CAYMAN ISLANDS LAW BULLETIN

NO. 16

SEPTEMBER 1998

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 (1998)16 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, Grand Cayman (345) 914-3540.

EDITORIAL STAFF

Mitchell C. Davies
Director of Legal Studies
Editor

John Epp
Senior Law Lecturer

Heather Neilly
Law Lecturer

Simon Cooper
Law Lecturer

Vaughan Carter
Law Lecturer

Roy Cairns
Law Lecturer

Monica Newell
Executive Officer

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EDITORIAL NOTE

The sixteenth 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 frontier of Cayman law. This edition features three articles, 'New Directions in Judicial Review; "Heresy" and the "Forbidden Merits": What to Legitimately Expect in the Cayman Islands' by Mr. V. Carter (at p.33); 'Leaving Provocation to the Jury - A Homicidal Muddle?' by Mr. M. Davies (at p.97); and 'The Strata Corporation and Member Debt' by Mr. J. Epp (at p.113).

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 nine bound volumes (1952-1979, 1980-83, 1984-85, 1986-87, 1988-89, 1990-91, 1992-93, 1994-95 and 1995-96). 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, and Murphy JJ, and Douglas, Orr and Patterson (Actg JJ) during the period March 5, 1997 - July 30 1998.

Also appearing in this edition are summaries of the decisions of the Cayman Islands Court of Appeal. 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
Editor

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Charitable Trusts

Charitable trusts - Meaning of legal charity - Imperative nature of obligation to distribute - Purposes generally beneficial to the community - Requirement of exclusivity - Relevance of locality cases - Scope of ejusdem generis principle

In the Matter of a Memorandum of Agreement Dated July 20 1976 and in the Matter of a Memorandum of Agreement Dated October 7 1982

Court of Appeal (4/96 & 1/97)
Zacca P, Kerr and Collett JJA
July 30 1998

Legislation

The Charitable Uses Act 1601
The Trusts (Foreign Element) Law S 4

Authorities referred to

In Re Vandervell's Trusts (No 2) [1974] Ch 269
A-G of the Bahamas v Roval Trust Co (1983) 36 WIR 1
Re Weekes' Settlement (1897) 1 Ch 289
Re Combe [1925] Ch 210
In Re Ogden [1933] Ch 678
IRC v McMullen [1981] AC 1
Pemsel's case (1891) AC 531
A-G v National Provincial Bank [1924] AC 262
Re Macduff [1896] 2 Ch 451
Incorporated Council of Law Reporting for England and Wales v A-G [1972] Ch 73
Incorporated Council of Law Reporting of Queensland v FRC (1971) 125 CLR 659
Morice v Bishop of Durham (1805) 10 Ves 522 at 531
Blair v Duncan [1902] AC 37
Houston v Burns [1918] AC 337
Re Smith [1932] 1 Ch 153
West v Knight (1669) 1 Ch Cas 10
A-G v Lord Lonsdale (1827) 1 Sim 105
Mitford v Reynolds (1848) 16 Sim 105
Nightingale v Goulburn (1847) 5 Hare 484
Re Pardoe (1906) Ch 184
Re Atkinson's WT [1978] 1 WLR 586
A-G for New Zealand v Brown [1917] AC 393

Authoritative work cited

Tudor on Charities (8th Ed)

Mr Goldsmith QC, Mr Close and Mr Ritchie for the appellant
Mr Etherton QC, Mr Tidmarch and Mr Foster for the first and second respondents
Mr Hart QC, and Mr Helfrecht for the third respondent
Mr Boyle QC, Mr Harrison and Mr Clifford for the fourth respondent
Mr Barrie for the fifth to fifty-fourth respondents

The subject matter of the present appeal was the validity or otherwise of the Continental Foundation ('CF'), a trust established by Memorandum of Agreement in the Bahamas in 1976.

The appellant to these proceedings, Compass Trust Co Ltd., represented the insolvent estate of Andrew Jahre who, according to the appellant, was the effective settlor of CF. The ostensible settlor was one Thorleif Monsen.

The first and second respondents are the trustees of the Aall Foundation ('AF'), a Cayman Islands trust established in 1982 with the same ostensible settlor. After the death of Mr. Jahre, and in accordance with clause 5 of the Memorandum of Agreement, the vast majority of the assets of CF were transferred to the trustees of AF. Litigation in the Grand Court in connection with these transactions was set in motion and a preliminary issue which arose was the validity of each of the Foundations.

It having been conceded by all parties that AF was a valid charitable trust, the matter for determination in these proceedings was the validity of CF. In particular, it was conceded that if CF was not a valid charitable trust it was necessarily void and of no legal effect, for infringing the rule against excessive duration, and in being a trust of imperfect obligation.

Two preliminary issues which had been accepted by the Honourable Chief Justice, whose rulings the Court of Appeal adopted, were:

(a) in accordance with clause 39 of the Memorandum of Agreement and s.4(4) Trusts (Foreign Element) Law 1987, the governing Law of CF (together with its *situs*) had effectively been changed to that of the Cayman Islands: and

(b) the substantive law of charities in the Cayman Islands was, in terms of broad legal principle, the same as that applicable in England: *A-G v Roval Trust Co of the Bahamas.*

The arguments put forward by the appellant in favour of a conclusion of invalidity and a consequential resulting trust of the assets to the estate of Mr. Jahre were twofold: (1) that the Memorandum of Agreement was insufficiently imperative in terms of the distribution of either income or capital to create a trust as opposed to a mere power (this argument had not been advanced before the Grand Court); and (2) that the purposes of CF, not being exclusively charitable, were necessarily ineffective and void in law.

The pivotal clause in the ruling of the Honourable Chief Justice which in his Lordship's view gave rise to a conclusion of charity was clause 3. This proceeded:

'The trustees may accumulate and add to the capital, the net annual income derived from the trust fund for so long as the law applicable to the trustees permits them so to do. In any year that the law applicable to the trustees requires them to distribute income or in any year that the trustees not being required to distribute income decide, in the exercise of an absolute discretion, to distribute income then such income or any part thereof shall be paid to any one or more religious, charitable or educational institution or institutions or any organisations or institutions operating for the public good (and the trustees shall be sole and absolute judges of whether any organisation or institution so qualifies are (sic) as a beneficiary hereunder) 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. In the case of any question as to the propriety of any

distribution or selection by the trustees the written approval of the advisors to the trustees, if such exists, shall be an absolute and final determination which shall not be open to question.'

Held: (allowing the appeal):

(i) The fact that no express obligation to distribute capital appeared in clause 3 was inconclusive: *Tudor on Charities* (8th Ed). In order to determine whether there existed such an obligation it was necessary to scrutinize the whole of the Memorandum in an attempt to discern whether the settlor intended that the trustees should apply at least some of the income to the specified objects.

One of the most powerful indications of the settlor's intention was to be found in the first recital where it was stated: '..the settlor wishes to establish a trust for the benefit of...' Accordingly, if an imperative obligation were not imposed upon the trustees by the terms of the Memorandum, it was apparent that the settlor's intention had been defeated by the inattention of the draftsman.

Moreover, the use of the word 'enable' in clause 3 in the context of the provision of trust funds indicated the imposition of an obligation upon the trustees.

Finally, it was important to recall that in the event of any doubt it was legitimate to invoke a benignant rule of construction in favour of charity: per Lord Hailshan LC in *IRC v McMullan*.

Accordingly, an intention to create a trust in favour of the objects specified in clause 3 was necessarily to be implied.

(ii) To qualify as charitable, a trust must fall within one of the four heads of charity and be within the 'spirit and intendment' of the preamble to the Statute of Elizabeth as laid down in *Pemsel's case* by Lord Macnaghten.

(iii) Although it was clear from the authorities that new purposes may be held legally charitable within the grouping of trusts for purposes generally beneficial to the community, this was not to suggest that every purpose being for the public good was necessarily to be held charitable: per Lord Cave in *AG v National Provincial Bank*.

The flexible approach to construction approved by Russell LJ in *Incorporated Council of Law Reporting for England and Wales v A-G* would be adopted. together with the (rebuttable) presumption that a purpose shown to be of general public benefit is *prima facie* charitable in law.

(iv) The requirement of exclusivity was at the root of the 'disjunctive purpose' cases such as *Re MacDuff* and *A-G v Roval Trust Co of the Bahamas*. Accordingly, the use of disjunctive language which introduced non-charitable objects alongside the charitable was necessarily fatal to charitable ascription.

The relevant language of clause 3 described the objects of the trust as 'one or more religious, charitable or educational institution or institutions or any organisations or institutions operating for the public good'. The first three objects corresponded to the first three heads from *Pemsel's case* (with

'charitable' being used in its eleemonsynary sense to mean for the relief of poverty). The issue here was whether the objects comprised in the phrase 'or any organisations or institutions operating for the public good' were *necessarily* limited to entities charitable in law. Unless suffused by a general glow of charity from its context, as held by the Chief Justice, it was clear that this disjunctive phrase must be regarded as comprising both charitable and non-charitable objects.

The 'locality cases' such as *Re Smith* which were considered persuasive in this regard by the Chief Justice were of little assistance. This was not a locality case, but indeed, as was apparent from the wide language of clause 3, almost the direct antithesis of such a case.

The 'locality cases' would not be extended, as urged by counsel for the first and second respondents. To do so would be to produce a presumption in favour of charity from wide general words directed towards public benefit which did not prevent a dedication to exclusively charitable purposes. Such a result would be to effect an illegitimate and substantial extension to the law of charities.

(v) The *ratio* of the Chief Justice's decision, that the *ejusdem generis* rule could be invoked to impliedly limit the purposes for public good by reference to the specifically charitable purposes which preceded them, was flawed. Clause 3 of the Memorandum was not coloured with the notion of legal charity. A comparison with the corresponding language of the AF Memorandum was instructive. The brief description there employed, in contrast to the wide language of clause 3, left no doubt as to its exclusively charitable objects.

(vi) Had clause 3 stood alone, the patent ambiguity might have been overcome by adopting the rule of benignant construction. In discerning the settlor's intention, however, all relevant parts of the document required consideration. Of particular relevance in this regard was the preamble and clause 31. The former described the objects of CF as 'worthy individuals, organisations and corporations'. The term 'worthy', being wider than 'charitable', was fatal to charitable ascription: *Re Atkinson* [illegible]

Clause 31 allowed, in prescribed circumstances, the amendment or revocation of the trust with the express exclusion of the settlor and past or present trustees. No restriction to exclusively charitable objects was expressed and in the light of the language of the preamble, none could be implied. A comparison with the relevant clause of the AF Memorandum was again instructive whereunder any amendment was expressly restricted to charitable objects.

The inevitable conclusion, having scrutinized the Memorandum as a whole, was that the trustees were invested with a virtually unrestricted discretion. The *ejusdem generis* principle could not be invoked in this context, however philanthropic the settlor's intention may have been: *AG for New Zealand v Brown*.

(vii) The appeal would be allowed with a declaration that the trusts contained in

the CF memorandum were not charitable trusts.

(viii) Costs to the appellants to be borne by the first and second respondents.

MD

Editor's note: for a summary of the Grand Court ruling see (1996) 15 Law Bulletin 6, and for a commentary on this ruling see (1996) 15 Law Bulletin 83.

Civil Procedure

Liquidators - Conflict of interest - Forum conveniens - Jurisdiction of the Grand Court

In the Matter of the Consolidated Applications of the Liquidators for Directions in Causes 285 to Causes 304 of 1996 (inclusive) and In the Matter of the Liquidators of the Companies Respectively Named in those Causes

Grand Court (285-304/96)
Smellie J
November 17 1997

Legislation

Companies Law (1995 Revision) S 140

Court Rules

RSC Order 18/19/16 (17th edition)

Authorities referred to

Stephenson v Garrett [1898] 1 QB 677
Chanel Ltd v F W Woolworth & Co Ltd [1981] 1 All ER 745
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581

Mr Woods for the applicants
Mr Alberga QC for the liquidators

The applicants sought to challenge the jurisdiction of the Grand Court to hear an application by the liquidators on the following grounds:

(a) The Grand Court could not properly hear the application while the liquidators and their attorneys remained in a position of conflict of interest by acting in the liquidations both of the Fund Companies and of the Fund Management Companies;

(b) The Grand Court had no jurisdiction to hear aspects of the liquidators' application which involved issues said to be currently joined before the Supreme Court of Quebec, and in which the liquidators were said to have already submitted to the jurisdiction of the Quebec Court.

Objections were raised by the liquidators.

Held: (upholding the objections and refusing to hear the application)

(i) The application was misconceived in that it sought to challenge the jurisdiction of the Grand Court to deal with the matters at all. What it really sought were:

(a) orders disapproving the liquidators' alleged conflict, either by discharging them as liquidators of the Fund Managers or refusing to hear their application whilst they remained in the alleged position of conflict of interest; and
(b) an order to the effect that Quebec was the more natural and convenient forum for trial of the issues and a further direction declining jurisdiction in deference to the Quebec Court.

(ii) It was an abuse of the process of the court and contrary to justice and public policy for a party to relitigate an identical issue which had already been decided. Although the applicants had not made any earlier objection to the liquidators' position, they had had the opportunity to do so in earlier proceedings in which they were present and in which the issue was specifically raised for determination on behalf of the liquidators. A party was not entitled to a rehearing of a matter unless there had been some significant change of circumstances or he had become aware of facts which he could not reasonably have known or found out at the time of the earlier hearing. Although an earlier order was expressed to be operative 'until further order', the applicants had not sought to advance any change of circumstance by which to justify revision of the order. Nor had any new matter been discovered. Even if some matter not already considered by the court was to be raised in the application, such matters should have been raised at earlier stages of the proceedings. To raise those concerns now would involve the court in a consideration of whether to overturn much of what had happened based on the liquidators having been allowed to act without objection, with inevitable prejudice to the better management of the liquidation as a whole. It was an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been raised previously.

Another important consideration was that the liquidators had been appointed over the Fund Management Companies with the agreement of G, the beneficial owner of the Fund Managers, therefore the applicants already had notice of and had given consideration to the apparent conflict about which they now sought to complain.

Furthermore, there was no apparent obstacle to the liquidators being able to consider objectively whether the Fund Managers should be admitted to prove as creditors in the liquidation of the Fund Companies, and vice versa. The applicants did not express concern about conflict of interest until after the liquidators had determined not to admit certain of their claims. The court was concerned as to the *bona fides* of their efforts to impugn the actions of the liquidators.

For these reasons, the application was an abuse of the process of the court and would not be heard.

(iii) The liquidators were simply seeking directions as to how to proceed in respect of certain claims, i.e. whether in this jurisdiction, Quebec or England. Those directions were within the jurisdiction of the Grand Court.

(iv) For the above reasons, the objections of the liquidators were properly taken and the application would not be heard.

HRN

Winding up petition - Affidavit evidence - Allegations of fraud - Whether cross-examination on the affidavit should be ordered

In the Matter of the Companies Law (Revised) and in the Matter of ALF

Grand Court (7/98)
Smellie J
February 27 1998

Authorities referred to

Re Canton Trust and Commercial Bank Ltd (No 2) [1965] HKLR 592
Tav Bok Choon v Tahansan Sdn Bhd [1987] 1 WLR 413
Re AB Coupler and Engineering Co Ltd [1962] 1 WLR 1236
Re Armvent Ltd [1975] 1 WLR 1679
Re Bank of Credit and Commerce International SA (No 6), Matifouz v Morris [1994] 1 BCLC 450
Re Clavbridge Shipping Co SA [1997] 1 BCLC 572
Re Tecnion Investments Ltd [1985] BCLC 434
Re Fildes Bros Ltd [1970] 1 All ER 923
Re BSB Holdings Ltd (No 2) [1996] 1 BCLC 155

Mr Alberga and Ms DaCosta for ALF
Mr Locke and Ms Collins for the petitioner

Affidavits filed by C, the liquidator of the petitioner, in support of a petition to wind up the company, contained certain allegations of fraud. The issue was whether C should be required to attend for cross-examination upon those affidavits.

Held: (refusing to order cross-examination upon the affidavit)

(i) The court had a discretion to order cross-examination upon the statutory affidavit filed in support of a winding up petition even if no affidavit evidence had been filed in opposition. If, in the exercise of that discretion, cross-examination were ordered and the respondent was not presented for cross-examination, the court had a discretion to refuse reliance on the affidavit: *Tav Bok Choon v Tahansan Sdn Bhd.*

(ii) The statutory affidavit filed by C in support of the petition contained a cross-reference to his first affidavit filed in the proceedings which contained very damaging allegations of fraud against those formerly involved in the management and control of the company. In that case, where the petition was to be presented by reliance on such allegations, the company, as a legal entity having *locus standi* to defend the petition, should not be denied the opportunity to cross-examine C.

(iii) However, since it had been conceded on behalf of the petitioner that no reliance would be placed on the allegations of fraud, and as the petition itself raised no allegations of fraud, it was no longer necessary to order cross-examination of C upon his affidavit. Cross-examination was to be ordered

where it was necessary for fairly disposing of the issues before the court and that depended on the circumstances of the particular case. The petition in this case was a creditor's petition which alleged certain indebtedness to be still outstanding. It was for the petitioner to assess how to present its evidence in proof and, if it chose to do so by narrowing the issues strictly to those of accounting and contract, it should be allowed to do so.

(iv) In seeking to prove its case, the petitioner would be restricted to those matters pleaded in its petition. However, the case was likely to be very complex, and although it was not appropriate for a judge to direct what evidence the parties should rely upon, it appeared that unless oral evidence were called, on each side, to bolster and explain the assertions and counter-assertions in the petition and affidavit evidence, the issues were unlikely to be speedily resolved. A party seeking to rely upon affidavit evidence in a case of this complexity could well find itself at a disadvantage by not presenting its witness for cross-examination.

HRN

Costs - Application to strike out originating summons - Interim costs order

In the Matter of the C Trust
I v B Ltd and Another

Grand Court (459/96)
Smellie J
March 5 1997

Court Rules

Grand Court Rules Order 18 rule 19
Rules of the Supreme Court Order 62 rule 8

Mr Helfrecht for the plaintiff
Mr Timms for the first defendant
Mr Moses and Miss Jaffa for the second defendant

The plaintiff, a beneficiary of the C Trust, by originating summons sought an order for administration of the C Trust. The second defendant was the settlor of the trust. He exercised a power to amend the original trust deed. The plaintiff alleged that the power was exercised improperly, on grounds of undue influence, collusion and fraud. By application of March 4 1997, the settlor unsuccessfully sought to strike out the plaintiff's originating summons. Then the court ordered the plaintiff to particularise the pleadings by delivery of points of claim. The rest of the settlor's application of March 4 1997 was adjourned, and dismissed on March 5 1997. The settlor sought an order that the costs of the dismissed summons of March 5 1997 be met by the plaintiff.

The question also arose as to whether the court should order the plaintiff to satisfy the costs orders forthwith.

Held: (ordering costs against the plaintiff)

(i) By obtaining an order for the particularisation of the pleadings by way of points of claim, the settlor succeeded in principle on the application of March

4 1997 to strike out the plaintiff's originating summons for disclosing no reasonable cause of action; and the costs of that application had been ordered against the plaintiff. The rest of the settlor's application was adjourned and subsequently dismissed. In these circumstances, it was appropriate that the second costs of the dismissed application be met by the plaintiff.

(ii) There was no equivalent in the Grand Court Rules or the Rules of the Supreme Court Order 62 rule 8 to enable the court to make an order during the pendency of an action for the payment of costs forthwith. Nonetheless, it was accepted that the court had inherent power to make such an order. In the exercise of discretion, the court would be guided by the principles which were applied by the English court; it appeared that costs would not be taxed until the conclusion of the proceedings irrespective of the stage at which the order was made unless the court expressly ordered earlier taxation.

In the light of the substantial security for costs given by the plaintiff, there was no reason to depart from the basic guiding principle, as it would be onerous to require a party to submit to taxation at different stages in the same proceedings.

SAAC

Application to strike out - Action based on information derived from discovery order - Whether action amounted to breach of implied undertaking - Whether action brought for collateral or ulterior purpose - Whether abuse of process

Laager v Kruger

Grand Court (266/96)
Harre CJ
June 20 1997

Authorities referred to

Miller v Scorey [1996] 3 All ER 18
Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd [1975] 1 All ER 41
Riddick v Thames Board Mills Ltd [1977] 3 All ER 677
Sybron Corporation v Barclays Bank plc [1985] Ch 299
Crest Homes Plc v Marks [1987] 2 All ER 1074
Wilden Pump & Engineering Co v Fisfield [1985] FSR 581

Mr Jones for the plaintiff
Mr Hochhauser QC, Mr McDonough and Mr Hellman for the defendants

This was an application by the defendants to strike out Cause 266/96.

On May 3rd 1996 a summary judgment (Cause 77/96) which provided, *inter alia*, for discovery of certain documents and records, was issued against the defendant. Information obtained pursuant to that order led to the instigation of the present action.

The plaintiff sought two declarations in this action:

1. That the plaintiff was entitled to enforce the judgment debt obtained

against the defendant in Cause 77/96 against certain assets on the grounds that the first defendant was (directly or indirectly) the legal and beneficial owner of the said property; and/or that the legal titles of the said properties were held by nominees for the first defendant absolutely; and/or that the beneficial interest of the said property was liable to be set aside on the grounds that it was transferred to the second defendant and/or other nominees either for no consideration or at an undervalue with intention to defraud creditors.

2. That the plaintiff was entitled to enforce directly against the assets owned by certain companies on the grounds that the structure and ownership of those assets through the companies was a sham devised by the first defendant to defraud his creditors.

The defendant responded that this amounted to a breach of the implied undertaking that documents obtained upon discovery and information derived from them would not be used otherwise than for the purposes of the action in which they had been disclosed, and further that the prosecution of Cause 266/96 involved a contempt of court in which it would not be proper for the court to grant retrospective leave.

Held: (dismissing the defendant's application)

(i) The documents, and information derived from them, were used for the very purpose for which they were produced, namely in aid of execution of Cause 77/96. (*Dicta* of Falconer J. in *Wilden Pump and Engineering Co* v *Fisfield* approved). *Miller* v *Scorey* would be distinguished on the grounds that the secondary action there was found to be collateral to the primary action whereas here the sole purpose of the secondary action was to '...determine whether the judgment in...Cause [illegible] 96) [could] be enforced against specific property.'

(ii) As a result of (i) above, the plaintiff's solicitors were not in breach of their implied undertaking and their actions did not amount to contempt of court.

(iii) The fact that this action was being aggressively pursued by the plaintiffs did not of itself amount to an abuse of the process of the court; this was particularly so in light of the fact that the omission in the original Mareva injunction of a provision for living and legal expenses had since been rectified by the court which meant that the defendants were now in a position to defend the Cayman actions.

RC

Editor's note: for related litigation see summaries at pages 22 and 71 infra.

Application to have issue tried as a preliminary matter in the main action - Whether res judicata - Whether estoppel preventing plaintiffs from bringing action - Whether action should be struck out as an abuse of the court

Golfco Ltd v Green Thumb Nursery & Landscaping and Godfrey Dawkins

Grand Court (320/97)
Douglas J (Actg)
January 30 1998

Court Rules

Rules of the Supreme Court 1965 O 38/2A/7

Authorities referred to

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581
Henderson v Henderson [1843-1860] All ER 378
Chanel Ltd v FW Woolworth & Co Ltd and others [1981] 1 All ER 742
In Re South American Company [1875] 1 Ch 37
Palmer and another v Durnford Ford (a firm) and another [1992] 2 All ER 122
Cayman Arms (1982) Ltd v English Shoppe [1990-1] CILR 299
New Brunswick Railway Co v British & French Trust Corporation Ltd [1938] 4 All ER 747
Carl Zeiss Stiftung v Rayner and Keller Ltd [1966] 2 All ER 536
Bank of Butterfield (Cayman) Ltd v N Crang [1992-93] CILR 409
Lawlor v Gray [1984] 3 All ER 345
Halstead (Donald) v AG of Antigua and Barbuda [1995] 50 WIR 98

Authoritative work cited

Halsbury's Laws of England (4th ed) Vol 16

Mr Sykes for the plaintiff
Mr Alberga QC for the defendants instructed by Mr Hellman

The claim of *res judicata* arose here from the defendants' claim that Consent Orders dated May 21 1996, which were agreed to and signed by all the parties to Cause 245/95, were binding on the present plaintiff because of his relationship as privy to the plaintiff in the earlier case, the defendants being the same parties in both instances. It was submitted that the issues raised by the current action were raised in the earlier case and were covered by those Consent Orders or, alternatively, should have been raised in the previous action but were not and that therefore the plaintiff was estopped from bringing the proceedings comprised in Cause 320/97. It was further contended by the defendants that the current action constituted an abuse of process and, as such, should be struck out by the court.

Cause 245/95 was an action concerning transfers of land and the Agreement contained within the Consent Orders stated that the parties were desirous of settling all claims arising out of the subject matter of the action on the terms set out therein. The said terms were expressed to be in consideration of the parties agreeing not to pursue the action to trial and in consideration of the obligation between the parties as set out in the Agreement. The parties to the Agreement were the current defendants and Dr. Brown.

The defendants directed their argument initially at the relationship between Dr. Brown, the plaintiff in Cause 245/95, and Golfco the plaintiff in the current action. They contended that they were in fact privies in that there was a sufficient degree of identification between them to make it just that the decision to which

one was party should be binding in proceedings to which the other was party and that Golfco had had the *locus standi* and opportunity to intervene in the earlier proceedings but had chosen not to do so.

Counsel for the plaintiff, whilst admitting that Dr. Brown and the plaintiff were privies, argued that this did not matter at law and that there could be no estoppel. It was further contended that the current action dealt with different issues from those dealt with in Cause 245/95 because Golfco had not been the proprietor of any of the land at issue and was taking the present action only in its capacity as party to a joint venture agreement with the defendants. Counsel also submitted that the Consent Orders of May 21, 1996 comprised merely an agreement, not adjudicated upon by a court on its merits, and to which the current plaintiff was not a party.

The main issue which fell to be determined was whether or not there were common issues in both actions, which would substantiate the defendants' plea of *res judicata* and estop the plaintiff from proceeding with Cause 320/97.

Held: (granting the defendants' application on both grounds)

(i) Where a final judicial decision had been pronounced by a court of competent jurisdiction, neither the parties in that litigation nor their privies could bring another action against the same person for the same cause. (Applying *Yat Tung Investment Co* and Halsbury's Laws of England, 4th edition volume 16 at para. 953). A party was required to bring forward their whole case, and if they did not do so in the first proceedings, they would be estopped from doing so in subsequent proceedings, whether brought by that party or their privy. This principle applied as much to proceedings which were the subject of a consent order as it did to proceedings in which formal adjudication had been made: *Henderson v Henderson.*

(ii) In determining whether the Agreement contained within the Consent Orders was 'a final judgment of the court' or merely a contractual agreement, as the plaintiff contended, the words used were to be first examined. The relevant words here were the 'Agreement is made by the Court'. These words clearly meant that the terms of the Agreement were part of the order and were embodied therein. Further support for this proposition was to be found in *Chanel Ltd v FW Woolworth & Co Ltd* where Buckley J. observed that such orders, notwithstanding any implied contract, took effect as orders of the court.

In Re South American Company and *Palmer and another v Durnford Ford* provided further support for the proposition that an order made by the court with the consent of the parties was as much an estoppel as where the court exercised its mind on a contested case. It therefore followed that any attempt to resurrect matters dealt with by such order could be met by a successful plea of *res judicata.*

(iii) Having established these two points it was necessary to determine whether the principles outlined in *Henderson* applied to any of the issues contained in the Consent Orders disposing of Cause 245/95. In a number of respects the Statement of Claim in Cause 320/97 sought to raise matters dealt with in the first proceedings, namely, the issue of privies, the ownership of Green Thumb and the ownership of that piece of land described as George Town Central Block 13D Parcel 37.

Contrary to the submission of counsel for the plaintiff, issues raised in a case were not solely determined by the pleadings and witness statements invariably raised issues which were introduced at the trial. The position regarding such statements was stated in R.S.C. O.38, r.2A/7 which provided *inter alia* at (2) 'that they relate to issues of fact to be adduced at the trial'. Witness statements were exchanged by order of the court in Cause 345/95 and they raised specific issues which also featured in the Statement of Claim in Cause 320/97.

(iv) It was accepted by both parties that the plaintiff's claim in the first action could have been amended to include the claims now made in Cause 320/97, and his failure to do so amounted to a 'failure to exercise due diligence'. The *dictum* of Lord Upjohn in *Carl Zeiss Stiftung v Rayner & Keller* which stated that where litigants had good reason for not raising an issue in the first action it might be unjust to preclude them from raising that issue in a subsequent action, was inapplicable here with *Henderson* applying. (*Bank of Butterfield (Cayman) v N. Crang and Lawlor v Gray* were likewise distinguished). Accordingly, Golfco was estopped *per rem judicatam* from proceeding with this action.

(v) The action would also be struck out as an abuse of the court: *Yat Tung Investment Co* and *Halstead (Donald) v AG of Antigua and Barbuda*.

RC

Variation of Mareva injunction - Whether defendants beneficial owners of funds in named bank accounts - Whether funds could be used to pay legal costs

In the Matter of the Proceeds of Criminal Conduct Law 1996 and In the Matter of the Mutual Legal Assistance (USA) Law 1986 and in the Matter of William J McCorckle et al

Grand Court (315/97)
Harre CJ
October 3 1997

Legislation

The Proceeds of Criminal Conduct Law 1996
Mutual Legal Assistance (USA) Law 1986

Authorities referred to

Laager v Kruger Cause (266/96)
AVC (No2) [1981] QB 961

Mr Quin for the defendants
Ms Agard for the Attorney-General

This was a summons by the defendant seeking a declaration that monies in an account with Royal Bank of Canada Trust Co (Cayman) Ltd, in the name of Quin and Hampson (in trust for William J. and Chantal McCorkle legal fund) were legal defence trust funds for the sole purpose of paying the defendants' costs associated with matters pending in Cayman and the United States.

There was a further summons, on behalf of the Attorney-General, seeking variation of a court order dated May 21st 1997 (issued pursuant to para. 6 of the Schedule to the Proceeds of Criminal Conduct Law 1996 which restrained the defendants from dealing with funds in three accounts at the Royal Bank of Canada) to restrict expressly the disposition of funds in that same account. This was sought without prejudice to the position of the Attorney-General that these monies were in any event subject to the original order.

Held: (order as follows):

The disputed account had not been impressed with a trust and was therefore subject to the original restraint order which was varied accordingly. It was further varied by reference to para. 6(1) of the Schedule to PCCL 1996 to except legal defence costs associated with the proceedings in the Cayman Islands.

RC

Editor's note: for related litigation see summary at page 60 infra.

Administration of Justice - Proceedings in Chambers - Restriction upon publication

In the Matter of Directions as to When to Publish Judgments of Proceedings Held in Chambers

Grand Court (135/95)
Smellie J
August 11 1997

Legislation

Administration of Justice Act 1962 S 12

Authority referred to

Alliance Perpetual Building Society v Belrum Investments [1957] 1 WLR 720

Mr Ritchie for the plaintiff
Mr Timms for the first and second defendants (holding also for Mr Foster for the sixth and seventh defendants)
Mr Chapman for the fifth defendant

The parties to the substantive issue, whilst accepting its general interest and importance, were divided as to the desirability (and proper form) of publishing proceedings held in Chambers. An overseas law reporter nevertheless requested permission to report the most recent judgment in this matter.

