CAYMAN ISLANDS LAW BULLETIN

NO. 17

AUGUST 1999

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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 opinions of the Cayman Islands Government.

Citation:
Cases appearing in this volume should be cited as (1999) 17 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 or E-mail at Mitch_lw@candw.ky.

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EDITORIAL NOTE

The seventeenth 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 which continues to advance the frontiers of Cayman law. This edition features two articles, "Moving the Goalposts - The Court of Appeal looks again at the test for setting aside judgments in default" by Derek O'Brien; and "A synopsis of the 1998 study of pre-trial disclosure in criminal proceedings in the Cayman Islands" by Mr. J. Epp and Ms. C. Ryan.

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. The series now comprises nine bound volumes (1952-1979, 1980-1983, 1984-85, 1986-87, 1990-91, 1992-93, 1994-95 and 1995-96). Despite the presence of the 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 judgement 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 December 11, 1996 – May 3, 1999.

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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Summaries of Judgements of the Court of Appeal and The Grand Court of the Cayman Islands

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ADMINISTRATIVE LAW

Planning – Appeal – Locus standi – Extent of person aggrieved standing requirement – Statutory interpretation

The National Trust for the Cayman Islands and Conolly v The Central Planning Authority

Grand Court (710 and 711/98)
Murphy J
April 29 1999

Legislation

Development and Planning Law (1998 Revision) Ss 10, 12, 39, 45
The National Trust Law 1987 S 4
Town and Country Planning Act 1959 Ss 23, 31
Development and Planning (Appeals) Rules Rg 3, 7
Town and Country Planning Act 1971 S 245
Town and Country Planning Appeals (Inquiries Procedure) Rules 1962
Local Companies Control Law S 8
Immigration Law S 10 (now 11)
West African (Appeals to Privy Council) Order in Council 1949

Regulations

Development and Planning Regulations Rg 8, 23

Court Rules

Grand Court Rules Order 53 R 3(7)

Authorities referred to

R v Immigration Board ex parte Kirk Freeport Plaza Limited [1996] CILR 281
Buxton v Minister of Housing [1960] 3 All ER 408
Ealing Borough Council v Jones [1959] 1 All ER 286
Ex parte Sidebotham (1880) 14 Ch D 458
Cook v Southend Borough Council [1990] 1 All ER 243
Garret and Others v The Licensing Justices of the Division of St Marylebone Middlesex (1884) 12 QBD 620
Re Riviere's Trademark (1884) 26 Ch D 48
In re J Burn Ex Parte EN de V Dawson HT McClellan and the Trustee [1932] 1 Ch 247
In re Baron [1943] 1 Ch 177
Buxton v Minister of Housing and Local Government [1961] 1 QB 278
Maurice v London County Council [1964] 2 QB 362
Turner v Secretary of State for the Environment (1973) 28 P & CR 123
Ex parte Official Receiver, re Reed Bowen & Company (1887) 19 QBD 174
Sevenoaks Urban District Council v Twynam [1929] 2 KB 440

Jennings v Kelly [1939] 4 All ER 464
Attorney-General of the Gambia v N'Jie [1961] 2 All ER 504
Arsenal Football Club Limited v Smith (Valuation Officer) [1977] 2 All ER 267
Barras v Aberdeen Steam Trawling and Fishing Company Limited [1933] AC 402
Sharpe v Wakefield (1888) 22 QBD 239
R v Chard [1983] 3 All ER 637
Farrell v Alexander [1976] 2 All ER 721
National and Grindlays Bank Limited v Dharmamshi Vallabhji [1966] 2 All ER 626
Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346
R v Devon County Council, ex parte Baker [1995] 1 All ER 73
Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited [1981] 2 All ER 93
R v Inspectorate of Pollution ex parte Greenpeace Limited (No 2) [1994] 4 All ER 329

Authoritative works cited

Wade Administrative Law (7th ed)
Bennion Statutory Interpretation (2nd ed 1992)
de Smith Woolf and Jowell Judicial Review of Administrative Action (5th ed 1995)

Mr Lamontagne QC for the first appellant
Mr Hellman for the second appellant
Ms Reid for the Attorney-General
Mr Alberga QC and Mr Taylor for the respondent

The outcome of this case was not dependent upon the merits of the development, known locally as the 'Ritz Carlton' project, for which planning approval was sought. However, the potential impact of the extension of the proposed development from the West Bay Road to the North Sound was important in order to appreciate the context in which two appeals to the grant of certain permissions arose. These two appeals, pursuant to s.45(4) Development and Planning Law (DPL), from a decision of the Appeals Tribunal, where the appellants were denied *locus standi* were addressed together. The question thus arose as to whether both of the appellants were 'person[s] aggrieved' within the meaning of s.45(1) DPL. Since the National Trust of the Cayman Islands and Mr. Conolly were the only appellants and both were denied standing, there had been no 'rehearing' at all as envisaged under s.45(1) DPL.

Whilst the cases were dealt with together, it was to be noted that the two appellants were not identical. Mr. Conolly was a private citizen, who was seeking to voice his concerns, whilst the National Trust was a creature of statute, with an interest in issues of environmental concern.

It was argued by counsel for the respondent that a narrow, 'material injury' approach to the meaning of 'person aggrieved' was preferable in order to keep the floodgates closed. The appellants, meanwhile, preferred a wider definition, based upon a discernible intention in the legislation and the most recent case law, which would encompass both private individuals and organisations, such as the National Trust.

Held: (allowing the appeals)

(i) Read as a whole, the intention of the DPL was to confer rights on all objectors. Whilst certain sections, such as s.39(1), could not by themselves confer a right of appeal, they did provide a clue to the legislature's intent that assisted with the interpretation of the section that did deal with appeals. There was thus no apparent limitation placed upon the scope of objections that could be made before the Central Planning Authority.

(ii) The case authority on the meaning of 'person aggrieved' was at best contradictory. It was preferable therefore to apply the wider approach as indicated by Cook.

(iii) In the absence of a consistent line of authority, statutory provisions could not be construed to have the meaning that they bore at the date the statute was enacted. As such, the attempt to adopt the narrow approach by way of statutory construction failed.

(iv) Whilst the trend in judicial review undoubtedly reflected a progressive broadening of the *locus standi* concept, it was not necessary to consider this expansion for the purposes of this case. The issue here was one of statutory interpretation.

VC

Judicial review – Application for licence under the Local Companies Control Law - S8 distinguished from S10

Jacques Scott & Company Limited v The Immigration Board and Island Companies Limited

Grand Court (91/97)
Harre CJ
September 1 1998

Legislation

Local Companies Control Law Ss 8 10 11 12

Authorities referred to

Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374
Attorney-General for New South Wales v Quin [1992] LRC (Const) 751
Doody v Secretary of State for the Home Department [1993] 3 All ER 92

Mr Lamontagne QC for the plaintiff
Mr Archie for the first defendant
Mr Alberga QC for the second defendant

The plaintiff sought judicial review of the decision of the Immigration Board to grant to Island Companies Limited a licence under Ss.10 and 11 Local Companies

Control Law (LCCL). The Board had been ordered by the Court of Appeal to rehear the s.8 application for the transfer of 51% of the shares to the major international group, Nuance, in accordance with procedural fairness. When this transfer was again requested, the Board consented. The application for the licence under s.10 then followed and this too was granted. It was the view of the Board that there had been sufficient advertisement of the facts surrounding this issue to permit it to come to such a decision.

Held: (quashing the decision of the Board)

(i) Noting the emphasis placed on the distinction between s.8 and s.10 LCCL by the Court of Appeal, it was permissible for an objector, who had not objected at the s.8 LCCL stage to then object when the licence was sought under s.10 LCCL. Section 8 LCCL was an invitation for local participation, whilst s.10 LCCL on the other hand invited local objections.

(ii) This was a cumbersome procedure and it would be desirable that the drafting of the law be scrutinised with a view to improvement.

VC

Judicial review – Grant of a license – Extent of discretion – Determination of character – Procedural guarantees

Moxam v The Liquor Licensing Board

Grand Court (44/98)
Graham J
May 26 1998

Legislation

Liquor Licensing Law (1996 Revision) Ss 5 8 (1) 9 10(1) 10(3) 12(1) 13 17(1) 17(2)
Liquor Licensing Law of 1974
Liquor Licensing Law of 1985
Liquor Licensing Law of 1995
Licensing Act 1964 S 3
Alehouses Act 1828 S 1

Authorities referred to

Re H (minors) [1986] AC 586
Sharpe v Wakefield and others [1896-90] All ER 651
R v The Lancaster Justices Re Tysons Appeal (1870-71) 6 LRQB 97
Graham Thompson and Associates v The Liquor Licensing Board and the Attorney-General [1988-89] CILR 25
Mr Alberga QC and Mrs Bodden for the applicant
Mr Lamontagne QC for Jacques Scott Limited
Mr Broadhurst for Tortuga Rum
Mr Hall-Jones for the Liquor Licensing Board

The applicant had applied under s.10(1)(b) Liquor Licensing Law (1996 Revision) (LLL) for the grant of a liquor license to sell sealed packets of alcoholic liquor on a retail basis to cruise ship passengers. Objections, premised upon the inappropriateness of the applicant's character and the already saturated provision of duty free outlets, were lodged before the Board under s.17(1) LLL by a considerable number of trade competitors and other local business people. In support of the application, a statistical survey was adduced, which indicated overwhelming support for the proposal.

Due to a number of circumstances, however, great delays took place and the application was only finally heard one year after the application was made. The Board rejected the statistical survey on the basis that it was not sufficiently comprehensive, and in the absence of any other evidence they concluded that the proposed premises would not be of service to the public. The applicant sought judicial review with a view to quashing the decision, obliging the Board to formally reconsider the decision and various other consequential orders.

Held: (quashing the decision and remitting it to the Board for their reconsideration)

(i) The discretion of the Board in the Cayman Islands was extremely limited and differed from the discretion afforded licensing Justices under the Alehouses Act 1828. The word 'may' appeared in the relevant Cayman legislation, which did not equate with the concept of 'need'. What the Board purported to do was to insert the concept of 'need' into its decision as to whether or not the applicant had established that the premises were 'situated at a location where they will be of service to the public'. In doing so, the Board fell into serious error and fatally misdirected themselves as to the law in this regard.

(ii) S.8(1)(a) LLL was clear on the definition of 'character'. For the purposes of the LLL, this was determined by the absence of previous convictions for fifteen years prior to the making of the application. Any evidence adduced to this end was to be subject to the strict rules adopted by Lord Nicholls of Birkenhead in Re H (minors). The proceedings before the Board were, however, conducted in far too permissive a manner, to the extent that s.8(1)(a) LLL was used to launch an illegitimate and improper attack on the applicant.

(iii) In order to avoid a similar occurrence, it was recommended that objectors should make any objections, in writing, seven days before the hearing, so that there could be a preliminary hearing, conducted by a legally qualified chairman, in which preliminary views as to admissibility expressed. Consideration should also be given to the imposition of costs, permitted under s.17(2) LLL.

VC

Application for stay of execution – What is fair and reasonable in the circumstances

Jacques Scott & Company Limited v Moxam and The Liquor Licensing Board

Grand Court (44/98)
Douglas Actg J
July 10 1998

Legislation

Liquor Licensing Law (1996 Revision) Ss 10(1) 14 (3)
Court of Appeal Law (1996 Revision) S 20(3)

Court Rules

Order 59 r13(1) RSC

Authorities referred to

Bibby v Partap (1996) 4 LRC 462

Mr Lamontagne QC for the defendants
Mrs Bodden for the applicant

The applicant, M, had applied to the Liquor Licensing Board for the grant of a Liquor license under s.10(1)(b) Liquor Licensing Law (1996 Revision). As a result of the application being refused by the Board, M applied for judicial review, which was granted and the matter remitted to the Board for their consideration.

The applicant then applied for a stay of execution pending appeal.

Held: (dismissing the application)

In order to obtain a stay of execution, the applicant must show good cause, which could be determined by what is considered to be fair and reasonable under the circumstances. Although it was fair and reasonable to grant a stay in Bibby v Partap, where the appellants were of little financial means with no alternative accommodation, the position of the parties in this matter was entirely different.

VC

Judicial review – Acquisition of shares in a local company by a foreign company – Re-hearing - Natural justice – Extent of the Board's obligations under s.8 Local Companies Control Law – S.8 distinguished from s.10

R v The Immigration Board ex parte Kirk Freeport Plaza Limited
R v The Immigration Board ex parte Wight

Grand Court (854/97) (272/98)
Graham J
June 19 1998

Legislation

Local Companies Control Law (1995 Revision) Ss 8 10 11

Authorities referred to

Padfield v The Ministry of Agriculture Fisheries and Food [1968] AC 997
Rhodes v The Ministry of Housing and Local Government [1963] 1 WLR 61
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 233
Save Britain's Heritage v Number One Poultry Limited [1991] WLR 153
R v Inland Revenue Commissioners ex parte Preston [1984] 3 All ER 625
Gillick v The West Norfolk and Wisbech Health Authority [1986] AC 112
R v Secretary of State ex parte Fayed [1997] 1 All ER 228
Re H (minors) [1996] AC 563

Mr Jowell QC and Mr Taylor for both applicants
Mr Bulgin and Miss Wilson for the respondent

Island Companies Limited (ICL) had applied under s.8 Local Companies Control Law (LCCL) to transfer 51% of its shares to Nuance International Holdings but had also attempted to secure some form of implied undertaking that, were they successful under s.8, they would also succeed with their subsequent s.10 LCCL application for a licence.

The application was first refused, then allowed, and latterly refused once more. Oral representations were then permitted to ICL and Kirk Freeport Limited, the lead objector, all of which culminated in an application for judicial review. This application proceeded to the Court of Appeal, where the Board was directed to re-hear the application, observing procedural fairness.

These further applications for judicial review arose out of concerns that the re-hearing breached the rules of natural justice. In particular, it was claimed that the Board had failed to provide a re-hearing by failing to consider the application in accordance with circumstances and opinions prevailing at the time, and that the Board ought to have advertised the application and permitted interested parties to have made representations.

Held: (dismissing the applications)

(i) There was a plain distinction between s.8 and s.10 applications. Where in excess of 40% of the shares in a local company are to be acquired by a foreign company, the Board must first consent to that allocation. Only when the s.8 requirement has been achieved can a s.10 application then be made.

(ii) It was the duty of the Board to either grant, or reject, the application under s.8 and this was to be done in writing.

(iii) When considering an application under s.8, the Board was not to have regard to the criteria contained in s.11. Thus, rather than placing a positive

duty of proof upon the applicant, s.8 merely envisaged an investigatory procedure where broad issues of public policy, not set out in s.11, might be considered.

