of the property until default has taken place. It may be argued that the property has been appropriated to the

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[93] At 356.
[94] At 358.
[95] [1994-5] CILR 343.
[96] J.Sainsbury plc v. O'Connor [1991] 1 WLR 963.
[97] Jobson v. Johnson per Nicholls LJ.

discharge of the debt, but it is nevertheless submitted that the security option should not be regarded as an equitable charge over the property; the fundamental difference in the remedies of foreclosure and sale strongly suggests that the security option, in which the parties intend the optionee to take the entire property rather than having a right of recourse to the property for the purpose of sale alone, should not be regarded as a variety of equitable charge.

If parties create a debt or other primary obligation which is secured by a security option, the arrangement cannot be regarded as a type of collateral advantage to the lender. The rule against collateral advantages seems to apply to advantages taken in addition to the obligation to repay the debt; where the advantage is one which is taken as a security for that obligation, and is consequently only exercisable in the case of a failure to comply with that obligation, then it falls outside the scope of relief from collateral advantages. This derives some support from the speech of Lord Parker in Kreglinger: the equitable relief against an unconscionable collateral advantage is "a right to redeem notwithstanding the contractual terms."[98] The existence of the security option is not a matter which burdens the borrower in the exercise of his primary obligation to repay the loan but a matter which only arises if that repayment does not occur, and it would be difficult to see how the jurisdiction to relieve can arise if the borrower's right to redeem is in no way rendered more burdensome by the advantage reserved to the lender.

If the security option falls outside the definition of mortgage or charge, and consequently the optionor does not have the relief afforded by the equitable right of redemption, the optionor may be protected through the rule against penalties. A security option requires consideration for the exercise of the option after the default has occurred, but as was seen in Jobson v. Johnson, the payment of consideration does not necessarily prevent a contractual term from constituting a penalty. "There should be no distinction in principle between a clause which requires the defaulter, on making default in paying money, to transfer shares for no consideration, and a clause which in like circumstances requires the defaulter to sell shares to the creditor at an undervalue." [99] The foregoing reasoning applies a fortiori where the consideration is nominal.

The security option falls easily within the definition of a forfeiture according to the current law of England, since that does not require that the item of property forfeited be transferred to the innocent party prior to breach. In England, the security option may also be held to be a penalty and relieved on that account by the form of order given in Jobson v. Johnson. The appropriate relief would be discretionary and dependent upon the forfeiture being seen merely as a security for the fulfilment of other contractual or covenanted obligations. The option would remain enforceable on default, subject only to the possibility of further time for the fulfilment of the optionor's primary obligations. In a commercial contract the time may be extended for a short period or refused altogether.

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[98] At 983.
[99] Per Dillon LJ at 628.

In the Cayman Islands, if the courts prefer to take the view that the Stockloser v. Johnson distinction between penalties and forfeitures still applies, the security option would not be susceptible to relief against forfeiture and the security option could only be subject to relief by virtue of the rule against penalties. This has the disadvantage that the bargain between two equal parties is compulsorily rewritten without being dependent on unconscionability, so matters such as the value of the property forfeited and negotiating strength are never relevant, and there would be no jurisdiction to allow a discretionary delay on terms before the forfeiture took effect. The optionee initially receives no estate in the property but merely a conditional right to demand a transfer of title, so the arrangement would not be treated as a forfeiture following Stockloser. The obligation to transfer the property only arises when the option is exercised, if it all, so that the optionee cannot be said to be in any sense retaining property already transferred, even though in the case of land he may have a limited equitable interest in the property ab initio by virtue of the conditional right to call for the legal title. It is submitted that the Stockloser dichotomy should not be followed and that a more consistent approach to equitable relief is achieved if the rule against forfeitures applies in the wider context indicated by the modern English and Commonwealth case law.[100]

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Charitable Trusts in the Cayman Islands: Goodbye to the Statute of Elizabeth?[1]

Lord Eldon cautioned in the seminal decision of Morice v The Bishop of Durham[2] that the English courts have: "taken strong liberties upon the subject of charities"[3] by which His Lordship was referring to the vast array of purposes found by the judges even by 1805 to be charitable in law. It nevertheless remains a fundamental truth that the boundary of legal charity has been greatly restricted by falling back upon the *fons et origo* of all legal charity - the preamble to The Statute of Charitable Uses 1601.[4] Whilst it is beyond dispute that the legal definition of charity in English law has far exceeded the purposes enumerated therein, the preamble's enduring influence[5] is seen in the proliferation of technicality which has produced an inherently limited term of legal art[6]. The privileges of being accorded charitable status in English law[7] have therefore come at a high price with the law reports over-flowing with examples of meritorious purpose trusts whose failure to satisfy the technical definition of charity has led not only to non-charitable status but to invalidity.[8]

The recent decision of the Grand Court in Bridge Trust Company Ltd and another v The Attorney-General of The Cayman Islands and others,[9] which has prompted this discussion, has embraced a refreshingly liberal concept of charity for these islands. In effect eschewing both technicality and the preamble to Charitable Uses Act, (hereafter the preamble), Harre CJ's ruling is to be welcomed in promoting a broad and inherently

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[2] [1805] 10 Ves 522.

[3] Echoed by Lindley and Lopes LJJ in Re Macduff [1896] 2 Ch 451 at 463 and 467-468 respectively. See also per Russell LJ in Re Grove-Grady [1929] 1 Ch 557 at 582. Most recently, Lord Upjohn in Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corporation [1968] AC 138 at 153 lamented that, "the 'spirit and intendment' of the preamble to the Statute of Elizabeth have been stretched almost to breaking point".

[4] Per Lindley LJ [1896] 2 Ch 451 at 467.

[5] The Statute of Elizabeth was repealed by the Mortmain and Charitable Uses Act 1888. It is generally thought however that s.13(2) of the 1888 Act preserved the preamble and that it consequently survived until 1960 when s.13(2) was itself repealed by the Charities Act of that year.

[6] In the leading decision of the House of Lords in Commissioners for Special Purposes of the Income Tax v Pemsel [1891] AC 531 at 581 Lord Macnaghten described the word "charity" as being: "of all the words in the English language ...one which more unmistakably has a technical meaning in the strictest sense of the term...peculiar to law."

[7] See infra p 96 et seq and n.91.

[8] See, for e.g., Re Astor's Settlement Trusts [1952] Ch 534; IRC v Baddeley [1955] AC 572 Re Shaw [1957] 1 WLR 729; Re Bushnell [1975] 1 WLR 1596. Lord Reid's observation in the Scottish Burial Reform case [1968] AC 138 at 147 that the modern attitude of the courts to legal charity is one of benignancy is seen in many of the more recent cases: Re Hetherington Dec'd [1990] Ch 1; Re Koeppler's WT [1984] Ch 243; Guild v IRC.[1992] 2 AC 310. But C.f. Attorney-General of the Bahamas v Royal Trust Co [1986] 1 WLR 1001. The chances of validity as a private trust have improved with the developments in Re Denley [1969] 1 Ch 373 and McPhail v Doulton [1971] AC 424 see infra at n.79.

[9] Cause 269/94. Unreported decision of Harre CJ, April 10 1996.

workable definition of legal charity. It is timely at this point to note that charitable designation in the Cayman Islands does not carry with it the fiscal advantages which necessarily accompany such a conclusion under English law.

Charitable Designation in English Law - Entering the Wilderness

Rules of substance in this area will rarely be applied by the court without it first having undertaken a preliminary examination of what the donor's words mean. This exercise in construction increases in importance as the definition of legal charity narrows. Accordingly, where a legal system has developed a narrow and technical definition of legal charity pure questions of substance will arise rarely being possible only where the donor has achieved absolute precision in his use of language. The converse cannot be assumed however, and even a broad definition of charity cannot obviate the need for construction, although such a definition may be expected to direct the inquiry towards matters of substance. These propositions are borne out by the Bridge Trust case in which the court was occupied by matters of both construction and substance although the pivotal matter (of substance) was whether admittedly wide language was nevertheless capable of giving rise to a conclusion of charity under Cayman law.

In order to place the decision in legal context, the substantive English rules must be visited. This journey may well be undertaken with a measure of trepidation by anyone who has already traversed the "wilderness of legal charity", as one writer[10] has aptly described a subject increasingly being recognised as a hybrid occupying the middle ground between trusts and taxation law. In this last statement, the central privilege of charitable status in English law is laid bare; and whilst it is true that charitable status will also lead to certain trusts law advantages,[11] it is the mainstay of this article that the primary reason for the inherently technical and limited definition of charity in English law is to be found in the fiscal and rating advantages thereby necessarily acquired.[12] In support of this thesis may be cited the increasing emphasis over the last fifty years on the public benefit requirement[13] as a necessary prelude to a conclusion of charitable status. It is no coincidence that during this same period the Inland Revenue has been the recipient of record levels of taxation income.

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[10] Bentwich (1936) 49 LQR 520.