Held: (restricting publication of the substantive issues)

(i) The restrictions imposed by s.12 Administration of Justice Act 1962 should continue to apply.

(ii) These provisions should be supplemented, where the sensitivity of the issues required it, by providing that the parties involved in any matter taken in Chambers should be at liberty to apply for an order against or delimiting publication.

(iii) The procedure to facilitate this ruling was, with the approval of the Chief Justice, to be simplified by the completion of an application. The procedure would avoid the need for any separate application by way of summons and would include suggested changes required to meet the needs of confidentiality. It should be submitted by counsel prior to the delivery of the written ruling or judgment in any case in which publication was sought.

VC

Release of security guarantee - Application for stay pending appeal - Purpose of appeal - Prospect of Success

Quintin and Westphal v Phillips Petroleum Company and CIBC Bank and Trust Company (Cayman) Ltd

Grand Court (177/97)
Smellie J
November 17 1997

Legislation

Court of Appeal Law (1996 Revision) S 20(3)

Authorities referred to

Winchester Cigarette Machinery Ltd v Payne and Another (No 2) [1993] TLR December 15
Wilson v Church (No 2) [1879] 12 Ch D 454
Linotype-Hell Finance Ltd v Baker [1992] 4 All ER
Imbar Martina SA v Gabor [1988-89] CILR 286

Mr Ritchie and Ms Whittaker-Myles for the plaintiffs
Mr Turner for the first defendant
Mr Chapman for the second defendant

The plaintiffs obtained a decision from the Grand Court discharging their obligations under a letter of guarantee issued in Cause 200/93. The first defendant requested a stay of this decision pending appeal. It is well established that the onus in such circumstances falls on the unsuccessful party to demonstrate good cause to prevent the successful party obtaining the fruits of his judgment. Moreover, the application for a stay must be brought in good faith and have a *bona fide* purpose.

The fruits at issue here were funds held by CIBC as a security guarantee, arising out of Cause 200/1993. This had similarly been decided in favour of the plaintiffs by the Court of Appeal, although a further appeal to the Privy Council was pending. Whilst recognising the need to protect the rights of the plaintiff, the question remained whether the guarantee should remain in place pending appeal to the Privy Council.

Held: (refusing the stay)

(i) Whilst the appeal of the decision of the Grand Court was brought for a *bona fide* purpose, there was no demonstrable prospect of success and as such, the security guarantee ought not to remain in place pending the appeal in Cause 200/93 to the Privy Council.

(ii) The balance of convenience was in favour of the plaintiffs, who would be disproportionately disadvantaged by the imposition of a stay. Since there were assets owned by the plaintiffs available to meet the defendants' costs, and an absence of other competing creditors, should the defendants succeed either in their appeal here or in that to the Privy Council in Cause 200/1993, the right of appeal would not be rendered nugatory.

(iii) In order to eliminate any potential action that might be brought by the first defendant against the second defendant, should the funds be released and the first defendant succeed in the final appeal of Cause 200/1993, it was also necessary for the first defendant to surrender the guarantee document so that it could be cancelled by the second defendant.

VC

Further and better particulars - Obligation to provide - What amounts to interrogatories

In the Matter of an Application for Further and Better Particulars

Grand Court (703/96)
Smellie J
February 9 1998

Legislation

Water (Production and Supply) Law (1996 Revision)

Authorities referred to

Astrovlanis Compano Narieva S.A. v Linard [1972] 2 All ER 647
IRC v Jackson [1960] 3 All ER 31

Mr Alberga QC and Mr Ashenheim for the plaintiff
Mr Croxford QC and Ms Bridges for the defendants

The plaintiff is the sole licencee for the production and supply of water to the Seven Mile Beach and West Bay area. The defendants are the developers of a multi-faceted development that is located within the licence area. The plaintiff asserted that the defendants produced and supplied water for reward to properties within the development which was now separately and individually owned, in a manner not permitted by law. With a view to openness and the minimization of costs, the plaintiff sought further and better particulars from the defendants on a number of issues:

1. The facts and matters relied upon in support of the denial that the licence was exclusive.
2. Whether the correct entity had been joined as a defendant.
3. Details of properties transferred to third parties.
4. The times when water was supplied to various areas of the development and the prices charged.

5. Details of all works undertaken on the water plant, which might have increased its capacity.
6. The averment that the plaintiff aided and abetted any breach of the law by purchasing quantities of water from the defendants.

Held: (order as follows)

(i) Where a denial left open the possibility of two separate and distinct allegations of fact, the plaintiff ought not to be left open to speculate which it is that the defence intends to rely upon.

(ii) The matter was sufficiently pleaded by the defendants, it was therefore a matter for the plaintiff if they wished to join the party as a further defendant.

(iii) Whilst it was a matter of public record, it was incumbent upon the defendants to assist by providing particulars of any properties within the development still owned by either of them.

(iv) Since the quantities were already provided in a schedule and the request as to prices was really in the nature of interrogatories, sufficient information had been forthcoming. Further details might become relevant if liability were established, before which they should be sought specifically.

(v) Since approximate figures had already been provided, the logs were available for inspection and the plaintiff's experts would want to digest these themselves, rather than relying upon the opinion of the defendants, the request suggested non-acceptance of the particulars given and was therefore in the nature of interrogatories.

(vi) The details of the alleged transactions had been set out as the basis for a specific defence of estoppel and were thus sufficiently well pleaded.

VC

Act of bankruptcy - Trustee in bankruptcy - Appointment of agent - Relationship between Trustee's agent and particular creditors for the purposes of litigation - Ancillary orders

In the Matter of the Bankruptcy Law (Revised) and in the Matter of Kruger a Debtor

Grand Court (669/96)
Smellie J
September 23 1997

Legislation

Bankruptcy Law (1978 Revision) Ss 12, 13, 14(8), 28, 29, 30, 31, 75, 107, 150

Authorities referred to

Ex parte Heyworth (1884-85) 14 QBD 49
In re Debtors [1936] Ch 622
Vogeler's Case [1901] AC 102
Ex parte Crispin (1873) LR 8 Ch 374
Theophile v The Solicitor General [1950] AC 186
Re Schuppan (A Bankrupt) (No 1) [1997] 1 BCLC 211
Re Maxwell Communication Corp plc [1992] BCLC 4653
Al-Sabah v Maples and Calder [1994-5] CILR 471

Mr Jones for the petitioner/judgment creditor
Mr McDonough for the respondent/judgment debtor

Summary judgment in Cause 77/96 resulted in the imposition of a judgment debt in the Cayman Islands in favour of the petitioner. This judgment had not been stayed and the petitioner therefore sought to recover following the non-payment of a duly served bankruptcy notice (the act of bankruptcy). The debtor was however no longer present in the Cayman Islands, although he was ordinarily resident there at the time the bankruptcy notice was served on him.

Satisfied that the bankruptcy notice had not been complied with and that the debt remained unsatisfied, the court made an order requiring the affairs of the debtor to be wound-up and his property administered under the Law. It was noted that when granting a provisional order of bankruptcy, it was sometimes appropriate to also make ancillary orders to protect the position of the Trustee who was appointed.

In this case, the Trustee expressed concern as to the adequacy of resources required to administer an estate of such size and complexity.

Further potential problems arose in relation to the transfer of assets from the debtor to his wife and the alleged fraudulent nature of those conveyances. Proceedings seeking to establish this were already underway (Cause 266/96), although the question remained whether the Trustee's agent should become involved in those proceedings, or whether similar proceedings in the Trustee's name should be instituted. Further questions included whether, if the Trustee/his agent became involved, they could obtain evidence already discovered in Cause 266, or instruct the same attorneys as the creditor in Cause 266. In respect of these matters, counsel for the respondent was particularly concerned about the danger of information finding its way into the hands of those prosecuting the respondent on criminal charges in Switzerland.

Counsel for the respondent additionally sought to stay the provisional order of bankruptcy, pending leave to appeal. The court recognised that it would be inappropriate to proceed with the provisional bankruptcy order upon a judgment which might be later impugned, but were also mindful of the rights of the creditors in general.

Held: (granting a stay for fourteen days)

(i) It was where the act of bankruptcy was committed or intended to operate, which gave the court jurisdiction.

(ii) Pursuant to s.12 Bankruptcy Law (Revised) 'a proper person' could be appointed as an agent. The court was satisfied that Mr Gleaver of Ernst and Young was such a person and sanctioned his appointment.

(iii) The Trustee's agent could remain the petitioning creditors' attorney, taking advantage of accumulation of knowledge and the associated savings, since this would benefit the creditors generally. If, at a later stage, a conflict of interests

were to arise, then the court ought to reconsider the matter.

(iv) As a further measure of protection, an order was made prohibiting the Trustee, the agent and the attorneys from using information obtained by way of discovery for any purposes besides the local bankruptcy proceedings, without the leave of the court.

(v) It was appropriate to stay this order for fourteen days, during which time a decision on the matter of the application for leave to appeal and a stay would be available.

VC

Establishment of a tribunal in the Republic of Ireland - Status of provisions in the Republic of Ireland enacted prior to its independence - Application by tribunal for evidence to be obtained in the Cayman Islands - Functions of a tribunal for the purposes of assenting to an application - Nature of proceedings requesting evidence

In the Matter of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 and in the Matter of Order 70 of the Grand Court Rules and in the Matter of Proceedings before a Tribunal of Inquiry (Dunnes Payments) Appointed by Instrument of an Taoiseach of Ireland

Grand Court (305/97)
Patterson J (Actg)
June 30 1997

Legislation

Ethics in Public Office Act 1995 (Republic of Ireland)
Tribunals of Inquiry (Evidence) Act 1921
Tribunals of Inquiry (Evidence) (Amendment) Act 1979 (Republic of Ireland)
Act of Union 1800
Irish Free State (Agreement) Act 1922
Government of Ireland Act 1920
Constitution of the Irish Free State Act 1922 (Irish Free State)
Irish Free State Constitution Act 1922
Plebiscite (Draft Constitution) Act 1937 (Irish Free State)
Constitution of Ireland 1937 (Republic of Ireland)
Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 S 9(1) Schedule, Ss 1(a), 1(b)
Evidence (Proceedings in Other Jurisdictions) Act 1975 S 1(a)
Order 70 GCR 1995
Foreign Tribunals Evidence Act 1856
Evidence by Commission Act 1859
Evidence by Commission Act 1885
Evidence (Proceedings in Other Jurisdictions) (Jersey) Order 1983

Authorities referred to

Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1977] 3 All ER 703
Re Imacu Ltd [1989] JLR 17
Worldwide Financial Holding v Citel [1994-95] CILR 391
Goodman International and Laurence Goodman v The Honourable Mr Justice Hamilton and the Attorney-General [1992] IR 542
McDonald v Bord na gCon [1965] 1 IR 217
Re State of Norway's Applications (Nos 1 & 2) [1989] 1 All ER 745

Authoritative works cited

Wade Administrative Law (6th Ed)
Morgan and Hogan Administrative Law in Ireland (24th Ed)
Windever Lectures on Legal History (2nd Ed)

Mr Bueno QC and Mr Quin for the applicant
Mr Alberga QC and Mr Myers for a witness

Following serious public concern in the Republic of Ireland about alleged payments made and benefits conferred by the Dunne family and their companies to Members of Parliament, their relatives or connected persons, a Tribunal was established in accordance with the laws of Ireland. The Tribunal was charged with the urgent inquiry into this situation to report, making such findings and recommendations as it saw fit. The sole member of the Tribunal was to be the Honourable Mr. Justice Brian McCracken, a Judge of the Irish High Court. Importantly, it was further established that the Tribunals of Inquiry (Evidence) Act 1921 and the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 would apply to the Tribunal for the purposes of identifying the procedures and powers for the taking of evidence.

The Tribunal had the power to issue subpoenas for witnesses to attend and give evidence, where they could be examined, and to require the production of documents. The power to penalise non-recognition of a subpoena however remained with the Irish High Court. Where necessary, the Tribunal could also request the examination of witnesses abroad. In this respect, the Tribunal sought the assistance of the Grand Court of the Cayman Islands, to make such provision as appeared to it to be fit and proper for the purpose of examining under oath specified persons, and for the production of documents by them. One of the prospective witnesses opposed the application.

Before the Grand Court is able to exercise its jurisdiction to grant an application for an order for evidence to be obtained in the Cayman Islands, the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 provides that two conditions precedent must be fulfilled. The court must be satisfied both that the application is made in pursuance of a request for or on behalf of a court or tribunal, and that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which have been either instituted or contemplated before the requesting court. The applications were opposed on the grounds that firstly, the request was made by a Tribunal not falling within the meaning of 'court or tribunal' in s.1(a) of the Schedule to the 1978 Order and secondly, that the requested evidence was not for the purposes of 'civil proceedings' within the meaning of s.1(b) of the Schedule to the 1978 Order.

Held: (refusing the application)

(i) The Tribunals of Inquiry (Evidence) Act 1921 ('the 1921 Act') was not inconsistent with either the Constitution of 1922 or the Constitution of 1937 and had not been repealed. The Tribunals of Inquiry (Evidence) (Amendment) Act

1979, which amended the 1921 Act in respects which were not material, clearly reflected this. The 1921 Act (as amended) therefore continued in full force and effect. Moreover, it was legitimately employed by the Tribunal, established in accordance with Irish law.

(ii) The Tribunal in question was not however a relevant 'court or tribunal' for the purposes of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978, since it performed merely an investigatory and not an adjudicatory function. Its remit was to establish facts and to report to the legislature, it being the latter and not the Tribunal that possessed decision-making powers. It was not correct to assert that the 1978 Order, (which stemmed from the Evidence (Proceedings in Other Jurisdictions) Act 1975 in the United Kingdom), must have been intended to encompass the type of tribunal set up under the 1921 Act, itself enacted by a previously constituted United Kingdom.

(iii) The decision on the first question effectively rendered the second question irrelevant. The answer to the second question of whether the proceedings were 'civil' was only applicable where the requesting body had been established to be a 'court or tribunal'.

(iv) If the requesting body were classified as a 'court or tribunal', it would be appropriate to employ the broad interpretation applied in *Re State of Norway's Applications (Nos 1 & 2)*, which relied upon the manner of classification in the requesting state. In this case the proceedings would be deemed to be civil, as opposed to criminal.

VC

Civil fraud - Standard of proof

British American Bank Ltd v Javee Gregory and Fred Ebanks and Karina Andrade and Kimbert Solomon

Grand Court (453/95)
Orr J (Actg)
November 6 1997

Authority referred to

Re H and others (minors) [1996] 1 All ER 16

Mr Algerga QC and Mr Hellman for the plaintiff
Mr Murray for the fourth defendant

The plaintiff sought recovery of money which the defendants obtained from it by fraud whilst in its employ. Default judgments were entered against the first three defendants.

Held: (judgment for the plaintiff)

(i) The standard of proof was that of the balance of probability: per Lord Nicholls in *Re H and others (minors).*

(ii) The evidence of the defendant, that he had not instructed a junior employee, Miss Andrade, to deliver the money to him was not accepted. He was liable to the plaintiff for the sum received from Miss Andrade as money had and received and as a constructive trustee of the money.

JE

Company Law

Liquidation - Statutory trust - Interest payable on pre-liquidation debt

In the Matter of Transnational Insurance Company Ltd (In Liquidation) and In the Matter of the The Companies Law (Revised)

Grand Court (61/93)
Smellie J
March 4 1998

Legislation

Companies Law (1995 Revision)
Insolvency Rules of the United Kingdom (SI 1986 No 1925)
Judgments Act 1838 (UK)
United Kingdom Judgment Debts (Rate of Interest) Order 1985 (SI 1985 No 437)

Court Rules

Grand Court Rules O 102 R17

Authorities referred to

Moor v Anglo-Italian Bank [1879] 10 ChD 681
In re Vocalion (Foreign) Ltd [1932] 2 Ch 196
In Re Ford [1900] 2 QB 211
Kemper Reinsurance Company v Covuran 79 NY 2d 353 (1992)
Humbert Iron Works and Shipbuilding Company [1869] LR Ch App 643

Mr McDonough for the applicant Delta American Reinsurance Company
Mr Locke for the respondent liquidators of Transnational Insurance Company

Transnational was incorporated and licensed under the laws of the Cayman Islands and carried on business as a reinsurer of other reinsurance companies. It was placed into voluntary liquidation in January 1993. In March 1993 the court ordered the judicial supervision of its winding-up due to pending litigation locally, and with Delta in New York.

Delta carried on business in Kentucky and New York. Delta was placed into voluntary liquidation in Kentucky in September 1985. By an agreement between Delta and Transnational, entered into in 1984, Transnational accepted a percentage of Delta's potential liability under certain contracts and treaties of reinsurance in return for a percentage of the premiums received from insurance clients. Delta submitted a claim under the agreement which was only partially admitted by the liquidators of Transnational. Delta sought an order requiring the liquidators to admit its claim in full by way of an appeal of the liquidator's decision pursuant to r. 4.83 of the Insolvency Rules of the United Kingdom (S.I. 1986 No. 1925) which applied locally by virtue of O.102 r. 17 of the Grand Court Rules. Payment of an interim dividend was pending.

Transnational argued that Delta's claim, as proven to date, was already satisfied through Delta realising on a letter of credit which was issued in the New York action on behalf of Transnational as a condition of Transnational being allowed to defend the New York action. The action was instituted in 1987 prior to the liquidation of Transnational, but the letter of credit was drawn down by Delta after Transnational was placed into

liquidation, as Transnational was unable to continue to defend the action.

Held: (for the applicant)

(i) The funds drawn down after Transnational was placed into liquidation were impressed with a statutory trust pursuant to s.100 Companies Law (1995 Revision). Therefore they were not paid to Delta. The general principles found in *In re Vocalion (Foreign) Ltd* were followed. Delta had not satisfied the final condition to remove the trust, namely filing in the New York court a certified copy of the judgment. Accordingly, Delta was in a position to elect to proceed to claim a dividend. Consequently, Delta was entitled to seek a full dividend payment if proven. The wording of the letter of credit in issue distinguished the matter from the kind of security exemplified in *Moor v Anglo-Italian Bank*. *In Re Ford* was distinguished.

(ii) Inherent in the nature of insurance business are losses that may have been incurred but not yet reported (IBNR). IBNR reserves were viewed as a contingent liability which may or may not actually be payable in the future. Transnational argued that since Delta had not made provision for IBNR to be paid in their own liquidation, Delta would have no loss under IBNR and therefore there was no loss for Transnational to indemnify. Delta argued that the contract was converted from one of indemnity to one of liability in the event of liquidation by Transnational through an 'insolvency clause'.

The contract was expressed to be governed by the law of New York. In *Kemper Reinsurance Company v Covuran* the New York Court of Appeals held that the effect of an insolvency clause in a reinsurance contract was to alter the nature of the contract from one of indemnity to one of liability. Delta was entitled to have its claim for IBNR admitted to proof for the payment of dividends in keeping with the Insolvency Rules.

(iii) Delta sought an order for interest on the amount of paid loss claims which had arisen and had been either satisfied or admitted by Delta and had been submitted to Transnational for repayment prior to the liquidation, but not paid. The contract between the parties provided for interest after sixty days in default of payment. The interest was properly claimable in Transnational's liquidation as pre-liquidation interest, pursuant to r. 4.93 of the Insovency Rules, which applied in the absence of any provision for interest in the Companies Law (1995 Revision). The Rule provided the court with discretion and referred to the Judgments Act 1838, and consequently to the United Kingdom Judgment Debts (Rate of Interest) Order 1985 (S.I. 1985 No. 437) which was promulgated under that Act. Rule 4.93 (6), by adopting the rate prescribed by s.17 of the 1838 Act, was applying that rate of interest which may have been claimed as at the date the company went into liquidation, but in respect only of interest accrued on the debt over a period ending no later that that date, as per r. 4.93 (3). That amount of interest was part of the debt on the date of winding up: *Humbert Iron Works and Shipbuilding Company*.

Interest was claimable at 15 per cent in accordance with the Order.

JE

Derivative action - Application to strike out - Whether beneficial holder of shares whose name was not on the register had locus standi to sue in respect of a wrong done to the company

Svanstrom and Others v Jonasson

Court of Appeal (271/92, CICA 15/94)
Zacca Pres., Georges, Kerr JJA
April 4 1997

Legislation

Companies Law (1995 Revision) S 37

Court Rules

Grand Court Rules Order 41

Authorities referred to

Foss v Harbottle (1843) 2 Hare 461
Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204
Edwards v Halliwell [1950] 2 All ER 1064
Schultz v Reynolds and Newport Ltd [1992-93] CILR 59
Bagshaw v Eastern Union Rly Co (1849) 7 Hare 114
Stena Fin BV v Sea Containers Ltd [1989] LRC (Comm) 641
Great W Rly Co v Rushout (1852) 5 DeG & Sm 290
Re Perkins ex parte Mexican Santa Barbara Mining Co (1890) 24 QBD 613
Binney v Ince Hall Coal and Cannel Co (1866) 35 LJ Ch 363
Maas and anor v McIntosh and ors (1928) 28 SR (NSW) 441
Hooker Investments Pty Ltd v Email Ltd and ors (1986) ACLR 443
Fulloon and anor v Radley and ors (1991) 9 ACLC 1434

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Halsbury's Laws Vol 7(2) (Hailsham Ed)
Pennington's Company Law (7th Ed)
Stroud's Judicial Dictionary (4th Ed)
Mayson French and Ryan on Company Law (10th and 11th Ed)
Gower's Principles of Modern Company Law (4th Ed)

Mr Bueno QC and Mr Harris for the first, second, seventh and eighth appellants
Mr Bueno QC and Mr Moses for the third, fifth and sixth appellants
The ninth and tenth appellants did not appear
Mr Leo-Rhynie QC and Mr McLaughlin for the respondent

The respondent was the beneficial owner of 15.11% of the shares in the seventh and eighth appellants ('the companies'). The first to the fourth appellants were the directors of the companies ('the directors') and together held the beneficial interest in 51.02% of the companies' shares. The ninth and tenth appellants were the registered shareholders of the entire shareholdings in each of the companies.

The respondent had brought a derivative action, claiming on behalf of himself and other shareholders (excluding the directors) for loss caused to the

companies when their assets were sold at an undervalue and when contracts which they could have secured were diverted to other companies in which the directors held substantial interests.

The first to the eighth appellants had filed a summons asking that the action be struck out under Order 41 of the Grand Court Rules, or under the inherent jurisdiction of the court, on the following grounds: (a) that the respondent did not at the date of commencement of the action have *locus standi* to bring it; and (b) that the action was obviously unsustainable against any of the appellants.

At the hearing of the summons, arguments were advanced solely on the grounds of *locus standi*. The summons was dismissed, leave to appeal was granted and all further proceedings were stayed until the hearing and determination of the appeal.

Held: (allowing the appeal and striking out the action)

(i) The learned trial judge, relying on the judgment of the Cayman Islands Court of Appeal in *Schultz v Reynolds and Newport Ltd*, had held that a beneficial owner of shares whose name did not appear on the register of members could bring a derivative action on behalf of the company to claim remedies for harm done to the company.

The passage relied upon by the learned trial judge did not support the proposition that the beneficial owner could sue provided that the registered owner was joined as a defendant. It merely stated that even if the beneficial owner could file a derivative action, the proceedings were not properly constituted because one of the two joint beneficial owners had not been joined. The issue in the instant case had not previously been considered by the Cayman Islands Court of Appeal and was therefore open for determination.

(ii) It was a fundamental rule of company law that a company was under no obligation to recognise trusts affecting its shares. This principle was restated in Article 11 of the Articles of Association of the companies. The only members of a company were its shareholders: s.37 Companies Law. A person holding a beneficial interest in a company's shares whose name did not appear on the register of members was thus precluded from being one of 'the aggrieved minority' permitted to bring an action on behalf of the company by way of exception to the rule in *Foss v Harbottle*.

(iii) In *Great Western Rly Co v Rushout*, the holder of a beneficial interest in shares whose name did not appear on the register had been allowed to bring a derivative action on behalf of the company. However, that decision was not binding on this court, and it cast doubt on the principle that a company was not obliged to recognise trusts affecting its shares. It was to be treated as a decision on its own facts, strongly influenced by the consideration that the company in question was a statutory company.

(iv) *Binnev v Ince Hall Coal and Cannel Co* did not appear to concern a derivative action and the approach taken in that case was not appropriate to modern

company law. In *Bagshaw v Eastern Union Rly Co* no question of an equitable title to shares arose. Neither case supported the proposition that the beneficial owner of shares registered in the name of another had *locus standi* to file a derivative action in respect of a wrong suffered by the company.

(v) The principle stated in three Australian cases, although distinguishable on their facts from the instant case, was correct: persons only beneficially interested in shares could under no circumstances file a derivative action, because they were not themselves shareholders.

(vi) The appeal would therefore be allowed and the action struck out on the ground that the respondent did not, at the date of its commencement, have *locus standi* to bring it.

The respondent was to pay the costs of this application here and below.

HRN

Winding up - Just and equitable ground - Choice of liquidators - Whether company insolvent

In the Matter of the Companies Law (Revised) and In the Matter of the Global Opportunity Fund Ltd

Grand Court (564/96)
Harre CJ
August 1 1997

Legislation

Companies Law (1995 Revision) Ss 93(d), 94, 104

Authorities referred to

Re Emmadart Ltd [1979] 1 All ER 599
Re Palmer Marine Surveys Ltd [1986] 1 WLR 573

Mr Locke for the petitioner
Mr Kaye QC and Mr McDonough for the respondents
Mr Timms for Morgan Stanley (Finance) Jersey Ltd and Morgan Stanley (Structured Products) Jersey Ltd

This was an amended winding up petition by the company pursuant to s.93(d) Companies Law. All parties agreed that the company should be wound up, but there was disagreement as to the solvency or otherwise of the company and as to the choice of liquidators. The respondents claimed to be substantial creditors of the company and strongly disputed that there would be a surplus available for distribution. They further contended that it would be inappropriate for the petitioners' nominees to be appointed liquidators on the ground that justice would not be seen to be done by the appointment of liquidators at the behest of the major shareholders who (or who were associated with companies which) were also intimately concerned in the establishment, administration and collapse of the company.

Held: (granting the winding up order and approving the petitioners' choice of liquidators)

(i) The company had been formed to pursue a business objective which could not be pursued without further capital, which the members were not prepared to contribute, and at the date of presentation of the petition there was no hope that the company would trade at a profit. Although there was no 'deadlock', all parties agreed that the substratum of the company had gone and that a full investigation of the company was required. There were therefore ample grounds to justify a winding up order on the just and equitable ground.

(ii) Whether or not the company was unable to pay its debts was a matter to be dealt with by the liquidators. It was not the case that justice would not be seen to be done by reason of the liquidators being those proposed by the petitioners. The eyes of the international financial community would be upon this liquidation. The petitioners had proposed liquidators of known probity and expertise who would be under a duty to seek the directions of the court from time to time and who had particular experience in liquidations in different jurisdictions. This was not a creditors' petition. It was therefore for the liquidators to decide whether claims admitted in due course made the company insolvent.

HRN

Privity of contract - Joint and several liability - Security interests - Priority - Conflict of laws

BPI v W Ltd

Grand Court (284/96)

Smellie J
September 3 1997

Court Rules

Grand Court Rules Order 50 rule 7

Authorities referred to

Eire Beach Co Ltd v Attorney-General for Ontario [1930] AC 161
The Colorado (1923) P 102
Bankers Trust International v Todd Shipyards Corporation The Halcyon Isle [1981] AC 221
Colonial Bank v Cady & Williams (1890) 15 App Cas 267
Kahler v Midland Bank [1950] AC 24
Bank voor Handel en Scheepvaart NV v Slatford [1953] 1 QB 248

Authoritative works

Cheshire and North's Private International Law (10th Ed)
Dicey and Morris, The Conflict of Laws (11th Ed)

Mr Jones for the plaintiff
Mr Hochhauser QC for the intervenor

This was an application by the intervenor, pursuant to Grand Court Rules Order 50 rule 7, to discharge a charging order absolute over certain shares held by the defendant ('the E shares') and an order for the sale of those shares. Both orders had been made by the Grand Court in favour of the plaintiff, BPI.

The intervenor claimed to have a prior secured interest in the E shares on the basis that, pursuant to Venezuelan

statute ('the GBL'), it had provided funding by way of a financial aid contract to F, a member of a Venezuelan financial conglomerate.

The intervenor asserted that the financial aid contract with F was entered into not only on behalf of all members of the group expressly named in the contract, but also on behalf of all 'related companies' including W, a wholly owned subsidiary of the parent company. The contract was executed on behalf of F by R, who declared in clause 10 of the contract that he was duly authorised to bind all the companies within the conglomerate including W.

The intervenor also claimed that the provisions of the GBL applied to the contract so as to require all unnamed related entities within the conglomerate also to be bound by the operation of the GBL. The final aspect of the intervenor's case was the operation of the GBL itself and whether it gave priority over other creditors such as BPI prior to the date of the charging order made in favour of BPI by the Grand Court.

Held: (dismissing the application)

(i) There was no basis for concluding that R was authorised to act on behalf of F or W so as to create privity of contract between W and the intervenor and so as to bind W itself with the obligations under the contract. The obligation of joint and several liability or *'solidaridad'* was a matter of contract. In the absence of privity of contract, neither the provisions of the Venezuelan statute nor the Civil and Commercial Codes operated so as to impose that obligation.

(ii) The GBL nonetheless operated so as to bind 'related companies', including non-domiciled companies such as W, with the obligations of the contract.

(iii) Although the operation of the GBL upon the contract did not create *'solidaridad'* it did create, prior to the intervention decrees and upon the grant of financial aid, a general privilege akin to a floating charge over assets of aided and related companies, including the assets of W. Upon the intervention of F SF and/or FCA, the intervenor acquired a preferential ranking or priority over the assets of the intervened entities.

(iv) However, as W was not domiciled in Venezuela, and as the E shares were to be deemed located in the Cayman Islands at all relevant times, the intervention decrees did not operate to intervene W or to create an immediate fixed security interest in favour of the intervenor over W or over the E shares.

(v) The intervenor's interest in W remained unsecured, therefore BPI's secured interest ranked in priority.

(vi) Costs to be taxed if not agreed.

HRN

Winding up petition - Locus standi of a director to challenge the petition - Ordinary application under Insolvency Rules rule 7.2 - Ratification by company of proceedings taken in its name but without authority - Security for costs

In the Matter of the Companies Law (Revised) and In the Matter of ALF

Grand Court (7/98)
Smellie J
February 27 1998

Legislation

Companies Law Ss 95, 105
Insovency Rules rules 4.18, 4.25, 4.31, 7.2
Insolvency Act 1985 S 124

Court Rules

Grand Court Rules Order 102
Rules of the Supreme Court Order 23 (1997 Ed)

Authorities referred to

Re Union Accident Insurance Co Ltd [1972] 1 WLR 640
Re Emmadart Ltd [1979] 1 Ch 540
Re Mid East Trading Ltd [1997] 3 All ER 481
Re Arrows Ltd [1992] BCC 121
Danish Mercantile Co v Beaumont [1951] 1 KB 925
Sir Lindsay Parkinson & Co Ltd v Triplan [1973] QB 609
Pure Spirit Company v Fowler (1890) 25 QBD 235
Dartmouth Harbour Comm v Major of Dartmouth (1886) 55 LJ QB 483

Authoritative works

Sealy and Milman's Annotated Guide to Insolvency Liquidation (4th Ed)

Mr Lowe for the sole director of the respondent
Mr Hildyard QC for the petitioner
Mr McDonough for the liquidators (absent)

A petition to wind up the respondent company ('ALF') had been presented by the petitioner, a major Brazilian bank, now itself in liquidation, on the basis that ALF was unable to meet liabilities owed to it. The Grand Court had appointed provisional liquidators pending the hearing of the petition. D, the sole director of ALF, brought an ordinary application under rule 7.2 of the Insolvency Rules, seeking the following directions and relief:

(a) abridgment of the time for service of the ordinary application (this was granted without opposition from the petitioner);
(b) adjournment of the hearing of the winding up petition;
(c) extension of the time for service of ALF's evidence in response to the petition;
(d) an order for the cross-examination of C, the liquidator of the petitioner, upon whose affidavit the winding up petition was based;
(e) an order for security for costs of the hearing of the petition against the petitioner;
(f) discharge of the order by which the provisional liquidators had been appointed.