(iv) S.8 did not require advertisement, nor did it require the Board to initiate an investigation. Ss 10 and 11 on the other hand, provided a perfect remedy for the hearing of grievances.

(v) The application by Mr. Wight was rejected. The material that he had sought was rightly confidential and there was therefore no evidence of any injustice suffered by Mr. Wight.

VC

Judicial review – Termination of employment – Public Service Commission Regulations – Natural justice – Appropriate remedies

Ebanks v His Excellency the Governor

Grand Court (462/98)
Murphy J
November 16 1998

Regulations

Public Service Commission Regulations 1985 S 47

Court Rules

Grand Court Rules Order 53
Authorities referred to

Dilbert v Public Service Commission [1988-89] CILR 33
Re Benn (1964) 6 WIR 500
R v South Australia (Governor) (1907) 4 CLR 1497

Mr Allen for the applicant
Mr Nicol for the respondent

The applicant was dismissed from her position as a Senior Labour Inspector after 15 years working for the Government. A Tribunal of Enquiry was convened to hear the various charges of misconduct made against the applicant. The Tribunal concluded that the charges were inadequate and defective and declined to enquire into evidence or invite evidence to be led.

The precise status of the proceedings before the Tribunal was unclear. The applicant had nonetheless been led to believe that the inquiry had been adjourned. No decision on any charge was ever communicated to the applicant and no other formal steps took place until the applicant received a letter from the Acting Permanent Secretary, (Personnel) terminating her employment. The

applicant maintained that she did not receive a fair hearing and sought a declaration to this effect, along with damages.

Held: (declaration in favour of the applicant)

(i) The applicant was denied her basic right to be heard, breaching the principles of natural justice and the Public Service Commission Regulations, in what amounted to a 'dog's breakfast' of procedural error.

(ii) Declaratory relief was appropriate, as the prerogative orders were not available against the Governor, he being the Crown's representative in the Islands.

(iii) The issue of damages should proceed by way of trial, since any liability on the part of the Government had yet to be established.

VC

Judicial review – Postponement of planning appeal – Excess of jurisdiction – Procedural impropriety - Unreasonableness

Cortina International Limited (Cortina Villas) v The Chairman of the Planning Appeals Tribunal, The Central Planning Authority, Governor's Harbour Homeowners' Association, DGO Enterprises Limited, Lead Balloon Holdings Limited, Day (Helen), Day (Liam), Purton and Key

Grand Court (282/98)
Harre CJ
September 1 1998

Legislation

Development and Planning Law S 41(2)
Development and Planning (Appeals) Rules 1985 Rules 3 7(1)

Authorities referred to

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
Doody v Secretary of State for the Home Department [1993] 3 All ER 92
R v Panel on Take-overs and Mergers ex parte Guinness [1989] 1 All ER 510
Ostreicher v Secretary of State [1978] 3 All ER 82

Mr Hellman for the plaintiff
Mr Lamontagne QC for the 3rd to 9th defendants
Mr Jackson for the Central Planning Authority

The plaintiff had applied for planning permission to build 65 apartment units. Permission was refused by the Central Planning Authority, in response to which the plaintiff filed a Notice of Appeal. After two adjournments , a preliminary hearing took place which fixed a provisional trial date, along with an alternative three weeks later. Both dates were convenient to all parties, although the latter

was ultimately settled upon in order to permit the plaintiff's expert witnesses to complete their reports.

Attorneys acting on behalf of the 3rd to 9th defendants then requested a further adjournment as their Counsel had a conflicting engagement in the Grand Court. Crown Counsel did not object to this request, although Counsel for the plaintiff's indicated that they would have to take instructions on the matter. This they undertook to do promptly and confirmed so in writing. However, before this undertaking could be fulfilled, the Permanent Secretary to the Planning Ministry informed all of the parties that the Chairman had agreed to postpone the appeal in accordance with the request.

The plaintiff thus sought a declaration that the decision of the Chairman was unlawful and an order quashing that decision. They submitted that the decision was illegal as the Tribunal was inquorate and that the Chairman was therefore acting in excess of jurisdiction; that it was procedurally flawed, as the plaintiff was afforded no opportunity to make representations in what was a matter of considerable importance; and that it was so unreasonable that no reasonable Tribunal, properly directing itself, could have arrived at such a decision on the merits.

Held: (quashing the decision)

(i) While it would be open to the Chairman to take a purely administrative decision, without calling a meeting of the Tribunal, the decision reached in the present case, where the plaintiff had made it clear that they might wish to be heard, was illegal and procedure improper. Not only did the plaintiff have a right to be heard, they had a right to be heard by a quorate Tribunal.

(ii) The decision was not however unreasonable. The decision of the Chairman may well have been flawed, but this did not necessarily mean that it was also irrational.

vc

Judicial review – Leave – Immigration – Work permit refusal – Irrationality – Proportionality – Human rights

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

Grand Court (633/98)
Smellie CJ
October 21 1998

Legislation

Immigration Law (1997 Revision) s 30

Authorities referred to

Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223
R v Barnsley MBC ex parte Hook [1976] 3 All ER 452
R v Secretary of State for the Home Department ex parte Brind [1991] 2 AC 696

Mr Alberga QC for the applicants

In light of the applicant's conviction for theft, the Immigration Board decided not to grant him a work permit upon application. This decision was premised upon s.30(1)(a) Immigration Law, which referred to 'character' as a factor to be taken into consideration when granting a work permit.

However, the issue of the conviction for theft had already been dealt with by the Court, when had deemed it inappropriate to deport the applicant. Moreover, the applicant was married to a Caymanian, whose interests also needed to be taken into account.

The applicant therefore sought leave to apply for judicial review, asserting that the decision to refuse his work permit as a result of his conviction was Wednesbury unreasonable, disproportionate (either independently or as evidence of its unreasonableness in a Wednesbury sense) and failed to give proper regard to the basic principles of fundamental human rights.

Held: (granting leave to apply for judicial review)

(i) There was an arguable case that the Immigration Board was unreasonable in the Wednesbury sense, as the public interest in depriving the applicant of a work permit when he had already been punished could not readily be discerned.

(ii) There were other Caymanian interests, including those of the wife, that might well have been over-looked in the decision-making process.

(iii) Pending the full hearing by the Court, the applicant would be permitted to work and the authorities were to take no further steps to remove the applicant from the Islands.

VC

Judicial review – Immigration – Work permit refusal – Irrelevant consideration Inter-relationship with relevant consideration – Error of law - Irrationality – Human rights – International Covenant on Civil and Political Rights – Proportionality

Streeter and K Coast Development v The Immigration Board and the Governor in Council

Grand Court (633/98)
Smellie CJ
December 31 1998

Legislation

Immigration Law (1997 Revision) Ss 2 29 30 72
Immigration Directions (1996 Revision) Directions 5(1) 9
International Covenant on Civil and Political Rights Articles 23 50

Authorities referred to

Smith v Commissioner of Police [1980-83] CILR 126
Re Roper [1980-83] CILR 181
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223
Council of Civil Service Unions v Minister for the Civil Service [1985] 2 All ER 374
Short v Poole Corporation [1926] Ch 66
R v Secretary of State for the Home Department ex parte Brind [1991] 2 AC 696
Jacques Scott and Company v The Liquor Licensing Board CCIA (14/98) (November 30, 1998) (unreported)
R v Lewisham Borough Council ex parte Shell UK [1988] 1 All ER 938
R v Statutory Committee of the Pharmaceutical Society ex parte Pharmaceutical Society of Great Britain [1981] 2 All ER 804
Garland v British Rail Engineering Ltd [1983] 2 AC 751
R v Barnsley MBC ex parte Hook [1976] 3 All ER 452

Authoritative works cited

De Smith, Woolf and Jowell, Judicial Review of Administrative Action (5th ed 1995)
Harris Commentary on the International Covenant on Civil and Political Rights and United Kingdom Law (1995)
Halsbury's Laws of England (4th ed)

Mr Alberga QC and Mr Quin for the applicants
Miss Wilson and Mr Warner for the respondents

The first applicant's work permit was revoked following his conviction and sentence for offences of theft. In coming to their decision the Immigration Board invoked the public interest in the preservation of moral standards, a discretion afforded to the Board by s.30 Immigration Law. The Board declined to rescind their decision upon representations by the applicant's attorney and an appeal to the Governor in Council was also unsuccessful.

At the time of conviction, however, the Court made no recommendation for deportation, yet it was agreed that the effect of the decision of the Immigration Board would essentially amount to the same. If the applicant were unable to work, he and his Caymanian wife would be forced to leave the Island. In addition, the decision would also have a significant effect on the applicant's new employers, who had engaged him with full knowledge of the charges that were at the time pending against him.

The applicants put forward a number of arguments to the effect that the decision-making process was flawed and that, as such, the decision ought to be quashed.

Held: (granting an order for *certiorari* quashing the decision of the Immigration Board)

(i) In deeming the hardship incurred to be self-inflicted and thus not a consideration and emphasising the availability of other citizenships to Mrs. Streeter, the Board failed properly to take into account the interests of Mrs. Streeter as required by s.30(1) (h) Immigration Law. In coming to their conclusion, the Board therefore took into account both matters that were factually incorrect and matters which although factually correct were irrelevant.

(ii) The Board fell into an error of law by approaching the issue on the basis that the first applicant was a 'convicted and deportable' person. Moreover, this materially influenced the decision of the Board to such an extent that it was impractical to attempt to sever the invalid reasons from the valid reasons for coming to their decision. The entire decision was thus tainted by illegality.

(iii) In approaching the matter on the basis that the first applicant was a habitual criminal, and in doing so expressing their disapproval of the sentence imposed by the Court, the Board acted unlawfully and irrationally. An alternative was open to the Board, which could have attached a condition to the work permit that would have satisfied the public interest.

(iv) In the absence of evidence to demonstrate that convicted Caymanians had, in the past, been deprived of any further opportunity for re-employment, the claim by the Board that it was necessary, out of fairness, to treat the first applicant in the same manner was in defiance of logic and reason.

(v) The failure to give sufficient regard to the first applicant's potential for rehabilitation and the consequent disregarding of references submitted on Mr. Streeter's behalf was jaundiced and riddled with prejudice, bias and misconceptions.

(vi) The Board misconstrued s.30(1)(d) Immigration Law, giving it too narrow a construction, thereby failing to give due weight to the interests of the second applicant. The business interests of the new employer could amount to a local interest deserving of protection under s.30(1)(d).

(vii) The purported policy of denying work permits to convicted persons was shown not to exist. This strict reliance upon a supposed policy failed to take account of the potential for rehabilitation and was therefore also irrational. Had there been a policy, such a policy might have been in contravention of the International Covenant on Civil and Political Rights, which creates binding obligations as a matter of international law. This obligation amounted to interpreting Cayman statutes in accordance with the Covenant where the statute was reasonably capable of bearing such a meaning. This approach was possibly limited to where there was some ambiguity in the statute.

(viii) In view of the foregoing, there was no need to consider whether proportionality existed as an independent ground of judicial review. The

question was however left open to be addressed, if necessary, in a more appropriate case.

VC

Judicial review - Contract of employment – Early termination - Public Service Commission and legal positions - Absence of any public law right - Disclosure - Appropriate remedy

Darkoh-Ageyman v The Director of Legal Studies, The Chief Secretary, The Chairman of the Public Service Commission and the Governor of the Cayman Islands

Grand Court (297/98)
Graham J
September 15 1998

Regulations

Public Service Commission Regulations 1985 Rgs 17 26 30 32 33 47 48

Authorities referred to:

R v The Civil Service Board, ex parte Bruce [1989] 2 All ER 907
R v East Berkshire Health Authority, ex parte Walsh [1985] 1 QB 152
Davy v Spelthorne Borough Council [1984] AC 262
R v Lord Chancellor's Department, ex parte Nangle [1992] 1 All ER 897
R v Crown Prosecution Service, ex parte Hogg [1994] ALR 778
McLaren v The Home Office [1990] ICR 824
Roy v Kensington, Chelsea and Westminster Family Practitioner Committee [1992] 1 AC 624

Mr Hellman for the applicant
Mr Bulgin and Miss Wilson for the respondents

The applicant had been suspended from his position as a lecturer at the Cayman Islands Law School, following a series of allegations of sexual harassment over a period of three years. When further written allegations surfaced, the applicant met with the Director of the Law School to discuss the claims made against him. Each and every allegation was denied. Thereafter the Director recommended that applicant's contract of employment be prematurely terminated.

The applicant sought judicial review of the entire process culminating in his early termination of contract. The applicant had also brought proceedings for defamation against the Director, where he sought additional damages for humiliation.

Held: (dismissing the application)

(i) Termination of the applicant's contract of employment was a matter of private law inappropriate for relief by way of judicial review, irrespective of

the statutory underpinning of the position. The correct remedy was by writ action for breach of contract, where damages could be sought and their full disclosure of all relevant documents completed. It was not feasible to convert the proceedings into a writ action. The defamation action and the potential wrongful dismissal action would have to pleaded in the proper manner.

(ii) The correct procedure for termination, according to the Public Service Regulations 1985, had been followed, although, since this was a legal professional position within the Legal Portfolio, the applicant's contract was probably excluded from consideration by the Public Service Commission. As such, the applicant could not have suffered any injustice by reason of the operation of an additional safeguard.

(iii) The procedure which applied to a contracted officer was less onerous than the procedure applicable to a pensionable public officer and there existed nothing in the agreement or any supervening legislation which would grant a pensionable right to the applicant.

VC

CIVIL PROCEDURE

Civil procedure – Deposition – Cross-examination

In the Matter of the Companies Law (Revised)

Grand Court (7/98)
Smellie CJ
July 2 1998

Authorities referred to

In the Bank of Credit and Commerce International SA (No 6) v Mahfouz Morris et al [1994] BCLC 450

Mr Locke for the petitioner
Ms DaCosta for the respondent

The petitioner was a member of E Corporation which loaned money to the respondent. It alleged that the respondent had not repaid certain loans in the amount of $ 218,276,794 and that the respondent was not able to do so. The respondent answered the petition with vague statements, typified by paragraph 10 of Mr D's affidavit: 'I am certain that at the time when the promissory notes matured namely 27th November 1995, E. Corporation must have been in possession of some underlying maturing investments which also automatically "matured" with which to pay the promissory notes'. The exchange of documents was completed. The respondent had not sought an order of discovery of the alleged 'underlying' documents.

The petitioner sought an order requiring the deponents to the respondent's case to attend for cross-examination upon the hearing of the petition. The deponents indicated their unavailability.

Held: (application dismissed)

(i) The test was whether cross-examination was necessary for the fair disposition of the issues in the petition, given the particular circumstance of the case. In the Bank of Credit and Commerce International SA (No 6) v Mahfouz, Morris et al.