[11] The following advantages apply equally following charitable designation under Cayman law: relaxation of the rules of perpetuity, uncertainty and enforceability which apply to purpose trusts. See infra text at p 98 et seq. It is worthy of note that charitable trusts are equally subject to the requirements that there must exist certainty of intention to create a trust (as opposed to a gift or a power) and there must be certainty of subject matter.

[12] See infra at n.91.

[13] See, for example, Re Compton [1945] Ch 123 and Oppenheim v Tobacco Securities Trust Ltd [1951] AC 297 (education); Gilmore v Coats [1949] 1 All ER 848 (religion) and Williams Trustees v IRC [1947] 1 All ER 513 (fourth head). Geoffrey (later Lord) Cross QC observed extra judicially (1956) 72 LQR 187: "A charitable trust is essentially a public trust. If a trust confers only private benefits as opposed to benefits to the community, it is not charitable."

It was the Radcliffe Commission, reporting in 1955, who first signalled a departure from the entrenched English practice of tying tax advantages to charitable status by the iconoclastic notion of creating a narrow range of fiscally privileged purposes.[14] The natural corollary of this recommendation would be the welcome development of a wide sweep of charity for non-fiscal purposes, bringing to an end the "unnatural union"[15] of general and revenue law definitions established in the landmark decision of their Lordships in Pemsel's Case.[16] It will be suggested below that it is the absence of any fiscal dimension to an outcome of legal charity in the Cayman Islands which allowed the Grand Court in Bridge Trust to apply a progressive interpretation of charity to the purposes before it.[17] The prospect heralded by the decision of a greatly simplified definition of charity, conducive to upholding general philanthropic wishes of the benefactor, is something which most legal practitioners in the UK would consider remarkable. The same could doubtless be said of the timorous approach displayed by successive British governments in denying efficacy to the recommendations of the Radcliffe Commission whose implementation would have long since ensured an end to charity's wilderness years for the Mother jurisdiction.

A Common Law Classification: The Divisions of Charity

It is well known that there has never been a general statutory definition of charity in English law[18]and that all proposals for introducing such a definition[19] have been resisted on the grounds that a comprehensive definition is unattainable.[20] Even the bold reforms of the Charities Act 1960 stopped short of attempting a statutory definition.[21] The common law has therefore for long predominated, augmented by the occasional and limited legislative incursion.[22] It is consequently in the arguments of Mr. Samuel

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[14] The Royal Commission on the Taxation of Profits and Income (the Radcliffe Commission) 1955 (Cmnd 9474). At Chapter 7, the Commission propose that fiscal privilege should be extended to trusts for the following purposes only: "the relief of poverty, the prevention or relief of distress, the advancement of education, learning and research, and the advancement of religion."

[15] Per Geoffrey (later Lord) Cross 72 LQR 187 at 205.

[16] [1891] AC 531 at 581.

[17] Although both the relevance of policy and the suggestion that "any bold or even timorous innovation in the law of charity" was heralded by the Bridge Trust decision were firmly denied by the learned Chief Justice. (Transcript at pages 10 and 42.)

[18] Although a limited definition in relation to recreational charities is contained within S.1 Recreational Charities Act 1958.

[19] Such as those of the Nathan Committee in their Report on the Law and Practice Relating to Charitable Trusts (1952) (Cmnd 8710). Significantly, this proposal was omitted from the legislation which implemented most of the Report's recommendations, the Charities Act 1960.

[20] "There is no limit to the number and diversity of the ways in which man will seek to benefit his fellow men." Per Viscount Simonds in IRC v Baddeley [1955] AC 572 at 583.

[21] See s.38(1) and (4) but see supra n.19. In *Charities: A Framework For The Future* (Government White Paper Cmnd 694, 1989), the proposal to introduce of a statutory definition of charity was rejected, it being concluded (at para 2.11) that any such reform "would be fraught with difficulty" and would risk compromising the flexibility of the current law "its greatest strength and most valuable feature". C.f s.96(1) Charities Act 1993: "Charity" means "any institution...which is established for charitable purposes".

[22] Such as the Charitable Trusts (Validation) Act 1954 and the Recreational Charities Act 1958.

Romilly to their Lordships in Morice v Bishop of Durham,[23] basing himself upon the preamble, that we find the first coherent synthesis of legal charity. Some eighty six years later, Lord Macnaghten, in the celebrated decision of their Lordships in Pemsel's Case,[24] reduced Romilly's categories to a more compendious form in suggesting the following four well- known divisions of charity, which continue to underpin contemporary English law: Trusts for the relief of poverty, for the advancement of education and religion and for other purposes generally beneficial to the community.

It is evident that with the sole exception of poverty trusts, the common thread which runs through all the divisions of legal charity is the existence of public benefit. In such cases, charitable ascription is predicated upon not only the presence but also the quality of public benefit. In other words there can be public benefit without charity,[25] but rarely a charity which is not public. The key question is to establish whether the donor's purposes are beneficial to the community in a way which the law regards as charitable. This is answered by looking for loose justification from the Statute of Elizabeth. The proposition has been variously stated as requiring the purpose to fall within the "spirit and intendment" or "equity", although not necessarily the letter, of the preamble. Thus, for example, trusts for the relief of the sick[26] and the advancement of religion will likely amount to charitable purposes as being analogous, respectively, to the relief of the impotent and the repair of churches, purposes to be found specifically listed in the preamble. Russell LJ has noted however that close scrutiny of the preamble is unnecessary,[27] with the method of analogy being only the "handmaid" to the usual practice of finding a "vague and undefined" justification therein.[28] Accordingly, in Incorporated Council of Law Reporting for England & Wales v The Attorney-General[29] the Court of Appeal found the preparation and publication of law reports to be charitable, *inter alia*, as being beneficial to the community and relieving the government of responsibility for the same in a way broadly akin to the category of public works enumerated in the preamble.[30]

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[23] (1805) 10 Ves 522.

[24] [1891] AC 531.

[25] See, for e.g., Farley v Westminster Bank [1939] AC 430.

[26] Le Cras v Perpetual Trustee Co Ltd [1967] 3 All ER 915. The Charity Commissioners have also held that the provision of advice and facilities concerning contraception is a charitable purpose being analogous to the preamble's reference to the preservation and protection of good health: Annual Report 1985, para 5.

[27] Although there is evidence even in the modern authorities of minute inspection of the preamble: Re Sahal's W.T. [1958] 1 WLR 1243; Re Cole [1958] Ch 877.

[28] Incorporated Council of Law Reporting for England and Wales v The Attorney-General [1972] 1 Ch 73 at 88. Lord Wilberforce has similarly remarked in Scottish Burial Reform And Cremation Society Ltd v Glasgow City Council [1968] AC 138 at 154 that: " it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied."

[29] [1972] 1 Ch 73.

[30] "..the repair of bridges, ports, havens, causeways, churches, sea-banks and highways...(and the) maintenance (of) houses of correction."

The "Common Thread" of Public Benefit

The existence or no of the requisite degree of public benefit represents a further complex issue with which the court or, more often in England, the Charity Commissioners must grapple. Indeed, the pool of legal charity has its waters further muddied by the fact that not only is the degree of public benefit a fluctuating one as between the four divisions, but that such variation exists even within the miscellany of charitable purpose to be found within division four. A review of the leading authorities reveals that whilst in the poverty trusts the requirement of public benefit has been effectively illiminated with the only condition being that the recipients must be identified as a class rather than as individuals,[31] in relation to the remaining three categories, a trust will not be considered charitable unless it is "for the benefit of the community or an appreciably important class of the community".[32] The foregoing requirement is to be read subject to the rebuttable presumption, however, that any purpose falling within the first three categories will be considered *prima facie* to be for the public benefit and therefore charitable. This important *caveat* was noted by Lord Simonds in National Anti-Vivisection Society v IRC who stated:[33]

"..when a purpose appears broadly to fall within one of the familiar categories of charity, the court will assume it to be for the benefit of the community and therefore charitable unless the contrary is shown.".

Until the decision of the Court of Appeal in Compton[34] it was arguable that, by application of a literal construction to all four categories, the requirement of public benefit was confined to cases falling within the fourth head. Since at least 1945, however, this proposition has been untenable,[35] although the requirement may well be at its strictest here. This category, coined "objects of general public utility" by Samuel Romilly, has consistently been recognised as the most problematic.[36] Vexed questions have presented themselves here in abundance not least because, as has been noted, whilst public benefit is a necessary indicator of charity within the category, it is never of itself

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[31] Per Jenkins LJ in Re Scarisbrick [1951] Ch 622 at 655. This was explained by Lord Greene MR in Re Compton [1923] 123 at 139 on the footing that "the relief of poverty (may) be regarded as in itself...beneficial to the community". See also Re Segelman Dec'd [1995] 3 All ER 676.

[32] Per Lord Westbury in Verge v Somerville [1924] AC 496 at 499. Some commentators have interpreted the authorities as exempting not only poverty trusts but also those for the advancement of religion from the need to show public benefit. See, for example, Newark: "Public Benefit and Religious Trusts" [1946] 62 LQR 234. This view appears vindicated by recent authority: Re Watson [1973] 3 All ER 678; Re Hetherington Dec'd [1990] Ch 1.