The petitioner raised the preliminary objection that D, in his capacity as director of ALF, had no *locus standi* to bring the application and, in particular, no *locus standi* to seek an order for discharge of the provisional liquidators.

Held: (dismissing the ordinary application but allowing it to be amended by substitution of the company as applicant, granting an extension of time for the filing of affidavit evidence and refusing an order for security for costs)

(i) The law in the Cayman Islands was as it had been in England prior to the changes introduced by s.124 Insolvency Act 1985, which enabled directors acting unanimously (if more than one) to present a winding up petition or alternatively to oppose such a petition. It appeared that s.124 had been introduced to reverse the decision in *Re Emmadart* which had operated to prevent directors from petitioning unless authorised by the company in general meeting or by the articles. The decision in *Re Emmadart* was to be preferred to the decision in *Re Union Accident*: it was more fully researched and reasoned and had clearly been regarded in the UK as the more persuasive, thus necessitating legislation to reintroduce the earlier and more convenient but impugned practice in *Re Union Accident*. If the directors had no *locus standi* as directors to present a petition unless authorised by the company in general meeting, they could have no standing as directors to apply to remove the provisional liquidators. D had therefore no *locus standi* (whether as a director or sole director) to apply to discharge the provisional liquidators or to oppose the petition.

(ii) A company could by resolution in general meeting ratify the institution of proceedings brought in its name but without proper authority: *Danish Mercantile Co v Beaumont*. Although the circumstances of this case were distinguishable in that the application was not brought in the name of the company but in D's name, D had purported to act on behalf of the company on the mistaken assumption that the residuary powers of the board enabled him as sole director to oppose the petition without authorisation by the company in general meeting. His actions could therefore be ratified by the company. The application could be amended by substitution of the company for D as applicant and could continue as so amended in light of the resolution passed by the company in general meeting seeking to ratify the ordinary application as having been brought on its behalf.

(iii) Although the petition was based on the insolvency of the company, the allegations of insolvency appeared to be inextricably linked to the allegations of fraud and misappropriation of the company's assets. This was a case of great complexity and it would be appropriate for the court to afford some reasonable leeway to the company to oppose the petition given the nature of the *ex parte* relief afforded to the petitioner in the manner of the appointment of the provisional liquidators. Assuming that the affidavit evidence to be relied upon would be the same as that filed in support of the ordinary application brought erroneously in D's name, the company would be given a leeway of 3 days, the length of time by which the company was in breach of rule 4.18 of the Insolvency Rules in the filing of its affidavit evidence.

(iv) The petitioner had acted within its rights in raising the issue of *locus standi* and was therefore entitled to its costs as the application had been improperly brought. However, given a number of factors, such as the logistical difficulties faced by the company in procuring its affidavit evidence, costs incurred as a result of late service of the company's evidence were to be costs in the cause.

(v) Notwithstanding the ruling on *locus standi*, the potential factual issue remained as to whether those who purported to authorise the applications on behalf of the company were duly authorised to do so; in particular, whether M, through WL, a BVI company, was the sole legal and beneficial owner of the shares. However, the petitioner had presented a petition to wind up the company, not as a beneficial owner, but as a creditor for very large sums. The petition, being based on a creditor/debtor relationship, did not therefore directly turn upon any question of true beneficial ownership of the company. That concern could only properly be addressed by an application for rectification of the register by those seeking to go behind the register. There was *prima facie* evidence that WL was entitled to challenge the petition. Provided that M submitted an affidavit verifying those matters, there was no proper basis for precluding the company from challenging the petition by denying it the *locus standi* to do so.

(vi) The fact that the petitioner was a foreign entity did not by itself dictate that an order for security for costs should be made against it. An important factor was the petitioner's likelihood of success, and given that considerable time had already been spent in considering in some detail the issues involved, it could be concluded on a *prima facie* basis that there was merit in the petition. A further factor to be considered was that the petitioner was itself in liquidation and therefore unlikely to be able to pay the company's costs if the company were to be successful. However, even in the ordinary case, the fact of insolvency would not by itself dictate an order for security. Where the petitioner was a large bank, as in this case, the fact of insolvency was even less appropriate as a ground for ordering security for costs. Furthermore, the petitioner was under the control of a liquidator appointed by the Brazilian government and there was nothing to suggest that any obligations as to costs would not be honoured should the petitioner be unsuccessful. The rule in Dartmouth Harbour Comm v Mayor of Dartmouth applied. The company's application for security for costs would be refused.

(vii) The issues as to cross-examination and discharge of the provisional liquidators would be heard at a later date, prior to the hearing of the petition.

HRN

Companies Law S 106 - Removal of liquidators - Locus standi - Inherent jurisdiction of the court

Johnson and another v Deloitte and Touche AG

Court of Appeal
Zacca P, Georges JA, Rowe JA (Actg)
April 3 1997

Legislation

Companies Law (1995 Revision)
Companies Act 1862
Companies Act 1900
Companies Act 1948
Insolvency Act 1986
Insolvency Rules

Authorities referred to

Re British Nation Life Assurance Association (1872) LR 14 Eq 492
Re Norwich Provident Insurance Society (1879) 28 WR 272
Webb's South Extended Silver Mining Co Ltd (1896) 6 BCPC 47
Re Tavistock Iron Works Co (1871) 24 TLR 605
Re Oxford Building and Investment Co (1883) 49 LT 495
Re Adam Eyton Ltd ex parte Charlesworth (1887) 36 ChD 229
Re New De Kaap Ltd [1908] 1 Ch 589
Re AJ Adams (Builders) Ltd [1991] BCLC 359
Re Corbenstoke Ltd (No 2) [1989] 5 BCC 767
Re Automated Extended Warranties Ltd [1991] BCC 62
Re Intercontinental Properties Pty Ltd (in liquidation) [1977] 2 ACLR 488
Re Bridgend Goldsmiths Ltd [1995] 2 BCLC 208
Re Marseilles Extension Rly and Land Co (1867) LR 4 Eq 692
Re Sir John Moore Gold Mining Co (1879) 12 ChD 325
Re Rubber and Produce Investment Trust [1915] 1 ChD 382
Re Karamelli & Barnett Ltd [1917] 1 ChD 206
Re Rica Gold Washing Co (1879) 11 ChD 36
South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provincien' NV [1987] 1 AC 24
Re Charterland Goldfields Ltd (1909) 26 TLR 132
Re Amalgamated Properties of Rhodesia Ltd (1914) 30 TLR 405
Re Kevpak Homecare Ltd [1987] 3 BCC 558
Re Arrows Ltd [1992] BCC 121
Re Sankey Furniture Ltd ex parte Harding [1995] 2 BCLC 594
Attorney-General of the Duchy of Lancaster v London and NW Rly Co [1892] 3 Ch 274
Wenlock v Moloney [1965] 1 WLR 1238
Re 67 Budd Street Pty Ltd: The Commonwealth of Australia v O'Reilly [1984] 2 ACLC
Re Parkdown Ltd (1993) (unreported)
Re Bullard & Taplin Ltd [1996] BCC 973

Authoritative works cited

Halsbury's Laws Vol 7(3)
McPherson on the Law of Company Liquidation (3rd Ed)

Mr Hunter QC and Mr Turner for the appellants
Mr Vos QC and Mr McLaughlin for the respondents

The appellants, who were the joint liquidators of Omni Securities Ltd ('OS'), had commenced Cause 104/95 against the respondent and others, alleging breach of contract, negligence, negligent misstatements and breach of statutory duty in respect of the auditing of OS for the years 1988 and 1989. The respondent alleged that the appellants

were acting under a serious conflict of interest and in breach of their professional rules in continuing to act as liquidators and in failing to take any steps to sue Coopers and Lybrand UK.

The respondent sought an order removing the appellants as joint liquidators of OS and in the alternative an order restraining the appellants from continuing the action against the respondent and others in Cause 104/95. The appellants sought an order dismissing the respondent's originating summons on the ground that the respondent had no *locus standi*. Smellie J held that the respondent had *locus standi* and in the alternative that the court had an inherent jurisdiction to restrain the liquidators from continuing the action in Cause 104/95. The liquidators appealed.

Held: (allowing the appeal)

(i) S.106(1) Companies Law was directly applicable to the circumstances of this case. However, the section did not specify by whom an application to remove a liquidator could be made.

A review of the authorities showed that the court, in resolving such an application, had to pass through three stages:
(a) did the applicant have *locus standi* to apply?
(b) had due cause been shown?
(c) if so, should the court exercise its discretion and remove the liquidator?
In the instant case, the court was only concerned with the first stage.

In resolving the issue of *locus standi*, it was not enough to ask whether the applicant was a 'proper person'. The cases cited in support of the 'proper person' test were cases of exceptional and peculiar circumstances (*Re AJ Adams (Builders) Ltd; Re International Properties Ltd; Re Bridgend Goldsmiths Ltd*). The applicant had to show a financial interest in the outcome of the liquidation: *Re Corbenstoke Ltd (No.2)*. The respondent was neither a creditor nor a contributor and could under no circumstances benefit from the assets of OS which might become available for distribution. The respondent, who was in the position of a defendant being sued by the liquidators, could become liable in damages and was therefore a potential debtor. There was no reason to enlarge the category of persons who had traditionally gained access to the court to seek to remove liquidators. The wide interpretation given to s.106(1) Companies Law by the learned trial judge would lend itself to the floodgates argument and would bring great uncertainty into this branch of the law.

The respondent had no *locus standi* under the statute to apply to the court for removal of the liquidators.

(ii) A recent authoritative statement on the jurisdiction of the court to grant injunctions was to be found in the speech of Lord Brandon in *South Carolina Ins. Co*: (a) where there was an invasion or threatened invasion of a legal or equitable right; or (b) where there was unconscionable conduct by a party to an action.

The learned trial judge was correct in declining to make a finding that the appellants had invaded or threatened to invade a legal or equitable right of the

respondent by bringing an action against the respondent when affected by conflicts of interest. In determining the issue of conflict of interest, it was important to identify clearly the persons to whom the fiduciary duty was owed. The liquidators owed no duty to debtors or potential debtors from whom compensation was being sought for damage allegedly done to the company by their negligence or malfeasance. The liquidators owed a duty to the company, its creditors and contributors to pursue such a claim with due diligence and in so doing could not be said in any way to have invaded the legal and equitable rights of the respondent.

The alleged conflicts of interest and lack of objectivity on the part of the appellants in suing the respondent but failing to sue Coopers & Lybrand UK were insufficient to warrant a finding of unconscionable conduct. If Coopers & Lybrand UK were liable, they could have been joined as a third party by the respondent. The learned trial judge had therefore erred in finding that the court's inherent jurisdiction could be invoked on the basis of unconscionable conduct to restrain the appellants from pursuing Cause 104.

(iii) Costs to be agreed or taxed.

HRN

Application for summary judgment - Whether court had jurisdiction to grant such order - Whether conduct amounting to breach of fiduciary duties - Whether evidence adduced subject to legal professional privilege

AB Co (Cayman) Ltd v XY Co SA and others

Grand Court (36/96)
Smellie J
March 24 1997

Court Rules referred to

Grand Court Rules Orders 13 and 14
Rules of the Supreme Court 1997 Order 15/16/2 and Order 24/5/12

Authorities referred to

Mitzger v Department of Health and Social Security [1977] 3 All ER 444
Patten v Burke Publishing Co Ltd [1991] 1 WLR 531
Ex parte Adamson (1878) 8 Ch D 807
Nocton v Lord Ashburton [1914] AC 932
Re Dawson (dec'd) [1966] 2 NSWR 211
Bartlett v Barclays Bank Trust Co Ltd (No2) [1980] Ch 515
Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) (In Liquidation) [1990] 1 WLR 153
Carl Zeiss Stiftung v Rayner and Keeler Ltd (No2) [1967] AC 853
Canadian Arab Financial Corporation and Kilderkin Investments v Player [1984] CILR 63
Moss SS Co Ltd v Whinney [1912] AC 254
Hogg v Bramphorn [1967] Ch 254
Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821
International Credit and Investment Co (Overseas) Ltd

and another v Adham and others [1994] 1 BCLC 66
Gamlen Chemical Co (UK) Ltd v Rochem Ltd [1983] RPC 1
Barclays Bank plc v Eustace [1995] 1 WLR 1238
Bullivant v AG for Victoria [1901] AC 196
Minter v Priest [1929] 1 KB 655
Balabel v Air India [1988] 2 WLR 1036

Authoritative works cited

Underhill's Law of Trusts and Trustees (14th Ed)
Snell's Principles of Equity (29th Ed)
Dicey and Morris The Conflict of Laws (11th Ed)
Kerr on Receivers (16th Ed)

Mr Bueno QC and Mr Quin for the plaintiff
Mr Cohen QC and Mr Moses for the eighth defendant

This was an application for summary judgment pursuant to Grand Court Rules Order 14. AB Co (Cayman) Ltd (ABC) is a company incorporated in the Cayman Islands. At all material times up to and including November 10th 1992 the directors and officers of the company were defendants 5, 6 and 7. Defendant 8 (D8) supported ABC's application and had been joined in this action at it's own request and no relief was sought against defendant 6 (D6).

On November 10th 1992 the Grand Court, by Order in Cause 389/92, appointed a receiver over ABC's assets and undertakings, the Court then being satisfied that the assets of ABC were in jeopardy from those then in control of the company. Undisputed evidence was adduced as to the identity and extent of ABC's assets by the liquidators world-wide of the BCCI and related liquidations, that action and the instant action having arisen as a result of the collapse of the BCCI group.

The trial in Cause 389/92 was completed in May 1995 and it was determined that the defendants to that action, including CSA, a Bahamian company, had knowingly participated in a conspiracy to defraud D8 and were liable in damages resulting from that conspiracy. The findings were also deemed to give rise to other causes of action against them and a consequence of the trial was that directions were given to the receiver to secure and collect in the assets of ABC. The instant proceedings were part of that process because CSA, which had also been placed into receivership as a result of the Order of November 10th 1992, had listed amongst its assets the shareholdings in and assets and undertakings of ABC.

D6 entered into a cooperation agreement with the liquidators of D8 and BCCI, which involved him giving evidence in aid of the liquidation generally, and his affidavit evidence amounted to an account of the events which occurred subsequent to the Order of November 10th 1992. He described a series of events in which he and other officers (defendants 5 and 7 in the instant action) of the group of companies controlled by CSA sought to transfer significant assets away from ABC, namely ownership of shares in defendants 1 and 2, to Panamanian 'off the shelf' companies (defendants 3 and 4 in the instant action), by means of 'resolutions' and

'assignments', in a bid to remove them from the control of the Cayman Islands court.

The matters before the court for consideration were, *inter alia:*

(a) whether the Grand Court had jurisdiction to grant summary judgment in respect of defendants 5 and 7, neither of whom had acknowledged service or given notice of their intention to defend the action;
(b) the effect of the purported transfers;
(c) whether the defendants' actions amounted to a breach of their fiduciary duties;
(d) whether legal professional privilege rendered the evidence of D6 inadmissible.

Held: (allowing the application)

(i) The court's jurisdiction over defendants 5 and 7 and the applicability of Grand Court Rules Order 14 in these circumstances was established by reference to Grand Court Rules Order 13 Rule 6(1) which provided for specific requirements of service when defendants failed to give notice of intention to defend. These requirements had been met by the plaintiff and, as the plaintiff was seeking purely equitable remedies, the further requirement of Order 13 Rule 6, that the claim must not fall within the common law claims excepted by Rules 1-4, was also satisfied. The principle that such claims were within the exclusive jurisdiction of equity to award was based on long accepted authority: *Ex parte Adamson* and *Vocton v Lord Ashburton.* As regards the other defendants, with the exception of defendants 3 and 4 (against whom attempts to effect service had been unsuccessful) and D6, Order 14 directly applied.

(ii) The purported transfers were void at law and of no effect. Furthermore, there could be no triable defence to the claim by ABC. ABC being a company incorporated in the Cayman Islands was governed by Cayman Islands law. As such, once the receiver was appointed by the Grand Court over the assets and undertakings of ABC, the board of directors (D's 5, 6 and 7) ceased to be the body capable of committing ABC to any legal transactions, in particular, to one by which ABC could properly seek to dispose of its assets. Once that appointment was effected, the receiver became the only person so capable: *Canadian Arab Financial Corporation and Kilderkin Investments v Player.*

(iii) By virtue of their fiduciary positions, directors owed strict duties to act *bona fide* in the best interests of their company and to act only for a proper purpose: *Hogg v Bramphorn.* If the purpose of the directors was improper, as the admitted purposes in this case were, then their decisions would be ineffective: *Howard Smith Ltd v Ampol Petroleum Ltd.* Further, the transactions in this case were plainly and admittedly a fraud, of which D's 3 and 4 had notice as they were in the common control of the same persons as ABC. The judgment of Harman J in *International Credit and Investment Company (Overseas) Ltd and another v Adham and Others* which involved certain of the present parties and dealt with similar attempted share transfers was approved. The fact that the transfers in both that case and the instant case had been made without any consideration, in addition to the

directors' motives, meant that the recipients of the shares could only hold them upon resulting or constructive trust for the true owner. D's 5 and 7 were acting for the purpose of seeking to evade the receivership appointed by the Grand Court and for the purpose of helping the defendants in Cause 389/92 to evade their liability to satisfy any judgment against them.

(iv) The issue of legal professional privilege was raised in respect of D6's evidence on the basis that he had acted as legal counsel to the parent company in the group. On the facts of the case there were two clear reasons why privilege did not attach to the evidence in question. The first was that strong *prima facie* evidence of fraud was disclosed in that evidence itself. Further, in Cause 389/92 fraud was found to have been made out against D6 himself and others in control of the relevant companies. Because of the connection between that action and this, the judgment and findings of Schofield J were highly persuasive in this regard. The second reason for disallowing privilege to attach to D6's evidence was that, on the facts, he had not been acting as a legal adviser when carrying out the fraudulent transactions, he had been acting as an officer of various companies. Thus the transactions and communications in question were to be regarded as not having fallen within the ambit of legal professional privilege in the first place. The limits to the privilege, although not strictly defined, require the relevant communications to be for the purpose of getting legal advice: *Minter v Priest; Balabel v Air India.*

RC

Confidentiality

Requirement to divulge confidential information under the Companies Law - Whether directions to be sought under the Confidential Relationships (Preservation) Law

In the Matter of X Ltd and In the Matter of the Companies Law (1995 Revision)

Grand Court (184/91)
Smellie J
October 13 1997

Legislation

Confidential Relationships (Preservation) Law
Companies Law S 126

Authorities referred to

Re Rolls Razor Ltd (No 2) [1969] 3 All ER 1386
In the Matter of Omni Securities (in liquidation) (Cause 93/1992)
I Ltd and F Ltd v A [1994-95] CILR Note 8

Ms Jaffa for the applicants
Mr Ritchie for the respondent

This was an application under s.126 Companies Law by the liquidators of X Ltd for orders directing the respondent to provide certain information about accounts held with the respondent which were now known to have been mixed up in the affairs of X Ltd. The respondent

was concerned as to whether, by complying with such orders, it would be divulging confidential information and would therefore first need to seek the direction of the court under s.4 Confidential Relationships (Preservation) Law ('CR(P)L').

Held: (granting the orders sought)

(i) The application had been brought by the liquidators as officers of the court and the extraordinary powers of the court under s.126(1) Companies Law were intended to enable the court better to fulfil its administrative and supervisory duties in the liquidation: 'to discover the truth of the circumstances in connection with the affairs of the company.'

(ii) There was as yet no question of the information being 'given in evidence or in connection with any proceedings' before any court, therefore s.4 CR(P)L did not apply.

(iii) In any event, the extraordinary powers of the court under s.126 Companies Law were within the exception mentioned in s.3(2)(c) CR(P)L.

(iv) If at some later stage the liquidators were to be advised to institute proceedings in which the information might be adduced in evidence or divulged in connection with those proceedings, they would first be bound to seek the directions of the court pursuant to s.4 CR(P)L. In those circumstances they would no longer be acting strictly within the scope of the powers given them as officers of the court under s.126.

HRN

Discovery - Norwich Pharmacal orders - Further disclosure for purpose of advancing claims of a third party - Whether plaintiff to be released from undertaking to the court

C v D Bank
C v M Ltd

Grand Court (468/95, 540/95)
Smellie J
September 25 1997

Authorities referred to

Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133
Alterskye v Scott [1948] 1 All ER 469
Home Office v Harman [1983] 1 AC 280
Sybron Corporation v Barclays Bank plc [1985] 1 Ch 299
Crest Homes plc v Marks [1987] AC 829
Bibby Bulk Carriers Ltd v Cansulex Ltd, The Cambridgeshire [1988] 2 All ER 820

Mr Ritchie for the plaintiff

The plaintiff had obtained discovery by way of *Norwich Pharmacal* orders, pursuant to which the defendant banks had provided documentary evidence in the form of affidavits containing the particulars of records of certain accounts held with them. In keeping with its written undertaking in Cause 468/1995, the plaintiff obtained the leave of the court to use the affidavits for the purposes of other proceedings overseas. The plaintiff subsequently applied for

leave to disclose the same affidavit evidence to a third party, E. Investigations conducted by E had revealed *prima facie* evidence that O had become involved in a fraudulent scheme similar to that found to have been perpetrated against the plaintiff. E was also aware that the defendants to the proceedings instituted by the plaintiffs included O and others who were targets of its own investigations. In order to substantiate and fully particularise its claims, E required access to the affidavits filed in these proceedings by the defendant banks. In response to E's request that the plaintiff provide that information, the plaintiff cited its earlier undertakings which prevented it from so doing without leave of the Grand Court. E did not seek *Norwich Pharmacal* relief because such an application would have unnecessarily duplicated the applications made by the plaintiff in respect of the same information and would have involved substantial costs, not only for E but for the defendant banks which were innocently implicated in the alleged wrongdoing. The plaintiff applied to be released from its undertakings to the court.

Held: (granting the application)

(i) The purpose of the plaintiff's undertaking was to ensure the proper confidentiality of the information disclosed in the interests of those still entitled to that confidentiality, whilst encouraging full and proper disclosure of evidence. In seeking the leave of the court to make further disclosure, the plaintiff had to show that the information was necessary and relevant and that it would be reasonably protected against further unauthorised disclosure.

(ii) The same principles applied where the further disclosure was intended to assist a third party for the purposes of bringing causes of action which were separate from and unrelated to the plaintiff's. The plaintiff, as the party who gave the undertaking, was therefore required to show particularly cogent and persuasive reasons why it should be released from its undertaking.

(iii) Where such release was to assist a third party, it was necessary for the court to investigate the intended manner of the third party's use of the information, the extent to which the information would be of value and the degree of control which the owner of the information or the court could exercise to prevent subsequent improper use: *Bibby Bulk Carriers Ltd v Cansulex Ltd*. The intended manner of E's use of the information and its potential value were readily apparent. There was *prima facie* evidence that E, like the plaintiff, was the victim of a fraud, and that fraud was inextricably linked with that perpetrated against the plaintiff, the factual matrix and *modus operandi* being similar in both cases.

(iv) Although some of the information contained in the affidavits of the defendant banks had come into the public domain, that consideration in no way served to release the plaintiff from its undertakings: *Sybron Corporation v Barclays Bank plc*.

(v) An undertaking by E not to use the evidence for any purposes other than its intended actions in England and/or the United States without the leave of the Grand Court would be sufficient to address any concerns regarding potential

prejudice to the beneficial owners of the information. The defendant banks themselves did not cite any potential prejudice. No substantive proceedings had been brought against them and they would not be exposed as defendants to further litigation as a result of further disclosure. There was also the practical benefit to the banks of not having to submit to separate *Norwich Pharmacal* proceedings which E could have instituted using the information already available from the public domain. The persons implicated and having an interest in the information to be disclosed were themselves defendants to the ongoing substantive proceedings, and some were the intended defendants to the substantive proceedings to be brought by E. They could therefore only expect such protection for their interests of confidentiality as the usual undertakings would properly provide.

(vi) The plaintiff had shown cogent and persuasive reasons why E should be provided with the information sought. The orders sought would be granted, subject to the appropriate written undertaking from E, and worded so as to identify the specific proceedings which E intended to bring.

HRN

Conflict of Laws

Application to recognise foreign decree of divorce providing no relief for wife - Errors on part of wife's legal advisors - Grounds of non-recognition - Public Policy and considerations of injustice - Absence of blame on husband's part - No inherent jurisdiction of the court to attach ancillary relief to a foreign decree - Interim maintenance order effective only during pendency of suit

Wheeler v Wheeler

Grand Court (D2/95)
Smellie J
July 29 1997

Legislation

Matrimonial Causes Law Ss 5, 7, 11 & 19
Recognition of Divorces and Legal Separations Act 1971 (UK)
Matrimonial and Family Proceedings Act 1984 S 12 (UK)
Grand Court Law Ss 3, 11 & 15

Authorities referred to

Quazi v Quazi (1978) 8 Fam Law 203 & [1979] 3 All ER 897
Newmarch v Newmarch [1978] 1 All ER 1
Joyce v Joyce and O'Hare [1979] 2 All ER 156
Hewitson v Hewitson [1995] 1 All ER 472
Canadian Arab Financial Corporation (t/a Kilderkin Investments) et al v Plaver [1984-85] CILR 63
McCallister v Santa Cruz Investment Company Ltd (No 2) [1984-85] CILR 411
Ingersol-Rand v Banco Portuguese de Atlantico [1988-89] CILR 189

Tower v Hadsphaltic [1986-87] CILR 40
In Re S Trust (Cause 118/91)
Formosa v Formosa [1962] 3 All ER 419
Chaudhary v Chaudhary [1984] 3 All ER 1017
Kendall v Kendall [1977] 3 All ER 471
Egerton v Brownlow (1853) ER 359
Tahir v Tahir 1995 SLT 194
Torok v Torok [1973] 3 All ER 101
Wood v Wood [1957] 2 All ER 14
F v F (Cause D 58/91)
Levette v Levette and others [1957] 1 All ER 720
Russell v Russell [1957] 1 All ER 729
Indvka v Indvka [1967] 2 All ER 689

Mr Alberga QC and Mr McCann for the husband
Mr Lamontagne QC and Mr DaCosta for the wife

The petitioner (wife) and the respondent/applicant (husband) are American citizens domiciled in North Carolina ('NC'). The parties had been ordinarily resident in the Cayman Islands where they had established their matrimonial home. The husband owned substantial assets, including the matrimonial home, within the jurisdiction.

The wife, having satisfied the court that she had been ordinarily resident within the jurisdiction for at least two years immediately preceding the presentation of the petition as required by s.5 Matrimonial Causes Law, petitioned the Grand Court seeking a declaration of divorce. Some six weeks after the presentation of this petition the husband successfully brought a divorce petition before the NC court, and by the present application he sought its recognition by the Grand Court. The wife urged the Grand Court to refuse recognition, arguing that the NC proceedings had been commenced due to the husband's knowledge that it would be financially difficult for her to become engaged in litigation on two fronts. The wife also argued that the NC petition had been motivated by a desire to oust the jurisdiction of the Grand Court in order to defeat her entitlement to maintenance and matrimonial property, available from that court. Neither form of relief was available from the NC court due to the US attorney for the petitioner ('H') having elected not to file any application for maintenance, alimony or 'equitable distribution of property' in the NC proceedings due to his mistaken belief that she would be able to make such an application to the Grand Court consequent upon the NC decree. It was H's belief that the award of the Grand Court would be more generous, and therefore his strategy was to offer no resistance (apart from an early challenge as to jurisdiction) to the NC proceedings. The husband instituted fresh ancillary proceedings before the NC court in order to allow the wife the opportunity to assert a claim before it for equitable distribution of matrimonial property. Any such rights had been lost by the husband's early discontinuance of the original proceedings, and it was apparently in order to meet criticism of this conduct that he initiated the fresh proceedings. H declined the opportunity to participate in these proceedings on the basis that any award would be very small (the husband having very little property in NC which had been acquired by the parties during their marriage) and would be likely to be outstripped by the costs of the litigation. With the discontinuance of

these proceedings, there was no further recourse available to the petitioner before the NC court.

For the husband it was argued that the NC decree was that of a court properly possessing jurisdiction which should therefore be recognised. The wife, having been given proper notice of the NC proceedings, had every opportunity to defend them, but had declined to do so, including the fresh proceedings allowing her a claim for 'equitable distribution' of property. It was also clear that with proper advice she could have secured some provision for alimony or maintenance from the original proceedings. Counsel for the husband contended therefore that it was as a result of the wife's own inaction, caused by 'strategical elections and errors of opinion', that resulted in her being left without provision from the NC proceedings. The husband was not at fault. It was furthermore asserted that the wife had been kept fully apprised of the decisions not to participate in the NC proceedings, and she had therefore consciously gambled on the outcome of the Cayman proceedings. She was, in short, 'the author of her own misfortune'.

Counsel for the wife advanced two alternative arguments:

(1) that the NC decree should be refused recognition because its 'net effect' was that she would receive nothing. This, it was suggested, should 'jar on the conscience of the court' causing it to exercise its discretion to deny recognition.

The grounds for non-recognition of a foreign decree are enumerated in the second proviso to s.7(1) Matrimonial Causes Law. These grounds include (a) lack of notice of the foreign proceedings; (b) lack of reasonable opportunity to take part in the proceedings; or that recognition would be manifestly contrary to public policy.

Counsel for the wife contended that even if the husband's conduct did not bring the case within paragraph (a) or the first limb of paragraph (b), the court could still exercise its discretion to refuse recognition on the ground of public policy; and

(2) in the event that the NC decree were recognised, the Grand Court had jurisdiction to continue the earlier order for interim relief which it had previously made.

Counsel for the husband denied the existence of any residual discretion of the court to impugn a foreign decree, regular on its face, by resort to public policy; and denied that local law allowed the court to make orders for maintenance or division of matrimonial property ancillary to a foreign decree of divorce.

Held: (denying the ability of the court to award relief ancillary to a foreign decree, but refusing to recognise the foreign decree)

(i) Any power to award relief ancillary to a foreign decree must arise from statute, such power not being within the inherent powers of the court. Such power was conferred upon the English courts by s.12 Matrimonial and Family Proceedings Act 1984.

S.11(1) Grand Court Law was not effective to import the substantive statutory provisions of the 1984 Act into Cayman law. S.11 was apt only to confirm that the Grand Court possesses like jurisdiction to that vested in the English High Court: *McCallister v Santa Cruz Investment Company Ltd (No 2); Ingersol-Rand v Banco Portuguese de Atlantico; Tower v Hadsphaltic; In Re S Trust*. The decision of the Court of Appeal in *Canadian Arab Financial Corporation (T/A Kilderkin Investments) et al v Player* would be distinguished for there the court was concerned with the inherent powers of the court and its view of the importation powers of s.11 were properly to be regarded as *obiter*. Moreover, unlike the provision under consideration in *Kilderkin*, (Supreme Court Act 1981), the 1984 Act was not an Act which amended the Supreme Court of Judicature (Consolidation) Act 1925, as contemplated by s.11.