(ii) The court would not assume conduct of the case for the respondent by directing that it present witnesses. It was for the trial judge to draw any inference he felt just from their non-attendance.

JE

Civil procedure – Costs – Discretion – Non-parties

In the Matter of the Companies Law (Revised) (No 2)

Grand Court (7/98)
Graham J
December 3 1998

Legislation

Judicature Law (1994 R) S 24(2)
Companies Law (1998 R) S 123

Authorities referred to

Re Bathampton Properties Ltd [1976] 1 WLR 168
Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965
In Re Fisher [1894] 1 Ch 450
Symphony Group PLC v Hodgson [1993] 4 All ER 143

Mr Locke for the petitioner
Ms DaCosta for the respondent

The petitioner sought, in addition to the usual order, an order as to costs against the respondent and four non-parties (jointly and severely) following judgment dated October 23 1998. The non-parties were Messrs. D, A and M, and W Corporation, a BVI company. It was found at trial that Messrs. A. and D attempted to mislead the court. People other than the directors were effectively in control of the company. The judgment ended as follows: 'There never was a basis for the proper opposition to this petition. The result of that is that a very great deal of money has been wasted.' The non-parties were notified and invited to make submissions as to costs, but they did not appear.

Held: (order as follows)

(i) The usual order was appropriate. The petitioner's costs of the petition and those incidental to it were to be paid out of the assets of the respondent.

(ii) The petitioner sought a 'Bathampton' order, Re Bathampton Properties Ltd, which would have the effect of placing the respondent's attorney after the last of the unsecured creditors. As the respondent was insolvent, this would mean that the attorney would not be paid at all (unless she had an agreement with another sponsor, which would preserve assets for the company and its creditors). In an early hearing (February 1998) counsel stated that the reason for the opposition to winding-up was that the company was in fact solvent. In July 1998, the court was told by the same counsel, that the company was in fact insolvent and that an order could be made in due course. At trial, counsel stated that his reason for opposing the winding-up order was to prevent 'political difficulties' accruing to Mr A in Brazil. The respondent argued that the wording of s.24(2) was different to the equivalent English provision and would not support a 'Bathampton' order. The Grand Court Rules did not contain the equivalent of the Supreme Court Rules Order 62 rule 11. That rule provided for the variation of the usual order of priority in a winding-up order and made the 'Bathampton' precedent redundant in England. The decision of the House of Lords in Aiden Shipping Co. Ltd v Interbulk Ltd. supported the petition's application. The discretionary powers of the Grand Court were wide. The order was to be made in exceptional circumstances only. Alternatively, s.123 Companies Law provided a statutory discretion whereby the costs, charges and expenses incurred in opposing the petition by the respondents were to be paid last in order of priority.

(iii) The petitioner was granted a further order as to costs (jointly and severally) against the non-parties. The behaviour of Messrs. A, D and M and the BVI Corporation demonstrated that they orchestrated the defence in the name of the respondent and that opposition to the petition was based on improper motivation as the 'predominant intention' was to obtain a private advantage at the expense of creditors. The order was made in this *cause* and therefore arguments as to service out of the jurisdiction did not arise. S.24(2) provided a very wide discretion to the Grand Court. The equivalent English legislation was interpreted in a broad manner. In Re Fisher. Section 24(2) has not been limited by Court Rules (e.g. Aiden Shipping, per Lord Goff) or other legislation. It included the jurisdiction to make a non-party costs order. It was an exceptional order to be granted only in accordance with the guidance provided in Symphony Group PLC v Hodgson, and the overall principles of 'reason and justice' (e.g. Aiden Shipping per Lord Goff).

JE

Civil procedure – Costs – Discretion – Successful party

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

Grand Court (315/97)
Harre CJ
April 22 1998

Legislation

Judicature Law (1995 R) S 24

Authorities referred to

Liversidge v Sir John Anderson [1942] AC 206
New Zealand Maori Council v Attorney-General of New Zealand [1994] 1 AC 466
R v Metropolitan Police Commissioner ex p Blackburn (No 3) [1973] 1 QB 241
R v Sec of State for the Environment ex p Shelter [1997] COD 49
Finsbury Bank & Trust Company v Attorney General of the Cayman Islands (December 6 1998) (unreported)

Authoritative work cited

Woolf Report (Access to Justice) (1996)

Mr Quin for the respondent
Mr Akiwumi for the Attorney General

The respondents, Mr and Mrs McCorkle, were successful on most points regarding the interpretation of the Proceeds of Criminal Conduct Law 1996. They sought, by this application, an award of costs.
The case raised a matter of great public importance. It was the first case where wide issues as to the interpretation of the Law 1996 fell to be considered. The Attorney-General had conduct of the case pursuant to an obligation in law arising from a request under the MLAT, and a certificate by the Cayman Authority. (The Authority being a judge acting in an administrative capacity.) Therefore, the Attorney-General was acting as a public official, performing a public duty, and not for any other reason.

Held: (application denied)

(i) It was presumed that a successful party would be granted an order requiring the other party to pay his costs.

(ii) The court had a wide discretion under the applicable provision, s.24 Judicature Law (1995 R). No other law or rule was brought to the court's attention.

(iii) A number of precedents where no order for costs in favour of a successful litigant was made were considered: Liversidge v Sir John Anderson, New Zealand Maori Council v Attorney-General of New Zealand, R v Metropolitan Police Commissioner ex p Blackburn (No. 3), R v Sec of State for the Environment ex p Shelter, Finsbury Bank & Trust Company v Attorney General of the Cayman Islands

(iv) The applicable portion of the Woolf Report (Access to Justice) (1996) was considered.

JE

Civil Procedure – Costs – Indemnity basis

Johns v Johns

Grand Court (D15/94)
Harre CJ
August 28 1998

Legislation

Matrimonial Causes Law 1997
Grand Court Law 1995

Court Rules

Grand Court (Taxation of Costs) Rules 1995
Matrimonial Causes Rules 1986
Mr McField for the petitioner
Mr Hampson for the respondent

The outstanding summonses by the petitioner husband were dismissed as an abuse of process on July 29, 1997. The Court was requested to address the question of costs regarding the enforcement proceedings taken by the respondent. It was asked to have regard to the whole pattern of the case, including the two consent orders, the lack of compliance by the petitioner, and the enforcement proceeding.

Held: (application granted)

(i) The usual order for costs to be taxed in favour of the respondent was the only order available in the circumstances. Had the sequence of events (the orders and decree) been different, an order for costs on an indemnity basis would have been possible, as it was appropriate due to the reprehensible conduct of the petitioner.

(ii) The Grand Court (Taxation of Costs) Rules 1995 applied to matters subject to the Grand Court Rules 1995 and the Matrimonial Causes Rules 1986, as amended. It was of no concern that s.4 Matrimonial Causes Law provided that the Court was empowered to make rules regarding matrimonial matters, and that s.19(3) Grand Court Law (1995) empowered the Rules Committee to make rules regarding other proceedings. The jurisdiction of the court and the committee was concurrent.

(iii) The argument of the respondent in favour of costs on an indemnity basis was creative, but unsuccessful. The respondent argued that a consent order was evidence of a contract on which it was based. The enforcement

of contracts and costs was addressed in Order 62, rule 2. Rule 2 provided for the recovery of legal fees and expenses on an indemnity basis if the contract provided for that result. The respondent requested that the court infer into the 'contract' an agreement to indemnify the expenses incurred in the enforcement of the 'contract'. However, both consent orders contained express provisions as to costs. Although the provision addressed only the costs of the order, and not enforcement of the order, it would be inappropriate to rewrite an express provision as to costs.

(iv) The court raised, and dismissed on the facts, the possible argument that an order of costs on an indemnity basis could be made pursuant to the Grand Court (Taxation of Costs) Rules in combination with the Matrimonial Causes Law 1997. Section 19 of the Law provided that in dealing with all ancillary matters arising under that Law the Court was to have regard to, among other things, the deserts of the parties. Section 22 of the Law provided that, at the time of pronouncing a decree, the Court shall make orders for, among other things, the disposition of the matrimonial property. Rule 3 of the Grand Court (Taxation of Costs) Rules provided that the Court could make 'an order for costs to be paid out of a fund on an indemnity basis'. It was left open as to whether the matrimonial property could be described as a 'fund' for the purpose of Rule 3. The question was moot however because the decree of divorce had been granted in 1995, with the ancillary matters agreed in the consent orders, and therefore the court no longer had jurisdiction under the Law.

JE

Civil Procedure - Leave to appeal

Thompson Shipping Co Ltd v The Port Authority and The Port Director

CICA (7/98, 11/98,5/98,6/98)
August 18 1998
Zacca P, Georges and Collett JJA

Mr Lamontagne QC for the applicant
Mrs Bridges for the respondent

Thompson Shipping Co. Ltd. Had, since 1977, carried on shipping services to Florida from the port owned by the respondent, a corporation created by statute. In September 1978 the applicant was given a licence to operate a crane at the port. It was a one year permit and renewable annually. In 1980, a second crane was allowed to be operated. At the same time, the respondent notified the applicant that it planned in the future to provide crane services exclusively. In January 1996 notice was given of the pending commencement of the exclusive crane service by the respondent. In May 1997 notice was given that the applicant would be required to remove its crane in June 1997. The licence was terminated and the applicant moved its cranes in September 1997 after unsuccessfully seeking injunction relief.

The applicant complained that the exclusive service was inefficient, causing additional expenses in the amount of $500,000 per annum. The applicant sought a declaration that it be permitted to use its own cranes in the port, claiming a contractual licence.

During the course of the litigation the respondent had sought an order of disclosure relating to the damages claim. The applicant suggested that the matter of liability should be addressed first, and in the event liability was found, the time consuming and sensitive process of disclosing 'commercial secrets' could be undertaken. The trial judge ordered that the applicant disclose records relating to its damages claim in an unusual manner. It was ordered that the disclosure be completed under the joint supervision of accountants and attorneys for the applicants and respondents, rather than by the production of a list of documents drawn by the applicant and later challenged, if need be, by the respondent. The applicant refused to comply with the disclosure order, and at the hearing decided not to call evidence. The court had warned counsel to consider his course carefully. Thereafter the contractual licence claim was dismissed. The applicant sought leave to appeal the disclosure order and the dismissal order.

Held: (leave to appeal refused)

(i) The form of the disclosure order was irregular on its face and an arguable ground of appeal sufficient to justify the granting of leave to appeal. However, the claim had been dismissed for appropriate reasons (no evidence having been led), and therefore it was unnecessary to hear the appeal on the disclosure order.

JE

Civil procedure - Summary judgment

Chile Holdings (Cayman) Limited v SCO De Chile Hotel Corporation SA e t al

Grand Court (35/96)
Graham J
April 13 1998

Court Rules

Grand Court Rules O 13 and 14

Authority referred to

Canadian Arab Financial Corp. and Kilderkin Investments v Player [1984] CILR 63

Mr McQuarter for the plaintiff
No appearance by the defendant

Some of the defendant companies were placed in receivership in 1992. Thereafter, the assets of those companies were transferred to other companies by the directors, in an attempt to avoid creditors.

The plaintiff sought summary judgment against the second defendant Contadora S.A. and the seventh defendant LTC Limited.

Held: (application granted)

(i) Order 14 r 1(1) permitted an application for summary judgment to be made against a defendant where 'that defendant has given notice of intention to defend the action'. The defendants here had not done so. However, Order 13 r 6 provided that, subject to rules 1-4 (common law claims), 'if any defendant fails to give notice of intention to defend the plaintiff may, after the prescribed time and, if that defendant has not acknowledged service... proceed with the action as if that defendant had given notice of intention to defend.' Rules 1-4 did not apply and therefore the plaintiff was able to proceed.

(ii) The evidence disclosed fraudulent conduct by certain directors of the defendant companies. The purported transfers were found to be void. Only the receiver was empowered to dispose of assets, Canadian Arab Financial Corp. and Kilderkin Investments v Player.

JE

Civil Procedure - Standing - Abuse of Process

Webster v Registrar of Land and Audrey Thompson-Ebanks and others as Trustees of the Church of God Full Gospel Hall (West Bay)

Grand Court (839/97)
Murphy J
September 7 1998

Court Rules

Grand Court Rules Order 53 r 3 (7)
Authorities referred to

Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd [1981] 2 All ER 93

Mr Sharschmidt QC for the applicant trustees
Mr Lamongtagne QC for the respondent

A dispute arose regarding the rectification of land registers for parcels of land upon which was situated the various Church buildings. In 1997, the Registrar noticed that the land was registered in the name of the Church. The Church was a voluntary organisation. He acceded to a request of the trustees to transfer the property into their names as trustees. The respondent sought to challenge the registration. The applicant sought to have his application for judicial review struck out on the basis that he had no *locus standi* and his action was an abuse of process.

Held: (application dismissed)

(i) Usually the question of standing was to be left for the substantive judicial review application: Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd. However the result was obvious in this case. The respondent was a member of the Church. He had sufficient interest to bring proceedings.

(ii) The applicant argued that the delay by the respondent in challenging the register was a waiver of or acquiescence in the Registrar's decision. This submission was found to be 'bizarre and unreal', and the pressing of the point by counsel was found to be 'pathetic'.

(iii) The application was 'futile, pointless and devoid of merit'. Costs to the plaintiff in the cause.

JE

Civil procedure - Injunction - Setting aside - Striking out - Abuse of process

Haylock and others as representatives of the Church of God Full Gospel Hall (West Bay) v Audrey Thompson-Ebanks, and others as trustees of the Church

Grand Court (835/97)
Douglas J Actg
August 7 1998

Court Rules

Grand Court Rules Order 19 r 18

Authority referred to

American Cyamid Co v Ethicon [1985] 1 All ER 504

Mr Sharschmidt QC for the applicant
Mr Hill QC for the respondent

A dispute arose regarding the rectification of land registers for parcels of land upon which was situated the various Church buildings. In 1997, the Registrar, noticed that the land was registered in the name of the Church. The Church was a voluntary organisation. He acceded to a request of the trustees to transfer the propriety into their names as trustees. The respondents were granted an *ex parte* injunction in December 1997 to open the Church, which the applicants sought to set aside on the ground of a failure to disclose material facts. The applicants also sought to have the action struck out as an abuse of process, alleging that the core issue was already the subject of another cause.

Held: (application dismissed)

(i) The affidavit filed in support of the injunction was somewhat misleading in one detail, but the exhibit attached to the affidavit clarified the point and therefore the court was not misled.

(ii) The argument that the application for an injunction should have been made *inter parties* failed due to the obvious time pressure in the days leading up to the Christmas celebration: American Cyamid Co. v Ethicon.