[33] [1947] 2 All ER 217 at 233. See also per Lord Wright at 220. The principle is graphically illustrated by the decision of Plowman J in Re Watson [1973] 3 All ER 678 (advancement of religion).

[34] [1945] Ch 123.

[35] See the authorities referred to supra n.13.

[36] Being described by Romily himself in the course of argument in Morice v The Bishop of Durham as "the most difficult" of the heads of charity: [1805] 10 Ves 522 at 532.

sufficient.[37] It was perhaps awareness of the category's titular tendency to deceive which was the source of Samuel Romilly's well-founded circumspection. The defining consideration once more is not simply whether one of the "familiar categories" of charity has been instanced but, rather, whether the purpose has been shown to fall within the equity of the statute.[38] This matter was returned to by Viscount Cave LC in Attorney-General v National Provincial Bank where His Lordship stressed:[39]

"Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain charitable trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning...it is not enough to say that the trust in question is for public purposes beneficial to the community...you must also show it to be a charitable trust."

Nonetheless, just as a trust which falls within one of Lord Macnaghten's first three categories is presumed to be for the public benefit,[40] so too, a trust manifestly for the public benefit will be presumed charitable within the fourth heading. Russell LJ, in a judgment heavily relied upon in the Bridge Trust decision, found against the Inland Revenue in ruling:[41]

"In a case such as the present, in which in my view the object (the preparation and publication of law reports on a non-profit basis) cannot be thought otherwise than beneficial to the community and of general public utility, I believe the proper question to ask is whether there are any grounds for holding it to be outside the equity of the statute."

The Principle of Exclusivity

In contrast to the relative ease with which an ascertained purpose may be brought within the spirit of the preamble, (a question of substance), a limitation that the courts have applied much more strictly, and which has been responsible for striking down many trusts, undeniably for the benefit of the community, is the necessity of showing the donor's purposes to be exclusively charitable (a question of construction). Whilst uncertainty of expression within the ambit of charity will never cause the trust to fail,

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[37] See, for e.g., Kendall v Granger (1842) 5 Beav 300.

[38] The enduring influence of the preamble was aptly described by Lord Upjohn in the Scottish Burial Reform case [1968] AC 138 at 151 as likely to be considered: "almost incredible to anyone not familiar with this branch of the English law."

[39] [1924] AC 262 at 265. See also Re Macduff [1896] 2 Ch 451 at 466-467 per Lindley LJ. Rigby LJ in the same case noted: (at 474): "..to deduce (from Lord Macnaghten's fourth category)...that every purpose of general use to the community must be a charity is just about as logical as to draw from a statement in the report of an insurance society that 'persons insured with us may be divided into men, women and children' the deduction that every man, every woman and every child is insured in that society."

[40] See supra text at n.33.

[41] In Incorporated Council of Law Reporting for England and Wales v Attorney-General [1972] 1 Ch 73 at 88. Sachs LJ concurred (ibid at 95). To like effect, see: Lord Reid's judgment in Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corp [1968] AC 138 at 146-147.

with a charitable scheme being directed, the use by the settlor of language which would permit distribution amongst non-charitable objects will be conclusive against a finding of charity.[42] Fine distinctions, such as those which follow, have frustrated many good intentions, prompting the censure of the bench and the profession[43] and without doubt the more than 99.9% of the population who, according to Lindley LJ,[44] have no comprehension of legal charity. An instruction that property be left for "charitable and benevolent" purposes will usually[45] be construed as wholly charitable and therefore valid;[46] however, substitute "and" with the generally disjunctive "or" and the purposes will likely fail as not being exclusively charitable. Thus, the following language will be bad on application of this rule of construction: i) "charitable or philanthropic"[47]; ii) "charitable or benevolent".[48] The donor's wide use of language will be equally fatal if, even theoretically, it goes beyond legal charity by embracing, for example, objects of "benevolence and liberality"[49] or "undertakings of general utility"[50] or the "education and welfare of Bahamian children".[51]

The Bridge Trust Decision

This brings us conveniently to a consideration of the Bridge Trust case, where the charitable nature of the trust's purposes turned upon the applicability of the fourth of Lord Macnaghten's categories. The width of language employed in purporting to create an *inter vivos* settlement formed the cornerstone of counsel's contention that it should be struck down as an invalid trust for purposes. The disputed settlement ("the Continental Foundation") had been executed in the Bahamas by a Memorandum of Agreement dated July 20th 1976. The critical language of the Memorandum was contained in Clause 3 which purported to set out the trust's purposes. According to this clause, the income of the trust was to be applied at the trustees' discretion for the following purposes:

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[42] The insistence by the courts on the exclusivity principle is a product of the imperative nature of all trusts, including those of a charitable nature, and the overriding need of the court to be vested with control of the trust's administration. Sir William Grant MR, in Morice v Bishop of Durham, stated the principle succinctly (1804) 9 Ves 399 at 404-405: "There can be no trust over the exercise of which this court will not assume a control, for an uncontrollable power of disposition would be ownership and not trust."

[43] See, for e.g., per Lord Wright in Chichester Diocesan Fund v Simpson [1944] AC 341 at 356; per Goddard LJ in Re Diplock [1941] 1 Ch 253 at 266. Geoffrey (later Lord) Cross QC has objected (1956) 72 LQR 187 at 199: "...the question whether a purpose is or is not charitable is often a very difficult one, the answer to which is quite uncertain until the House of Lords has given it by a majority of three to two."

[44] Re MacDuff [1896] 2 Ch 451 at 464.

[45] Subject to this usual construction being consistent with the whole of the instrument, as determined by the court: Re Hummeltenberg [1923] 1 Ch 237. Thus in Attorney General of the Bahamas v Royal Trust Co [1986] 1 WLR 1001 the word "and" was construed by the Privy Council to be disjunctive.

[46] Hill v Burns (1826); Miller v Black Trustees (1837).

[47] Re Macduff [1896] 2 Ch 451.

[48] Chichester Diocesan Fund and Board of Finance v Simpson (1944) AC 341.

[49] Morice v Bishop of Durham (1805) 10 Ves 522.

[50] (1842) 5 Beav 300.

[51] Attorney-General of the Bahamas v Royal Trust Co [1986] 1 WLR 1001.

"...to any one or more religious, charitable or educational...institutions or any organisations or institutions operating for the public good...the intention being to enable the trustees to endeavour to act for the good or for the benefit of mankind in general or any section of mankind in particular anywhere in the world or throughout the world."

A preliminary matter, calling for an application of principles of private international law, fell first for determination. By exercise of a shifting law clause contained in the July memorandum, a further Memorandum of Agreement had been concluded on December 22nd 1976 by which the situs of the Foundation and the applicable law were expressed thenceforward as being that of "Grand Cayman B.W.I.". The first attack on the Foundation was the submission that it was invalid according to Bahamian law. By application of the Cayman Islands Trusts (Foreign Element) Law, 1987,[52] however, the Chief Justice ruled that the sole significance of the law of the Bahamas was, in accordance with s4(4),[53] whether that law recognised the change of law clause. The validity or otherwise of the trusts themselves fell to be determined exclusively by application of Cayman law.[54] This, in turn, depended upon whether clause 3 was effective in creating a charitable trust under the law of the Cayman Islands

Resisting the entreaties of counsel for the Attorney-General to the contrary, the Chief Justice was resolute in holding there to exist no considerations of policy sufficient to justify any departure from the English common law principles.[55] His Lordship asserted[56] that it was not:

"in the best interests of the Cayman Islands as a respectable offshore financial centre to take any radical new approach in relation to the law of Charity. Any perceived policy reason that I should do so is in my view misconceived."

Two prefatory observations may be made: (i) It is beyond doubt that had clause 3 of the Memorandum of Agreement been limited to: "religious, charitable or educational institutions", on the basis of the existing English authorities, a valid charitable trust would have been created; but (ii) on the basis of the same authorities it would appear,

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[52] Which, by s.3, is retrospective in effect applying to trust dispositions wherever the trust property is situated.

[53] Section 4(4) provides: "If the terms of a trust so provide, the governing law of the trust may be changed to or from the laws of the Islands provided that: (i) in the case of a change to the laws of the Islands, such change is recognised by the governing law of the trust previously in effect..."

[54] Transcript at pages 20-22.

[55] As noted by counsel for the plaintiffs, however, (transcript at page 13) it is arguable that the English common law definition of charity has never applied to the Cayman Islands, this corpus of law (Morice v Bishop of Durham (1805) is generally considered the genealogical root of the present law) having been developed since 1728, the cut off date for the direct importation of English case and statute law into the Cayman Islands (not since repealed under Cayman law) according to s.40 Interpretation Law (1995 Revision). This argument was rejected by Harre CJ, (transcript at p 14), who relied upon the ruling of the Court of Appeal of the Bahamas in *Attorney-General of the Bahamas v The Royal Trust Company* (1983) WIR 1.