Any such importation was excluded in the context of matrimonial causes in any event by s.15 Grand Court Law, extending to the Grand Court only that jurisdiction conferred by the Matrimonial Causes Law.

(ii) The cases both before and since the enactment of the Recognition of Divorces and Legal Separations Act, 1971 (upon which s.7 Matrimonial Causes Law was modelled) indicate the existence of a wide discretionary power in the court to refuse recognition on the basis of public policy. The English cases which resulted in non-recognition on the grounds of public policy all involved allegations of dishonourable conduct or subterfuge in the bringing of the foreign proceedings. This was not the case here where the husband had proceeded openly and without deception. The ambit of the public policy defence to recognition was therefore central to the outcome of the present application.

It was clear from the language of s.7 that the grounds for refusal therein enumerated were disjunctive and were a matter for the court's discretion: *Quazi v Quazi*. Accordingly, refusal based upon the public policy ground was not predicated upon any necessary proof of impropriety or lack of notice: *Joyce v Joyce* and could extend to errors of the legal advisors: *Newmarch v Newmarch*. Evidence of injustice, irrespective of questions of *culpa*, was to be within the contemplation of the court when exercising its discretion as to refusal on the basis that recognition would be manifestly contrary to public policy. The net effect of recognition here, due to the errors of the wife's legal advisers and the severity of the foreign law in these circumstances, would be to leave the wife with nothing. Whilst the husband was not at fault for the errors of her legal advisers, there was no reason in principle to allow him to benefit from them: 'If the consequence of the recognition of his foreign decree is to be injustice to the wife, he has no enforceable right to insist on recognition.' Recognition would be refused on the public policy ground.

(iii) Had the NC decree been recognised, contrary to the submissions of counsel for the wife, the interim maintenance order would necessarily have been discharged, with the statutory jurisdiction of the court being limited to the pendency of the suit instituted by the petition. The interim order here had no

existence separate from the pending suit: *Wood v Wood*, *Oureshi v Oureshi* and *Newmarch v Newmarch* distinguished.

(iv) The husband would be entitled to cross-petition on the wife's continuing petition before the Grand Court, approving *F v F*.

MD

Conflict of laws - Matrimonial agreement - Enforcement - Negotiable Instruments - Cheques - Summary judgment

L v L

Grand Court (40/95)
Harre CJ
May 12 1997

Legislation

Bills of Exchange Law S 4

Authorities referred to

DPP v Turner [1973] 3 All ER 129
Re Charge Card Services Ltd [1988] 3 All ER 702

Mr Giglioli for the plaintiff
Mr Broadhurst for the defendant

In 1990, the parties entered into an ancillary relief agreement in Quebec wherein the defendant agreed to pay a sum to the plaintiff over a period of seven years. To facilitate and 'guarantee' the payments, the defendant supplied 84 postdated cheques. The agreement was never incorporated into a court order.

Sixteen of the cheques were dishonoured. The cheques were all drawn on a bank in the Cayman Islands, presented for payment at another Cayman Islands bank and dishonoured in the Cayman Islands. The plaintiff brought an action seeking judgment in the amount of $25,000.

The defendant sought to stay her action on the ground of *forum non conveniens*.

Held: (stay denied and summary judgment granted)

(i) The expert evidence regarding Canadian divorce law and ancillary relief issues was conflicting. One expert indicated that the plaintiff could seek to enforce the agreement in Canada, and that the defendant was entitled to apply for a reduction, or forgiveness, of a part of the debt on the basis of a material change in circumstance. The other expressed the view than no variation would be allowed, and that the Quebec court would decline jurisdiction.

(ii) The court was of the view that the dispute could be more clearly addressed as simply an action on dishonoured cheques. The court rejected the argument that because the matrimonial proceedings were governed by the law of Canada that it was to be inferred that the parties, in regard to the arrangements concerning the 'guarantee' of payment by means of post-dated cheques, intended that Canadian law should apply. The more likely inference was that they intended the opposite, and indeed that the parties chose the law of the Cayman

Islands to be that which governed the obligation to pay on the presentation of the cheques. That was the law with which the transaction had its closest and most real connection.

(iii) The Bills of Exchange Law, like the English provisions, adopted the principle that a bill of exchange involves several contracts entered into by the drawer for the purpose of securing the payment in due course of the sum for which the bill is drawn.

(iv) The cheques in issue were inland bills within the definition of s.4 Bills of Exchange Law. On their face they purported to be both drawn and payable within the Cayman Islands or drawn within the Islands upon some person resident therein.

(v) The cheques were to be treated as cash for the purpose of the summary judgment.

(vi) *DPP v Turner* and *Re Charge Card Services Ltd* were distinguished.

JE

Criminal Law

Assaulting police officer in execution of his duty - Mistake of fact - Relevance of the accused's actual belief as to identity of person effecting the arrest - Proviso to S 9 Court of Appeal Law - Irrelevance of mistake of law

Miller v R

Court of Appeal (32/97)

Zacca P, Georges and Collett JJA
April 24 1998

Legislation

Court of Appeal Law S 9

Authority referred to

Blackburn and others v Bowering and another [1994] 3 All ER 380

Authoritative work cited

Archbold's Criminal Evidence and Pleading

Mr Lamontagne for the appellant
Mr Akiwumi for the Crown

In August 1994 police officers, following a report of a public disturbance, arrived at the scene of a street party in Mary Street, George Town, in order to break it up and disband the assembled crown of 200 people. Some bottles were hurled at the police officers with one officer being injured by a broken bottle which he alleged had been thrown by the appellant. As a result of this alleged incident, the appellant was arrested after a struggle with several police officers. Of importance to the present appeal was the fact that the disc jockey had announced to the crowd that he was discontinuing the music at the request of the recently arrived police task force. In March 1996, as a result of this incident, the appellant was convicted in the Summary Court on charges of resisting arrest and assaulting a police officer in the execution of his duty. He was sentenced to one month's imprisonment,

suspended for two years, in respect of each offence, consecutively. He was acquitted, however, of a charge of disorderly conduct, it not having been established that he was responsible for having thrown any bottles.

His appeal against conviction was dismissed by the Grand Court in September 1997. He now appealed to the Court of Appeal, arguing that the lower courts had erred in law in holding/assuming: (a) that knowledge by the appellant that those seeking to arrest him were police officers acting in the course of their duty was not required to be proved by the prosecution; and (b) that the appellant was not entitled to defend himself by using reasonable force even if he genuinely believed that those assailing him were not police officers acting lawfully.

Held: (dismissing the appeal and confirming sentences)

(i) Where a defendant asserts that he forcibly resisted arrest in ignorance of the official capacity of the individual making the arrest the test to be applied was subjective. Accordingly, if on the defendant's mistaken view of the facts the force used was reasonable he would have a good plea of self defence. The reasonableness or otherwise of the defendant's mistake was irrelevant provided it led to a belief actually held which would justify the amount of force resorted to: *Blackburn v Bowering*.

(ii) The courts below, not having been referred to *Blackburn v Bowering*, had reached no finding on whether they accepted the appellant's contention that at the time of the arrest he did not know his 'assailant' to be a police officer. This amounted to an error of law and would lead to the necessary quashing of the convictions unless, as provided for by the proviso to s.9 Court of Appeal Law, there had been no substantial miscarriage of justice. It was clear from the evidence, however, that if the trial magistrate had addressed his mind to this question he would almost inevitably have found that the appellant knew he was being arrested by a police officer. Not only was it the evidence of the arresting officer that he had given the appellant this information at the time of the arrest, but it was clear that the arrival of the police had been disseminated to the crowd by the disc jockey. The police officers had also been wearing similar uniforms which identified them as such, albeit that these were not the regular uniforms of beat officers. Consequently, the appellant had not been labouring under any mistake of fact.

(iii) The appellant, not having in fact thrown any bottles at the police officers, may have been labouring under a mistake of *law* that he was entitled to forcibly resist the arrest of a police officer acting under the misapprehension that he had so conducted himself. The appellant had no legal right to resist arrest, however, and his mistake of law would afford him no defence.

MD

Editor's note: see further the following English/Privy Council decisions on mistake of fact: R v Beckford [1987] 3 All ER 425; R v Williams [1987] 3 All ER 411 and DPP v Morgan [1975] 2 All ER 347.

Rape - Identification of the accused - Fairness of directions of trial judge - Inability of victim's photograph to act as corroboration of her identification - Application of proviso to S 9 Court of Appeal Law

Ebanks v Regina

Court of Appeal (16/96)
Zacca P, Georges and Collett JJA
July 30 1998

Legislation

Court of Appeal Law S 9

Authority referred to

Mears v R (1993) 97 CR App Rep 239

Mr Hill and Mr Collins for the appellant
Mr Roberts for the Crown

The appellant was convicted in June 1996 by a unanimous verdict of the jury of the offences of rape, robbery and assault occasioning actual bodily harm. The prosecution's case was that on October 29th 1994 the victim, Miss H, a visitor to the Cayman Islands, had arisen early (between 5.00-5.30 a.m) and had walked to Seven Mile Beach from her nearby apartment to take a photograph of the sunrise. Whilst there, the appellant, who was previously unknown to H, engaged her in conversation and it transpired that they both knew a man called Blair in the United States. The appellant took a photograph of H and she in turn took one of the appellant saying that she would show it to Blair when she returned home. When H indicated her intention to return to her apartment, the appellant asked her not to and when she persisted he threw her to the ground and ordered her to give him her jewelry. He struck her several times to the mouth and threatened to kill her. He then forced her to have sexual intercourse and oral sex with him. During the latter, H stated that she had bitten the appellant's penis, but that he shown no pain. She eventually escaped and ran naked to her apartment complex where she alerted one Mathew Dennen of her ordeal. He observed her to be visibly shaken and almost hysterical. Dennen then recovered H's bathing suit and her other belongings from the beach, including her camera. He subsequently handed these items over to the police officer who arrived at the apartment at about 6.00 a.m. The film was developed later that day with exposure 17 being the photograph of H taken by the appellant, and exposure 18 that of the appellant taken by H. DNA taken from H matched the DNA of a blood sample taken from the appellant. H was subsequently shown a police book of photographs and she identified the appellant from a photograph therein.

The defence of the appellant was alibi. He maintained that he had not been on the beach but had been at his mother's home. He denied that H had taken a photograph of him. His mother was called as a witness to support his alibi. Medical evidence adduced for the defence indicated that there was no bite mark to the appellant's penis.

Counsel for the appellant, citing *Mears v R*, based his appeal on the contention that the trial judge's directions had been unfair to his client in failing to point out significant features of the evidence favourable to him. Specifically, counsel

contended that the following evidence, challenging the identification of the appellant, should have been put to the jury: (a) that the photograph of the appellant was not authentic. It was suggested that it had not been taken by H but was a photograph of a photograph, perhaps taken by Dennen who knew the appellant. It was further questioned why, if H's story were true, the appellant had not taken the camera with him; (b) that H had stated that her assailant was wearing baggy pants, whereas those in the photograph appeared not to be; (c) that there was no evidence of the appellant's fingerprints on either the camera or a cassette tape which H alleged the appellant had handled; (d) that the use of a police book of photographs for purposes of identification rather than holding an identification parade was irregular; (e) that there was no evidence of any injury to the appellant's penis; and (f) that the trial judge was in error in telling the jury that exposure 18 of the appellant was evidence which was capable of corroborating H's other evidence identifying the appellant.

Held: (dismissing the appeal)

(i) The directions of the judge were not unfair or unbalanced. The case was distinguishable from *Mears v R* . There was nothing here to suggest that the judge had misquoted the evidence or expressed views unwarranted by it. The jury was directed on the whole of the evidence (including points b-e above) and the jury were left in no doubt as to the arguments which had been fully ventilated by the defence.

In relation to (a), there was no evidence to suggest that H had made any identification of the appellant whilst the camera was still in Dennen's possession; equally, no plausible reason had been advanced to show why Dennen should wish to take a photograph of an existing photograph, assuming this to be possible with H's camera, which the Crown's expert witness strongly doubted. This contention was no more than mere speculation by the defence. As to (c) above, the camera had not been dusted for fingerprints for reasons which a police officer had explained to the jury. Both the camera and the cassette tape had been handled by several persons. It was not possible to say whether the appellant's fingerprints were on either therefore. As to (d) above, it was not accepted that the method of identification was irregular, and the lack of injury to the appellant's penis [(e) above] was inconclusive as H had not been cross-examined on the extent of the bite. Furthermore, H had stated in evidence that the appellant appeared to feel no pain from the bite.

(ii) Counsel's contention as to the inability of H's photograph to corroborate her own other evidence [(f) above] would be sustained. However, it was clear that the jury accepted the authenticity of the photograph and this being the case it amounted to very strong evidence supporting her identification of the appellant. The prosecution's case was a very strong one. Properly directed the jury would have come to the same verdict. The misdirection therefore produced no miscarriage of justice and the proviso to s.9 Court of Appeal Law would be applied.

MD

Robbery - Identification of accused

R v Minzett

Grand Court (50/97)
Douglas J (Actg)
November 25 1997

Authority referred to

R v Turnbull [1976] 3 All ER 549

Ms Richards for the Crown
Mr Furniss for the defendant

The defendant was charged with one count of robbery. The question that the court had to determine was whether the required burden of proof had been discharged by the prosecution, who were reliant upon an identification by the complainant.

Applying the *Turnbull* principles, it was relevant to consider a number of factors. Firstly, the length of the observation, which lasted some two and a half minutes. Secondly, the distance at which the defendant was observed, which was accepted here since the two people were engaged in a struggle. Thirdly, the light in which the observation took place. The struggle occurred in the entrance to a kitchen. The kitchen light was on and there were two adjoining street lights. Finally, the familiarity of the observee to the observer was significant. The complainant asserted that he had known the defendant all of his life and was shocked to observe him.

The defendant claimed that the complainant was mistaken and relied upon alibis provided by three other witnesses.

Held: (convicting the defendant)

(i) The identification by the complainant was sound, amounting to more than a fleeting encounter, at a close proximity, in sufficiently unimpeded light and of a person with whom he was completely familiar.

(ii) In such circumstances it was permissible to show the complainant a series of photographs in lieu of a formal identification parade.

(iii) The alibis provided were not persuasive, since it was possible that the defendant could have slipped away for a sufficient period of time and returned without being noticed.

VC

CRIMINAL LAW - SENTENCING

CRIM APPEAL NO.	CASE NO.	OFFENCE	SENTENCE
16/96	4/95	Rape Robbery Assault Occ. ABH	11 years Imp. 6 years Imp. (Conc.) 3 years Imp. (Conc.)
50/96	18/95	Causing death by dangerous driving	3 years Imp. Disqualified for 8 years
8/97	60/97	Att. Burglary Burglary	12 months Imp. 3 years Imp.
14/97	9/97	Robbery Poss. of firearm	6 years Imp. 6 years Imp. (Conc.)
15/97	13/96	Causing death by dangerous driving	2 years Imp. Disqualified for 6 years
23/97	61/95	Theft (4 counts)	3, 3 1/2, + 4 years Imp. (Conc.) 4 1/2 years Imp. and $500,000 comp or 6 months Imp. (Conc.)
30/97	2/97	Robbery GBH	3 1/2 years Imp. 2 years Imp. (Conc.)
31/97	4026/94 4028/94 4030/94 4024/94 4032/94	Poss. of Cocaine with intent to supply Poss. of Cocaine with intent to supply Poss. of Cocaine with intent to supply Poss. of Cocaine with intent to supply Failing to give urine sample	4 years Imp. and $3,000 fine or 6 months Imp. 4 years Imp. (Conc.) 4 years Imp. (Conc.) 7 years Imp. (Conc.) 6 months Imp. (Conc.)

CRIM. APPEAL NO.	CASE NO.	OFFENCE	SENTENCE
32/97	3546/94	Resisting Arrest	1 month Imp. (susp. 2 years)
	3548/94	Assaulting Police Officer	1 month Imp. (Consec.) susp. 2 years.
	3549/94	Indecent behaviour	No separate sentence
34/97	277/96	Poss. of Cocaine with Intent to supply	4 years Imp.
	276/97	Poss. of Cocaine with intent to supply	2 years (Consec.)
36/97	6/96	Causing death by dangerous driving	3 years Imp. disqualified for 7 years .
37/97	307/97	Import. of Cocaine	8 years Imp. and $950 fine or 3 months Imp.
	308/97	Poss. of Cocaine	Left on file
	309/97	Poss. of Cocaine with intent to supply	Left on file
38/97	4913/97	Poss. of Cocaine with intent to supply	3 years Imp.
40/97	991/97	Poss. of Ganja with intent to supply	18 months Imp. Bicycle forfeited to Crown
42/97	2072/96	Robbery	5 years Imp.
43/97	2451/95	Poss. of Cocaine with intent to Supply	3 years Imp.
	2452/95	Poss. of Cocaine	To remain on file
	2453/95	Failing to give urine sample	3 months Imp. (Conc.)
	2454/95	Disorderly conduct	Adjourned sine die

CRIM APPEAL NO.	CASE NO	OFFENCE	SENTENCE
44/97	4391/96 4392/96	Import. of Cocaine Poss. of Cocaine with intent to supply	4 1/2 years Imp. 4 1/2 years Imp. (Conc.)
45/97	38/97	Theft	6 months Imp. (susp.)
47/97	1795/97	Import. of Cocaine	8 years Imp.
49/97	8/97	Defilement of girl under 16 years (4 counts)	2 1/2 years Imp. (each count - Conc.)
50/97	55/97	Causing death by reckless driving	15 months Imp. Disqualified for 6 years
51/97	10/97	Defilement of girl under 16 years	9 months Imp.
52/97	10/97	Defilement of a girl under 16 years	2 years Imp.
3/98	1392/97 1393/97 1394/97 1395/97 1396/97	Import. of Cocaine Poss. of Ganja Import. of Cocaine Supplying Cocaine Poss. of Cocaine with intent to supply	10 years Imp. 6 months Imp. (Conc.) 10 years Imp. (Conc.) and $200 fine or 1 month Imp. 10 years Imp. (Conc.) No separate penalty Rec. for deportation
4/98	1907/96	Poss. of Cocaine with intent to supply	3 1/2 years Imp. Fined $150
6/98	2012/94	Poss. of Cocaine with intent to supply	9 years Imp.
7/98	25/97	Manslaughter	Life Imp.
8/98	3354/97	Handling Stolen Goods	22 months Imp. Restitution order of US$25, 860 and CI$17,838
9/98	3634/94	Carrying offensive weapon	3 months Imp.

CRIM APPEAL NO.	CASE NO	OFFENCE	SENTENCE
9/98	3635/94 1110/95 1111/95	Resisting Arrest Ass. Occ. ABH Carrying offensive weapon	3 months Imp. (Conc.) 18 months Imp. (9 months susp.) (Consec.) and $500 comp. or 2 months Imp. 3 months Imp. (Conc.)
14/98	2012/94	Poss. of Cocaine with intent to supply	11 years Imp.
17/98	5/98	Defilement of girl under 16 years	6 months Imp.
18/98	27/97	Burglary	6 months Imp. and activation of 12 months susp. sentence (Consec.)
19/98	57/95	Theft (7 Counts)	18 months Imp. susp. for 2 years
20/98	57/95	Theft (4 Counts)	18 months Imp.
21/98	1/98	Theft (8 Counts) Forgery	3 1/2 years Imp. 1 year Imp. (Consec.)
31/98	34/94	Theft Making docs. without authority (2 counts)	6 Months Imp. 6 Months Imp. (Conc.) and $3000 costs or 3 months Imp. Comp. of US$1239.08 (within 10 months of release) or 3 months Imp.
32/98	3781/97 3780/97 3779/97	Theft Theft Theft	2 years Imp. 2 years Imp. (Conc.) 2 years Imp. (Conc).

CRIM APPEAL NO.	CASE NO	OFFENCE	SENTENCE
32/98	3776/97	False Accounting	12 months Imp. (Conc.)
	3777/97	False Accounting	12 months Imp. (Conc.)
	3778/97	False Accounting	12 months Imp. (Conc.)
	3355/97	Theft	12 months Imp. (Conc.)
33/98	608/98	Failing to provide urine sample	3 months Imp. 6 months susp. sentence for like offence activitated (Consec.)
	609/98	Failing to surrender to bail conditions	1 month Imp. (Conc.)
34/98	39/97	Obtaining property by deception (5 counts)	9 months Imp. (susp. for 2 years)
35/98	61/98	GBH	5 years Imp.
		Threatening violence	3 Years Imp. (Conc.)

Criminal Procedure

Restraint order under the PCCL - Application for discharge

In the Matter of the Proceeds of Criminal Conduct Law 1996 and In the Matter of the Mutual Legal Assistance (United States of America) Law 1986 and In the Matter of McCorkle et al

Grand Court (315/97)
Harre CJ
January 20 1998

Legislation

Proceeds of Criminal Conduct Law 1996
Proceeds of Criminal Conduct (Designated Countries) Order 1997

Authorities referred to

R v Secretary of State ex parte Hill [1997] 2 All ER
Carltona Ltd v Commissioner of Works [1943] 2 All ER 560
Re JL and in the Matter of Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990

Ms Agard and Mr Akiwumi for the Attorney-General
Mr Jones QC and Mr Quin for the applicants

This was an application to discharge a restraint order made under the Proceeds of Criminal Conduct Law ('the PCCL'), whereby M and his wife were restrained from disposing of or dealing with funds in three bank accounts.

The application to set aside the order rested on the following grounds:

(a) the PCCL did not apply retrospectively, yet the restraining order granted by the Grand Court was not limited to transfers after the commencement date of the PCCL.
(b) No proceedings in the designated state (United States) for the order required by paragraph 5(3) of the Schedule to the PCCL had been instituted within 7 days of the application in Grand Cayman.
(c) The purpose of the Schedule was to permit the granting of a restraint order where criminal proceedings had not been instituted within 7 days in exceptional circumstances.
(d) The affidavit accompanying the application for the order had not been made by the appropriate authority.
(e) The affidavit of M failed to deal with all the requirements of paragraph 8 of the Schedule of the PCCL.
(f) Material non-disclosure.
(g) Abuse of process.
(h) Discharge of the order under a discretion conferred upon the court in paragraph 6(6)(a).

Held: (granting the application)

(i) The fact that further acts alleged to be criminal conduct of a similar nature occurred after the commencement of the PCCL could not have the effect of bringing acts which occurred before that commencement, and in respect of which a specific claim for a restraint order had been made, within the ambit of that Law.

The order related to a substantial extent to transfers made before that date and should therefore be discharged.

(ii) With regard to grounds (b) and (c), the question was therefore whether the filing of an external confiscation order rather than the hearing of the application by a tribunal constituted the application. In both paragraphs 2 and 5 of the Schedule, time began to run from the date of application to the court.

The effect of paragraph 2(2) of the Schedule was that proceedings were instituted in the United States where an indictment, information or complaint had been filed against a person in respect of an offence or an application had been made to a US court for an external confiscation order. In relation to an application to the Grand Court for a restraint order, 'application' meant more than a mere filing in a court office or registry because there was no way in which the Grand Court could be satisfied that proceedings would be instituted against the defendant in a designated country within 7 days of the application unless that application was actually before it. No application for an external confiscation order was before a court within 7 days. If 'application' meant filing, the filing in Cayman of the application for the restraint order was more than 7 days before the filing of the application for the external confiscation order. The 7 day requirement was to be strictly enforced in the exceptional circumstance when a restraint order was sought before proceedings had been instituted against a defendant. For that reason also the restraint order should be discharged.

(iii) Grounds (d) and (f): an affidavit made by S, the Deputy Director of the Office of International Affairs of the Criminal Division of the US Department of Justice, describing the functions of two officers of the Department of Justice, provided sufficient evidence that the affidavits supporting the application for a restraint order had been made by the appropriate authority.

Furthermore, S's evidence showed that this was not a tax case, and failure to inform the Grand Court that one of those officers was merely repeating the words of an IRS agent did not amount to material non-disclosure.

(iv) Ground (e): where an application did not relate to an external confiscation order made in respect of specified property, a restraint order could apply to all realisable property held by a specified person. The PCCL would be unworkable if the precise amount had to be stated in the order.

Nor was it necessary to include all the names and addresses of the alleged victims of the conduct of M and his wife. The affidavits supporting the application therefore sufficiently complied with the requirements of the PCCL.

(v) Grounds (g) and (h): with regard to Ground (h), paragraph 6(6)(a) of the Schedule simply provided that a restraint order could be discharged or varied in relation to any property. It merely indicated the form in which an order could be made rather than extending the powers elsewhere provided to make the order at all.

With regard to Ground (g), it was contended that no proceedings for an offence of the kind required by the Proceeds of Criminal Conduct (Designated Countries) Order had been instituted, and that the filing of an application for an external confiscation order was a device to allow the property in the Cayman Islands to be restrained while the leisurely process of an enquiry before a grand jury took its course. The categories of conduct rendering a claim an abuse of process were not closed, and considerations of public policy and the interests of justice were material. However, in the circumstances there had been no abuse of process.

(vi) Leave to appeal would be granted, and execution of this order stayed pending determination of the appeal.

HRN

Customs Law

Importation of prohibited goods - Forfeiture

Avalon Tours Ltd v Attorney-General

Court of Appeal (14/96)
Zacca P, Telford Georges JA, Kerr JA
April 3 1997

Legislation

Traffic (Amendment) Law 1993 S 12A
Customs Law Ss 9, 59, 64

Authority referred to

Customs and Excise Commissioners v Tan [1977] 1 All ER 432

Mr Helfrecht for the appellants
Mr Alberga QC and Mr Parkinson for the respondents

The first respondent with the assistance of the second respondent imported three coaches into the Cayman Islands. The second defendant and Mr B (the sole shareholder and director of the first respondent) were aware of the prohibition against the importation of coaches over ten feet under s.12A Traffic Law.

The bill of lading and invoices were collected and taken to the Customs Office. A customs entry form was completed and duty paid. Port handling charges were also paid to the Port Authority. The Customs Officer inspected the coaches and on the Customs Officer's receipt (entitled Authority to Deliver) he wrote 'OK to release by Customs' and Mr B was advised that he could take the coaches.

Before removal of the coaches, the acting Attorney-General informed the Collector of Customs of the importation of the coaches and the height restriction on imported coaches under s.12A Traffic Law. On measuring the coaches, the Customs Officer found that they exceeded the height restriction. The Collector of Customs then directed the Port Director not to release the coaches, and Mr B was not permitted to remove them.

Each coach had a small roof extractor. The total height of the coach including

the extractor exceeded ten feet, but if the extractor were removed the height of the coach was less than ten feet.

The respondents sought the following declarations: (a) that the coaches did not exceed the height restrictions, (b) that they were lawfully imported and the Customs Law did not apply to them, and (c) that the seizure was unlawful and followed by unlawful detention.

The trial judge held that height of the coaches was determined by the distance from the ground to the top of the topmost appendage, which included the extractor. The trial judge therefore refused to make the first and second declarations. However, the trial judge held that the coaches were unlawfully seized, and so granted the third declaration and awarded damages.

The appellants submitted that the coaches were lawfully seized under the Customs Law. The respondents submitted that the coaches were not over ten feet high and so could not be lawfully seized, and that the appellants were estopped from seizure once delivery had been made.

Held: (allowing the appeal)

(i) The coaches exceeded the height restriction for the reason given by the trial judge.

(ii) The judge was wrong to conclude that the coaches were not seized for the reason of the height restriction. At the time of seizure, the Collector of Customs believed that the coaches exceeded the height requirement and that he had no authority to release them due to the contravention of the Traffic Law, and this was communicated to Mr B. The seizure took place in accordance with s.59 Customs Law.

(iii) The coaches could be seized at any time and were in fact seized before they left the dock. *Customs and Excise Commissioners v Tan* distinguished. The Customs Law permitted seizure after receipt for delivery was tendered.

SAAC

Family Law

Family - Ancillary relief - Relocation expenses - Child maintenance

BJH v RSH

Grand Court (D3/97)
Smellie J
October 14 1997

Mr Lamontagne QC for the petitioner
Ms Hernandez for the respondent

The parties were divorced. By agreement, the petitioner was given the primary custody, care and control of the children, aged 10 and 5 years. The petitioner brought an application for ancillary relief in respect of the children, but not herself. She planned to relocate herself and the children to Australia, and to re-enter the job market there after a long period as a home-maker. The petitioner's extended family lived in that country.

Held: (order for the petitioner)

(i) The respondent exhibited recalcitrance and had failed to take the steps to ensure the well-being of the children. The court's objective was to treat the welfare of the children as paramount.

(ii) The respondent was ordered to pay the greater portion of the airfare, and a reasonable freight allowance for the petitioner and the children. The costs of a reasonable motor car, a computer for e-mail communication and other incidentals brought the total lump sum order to $8,000.

(iii) The petitioner sought maintenance for the children at a higher than normal level. She argued that this would ensure that she would be able to meet mortgage repayments in purchasing a home (in which to raise the children) without exhausting her portion of the proceeds of the sale of the matrimonial home. The court considered the actual and potential incomes of the parties, and ordered the respondent to pay $US3,000 per month during the first six months of the relocation to Australia and thereafter US $2,000 per month. The latter amount was less than one-quarter of the respondent's monthly income.

(iv) The orders were intended primarily for the protection of the children even if, incidentally, they provided the wife with some small additional benefit. It was not to be forgotten that she would have the daily burdens of parenthood and the everyday exigencies of life to face.

JE

Application to vary order made ancillary to matrimonial proceedings - Whether court had jurisdiction - Application for ruling on outstanding summonses

EJ Johns v FL Johns

Grand Court (D15/94)
Harre CJ
July 29 1997

Legislation

Matrimonial Causes Law Ss 21 and 23

Authority referred to

Range v Range [1988-89] CILR 437

Mr McField for the petitioner
Mr Hill QC and Mr Hampson for the respondent

This was an application to vary an Order arising from a settlement by consent in matrimonial proceedings which was arrived at on January 31st 1995. Since the grounds of divorce were proved on December 1st 1994 the parties had been before the courts on a number of occasions. The motions had taken differing forms, but essentially involved the respondent trying to enforce the orders and the petitioner, according to the respondent, attempting to evade his obligations thereunder. All the sums due under the two consent orders (the second of which was approved by the court on December 5th 1995) had been paid by the petitioner at the date of this hearing, following a suspended order for his

committal made by Harre CJ on November 29th 1996.

There were two points at issue in the present proceedings. First, did the court have jurisdiction to vary the first of the consent orders and, if so, would it do so; and second, what was the position with regard to the outstanding summonses?

Held: (dismissing the application to vary the Order and ruling that the outstanding summonses be dismissed)

(i) The Cayman Islands Court of Appeal decided in *Range v Range*, after reviewing the relevant authorities from England and Hong Kong, that either spouse or their personal representatives could make application for variation of any order made under s.21 Matrimonial Causes Law. It was therefore clear that the court had the jurisdiction to consider the application. However Zacca P in *Range* had further stated that the jurisdiction should be sparingly used where the order itself appeared to contemplate finality and was made with the consent of the parties. On the facts, this was clearly not a case where the sparing exercise of the jurisdiction should be exercised.

(ii) There being matters pertaining to the case which gave rise to considerable concern, the outstanding summonses were an abuse of the process of the court and were dismissed.