(iii) Filing a separate action containing the same subject matter as that filed by the other party cannot, *ipso facto*, be considered to be frivolous or vexatious, nor does it constitute an abuse of the process of the Court. An action which challenged title did contain a serious issue to be tried. Consolidation migrant is the end result. The use of a related action to support an application for an injunction was not an abuse of process where time was of the essence.

JE

Civil Procedure- Default judgment- Effect

McField v Willmitt and Ebanks

Grand Court (296/86)
Smellie CJ
March 6 1998

Mr Hill QC for the plaintiff
Mr Henriques QC for the defendants

After a dispute between the plaintiff and first defendant regarding title to a property, the parties entered an agreement. A consent order was made in November 1987 allowing default judgment in favour of the plaintiff. The plaintiff agreed not to seek registration of title until the second defendant's claim was resolved by settlement or trial.

The plaintiff continued his action against the second defendant. The second defendant's claim to title depended on that of the first defendant as trustee. The effect of the default judgment, as it stood, was to prevent the second defendant from asserting title against the plaintiff. The trial began and the issue was raised regarding the effect of the default judgment as against the second defendant.

Held: (judgment for the plaintiff)

(i) There was no triable issue because the second defendant would have no hope of success unless the first defendant's title *vis-a-vie* the plaintiff could be established. This would require the setting aside of the default judgment. There was no mechanism by which a default judgment could be suspended as the result of the decision between the remaining parties. Either the default judgment existed or it did not.

(ii) The judgement of the court was a final order. In the event that the ruling was overturned on appeal, the trial would begin anew before another judge.

(iii) The ordinary rule that costs follow the event applied, except that a wasted costs order was made against the second defendant in the amount of one day of trial. The second defendant was on notice, through the defence to the counter-claim, that the plaintiff was going to rely on the default judgment at trial. Had he thought this position untenable, the second defendant should have attempted to strike out that pleading .

JE

Confidentiality – Requirement to comply with directive of foreign authorised officer – Requirement to give evidence in the Cayman Islands – Sufficient certainty and clarity

In the Matter of the Confidential Relationships (Preservation) Law (1995 Revision) and in the Matter of Anbacher (Cayman) Limited and in the Matter of an appointment of an authorised officer oursuant to the Companies Act 1990 of Eire

Grand Court (66/98)
Smellie J
May 13 1998

Legislation

Confidential Relationship (Preservation) Law (1995 Revision) Ss 4, 5
Companies Act 1990 (Eire) S 19
Evidence (Foreign Proceedings)(Cayman Islands) Order 1978

Authorities referred to

UJB Financial Corporation v Chilmark Offshore Capital Fund Limited [1992-93] CILR 237
In the Matter of H [1996] CILR 237
Re Cayman Trust Bank Limited (In Liquidation) (123/95) Written judgment delivered on July 14 1995
Ferrostaal AG v Jones [1984-85] CILR 143
Tournier v National Provincial and Union Bank of England [1924] 1 KB 461
In re I and R [1994-95] CILR N9

Mr Jones for the applicant
Mr Hall-Jones for the Attorney General as *amicus curiae*
Mr Bueno QC Mr Quin and Mr Lawless for the Government of Eire (with them Mr Ryan and Mr Appleby for the Minister for Enterprise Trade and Employment of Eire)

A Tribunal of Inquiry, established by resolution of both Houses of the Irish Parliament, was mandated to investigate possible corruption of certain public

officials. Their report referred to records relating to alleged illegal banking activity. The Tribunal had applied to the Grand Court of the Cayman Islands for assistance by way of the production of documentary evidence, when can only be refused on the basis that the Inquiry was not a 'Court or Tribunal' for the purposes of the Evidence (Foreign Proceedings)(Cayman Islands) Order 1978.

Pursuant to s.19 Irish Companies Act 1990, an authorised officer was appointed, who directed the alleged holder of certain documents in the Cayman Islands to produce those said documents. The company concerned refused, asserting that the directive also operated as a 'requirement' to give evidence for the purposes of s.4 Confidential Relationship (Preservation) Law (1995 Revision) (CR(P)L), so as to vest the Grand Court with jurisdiction to hear their application and give directions whether or not to comply. Moreover, they also claimed that they never carried on the alleged activity in Ireland, and that there had not been proper and effective service.

Held: (refusing to seize jurisdiction)

(i) The requirement to give evidence upon which jurisdiction was to be founded must be shown to be operative with a reasonable degree of clarity and certainty, which was not present at this time.

(ii) It had yet to be determined whether there was proper service in Ireland and pending, such a determination, the company concerned could not properly be regarded as being under an obligation or requirement to respond as contemplated by s.4 CR(P)L.

(iii) Where there was sufficient clarity and certainty, a foreign legal obligation could, however, create a requirement to give evidence for the purposes of the CR(P)L.

VC

Request for testimony from foreign court – Excessive breadth of request

In the Matter of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 and In the Matter of Civil Proceedings now pending before the United States District Court for the District of Columbia

Grand Court (847/97)
Smellie J
May 21 1998

Legislation

Evidence (Proceedings in Other Jurisdictions)(Cayman Islands) Order 1978 S 2
Evidence Act 1975
Foreign Tribunals Evidence Act 1856

Authorities referred to

First American Corporation et al and Sheikh Zayed Bin Sultan Al Nahayan et al Cause JC/97/1708
First American Corporation et al and Sheikh Zayed Bin Sultan Al Nahayan et al (CA)
The Westinghouse Case [1978] AC 547
Voluntary Purchasing Group v Insurco [1994-95] CILR 84
Re The State of Minnesota's Request (CA unreported judgment July 30 1997)
Re The State of Norway's Application (No1) [1981] 1 QB 433
Radio Corporation of America v Rauland Corporation [1956] QB 618
Re The State of Norway's Application (No2) [1990] 1 AC 181

Mr Jones and Mr Timms for the intended witnesses
Mr Rubin and Mr Barrie for the plaintiff

As a result of the collapse of the Bank of Credit and Commerce Holdings S.A. and its affiliates (BCCI), an American bank sought damages in the United States. BCCI had acquired the American bank in breach of United States law and when this interest became public; the bank's share value plummeted.

The bank now sought orders in the Cayman Islands granting and enforcing a Letter of Request from the United States District Court for the District of Columbia for the testimony of two intended witnesses.

Held: (refusing the request)

(i) Notwithstanding the duty and wish of the Court to assist the District Court in what was a very complex and important case involving international fraud, the Court had no power to re-write what was an oppressively wide request.

(ii) The arguments in this matter forced the elucidation of issues, which clearly pointed to how a carefully redrafted schedule of requested testimony, could overcome the objections in this case.

VC

COMPANY LAW

Local Companies Control Law – Grandfather companies – Exemption from full scope of the law

Hadsphaltic International Limited v The Immigration Board and Attorney General

Grand Court (881/97)
Graham J
June 12 1998

Legislation

Local Companies (Control) Law of 1971

Local Companies (Control) Law (1995 Revision) Ss 11, 25

Mr Alberga QC and Mr Walton for the plaintiff
Mr Hall-Jones for the defendants

The plaintiff, a building company that had traded for over thirty years in the Cayman Islands, had applied for the renewal of their trade and business licence, pursuant to the Local Companies (Control) Law (1995 Revision) (hereinafter referred to as ('LCCL'). The Immigration Board sought to impose a condition on the granting of this licence to the effect that the plaintiff would be restricted to development projects in excess of 1.5 million dollars.

When asked to reconsider their decision, the Immigration Board asserted that the decision was taken in accordance with the Law, it being necessary for the protection of local interests. The plaintiff, however, contested that they were in a special position, since they had been trading in the Islands prior to the enactment of the Law in 1971 and that s.25 LCCL consequently exempted them from the rigorous considerations outlined in s.11(3) LCCL, including the protection of local interests.

Held: (quashing the purported decision of the Immigration Board)

(i) The plaintiff had, by virtue of s.25 LCCL, a legal right to a grant, subject only to s.11(2) LCCL and not to the more extensive provisions of s.11(3) LCCL. The substantive right enshrined in s.25 could not be removed by s.11(3) unless this was specifically stated.

(ii) The scope of s.11(2) LCCL extended to restrictions on, *inter alia*, operational locations and the transfer of shares and did not encompass the more extensive criteria contained in s.11(3) LCCL. As such, the purported insertion of a restriction based upon s.11(3) LCCL in the licence of a so-called 'grandfather company', was *ultra vires* the Board, whose power here were confined to s.11(2) LCCL.

VC

Insolvency – Hochpot – Surrender of security as pre-condition to claiming in insolvency – Conversion of contract of insurance from contract of indemnity to contract of liability – Entitlement to interest under Insolvency Rules

Delta American Reinsurance Company (In Liquidation) v GE Cleaver and Noel Bodden

Court of Appeal
Zacca P, Kerr and Collett JJA
April 16 1999

Legislation

Companies Law (1995 Revision)
Insolvency Rules of the United Kingdom (UK) (SI 1986 No1925)

The Judicature Law (1995 Revision)
Insolvency Act 1986

Court Rules

Judgment Debts (Rate of Interest)Rules 1995

Authorities referred to

Re Compton Corp 831 F 2 Ed 586 (5th Circuit 1987)
Moor v Anglo Italian Bank [1879] 10 Ch D 681
Blanco de Portugal v Waddell [1879-80] 5 App Cas 161
Power Curber International Ltd v National Bank of Kuwait SAK [1981] 3 All ER
Re Ford [1900] 2 QB 211
Re West Cumberland Iron & Steel Company [1893] 1 ChD 713
Kemper Reinsurance Company v Covuran 79 NY 2d 353 [1972]
Unigard Sec Ins. Co. v North River Ins 762 F Supp.566 (SDNY) [1991]
Aetna Cas and Sur.Co v Home Ins.Co 882 F Supp 1328 [1995]
Re Humber Ironworks and Shipbuilding Company [1869] LR CH App 643

Authorities works cited
Fletcher's Law Of Insolvency [1990]
Dicey and Morris Conflict of Laws - 11th Ed. Vol.2
Strain Reinsurance [1994]

Mr Roy for the Plaintiff
Mr Walton for the Defendant

The appellant in this case was an insurance company, licensed to do business in Kentucky and New York. The company had been placed in liquidation by the Court in Kentucky in September 1985. The respondents were the liquidators of Transnational Reinsurance Company Ltd ('Transnational'), a company incorporated in the Cayman Islands which had carried on the business of retrocessionaire. Transnational went into voluntary liquidation in January 1993 and the winding-up proceedings came under the supervision of the Cayman Court in March 1993.

In March 1984 the Appellant had entered into a Retrocession Agreement ('the agreement') with Transnational whereby the appellant ceded and Transnational accepted a percentage of the appellant's liability under certain of the appellant's contracts and treaties of reinsurance. Under the agreement the appellant paid to Transnational a percentage of premiums which it received from its insured in return for the acceptance by Transnational of that percentage of the Appellant's liabilities for losses it insured and by means of which Transnational agreed to indemnify the appellant in respect of liabilities to that extent. Article XVI of the agreement provided that: 'reinsurance shall be payable directly to [Delta re] or its liquidator...on the basis of the liability of [Delta re] without diminution because of the insolvency of [Delta Re] or because of the liquidator...of [Delta Re] has failed to pay all or a portion of any claim'.

In May 1989 the appellant commenced proceedings against Transnational in the New York Courts to enforce claims for reimbursement for losses incurred pursuant to the agreement. Transnational counter-claimed and the appellant applied for and was granted security for its costs of defending the counterclaim in the sum of US$735,393. Pursuant to the order for security for costs dated July 20, 1990, a Letter of Credit was issued by Barclays Bank plc Cayman.

Following the liquidation of Transnational, the appellant submitted a claim for covered losses which was only partially admitted by the liquidators and the appellant applied pursuant to Order 102 rule 17, for an order varying the decision of the respondents to reject the appellant's proof of debt and for the proof to be admitted as to US$1,583,648.40. The appellant further sought a declaration that the appellant was a secured creditor in the liquidation to the extent of US$735,393 (in respect of the sum paid by Barclays Bank plc pursuant to the Letter of Credit) and further, or alternatively, that the payment of) the sum due under the Letter of Credit did not represent a part payment or any distribution or dividend which might be due to the appellant in the liquidation.

At the hearing before Smellie, C.J., the following issues were identified as requiring determination:

(1) whether or not the appellant was entitled to treat the Letter of Credit as security for its face value and, in addition, entitled to claim for the balance owed in the liquidation of Transnational;

(2) whether or not the appellant was entitled to claim certain contingent liabilities - incurred but not reported losses (IBNR); and

(3) whether or not the appellant was entitled to interest claimed on losses which had been paid on claims prior to Transnational's liquidation.

The learned Chief Justice found with regard to the first issue, that because the insolvency proceedings had intervened before the conditions for enforceability of the Letter of Credit had been met, i.e. because the appellant had notice of the liquidation before entering the default judgment against Transnational and thus enforcing the terms of the Letter of Credit, the amount of the Letter of Credit was impressed with the statutory trust arising under s.100 Company Law (1995 Revision) and thus remained part of Transnational's estate for the purposes of the liquidation. Accordingly, the appellant was faced with the choice of electing to keep the amount realised on the Letter of Credit and abandoning its claim in the liquidation, or pursuing its claim in the liquidation, in which case the amount realised on the letter of credit would have to be brought into hotchpot. The learned Chief Justice further upheld the IBNR claim and held that the appellant was entitled to interest as claimed at the rate of 15% per annum pursuant to the Insolvency Act 1986.

The appellant appealed on the ground that the learned Chief Justice had erred in applying English/Cayman law in deciding the question of whether the sum payable under the Letter of Credit formed part of the liquidation estate of Transnational.

Held: (allowing the Appeal and dismissing the respondents' cross-appeal)

(i) Applying the exception to the principle in Blanco de Portugal v Waddell , the principle of surrender into hotchpot as a pre-condition to the creditor's eligibility to lodge proof did not apply to the realization of *bona-fide*, pre-existing securities against the bankrupt's foreign assets: such a creditor could prove for the balance of his claims against the bankrupt without being obliged to surrender his security; although he must account for what he has received.

(ii) Whether, as under the New York Law, the property in the security passed on creation of the Letter of Credit to the beneficiary, or the approach of the Learned Chief Justice was applied, on the basis of the nature of a Letter of Credit as described in Power Curber International Ltd v National Bank of Kuwait SAK, it was to ignore the realities to hold that the intervening insolvency of Transnational could defeat the purposes for which the Letter of Credit was created and issued in accordance with the directions of the New York Court. Accordingly, the appellant was entitled to realize the security in the Letter of Credit and in addition prove for the balance of its claim in the liquidation without being obliged to bring the amount realized on the security into hotchpot.