[56] Transcript at page 10.

prima facie, that the addition of the language: "or any organisations or institutions operating for the public good" would be conclusive against charitable designation due to the breadth of the objects encompassed by the statement. It is trite law, as we are reminded by Viscount Cave LC [57], that Lord Macnaghten's fourth category has not been taken at face value. Some purposes falling within the division will be charitable whilst others will not. Each case will depend upon a finding that the manner of conferral of benefit is rooted in the preamble or the stepping stones which lead therefrom.

It is, with respect, questionable whether the language of Clause 3 of the Bridge Trust memorandum satisfied these strict common law principles. Whilst broadly expressed altruistic sentiments may nonetheless be confined to legal charity[58] with the courts[59] injecting the necessary precision by directing a scheme of administration, where the instrument employs language in terms which may reach beyond legal charity the court is unable to discern the boundaries of the donor's intention and, denied residual control, must declare the instrument invalid.[60] A powerful authority which strongly suggests this outcome in England is Kendall v Granger[61] where Lord Langdale concluded that a trust for the purpose of "encouraging undertakings of general utility" was not exclusively charitable and therefore void. Likewise, in Attorney-General v National Provincial Bank the Court of Appeal[62] and the House of Lords[63] agreed that similarly broad language[64] was fatal to charitable construction.

In holding the objects of benevolence and liberality to be non-charitable in Morice v Bishop of Durham,[65] Lord Eldon LC remarked that the "true question" to be asked was:

"...if upon the one hand (the Bishop) might have devoted the whole to purposes, (legally charitable), he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this court construes those words."

On the premise that English principles are to determine the validity of Clause 3 above, the "true question" posed by Lord Eldon LC remains apposite, as does his conclusion. Like the Bishop, the trustees of the Continental Foundation could, in keeping with the intention of the settlor, have applied the whole funds to non-charitable objects such as the

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[57] Attorney-General v National Provincial Bank [1924] AC 262 at 265.
[58] For example, "I bequeath £100,000 for charitable purposes."
[59] Or, in England, The Charity Commissioners: s.16(1)(a) Charities Act 1993.
[60] See cases cited supra at Nn 47-51. C.f trusts of imperfect obligation infra n.111.
[61] (1842) 5 Beav 300.
[62] [1923] 1 Ch 258.
[63] [1924] AC 262.
[64] "...for such patriotic purposes or objects and such charitable...institutions or charitable...objects in the British Empire" as the trustees should select.
[65] (1805) 10 Ves 522 at 541. Cited with approval by Lindley LJ in Re Macduff [1896] 2 Ch 451 at 464-465.

maintenance of condominiums along Seven Mile Beach or the provision of seminars on the benefits of investing in offshore jurisdictions.

Harre CJ, nevertheless, applying a benign construction to the definition of charity, as advocated *obiter* by Lord Hailsham in IRC v McMullen,[66] and holding applicable the equally benign interpretative principle enjoined by Russell LJ in Incorporated Council of Law Reporting v Attorney-General[67] concluded that Clause 3 created a valid charitable trust within the fourth of Lord Macnaghten's categories.[68] Building upon these liberal principles of construction, Harre CJ held [69]that the meaning of the words "public good" within Clause 3 were to be construed both contextually and conjunctively[70] and were therefore limited to wholly charitable objects within the spirit of the preamble. This was the preferred construction due both to the language which preceded[71] and succeeded[72] the reference to "public good". The present was "...a classic case for an ejusdem generis construction, the genus being 'charity.'[73]" Moreover, a consideration of Re Smith [74] and the locality cases led the court to be fortified in the knowledge[75] that very general words of gift can, in appropriate cases, lead to a conclusion of charity.

By praying in aid these tools of benign construction, the Chief Justice was thus able to fashion an outcome of charity which, in the very different fiscal conditions of England, would likely have been achieved only within the limited compass of the Charitable Trusts (Validation) Act 1954. It is submitted, however, that Harre CJ's reasoning in bringing the language of Clause 3 within the English principles is of less significance than his premise that English law was to apply with full vigour to the jurisdiction of the Cayman Islands.[76] As emphasised by counsel for the plaintiffs,[77] the court was "here with the first

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[66] [1981] AC 1. See supra n.7.

[67] That an identified purpose which is of benefit to the community is *prima facie* to be construed as charitable within the fourth heading: see text at p 89 supra.

[68] Transcript at Pp 27-30. It is also worthy of note that it was not considered objectionable that the whole of the Foundation's funds could have been expended on beneficial purposes outside the Cayman Islands (transcript p 39). The Charity Commissioners in their Annual Report for 1963 have stated (paras 72-73) that in the context of the fourth head there must be benefit, even if indirect, to the *community of the UK*. See Camille v Henry Dreyfus Inc [1954] Ch 672. See infra n.162. C.f the Canadian case of Re Levy Estate (1989) 58 DLR (4th) 375 where foreign benefit alone was held charitable within the fourth category.

[69] Transcript at Pp 41-44.

[70] Whilst acknowledging (transcript at p 41) the use of generally disjunctive language in the form of "or". See cases cited supra at Nn 47 and 48.

[71] "...any one or more religious, charitable or educational.. institutions".

[72] "...to enable the trustees to endeavour to act for the good or for the benefit of mankind in general or any section of mankind in particular anywhere in the world or throughout the world."

[73] Transcript at Pp 41-42. Having earlier (p 39) prayed in aid Re Pardoe [1906] 2 Ch 184. This is not to suggest, however, any doctrine of "charity by association": "if you meet seven men with black hair and one with red hair, you are not entitled to say that here are eight men with black hair" per Buckley J in Re Jenkins WT [1966] Ch 249 at 256.

[74] [1932] 1 Ch 153. Where a testamentary bequest: "to my country England to and for-own use and benefit absolutely" was held valid by the Court of Appeal.

[75] Transcript at p 36.

[76] Notwithstanding the effect of s.40 Interpretation Law (1995 Revision) which does not require this result. See supra n.55.

building block in a real sense of the jurisdiction of this country". It will be suggested below that this first building block has, in effect, been laid in the form of the adoption of an approach *de novo*, fully justified by the difference in consequence of being accorded charitable status in the Cayman Islands, in particular the absence of fiscal benefit from such ascription. As Cross has maintained:[78]

"Once fiscal privilege is out of the way, it would seem unnecessary to limit the public benefit to be required of a charitable trust to benefit of any particular type. Lord Macnaghten's words 'a purpose beneficial to the community' could be taken at their face value and not limited to purposes analogous to those contained in the preamble..."

This Utopian picture painted by Cross has, it is submitted, been taken from the realm of pure abstraction and given substance by the Bridge Trust ruling with the fourth head transformed into a general category of Public Benefit Trust apt to uphold a wide range of meritorious purposes previously held invalid on technical rather than logical grounds.[79]

The Bridge Trust decision is therefore of significance as a probable indicator of the way English law would have developed had the recommendations of the Radcliffe Commission[80] to produce a limited definition of charity for fiscal purposes been implemented. It has been noted that the likely consequence of such reform would be the creation of a broad category of legal charity without fiscal advantages, a result entirely consistent with the model provided by the Bridge Trust decision. The "tangle of cases as to what is and what is not a charitable gift"[81] have, at a stroke, been unravelled by the Grand Court's ruling, with the essence of legal charity, the sufficiency of public benefit, being allowed to re-emerge as the defining characteristic. Whilst a literal reading of Lord Macnaghten's fourth category may be considered anathema by conceptual purists, the compensation in terms of legal certainty would have been regarded by Lord Sterndale MR[82] as a benefit worthy of a much greater sacrifice. The concerns of the Master of the Rolls have been echoed by Cross,[83] who lamented:

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[77] Transcript at p 9.

[78] (1956) 72 LQR 187 at 205.

[79] As a consequence, the divide between public and private trusts will narrow. Some significant advances were achieved in this regard, by broadening the category of valid *private* trusts, in Re Denley's Trust Deed [1969] 1 Ch 373 where Goff J held that although expressed for purposes, the trust in point was for the benefit of ascertained individuals, the employees of a company, and therefore valid. See Gravells (1977) 40 MLR 397 who concludes (at 417) "...the point at which a purpose trust ceases to be public...may be almost coincidental with the point at which the class of intended beneficiaries may reasonably be ascertainable to bring the trust within the Re Denley principle." In addition to having to satisfy the (more flexible) class ascertainability test from McPhail v Doulton [1971] AC 424, the Denley principle, in providing a private trust solution, is necessarily applicable only to instruments expressly limited to the perpetuity period. It is therefore suggested that even if Denley is applied in Cayman the divide between public and private trusts remains significant, although the development of the Public Benefit Trust should ensure that only unmeritorious or political purpose trusts (see below) are likely to be held invalid locally.

[80] Supra n.14.

[81] Per Lord Sterndale MR in Re Tetley [1923] 1 Ch 258 at 266.

[82] Ibid.

[83] (1956) 72 LQR 187 at 198.