RC

Land Law

Application for order for sale by private treaty by mortgagee where mortgagor in default - Whether letter sent by mortgagee constituted valid notice - Whether in any event the court could exercise statutory discretion to make such order

X Bank Ltd v W

Grand Court (349/97)
Orr J (Actg)
November 19 1997

Legislation

Registered Land Law (1995 Revision) Ss 64(2), 72 and 77

Authorities referred to

Paradise Manor Ltd and others v Bank of Nova Scotia [1985] CILR 437

Mr McDonough for the plaintiff
Mr McLaughlin for the defendant

This was an application by the plaintiff for an order of sale by private treaty, under the Registered Land Law, of a property owned by the defendant and charged to the plaintiff as security for a loan.

In 1989 the parties entered an agreement whereby the plaintiff advanced a loan to the defendant secured by a charge on the defendant's property. The charge provided that the defendant would repay

the plaintiff the sum loaned on demand and that pending such demand the defendant would repay by means of monthly instalments, specified by the plaintiff, over a period of fifteen years. The charge further provided that in the event of default by the defendant in payment of the amounts due or in the performance of any other term of the charge the plaintiff could sell the property by private treaty or public auction.

By August 1995, payment of the monthly instalments had fallen significantly into arrears and the plaintiff's attorneys wrote to the defendant advising him that the full amount outstanding had to be paid by November 9, 1995, otherwise the plaintiff would enforce its charges over the property by means of a sale. It was accepted by all parties that this constituted a demand pursuant to s.64(2) Registered Land Law. The effect of this notice was to make the entire loan repayable in November 1995 and to render the plaintiff subject to the formalities prescribed by s.72 Registered Land Law in exercising any remedies. S.72 provides that before the chargee can exercise a power of sale a notice must be sent to the chargor to pay the money owing or to perform and observe the agreement as the case may be.

The substantive issue here was whether or not a second letter sent by the plaintiff to the defendant constituted a valid notice under s.72, and, in the event that it did not, whether the court had discretion under s.77 to order the sale in any event.

Held: (granting an order for sale by private treaty)

(i) The second letter did constitute a valid notice under s.72. *Paradise Manor* would not be followed because the relevant comments were *obiter* and the argument in that case centred upon whether one notice could satisfy both statutory provisions whereas in the instant case two notices had been served. Further, there was no requirement in s.72 that the demand should specify the amount due and the interest.

(ii) In the event that the second letter did not constitute a notice for the purposes of s.72, s.77, which provided the court with the power to vary s.72, allowed the court to exercise its discretion to dispense with the requirement, having regard to the proceedings and conduct of the parties.

RC

Injunction sought to restrain trespass - Whether decision by Chief Land Registrar amounted to an adjudication to give rise to estoppel per rem judicatam

Brinsley Danville Lazzari v Leon Lazzari Freda Lazzari and Pedro Lazzari

Grand Court (203/92)
Harre CJ
July 24 1997

Legislation

Prescription Law 1964 S 2
Registered Land Law (1995 Revision)
Part IX Ss 138, 147, 148 and 149

Authorities referred to

Thrasyvoulou v Secretary of State for the Environment [1990] 2 WLR 1
Harley Development Inc v Commissioner of Inland Revenue [1996] 1 WLR 727
Re Freehold Land in Dances Way Hayling Island [1962] 2 All ER 42

Mr Henriquez QC and Mr Roy for the plaintiff
Mr Lamontagne QC for the defendants

This was a claim by the plaintiff for an injunction to restrain the defendants and their servants or agents from entering land comprising Cayman Brac East Block 108D, Parcel 34, and to restore the property to its former state prior to their interference therewith.

The defendants counterclaimed the existence of a right of way across Parcel 34 by prescription or by virtue of a lost modern grant and (if necessary) claimed rectification of the land register and damages. There was a further submission that the land over which the claimed easement was being exercised was in fact Crown land over which the defendants had been granted an easement.

The defence to the counterclaim raised a further issue of law, namely the assertion that the defendants were estopped from maintaining their claim in the action against the plaintiff on the grounds that a claim by them for an easement by prescription over Parcel 34 had been refused by the Acting Registrar in 1989 and no appeal had been taken against that decision. It was on this point that the present case focused.

Held: (granting the injunction)

(i) The two sources for statutory prescriptive rights of relevance here were the Prescription Law, s.2 and Part IX of the Registered Land Law (1996 Revision), s.138. Ss 147-149 Registered Land Law set out the procedural scheme for appeals from the Registrar to the Grand Court and the Court of Appeal. The Acting Registrar when refusing to register the easement over Parcel 34 had made a decision that the easement had not been acquired by prescription. In *Thrasyvoulou*, which considered whether an estoppel arose as a result of proceedings pursuant to the Town and Country Planning Act 1971, Lord Bridge was of the opinion that the principle of *res judicata* generally applied in relation to adjudications in order to give finality to a determination. To like effect was the speech of Lord Jauncey in *Harley Development Inc*.

The decision of the Acting Registrar was a substantive decision against which the appeal provisions of the Law (Ss.147-149) could have been invoked but had not been. It would be wrong for the court to relitigate the issue many years later and there was a clear estoppel as far as the claim for an easement over Parcel 34 was concerned. *Re Freehold Land in Dances Way, Hayling Island* would be distinguished because there it was held that the Chief Land Registrar had not made a final determination of the issue.

(ii) With respect to the claim that the easement arose under the principles of lost modern grant, it had been long

established that a court need not consider such a claim unless the necessary period of user had been established. This had not been done here.

(iii) The claim that the land over which the easement was being exercised was Crown land and that the defendants had been granted a valid easement by Government was incorrect. An independent Government survey of the disputed area, which corresponded with the titles and plans in the Land Registry, found that the land over which the easement was exercised was part of Parcel 34.

RC

Construction of Ss 38 and 42 Registered Land Law - Fraud - Constructive Trust - Assets traced in equity to land transferred to bona fide purchaser - Competing equitable interests - Nemo dat quod non habet

AB and CD and Z Bank v Registrar of Lands (EF Co intervening)

Grand Court (135/96)
Smellie J
February 3 1998

Legislation

Registered Land Law (1995 Revision)
Companies Law (1995 Revision)

Authorities referred to

Smith v Morrison [1974] 1 WLR 659
Strand Securities Ltd v Caswell and Another [1965] 1 All ER 820
Myles and Winton v Prospect Properties Ltd and Woolf [1994-95] CILR 1
Gibbs v Messer [1891] AC 248
Ebanks v Clarke [1992-93] CILR 33
Assets Company Ltd v Mere Roihi [1905] AC 176
Lipkin Gorman v Karpnale Ltd [1992] 4 All ER 512
Re Diplock [1948] Ch 465
Taylor v Blakelock (1886) 32 Ch D 560
Wigg v Wigg (1739) 1 Atk 384
Cave v Cave (1880) 15 Ch D 639
Sharpe v Foy (1868) 4 Ch App 35
Assaf v Fuwa [1955] AC 215
Frazer v Walker [1967] 1 AC 569

Authoritative Works cited

Simpson Land Law and Registration
Megarry and Wade The Law of Real Property
Halsbury's Laws of England

Mr McDonough for the applicants
Mrs Banks for the respondent
Mr Hellman for the intervenor

The applicants sought rectification of the Land Register on the following issues: (1) the removal of an inhibition, registered by EF Co., against certain residential property which they claimed to have purchased; (2) registration of the applicants as the registered proprietors of that property; and (3) registration of Z Bank as the proprietors of a charge by way of mortgage over the same property.

The property which forms the subject matter of these proceedings is subject to a number of competing equitable claims arising from a complicated factual background. EF Co., the intervenor, claims to be able to trace in equity

against the property because it represents at least in part the proceeds of a fraud which was perpetrated against them by the predecessors in title of the applicants. The court was invited by the parties to approach the case on the basis of certain factual assumptions undisputed by them. These assumptions comprised:

(a) that B stole monies from EF Co., the intervenor;
(b) that those monies were used by X Co. to purchase the property;
(c) that X Co. was controlled by B;
(d) that H was a party to B's fraudulent designs and knew that the property had been purchased using stolen money;
(e) that H paid no consideration to X Co.;
(f) that the Registrar had no notice of any of (a) - (e) above; and
(g) that the applicants had no notice of any of (a) - (e) above.

B moved the stolen monies to Grand Cayman and set up X Co who then purchased the disputed property. X Co purported to transfer the property to H by executing a deed of transfer. However this transfer had been arranged before X Co had acquired title and no consideration passed from H to X Co. This transfer was never presented for registration, instead H purported to transfer title to the applicants by means of a further deed of transfer. The applicants had obtained the consent of X Co, as registered proprietors, to search the register and to impose a stay of dealings pursuant to s.42 Registered Land Law. Such stays are operative for fourteen days by virtue of s.42(1), and the stay obtained by the applicants expired on February 7th 1996. On February 1st 1996 the applicants' attorneys submitted to the Land Registry for registration the deed of transfer from X Co to H, the deed of transfer from H to the applicants and the charge in favour of Z bank given by the applicants. The application also included a cheque for fees and stamp duty in the appropriate amounts.

On February 2nd 1996 EF Co. (the intervenor) issued proceedings in Cause 42/96 against X Co., B and others, to restrain dealings with the property. On the same date EF Co. obtained orders which included an inhibition pursuant to s.124 Registered Land Law and which was immediately entered on the register inhibiting the registration of any further dealings with the property. The inhibition was entered notwithstanding the stay, pursuant to s.42, which was then in place.

The applicants' claims were premised on the basis that the remedies sought would provide only the same secured position they would have achieved in respect of the property had their application been entered upon presentation, thereby redressing the grant of priority given to EF Co's inhibition.

Held: (dismissing the application for rectification of the Land Register and ruling that the application was unregistrable for fraud)

(i) An inhibition, even though an order of the court, assumed no priority of registration during the pendency of a stay of registration, effected pursuant to s.42 Registered Land Law, an inhibition being effective only upon registration. Counsels' submissions that the word affecting as it appeared in subsections

(2) and (3) should actually read effecting were accepted and, on that construction, s.42 clearly sought to accord priority to an instrument properly executed and which gave effect to the proposed dealing for which the search was initiated and the stay imposed.

(ii) Legal title could only pass in accordance with the Registered Land Law where the person passing the legal title was a proprietor as defined therein. The combined effect of Ss. 2, 37(1), 83(1), 83(12) and 106(1) Registered Land Law was that H, not being the registered owner, could pass no legal title by his bare execution of the deed of transfer. The applicants had to ascertain that H, as the vendor, was the registered proprietor in order to fall within the scheme of protection afforded by s.38, as the scheme was predicated upon dealings with a registered proprietor.

(iii) H's inability to pass legal title, combined with the effect of the assumptions relating to the factual background, meant that EF Co and the applicants' claims were based on competing equities. EF Co's claim arose by virtue of a fiduciary relationship between itself and B upon which it founded its claim as beneficial owner with an equitable proprietary interest in the property. As X Co was B's *alter ego* and deemed to have knowledge of that equitable proprietary interest, X Co, in turn, became constructive trustee of the property for EF Co. Thus EF Co had an equitable interest which arose prior to any equitable interest enjoyed by the applicants. *Ebanks v Clarke* and *Assets Company Ltd v Mere Roihi* were settled authority that X Co's legal title would be subordinated to EF Co's equity, as X Co held on trust for EF Co. in these circumstances.

(iv) The applicants' claim that the right to trace could not be exercised against a *bona fide* purchaser for value without notice of the equity, relying on *Re Diplock* and *Taylor v Blakelock*, failed because it was necessary for the *bona fide* purchaser to attain a legal entitlement in order to defeat a pre-existing equitable entitlement. This was not the position that the applicants had secured. Furthemore, it was clear from *Wigg v Wigg* and Megarry and Wade's The Law of Real Property that a *bona fide* purchaser not having legal title would have at best only an equitable interest. The rule applicable in such circumstances is that where equities are equal the first in time prevails: *Cave v Cave*. This conclusion was necessarily to be applied in light of the decisions of the Court of Appeal in *Myles v Prospect Properties* and the Judicial Committee of the Privy Council in *Assaf v Fuva*.

(v) The principle *nemo dat quod non habet* also applied in these circumstances to defeat the applicants' claim. X Co was necessarily to be considered a constructive trustee of the property for EF Co, thus X Co could pass no equitable or legal title to H, as he took with knowledge of EF Co's interest and for no consideration. This conclusion was further supported by the fact that the purported deed of transfer to H was *ex facie* fraudulent, having shown consideration to have been paid when none had been, contrary to s.105(3) Registered Land Law. A strict application of s.37(1) of the Law meant that this transfer did not amount to a 'properly executed instrument' and was

therefore unregistrable for failing to comply with the requirements of the Law. To allow this transfer to be registered, so as to vest legal title in H, would be to permit a statute to be used as an instrument of fraud, which equity would prevent: *Ebanks v Clarke*.

RC

Public Law

Judicial review of Governor's authority issued under S 7(4) Extradition Act 1989 - Second application for extradition

In the Matter of an Application for Leave to Apply for Judicial Review

Grand Court (146/97)
Smellie J
March 18 1997

Legislation

Extradition Act 1989 Ss 7(4), 11(3), 12(1) and 12(2)
European Convention on Extradition (Dependent Territories) Order 1996 (SI 1996 No 2875)
European Convention on Extradition Order 1990 (SI 1990 No 1507)
Extradition Act 1870

Court Rules

Rules of the Supreme Court Order 53
Grand Court Rules Order 53

Authorities referred to

Re Rees [1986] AC 937
Re Bodden [1988-89] CILR 259
Re Fedele [1988-89] CILR 155
US Government v Bowe [1989] 3 All ER 315
Re Evans [1994] 1 WLR 1006
Atkinson v US Government [1971] AC 197
Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155
R v Sang [1980] AC 402
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
CCSU v Minister for the Civil Service [1985] 1 AC 374
Smith v Commissioner of Police [1980-83] CILR 126

Authoritative work cited

Jones On Extradition

Mr Jones QC and Mr McDonough for the applicant
Mr Archie for the Governor
Mr Nichols QC, Mr Lewis and Miss Richards for the Government of Switzerland

The applicant was a Swiss national residing in Grand Cayman, who was subject to a number of criminal charges in Switzerland. The Swiss government sought extradition. Both the applicant and his wife had been the subject of an earlier request for extradition which had involved largely the same allegations and had been discharged. A provisional warrant for the applicant's re-arrest was issued by the magistrate on February 19, 1997. On March 3, 1997 the Governor issued his authority to proceed.

The applicant sought leave to apply for judicial review on two grounds. The first ground centred on the action of the Governor in reliance upon the European Convention on Extradition (Dependent Territories) Order 1996 (SI 1996 No 2875) which was said to be *ultra vires*. It was however conceded by counsel for the applicant that the necessary arrangements for the extension of this Convention to dependent territories, including the Cayman Islands, had been properly concluded.

The remaining limb of the application claimed that the decision of the Governor to proceed was irrational, that no reasonable Governor could have issued an order to proceed against the history of the case. Counsel for the applicant accepted that a second or subsequent authority to proceed could be lawful, but that it was wrong in this case. Whilst the categories of circumstances in which a further order to proceed might properly be issued were not limited, it was argued that they should not be extended to situations where the requesting state had been shown to be at fault in the disposition of the earlier request. In further support of this argument counsel for the applicant emphasised the inappropriate behaviour of the requesting state, in that they had misrepresented the strength of the case against the applicant. It was suggested that this amounted to a lack of good faith and that it was precisely this that the Governor ought to have considered when exercising a discretion as to whether to issue the authority to proceed, even at the final stage after committal.

This application, although designed to be taken *ex parte*, was taken *inter partes* at the behest of the applicant. Since the case concerned the liberty of the applicant, whose position could not be prejudiced by such an arrangement, it was accepted on this basis by the court in the interests of time and expense.

Held: (refusing the application)

(i) A decision of the Governor was amenable to judicial review where it was derived entirely from statute and was not a manifestation of the Royal Prerogative of the Crown.

(ii) The state requesting extradition need no longer show the existence of a *prima facie* case before the magistrate. The arrangements established by the European Convention on Extradition, duly applied to the Cayman Islands and were sufficient to ensure that any conditions that the magistrate sought to impose upon the extradition would be complied with.

(iii) In principle, the Governor had the power to refuse to extradite after committal by the magistrate. However, on the facts presented, there was nothing to suggest that the Governor had acted irrationally, or unreasonably in the *Wednesbury* sense, in granting the authority to proceed. The applicant's claim that the actions of the Swiss government precluded the Governor from rationally proceeding contained surmise, speculation and conjecture and found no support in any previous pronouncement on the facts by a court in the Cayman Islands. As such, it was therefore open to the Governor to conclude that such concerns should be no bar to a further request for extradition.

Application for judicial review - Amendment of remedies sought - Procedural fairness - Legitimate expectation - Rights of objectors under Ss 8(2) and 10 Local Companies Control Law (Revised)

In the Matter of Joined Summonses for the Variation of an Ex Parte Order Granting Leave to Apply for Judicial Review and the Lifting of a Stay on the Grant of a Licence

Grand Court (91/97)
Smellie J
May 14 1997

Legislation

Local Companies Control Law (1995 Revision) Ss 8(2) and 10

Court Rules

Grand Court Rules Order 53 rule 3(6)
Rules of the Supreme Court Order 53

Authorities referred to

Swiss Bank and Trust v Iorgulescu [1994-95] CILR 149
The Matter of an Application for Leave to Apply for Judicial Review (Re K) (146/97) March 18 1997
R v Devon County Council ex parte Baker et al [1995] 1 All ER 73
CCSU v Minister for the Civil Service [1984] 3 All ER 935
Issac v Minister of Consumer Affairs [1991] LRC (Const) 777
Attridge v Caymanian Protection Board [1987] CILR 246

Mr Lamontagne QC and Mr Adams for the plaintiff
Mr Archie for the first defendant
Mr Alberga QC and Mr McCann for the second defendant

The second defendant had previously sought to transfer 51% of its shares to a foreign investor. In accordance with s.8(2) Local Companies Control Law (Revised) this had been widely publicised. Objections were forthcoming and these matters were eventually brought to the court. On this matter the court ruled in favour of the second defendant. The plaintiff had however not objected at this stage, in the belief that it would be able to do so when the second defendant applied for a licence under s.10 Local Companies Control Law (Revised). When the second defendant then applied for the licence, the plaintiff, believing that its objections would not be taken into account, obtained leave to apply for judicial review by way of orders of prohibition.

The plaintiff's objections were duly noted by the Immigration Board on December 10, 1996, one day after the Board had taken the decision to grant the licence, which was subsequently issued on December 16, 1996. The plaintiff therefore sought to alter the original orders with a view to quashing the decision of December 9 1996 and, if appropriate, that of December 16 1996,

and to stay the licence that had now been granted.

Counsel for the plaintiff argued that the first defendant, the decision-maker, had failed to act fairly in not providing the plaintiff with an opportunity to present its objections and that the plaintiff had a legitimate expectation of such procedural fairness, there being insufficient publication of the second defendant's application. Moreover, that in making its decision, the decision-maker had taken into account irrelevant factors provided by the second defendant about the nature of its business, and had failed to take relevant factors into account. Having lodged its objections, the plaintiff further proposed that these ought to have been considered at the purported final decision of December 16.

Held: (granting leave to amend the application on limited grounds)

(i) There was a case to be heard as to the issue of procedural fairness. This merely being an application for leave to amend, it fell to a full hearing to determine whether the s.10 application was separate and distinct from the s.8 dealings, whether the decision-maker ought to have contemplated the likelihood of other objections, and whether a legitimate expectation extended to an objector, albeit one with a sufficient interest.

(ii) There was however no support for the claim that the decision-maker had failed to take into account relevant factors, or that it had taken account of irrelevant factors.

(iii) The decision of December 16 was merely one of ratification and there were no grounds to suggest that the substance of the decision could be re-examined and that the plaintiff's objections could then be considered.

(iv) In order to protect the interests of the second defendant who had been awarded the licence, it was necessary to consider whether appropriate conditionalities could be put in place before a stay could be granted.

VC

Application for leave to apply for judicial review - Imposition of restrictions on Local Companies (Control) Licence - Legitimate expectation to a substantive right

Hadsphaltic v The Immigration Board and the Attorney-General

Grand Court (851/97)
Harre CJ
January 22 1998

Legislation

Local Companies (Control) Law (1995 Revision) Ss 11(2), 11(3)
Immigration Law 1992 S 10

Authorities referred to

R v Devon County Council ex parte Baker et al [1995] 1 All ER 73
R v Torbay Borough Council ex parte Cleasby [1991] COD 142

R v Secretary of State for the Home Department ex parte Khan [1984] 1 WLR 1337

Mr Alberga QC and Mr Walton for the plaintiff

Hadsphaltic International Limited had been operating as Building and Civil Engineering Contractors in the Cayman Islands since the 1960's. Significantly, this predated the introduction of the Local Companies (Control) Law in 1971. Following the introduction of these provisions, Hadsphaltic had successfully obtained licence renewals without the imposition of any limitations on their operation.

Upon a recent renewal of their licence pursuant to these provisions, the Immigration Board decided to impose a dollar value restriction on projects undertaken by Hadsphaltic. The restriction was designed to protect and promote smaller Caymanian building concerns.

Counsel for Hadsphaltic proposed that the decision to impose the condition was illegal and void, irrational and in breach of a legitimate expectation that there would not be a restriction imposed on a subsequent renewal.

Held: (refusing leave to apply for judicial review)

(i) The Immigration Board was free to impose conditions beyond those that it was obliged to consider under s.11(3) Local Companies (Control) Law.

(ii) Taking into account the lawful considerations of smaller Caymanian companies, the decision could not be considered irrational.

(iii) Whilst a substantive legitimate expectation could exist, there was insufficient evidence of a clear and unambiguous representation which could reasonably be relied upon to prevent the decision-maker departing from what they had previously represented.

VC

Editor's note: Hadsphaltic's application was renewed before the Court of Appeal who granted leave to apply for judicial review. The subsequent application was granted by Graham J on June 12, 1998 who, in holding the decision of the Immigration Board to be ultra vires, quashed their order and reversed the ruling of Harre CJ. A summary of Graham J's ruling will be included in (1998) 17 Law Bulletin. See further Carter 'New Directions in Judicial Review' infra p.82.

Interlocutory injunction - Application for judicial review

Thompson Shipping Co Ltd v The Port Authority of the Cayman Islands

Court of Appeal (CICA 11/97 & CICA 12/97)
Harre CJ (sitting as a single judge of the Court of Appeal)
September 22 1997

Authorities referred to

Series Five Software Ltd v Clarke et al [1996] 1 All ER 853
American Cyanamid Co v Ethicon Ltd [1975] AC 396
Hoffman-La Roche (F) & Co v Secretary of State for Trade and Industry [1974] AC 295
Hubbard v Vosper [1972] 2 QB 84
Evans Marshall & Co Ltd v Bertola SA [1973] All ER 992

Mr Lamontagne QC and Mrs Thompson for the plaintiff
Ms Bridges for the defendant

The plaintiff had sought an interlocutory application to restrain the defendant from compelling the plaintiff to remove its cranes from the George Town Port area and judicial review with the same aim. In addition, it was sought to restrain the defendant from giving effect to its alleged decision to cancel a permit issued to the plaintiff. These applications were both dismissed by the Grand Court.

The plaintiff appealed, applying *de novo*, for an injunction and a stay of the cancellation of the permit.

Held: (dismissing the appeals)

(i) A single judge of appeal did have jurisdiction to hear these proceedings.

(ii) Citing with approval the analysis of Laddie J in *Series Five Software Ltd v Clarke et al*, the applications would be refused because, in either case, damages would be an adequate remedy for each party.

VC

Tort

Negligence - Personal Injury - Quantification of damages

Andrew McGregor Yates v Sonia Radtke

Grand Court (357/96)
Smellie J
October 24 1997

Authorities referred to

Mitchell v Mulholland (No2) [1972] 1 QB 65
Cunningham v Harisson and another [1973] 3 All ER 463
Donnelly v Joyce [1973] 3 All ER 475
Adamek v Jurgens [1992-93] CILR note 17
Housecroft v Burnett [1986] 1 All ER 332
Ashcroft v Curtin [1971] 1 WLR 1731

Authoritative work cited

Munkman On Damages 9th ed

Mr Clement for the plaintiff
Mr Hill QC for the defendant

Due to the negligent driving of the defendant on October 26 1993, her vehicle struck the plaintiff's motorcycle. The plaintiff sought quantification of damages arising from injuries and loss sustained as the result of the accident.

At the date of the accident the plaintiff was thirty-five years old (thirty nine at the date of trial), physically active, accustomed to working long hours, and with great efficiency, as the owner/manager of a service station. At trial it was found that he was restricted to less strenuous activities due to his injuries, including permanent partial disability and progressive deterioration of the left ankle and hip (assessed at 25% permanent disability of the whole body). Ankle surgery and hip replacement surgery was found likely to be required in the years ahead.

Held: (for the plaintiff)

(i) The risk of complications arising from the future likely surgery was to be taken into account. Damages were determined with this additional loss in mind.

(ii) The court could adopt the factual premises of an expert only if they accorded with the court's independent assessment of the evidence. Adoption of expert evidence was further limited to the extent that the court agreed with any aspect of the computations and results: *Mitchell v Mulholland (No.2)* .

(iii) The ownership of the service station was questioned on the basis that the plaintiff's father-in-law held the franchise agreement with Esso. The evidence indicated that the arrangement between the plaintiff and the franchisee was such that the former was the owner and not an employee of the franchisee. The evidence revealed an established and open pattern by which the plaintiff used the income of the business to meet all his personal out-goings. That was found to be a pattern which was consistent only with ownership.

(iv) The plaintiff's claim for damages in an amount equal to the purchase price of the motorcycle without deduction was allowed. The motorcycle was new and in high demand, and it had been in use only for four days. Damages were also awarded for the freight, customs duty, licensing and insurance for one year as they were more than *de minimis*.

(v) The plaintiff's claim for travel expenses for his wife (and, alternatively, other family members) to accompany him to Miami for medical treatment was allowed, as was the cost of child care in Cayman whilst she was in Miami: *Cunningham v Harisson and another* and *Donnelly v Joyce*. The cost of the children travelling to Miami during a one week period of surgery and convalescence was not allowed.

(vi) The plaintiff's father-in-law managed the service station in the plaintiff's absence. By the date of trial he had not been paid the agreed wage. The payment was expressly contingent on recovery by the plaintiff from the defendant. This did not disqualify the claim: *Donnelly v Joyce* and *Adamek v Jurgens*. A discount of one-quarter was imposed to take into account the possibility that the claim 'may be inflated beyond that which the relative would otherwise reasonably accept': *Housecroft v Burnett* .

(vii) The need to delegate some managerial functions and to employ additional labour was established. The amount of additional salaries paid to then current and new employees was allowed

as damages, subject to a reduction to account for the need for additional wage disbursements due to increased volume of sales: *Ashcroft v Curtin*.

(viii) The evidence of increased sale volume led to the conclusion that the plaintiff would eventually have had to focus on management tasks rather than labour tasks. The impact of his physical impairment on future wages was adjusted accordingly.

(ix) Being guided by local precedent, the award for pain, suffering and loss of amenities of life was $60,000.

(x) The multiplier for the expenses of future medical care was based on the actual length of life expectancy, unlike earning loss where contingencies such as illness were allowed for: Munkman On Damages p 82 . The appropriate multiplier in this case was found to be 12.

(xi) The vagaries of the plaintiff's service station business were found to be high because of the unique arrangement between Esso, the father-in-law as franchisee and the plaintiff as owner. The future income claim was calculated by applying a multiplier of 6.

JE

Assessment of damages - Methodology

International Credit and Investment Company (Overseas) Limited (In Liquidation) and Finance and Investment International Limited v Ghaith Rashad Pharaoh and Pharaoh Holdings Limited

Court of Appeal (A2/97)
Zacca P, Collett JA, Kerr JA
August 15 1997

Authorities referred to

Armory v Delamirie (1772) 93 ER 664

Mr Cohen QC and Mr Moses for the appellants
Respondents did not appear

The appellants, who were successful plaintiffs in an action for the tort of conspiracy against the respondents as defendants, appealed against a preliminary ruling made by Murphy J in relation to assessment of damages under one of the heads of liability established earlier in a judgment of Schofield J. Murphy J had considered the quantification of the actual increased deficit from the date that ICIC would probably have been suspended from operating (found as US $37 million in 1978) until its actual closure in 1991. The calculation methodology applied by Murphy J could be summarised in the algebraic formula D = P + O + C - A; where D = the net deficit of ICIC; P = the total debts proved in the liquidation; O = the total monetary value of the obligations falling to be discharged by the liquidators apart from P and C; C = the total costs of the liquidation; and A = the total sum realised or to be realised form the assets of ICIC. This method of calculation was challenged in the present appeal.

Held: (appeal allowed)

(i) The methodology that was applied by Murphy J was correct. However, the failure to take into account the full impact of various 'pooling' agreements in 'O' was incorrect. The pooling agreements had been entered into by the liquidators of ICIC (after it was closed) with the liquidators of other corporate entities in the associated BCCI group as well as various other governmental authorities and individuals world wide. The wording of the key clause in each of the agreements was to be given its ordinary meaning.

(ii) Damage or loss which did not directly and naturally flow from the illegal conduct of a tortfeasor and which could not be within his reasonable contemplation at the time the tort was committed was not recoverable from that tortfeasor.

(iii) The normal course would be for the court to vacate the order of the judge below and remit the matter for further consideration by another judge of the Grand Court. However, that course would inevitably be fraught with further delay and expense for those involved. The appeal court was in possession of all the material and evidence necessary to be make the determination. A determination was made to expedite justice.

(iv) *Armory v Delamirie* was long standing authority for the proposition that, where the actions of a torfeasor have rendered it impossible to arrive at an accurate assessment of damage, strong presumptions may be maintained against him in order to arrive at an estimation of its amount.

(v) Subject to a reduction for consequences which amounted to a *novus actus interveniens* the damages were found to be US$2.19 billion. The total to be paid was, therefore, US$ 2.19 billion less US $37 million, plus costs.

JE

Trusts

Application for approval for variations of a trust - Whether variation would be of benefit to all the beneficiaries - Interpretation and meaning of 'benefit'

AB and Others v Z Bank Trust Co Ltd Et Al

Grand Court (821/97)
Smellie J
February 2 1998

Legislation

Trusts Law (1996) Revision Ss 60 and 68

Authorities referred to

In Remnant's Settlement [1970] 2 All ER 554
In Re H [1990-91] CILR n24
In Re Cohen's ST [1965] 1 WLR 1229
In Re Bristol Settled Estate [1965] 1 WLR 469

Mr Bolton for the applicants
Mr Jones for the respondents

Mr Foster for the contingent beneficiaries and remoter issue (by the guardian *ad litem* Mr Powery)

This was an application, *inter alia*, for the court's approval of an arrangement for the variation of a trust settlement pursuant to Ss. 60 and 68 Trusts Law (1996 Revision).

The four principal beneficiaries, who were all *sui juris* and in agreement, presented a draft form of arrangement for the court's approval. A number of variations to the beneficial interests and certain administrative changes, aimed at modernising the trustees' powers of investment, were proposed. The application was supported by the trustee.

The trust was settled in 1959 in the Bahamas with the purpose of minimising, or avoiding, exposure to U.K. tax upon the death of the settlor. The domicil of the trust was moved to the Cayman Islands in 1974 and the settlor died in 1978. As the existing beneficiaries are all resident and domiciled in the U.K., the fiscal consequences of the current tax regime upon them depends upon the nature of the trustees' powers and the exercise, or not, of those powers.