(iii) Upholding the decision of the Learned Chief Justice, as a matter of the Law of Cayman as well as New York, the effect of Article XVI - the Insolvency Clause - was to convert the contract of insurance from one of indemnity into one of liability, i.e. one in which the reinsurer no longer simply indemnifies against actual claims paid but agrees to meet its prorated share of all liabilities of its reinsured. Accordingly, the reinsurer is obliged to pay the reinsured based on the liability of the reinsured, not based on whether the reinsured has actually paid out on those liabilities. Hence, estimates of claims incurred but not yet reported were provable in the liquidation on proper actuarial assumption that they will crystallize.

(iv) Applying rule 4.93 of the UK Insolvency Rules (applicable by virtue of Grand Court Rules 102, rule 17) and the principle in Re Humber Ironworks and Shipbuilding Company, in the case of an insolvent company which was being wound up, creditors whose debts carry interest were entitled to dividends... upon what was due for principal and interest at the winding up. The legislative intent of Order 102, rule 17 was to incorporate the English Insolvency Rules only in so far as such rules are not inconsistent with ...such other rules as may be applied to the proceedings in question. In this case the relevant rules were to be found in The Judicature Law (1995 Revision) and the Judgment Debts (Rate of Interest) Rules 1995 which provided for interest at the rate of 7 3/8 percent per annum. Accordingly, the Order for interest of the Learned Chief Justice would be affirmed subject only to a variation of the rate of interest from 15 percent (being the UK rate of interest) to 7 3/8 percent per annum.

DOB

Confidentiality – Application of s.4 Confidential Relationships (Preservation) Law to information obtained pursuant to s.126 Companies Law – Leave of the Court needed

In The Matter Of Bank of Credit and Commerce International (Overseas) Ltd. And In The Matter Of The Companies Law (1995 Revision)

Grand Court (184/1991)
Smellie J
January 1998
Legislation

Companies Law (1995 Revision) S 126
Confidential Relationships (Preservation) Law (1995 Revision) Ss 3 and 4
Insolvency Act 1986 S 36

Authorities referred to

Re Arrows Ltd (No 2) [1994] BCLC 355
Morris Richards and Akers (as liquidators of BCCI SA) v Bank of America National Trust and Ass et al (unreported)

Miss Jafa for the applicants
Mr Ritchie for the respondent

This was an application for clarification of an earlier ruling concerning the applicability of s.4 Confidential Relationships (Preservation) Law ('CR(P)L') to proceedings under s.126 Companies Law ('The Law'). The applicants wished to use information obtained pursuant to s.126 in connected proceedings to be brought in another jurisdiction. The central issue for determination was whether confidential information obtained and thus exclusive of CR(P)L, entirely lost its character as information governed by CR(P)L, and whether it could then be used for purposes collateral to, or separate from those of the instant liquidation.

Held:

(i) S.126 gave wide powers enabling the court to help a liquidator 'to discover the truth of the circumstances in connection with the affairs of the company...in order that the liquidator may be able, as effectively as possible...with as little expense as possible...to complete his function as liquidator'. The power did not, however, extend so far as to immediately enable a liquidator to use the information he obtained as an officer of the court, pursuant to s.126 of the Law, for other collateral purposes of the liquidation. This was 99the case at least without the leave of the court.

(ii) Before such further use could be authorised the discretion of the court must be specifically exercised pursuant to CR(P)L.

(iii) Where applicable, s.4 CR(P)L provided its own statutory guidelines for the exercise of judicial discretion whether or not to allow indulgence, and that

discretion was to be exercised by the court and could not be delegated to the liquidators, even though officers of the court.

(iv) On the facts of the present case, the proposed use fell within the ambit of s.126 of the Law.

DOB

Rectification of company's register – Registration of transfer of shares pursuant to Order of Superior Court of Quebec – Correct procedure for recovery of funds in overseas companies

Mayer Diamond Interim Receiver Manager of 160088 Canada Inc 151095 Canada Inc and 152931 Canada Inc v Socoa International

Grand Court
Harre CJ
September 3 1998
Legislation
Companies Law (1993 Revision) Ss 32, 45 and 47

Authorities referred to

Reese River Silver Mining Co v Smith (1869) LR 4 HL 64
Colonial Bank v Cady and anor (1890) HL Vol. XV267
AG v Bank of Nova Scotia et al (1984-85) CILR 418

This summons concerned an application by the plaintiff for the rectification of the defendant company's register pursuant to s.45 of the Companies Law (Revised) and/or the inherent jurisdiction of the Court to record the registration of the transfer of shares in the defendant company to the plaintiff pursuant to an Order of the Superior Court of the Province of Quebec dated 22nd December 1993.

The Order of the Superior Court provided, *inter alia*, that the several defendants in that action should assign and remit to the plaintiff all their shares in the defendant company within 10 days by signing the form annexed to the judgment, and that in the event of their failure to comply with the terms of the Order, the Order should avail instead of their signatures to effect the transfer of the shares.

The defendants in the Canadian action failed to comply with the terms of the order. The defendant company, in turn, refused to register the transfer of shares and the plaintiff applied, pursuant to s.45 Companies Law (Revised), for rectification of the register of the defendant company to record the transfer of the aforesaid shares to the plaintiff.

Held: (refusing the application)

(i) Following Colonial Bank v Cady and anor the rule of private international law is that shares are deemed to be situated in the country where they can be effectively dealt with between the shareholder and the company. In this case there was thus only one place where issues regarding the

perfecting of title by rectification of the register could be dealt with. It was before the Grand Court of the Cayman Islands under s.45 Companies Law.

(ii) The transfer of shares in the defendant company was subject to s.32 Companies Law (Revised) which provided that any transfer of shares was subject to any restriction or condition on the transfer of the shares or interest set out in the regulations of the company. In the case of the defendant company, the Articles provided that the transfer must be a voluntary transfer by the registered owner.

(iii) There were established procedures for recovering funds alleged to have been wrongfully hidden in overseas companies. Use of the summary procedures for rectification of the register of the defendant company under compulsion of the order of the Canadian Court was not among them.

DOB

Law of Bahamas on transfer of shares – Effect of dishonest transfer of shares – Standard of proof in civil cases – Meaning of triable defence

AB Ltd and CD Ltd V E and others

Grand Court (389/92)
Graham J
August 3 1998

Legislation

International Business Company Act 1989 Ss 9(1), 10(1) and 53

Authorities referred to

Re H Minors [1996] AC 563
R v Ghosh (1982) 75 Cr App 154
National Westminister Bank PLC v Daniel [1994] 1 All ER 159
Banque de Paris v De naray [1984] 1 Lloyds Rep21 & 23

Mr Cohen QC, Mr Moses and Miss Jafa for the plaintiffs
Mr Bueno QC and Mr Quin for the receiver
Mr Lavender and Mr Levy for the 7th defendant

This was an application by the plaintiffs to enforce by equitable execution certain judgments which they had obtained against the 4th defendant, H Ltd. The property over which execution was sought were shares in UVW, a company incorporated in the Cayman Islands. The shares in UVW were registered in the name of XYZ S.A and were the property of the 4th defendant, H Ltd, a fact which was disputed by the 7th defendant, JKL S.A, but supported by the receiver of UVW.

The agreed facts were:

1. By a judgment of Schofield J (as he then was) in 1995 the 4th defendant, had been found guilty of a conspiracy to defraud the plaintiffs by falsifying their accounting records. The aggregated damages were assessed at in excess of $2 billion.

2. The last audited financial statements of the H Ltd were signed by the 3rd defendant, G, as 'sole director and shareholder'.

3. Amongst the assets owned by H Ltd were 100% of the issued shares of UVW.

4. In a short period of time around 27th February 1991 all, or substantially all, of H Ltd's assets, including the shares in UVW were transferred to MNO Holdings Ltd ('MNO'), a Bahamian company of which the 3rd defendant, G, was the sole director and shareholder. None of these transfers were a sale and no consideration was given. By the declaration of trust dated July 1990, G held his shares in MNO on trust for his wife and children on his death or incapacity, subject to the provision that he retain full voting rights in respect of the shares which he settled.

5. On 4th May 1991, MNO purportedly transferred the entirety of the issued share capital in UVW to the 7th defendant, JKL SA, its wholly owned subsidiary. This purported transaction was not a sale and no consideration was given for the transfer. JKL SA remained the registered shareholder until the registration in its place of the receiver by appointment of the Grand Court on 10th November 1992.

The disputed facts were as follows:

1. What was the relevant law of the Bahamas on the transfers?

2. Was the transfer of UVW's shares on 27th February 1991 made:
   - Dishonestly, as part of a dishonest scheme entered into with the intention of defrauding creditors or;
   - As part of a *bona fide* corporate re-organisation, the purpose of which was to place the 4th defendant's assets under a new holding company, MNO, and to increase the indirect beneficial interest of the 4th defendant's children in the shares and reduce the wives' interest as contended by the 7th defendant?

3. If the transfer of UVW's shares on 27th February 1991 was made as part of a dishonest scheme entered into with the intention of defrauding creditors, was it ineffective on the ground that the 3rd defendant, as the sole director of the 4th defendant, had no power to effect the transfer under Bahamian law?

The issue for the court to determine on the application was whether the 7th defendant had shown a triable defence to the application for equitable execution.

The court heard evidence from expert witnesses on behalf of the Receiver and the plaintiffs and the 7th defendant on the relevant provisions of Bahamian law, namely, Ss 9(1), 10(1) and 53 International Business Company Act 1989. It was

contended by the expert witness for the 7th defendant that the transfer of the issued shares in UVW to MNO was valid under s.9(1) as 'a disposition necessary or conducive to the conduct, promotion or attainment of the object or purposes of the company, having regard to s(1)(i) which permits action to – 'protect the assets of the company for the benefit of the company and its members and at the discretion of the directors for any person having a direct or indirect interest in the company." The plaintiff's expert, by contrast, contended that s.9(1) was expressly subject to s.53 which provided that it was the duty of a company to act in good faith with a view to the best interests of the company, and that it could never be in the best interests of the company nor necessary for the attainment of its lawful objects, to cheat creditors.

Held: (granting the application)

(i) The directors of H Ltd had a duty to act honestly and in good faith with a view to its best interests. It could never be part of a company's best interests to cheat a creditor, and it was not necessary nor conducive to the attainment of the company's objects for it seek to cheat creditors. S.9(1) did not permit a company to cheat its creditors or to act outside its objects and was to be construed by reference to s.53 which required a director to act honestly and in good faith with a view to the best interests of the company.

(ii) The standard of proof in civil cases where very serious allegations were made was that laid down by the House of Lords in Re H Minors where it was held that where serious allegations are made that did not mean that the standard of proof was higher than upon the balance of probabilities. What the court had to keep in mind was 'the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities in deciding whether, on balance, the event has occurred. The more improbable the event the stronger must be the evidence that it did occur, before finding on the balance of probability that its occurrence has been established.' In determining dishonesty, regard may be had to the definition given by Lord Lane in R v Ghosh – 'That what was done was dishonest by the standards of ordinary and decent people and that (the parties) must have realised that what they were doing was dishonest by the standard of ordinary and decent people.'

(iii) The onus was on the 7th defendant to satisfy the Court that there was evidence which fairly or reasonably indicated the probability of its having a real or *bona fide* defence and not merely the faintest possibility that there was such a defence. As indicated in National Westminster Bank PLC v Daniel and Banque de Paris v De Naray the mere assertion in an affidavit of an alleged series of facts was not of itself grounds for granting leave to defend.

DOB

CONFIDENTIALITY

'Proceedings' in the context of the Confidential Relationships (Preservation) Law - Public policy concerns underpinning such definition - International and judicial comity where co-operation sought for disclosure of confidential information.

In the Matter of the Confidential Relationships (Preservation) Law (1995 Revision)
And in the Matter of disclosure actions between C Co and DSB and MG
And in the Matter of an Application before the United States District Court for the Southern District of New York to enforce an Administrative subpoena of Commodity Futures Trading Commission against PBWT

Grand Court (2/99)
Smellie CJ
February 11 1999

Legislation

The Confidential Relationships (Preservation) Law (1995 Revision)
The Mutual Legal Assistance Treaty with the United States of America
The Evidence (Proceedings in Other Jurisdictions)(Cayman Islands) Order 1978

Authorities referred to

Norwich Pharmacal v Customs and Excise Comissioners [1974] AC 133
In the Matter of H [1996] CILR 237
United States v Morton Salt Co (1950) 338 US 632
Rio Tinto Zinc Corporation v Westinghouse [1978] AC 547
Herbert Berry Ass v IRC [1978] 1 All ER 163
Attorney General v Bank of Nova Scotia [1984-85] CILR 418
In the Matter of BankAmerica Trust and Banking Corp [1992-93] CILR 574
Barclays Bank Plc v K Ltd E Ltd and H Ltd [1994-95] CILR N4
Stutts v Premier Benefit Capital Trust [1992-93] CILR 605
In Re the State of Norway (No 2) [1990] 1 AC 723
In the Matter of the Ontario Securities Commission [1995-95] CILR 131
CFTC v Schindler Grand Court (237/97)

Mr Ritchie for the applicant C Co
Mr Helman for CFTC
Mr Hall-Jones for the Attorney General (as *Amicus Curiae*).

Previous proceedings in the Grand Court had led to the granting of Norwich Pharmacal orders in favour of C Co, resulting in the disclosure of confidential information to C Co by DSB and MG. The information thus obtained enabled C Co to commence an action in Grand Court to trace and recover monies, representing, in part, the proceeds of a massive fraud perpetrated against it. The Norwich Pharmacal orders were given upon C Co's express undertaking that the information be disclosed or used for no purposes, without the leave of the Court,

apart from the prosecution of the tracing action within the jurisdiction. Subsequent application to the Grand Court, by C Co, led to leave being granted to use the information to pursue its tracing claims in other jurisdictions, including in the State of New York. Leave in that instance was given upon the further undertaking of C Co's lawyers abroad, PBWT , in similar terms to the original undertaking.

The present action arose as a result of PBWT becoming the subject of an administrative subpoena, issued from the Commodity Futures Trading Commission (CFTC), requiring the production of the information obtained pursuant to the orders of the Grand Court. PBWT cited it's undertaking to the Grand Court in not complying with the subpoena, resulting in the CFTC applying for enforcement of the subpoena in the New York Courts. Non-compliance by PBWT would lead to their being held in contempt. Accordingly, the present action comprised an application by C Co to allow PBWT to comply with the subpoena, the New York proceedings having been adjourned to allow this application to be made.