"No lawyer will ever be able to advise with confidence whether a trust is a charity within the fourth class until either the class is extended to cover all classes which confer an appreciable benefit on the public or restricted to some clearly defined purposes - such as public works."[84]

In adopting the former solution, it is asserted that the Bridge Trust decision is to be welcomed and provides a paradigm example to English lawmakers of how readily the English concept of charity could be transformed into a less opaque formula. Following the Grand Court's decision, it is submitted that legal charity in the Cayman Islands may be broken down into:

(a) Established Benefit Trusts; and

(b) Public Benefit Trusts.

These broad categories equate, respectively, to:

(i) those objects falling within the first three categories from Pemsel's Case; and

(ii) those objects which, as in Bridge Trust, have been shown to confer significant benefit on a sufficient section of the community.

Both categories will continue to be subject to the limitation of not being overtly political in nature[85] and, whilst the common law's presumption of public benefit applicable to purposes within (i) above[86] may be expected to remain, in category (ii) cases tangible benefit, to a section of the community will continue to require to be positively established.[87]

The foregoing categories may also serve as a useful basis for developing fiscal and non - fiscal definitions of charity in England. Charity, for fiscal purposes, it is suggested, should include: those purposes in category (i) above, adjusted to require tangible public benefit to a section of the community to be positively shown in all cases apart from the

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[84] Cross appeared for the appellants in IRC v Baddeley [1955] AC 572 and reports [(1956) 72 LQR 187 at 198] that Lord Simonds, but not the majority of their Lordships, accepted in argument that beyond the first three categories of charity should be added only purposes falling within the description of "public works" as represented in the preamble. See supra at n.30.

[85] But see text infra at p 104 et seq.

[86] See text supra at p 88.

[87] It is suggested that Lord MacDermott's degree of benefit test, proposed in the course of his dissenting judgment in Oppenheim v Tobacco Securities Trust [1951] AC 297, is likely to be preferred in Cayman over the Compton test endorsed by the majority in Oppenheim. See text infra at p 102 et seq.

relief of poverty.[88] The necessary compromise between flexibility and certainty could be struck by reliance upon the preamble to add to this list:

1. those purposes which, on a strict construction, fall under the umbrella of "public works", as proposed by Cross[89]; and

2. those purposes which have been held to fall within the relief of the aged and "impotent".[90]

Category (ii) charities, which would qualify for the non-fiscal benefits of charitable status, would merit these privileges by either:

(A) qualifying as a Public Benefit Trust by satisfying the sufficiency of benefit test, *infra*; or

(B) if unable to pass this test, by coming within one of the first three heads from Pemsel's Case where, for present purposes, the presumption of public benefit would remain.

It is to be regretted that the benefits of departing from the restrictive line of the English cases by opening the category of Public Benefit Trusts were not pursued by counsel in the Bridge Trust case with greater vigour. It would, for example, be hard to persuade the detached observer on the Rum Point ferry that there is merit in denying efficacy to a testator's wish to leave his estate on trust for: "philanthropic, charitable or public purposes" on the basis of fine distinctions of etymology and a failure to secure the approbation of a repealed English statute of 1601. It is confidently predicted therefore that should a trust in these terms arise for determination in the Cayman Islands, the liberal process commenced by Harre CJ will be openly embraced and the "refinements" of the common law openly rejected.

The Fiscal Dimension of Charitable Status

Because of the fiscal implications of charitable status in England, our Rum Point traveller's counterpart on the Clapham omnibus cannot, by contrast, be described as "detached". The fiscal and rating advantages conferred automatically upon all English

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[88] Thereby preventing the award of fiscal privileges to essentially private trusts as occurred in Re Watson [1973] 3 All ER 678 and Re Hetherington Dec'd [1990] Ch 1, for example. Such purposes would qualify as a category (ii) charity however.

[89] (1956) 72 LQR 187 at 205.

[90] I.e. the relief of the sick: Le Cras v Perpetual Trustee Co [1967] 3 All ER 915. The main categories of existing charity which would be thus denied fiscal privilege under this formula would be the controversial animal cases (see, for e.g., Lord Sterndale MR in Re Tetley [1923] 1 Ch 258 at 266), certain miscellaneous entities such as The National Trust (held charitable in Re Verrall [1916] 1 Ch 100) and recreational charities currently falling under the Recreational Charities Act 1958. All of the foregoing would achieve *validity*, however, as Category (ii) charities.

charities constitute an economic charge to the taxpayer[91] with the result that registration as a charity can only be justified if the organisation's activities have a corresponding benefit in relieving the government of expenditure which it would otherwise be obliged to make[92]. The generally narrow definition of charity favoured since Pemsel's Case, with a back-drop of steadily increasing taxation rates, is therefore unacceptional and wholly justified. Why should the taxpayer indulge by subsidy the whims of a testator who seeks governance by "the dead hand"?[93] or a company which seeks to make itself more attractive in the recruitment market by offering to fund the education of its employee's children?[94] Indeed, when viewed in this light, the criticism most obviously to be levelled at the trend of the English cases, especially in relation to the advancement of religion[95] and education,[96] is that charitable status has often been ascribed too readily.[97]

Returning to our postulant on the Clapham omnibus, he may cogently question why charitable status has to beget fiscal privilege. Better, surely, to allow philanthropic wishes to achieve expression without the additional dividend of fiscal privilege, than to frustrate many purposes of social value by making them hostages to tax legislation. This underlying theme of the Radcliffe Commission has been taken up by many eminent judges and jurists.[98] Leading the way once more has been Geoffrey Cross who opined:

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[91] Both charities and their benefactors receive a variety of fiscal exemptions. The Income and Corporation Taxes Act 1988 exempts charities wholly from the following taxes: i) income tax on its investment income/profits applied solely to its charitable purposes; ii)capital gains tax provided that the gain is applied to the charity's purposes. Furthermore, the Finance Act 1982 exempts charities from stamp duty in relation to any conveyance/letting made to it; and the Local Government Finance Act 1933 provides for a mandatory 80% relief (rising in some cases by virtue of the 1988 Act to 100%) of non-domestic rates in respect of land used by a charity wholly or mainly for charitable purposes. Certain medical charities are also exempt from value added tax (VAT Act 1983). When donors' exemptions are also accounted for it has been estimated that the total public subsidy is in excess of £1,000m per annum; see Moffat *Trusts Law and Materials* (2nd Ed.) at p.638.

[92] The Report of the Goodman Committee on Charity Law and Voluntary Organisations (National Council of Social Service, 1976) concluded at para 112: "..if a balance were drawn the advantages to the community derived from charitable funds' services would far outweigh the cost of the taxes and rates forborne".

[93] Re Endacott [1960] Ch 232; Re Pinion [1965] Ch 85.

[94] Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297.

[95] Re Watson [1973] 3 All ER 678 and Re Hetherington Dec'd [1990] Ch 1, for example.

[96] Re Dupree's Deed Trusts [1945] Ch 16 (establishing a chess tournament for young people in Portsmouth); Re Shaw's WT [1952] Ch 163 (a "sort of finishing school for the Irish people"); Re Koeppler's WT [1984] Ch 243 (funding of conferences for academics with a political flavour).

[97] The first judicial recognition of this view, giving notice of a more austere approach by the courts, is found in the judgment of Lord Upjohn in the Scottish Burial Reform case where it was stated in 1967 ([1968] AC 138 at 153) that as charitable status is now "...used so frequently to avoid the common man's liability to rates or taxes, this generous trend of the law may one day require reconsideration."

[98] See Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corp [1968] AC 138 at 153 and Dingle v Turner [1972] 1 All ER 878 at 889-890. For an early discussion of these issues see Brunyate (1945) 61 LQR 268 at 285. Gravells has returned to this theme at (1977) 40 MLR 397. There are also those who would wish to maintain the *status quo* however, including the members of the Goodman Committee (supra n.92). Most beguiling are the assertions of those who, in the face of all the evidence to the contrary, (e.g. Compton and Oppenheim) seek to deny the existence of any correlation between fiscal considerations and charitable ascription: see the views of the majority of their Lordships in Dingle v Turner

"I am sure that the best hope of bringing some order into the law of charity lies in separating the question whether a trust should be regarded as a charitable trust for the purpose of the general law of trusts from the question whether it should enjoy any special fiscal privileges. A judge who is called upon to decide whether or not a trust is a charitable trust may thus find himself in a dilemma. If he decides that it is not a charity, he defeats the donor's intention altogether - since the trust will be void. If, on the other hand, he decides that it is a charity, he not only gives effect to the donor's intention but blesses it with a substantial public subsidy in the form of freedom of tax which he may feel it does not deserve."[99]

Harre CJ in the Bridge Trust litigation did not find himself on the horns of such a dilemma, and unless the diminishing trusts law privileges[100] reserved for charitable trusts in the Cayman Islands require a restrictive approach, an expansive interpretation of legal charity is necessarily unobjectionable. Lord Upjohn has remarked that the period of expansion of legal charity in English law in the nineteenth and early twentieth centuries coincided with an era in which the fiscal advantages of such ascription were limited and the uppermost concern of the courts was to prevent the failure of laudable purposes through the application of technical legal rules.[101] Taking this as our starting point, there would not therefore appear to be any compelling reasons why the trusts law privileges should be the sole preserve of a narrow range of legal charity. Indeed, such would be the premium in terms of certainty accompanying the introduction of the Public Benefit Trust, that one would expect the rationale for limiting such trusts to the perpetuity period, for example, would need to be very powerful indeed.