The application sought three major changes to the original settlement. First, that capital be immediately distributed from the trust fund to establish sub-trusts for the *certain* benefit of the beneficiaries' children and remoter issue who, under the original settlement, would be beneficially entitled only upon contingency and at the trustees' discretion. The existing settlement provided a discretionary benefit of *all* the income and capital for the four principal beneficiaries. Second, that the category of beneficiaries be widened to include spouses. This would effectively subject each of those having entitlement to a lower rate of taxation under the UK's existing capital gains tax laws. Third, that certain administrative changes should be made allowing the trustee to have access to modern avenues of investment and to professional services for those purposes.

Held: (approving the proposed variation)

(i) The court's concern was with the interests of minor and unborn beneficiaries, s.68 Trusts Law (1996 Revision) mandating that approval be withheld unless the court was satisfied that the proposed arrangement was for the benefit of such beneficiaries. Following *Re Remnant's Settlement* and *In Re H*, 'benefit' was to be given a broad interpretation and was not to be confined to merely financial, educational or social benefits. In addition to the apparent financial benefit, the wider discretion proposed to be given to the trustees could also bring other benefits by virtue of the greater flexibility in the distribution of income or capital.

(ii) *In RE Cohen's S.T.* held that to satisfy the statutory provisions the applicant must show that the benefit would accrue to each individual infant and unborn beneficiary in all circumstances. The establishing of the sub-trust with the resulting certain future benefit, over and above any contingent benefit to be vested in the minor and unborn beneficiaries enabled the court to

give approval to the overall variation following *In Re Bristol Settled Estate.*

RC

Action by trust protector seeking to replace current trustee - Challenge by principal beneficiary - Trustees maintaining neutral stance - Whether trustees' costs in that action should be borne by trust fund on an indemnity basis

In the Matter of the Omar Family Trust

Grand Court (575/97)
Harre CJ
August 27 1997

Authorities referred to

McDonald et al v Horn et al [1995] 1 All ER 961
Alsop Wilkinson v Neary et al [1995] 1 All ER 431
Buckton v Buckton [1907] 2 Ch 406

Mr Andrew for the Trustees
Mr Bolton for the Trust Protector
Mr Helfrecht for Omar Danial

This was an *inter partes* hearing in which the trustees sought an order for costs incurred in and incidental to Cause 565/97 to be paid out of trust assets on an indemnity basis. The issue in the first action was whether the Trust Protector, who had sought to replace the present trustees, had properly exercised a power expressed in the trust deed. The parties to the action were the principal beneficiary and the Trust Protector, with the existing trustees maintaining essentially a neutral position.

With regard to the question of costs, Harre CJ referred to correspondence between the respective attorneys. The Protector only agreed to indemnify the trustees as to costs on very limited terms. The trustees, whilst not intending to actively oppose the Protector's action, nonetheless felt that they should put forward all relevant evidence in their possession and explain to the court their concerns as to the propriety of their removal as trustees by the Protector.

Held : (granting the trustees an order for costs to be borne by the trust fund)

(i) The *dictum* of Hoffman LJ in *McDonald et al v Horn et al* that a trustee is entitled to his costs out of the fund on an indemnity basis provided that he has not acted unreasonably or for his own benefit rather than that of the fund, was approved. Noting that in *Alsop Wilkinson v Neary et al* Lightman J had identified three types of dispute in which trustees could be involved, it was observed that the instant case was a novel one. The novelty arose by reason of the involvement of the Protector, preventing the instant case from falling neatly into any of the categories identified by Lightman J.

(ii) There was a distinction to be drawn between true adversaries and a trustee who found himself embroiled in an application concerning the trust: *Buckton v Buckton*. It was unrealistic to say that the question of whether the removal of the original trustees was valid or not could be properly addressed without a

full presentation by the trustees of their concerns relating to the purported exercise of the power of removal. In doing so the trustees would not be compromising their neutrality in a dispute which, in its adversarial aspect, was one between the Protector and a beneficiary.

RC

NEW DIRECTIONS IN JUDICIAL REVIEW; "HERESY" AND "THE FORBIDDEN MERITS": WHAT TO LEGITIMATELY EXPECT IN THE CAYMAN ISLANDS?

As the concept and application of judicial review continues to fluctuate and evolve, the notion of legitimate expectation has found itself marooned on the cusp of this activity. Unsure as to which of the grounds of judicial review it is rooted in, it has come to mean a variety of different things even to those that are convinced of its existence. The authorities are conflicting. Does it exist, or does it not? Is it confined to procedure, or can it salvage substantive claims? These questions have dogged the courts in the United Kingdom for many years now and it would appear that the Grand Court of the Cayman Islands is poised to enter the debate. In order to fully understand the difficulties that the Cayman Islands are likely to encounter and the potential conflict that may arise, it is necessary to trace the history behind this debate.

Expressing the desire that it would "clear away some at least of the many semantic confusions that have bedevilled this area of our law", Simon Brown LJ sought in *R v. Devon County Council, ex parte Baker, R v. Durham County Council, ex parte Curtis*[1] to define the scope and application of the term "legitimate expectation".[2] He began in perhaps the broadest possible manner with the assertion that "sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him."[3] He continued, explaining that:

"[T]he claimant's right will only be found established where there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it."[4]

This proposal was not without support. *R v. Secretary of State for the Home Department, ex parte Khan*[5] *and R v. Secretary of State for the Home Department, ex parte Ruddock and others*[6] were both cited as successful applications of this purported new doctrine.[7]

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[1] [1995] 1 All ER 73, at 88-9. Note that the judgements on these cases were in fact delivered on 21 December 1992. Both cases concerned local authorities and whether they were under a duty to consult the residents of old peoples' homes about their proposed closure. It is significant that neither case actually gave rise to a substantive expectation. See *infra* n.49 and associated text.

[2] For a more exhaustive study see Craig, "Legitimate Expectations: A Conceptual Analysis" (1992) 108 LQR 79, which was expressly referred to by Laws J, *ibid*, at 89.

[3] *supra* n.1, at 88.

[4] *Ibid.*

[5] [1985] 1 All ER 40.

[6] [1987] 2 All ER 518.

[7] *R v. Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd* [1990] 1 All ER 91 and *R v. Jockey Club, ex parte RAM Racecourses Ltd* [1993] 2 All ER 225 were also noted as unsuccessful

Such authority however, belies the problematic operation of a principle that has the potential to propel the concept of judicial review to new heights and into the "forbidden merits".[8] Consequently, in the relatively short period of time since the decision in *ex parte Baker*, there have been several cases, which have revisited both the scope of legitimate expectation and its application in a substantive context.[9] Any attempt to clarify an aspect of what is a notoriously uncertain area is to be welcomed, yet it would appear that the ambitions of Simon Brown LJ have been thwarted. Perpetual revisits are testament to the fact that confusion remains, whilst his acceptance and affirmation that such a claim exists have thus merely prompted fresh controversy and dispute.

This response is not unexpected. Any venture into the realms of substantive judicial review of administrative actions is likely to encounter hostility from the decision-maker, who feels that their discretion has been unjustifiably usurped, and from the judiciary, hesitancy, which stems from a reluctance to compromise their independent position and become embroiled in political machinations. Only nine months after the judgements in *ex parte Baker* were delivered, a decision at first instance questioned the essence of the scene that had been set by Simon Brown LJ. In *R v. Secretary of State for Transport, ex parte Richmond London Borough Council*,[10] Laws J held that the doctrine could not be extended so as to give rise to an enforceable substantive expectation. He states:

"[T]here is no case so far as I am aware (certainly none was cited to me) in which it has been held that there exists an enforceable expectation that a policy will not be changed *even though*[11] those affected have been consulted about any proposed change."[12]

No reference was made to *ex parte Baker*,[13] whilst the authorities that Simon Brown LJ had relied upon were distinguished and dispensed with. According to Laws J, both *ex parte Ruddock* and *ex parte Khan* had been misinterpreted, it being misleading to describe the expectation sought in either case as substantive. Rather, they were mere procedural guarantees that were coveted. Certainly a legitimate expectation could arise, whether this was by way of past practice or express promise, although all that this could encompass was a right to be heard prior to any departure from this past practice or express promise. Moreover, the public authority did not have to demonstrate any

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applications of the principle. Reference to such cases was perhaps indicative of the potential uncertainty as to its future application and, it is submitted, better indicators of how the drama has so far played.

[8] Forsyth, "*Wednesbury* Protection of Substantive Legitimate Expectations" [1997] PL 375, at 381.

[9] *R v. Secretary of State for Transport, ex parte Richmond London Borough Council* [1994] 1 All ER 577 (judgement delivered on 29 September 1993, nine months after that in *ex parte Baker*); *R. v Ministry of Agriculture, Fisheries and Foods, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714; *R v Secretary of State for the Home Department and another, ex parte Hargreaves and others* [1997] 1 All ER 397.

[10] *Ibid.*

[11] Emphasis in original.

[12] *R v. Secretary of State for Transport, ex parte Richmond London Borough Council* [1994] 1 All ER 577, at 596.

[13] The decision in *ex parte Baker* was in fact not reported until 1995, only after the decision in *ex parte Richmond* had perhaps inadvertently stolen the spotlight.

"overriding public interest"[14] in order to justify this departure, since this "would impose an obvious and unacceptable fetter upon the power (and duty) of a responsible public authority to change its policy when it considered that that was required in fulfilment of its public responsibilities."[15]

In *ex parte Khan*, the applicant wished to rely upon a Home Office circular which indicated that although no child had the right to enter the United Kingdom for the purposes of adoption, the Secretary of State would, in exceptional circumstances, provided certain criteria were met, exercise his discretion in favour of the child. Khan and his wife sought to adopt a child from Pakistan, had complied with the criteria outlined by the circular, and therefore expected to profit from the favourable exercise of the Secretary of State's discretion. On the contrary, the Secretary of State departed from the criteria that he had established, adopting instead an entirely different set of guidelines, so as to deny the child entry.

This predicament has somewhat simplistically been interpreted as giving rise to two possible outcomes. Could the applicant preclude the Secretary of State from his proposed alternate action, or were their expectations limited to the receipt of procedurally fair treatment in the pursuance of this alternative course? Two such stark extremes may in fact oversimplify the realities of the problem. Conceivably, fairness could dictate that it be the initial course of action that ought to be followed, yet the inherent danger in such an assertion would mitigate against its outright expression. In which case, the expectation might be classified as procedural, but the outcome may in fact be substantive. This is perhaps where the confusion arises.[16] Ascertaining whether the expectation itself is procedural or substantive does not dictate the actual outcome of the expectation. The decision in *ex parte Khan* may not therefore be authority for a substantive legitimate expectation in the independent sense that Simon Brown LJ describes in *ex parte Baker*. Any substantive benefit, as held in *ex parte Richmond*, would emanate from procedural fairness and the protection that this is afforded, a fortuitous by-product of the unreasonableness of departing from this adopted procedure.

Conversely the interpretation of Laws J in *ex parte Richmond* may also be flawed. Focusing entirely on the nature of the expectation, without consideration of the actual outcome, leads Laws J to conclude that *ex parte Khan* was ostensibly concerned with procedural matters and that in turn, the distinction between procedural and substantive legitimate expectation was therefore of "little (if any) utility".[17] Behind this conclusion however, lies a great deal of self-perpetuating reasoning. If the outcome is excluded, it matters not how the expectation is classified. Classification is therefore important to the

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[14] For further elaboration on this point see Lord Denning MR in *Re Liverpool Taxi Owners' Association* [1972] 2 All ER 589, at 594 and Parker LJ in *ex parte Khan*, *supra* n.5, at 46. Both cases in point were considered by Laws J in ex parte Richmond, *supra* n.12.

[15] *Supra* n.12.

[16] For further discussion of this confusion see Foster, "Legitimate Expectations and Prisoners' Rights: The Right to Get What You are Given" (1997) 60 MLR 727, at 729.

[17] *Supra* n.12, at 595.

extent that it excludes the preferred outcome. Furthermore, as far as the applicants in these cases are concerned, it is the outcome that is of prime importance and the distinction between this and unadorned procedural fairness that is fundamental. As Forsyth exemplifies:

"[W]here the legitimate expectation is of some boon or benefit it is far from clear that that expectation is best protected or protected at all by procedural justice. Often as in *ex parte Khan*, a hearing will be of no value to the applicant if the authority in making its decision is free to ignore the legitimate expectations it has previously aroused. In other cases, such as *ex parte Ruddock*, granting a hearing would be inappropriate and would achieve little. Plainly procedural justice will not protect such substantive legitimate expectations."[18]

Yet Forsyth's reasoning was conveniently dismissed by Laws J. An inability to distinguish between procedural and substantive expectations and the consequent over-emphasis on the former, resulted for Laws J, in the elimination of the latter.[19]

A closer analysis of *ex parte Ruddock* further reveals the inadequacies of this reliance on procedural fairness. Here the applicants sought judicial review of the Secretary of State's decision to authorise the interception of one of the applicant's telephone calls. The decision was based upon criteria, which had been publicly repeated between 1952 and 1982. Moreover, the incumbent Secretary of State had expressly endorsed the application of these criteria. The expectation therefore arose both from previous practice and from specific assurances and was easily established. The matter could not however be disposed by way of a hearing since this would negate the very need for the interception in the first place. Thus, a procedural right to be heard, inapplicable here because of the overwhelming interests of national security, potentially left the applicants without any expectation of a beneficial outcome, in spite of the ease with which the expectation could be established. These concerns prompted Taylor J to hold:

"The doctrine of legitimate expectation ... was not restricted to cases where the expectation was to be consulted or to be given the opportunity to make representations before a decision was made. Where *ex hypothesi* there was no right to be heard it could be more important to fair dealing that a promise or undertaking given by a minister as to how he would proceed should be kept."[20]

Although on the facts presented the applications were refused, there being insufficient evidence to support the view that the Secretary of State had "acted with an improper motive or had deliberately flouted the criteria",[21] the possibility of a substantive expectation was nonetheless endorsed. Despite which, Laws J felt able to consign *ex*

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[18] Forsyth, "Provenance and Protection of Legitimate Expectations" [1988] CLJ 238, at 253.
[19] *Supra* n.12, at 597.
[20] *Supra* n.6, at 519.
[21] *Ibid.*

parte Ruddock to the same substantive scrap heap as *ex parte Khan*. Accordingly, he maintained that "the case demonstrates no more than that there may be circumstances in which it will be unfair to change a policy adhered to over a period of time without giving those affected a right to be heard: as such the protection afforded is as surely 'procedural' as in the *CCSU*[22] case."[23] Yet if the protection were procedural, this would require the Secretary of State to inform the applicants that he is intending to authorise the interception of their telephone calls. This is plainly an absurdity and exacerbates the effects of Laws J's substantive denial.

It was precisely this type of discord that Simon Brown LJ sought to eliminate. So where does this leave the doctrine and Simon Brown LJ's interpretation of it now? On the one hand, the boldness and certainty with which it was declared has paled, *ex parte Khan* in particular, and *ex parte Ruddock* not being quite the strong authorities that had once been thought. As Foster affirms, "the cases are not authority for the principle that the person would receive a substantive benefit."[24] He does however continue with the proviso that if "the person satisfies the criteria there would have to be good reason[25] for them not receiving [the substantive benefit]."[26] Or, as it has been termed here, a beneficial substantive outcome. Thus although the doctrine may have been slightly wounded, it is by no means fatal. On the other hand, the rationale responsible for its rejection in *ex parte Richmond* is open to far greater conjecture. Adopting Foster's terminology once more, "*at the very least*,[27] [*ex parte Khan* and *ex parte Ruddock*] allowed the applicants to entertain an expectation that the decision-making process governing their positions would not change."[28] To simply perceive this as procedural, ignores an obvious substantive dimension that cannot simply be cast aside.

However, this was by no means the end of the story. With the decision in *R v. Ministry of Agriculture, Fisheries and Foods, ex parte Hamble (Offshore) Fisheries Ltd*[29] the plot further thickened. Again decided at first instance, Sedley J here redirected the doctrine, revitalising it in a substantive sense. It is perhaps not a coincidence since Sedley J did in fact derive guidance from the judgement of Simon Brown LJ in *ex parte Baker*,[30] which was not available to Laws J in *ex parte Richmond*.[31] The issue before Sedley J centred on the European Community's common fisheries policy and the approach that had been taken towards licences and quotas. Previously, it had been possible to transfer and aggregate licences, although in an attempt to maintain fish stocks this policy was

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[22] *Council of Civil Service Unions v Minister of the Civil Service* [1984] 3 All ER 935.
[23] *Supra* n.12, at 595.
[24] *Supra* n.16.
[25] In *ex parte Khan* this "good reason" was defined as an "overriding public interest", whilst in *ex parte Ruddock* it was implicit that the interests of national security operated in such a fashion.
[26] *Supra* n.16.
[27] Emphasis in original.
[28] *Supra* n.16.
[29] *Supra* n.9.
[30] *Ibid*, at 724.
[31] What is particularly interesting in light of the disagreement between Sedley J and Laws J is that they were the rival advocates in *ex parte Ruddock*.

discontinued. A strict exception was however granted to entities that were irreversibly financially committed as a result of the policy. Hamble had commenced but failed to complete the transfer and aggregation process and in view of urgent need to reduce fishing could not establish that they had such a legitimate expectation.

Although the legitimate expectation was not established, Sedley J did nevertheless provide instruction as to when it could arise. To him, it was "difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step."[32] He also perceived no danger in drawing this conclusion. Having confirmed that substantive legitimate expectations could be accommodated, he then proceeded to regulate their application on the basis that "no individual can legitimately expect the discharge of public duties to stand still or be distorted because of that individual's peculiar position."[33] However, in the words of Lord Denning MR, it is also well established that "it is a misuse of power for it [a public body] to act unfairly or unjustly towards the private citizen where there is no overriding public interest to warrant it."[34] As such, a substantive legitimate expectation could still arise. Thus, "legitimacy is itself a relative concept, to be gauged proportionately to the legal and policy implications of the expectation", it is certainly not an absolute, but it can and will, under the circumstances outlined above, "protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness out tops the policy choice which threatens to frustrate it."[35]

This proportionate approach can be equated with that of Parker LJ in *ex parte Khan*. He too recognised that the doctrine was not absolute, that there would have to be some sort of limitation upon its operation and that it could therefore be defeated by some overriding public interest.[36] The balance does however appear to have swung. Once a legitimate expectation has arisen, which is itself admittedly problematic,[37] there would have to be extremely strong grounds to justify departing from it. A number of barriers are therefore now in place to delay this departure, including the procedural guarantee of a hearing, the express statement here that a particular policy cannot be expected to continue *ad infinitum* as well as the demonstration of an overriding public interest. Following *ex parte Hamble* the substantive doctrine was thus firmly back on the agenda, with the manner of its operation also taking shape.

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[32] *Supra* n.9, at 724.
[33] *Ibid.*
[34] *HTV Ltd v. Price Commission* [1976] ICR 170, at 185, cited with approval by Lord Templeman in *Preston v. IRC* [1985] 2 All ER 327, at 340 and by Sedley J in *ex parte Hamble*, *ibid*, at 730.
[35] *Supra* n.9, at 724.
[36] See the conclusion of Forsyth, *supra* n.18, at 260.
[37] Sedley J does indeed express disappointment that further submissions were not made on what constitutes an expectation that is legitimate, *supra* n.9, at 728-9. He does however indicate that an expectation premised upon an express promise is of greater credence than those generated by past practice, particularly where the practice has originated from precisely the policy from which departure is now sought.

The situation as it stood had been neatly encapsulated by Singh:

"Legitimate expectation cannot be used to defeat a duty which public law imposes on a body nor to extend the power of a public body beyond what legislation has prescribed but it can be used to ensure that an act which is *intra vires* is performed if the public body has given rise to a legitimate expectation that it will be."[38]

However, when the doctrine returned to the Court of Appeal in *R v. Secretary of State for the Home Department and another, ex parte Hargreaves and others*,[39] the "semantic confusions" that Simon Brown LJ had attempted to irradicate once again resurfaced. Although *ex parte Baker* and the comments of Simon Brown LJ were available to the Court of Appeal, they were not employed in the desired authoritative fashion.[40] Instead Hirst LJ effectively preferred the restrictive, procedurally driven analysis of Laws J in *ex parte Richmond*.[41] This was of particular importance to the applicants, not just because it effectively defeated their claim, but because of the especially vulnerable position in which they found themselves. The applicants in *ex parte Hargreaves* were all prisoners and as Foster points out, there is very little in the way of primary legislation which provides rights for these persons.[42] Consequently, they are highly dependent upon Prison Rules and administrative regulations and the expectation that they will be consistently applied. Departure from these even with attempts at justification and consultation renders the prisoner in a helpless position.

All of the prisoners seeking judicial review had been issued with a notice upon their admission indicating that they would be entitled to apply for home leave upon completion of one-third of their sentences. They were warned that home leave remained a privilege, although a compact distributed at the same time reiterated that there was such a promise and that it was dependent upon good behaviour. However, following a number of transgressions during these home visits, the system was amended, increasing the portion of sentence to be completed before a prisoner would become eligible for home leave. The Court of Appeal held that it was reasonable, in the *Wednesbury*[43] sense, for the Secretary of State to modify the guidelines and that in any case, there was not a sufficiently clear and unambiguous representation to give rise to any expectation on the part of the prisoner. In coming to this conclusion, both Hirst LJ[44] and Pill LJ[45] proceeded

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[38] Singh, "Making Legitimate Use of Legitimate Expectation" (1994) 144 NLJ 1215, referred to by Sedley J, *ibid*, at 730-1.
[39] *Supra* n.9.
[40] There was no reference at all to the case as authority for a substantive dimension to the doctrine. In fact the only mention of *ex parte Baker* was in connection with how a legitimate expectation can arise, *ibid*, at 413.
[41] Note however, that *ex parte Richmond* was not expressly referred to in any of the judgements in *ex parte Hargreaves*. The conclusions in *ex parte Hamble* were however, explicitly rejected, Hirst LJ agreeing with counsel's characterisation of Sedley J's approach as "heresy", *supra* n.9, at 412.
[42] *Supra* n.16.
[43] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[44] *Supra* n.9, at 411.
[45] *Ibid*, at 416.

to reject the substantive doctrine propounded by Sedley J in *ex parte Hamble*. A legitimate expectation could still therefore arise under the same criteria already established, what had now changed was that it could not operate in a substantive fashion.

So, if legitimate expectations have been confined to procedural benefits and the directions in *ex parte Baker* do not provide the definitive instruction in this area, why begin this comment by introducing the case and tracing the history behind substantive expectations? The answer lies in a recent judgement delivered by the Grand Court in the Cayman Islands and summarised in this edition of the Cayman Islands Law Bulletin.[46] In *Hadsphaltic International Ltd v. The Immigration Board and the Attorney-General*,[47] Harre CJ referred authoritatively to the judgement of Simon Brown LJ in *ex parte Baker*, accepting that a substantive right could exist. On the facts, it was "doomed to fail",[48] there being insufficient representations upon which it would be reasonable for the claimant to rely. Nonetheless, Harre CJ does implicitly embrace the doctrine. It is therefore plausible in the Cayman Islands, following this decision, provided there are sufficiently clear and unambiguous representations, to successfully advance an expectation to an undeniable entitlement.

This might be considered surprising in view of the continuing debate that has persisted in the United Kingdom and particularly, the damning decision in *ex parte Hargreaves*. Yet this should not negate the legitimacy of the task performed by Simon Brown LJ. His categorisations are an important contribution to the clarification and development of this area of the law. They were, after all, affirmed in the Court of Appeal, the very same court that adjudicated upon *ex parte Hargreaves*. However, to the extent that they recognise substantive expectations, the comments in *ex parte Baker* are *obiter dicta*,[49] the facts giving rise merely to a claim for procedural fairness. In which case, it would appear that they have been superseded by *ex parte Hargreaves*. Nonetheless, it is submitted that there is life left in the substantive doctrine. Neither *ex parte Khan*, nor *ex parte Ruddock*, were addressed in the *ex parte Hargreaves* judgements. It is upon these cases that the substantive doctrine is built. In particular, one would have thought that the Court of Appeal decision in *ex parte Khan* would have to be metaphorically demolished before an alternative could be founded. Who is to say that the restrictive interpretation of *ex parte Khan* in *ex parte Richmond* is correct? Simon Brown LJ in *ex parte Baker* certainly thought otherwise. Failure to reconcile these cases, and the resulting silence in *ex parte Hargreaves*, thus leaves several questions unanswered and potential scope for the recognition of the substantive doctrine.

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[46] Note in addition the decision of Smellie J (as he then was) in Cause 91/97, also summarised in this edition of the Cayman Islands Law Bulletin, where at transcript p.13, he also relies upon the broad categorisations of Simon Brown LJ in *ex parte Baker*. Although this case involved a different category, it further exemplifies the impact that the *ex parte Baker* categorisations are having in the Cayman Islands.

[47] Cause 851/97.

[48] *Ibid*, transcript at p.4. Note however, that the applicants did ultimately succeed on different grounds with a further application, in cause 881/97 (judgement delivered 12th June 1998).

[49] *Supra* n.1.

In a more limited sense, some comfort may be drawn from another case recently heard in the Court of Appeal, *R v. Inland Revenue Commissioners, ex parte Unilever and Related Applications*.[50] This case is of interest for two reasons.[51] Firstly, it was held that a past practice, in exceptional circumstances, could form the basis of a legitimate expectation. In these circumstances the past practice could equate to a particular express, clear and unambiguous representation, thereby extending the propensity for legitimate expectations to surface.[52] Secondly, and more significantly, *ex parte Unilever* also considers how to approach these legitimate expectations once they have surfaced. Both Sir Thomas Bingham MR, and Simon Brown LJ again, ultimately agreed that the actions of the Inland Revenue were so unreasonable that no reasonable person in that position could have come to such a decision.[53] In doing so, they afforded the desired substantive protection, although their reasoning was not supported by a separate substantive doctrine. Instead they preferred here the tried, but perhaps not to be trusted, *Wednesbury* test. Without a doubt, this provides an avenue through which substantive expectations can at times be enforced, yet the applicant is subject to the vagaries of the *Wednesbury* test[54] and as a result is not guaranteed a beneficial outcome. As Forsyth demonstrates:

"[B]oth *ex parte Hargreaves* (*in which the challenge failed*)[55] and *ex parte Unilever plc* (in which the challenge succeeded) rest the protection of substantive legitimate expectations on *Wednesbury* unreasonableness. In sum this means that ... the English courts ... will only intervene in that decision if satisfied that it is irrational or perverse."[56]

The failure of *Wednesbury* to assist in *ex parte Hargreaves* is particularly surprising in view of its concern with fundamental human rights. It has been argued that where fundamental rights are in danger, judicial scrutiny of administrative decisions ought to be more stringent and intrusive, since no reasonable decision-maker would decide to infringe human rights unless there was some overriding public interest.[57] The test, which ordinarily is notoriously difficult to transcend, might therefore operate at a lower threshold in a rights context. Whilst there is authority for this conclusion,[58] and a certain

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[50] [1996] STC 681.

[51] See Forsyth, *supra* n.8, at 383.

[52] See n.36, *supra*, and Forsyth, *ibid.*

[53] *Supra* n.50, at 692, 695 and 697.

[54] Forsyth, *supra* n.8, at 383, describes the test as possessing an "inherently plastic nature".

[55] Emphasis added in order to demonstrate how *Wednesbury* unreasonableness can, and indeed does, fail to protect substantive expectations.

[56] *Supra* n.8, at 383. See also n.43, *supra*, and associated text.

[57] See Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] PL 59 and Jowell and Lester, "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368, at 377.

[58] *Bugdacay v. Secretary of State for the Home Department* [1987] AC 514, at 531 and *R v. Ministry of Defence, ex parte Smith and other appeals* [1996] 1 All ER 257. For a less receptive evaluation see Lord Irvine (now the Lord Chancellor), "Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review" [1996] PL 59. Paradoxically, both those advancing this proposition and its detractors draw upon the decision in *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 697 and it is therefore interesting to compare the contrasting rationales that underpin the various speeches in that case.

moral justification for its evolution in the absence of a Bill of Rights in the United Kingdom,[59] it is not an effective culmination to the debate surrounding substantive legitimate expectation. The *Wednesbury* test was itself developed to restrict judicial intervention into the substance of decisions and it would seem perverse to now rely solely upon it for the substantive protection of legitimate expectations. The decision in *ex parte Hargreaves*, where the fundamental rights of the prisoners were affected by the denial of the expectation, is surely testament to the fact that it is ineffective and inappropriate. This is not to suggest that *Wednesbury* unreasonableness is defunct or irrelevant, rather that it cannot be expected to continually expand in order to meet each and every problem with administrative law. In a similar vein, Laws J has called for the ground of proportionality to exist in its own right and not merely as a *Wednesbury* spin-off:

"The difficulty is that if proportionality is merely a facet of irrationality, it adds nothing to *Wednesbury* and lacks all utility as a category of judicial review ... But if it is to take its place as a distinct concept, then there must be cases where it may succeed as a ground of substantive challenge where *Wednesbury* would not; and this means that the court must be willing to strike down a decision on substantive and not merely procedural grounds where *ex hypothesi* the decision is not an irrational one."[60]

These sentiments are, it is submitted, equally applicable to the enveloping of substantive legitimate expectations by *Wednesbury*. All decision-makers are in fact already subject to a separate *Wednesbury* examination. What is called for here is something in addition that specifically protects legitimate expectations, where it may not be irrational in the extreme *Wednesbury* sense to depart from them. In spite of these objections, familiarity with *Wednesbury* might prompt courts in the Cayman Islands for example, to prefer the *ex parte Unilever* compromise. More practically minded and eminently less radical, this line of thought can however only offer a partial solution.

Forsyth presents one further critique of this approach when he questions, "why should domestic legitimate expectations be less well protected than European expectations?"[61] There is no adequate answer, yet this would appear to be the situation, since substantive legitimate expectations have been unreservedly accepted by the European Court of Justice. In *Mulder v. Minister van Landbouw en Visserij*[62] a milk producer had been induced by a European Community scheme to cease production for a period of time. Upon completion of this term, Mulder sought to resume production, only to be informed

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[59] The United Kingdom is in the process of incorporating the European Convention on Human Rights into its domestic law, which will serve as its Bill of Rights, albeit without the security of entrenchment. However, the Cayman Islands do not possess even this minimal protection. If this void continues, the development of judicial review in the Cayman Islands may mirror that in the United Kingdom prior to its introduction of a Bill of Rights and seek to fill this void. Such action has been described extra-judicially by Lord Browne-Wilkinson in "The Infiltration of a Bill of Rights" [1992] PL 397, as a "half-way Bill of Rights".

[60] *Supra* n.57, at 72.

[61] *Supra* n.8.