The issues before the Grand Court comprised the following:

1. Whether the Grand Court had jurisdiction to direct disclosure in response to the CFTC's subpoena, pursuant to the Confidential Relationships (Preservation) Law (CRPL), s.4; which required that 'proceedings' be in train in which the evidence required is to be given;

2. whether any public policy concerns arose which would preclude or condition the disclosure of confidential information to a regulatory body such as the CFTC *qua* an investigatory body;

3. whether the proceedings in the United States, ie. those before the CFTC and those now instituted before the New York District Court, gave rise to principles of international and judicial comity.

Held:

(i) This ruling was not to be taken as a general precedent. Direction given that PBWT could make disclosure, subject to the pre-condition that the New York District Court first made an order compelling PBWT to do so.

(ii) To determine whether the administrative subpoena of the CFTC, which at the time of this application did not carry the sanction of the New York District Court, constituted a 'proceeding' within the meaning of the CRPL it was necessary to examine the status of the CFTC itself in this regard. It was apparent that the CFTC was in a position analogous to a Grand Jury from the Memorandum of Law filed by counsel in support of the motion to enforce the subpoena in which reference to United States v Morton Salt Co, a decision of the US Supreme Court to that effect, was made. A Grand Jury was not a Court and the Grand Court has refused directions that confidential information be given in response to it's subpoenas, In the Matter of H. In addition, it was a well established principle of English common law (and hence of Cayman law) that the courts will not and are

not, as a matter of judicial comity, obliged to render assistance to the deliberations of the Grand Jury, Rio Tinto Zinc Corp v Westinghouse. Notwithstanding this, *Smellie, CJ* recognised that the CFTC's role and remit were entirely proper. It regulates, under the auspices of the Commodity Exchange Act, commodities futures and options trading in the US in order to protect market participants from manipulation, abusive trade practices and fraud. The CFTC's investigation into C Co's publicly disclosed massive trading losses was being conducted to determine, in relation to those losses, whether there had been violations of the Commodity Exchange Act provisions. It was this aspect that compelled the Court to recognise the legitimate interest which the CFTC had in investigating the alleged fraud on C Co to determine whether the mechanics of the fraud violated US laws. It was also accepted that as the matter was before the New York District Court by way of Notice of Motion it came within the meaning of 'proceedings' for the purposes of CRPL, s.4. That pending Notice of Motion, being preliminary to the court proceedings themselves, distinguished the instant case from the Grand Jury subpoena which was the subject of the unsuccessful application in In the Matter of H. As a result, there was jurisdiction in the Grand Court to give directions in this matter. However, before PBWT could assert that they were required, or intended to give evidence in 'proceedings', they had first to be faced with an order of the New York District Court to that effect, and such order was required as a precondition of the Grand Court's directions.

(iii) The public policy concerns in the instant case were of reduced importance for two reasons. Some of the information was already in the public domain. No concerns arose with respect to repercussions to innocent third parties - a possibility which could arise in other cases if confidential information were to be abused. This was the case notwithstanding the fact that CFTC refused to give the undertaking that it would not, without the leave of the Grand Court, use the information for any purpose other than it own investigation. It was explained that the CFTC could not give such an undertaking because it would preclude access to the information by other regulatory or administrative agencies with whom it was obliged to co-operate. The result being that the Court was being asked to direct that confidential information be disclosed without any assurance as to the limitations on its use. This consequence was, for many reasons, contrary to public policy - Attorney General v Bank of Nova Scotia, In the Matter of BankAmerica Trust & Banking Corp and In Re H. However, in the instant case, the Court had to balance conflicting public policy concerns. The nature of the allegations involved and the fact that the information was originally disclosed in redacted form by the banks, combined with the Court's acceptance that it was not in the public interest to obstruct appropriate regulatory agencies in appropriate countries, and cases in the conduct of their regulatory activities, weighed in favour of disclosure. In addition, this was not a case involving the enforcement of foreign penal measures as the CFTC were embarking upon investigations and were still some way from seeking penal sanctions against anyone: Barclays Bank Plc v contract Ltd, E Ltd and H Ltd and Stutts v Premier Benefit Capital Trust. The provision of information for the purposes of such investigations had been

distinguished from the enforcement of penal sanctions: In Re The State of Norway.

(iv) Notwithstanding the conclusions reached by the Court, the case presented difficulties which, as a matter of international and judicial comity, should have been avoided by recourse to other appropriate avenues of assistance available under the Mutual Legal Assistance Treaty and the Evidence (Proceedings in Other Jurisdictions) Order 1978. This would have avoided the embarrassment of seeking to compel a recipient of confidential information to disclose it upon pain of penalty in the US where such disclosure would result in the recipient being in breach of undertakings given to the Grand Court.

RC

Undertakings necessary for Orders granted under s4 Confidential Relationships (Preservation) Law

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

U Ltd v W & BB Ltd

Grand Court (563 & 4/98)
September 24 1998
Smellie CJ

Legislation

The Confidential Relationships (Preservation) Law (1995 Revision) (CRPL)

Authorities referred to

Deutsch Sudamerikanische v Codelco [1996] CILR 1
Laager v Kruger [1996] CILR No 2
Bankers Trust Co. v Shapira [1980] 1 WLR 1274
Omar and Others v Omar and Others [1995] 1 WLR 1428

Mr Murray for both defendant banks
Mr Hall-Jones for the Crown
Mr Quin (at the invitation of the Court) for the plaintiff

This was the second defendant's application for directions under s.4, CRPL as to how it should respond to an Order of the Grand Court dated August 31st 1998. This Order included discovery and vested a very wide discretion in the plaintiff as to the deployment of information so obtained in proceedings abroad. In effect, the Order permitted the plaintiff to use the information to the extent that they deemed necessary for the purpose of any related tracing claim or any other claim which the plaintiff may bring anywhere in the world against the defendants.

Held :

(i) The Order of August 31st 1998 did not generally represent the present state of Cayman Islands law or practice. The applicants were directed to disclose to the plaintiff the information as required by the Order on condition that the plaintiff first undertook in writing to the Court that any information disclosed would not be used for any purposes apart from the conduct of the plaintiff's case in the action to be brought in this jurisdiction, without the leave of the Court being first obtained for use for any other purposes.)

(ii) There were many reasons why such a wide order could be prone to abuse even in the hands of a responsible and well-meaning plaintiff, examples of which were discussed in Deutsch Sudamerikanische v Codelco. Given the importance of this issue to local practice, the directions given by the Court in the instant case were intended to reflect what should be regarded as the standard practice. Were it not for the very wide terms of the Order of August 31st 1998, an implied undertaking would have arisen at common law and sufficed for the purposes of assuaging concerns about misuse of information. This was an aspect of practice, well recognised at common law. The principles were comprehensively considered in Deutsche Sudamerikanische, Laager v Kruger and Bankers Trust Company v Shapira. The Order made on August 31st 1998 was based upon a form now vogue in England and Wales and which follows the precedent created by Omar and Others v Omar and Others. This authority was not to be regarded however as authority for sweeping settled practice aside. As the Court had no automatic remit over matters outside its jurisdiction, some justification must be shown for the use abroad of information obtained pursuant to its Orders. Treating the process as automatic and as left to the discretion of the plaintiff was wrong in principle, and where the merits of use abroad were not first demonstrated, the duty to prevent misuse would be abdicated. Furthermore, in this jurisdiction, whilst the interests of justice would be considered paramount there were public policy issues which also fell to be considered in this regard.

RC

Undertaking given to Grand Court - Rights attaching to undertakings - Enforcement of undertakings

WX v YZ

Grand Court (403/98)
Smellie CJ
November 17 1998

Legislation
Confidential Relationships (Preservation) Law (1995 Revision)

Court Rules

Rules of the Supreme Court of England and Wales

Authorities referred to

Cheltenham & Gloucester Building Society v Ricketts [1993] 4 All ER 276

Ms Ebanks for the petitioner
Mr Barrie for the respondent

WX applied to the Grand Court, in July 1998, for directions regarding their response to orders of the US District Court for the Southern District of New York. The orders required the disclosure of certain information which was rendered confidential by the Confidential Relationships (Preservation) Law (1995 Revision). The directions given by the Grand Court were that WX could disclose information in redacted form but, as a precondition to this direction, YZ were asked to give certain undertakings to the Court. Among these undertakings was an undertaking that YZ would pay the costs properly incurred by XY in complying with the terms of the order.

The subpoenas which WX had sought directions in respect of were issued in respect of the ongoing litigation resulting from the collapse of BCCI. WX had come into possession of thousands of documents during their earlier involvement in the audit process of BCCI. Compliance with the Grand Court Order permitting disclosure of some of these records in redacted form had involved WX in considerable expenditure for which they sought recompense, pursuant to the undertaking given by YZ. YZ submitted that WX had grossly overredacted the documentation such that WX had, in effect, breached the direction for disclosure and, as there was already a motion to determine the same issues of costs listed for hearing before the New York District Court, that it was the appropriate forum

Held: (Ordering that the summons and cross-summons be adjourned for a set date before Mr. Justice Graham as the judge who required the undertaking.)

(i) An undertaking was not in the right of the party - in this case WX. It was an undertaking given to the Court as deemed necessary for the efficacy of its own orders. In effect it was part and parcel of the order of the Court. The power to enforce it was the inherent power of the Court to enforce its own orders, to be exercised in its discretion. The principles were to be found in Order 29 Rules 29/L/30-31 of the Rules of the Supreme Court of England and Wales. In one of the leading cases there cited, Cheltenham & Gloucester B.S. v Ricketts, Peter Gibson stated:

'The undertaking is given to the Court and not the respondent, who can ask the Court to enforce it but has no right to its enforcement or any right to damages until the discretion is exercised in his favour and damages are awarded.'

(ii) It was axiomatic that that discretion could only be exercised by the same Court, and preferably the same judge, who required the undertaking. That Court and judge was well placed to take all relevant factors into account, including whether to defer the issue of costs to the discretion of another Court if satisfied that that Court had a wider picture of the relevant issues. The Court that made the order could, if it enforced the undertaking, delimit the

award by virtue of the conduct of the party taken in compliance with its order. Gross overredaction of documentation which effectively resulted in a breach of the directions of the Court would be reason for the exercise of the discretion to delimit the award of costs.

RC

CONFLICT OF LAWS

Jurisdiction - Service on absent defendants - Grounds - Exercise of discretion - Retrospective validation under sub-rule (c) - Forum conveniens principle - Lis alibi pendens

Chile Holdings (Cayman) Ltd v Contadora Enterprises SA

Argentine Holdings (Cayman) Ltd v Rhone Developments SA and Loire Developments SA

Court of Appeal (27/98)
Zacca P, Kerr and Collett JJA
April 15 1999

Court Rules

Grand Court Rules Order 2 rule 1 (2); Order 11 rule 1(1) and 4(2)

Authorities referred to

Lhasa Investments Ltd v International Credit and Investments Company (Overseas) Ltd [1994-95] CILR 293
Metall und Rohstoff AG v Donaldson Lufkin [1990] 1 QB 391
The Eras Eil Actions [1992] 1 Lloyds reports 570
El Ajow v Dollar Land Holdings [1993] 3 All ER 717
Qatar Petroleum v Shell [1983] 2 Lloyds Rep 35
Kuwait Oil Tanker v Al Bader [1997] 2 All ER 855
Guaranty Trust of New York v Hannay [1915] 2 KB 536
Spiliada Maritime Corporation v Cansulex [1987] AC 460
The Abidin Daver [1984] AC 398
Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd [1989] 3 All ER 65

Authoritative works

Dicey and Morris on The Conflict of Laws (12th ed)
Mr Mallins QC and Mr Scott for the appellants/defendants
Mr Cohen QC Mr McQuater and Ms Jafa Bodden for the respondents/plaintiffs

On March 20 1998, the trial judge had dismissed summonses brought by the appellants, three Panamanian companies, seeking to set aside orders of the Grand Court allowing service of process on them outside the Cayman Islands jurisdiction.

These, and all other defendants relevant to the present proceedings, were at all material times outside the jurisdiction. The plaintiffs to the 1st instance proceedings, before Graham J, the present respondents, are Chile Holdings (Cayman) Ltd and Argentine Holdings (Cayman) Ltd, both being companies incorporated in the Cayman Islands.

Erstwhile directors of the respondents, Pharon (P), Whitbeck (W) and Djouhri (D), in this capacity, had brought about the transfer of the entire shareholding of three other Panamanian companies, formerly held by the respondents, to the appellant companies, of which P,W and D were also directors. The respondents commenced proceedings seeking a declaration that the purported share transfers were void or, alternatively, an order setting the transfers aside and an order requiring P,W and D to compensate the respondents for alleged breaches of fiduciary duty.

Whilst the appeal was brought in relation to an interlocutory matter, by an order of the Court of Appeal dated August 1998 the matter was directed to be argued *inter parties* and, following the consent of the parties, it was agreed that the application be treated as the hearing of the substantive appeal.

The trial judge had exercised his discretion in favour of allowing service out of the jurisdiction by reliance upon paragraphs (c), (f) and (g) of Order 11 rule 1(1). The appellants sought to set aside this ruling on the following grounds:

1. That the claims of the plaintiffs did not fall within any of the paragraphs of Grand Court Rules, Order 11, rule 1(1);
2. That, in any event, the learned judge was wrong to exercise his discretion in favour of service out of the jurisdiction under Order 11 rule 4(2);
3. That the learned judge was also wrong to conclude that the Cayman Islands was the *forum conveniens* for the resolution of the dispute, as the substance of the respondents' claim was to seek restitution in connection with acts performed outside the Cayman Islands and relating to the shareholding of Panamanian companies.

The trial judge's finding that paragraphs (f) and (g) were applicable in the present circumstances was conceded, on appeal, to be wrong by counsel for the respondents, who consequently placed their reliance solely upon paragraph (c).

Held: (dismissing the appeal, but finding partly in favour of the appellants)

(i) Since several of the grounds of appeal related to the exercise of discretion by the trial judge, it was important firstly to restate the principles governing the review of such discretion by the appellate court. The strict test applied in Lhasa Investments Ltd was authoritative and correct: it was not the function of the appellate court in such circumstances to simply substitute its views for those of the trial judge.

(ii) Before the question of discretion became relevant, however, it was first necessary to determine if the respondents had established that one or more of the jurisdictional heads of Order 11 rule 1(1) applied. The test was a

strict one, with any doubt to be resolved in favour of the foreign defendant: Metall und Rohstoff v Donaldson Lufkin.

(iii) The concession of respondent counsel regarding paragraphs (f) and (g) was proper and correct. This, to some extent, called into question the learned judge's approach to the applicability of the sub-rule itself.