It is timely therefore at this juncture to analyse these privileges with a view to establishing if there exist any cogent reasons for withholding them from the wider category of Public Benefit Trusts. Charities in Cayman, as in England, enjoy exemption from the following rules applicable to private trusts:

i) rules against excessive duration of trusts;
ii) rules requiring certainty of objects;
iii) rules of enforcement: the beneficiary principle;
iv) rules relating to lapse, where a cy pres scheme is applicable.

These rules of limitation are well known and will not be rehearsed here except in so far as is necessary in order to identify the underlying reason for allowing charitable trusts to escape their embrace. Taking them in turn:

[1972] 1 All ER 878 at 880-881 (Viscount Dilhorne and Lords MacDermott and Hodson). See the criticism of Gravells supra at 401.

[99] (1956) 72 LQR 187 at 204. Cross re-iterated these concerns as Lord Cross in the course of delivering the leading speech of their Lordships in Dingle v Turner [1972] 1 All ER 878 at 889-890.

[100] As the conditions of validity of private trusts are eased, the gap between public and private trusts necessarily narrows: Re Denley [1969] 1 Ch 373 and McPhail v Doulton [1971] AC 424. See supra n.79.

[101] Scottish Burial Reform v Glasgow Corporation [1968] AC 138 at 153.

i) Excessive duration

With the exception of the rule in Christ's Hospital v Grainger,[102] charities are equally subject to the aspect of the perpetuities rule which proscribes remote vesting of interests. That aspect of the perpetuities rule to which charities are exempt, the rule against excessive duration,[103] reflects the economic imperative of preventing the stagnation of commercial interests by the long-term dedication of capital to non-charitable purposes. The exception extended to charitable purposes acknowledges that it is commercially insignificant and yet socially expedient for a framework to exist within which a limited range of laudable purposes may be continued into perpetuity. Whilst the benefits to society derived from perpetual charitable purposes outweigh any risk of economic stagnation, the need to subject such objects to temporal limitation disappears. Exemption from the rule in such circumstances is the more significant when it is recalled that failure by a purpose trust to satisfy its provisions will result in England in the trust being struck down ab *initio*.[104] The remaining question therefore is whether there are any reasons of policy why the exemption should not be extended to a wider range of Public Benefit Trusts. The answer seems clear: whilst the benefits accruing to society from effecting such purposes continue to outstrip any risk of economic stagnation the position of net benefit should be maintained. The risk of collective beneficence becoming so great as to cause a significant diminution of capital in circulation would appear to be remote. With commercial vitality far more susceptible to the effects of inflation and cyclical trends in world markets, it is suggested that few economists would consider the extension of immunity under review to have even a marginal effect on the dynamics of a typical economy. Accordingly, there would appear to be no basis in the application of the perpetuities rule for limiting the concept of legal charity to Lord Macnaghten's categories.

ii) Certainty of objects

It has been often stated that the law knows what legal charity is and that a gift "for charitable purposes" is therefore not void for uncertainty.[105] The width of the testator's language will be supplied with the necessary precision by a charitable scheme being directed. Difficulties only arise, as has been seen, where the testator's language goes beyond that which is legally charitable by, for example, including, as alternatives, "benevolent" or "philanthropic" causes. Drawing the line thus is clearly artificial and the

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[102] (1849) 1 Mac. and G. 460. This position is confirmed in Cayman by s.10 Perpetuities Law 1995.
[103] A period of 150 years commencing from the effective date of the instrument is specified under Cayman law: s.4(1) Perpetuities Law 1995. C.f Ss 1(1);3(4),(5) and 9(2) Perpetuities and Accumulations Act 1964.
[104] The "wait and see" rule has no application to purpose trusts: S.15(4) Perpetuities and Accumulations Act 1964. C.f. s.11 Perpetuities Law 1995 which provides that non-charitable purpose trusts, if otherwise valid, "become void for perpetuity *at the end of the perpetuity period* (author's emphasis) (i.e., after 150 years, see n.103 supra).
[105] See, for e.g, Lord Simonds in Chichester Diocesan Fund v Simpson [1944] AC 341 at 371.

logic in its location difficult to defend,[106] but its capacity to uphold large numbers of inherently uncertain yet beneficial purposes[107] produces benefits which few would gainsay. Fewer objections still may be anticipated if, freed from fiscal considerations, this technique were extended to all trusts whose purposes satisfied a flexible concept of social utility. Furthermore, in extending the certainty exemption to all trusts of general societal benefit the legal drafting trap set by authorities which "bring no credit to our jurisprudence"[108] would be mercifully sprung. In a setting where fiscal privileges have been removed from the equation, the objections which may be anticipated against extending the scope of the present exemption would be: i) that the dangers of departing from the testator's actual wishes would intensify; and ii) that unacceptable levels of delegation of the testamentary power would be reached. These objections are of course equally well made against decisions such as Re Best[109] and it is suggested that the premise of this case, that the merits of effectuating public-spirited causes over-ride the demand for certainty, applies with equal force to a wider range of Public Benefit Trusts.[110] Moreover, only by removing the arbitrary limit set by the courts for the operation of the certainty exemption can the inherent tensions and inconsistency of the existing law be addressed.[111]

iii) Enforceability

According to the decision of Roxburgh J in Re Astor's Settlement Trusts,[112] the principal objection to non-charitable purpose trusts is not, however, founded in the need for certainty but rather in the absence of any human beneficiary to enforce the trust. For this reason, the settlor's purposes, which included "the improvement of good understanding between nations" and "the preservation of the independence and integrity of newspapers", were held invalid. It is well known that a trust for charitable purposes will be enforced by the Attorney-General acting on behalf of the Crown as *parens patriae*; but a trust which is expressed to be for "public purposes", for example, being regarded as non-charitable, will fail for want of a human beneficiary.[113] Accordingly, the role of enforcement played by the equitable owner in a private trust is fulfilled by the Attorney-General who, however, lacking intimate knowledge of the vast array of trusts under his ultimate

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[106] See Cross (1956) 72 LQR 187 at 199.

[107] Re Sutton (1885) 28 Ch D 464 ("charitable and deserving objects"); Re Best [1904] 2 Ch 354 "charitable and benevolent objects); Re Rumball [1956] Ch 105 (to the Bishop of the Windward Islands "to be used by him as he thinks fit in his diocese".)

[108] Hanbury and Martin (14th ed. at p.433.)

[109] [1904] 2 Ch 354.

[110] Whilst there will be little likelihood of close adherence to the testator's unexpressed priorities in expending the fund, Uthwatt J has provided a workable guideline in suggesting that the scheme should seek "to give effect to the drift of the ideas embodied in the expression": Re Gott [1944] Ch 193 at 197.

[111] The case in favour of extending the certainty exemption to Public Benefit Trusts in general is strengthened by the admitted validity of certain classes of *private* purpose trusts out of "concessions to human weakness or sentiment". Per Roxburgh J in Re Astor's Settlement Trusts [1952] 1 Ch 534 at 547. See for, e.g., Re Hooper [1932] 1 Ch 38 and Re Dean (1889) 41 Ch D 552.

[112] Ibid.

[113] See: Morice v Bishop of Durham supra n.2.

stewardship will, in reality, be much more likely to find himself aligned with the trustees in discharging the collective responsibility of "trust defender"[114] than enforcing the due administration of the trust. It is again submitted that the law's relaxation of the usual conditions of validity in the case of a charitable trust is attributable to a desire to effectuate socially meritorious purposes and is not predicated upon any absolute confidence that the Attorney-General, assisted by five[115] Charity Commissioners, are together a prophylactic against abuse. Accordingly, it is submitted that the same concession should be extended to all trusts of social utility which, if promoting non-specific purposes, would continue to be enforceable by the Attorney-General, and, in more specific cases such as Re Bushnell,[116] by the relevant department of government or other watchdog organisation. This conclusion has been reached by Gravells who suggests,[117] for example, that the Press Council could be expected to exert the necessary control in relation to "many of the purposes" of the Astor Trust. In a small jurisdiction such as the Cayman Islands the setting up of workable enforcement mechanisms to police all Public Benefit Trusts could be achieved with a minimum of difficulty and, once again, it is suggested that the logic which demands concessions in favour of certain purposes of public benefit can, on principle, only be defended by the uniform application of this principle to all such purposes.

iv) Lapse

It has been stated that "the courts have gone very far ...to resist the conclusion that a legacy to a charitable institution lapses".[118] Thus whether the charitable donee has ceased to exist by the date of operation of the gift (initial failure) or where, the gift having come into effect, the donee becomes defunct (subsequent failure)[119] it may be possible by application of a cy pres scheme to rescue the appointed assets and apply them to similar charitable purposes. The responsibility for exercising this "rescue" jurisdiction lies largely, but not exclusively, with the courts.[120] In cases where the trust property is thus saved from the operation of the doctrine of lapse a very real advantage over private trust law rules, which would demand the return of the property to the donor or his estate, is discernible. This limited protection from the doctrine of lapse[121] may be seen to be

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[114] Harre CJ's description of all the proponents of charitable designation in the Bridge Trust case: transcript at p.24.