[62] Case 120/86 [1988] ECR 2321.

that the regulating criteria had changed during this intervening period. It was now in fact impossible for Mulder to recommence production because the requisite allocated quotas were now dependent upon milk produced in the previous year. Mulder was obviously unable to meet this requirement but claimed that he had a legitimate expectation to resume nonetheless. The European Court of Justice determined that whilst Mulder did not have a legitimate expectation to resume production under identical conditions,[63] the fact remains that where:

"... a producer ... has been encouraged by a Community measure to suspend marketing for a limited period in the general interest and against payment of a premium he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions."[64]

Hence the acceptance of a substantive benefit but with certain restrictions. As Craig illustrates, "the public interest in the orderly operation of the milk market, as encapsulated in the modified rules on quotas, could not serve to justify the harsh effect upon those who had taken part in the earlier scheme"[65] but, "it also shows that the willingness to accept this species of legitimate expectation will not ossify policy within the relevant area."[66] This balancing exercise resembles the proportionate gauging undertaken by Sedley J in *ex parte Hamble*.[67] While these parallels are strong, Forsyth still claims that the methodology employed in *Mulder* is consistent with that in *ex parte Hargreaves*, since "a court could readily conclude that it would be *Wednesbury* unreasonable to deny Mulder any milk quota."[68] In which case *Mulder* could simply be accounted for as a successful challenge, under *Wednesbury* principles, akin to the positive outcome in *ex parte Unilever*.[69] Had this been the end of the *Mulder* saga, any new attempt to import the approach of the European Court of Justice into the United Kingdom, even to breathe fresh life into the reasoning of Sedley J, could have been usurped by the *Wednesbury* compromise that has sprung from both *ex parte Hargreaves* and *ex parte Unilever*.[70]

However, further exposition of the European balancing act was necessitated when another Regulation attempted to address the expectations of Mulder (and others in his position) by permitting them to produce only 60% of that which they had marketed in the year

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[63] This sounds very much like the caveat, "no individual can legitimately expect the discharge of public duties to stand still or be distorted because of that individual's peculiar position", introduced by Sedley J in *ex parte Hamble*, which tempered his acceptance of the substantive doctrine, *supra* n.33.
[64] *Supra* n.62, at paragraph 24.
[65] Craig, "Substantive Legitimate Expectations in Domestic and Community Law" (1996) 55 CLJ 289, at 308.
[66] *Ibid.*
[67] See n.35, *supra*, and associated text. For further similarities, see also n.63, *supra*.
[68] *Supra* n.8, at 380-1.
[69] See n.56, *supra*, and associated text.
[70] *Ibid.*

prior to their cessation. This too was successfully challenged[71] and Mulder therefore claimed compensation for the time in which he had been illegitimately denied his full quota. The European Court of Justice, in its balancing of the competing interests, found that there was a distinction to be drawn.[72] The damage inflicted by the first Regulation which had totally precluded production, was sufficiently serious to outweigh any higher public interest,[73] whilst the second Regulation, which also infringed Mulder's legitimate expectation, did not yield damages.[74] This act, measured against wider economic policy demands, did not exceed the higher public interest.[75]

Such considerations are innately substantive and inhabit the very heart of the "forbidden merits."[76] They are not only antithetical to the High Court's conventional supervisory jurisdiction, but also incompatible with the limited *Wednesbury* compromise. These considerations are not, however, dissimilar to Sedley J's so-called "heresy."[77] With a more advanced European buttress, the first instance decision in *ex parte Hamble* has renewed vigour with which to advance the substantive doctrine. It promises to raise the protection of substantive legitimate expectations to the higher European plane, thereby alleviating this absurd dichotomy. Whether it now has the strength to overwhelm the Court of Appeal's current stance is debatable. Until it does, applicants in the United Kingdom can only be assured of substantive protection for their legitimate expectations when there is a European dimension to their claim. Only then will the court be freed from the shackles of the restrictive and erratic over-reliance on *Wednesbury*, to actually apply and enforce the substantive doctrine. So what are the prospects for reconcilement? The incoming European tide[78] is becoming increasingly difficult to hold back. As Koopmans has prophesied:

"We are bound to come to one European system. The integration process cannot be discontinued."[79]

It is not so much the primacy of this evolving supranational legal system that is of specific concern here. Of more importance is the mutual public and administrative law that seems to be emerging. Spurred on by the existence and evolution of the Community and its new legal order, as well as the pervasive European Convention on Human

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[71] See Case C-217/89 Spagal v. Hauptzollamt Rosenbeim [1990] ECR I-4359, paragraphs 24 and 29, and Case C-217/89 *Pastätter v. Hauptzollamt Bad Reichenhall* [1990] ECR I-4585, paragraphs 15 and 20.
[72] Cases C-104/89 & 37/90 *Mulder v. Council and Commission* [1992] ECR I-3061. See also on this point, Case C-152/88 *Sofrimport Sarl v. Commission* [1990] ECR I-2477.
[73] *Mulder v. Council and Commission, ibid*, at paragraph 16.
[74] *Ibid*, at paragraphs 18-22.
[75] Note the resemblance with "overriding public interest", the term utilised in the United Kingdom. See n.25, *supra*.
[76] *Supra* n.8.
[77] *Supra* n.41 and n.9.
[78] Hood Phillips, "Has the 'Incoming Tide' Reached the Palace of Westminster?" (1979) 95 LQR 167. For a more recent appraisal of the same question, see Nicol, "Disapplying With Relish? The Industrial Tribunals and Acts of Parliament" [1996] PL 579, at 589.
[79] Koopmans, "European Public Law: Reality and Prospect" [1991] PL 53, at 62.

Rights,[80] this common course is not a completely original creation. Rather, it is a blend of various national perspectives, fused together by the Community and the Convention.[81] As their influence filters down, the action is taking place as much in the national courts, as it is in either of the European courts in Luxembourg or Strasbourg.[82] As Schwarze states:

"In the light of the further approximation of national laws in Europe in the future,[83] the field of administrative law will have to be opened more and more to comparative legal analysis and can no longer remain as a sort of specific branch of genuine national law in isolation."[84]

The United Kingdom has successfully exported procedural rights to the European Community[85] and has in return, at least partially, embraced the concept of proportionality from German law, via the European Community.[86] As the process of integration moves relentlessly onward, a common acceptance of substantive legitimate expectations may be just on the horizon. It requires no stretch of the imagination to conceive that the "incoming tide" of European Community law, which threatens to remodel the grounds of judicial review in the United Kingdom, will before long wash up on the shores of the Cayman Islands. If it does so, it would positively bolster the somewhat precarious position that the substantive doctrine finds itself in.

With the decision in *ex parte Hargreaves* the story line has undoubtedly taken another sharp twist, although it appears unlikely that this will prove to be the final act. Surely the curtain will not come down before the House of Lords has scripted a finale? It remains to

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[80] Koopmans, *ibid*, at 61, citing in particular, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] 3 ECR 1651, argues that it is increasingly difficult to distinguish the European Convention on Human Rights and the European Community. Although the Community and its institutions are not subject to the European Convention on Human Rights, the European Court of Justice having ruled that the Community itself does not have the competence to accede, fundamental rights are a general principle of Community law and the wider Union (see amended Articles 6 and 7 TEU). Whilst not yet formally at one on a supranational level, the intermingling is widespread. For further debate on this issue, see Craig and de Búrca, *EU Law: Text, Cases and Materials*, 2nd ed., (Oxford, 1998), chapter 7.

[81] See, for example, *Johnston v. Chief Constable of the Royal Ulster Constabulary, ibid.*

[82] For classic illustrations of this impact on courts in the United Kingdom, *see R v. Secretary of State for the Home Department, ex parte Brind, supra* n.58, and *Council of Civil Service Unions v. Minister of the Civil Service*, supra n.22. See also, McEldowney, *Public Law* (Sweet & Maxwell, 1994), 242-5.

[83] A process, which may have historically drawn predominantly on French law, but which according to Schwarze is now contributed to by all national laws.

[84] Schwarze, "Tendencies Towards a Common Administrative Law in Europe" (1991) 16 EL Rev 3, at 18.

[85] See case 17/74 *Transocean Marine Paint v. Commission* [1974] ECR 1063, where the European Court of Justice established that a person affected by a decision taken by a public authority, ought to be given a fair hearing and the opportunity to comment, or what a court in the United Kingdom would term, natural justice.

[86] See *CCSU*, at 950 and *ex parte Brind, supra* n.82, plus, in addition, n.60, *supra*, and associated text. For further discussion see Jowell and Lester, *supra* n.57, at 375; Laws, *supra* n.57, at 71; and Jowell and Lester, "Proportionality: Neither Novel nor Dangerous" in Jowell and Oliver (eds.), *New Directions in Judicial Review* (London, 1988), 51-73. Beyond a Convention or Community context, proportionality does still form an aspect of the *Wednesbury* test. It too has yet to fully mature. See n.60, *supra*.

be seen, in the wake of the Court of Appeal's decision in *ex parte Hargreaves*, whether the courts in the Cayman Islands are prepared to follow their initial direction and recognise substantive expectations. As outlined above, this is undoubtedly problematic in view of the seniority of the court that has queried its acceptance. On the other hand, having embraced the principle, there is equally an opening that could permit and support the further development of the substantive doctrine in the Cayman Islands. Such a decision would however have to look beyond the optimistic aspirations of Simon Brown LJ, to a more reasoned explanation and justification. *Ex parte Khan* offers one source of assistance, but this too would require further elucidation. The resurrection of Sedley J's "heresy"[87] and/or the importation of the European approach are other possibilities. The "forbidden merits"[88] are there for the taking and perhaps not as sacred as once thought.

Ironically, the doctrine now, to all intents and purposes, finds itself in a similar position to that prior to the explication in *ex parte Baker*, calling out for the "semantic confusions"[89] to be expunged once and for all. The legal communities and potential applicants alike, in both the United Kingdom and the Cayman Islands, still await this much-needed authoritative clarification.[90]

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[87] *Supra* n.41.
[88] *Supra* n.8.
[89] *Supra* n.1, at 89.
[90] Vaughan Carter, LL.B., LL.M., Lecturer in Law, Cayman Islands Law School.

Editor's note: the following article was originally published earlier this year in England in the Journal of Criminal Law. Its interest locally is assured due to the fact that the provision at the centre of the following discussion, s.3 Homicide Act 1957, is reproduced verbatim in s.184 Penal Code (1995 Revision). Accordingly, although there is a paucity of local case law dealing with the respective functions of judge and jury in this area, it may be predicted with some confidence that the English authorities, particularly the ruling of their Lordships in R v Acott, will point the way.

Leaving Provocation To The Jury: A Homicidal Muddle?

The story has been recently told (London Times, August 11, 1998) of the Irish jury who acquitted the defendant against the evidence. Out of curiosity, a dumbfounded judge asked the foreman how they reached this conclusion. 'Insanity' replied the foreman. 'What?' responded the judge, 'All twelve of you?'

Professor Sir John Smith in his commentary to *R v Stewart* [1] lamented the emergence of a novel judicial duty to unilaterally raise the defence of provocation, regardless of the judge's view as to the merits of the defence, once it is shown that the accused may have lost his self-control as a result of something said or done (usually) by the victim. From this point all other questions, in particular the reasonableness of the accused's response, are for the jury alone to determine. Making the point colourfully, Professor Smith has observed (ibid) "[T]he jury must not be deprived of their opportunity to return a perverse verdict". Such sentiments reflect a profound revision to the common law defence of provocation which has been attributed to s.3 Homicide Act 1957. S.3 is set out in the following terms:

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

Lord Widgery CJ in *Whitfield*[2] first identified the new demarcation of the roles of judge and jury in stating (at 43):

"We are impressed by the fact that Parliament in the Act of 1957 has taken an unusual step of deliberately insisting that a particular issue shall be tried by the jury and no one else. In other

[1] [1995] Crim LR 66; [1996] Cr App Rep 229.
[2] (1976) 63 Cr App Rep 39.

words the reaction of the reasonable man must be assessed by the jury because the section says so."

In the Chief Justice's view therefore the heightened responsibility of the jury was the result of the express and unambiguous language of the section.[3] The *obiter dicta* of Viscount Dilhorne in giving the judgment of the Court of Appeal in *Gilbert*[4] favoured the same approach, but more cautiously acknowledged that this construction was apt to produce results (such as perverse manslaughter verdicts) not intended by Parliament. This interpretation of s.3 rapidly gathered momentum with the *obiter* approval of their Lordships in *DPP v Camplin*[5]. Lord Diplock, in particular, drew attention (at 173) to the new judicial duty to leave the defence of provocation to the jury where there exists "any evidence that the accused himself...in fact lost his self-control in consequence of some provocation" (the subjective limb).

If the *Whitfield/Camplin* (hereafter *Camplin*) interpretation is correct, as the weight of authority suggests, it marks a profound departure from the common law position where the judge was invested with a discretion (consistent, in principle, to that enjoyed in the context of other defences such as self-defence) to withhold the defence from the jury in any case where he considered the accused's response to be too extreme to provide even partial justification for the killing.

This article seeks to challenge the wisdom of the *Camplin* construction of s.3 by drawing attention to the shortcomings of an approach which owes its genesis to largely *obiter* debate. It will be argued that the *prima facie* literal method of interpretation favoured since *Whitfield* in fact involves the application of an unacceptable gloss to the statutory language brought about by neglecting one limb of the legal test of the defence. In short, a preoccupation with the loss of self-control issue has shifted the focus away from considerations of the aetiology of the lost self-control. This asks the legal question of whether there is evidence upon which the jury *can find* that the loss of self-control may have been the result of provocation. In support of this approach, which is faithful to the whole of the statutory language, will be cited both the policy interest in ruling out perverse jury verdicts as a matter of law; and the pragmatic interest of avoiding the negation, inherent in the *Camplin* approach, of s.2(1) Criminal Appeal Act 1995[6] wherever a misdirection bearing upon provocation has arisen. In closing, it will be argued that a welcome retreat from *Camplin* is discernible from the recent decision of their Lordships in *Acott*[7] which reasserts the potency of the subjective limb of the defence as an exclusionary mechanism, and which, it is suggested, in better explaining the outcome of many of the recent authorities, points the likely way forward.

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[3] See, further, for e.g., *Cox*, [1995] 2 Cr App R 513 at 516, where s.3 was said to be "explicit" in producing this result.

[4] (1978) 66 Cr App R 237 at 242.

[5] [1978] 2 All ER 168.

[6] Enabling the Court of Appeal to dismiss an appeal against conviction in any case where the court considers the conviction to be not "unsafe".

[7] [1997] 1 WLR 306.

Leaving Provocation to the Jury pre-Homicide Act 1957

Although, post-*Whitfield*, the judge is invested with only limited discretion to rule out provocation, his role in a murder trial where loss of self-control may have played a part in the killing is peculiarly proactive. Indeed, it has been clear since Lord Reading's celebrated judgment in *R v Hopper*[8] that the suggestion of lost self-control does not have to originate in the accused's corner, with the consequence that provocation must be unilaterally raised by the judge where any evidence sufficient to support it has been introduced into argument. Lord Reading CJ asserted (at 435):

"Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself...[W]e do not accept...that because the appellant said that he was not angry at the time, that must be taken against him as negativing...manslaughter."

It is undoubtedly of significance that this rule was developed in the context of a unique common law reply to a capital crime. The *Hopper* principle appears to be a tacit acknowledgement of the humanitarian instinct which will lead many jurors to reject the ultimate state sanction in favour of unconditional liberty if given only the choice between these extremes. More precisely, *Hopper* acknowledges the defence tactic in such a case which, playing to such emotions, rejects any position which increases the opportunity of a compromise verdict. Lord Reading's dictum concedes the element of risk inherent in this approach and assigns to the judge the responsibility of apprising the jury of all facts of potential relevance. A jury dissatisfied with the defence explanation must not feel constrained to return a murder verdict on incomplete evidence, especially where this would consign the accused to the gallows. Lord Tucker in *Bullard v R*[9] (at 7) vigorously defended this approach:

"Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence on which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

The limits of the judicial duty to introduce evidence of provocation at common law were set out by the House of Lords in *Mancini v DPP*[10]. In affirming *Hopper*, Viscount Simon LC 's judgment is primarily notable for its articulation of a judicial duty to scrutinize the evidence in order to determine whether, as a matter of law, the provocation defence is fit to be left to the jury. His Lordship, applying *R v Lesbini*[11], declared (at 276-277):

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[8] [1915] 2 KB 431.
[9] (1958) 42 Cr App R 1.
[10] [1941] 3 All ER 272.
[11] [1914] 3 KB 1116.

"The possibility of a verdict of manslaughter instead of murder arises only when the evidence given before the jury is such as might satisfy them as judges of fact that the elements were present which would reduce the crime to manslaughter...It is not all provocation which will reduce the crime of murder to manslaughter."

Accordingly, even having established the existence of a sudden and temporary loss of self-control, the defence at common law is nonetheless to be withheld from the jury if the judge forms the legal opinion that the accused's loss of self-control, set against the standard of the reasonable man, is not objectively justified. The effect of *Mancini* is inevitably to direct judicial attention towards the *victim's* conduct in order to determine whether the accused's response may have been proportionate. In the classic statement of the principle, Viscount Simon LC asserted (at 277):

"[T]he mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be reduced to manslaughter."

On the facts of *Mancini*, the accused had responded to a punch thrown by the victim by stabbing him with a 6" knife. The jury, having rejected a plea of self defence, convicted the appellant of murder. Viscount Simon held that in these circumstances Macnaghten J's failure to introduce the defence of provocation to the jury was unimpeachable, for any provocation offered by the victim was not such as legally justified "the mode of resentment" employed by the appellant.

In *Holmes v DPP* [12] His Lordship returned to this theme in stating (at 137-138):

"If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven [to kill as the accused had done]...it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter."

The common law had accordingly struck a sensible balance in its allocation of the respective functions of judge and jury; evidence which tended to show a relevant loss of self-control by the accused did not, of itself, carry with it entitlement to a jury ruling on the issue of provocation. The spectre of perverse jury verdicts was accordingly ruled out by application of the proportionality principle. Provocation, by definition, became a live issue only consequent upon a legal ruling that a reasonable jury could find the killing to be not unprovoked. Despite the merits of this approach, the *Mancini/Holmes* principle left itself open to the inevitable charge that it afforded no protection against perverse *judicial* rulings. Was the jury function in danger of being undermined by the over-enthusiastic use of judicial veto?

[12] (1946) 31 Cr App R 123.

Leaving Provocation to the Jury Post-Homicide Act 1957

Their Lordships in *DPP v Camplin* were of the view that this question had received a positive reply from the legislature in the enactment of s.3 Homicide Act 1957 which transferred primary responsibility for the defence to the tribunal of fact.[13] The wholesale rejection of the proportionality principle as a legal test and the exclusive focus instead on the subjective limb of the defence produces a rule which is objectionable in being indefensibly partizan towards the accused. A judge is now obliged to initiate the jury's investigation into whether circumstances of partial justification may have accompanied the killing although he is unequivocally of the view that the loss of self-control was disproportionate. As observed by Viscount Dilhorne in *Gilbert*[14], it is most unlikely that the section was intended by Parliament to have this effect. According to the *obiter dicta* of Lord Diplock's leading speech in *Camplin*, however,[15] the discretion previously enjoyed by judges in provocation cases had been severely curtailed by the language employed in the opening lines of s.3, which reserved solely for the jury the task of determining whether a reasonable man may have responded in like circumstances as the accused had done. This principle was expressed by His Lordship[16] as follows (at 173):

"..[I]f there was any evidence that the accused himself at the time of the act which caused the death in fact lost his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question, which is one of opinion and not law, whether a reasonable man might have reacted to that provocation as the accused did."

In analysing the impact of s.3, it is revealing to discover that prior to Lord Widgery CJ's brief judgment in *Whitfield*[17] there had been no suggestion in the leading cases that the proportionality test from *Mancini* continued to be otherwise than authoritative. In *Porritt*[18], the first reported case to consider the section, the Court of Criminal Appeal approved (at 468) the opinion of the Privy Council in *Bullard*[19] where, applying *Mancini*, Lord Tucker stated (at 5) that the judicial duty was triggered where "there is any evidence of provocation fit to be left to a jury". Moreover, the Privy Council in *Lee Chun-Chuen v R*[20], in dismissing an appeal against the decision of the Hong Court of Appeal on the grounds that there existed insufficient evidence to justify leaving provocation to the jury, nowhere suggested that they were reaching

[13] It may be noted in passing that an equally wide ranging judicial discretion exists in the context of attempted crime where the judge is empowered to remove the matter from the jury on the footing that there exists no evidence in law of the *actus reus* of an attempt: s. 4(3) Criminal Appeal Act 1981.
[14] [1978] 66 Cr App R 237 at 242.
[15] With which Lords Fraser and Scarman concurred.
[16] See, to like effect, the *dicta* of Lords Morris and Simon at 176-177 and 181 respectively.
[17] (1976) 63 Cr App R 39 at 42.
[18] [1961] 3 All ER 463.
[19] (1958) 42 Cr App R 1.
[20] [1963] 1 All ER 73.

a decision at variance with the prevailing English principle. Lord Devlin delivered the opinion of the Privy Council and declared (at 79):

"Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements."

Likewise in *Cascoe*[21] Salmon LJ asserted (at 835) that the judge "if he considers that there is evidence upon which a jury might reasonably...find provocation, has a duty to leave that issue to the jury". It was the dominant view therefore that post-1957 the proportionality test from *Mancini* continued to be authoritative. This prompts an inquiry as to whether Lord Widgery CJ was correct in *Whitfield* to depart from such consensus by charting a new and uncertain course for the defence.

In addressing this question, one should be mindful that s.3 assumes the continued existence of certain of the common law principles such as, for example, the effect of successfully raising the defence. As a consequence, the modern defence of provocation is necessarily of mixed parentage. Starting from this premise, the conclusion logically follows that those common law principles not inconsistent with the legislation must survive. When, therefore, is a judge required to place the defence before the jury? The answer is to be found within the first two lines of s.3, namely, where "[T]here is evidence on which the jury can find that the person charged was provoked to lose his self-control". It is strongly urged that this language was intended to be interpreted in the context of the existing common law as held in *Porritt* and the other pre-*Camplin* authorities discussed above. Consistent with this contention is the observation of Viscount Dilhorne in *Gilbert* (at 242) that the opening lines of s.3 create two legal questions:

"[F]irst was there any evidence of provocation of the accused, and secondly, any evidence that the provocation caused him to lose his self-control. Only if both questions are answered in the affirmative, should a plea of provocation be left to the jury."

Accordingly, where the judge concludes that either the element of provocation or lost self-control is missing he is required as a matter of law to withhold the defence from the jury. It is submitted that a judicial preoccupation with the second of the foregoing questions explains the post-Whitfield confusion with regard to the scope of the defence. Before the loss of self-control question can be examined, however, s.3, properly construed, requires the judge to determine whether there exists in law evidence of provocation. Where the judge is persuaded on the evidence most favourable to the accused that the killing was caused otherwise than by the things done or said required by s.3, such as by the accused's irascibility (the first question), or where he finds the killing to have been pre-meditated (the second question), he is required by the 1957 Act to remove the non-relevant issue from the jury's consideration.

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[21] [1970] 2 All ER 833.

Equally, where the accused's fatal response, to the judge's satisfaction, is disproportionate, it necessarily follows that in the language of s.3 there is no "evidence on which the jury can find" the accused to have been provoked in law. Only if this initial legal question is ignored does one reach the untenable conclusion that it was the intention of Parliament to remove the judicial discretion to exclude once a loss of self-control has been instanced. It is therefore strongly submitted that the opening two lines of s.3 were not intended to represent a departure from the common law position, with the result that a "Mancini" defendant is no more entitled to the opportunity of a perverse jury verdict under the 1957 Act than he was at common law. Moreover, Parliament cannot be taken to be impervious to the interests of justice which are unlikely to be served by a rule which requires an increasingly confused jury to consider a defence which is both inconsistent with the accused's case and unsupported on the evidence in the view of the judge.

Neither should reinstating the legal character of the defence be resisted for fear of undermining the proper jury function. Allowing the common law approach to exclusion to provide amplification of the statutory language, the courts will continue to ensure that any doubt is resolved in favour of the defendant. Only in relatively rare cases will the "mode of resentment" employed by the accused be capable of being characterised as being so disproportionate to the victim's conduct as to warrant the legal exclusion of the defence, with the result that the primacy of the jury will remain largely undisturbed. In further support of this assertion, it may be emphasised that once the legal threshold of the defence is crossed the judge is obliged to leave provocation to the jury however inappropriate he considers a manslaughter verdict to be.

Notwithstanding the foregoing objections, post-*Camplin*, the courts, with little sign of demurring, have accepted Lord Diplock's construction of s.3. Consequently, the only way for a judge to now ensure that a defendant is not given the opportunity of receiving a perverse manslaughter verdict is for him to rule that there exists no evidence of relevant lost self-control. Deprived of the ability to rule provocation out at an objective level, trial judges might therefore be expected to develop an increasingly circumspect approach in answering the question whether, as a subjective matter, a relevant loss of self-control has been established.[22] Many of the cases, including *Whitfield* it is submitted, ought properly to have been decided on this basis. This thesis finds support in the most recent House of Lords ruling in *R v Acott*, considered below, which suggests that resort to common law principles may not be necessary in order to restore effective judicial control to the defence.

[22] There is evidence that this approach is not being endorsed by the Court of Appeal who, in Baillie [1995] 2 Cr App R 31, applied s.3 to overturn the judge's decision to exclude provocation, even though the evidence of loss of self-control was scant (see infra) and the appeal court admitted (at 38) that there were "perhaps insuperable obstacles in the jury arriving at a verdict of manslaughter because of provocation".

The Judicial Duty To Raise Provocation: Nothing Ventured, Nothing Lost?

Objections to the *Camplin* construction intensify when the judicial duty laid down in *Hopper* to unilaterally introduce provocation is recalled. This duty, originally tempered by the proportionality test, has had its reach extended considerably as a result of *Camplin*. This was acknowledged by Lord Taylor CJ in *Cambridge*[23] who was emphatic in stating (at 975-976):

"In our judgment therefore there must be evidence on the first limb from which a reasonable jury might properly conclude that the defendant was in fact provoked to lose his self-control...If the judge...concludes that there is such evidence...the statute obliges him to leave provocation to the jury, even if he himself believes the circumstances to be such that no reasonable man would have reacted as the defendant did."

The application of this principle has led to the increased vulnerability of jury murder verdicts in those cases where provocation may have been suggested by the evidence, but has not been ventilated before the jury. According to *Hopper* and the subsequent case-law, the fact that the accused has deliberately suppressed any reference to provocation for fear of it prejudicing his principal defence, is no answer to his assertion on appeal that the judge fell into error in not raising it himself.

In the context of an adversarial system of criminal justice, a rule of procedure which requires a judge to unilaterally introduce a defence which he considers to be unmerited on the facts is both anomalous and partizan. It has been rightly said[24] that this rule unfairly benefits the accused whose principal defence of accident or self defence at trial may be regarded as incompatible with the defence of provocation which will consequently remain unpleaded. Notwithstanding the judge's error in failing to leave provocation to the jury, the Court of Appeal in *Cox* unusually affirmed the murder conviction by application of the proviso to s.2(1) Criminal Appeal Act 1968[25]. In so doing, Glidewell LJ emphasised the obligation owed to the court by both sets of counsel to raise the issue of provocation if it appears to them that there exists evidence of the defence fit to be left to the jury. The rash of recent cases which continue to rely on this "hidden" defence as the foundation for an appeal would suggest, however, that the *Cox* guidelines are in reality unworkable, at least in so far as they are directed at defence counsel. With the inherent incompatibility in pleading justification (the primary defence) and an excuse such as provocation, it is unrealistic to expect counsel to risk compromising the former, and the liberty of his client, in deference to an ill-defined obligation to the court. This much was expressly acknowledged by Lord Devlin in *Lee Chun-Chuen v R* [26] where His Lordship observed (at 79): "The admission of loss of self-control is bound to weaken, if not to destroy, the alternative defence and the law does not place the accused in a fatal dilemma."

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[23] [1994] 2 All ER 760.
[24] See, for e.g., *Cox* [1995] 2 Cr App R 513 at 518 per Glidewell LJ.
[25] See now s.2(1) Criminal Appeal Act 1995.
[26] [1963] 1 All ER 73.

It would seem axiomatic to suggest that the primary responsibility for unmasking a hidden defence of provocation ought properly to lie with prosecuting counsel, with any murder verdict otherwise left vulnerable; and, particularly, with the trial judges themselves. The current of recent authority indicates that only by a display of greater circumspection by the latter will the integrity of a jury's murder conviction be preserved where provocation is in the air. The predictable opposition of defence counsel to the introduction of provocation should be given little weight by the judge. Indeed, it was the judge's misplaced attempt to be fair by yielding to defence counsel's objections to the introduction of the defence which proved to be the accused's salvation on appeal in *Dhillon*[27]. With some reluctance, Ward LJ was driven to conclude (at 114) that, given the abundance of evidence tending to show a relevant loss of self-control, the judge had fallen into error in failing to leave provocation to the jury. In seeking "the more favourable way of directing the jury" the judge had been wrongly persuaded by counsel on both sides to omit any reference to provocation. The simple "all (murder) or nothing (accident)" direction favoured by counsel, not being justified on the totality of the evidence, should have been rejected by the judge. Counsel for the Crown urged the appeal court to apply *Cox* in holding the murder conviction to be safe notwithstanding the misdirection. In His Lordship's judgment, the combined effect of s.2(1) Criminal Appeal Act 1995 and s.3 was to require the court to be sure that at least ten members of the jury would still have returned a murder verdict had provocation been put to them before it could be satisfied that the verdict was safe. The question was not, Ward LJ pointedly emphasised (at 114), "[W]hether we, on due and proper consideration of all the relevant evidence are sure of guilt". As it could not be said that a murder conviction would inevitably have been returned by the jury, a manslaughter verdict was substituted. This result was neither, His Lordship stressed, to afford the accused the opportunity of receiving a perverse jury verdict. In language recalling that of Lord Diplock,[28] Ward LJ emphasised (ibid) that the "judgment of human frailty" was cast by the legislation upon the jury who, in reviewing the evidence, were "well placed to accommodate a permissible difference of emphasis" from that which the court might take.

Ward LJ's logic appears to be as follows: As the sole decision as to the satisfaction of the objective limb of the defence is required to rest with the jury, in no circumstances can the court characterise a finding in favour of the accused unreasonable. Accordingly, the court lacks authority to condemn any jury finding as perverse; it may be inconsistent with the (presumably) reasonable view of the court, but inconsistency with this only available benchmark of reason does not amount to perversity!

By the same token, *Dhillon* suggests that the operation of s.2(1) Criminal Appeal Act 1995 in this context is effectively excluded by dint of the *Camplin* interpretation of s.3. The need of establishing under s.2(1) that the murder conviction would have been the verdict of a properly directed jury (or the required majority) is beyond the purview of the appeal court. The inevitable result therefore is that the appeal must succeed. This proposition, it will be argued, in itself powerfully illustrates the need to re-evaluate the *Camplin* ascription.

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[27] [1997] 2 Crim App R 104.
[28] Supra p.4.

Ward LJ's deference to the *Camplin* interpretation of s.3 should not, however, be taken as an indication that he was sanguine as to the result. Indeed, with undisguised frustration, His Lordship lamented (at 114):

"The result, making some mockery of our hallowed adversarial procedure which strives to do justice to both sides, is that the appellant is able both to have his cake at trial and eat it on appeal".

This damning statement of the law would have been a *non sequitur* prior to *Whitfield*, when the proportionality principle provided a firm foundation for any legal decision to exclude provocation, such that this ruling and consequent murder verdict would rarely have given the opportunity to invoke the Epicurean metaphor.

A Judicial Duty to Marshall the Evidence?