Paragraph (f), which applied to certain claims founded on a tort, fraud or breach of duty, was inapplicable in the present circumstances because its requirement that damage was sustained or resulted from an act committed within the jurisdiction was not satisfied. The fact that the respondents were companies incorporated in the Cayman Islands was irrelevant. This did not mean that damage was sustained within the jurisdiction. To hold otherwise would be to suggest that in a case of personal injury a person resident in the Cayman Islands who sustained injury anywhere in the world would be held to have sustained it in the Cayman Islands. This was clearly an untenable conclusion which would render this aspect of paragraph (f) otiose. It was also directly contrary to authority: The Eras Eil Actions.

Paragraph (g) was also inapplicable. This requires that the claim is brought for any relief or remedy in respect of a trust that is governed or ought to be executed according to Cayman law. The learned trial judge had ruled that the governing law of a constructive trust was to be established by determining 'where the location of the centre of gravity lies'. By reference to Dicey's Rule 201 (2) (c), as approved by Millet J in El Ajow v Dollar Land Holdings, this approach was clearly incorrect, with the correct approach being to apply the law of the country where the enrichment occurs. Applying this test to the present facts, the alleged enrichment had clearly not occurred in the Cayman Islands.

(iv) This left paragraph (c) as the only available head upon which the jurisdiction of the Cayman Islands court with regard to the appellants could properly be based. This requires the plaintiff to establish that the absent defendant is a 'necessary or proper' party to the claims made against another defendant who has been duly served either within or without the jurisdiction. In this regard, the respondents asserted that the appellants were proper parties to be joined to the claims against the defendant directors, P, W and D, who had each been duly served. The test applied in Qatar Petroleum v Shell was authoritative: the applicability of the sub-rule was limited to the extent that it could be determined that common questions of law and fact arose in relation to the claims against the parties, such that if all were present within the jurisdiction they could each have been made parties to the same proceedings.

The learned trial judge had undoubtedly been correct in finding that the appellants were proper parties to be joined to the proceedings in the above sense. The respondents' claim against all the parties was founded upon an allegation of conspiracy to defraud with the common purpose of recovering the shares transferred by P, W and D. This purpose could only

be achieved by joining the appellants to the proceedings with a view to obtaining a judgment which could be executed *in rem*.

One final hurdle which the appellants had to overcome in order to rely upon the sub-rule related to the chronology of the proceedings. In Kuwait Oil Tanker Co v Al Bader it was held by the English Court of Appeal that Order 11 rule 1 (1) (c) Rules of the Supreme Court (upon which the local provision is modelled) required that at least one other defendant should have *already* been duly served before leave could be granted under the sub-rule. The respondents had properly abandoned their claim, advanced before the trial judge, that the interpretation of the English court should not be applied locally. Only where the most cogent of reasons existed should authoritative pronouncements by the English court on provisions used as a model locally be departed from.

This was not the end of the matter, however, as the trial judge in the instant case had exercised a discretion vested in him under Order 2 rule 1(2) to retrospectively validate the leave granted against the absent defendants after due service on the other defendants had taken place. Such discretion was exercisable based upon a finding of good cause. The learned judge's reason for finding good cause to exist on the present facts would not be interfered with. This was that the practice adopted by the attorneys in the present case was consistent with that which had been followed for many years prior to the introduction of the new Grand Court Rules in 1995. The attorneys' ignorance as to the change in procedure was understandable as no authoritative pronouncement on the interpretation of paragraph (c) had been available prior to the Kuwait Oil Case which had been decided in another jurisdiction after the leave in the instant case had already been granted. This was not to say, however, that the same indulgence would be extended by the court in the case of such a procedural mistake in the future. In the absence of the appellants being able to establish that they would suffer any real prejudice by the retrospective validation of leave, the exercise of the judicial discretion would not be interfered with.

(v) It was also submitted that even accepting that the facts fell with sub-rule (c), service on the absent defendants should have been denied on the grounds that the Cayman court was not the *forum conveniens* to hear and determine the litigation: Spiliada Maritime Corporation v Cansulex. In this connection, the appellants argued that the Panamanian courts were the most appropriately placed to hear the dispute as the assets in question were shares in Panamanian companies with any rectification of the relevant registers capable of being ordered only by the Panamanian courts.

Notwithstanding the attractive nature of this argument, the trial judge had correctly found that the Cayman court was the *forum conveniens* in placing reliance upon the following issues:

1) that the fundamental question was the legality of the directors' actions according to the company law of the Cayman Islands;

2) that summary judgment had already been entered by the Cayman Islands court against two of the defendant directors;
3) that the evidence and relevant documents were all expressed in the English language.

A plea of *lis alibi pendens* had also been advanced by the appellants in support of their contention that the Panamanian courts were the *forum conveniens* to hear the dispute. Whilst it was accepted that the existence of concurrent proceedings initiated by the same plaintiff would usually cause the plaintiff to be put to his election between them, there was here sufficient reason for the existence of those proceedings, supported by the testimony of an expert witness before the Grand Court. This was the absence of any provision under Panamanian law for interim relief in relation to proceedings pending in a foreign jurisdiction. In order to forestall any attempt by the defendant directors to alienate the disputed shareholding in favour of third parties, it had therefore been necessary for the respondents to commence substantive proceedings in Panama in order to obtain interim injunctive relief.

The basis of the rule that a plaintiff will not usually be permitted to pursue the same defendant in concurrent actions in different jurisdictions lay in the fact that such a procedure would usually represent an abuse of process of the court. This was not the case here. If the Cayman proceedings, being much the more advanced of the two, were resolved in favour of the respondents, the Panamanian proceedings would be discontinued: Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd distinguished.

(vi) The contention of counsel for the appellants that the trial judge's exercise of his discretion should in any event be regarded as flawed on account of his reliance upon and acceptance of paragraphs (f) and (g) would be rejected. Once a claim has qualified under any sub-rule (and the present claim was accepted by the trial judge to come also within paragraph (c)) it then became a matter for the exercise of discretion with one factor likely to be the inherent strength of the action.

(vii) There also existed strong public policy reasons, properly taken account of by the trial judge in arrogating jurisdiction to the Cayman court, namely the need for that court to be competent to intervene where international commercial issues arose concerning the management of a Cayman Islands international company.

(viii) Appeal dismissed. 60% costs order only in favour of the respondents to reflect the appellants' success in relation to two important aspects of the appeal.

MD

Editor' Note: It is of interest to note that the chronology issue identified in the Kuwait Oil Tanker case referred to in the summary at point (iv) above has been held by the English Court of Appeal to have no application to the equivalent co-

defendant provision under the Lugano/Brussells Conventions (Article 6), where the English court is being asked to take jurisdiction against a defendant domiciled in a contracting state: Canada Trust Co v Stolzenberg [1998] 1 WLR 547.

Insurance – Bankruptcy - Appropriate forum – Declarations sought in Cayman - Pre-emptive strike is an abuse of process

Insurco International Limited v Voluntary Purchasing Groups Incorporated and Ferti-Lome Distributors Incorporated

Grand Court (450/91)
Harre CJ
September 1 1998

Legislation

Companies Law 1995 S 192
Insurance Law 1979 S 4
Texas Insurance Code Article 1.14-1 S 2(a)
United states Bankruptcy Code Chapter 11

Court Rules

Grand Court Rules Orders 18, 19

Authorities referred to

Du Pont v Agnew [1987] 2 Lloyd's Rep 535
Cantieri Navali Riuniti SpA v NV Omne Justitia and Others (The Stolt Marmaro) [1985] 2 Lloyd's Rep 428
Spiliada Maritime Corporation v Cansulex Limited [1986] 3 WLR 973
R v International Trustee for the Protection of Bondholders Aktiengesellschaft [1937] AC 500
Lavington Bonython & Ors v Commonwealth of Australia [1951] AC 201
Insurco Limited v Gowan Companies [1994-95] CILR 210
Banco Atlantico SA v The British Bank of the Middle East [1990] 2 Lloyd's Rep 504
Adams v Cape Industries plc [1991] 1 All ER 929
La Bourgogne [1899] P 1
Jabbour v Custodian of Absentee's Property of State of Israel [1954] 1 All ER 145
Amin Rasheed Shipping Corporation v Kuwait Insurance Company (The Al Wahab) [1983] 2 All ER 889
Agrichem Limited and Insurco International Limited v Mutual Service Insurance Company and Frit Industries Incorporated [1994-5] CILR 210

Mr Henriques QC and Mr Roy for the plaintiff
Mr Quin and Mr Hellman for the defendants

The plaintiff is an exempt insurance company incorporated in the Cayman Islands. The defendants were at all material times incorporated and carrying on business in Texas. The second defendant is a wholly owned subsidiary of the first. The first

defendant owned equipment, which it leased and used to manufacture monosodium methylarsenate. Pollution litigation had arisen in Texas and the plaintiff denied liability under various insurance policies. The defendants, meanwhile, counterclaimed that the allegations resembled those in the Texas proceedings and that the declarations sought here were for the purpose of providing a defence to those proceedings in Texas.

Held: (refusing to grant the declarations)

(i) Since the bankruptcy problem was to be resolved in the United States, any declarations and findings by the Cayman Court in those circumstances were not likely to be followed by the Texas Courts. It was therefore preferable to stay the proceedings in the Cayman Islands, despite the delay and cost to the plaintiff.

(ii) The attempt to obtain a declaration that the plaintiff was and had at all material times been entitled to avoid the policies enumerated on the ground of non-disclosure and misrepresentation, along with the ancillary claim for recession, amounted to a defensive and pre-emptive strike against the proceedings in Texas. This attempt to obtain a positive order was a mischief and was the same as that found to be an abuse of process in the case of Insurco Ltd.

VC

Application to stay the proceedings on the ground of forum non conveniens – Factors to be considered

Weststar TV Ltd v Coronado Ray Development Ltd

Grand Court (807/97)
Harre CJ
May 8 1998

Mr Broadhurst for the plaintiff
Mr Murray for the defendant

The plaintiff initiated an action in the Grand Court for the return of a promissory note issued by the defendants in the amount of US$300,000.00 plus interest at a rate of 10% pa and a declaration that the indebtedness secured by the note had been fully discharged. The plaintiff claimed that they paid over the full principal and accrued interest on 22 July 1996. The defendant alleged that they had not accepted the repayment of US$377,319 and that they remained entitled to 300,000 Class A shares as per the terms of the Promissory Note. The defendants brought proceedings to stay this action on the ground that California was the more appropriate forum to hear the dispute. An action was already in existence in California in relation to these proceedings. The factors in favour of each jurisdiction were examined in order to determine what was the most appropriate jurisdiction.

The relevant factors in favour of the Cayman Islands were: (1) the plaintiff was incorporated in the Cayman Islands; (2) both parties to the Promissory Note were Cayman Islands companies; (3) the Promissory Note was drawn and payable in the Cayman Islands; (4) the Promissory Note was in Cayman Islands currency; (5) the Promissory Note was drafted by a Cayman Islands attorney; (6) the issue of the legal effect of the document was to be decided by Cayman Islands law; and (7) the witnesses were in the Cayman Islands.

The relevant factors in favour of California were: (1) in February 1994, West Interlink, a Nevada corporation, took over management of the plaintiff from Weststar Communications, a Californian corporation; (2) the defendant commenced proceedings in the Superior Court of the State of California in October 1996; (3) the Sacramento Superior Court determined there to be a valid cause of action against the plaintiff in California on January 28, 1998; (4) considerable work and expense had been incurred in California that would have to be duplicated in the Cayman Islands proceedings; (5) expert evidence of Cayman Islands law could easily be given in the California action; (6) the payment of the principal and interest was not made until July 22, 1996 which was two years after the deadline for payment; (7) the Cayman Islands writ was not issued until December 1, 1997; (8) the defendant would have great difficulty eliciting evidence from third parties outside Cayman in the Cayman proceedings with regard to the true nature of the transaction between the parties; and (9) the Articles of Association of the plaintiff showed that management and control of the company was held by Weststar Communications until February 1994, when control was handed over to West Interlink. Neither of these companies were incorporated or managed in the Cayman Islands.

Held: (staying the action)

(i) On a balance of all the factors taken into account, this case could be more suitably tried in California for the interests of all parties and the ends of justice, including the advantages of efficiency, expedition and economy.

(ii) The most important consideration was the fact that the defendant would have had great difficulty eliciting evidence from third parties outside the Cayman Islands in the Cayman proceedings with regard to was alleged to have been the true nature of the transaction between the parties.

(iii) The question of (a) what the defendant was getting for consideration of their $300,000 investment, (b) on what authority the share issue could be made, and (c) the fraud allegation were all inextricably linked with the Californian proceedings and therefore the entire matter was more appropriately heard by the Californian court.

PAL

CONTRACT LAW

Appeal against judgment of Grand Court - Fraudulent insurance claim

Esther Mc Laughlin v The American Home Assurance Company

Court of Appeal (8/95)
Zacca P, Kerr and Collett JJA
December 11 1996

Authorities referred to

Re Dellow's Will Trusts [1964] 1 WLR 454
Watkins v Legal and General Assurance Company Ltd [1981] 1 Lloyds Rep 674

Mr Parkinson for the appellant
Mr Murray for the respondent

This was an appeal against the judgment of the Grand Court, that the respondent insurance company were entitled to forfeit an insurance policy following a fraudulent claim by the appellant. The appellant's home was damaged by fire due to arson on 16 August 1986. She had a policy of insurance with the respondent company. The respondents denied liability on the ground that the claim was fraudulent as the appellant had deliberately set fire to her own house. The appellant nevertheless claimed damages under the insurance policy.

The trial judge found that first, the insurance cover on the appellant's property was increased about two months prior to the fire; second, that many items of property had been removed prior to the fire; third, that the house contents were over-insured at the time of the fire. There was, however, apparently no motive for committing arson. The burden of proof was on the respondent to show that the benefits under the policy were forfeited by reason of the claim being fraudulent: (Re Dellow's Will Trusts) Watkins v Legal and General Assurance Company Ltd). On the evidence, the judge was satisfied that the respondent had discharged the burden of proof and was therefore entitled to forfeit the benefit under the policy of insurance on the ground that the claim was fraudulent.