[115] Pursuant to the power provided by para 1(5) Schedule 1 Charities Act 1993 two part-time commissioners have been appointed in addition to the three full-time officers.

[116] [1975] 1 WLR 1596, where, prior to the enactment of the National Health Service Act 1946, the testator left the residue of his estate to promote a socialist system of public health. Goulding J held the purpose to be political and to therefore fail. See text infra at p 104 et seq.

[117] (1977) 40 MLR 397 at 415.

[118] Per Wilberforce J in Re Roberts [1963] 1 WLR 406 at 412.

[119] For the meaning of "failure" see s.13(1) Charities Act 1993.

[120] S.18 Charities Act 1993. C.f the modernisation aspect of cy pres schemes (where no failure of purposes is called for) which is largely exercised by the Commissioners.

[121] No cy pres scheme will be ordered if, in a case of initial failure, there cannot be found a width of charitable intent: Re Rymer [1895] 1 Ch 19. If, having dedicated the property to charitable purposes, the

entirely complementary to the exemption from the rule against excessive duration in facilitating the continuation of purposes perceived to be of social benefit. The policy of the law thus holds that it is preferable for the property to be applied to similar such purposes, where the testator's intention permits this, than to provide a windfall for the next of kin. There exists no reason for limiting this principle to a narrow conception of charity, with logic dictating that once a trust's purposes are considered generally beneficial it is in the public interest that they should not be allowed to lapse.

Thus we may conclude from the foregoing that Lord Cross was, with respect, correct in stating in Dingle v Turner[122] that on the basis of trusts law privileges alone:

"..there would be no reason for the courts not to look favourably on the claim of any 'purpose' trust to be considered as a charity if it seemed calculated to confer some real benefit on those intended to benefit by it...if it would fail if not held to be a charity."

This being so, we must now consider what validating conditions we may expect Public Benefit Trusts to be subjected to.

Continuing Conditions of Validity of Public Benefit Trusts

Whilst the development of the new category of Public Benefit Trusts has the major advantage of avoiding the myriad fine distinctions of the existing law, it must not be supposed that every trust with a public aspect will necessarily fall within the category. A test which marks the public/private divide must therefore be formulated. Moreover, the continuing validity of the so called political purpose objection will need to be assessed. These matters will be taken in turn.

1. Defining sufficiency of public benefit

The fiscal consequences of being conferred charitable status have for long influenced the definition applied to public benefit and it has already been observed that as fiscal privileges have increased so too has the need to establish sufficiency of such benefit. Notwithstanding the emergence of this limitation, it has been seen[123] that the "familiar" heads of charity which contain a public element (advancement of religion and education) have been accorded a rebuttable presumption of public benefit. Having first eliminated fiscal considerations, one would expect this legal presumption to become more compelling, if not irrebutable. The only purposes dependent upon positive proof of public benefit in the Cayman Islands will therefore be those falling for consideration as Public Benefit Trusts, and it is accordingly here that the sufficiency of benefit debate will be staged.

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settlor wishes the property to revert to his estate he must expressly so provide with reversion to take effect within the perpetuity period (now subject to "wait and see" rules: C.f Re Peel's Release [1921] 2 Ch 218.)

[122] [1972] 1 All ER 878 at 889.

[123] Supra n.33.

It is submitted that the absence of fiscal considerations leans heavily towards the exclusion of Lord Greene MR's rigid personal nexus test from Re Compton which would be unduly limiting. Here the Court of Appeal held bad a gift for educating the descendants of three named persons. This was regarded on appeal as an inherently familial purpose, and as such the antithesis of a charitable trust. In overturning the decision of Cohen J at first instance, the Master of the Rolls asserted:[124]

" a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift."

The majority of the House of Lords in Oppenheim v Tobacco Securities Trust[125] allowed the Compton test to claim its most celebrated victim - a purported trust for education - whose sizeable class comprised the children of existing and former employees of the British-American Tobacco Company Ltd. Lord Simonds, who gave the leading majority speech, was unmoved by the fact that the class numbered in excess of 110,000 individuals. He asserted:[126]

"..the quality which distinguishes (the class) from members of the community must be a quality which does not depend on their relationship to a particular individual. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes."

Lord MacDermott, in a powerful dissenting speech, charged the Compton test with being both "arbitrary and artificial".[127] His Lordship preferred to apply the pre-Compton authorities[128] which tested the public quality of a trust by subjecting it to a broad survey without pre-determined limits. The matter was to be viewed as one of degree in each case with the numerical composition of the class one relevant consideration.[129] Lord MacDermot's flexible approach was approved, in principle, by all their Lordships in Dingle v Turner.[130] Lord Cross, in delivering the judgment of their Lordships, asserted:

"In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust."

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[124] Re Compton [1945] Ch 123.
[125] [1951] AC 297.
[126] Ibid at 306.
[127] Ibid at 318.
[128] See, for e.g., Verge v Summerville [1924] AC 499.
[129] [1951] AC 297 at 314.
[130] [1972] 1 All ER 878. The status of the Compton test in English law remains unclear, the view of the House of Lords in Dingle v Turner (a poverty case) (infra) being necessarily *obiter*.

Thus, even in a jurisdiction where charitable status begets fiscal privilege, there is clear judicial evidence of discontent for the Compton test as a universal proposition. It is possible to predict with some confidence therefore that Lord MacDermott's degree of benefit test will prevail in the Cayman Islands. On this basis, Public Benefit Trusts in the Cayman Islands may be expected to attain validity if it can be shown, adopting a broad approach, that the trust, in the court's assessment,[131] will benefit a sufficient section of the local[132] or international community.[133]

By embracing the new category of Public Benefit Trusts, thus defined, it is submitted that a conclusion of legal charity under Cayman law would be likely to be reached on the facts of the most troublesome of the English cases. [134] For the reasons which follow, it is further contended that many trusts held non-charitable in England on political grounds[135] merit reconsideration in the light of the *ad hoc* development of this limitation. This applies *a fortiori* once the fiscal dimension has been removed.

2. The Scope of Political Purposes

The fiscally motivated concern to see legal charity narrowly circumscribed by raising the profile of the public benefit requirement, has also developed a more specialist weapon in the form of the political purpose exclusion. As with legal charity itself, the definition of political purposes has become a term of art. The origins of the principle are traceable back only to the judgment of Lord Parker in Bowman v Secular Society,[136] with the previous cases showing little concern for the possible political dimensions of trusts coming before them.[137] Having already determined that a valid private trust in favour of the donee corporation had been raised, Lord Parker stated *obiter* that[138]:

"...a trust for the attainment of political objects has always been held invalid, not because it is illegal...but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit."

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[131] Sufficiency of public benefit is clearly an objective question; the opinion of Chitty J in Re Foveaux [1895] 2 Ch 501 that the view of the donor is paramount was over-ruled by their Lordships in National Anti-Vivisection Society v IRC [1948] AC 31 (see, for e.g., Lord Wright ibid at 46-47). Their Lordships confirmed the test to be objective affirming Re Cranston [1898] 1 IR 431 and Re Hummeltenberg [1923] 1 Ch 237 in this regard. In the former case, Fitzgibbon LJ stated (at 446) "the benefit must be one which the founder believes to be of public advantage and his belief must be at least rational and not contrary either to...the general law...or to the principles of morality."

[132] Bearing in mind that the resident population of the Cayman Islands is approximately 30,000.

[133] Applying Bridge Trust and Following Re Levy Estate (1989) 58 DLR (4th).

[134] Re MacDuff [1896] 2 Ch 451; Re Astor's Settlement Trusts [1952] Ch 534; IRC v Baddeley [1955] AC 572 and IRC v Williams [1947] 1 All ER 513, for e.g.

[135] Re Shaw [1957] 1 WLR 729 and Re Bushnell [1975] 1 WLR 1596, for e.g.

[136] [1917] AC 406.

[137] See, for e.g., Re Cranston [1898] 1 IR 431 and Re Scowcroft [1898] 2 Ch 638.

[138] [1917] AC 406 at 442. The only authority cited by Lord Parker in support of this proposition was that of Themmines v De Bonneval (1828) 5 Russ 288 which turned on principles of public policy.