A further potentially fertile means of reducing a murder conviction has been identified in recent cases as a direct consequence of *leaving* provocation to the jury. In *Scott*[29] the judge had left provocation to the jury as an alternative to the primary defences of accident and self-defence. Following conviction for murder, the accused appealed, arguing that the jury direction was defective in failing to identify the specific evidence which the jury should have regard to in considering the availability of the defence.[30] In dismissing the appeal, the court ruled that whilst the judge was required to incorporate all relevant evidence in his summing-up, only exceptionally would he be obliged to identify evidence specific to a particular line of defence. This was a decision which was usually best left to the judge in the individual case, mindful that this task was the traditional function of counsel. In making that decision the judge was to be alive to the danger, particularly present where provocation had not been raised by the defence, of undermining the primary defence by placing undue emphasis on the issue of partial excuse. The murder conviction was therefore affirmed. Without the need, or apparently the authority to so hold, the court thought it fit to add that the objective limb of the defence had not in any event been satisfied on the present facts. More will be said of this below.

In *Stewart*[31] the alleged insufficiency of the judge's provocation direction again formed the basis of the appeal. The judge, as in *Scott*, had unilaterally introduced provocation to the jury in circumstances where the primary defence relied upon was one of accident. Unlike in *Scott*, the judge had apparently given the jury no guidance as to which evidence could have a bearing upon the partial defence. In dismissing the accused's appeal against conviction for

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[29] [1997] Crim LR 597.

[30] In *Baillie* [1995] 2 Cr App R 31, by contrast, the judge was held to have fallen into error by being overly specific with regard to the admissible evidence of provocation. The observation of Professor Sir John Smith, uttered in a different context is apposite: it seems as if we need a system of stamping a judicial health warning across the procedural aspects of the provocation defence.

[31] [1996] Crim App R 229.

murder, a differently constituted Court of Appeal nevertheless confirmed the need for such elaboration unless the relevant evidence was "obvious". In contrast to *Scott*, the court asserted that such a direction was particularly necessary where provocation had not been raised by counsel. How was a jury to properly determine if the conditions underpinning the defence had been satisfied, in particular the objective limb, unless apprised of those matters of potential relevance to this inquiry? Despite the failure of the judge to provide a direction in these terms, the court affirmed the murder conviction by application of the proviso to s.2(1) Criminal Appeal Act 1968. The omission had caused no miscarriage of justice because a jury focusing upon the relevant evidence would inevitably have concluded that a reasonable man would not have acted as the accused had done.

Whilst the ruling in *Stewart* is to be welcomed, the result, as with *Cox* and the *dicta* in *Scott*, sits awkwardly with the Camplin interpretation of s.3. Whilst in the *courts' view* (the common law test), no reasonable jury could have reached a conclusion on the evidence at variance with its own, the whole point of *Whitfield,* as emphasised in *Camplin* and *Dhillon,* is that the court is precluded by the terms of s.3 from making this assessment; the jury's opinion, founded upon a "permissible difference of emphasis"[32], may have been different, and the court, absent any available yardstick, cannot condemn this opinion as wrong. This principle would seem therefore, as acknowledged by Rougier J in the Court of Appeal in *Acott*[33] (at 452), to necessarily rule out reliance by the appeal court on s.2(1) Criminal Appeal Act 1995 wherever a misdirection bearing upon the provocation defence is found to have occurred. Lord Widgery CJ in *Whitfield* having referred to the conversion of provocation into primarily a jury issue declared (at 43): "There is no jury in this Court. If we apply the proviso we are in fact determining that issue otherwise than by the verdict of the jury."

Similarly, McCowan LJ in *Burgess and McLean*[34], applying *Whitfield,* observed that he:

"[F]ound it very difficult to see how there could be a case where the proviso could be applied in circumstances such as these for all the reasons given by the Lord Chief Justice..."

With respect, the reasons given by Glidewell LJ in *Cox* for applying the proviso to s.2 (1) Criminal Appeal Act 1968 do not meet these formidable objections. His analogy (at 519-520) with other defences such as self-defence, where the proviso legitimately operates, is unhelpful. The comparison is flawed because, in contrast to the present defence, self-defence is *not* required to be left to the jury if the judge is "clear beyond all doubt that no reasonable person or jury could conclude that the homicide was justifiable"[35].

More fundamentally, Glidewell LJ opined (at 520), that s.3 is "dealing with the trial and not with the appeal", therefore leaving the *appeal court* unfettered from asking what a reasonable

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[32] Per Ward LJ in *Dhillon, supra.*
[33] [1996] 4 All ER 443.
[34] [1995] Crim LR 425.
[35] Per Viscount Dilhorne in *Reference Under s.48A Criminal Appeal (N.I.) Act 1968 (No 1 of 1975)* [1976] 2 All ER 937 at 955.

jury, properly directed, would have determined. It is strongly urged that the *Camplin* construction of s.3 does not allow for this anodyne approach. This assertion finds support in Acott[36] where Lord Steyn was careful (at 312-313) to acknowledge the continued value of the proportionality test as a factual jury tool without any suggestion of its wider function for the appellate court. Moreover, if the appeal court is exempt from the s.3 limitation, the *Camplin* concern for the primacy of the jury function begins to ring very hollow, with the common law proportionality test, barred from direct entry, being welcomed in enthusiastically via the back door. On this approach, the right of the defendant to have provocation assessed by the jury is a most imperfect one. A trial judge who has improperly excluded the defence on the basis that no reasonable jury would be satisfied as to the objective question, may have his resultant misdirection condoned by a Court of Appeal sympathetic to the Crown's case. This cannot be right. Acceptance of the *Camplin* construction of s.3 necessarily carries with it acceptance of the conclusion that any misdirection bearing upon the provocation defence (whether through wrongful exclusion or inadequacy of explanation) automatically results in the murder verdict being declared unsafe within s.2(1) Criminal Appeal Act 1995. The unsatisfactory nature of this approach is patent, which speaks powerfully of the need to challenge the wisdom of the *Camplin* interpretation rather than attempt to emasculate its effects in the individual case as instanced in *Cox*.

The Subjective Limb as an Exclusionary Mechanism:

For all this, *Cox*, *Stewart* and *Scott* illustrate welcome resistance to a recent trend which has shown jury murder verdicts to be singularly vulnerable to the tactical use of the provocation card. This line of authority, however, in continuing to favour an avowedly literal approach to statutory construction, affirms the *Camplin* line of demarcation between judge and jury without questioning its legitimacy. The authorities, whilst evoking principles reminiscent of the *Mancini* test of proportionality, licence this approach only at an appellate level and confirm the inability of trial judges to exclude provocation from the jury once satisfied that the subjective limb of the defence may have been made out. As observed above, tight control over the subjective limb of the defence may prove to be sufficiently effective as an exclusionary mechanism as to render unnecessary a return to *Mancini*. Indeed, it is suggested that reliance upon the subjective limb would have brought a more principled and satisfactory outcome to many of the leading cases already considered. The dubious substitution of a manslaughter verdict in *Whitfield*, for example, could have been avoided by greater concentration upon the subjective limb. The abundant evidence of preparation (the accused admitted to arming himself with a "small sword") is entirely inconsistent with the requirement of a sudden and temporary loss of self-control and should, it is submitted, have resulted in the exclusion of the defence on this basis.[37] A comparison with the facts of

[36] [1997] 1 WLR 306.

[37] The decision of the judge at first instance in *Baillie* [1995] 2 Cr App R 31 to exclude all evidence prior to the appellant having reached his victim's house, should not, it is submitted, for this reason, have been disturbed. Having been told of a threat made to him by his son, the father went up to the attic, obtained a gun, placed it in his car and then drove two miles to his victim's house, stopping en route to buy petrol. This appears a paradigm

Dryden[38] is instructive, where the defence of provocation was ruled out by the appeal court at this level. Equally, the murder conviction in *Cox* ought properly to have been affirmed on the basis of the insufficiency of the evidence pointing to a relevant loss of self-control, rather than by the doubtful application of the proviso to s.2(1) Criminal Appeal Act 1968. Indeed, Glidewell LJ admitted (at 521) that the evidence of the appellant having been provoked was "tenuous", a conclusion borne out by even the medical expert for the defence who was of the opinion (ibid) that the loss of self-control had likely occurred *after* the fatal blows were struck.

The foregoing survey of the authorities prompts an inquiry as to the weight of the evidence required at the subjective level before the judicial duty to leave the defence is triggered. In *Camplin*, Lord Diplock had expressed the duty widely in stating (at 173) "..if there was any evidence that the accused...lost his self-control in consequence of some provocation however slight it might appear to the judge he was bound to leave [the defence] to the jury...". Lord Taylor CJ has cautioned however in *Cambridge*[39] that Lord Diplock was not suggesting that the duty arose where the evidence of any provocation was flimsy or equivocal, but rather that clear evidence of even slight provocation would be enough to cause the defence to become a matter solely for the jury. Accordingly, Lord Taylor noted, (at 765) that there was no judicial license: "..to conjure up a speculative possibility of a defence which is not relied on and is unrealistic". This was to repeat the caution of Lord Devlin who over 30 years previously had warned in *Lee Chun-Chuen v R*[40] (at 80): "If no such narrative (disclosing material which suggests provocation in law) is obtainable from the evidence, the jury cannot be invited to construct one."

With respect, this principle appears to have been overlooked by Russell LJ in *Rossiter*[41] (at 758) who, like Glidewell LJ in *Cox*, was of the view that even "tenuous" evidence of provocation was apt to trigger the judicial duty to leave provocation to the jury. Accordingly, the appeal court ruled that the circumstances of the killing, (in particular, the infliction of 50 wounds), in showing the accused to have gone "virtually berserk", were themselves enough to require the defence to be left to the jury. This, however, was clearly to speculate, as the evidence showed no more than a loss of self-control of uncertain aetiology. The appellant's violent outburst could have been due to her irascibility, the onset of menopause or her discovery that Mr. Rossiter had had an affair thirty years previously. The evidence, therefore, in failing to unambiguously point to specific conduct capable of amounting to provocation in law should not have been left to the jury. The frenzied circumstances of the killing were again held by the appeal courts in *Stewart* and *Scott* to vindicate the trial judges' decisions to introduce the defence to the jury. With respect, these rulings must also be regarded as wrong.

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case of planning with ample time for reason to resume its seat. The Court of Appeal, however, took a different view. See: Reed (1997) (4) Jo of Crim. Law 439.

[38] [1995] 4 All ER 987.

[39] [1994] 2 All ER 760.

[40] [1963] 1 All ER 73.

[41] [1994] 2 All ER 752.

The words of Lord Devlin in *Lee Chun-Chuen v R* (at 81) are again apposite: "The material produced is evidence of a provocative incident and of nothing more and that is not enough".

The most powerful indication that a relevant loss of self-control must be rooted in the evidence and, contrary to the decisions in *Cox*, *Rossiter*, *Stewart* and *Scott* be more than the product of conjecture, is the recent ruling in *Acott*[42] where their Lordships' requirement for direct evidence of provocation provides a clear caution against the recent judicial tendency to dilute the legal content of the defence. Lord Steyn, in delivering the only speech, emphasised the need for the evidence to point to specific provoking conduct capable of explaining the accused's loss of self-control before the defence could properly be placed before the jury. Any suggestion that provocation could be made relevant merely from the circumstances, such as by evidence of a frenzied attack, was firmly rejected, in welcome contrast to the wider view advocated in the recent rulings of the Court of Appeal.

The relevant facts of *Acott* can be shortly stated. The accused, aged 48, lived at home with his mother who was aged 78 at the time of her death. On the night in question he had telephoned the emergency services in a "state of agitation" reporting her injury in a fall. She was pronounced dead at the scene by ambulance personnel, having sustained serious injuries to her head and face. The weight of the medical evidence pointed to her injuries being the result of a sustained and frenzied attack. The prosecution alleged that the appellant had deliberately killed his mother out of frustration for her frequent chastisement of him, compounded by his embarrassment at being financially dependent upon her. The appellant denied this allegation, maintaining that the victim's injuries were the result of an accidental fall. He attributed her injuries to a combination of the fall and his vigorous and unskilled attempts to revive her. Given the nature of the appellant's defence, provocation was no part of his case and the Recorder consequently directed the jury that this was a case of "murder or nothing". By a majority, the jury favoured the prosecution's version of events and convicted the appellant of murder. On appeal, counsel for the appellant submitted that provocation should have been left to the jury by the Recorder. Delivering the judgment of the Court of Appeal,[43] Rougier J noted that central to the appeal was the nature of the evidence required in order to trigger the judicial duty to leave provocation to the jury. The appellant's case was that non-specific evidence was sufficient for this purpose. In particular, it was asserted that the Crown's repeated allegation that the accused had killed the victim whilst in a state of lost self-control, induced by resentment for being treated as a child, had itself introduced the issue of provocation. Loss of self-control, it was maintained, could also be inferred from such varying circumstances as the extent of the victim's injuries, the fact of the appellant's financial dependence upon her and allegations suggesting that the victim was prone to black moods and excessive drinking.

In dismissing the appeal, both the Court of Appeal and House of Lords agreed that more was needed, beyond proof of general circumstances consistent with an absence of self-control, in

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[42] [1997] 1 WLR 306.
[43] [1996] 4 All ER 443.

order for the defence to become a live issue. As noted by Lord Steyn, (at 312) evidence of a loss of self-control *per se* did nothing to advance the defence of provocation which could be caused by *circumstances*[44] such as "fear, panic, sheer bad temper or...a slow down of traffic due to snow". Although prepared to concede (ibid) that "there was a reasonable possibility that the appellant lost his self-control and attacked his mother in anger", His Lordship stressed that to leave the defence to the jury in such circumstances would involve unwarranted speculation as to the cause of the loss of self-control. Accordingly, in order for the jury to be able to discharge its function of assessing whether the subjective and objective conditions of the defence had been met it was essential that they were apprised of the specific provoking event attributed to the victim which was said to have sparked the homicidal response. In short, as Rougier J had said (at 453), what was required was "evidence of provocation in its active sense"; in other words evidence tending to show *what* had been said or done by the victim[45] immediately prior to the assault. In the absence of specific evidence,[46] of the victim's conduct there would exist no triable case of provocation and accordingly nothing on this issue to go before the jury.

As has been noted, Lord Steyn was at pains to assert (at 312-313) that the *Mancini* test of proportionality continued to have an important role to play in the *jury's* answer to the objective question. The value of the proportionality principle in His Lordship's view was its tendency to concentrate the jury's attention on the degree of provocation offered. Thus directed, the jury would be well placed to assess whether there existed partial justification for the accused's fatal response, sufficient to allow a reduction in the crime to that of manslaughter.

The outcome of both appeals is, with respect, to be welcomed. A mere suspicion of loss of self-control should never be enough to release provocation to the jury. That this is so is evident from the language of s.3 which, as has been seen, is specific in terms of the required aetiology of the loss of self-control. As Rougier J points out (at 453), the appellant's argument was fatally flawed in that it omitted the bracketed words of the section. *Acott* therefore provides welcome clarification that evidence of specific provoking conduct is required in order for provocation to become a relevant jury issue. The appellate rulings reject merely vague evidence of lost self-control for two convincing reasons:

i) The jury's inability to assign a cause of the loss of self-control. The evidence, of necessity, will be equivocal in its portrayal of the victim's conduct. The jury will consequently be left in doubt as to what (if anything) he may have said or done. Perhaps the accused erupted irrationally without any external cause; and

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[44] As opposed to the things done or said required by the section.

[45] Or, occasionally, by a third party: *Twine* [1967] Crim LR 710. See also *Baillie* (supra).

[46] Which would usually be direct, although Rougier J provides the following example of inferred evidence at 453: "...shortly before his death, the deceased was heard to say that he proposed to go and taunt the defendant upon a matter whereon the latter was known to be particularly sensitive."

ii) The jury's inability to determine whether the accused's response was proportionate in all the circumstances. As the circumstances are not known to the jury they are incapable of making such an assessment. Rougier J made this point forcefully (at 453):

"To direct [the jury] to determine whether the provocation in question was enough to make a reasonable man do as the defendant did, without the slightest inkling of what the provocation was, would be to ask the impossible."

Conclusion

With the ruling in *Acott* comes the first real challenge to the contemporary portrayal of provocation as an invariable jury question, a proposition which has threatened to spiral out of control since it gained acceptance in the *obiter* opinions of their Lordships in *Camplin*. *Dicta* in *Rossiter, Scott* and *Stewart* and the decision in *Cox* all indicate that the judicial duty to leave provocation to the jury can be triggered by equivocal evidence. This approach is unprincipled and, together with *dicta* which suggests that the required loss of self-control may be inferred by reference to the severity of the attack, must, in the light of *Acott*, now be considered wrong. The lesson for trial judges is clear; in the absence of direct evidence of a specific provoking event which may have sparked a loss of self-control there exists no discretion to leave the defence to the jury.

Whilst *Acott* does not directly challenge the *Camplin* approach to the construction of s.3, in raising the legal dimension of provocation it demands increased circumspection by trial judges in determining whether to release the defence, and this may yet prompt an inquiry into the fundamental wisdom of *Camplin*. The triumvirate of cases discussed above which forgive misdirections impacting upon the provocation defence are inescapably at odds with *Camplin*, which, as first acknowledged in *Whitfield*, reserves solely for the jury the task of comparing the accused's fatal response with that which, as a matter of lay opinion, may have been the reply of a reasonable man. On this approach, the courts, statutorily denuded of authority, have no means of assessing the outcome of the lay inquiry, and however remote (and perverse in judicial eyes) may be a verdict of manslaughter, *Camplin* ordains this outcome to be the inevitable result of a misdirection with regard to provocation: the murder conviction is necessarily unsafe within s.2(1) Criminal Appeal Act 1995. It has been argued that the construction of a defence in terms unwarrantably tendentious to the accused cannot be taken to represent the intention of Parliament and that however entrenched a method of ascription may have become, where it is shown to be manifestly unworkable and productive of injustice, an approach *de novo* is required. It is suggested that this process may have been set in motion by the decision of their Lordships in *Acott*. If this view is unduly optimistic, then equally significant is the re-emergence in *Acott* of a defence able to claim more than an atavistic resemblance to its more celebrated common law forbears, with the consequence that future decisions may increasingly be expected to rely upon the exclusionary properties of the subjective limb as an effective prophylactic against the scourge of *Camplin*.[47]

[47] Mitchell C Davies, Director of Legal Studies, Cayman Islands Law School.

The Strata Corporation and Member Debt

A. Introduction

The Cayman Islands have experienced a vast increase in the number of strata corporations over the past decade. All indications lead to the conclusion that the number of people participating in strata corporations will continue to grow. For example, anecdotal evidence suggests that the apartment and townhouse units built pursuant to registered strata plans comprise nearly sixty per cent of all domestic dwellings constructed, or approved for construction, in the last three years.[1] Also, representations have been made to the Government to reduce the minimum number of units required to register as a strata corporation.[2]

Inevitably, just as the number of units began to increase so too did the number of questions regarding the adequacy of the *Strata Titles Registration Law.*[3] Many of the problems identified in the law were addressed by the provisions relating to phased development as found in the *Strata Titles Registration (Amendment) Law, 1994.*[4] However, one important question remains unresolved. It is submitted that the Law fails to adequately equip strata corporations in relation to the collection of debts owed to it by owners of units within the development.

B. Corporate Duties and Powers

Pursuant to the *Strata Titles Registration Law* (1996 Revision) the owners of strata lots contained in any strata plan become a corporation upon the registration of the strata plan.[5] The strata corporation has legal status allowing it to sue and be sued in its own name.[6] The Law states that the corporation is duty bound to insure all the buildings to their replacement value and to keep the common property in good repair.[7] The Law provides the corporation with the power to establish a fund to meet these expenses by levying contributions on the owner of an individual condo or lot.[8] Also it authorises the corporation to incur management fees, though the smaller corporations are known to address corporation business through the assistance of volunteer committees of proprietors.[9] If an owner refuses to pay the levy, the only remedy stated in the Law is the right to sue the owner to recover that debt.[10]

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[1] The estimation is based on Planning Department statistics for 1995-1997.
[2] A minimum of four units is required to qualify for registration as a strata corporation, *Strata Titles Registration Law* (1996 Revision), s. 2 definition of "strata".
[3] Law 14/73.
[4] Law 14/94.
[5] Part II 1996 Rev.
[6] Id., s 5.
[7] Id., s 6(1).
[8] Id., s 6(2).
[9] Id., s 6(2)(a) and Schedule 1 para 3 (f). In a strata corporation of less than 30 units it does not appear prudent to retain a salaried manager.
[10] Id., s 6(2)(c); Section 6(3) extents the right of action in debt to a subsequent purchaser.

The *Strata Titles Registration Law* does allow the Corporation to make bye-laws.[11] However, the extent to which a Strata Corporation can increase its enforcement options is questionable.[12] Nonetheless, many strata corporations have adopted a standard form set of bye-laws to replace the bye-laws set out in the Schedule to the Law.[13] The replacement bye-laws purport to allow the corporation to charge interest on overdue levies. Additionally, if the unit owner refuses to pay, then the corporation, it is written, is empowered take the rents and profits from the strata unit or lot.[14]

C. The Problem

It is submitted that in situations where the owner refuses to pay to the strata corporation duly levied fees the strata lacks an efficient remedy[15] in the following situations: (1) the owner of a unit has a mortgage that equals or surpasses the market value of the property and he himself does not occupy the unit but his spouse and family are in occupation, or (2) the unit is owner occupied and he is of low net worth and refuses to sell it, or (3) the unit is occupied by tenants. In other cases, the *in personum* remedy found in s 6 (3) is a reasonably adequate supplement[16] to an action in debt.[17]

1. Family Occupied and Mortgaged

In the first case the corporation may have incurred on an owner's behalf say $10,000 in common maintenance and insurance costs. Then the corporation receives notice that the owner has left the Island and does not intend to pay the strata bill nor his mortgage. He leaves his wife and children in the unit so it can not be rented by the strata under the terms of the bye-laws.[18] Inevitably the bank starts foreclosure proceedings. The bank claims first priority over all moneys from the sale because its mortgage is the first charge registered with the Land Registry. When the bank finally obtains an eviction order and a judicial sale, say a year later, the bank uses all of the sale proceeds to satisfy the mortgage. The corporation gets little or nothing toward the past debt. Meanwhile, through the period of the foreclosure proceeding, it has incurred a further $8,000 to $10,000 in common expenses on behalf of the unit owner. As a result the strata corporation, which has incurred a debt on behalf of a unit owner under the duty imposed by law, is owed

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[11] Id., s 21; Bye-laws are deemed to be contractual in nature, s 21 (7).
[12] *See* the discussion in Part C 3 below.
[13] Id., s 21(3) allows for modification of the bye-laws found in the law.
[14] For example, Cook Quay & Drake Quay Strata Corporation, Strata Plan no. 45, bye-law 34.
[15] It is acknowledged that an action in debt is an "efficient" remedy in certain, but increasingly more limited, circumstances.
[16] David Walker, Debt Enforcement Options Available to Strata Corporation Executive (17 January 1995, PPC dissertation, p 5; AF Raft et. al, Strata Titles (Sydney, The Law Book Co. of Australia Ltd:1962) commentary on s. 16 (3), the equivalent provision in Australia.)
[17] However, a long delay in the transfer of ownership, and obligation pursuant to s 6 (3), can place tremendous financial pressure on a small strata corporation.
[18] It is likely that this bye-law is *ultra vires* of the corporation, see below part c 3.

$18,000 to $20,000, and it cannot recover that money because the debtor has left the island or is without sufficient funds.[19]

It is respectfully submitted that this is unjust. This injustice could be remedied by amending the Law so that the strata corporation has first charge *in rem* for common expenses on any unit or lot within the plan. The result would be that the strata corporation would have an effective remedy in the event that levies made as a result of debts incurred for the common good are not paid by unit owners. For example, if a unit is sold the corporation's charge would stay on the unit. The new owner would insist on the vendor paying the debt out of the sale proceeds so the new owner would get clear title.[20] In another possible scenario, where a bank has foreclosed on its mortgage charge, the bank would pay the strata corporation's levy. This is reasonable because the bank's security (that is the condo unit) has been protected by insurance, and maintained by services, paid for by the strata corporation. If the strata corporation had not done so the bank would have incurred those costs in any event to protect its interest. Certainly that is standard procedure when the bank is faced with an uncooperative owner of a mortgaged house. It worthy of note that Ontario has adopted this approach.[21] In that province, the strata corporation is entitled to register a lien against the unit's title. The lien takes priority over all prior mortgages and encumbrances to secure the debt. Recently Jamaica has adopted a similar scheme.[22] This concept is not foreign to the banking community in Cayman. Until 1993, many banks informally recognised the levy of a strata corporation as first priority, and paid the outstanding balance due to a strata corporation on behalf of its customer. In some instances payment was made even without proceedings in debt being commenced.[23]

2. Delinquent owner and no sale

The amendment proposed also satisfies the second concern and that being the owner occupied condominium unit where an owner has no intention to sell the unit, say, within ten years. If an owner simply refuses pay the levies, but rather pays all his other creditors, the corporation's only remedy is to sue him for the levied amount. For example, let us assume that $10,000 to $20,000 is outstanding. It is not cost effective or practical for a corporation to seek an eviction order. This order will usually only follow a judicial sale. A judicial sale is unlikely because the owner will have an equity far exceeding the debt. Debt enforcement methods are costly, time consuming and fruitless against individuals of low net worth. A stubborn unit owner could continue to refuse to pay through to the time of commencement of action. As matters come to a head, the unit owner offers a portion in full satisfaction, and the action is settled to avoid litigation costs, and accelerated tensions. (After all, the man is still in the "neighbourhood".)

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[19] It appears correct to assume that a judicial sale would expunge the previously levied amounts and therefore, s. 6(3) of the 1996 Rev. would not allow the strata corporation to pursue the new owner. However no case on point was uncovered.

[20] This would be consistent with the goal of s 6(3), but it would have the advantage of being an effective remedy where the subsequent owner, say by gift, may be unable or unwilling to pay the debt to the corporation.

[21] *Condominium Act* (RSO 1979 c.26) as reenacted in *Condominium Act 1997*.

[22] Myers Fletcher and Gordon (a firm), *Newsletter*, July 1997 p 1.

[23] David Hendry, attorney.

Experience teaches that some unit owners embark on the familiar pattern of delinquency, part payment in full satisfaction and renewed delinquency year after year thereby forcing the corporation into a position of having to commence a new court action each year. Even if the corporation does register a post-judgment writ of execution with the Land Registry the corporation is only an unsecured creditor ranking below any secured creditors (e.g. at least one bank). It may even rank below other unsecured creditors who have previously registered writs of execution. By giving the first charge to the corporation it could wait to collect its levies until the date that the unit is sold or transferred, confident that it would be fully reimbursed.[24] The inevitable ill-will amongst neighbors caused by a court action and judgment collection would be avoided and the corporation would not have to waste money on litigation on a debt that they may never otherwise collect. Further, with a position of first priority in the corporation, other secured creditors would pressure the unit owner to settle his account with the corporation. Again, prompt payment is of special importance to the viability of small strata corporations.

3. Rents and Profits

Some strata corporations have adopted bye-laws which purport to authorise the corporation to collect outstanding levies from the tenants of delinquent unit owners.[25] Usually the bye-laws require a series of steps to be taken including the service of notice by the corporation on the tenant and owner sixty days prior to the "attachment" of the rental payment. However, a claim in debt is not necessarily commenced. In cases where the tenant accepts the assurances of the corporation of its power to demand and collect the rental payment, the corporation experiences a reasonably efficient levy collection. However, more sophisticated tenants may wish to challenge the demand from the corporation. The refusal may be based on a number of factors. These include the tenant's friendship with, or fear of, the delinquent owner, or his knowledge of the law.

It can be argued that attempts by a strata corporation to embark on a quasi-garnishment process is *ultra vires* of the corporation. The corporation exists by statute, and its powers are specified in that statute. The corporation's power over the collection of levies from owners is stated simply and singularly as proceeding in debt.[26] It is a well established principle of administrative law that subordinate legislation or delegated powers, like that of making bye-laws, cannot go beyond the powers found in the parent legislation.[27] The provisions of s 21 of the 1996 Revision of the Law appears to add strength to the foregoing argument. Section 21 (4) states, "No bye-law shall operate to prohibit or restrict the devolution of strata lots or anv dealing therewith or to destroy or modify any easement implied or created by this Law." (emphasis added). It has been stated by

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[24] Therefore the weaknesses in the protection provided by s. 6(3) 1996 Rev. could be ignored.
[25] For example, Strata No. 45 bye-law 34(3)(b).
[26] 1996 Rev. s 6 (2)(c).
[27] Attorney-General v. Great Eastern Rv. Co. [1907] A.C. 415 HL. In the case of Attorney-General v Fulham Corporation [1921] 1 Ch. 440 the Borough was a statutory body created under the *London Government Act, 1899* and empowered under the *Baths and Wash-houses Acts, 1846 - 1878*, to establish baths and wash-houses. In due course the corporation established a laundry service enterprise and restricted access to the wash-house. Since this service was not authorised by the statute, the corporation was restrained from entering into contracts of laundry service.

another commentator that the purported right of the corporation to take rental payments can be justified through concepts in contract law. David Walker has argued that the bye-laws can be viewed as more than delegated legislation, but rather as contract between each owner and the corporation.[28] Some merit may be found in this argument when one considers the wording of s 21 (7). Section 21 (7) states, "Bye-laws for the time being in force shall bind every corporation and the proprietors to the same extent as if such bye-laws had respectively been signed and sealed by such corporation and each proprietor and contained covenants on the part of such corporation with each proprietor and on the part of each proprietor with ever other proprietor and with such corporation to observe and perform all the bye-laws." Mr. Walker opines that "the bye-laws can be designed to incorporate a debt enforcement clause which may deter debt accumulation by the solvent individual who chooses to ignore strata billings, or those who schedule payments to the strata last because other creditors apply more direct pressure."[29] However, it might be suggested that this corporate strategy is undermined by the core concept of delegated legislation, in that, the corporation cannot purport to do by contract that which the legislation which gives it life does not authorise it to do. The legislation stipulates the manner in which the corporation can collect debts, and therefore it can go no further.[30] The question of assuming control to collect rents from an owner was briefly addressed by Schofield J in Brandon v Proprietors Strata Plan No 30.[31] He adopted the argument of the owner, which was conceeded by the strata corporation, that the Law did not permit the strata corporation to assume control of the plaintiffs unit in spite of the terms of the bye-laws which purported to give such authority.

If the corporation is not able to attempt to collect the outstanding levies through the taking of rents from the tenants of delinquent unit owners then the debt enforcement powers of corporations are unduly limited and inefficient in many cases. Any difficulties are magnified in cases where the owner lives outside of the jurisdiction. It is submitted that the suggested amendment is appropriate in that it alleviates a portion of the problems of the strata corporation.

D. Conclusion

Experience teaches that, with the increasing number of people who are choosing to buy units in strata corporations, debt collection problems will only become more wide-spread. It is respectfully submitted that the *Strata Titles Registration Law* should be amended so as to provide strata corporations with a first charge against a lot or condo unit to secure the costs incurred for any services provided by the corporation, common or specific, whether due or accruing due. The obligations placed on strata corporations are significant. A general and efficient levy collection method can be found, as in other jurisdictions, in allowing the strata corporation to have first priority *in rem* over other creditors. An amendment in the Law to facilitate this suggestion would benefit all concerned.[32]

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[28] Supra note 16, pp 2 and 4.
[29] Id., p 2.
[30] I am grateful to attorneys Frank Banks and Norm Klein for participating in debate on this point.
[31] (1995) 13 Law Bulletin 43
[32] John A Epp, Senior Lecturer in Law, Cayman Islands Law School.