Following this dictum it was unclear what the term "political object" connoted, but it was strongly arguable that Lord Parker intended the limitation to apply singularly to those trusts whose direct purpose was only capable of fulfilment by effecting legislative change.[139] The watershed decision, however, was that of the majority[140] of their Lordships in National Anti-Vivisection Society v IRC.[141] Here, Lord Simonds expressly eschewed a narrow interpretation of Lord Parker's dictum and regarded the political purpose objection to be so clear and settled[142] as to lead him to "neither expect nor require much authority"[143] in support of it. In His Lordship's leading majority speech, clear notice was served of the arrival of a new era, restrictive of legal charity, which he would confirm three years later in Oppenheim. The principal reason for invoking Lord Parker's limitation was stated as being the inability of the courts to judge whether a proposed change in the law was for the public benefit or not.[144] His Lordship expressly approved the statement [145]that:

"[T]he law could not stultify itself by holding that it was for the public benefit that the law itself should be changed."

The flaw in this statement, it is submitted, is that it views the concept of public benefit too narrowly. What of the public benefit which accrues to any democracy by ensuring that freedom of expression is not stultified? It is submitted that in relation to quasi-political issues the law should stand neutral by allowing Public Benefit Trusts to embrace the cause of both sides. Examples might include campaigns for tighter gun and drug control laws.[146] There is much to be said, therefore, in favour of ascribing a more limited significance to Lord Parker's dictum, as asserted by Lord Greene MR in the Court of Appeal[147] and Lord Porter in their Lordships' House. In Lord Greene's view,[148] the principle from Bowman was to be limited to matters of "acute political controversy" and not extended to "non political" questions such as changes in the law. The Master of the

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[139] All the purposes of the Secular Society under review fell within this narrow ambit: e.g., the disestablishment of the church, the secularisation of education, the alteration of marriage laws and laws prescribing the observance of the Sabbath.

[140] With Lord Porter dissenting.

[141] [1948] AC 31.

[142] Whilst at the same time admitting (ibid at 63) there to be "a paucity of judicial authority". Lord Porter (ibid at 54) likewise commented upon how "scanty" the authorities were in support of the political purpose limitation. There were just two reported decisions on political purpose between Bowman, and the Anti-Vivisection case, the later (and more senior) authority held inapplicable Lord Parker's principle: IRC v Temperance Council (1926) 136 LT 27; Re Hood [1931] 1 Ch 240.

[143] [1948] AC 31 at 63.

[144] Somewhat inconsistently, however, in the course of applying the public benefit requirement, the majority did not hesitate in making this value judgment in reaching the conclusion that the reforms of the Anti-Vivisection Society would be to the public disadvantage. See, for e.g., the strong position taken by Lord Wright [1948] AC 31 at 49.

[145] Appearing in Tyssen on Charitable Bequests, 1st Ed.

[146] See infra n.154.

[147] National Anti-Vivisection Society v IRC [1946] KB 185 at 207-208. Lord Greene MR was the only member of the Court of Appeal to consider the political purposes objection.

[148] Ibid.

Rolls reasoned that any legislative goal of the Society was necessarily ancillary to its main objective[149] of suppressing cruelty to animals, but that in any event:

"A charitable institution must surely be at liberty to achieve its object by the most efficient and practical means, which may well be legislation."[150]

In their Lordships' House, Lord Porter endorsed Lord Greene's reasoning in asserting that charitable status would only be compromised on the political ground if the main object being pursued necessarily required legislative reform. Unlike the purposes of the Secular Society, which sought to promote individual liberty in a way only achievable by repeal of laws of "positive injunction",[151] the present Society's objectives could, as a theoretical matter, be achieved by universal consensus. Lord Porter maintained that the position could not be otherwise[152] or legal charity would historically have excluded campaigns against slavery[153] and the use of child chimney sweeps[154] once legislative reform was placed at the forefront of their agenda.[155]

The majority rejected these arguments, however, and held the purposes of the Anti-Vivisection Society to be non-charitable, *inter alia*, on the political ground. As a result of the broad terms in which the political purpose limitation was affirmed by the majority, its operation has not since been confined to trusts having as their primary purpose to effect a change in the law. Accordingly, as has been noted, a trust to disseminate the benefits of a socialised system of public health has been held non-charitable.[156] Equally, trusts intended to foster international relations[157] and even to check abuses in human rights in all parts of the world[158] have been denied charitable status on the score of the political purpose objection.

It is suggested that the foregoing cases go too far in restricting the scope of legal charity and that the original focus of the political purpose objection requires to be reassserted. In the absence of the fiscal pull towards definitional conservatism of legal charity, it is hoped that the Cayman Islands courts, which have yet to confront the issue of political purposes, will be carried by the momentum of the Bridge Trust case and embrace Lord

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[149] The trust in Re Hood [1931] 1 Ch 240 was held charitable on this basis, although its purpose was to "extinguish the drink traffic".
[150] [1946] KB 185 at 208.
[151] [1948] AC 31 at 54.
[152] Ibid at 55.
[153] C.f. Jackson v Phillips (1867) 96 Mass (14 Allen) 539.
[154] More modern examples would include anti-smoking and gun control campaigns, although each would fall within Lord Porter's "reform by societal consensus" category.
[155] All their Lordships were agreed that if the political purposes could be considered merely ancillary to the charitable there would be no grounds for objection.
[156] Re Bushnell [1975] 1 WLR 1596. Equally, a trust to promote any political party is invalid, e.g., Re Ogden [1933] Ch 678.
[157] Re Strakosch [1949] Ch 529.
[158] McGovern v Attorney-General [1982] Ch 321. For a more benign ruling of the same judge on the ambit of political purpose see: Re Koeppler's WT [1984] Ch 243.

Parker's narrow conception of political purpose. On this premise, a trust which passes Lord MacDermott's degree of benefit test will be charitable, even if it has an objective of legal reform, unless its primary objective is societal influence against a rule enjoined by *Cayman Islands* law. Obvious examples of political purposes, thus defined, would include campaigns to restore capital punishment for murder, to extend alcohol licensing laws or to effect electoral reform. A limitation in these terms is easily justified for in each case a judge would have genuine difficulty in quantifying public benefit. On the other hand, campaigns for reform of a foreign country's laws should not be brought within the limitation if the available evidence allows an objective determination[159] of the balance of public benefit. As acknowledged by Slade J in McGovern v Attorney-General,[160] there is no obligation on a judge to assume that a foreign law is correct as it stands and many reform campaigns can be expected to be directed against laws and practices which all fair-minded individuals would consider opprobrious. It should not, for example, be considered arrogant for a judge in the Cayman Islands to apply his standards in concluding that the abolition of capital punishment in an Islamic country for the crime of adultery[161] is for the public good of the affected populous.[162]

Such cases aside, the court should be concerned only to ensure that the trust's primary purpose is not political in the narrow sense herein advocated, leaving the ultimate determination of charitable status to the public benefit test and the wider question of political purpose to the general public, without whose support any judicial label of charity rings decidedly hollow. Charitable designation will continue to elude some purposes having a political flavour in the wide sense, but this should be determined by applying the public benefit test and not that of political purpose. This, it is submitted, is the preferred construction of the Anti-Vivisection decision where the majority's primary ruling was that the trust's purposes were detrimental to society.[163] In most cases a judicial determination on the public benefit question should be possible, and it is noteworthy that Chitty J was censured by their Lordships in the Anti-Vivisection[164] case for "standing neutral" on the merits of anti-vivisection in Re Foveaux.[165]

Conclusion

The proposal of the Radcliffe Commission to create a limited category of fiscally privileged charities has been allowed to languish for too long and, with the current state of the law in England as described, is ripe for implementation. It is submitted, however,

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[159] Supra n.133.
[160] [1982] Ch 321 at 338.
[161] See Slade J *contra* ibid at 339-340.
[162] C.f the view of Sir Raymond Evershed MR in Camille and Henry Dreyfus Inc v IRC [1954] Ch 672 at 684 who considered that the relevant community to be considered by an English court in all cases was that of the UK. C.f. the views of Slade J in McGovern v Attorney-General [1982] Ch 321 at 338.
[163] Supra n.144.
[164] See, for eg., per Lord Wright [1948] AC 31 at 46-47.
[165] Supra n.131.

that the definition of "fiscal charity" proposed above[166] is preferable to the formula proposed by the Commission, [167] having the advantage of certainty without absolute rigidity. The introduction of a general Public Benefit limb of charity (Category (ii) above), for the purposes of qualifying for exemption from the technical legal rules only, would complete the reform in eliminating the most troublesome of the somewhat schizophrenic existing rules which call for both utmost fidelity to "charity" as a linguistic matter and yet encourage great violence to the preamble as an historic matter.

It has been shown that the overwhelming consideration in limiting the English concept of legal charity has been the myriad fiscal privileges which such designation automatically attracts. It has been suggested that once introduced to an environment where this nexus does not exist, legal charity will evolve into a broad genus of purpose trust identifiable from its forebears only by the continuum of public benefit. The Cayman Islands provide just such an environment and in the decision of the Bridge Trust case is to be found the first evidence of the metamorphosis of legal charity into an inherently workable concept. By application of the definitions herein suggested to the concepts of public benefit and political purpose, the transformation of the substantive law of charity will be complete. This will ensure that minute questions of construction become a relic of the past. Much like the Statute of Elizabeth itself.

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[166] See text supra at p 95 et seq.
[167] Supra n. 14.