Held: (dismissing the appeal and upholding the decision of the trial judge)

On the basis of the evidence before him, the trial judge did not err in reaching the conclusions outlined above, and was thus entitled to hold that the respondents had discharged the burden of proof.
SW

CRIMINAL LAW

Causing death by dangerous driving - Sentencing - Principles to be applied

O'Donoghue v R

Court of Appeal (43/98)
Zacca, P, Kerr, and Collett JJA
December 10 1998

Legislation

Road Traffic Law S 67(1)
Authorities referred to

R v Boswell [1984] 3 All ER 353
R v Shepherd; R v Wernet [1994] 2 All ER 242
R v Willetts [1993] RTR 252
R v Pettipher (1989) Cr App R 321
R v Guilfoyle [1973] 2 All ER 844
Rivers v R [1988-89] CILR 77
D K Ebanks v R [1984-85] CILR 432
Ebanks (1998) (unreported)
R v McKenzie (unreported)

Mr Hill QC for the appellant
Mr Roberts for the Crown

The appellant had been convicted by a jury on two counts of causing death by dangerous driving, following the death of two women who had been walking along Eastern Avenue, George Town, when they were struck from behind by a vehicle being driven by the appellant. There was evidence indicating that the appellant had consumed an unspecified amount of alcohol prior to the fatal collision. The trial judge had sentenced the appellant to a term of three years imprisonment in relation to each count with the sentences to run concurrently. The appellant was also disqualified from driving for a period of five years from the date of conviction. As the appellant's first trial had been aborted in November 1997, due to circumstances beyond her control, the trial judge applied the sentencing tariff applicable at that date.

The appellant appealed against sentence with defence counsel citing numerous English authorities with a view to persuading the court that the sentences imposed were excessive.

Held: (allowing the appeal against sentence)

(i) Whilst there was no scientific evidence to establish the exact blood alcohol level of the appellant at the time of the collision, there was cogent evidence which indicated that whatever the amount of alcohol consumed, it had contributed to the dangerous manner of the appellant's driving, and had therefore correctly been considered by the trial judge to be an aggravating factor.

(ii) The practical approach of the English court in R v Pettipher regarding multiple victims would be followed. This too, was an aggravating factor.

(iii) Where aggravating circumstances exist, it was appropriate to subject a defendant convicted of the offence of causing death by dangerous driving to a custodial sentence: R v Guilfoyle.

(iv) Based upon the older authorities representing the former sentencing policy and tariff applicable to this case, a sentence of 18 months imprisonment would be substituted for the term imposed by the trial judge: Rivers v R; D K Ebanks v R; Ebanks v R; R v McKenzie.

MD

Theft - Participation - Mens rea - Adequacy of judge's directions - Majority jury verdicts

Seales v R

Court of Appeal (20/98)
Zacca P, Georges and Kerr JJA
December 10 1998

Legislation

Penal Code Ss 223 and 229
Judicature Law S 16

Mr Hill QC for the appellant
Mr Bulgin and Ms Richards for the Crown

The appellant had been jointly charged with his wife with eight counts of theft, contrary to Ss 223 and 229 Penal Code (1995 Revision). Mrs Seales had in addition been indicted alone in respect of two further counts of theft. Prior to the trial of the appellant, his wife had pleaded guilty to eight of the counts.
The appellant was chairman and director of CITV, a company of which his wife was also a director. The couple were also directors of Seales and Company, a local real estate and management company. CITV was the first television station to operate in the Cayman Islands and it soon ran into financial difficulties.

The Crown's case was that moneys belonging to third parties, which had come under the control of the Seales in their capacity as directors of the real estate company, had been misappropriated by Mrs Seales, in reduction of a CITV overdraft, with the full knowledge and consent of the appellant. It was further alleged that the Seales had stolen some CI$6,900 from the Cayman Islands Government, being sums due to the Government in stamp duty following the purchase of land.

The appellant did not dispute the above facts, but raised as his defence that he was not a party to the transfers and had no knowledge at the time of their having taken place. A plea of no case to answer was submitted in relation to the count relating to the non payment of stamp duty.

The appellant was convicted by a jury of four of the counts in respect of sums totalling CI$32, 400. Three of the guilty verdicts were the result of majority decisions. With terms of imprisonment relating to two of the

counts expressed to run consecutively, the appellant was sentenced in total to 36 months imprisonment. He appealed against conviction and sentence.

The following grounds of appeal were argued:

1) that the jury's verdict was unreasonable and went against the weight of the evidence;
2) that the trial judge misdirected the jury by inviting them to speculate as to the question of the appellant's knowledge of the relevant transfers, and that the evidence as it related to telephone conversations and letters written by the appellant was irrelevant, being subsequent to the transactions;
3) that the trial judge failed to adequately direct the jury as to the meaning of one of the *mens rea* elements of the theft offence, namely an intention permanently to deprive;
4) that the trial judge failed to direct the jury as to the standard of proof required to establish the accused's *mens rea*;
5) that the trial judge failed to give the jury a majority verdict direction and as a result the verdicts taken were in breach of the Judicature Law (1995 Revision).

Held: (dismissing the appeal)

(i) The appellant was the director of and active participant in both companies. It was common ground that he was concerned about the financial difficulties of CITV and, in particular, the extent of its overdraft. Nowhere in his communications with the complainants did the appellant disclaim personal responsibility or knowledge of the transactions from the date of the relevant transfers. It was accordingly open to the jury to infer from the evidence that the appellant had the required knowledge at the time of the transactions. Their verdict was neither unreasonable nor insupportable by the evidence.

(ii) The trial judge had not directed the jury to speculate. A close examination of the jury direction revealed, to the contrary, that the judge had given the jury a clear admonition that they were not to reach a verdict on the basis of surmise or conjecture.

(iii) The trial judge had given an adequate direction to the jury as to the meaning of the phrase an intention permanently to deprive. In particular, the judge had been careful to emphasise that the Crown's case rested upon a finding that the appellant was a participant to the taking of the money at the time of such taking and that there existed, also at that time, an intention by the appellant to permanently deprive the owner.

(iv) The trial judge had clearly explained to the jury that the burden rested upon the Crown to prove, beyond a reasonable doubt, the ingredients of each count of theft.

(v) There was no evidence to support the contention that the trial judge had invited the jury to infer the existence of a joint enterprise out of the marital relationship between the appellant and his co-accused.

(vi) There was no requirement within the Judicature Law that a direction be given to the jury as to the returning of majority verdicts, although there would be cases where the trial judge would do so. In the instant case, the jury had retired for considerably more than the hour required by s.16(7), and the judge was entitled to accept the majority verdicts.

(vii) For the foregoing reasons, the appeal would be dismissed and the convictions affirmed.

(viii) The sentences imposed by the trial judge would be varied so that all sentences would run concurrently

MD

Editor's note: It is of interest to note that the defence did not pursue the argument that mere knowledge of the commission of an offence will not, in usual circumstances, render the participant culpable: R v Clarkson [1971] 3 All ER 344 and Bland [1988] Crim LR 41. The circumstances of this case are complicated, however, by the position of control enjoyed by S over the relevant companies, but it still seems that this point was potentially exculpatory, especially as there was apparently no evidence that S was present at the time of the transfers effected by his wife: 'Mere passive acquiescence is sufficient only , I think, where the alleged aider and abettor has the power to control the offender and is actually present when the offence is committed' per Slade J in National Coal Board v Gamble [1959] 1 QB 11.

In relation to the Count relating to the non payment of stamp duty, the key issue for the Crown would seem to rest upon the identification of any conduct amounting to an appropriation with the requisite dishonesty. The House of Lords have ruled in Gomez [1993] AC 442 that there may be an appropriation even with the consent of the victim (thus virtually assimilating the theft and deception offences) and this has been extended by recent Court of Appeal rulings in identifying an appropriation, even where the defendant has obtained an indefeasible title to the property: Kendrick & Hopkins [1997] 2 Cr App R 524 Hinks [1998] Crim LR 904. To identify the existence of a dishonest appropriation, or indeed any appropriation, out of a debtor – creditor relationship, as the present case appears to do, goes considerably further, however, than even the most liberal construction of the recent English case law would seem to allow: cf R v Gallasso (1992) 98 Cr App R 284.

Theft - Obtaining property by deception - Conduct of trial by judge - allegation of bias - Directions on dishonesty and an intention permanently to deprive – Alleged false representation by the judge of the prosecution's case

Randall v R

Court of Appeal (23/97)
Zacca P, Georges and Kerr JJA
December 10 1998

Legislation

Penal Code Ss 223, 224, 229 and 235

Authorities referred to

Hulusi and Purvis (1973) 58 Cr App Rep 378
Mears v R [1993] WLR 1 WLR818
R v Ghosh [1982] QB 1053

Mr Hamilton QC and Mr Furniss for the appellant
Mr Small and Mr Bulgin for the Crown

The appellant had been convicted of four counts of theft and one count of obtaining property by deception, contrary to Ss 223, 229 and 235 Penal Code (1995 Revision), following a trial by jury which had lasted 41 days. The first four counts of the indictment alleged that between May 1988 and March 1989 the appellant had stolen some US$856,300 from client trust funds by abusing his office of director of the company with which those funds had been placed. The fifth count alleged that between November 1987 and June 1988 the appellant had dishonestly obtained by deception, with an intention permanently to deprive, a valuable security to the value of US$500,000 from an American businessman (the complainant). The nature of the alleged deception was the false representation by the appellant that funds supplied by the complainant would be applied to a company of which one Ms S was a shareholder and on whose account the complainant had parted with the funds. The appellant was sentenced to a total of four an a half years imprisonment and was made subject to two compensation orders of US$500,000 each with a consecutive term of 6 months imprisonment in relation to each in default of payment.

The appellant appealed against conviction and sentence, citing an alleged unfairness and bias in the conduct of the proceedings by the learned trial judge, arguing that this had resulted in the appellant's defence, which centred upon a lack of dishonesty (the appellant having cited the wide powers of ownership conferred upon his company by the terms of the trust deed in this regard), never having been allowed to be properly considered by the jury.

Specifically, the amended grounds of appeal read:

'The conduct and repeated intervention of the trial judge had the effect of:

a) inviting the jury to disbelieve the defence;
b) making it virtually impossible for counsel for the defence to do his duty in properly presenting the defence; and
c) effectively preventing the appellant from telling his story in his own way.'

It was further contended that the trial judge erred in his summing up by allowing counsel for the Crown to make comments prejudicial to the appellant.

It was further argued on appeal that the trial judge had misdirected the jury with regard to the (limited) statutory definition of conduct not amounting to dishonesty within s.224(1)(a) and (b) Penal Code, and that he had given inadequate directions as to the meaning of an intention permanently to deprive. In relation to the meaning of dishonesty, the trial judge had stated:

'...Ghosh would be of no assistance to the accused if you find that the defendant acted in a fraudulent or dishonest manner. Any belief that the defendant may have had must be an honest belief. If it is a dishonest belief then those provisions would not help him...'

In relation to count five, it was argued that the trial judge had erred in suggesting to the jury a relationship of manipulation by the appellant over Ms S, and that he had falsely attributed such allegations to statements of Crown Counsel.

Held: (allowing the appeal in part)

(i) The conduct of the trial judge had left something to be desired. In particular, his insistence on laboriously taking down all the evidence in long-hand, despite the presence of a Court Reporter, was regrettable and had contributed both to the length of the trial and, on occasion, to the misunderstanding of questions and the answers to those questions. The judge had also adopted an ambulatory approach at attempts by defence counsel to introduce fresh evidence without prior agreement. Such a situation demanded prompt and decisive action by the trial judge in order to deter the lengthy and semantic debates which had been allowed to continue in the instant case. It was not, however, established that the foregoing had visited prejudice upon the defence. Moreover, the test of unfairness in the conduct of the trial laid down in Hulusi and Purvis had not been satisfied.

(ii) The trial judge's direction on dishonesty was unimpeachable. He had done no more than advert the jury to the incompatibility of deliberate deception with a genuine belief, as he was entitled to do.

(iii) In the light of the appellant's admission to the actual disbursement of the loans in counts 1-3 and the evidence of actual permanent deprivation in count 4, there was no merit in the assertion that the trial judge's directions in regard to this element of the offences were inadequate.

(iv) Accordingly, the convictions in relation to counts 1-4 would be affirmed.

(v) There was merit in the ground of appeal relating to count 5 however. There existed no evidential basis for the judge's attribution of his comments regarding the supposed malleability of Ms S to Crown Counsel. Such comments were directly at odds with the appellant's contention that the funds provided by the complainant were applied for their intended purpose. In making such remarks, the judge had eroded one of the most important plinths of the appellant's defence in relation to this count: Mears v R applied.

(vi) Accordingly, the appeal against conviction in relation to count 5 would be allowed.

(vii) The appeal against sentence on counts 1-4 would be dismissed. Considering the sentence in its totality, and having regard to the nature of the offences, the sentence was not excessive.

MD

Editor's note: A strikingly similar English case, apparently not referred to in argument, is R v Clowes (No 2) [1994] 2 All ER 316.

It is respectfully questioned why it was considered necessary for the learned trial judge to refer at all to the ruling of Lord Lane and the English Court of Appeal in R v Ghosh [1982] 3 WLR 110. As is well known, the statutory definition of what dishonesty does not amount to within both the Penal Code and the English Theft Act amounts to only a partial definition of the mens rea term. In employing the language 'in the belief that' it has for long been established that the test posed by the section is wholly subjective: R v Small [1988] 86 Cr App R 170. The hybrid requirement of objective test and subjective standard applied in Ghosh is relevant for consideration only where the limited statutory defences do not apply (even here it has no application to cases of 'obvious dishonesty': Roberts [1987] 84 Cr App R 117. As such, the Ghosh test has no relevance to questions of dishonesty under the theft legislation either here or in England.

It is also respectfully submitted that in relation to the requirement of an intention permanently to deprive, the Court of Appeal's reliance in proof of this element upon i) the actual disbursement of the loans (counts 1-3) and ii) the evidence of 'actual permanent deprivation' (count 4) was misguided. The question of whether there has been actual permanent deprivation of property is irrelevant to this question. Accordingly, when I 'borrow' your umbrella the question is not whether you ever received it back, but rather to determine what was my intention at the time of the taking. If, at the time of the appropriation, I borrowed the umbrella on account of a storm having recently blown up, intending to return it to you after the storm has passed, I self-evidently lack an intention permanently to deprive you of it. The situation can be no different where, unexpectedly, the ferocity of the storm causes the umbrella to be blown from my grasp and irreparably damaged. The key then is to look at the accused's intention at the time of the taking, and not to colour it with reference to what has followed: see, for eg, R v Coffey [1987] Crim LR 498.

Criminal Law - Sentencing

Offence	Criminal App No.	Case No.	Sentence
Import of Cocaine	51/98	4440/97	8½ yrs imp. + $800 fine or 6 mths imp. Rec for Deport.
Being conc in imp of Cocaine	41/98	3965/97	6½ yrs imp + forfeiture of motor vehicle. (Sentence red from 7 yrs by G.C. & affirmed by CA).
Poss of Cocaine with int to supply	34/96	4977/96	3 yrs imp + $100 fine or 14 days imp. (Sentence reduced from orig. sentence of 5 yrs by CA).
Poss of Cocaine with int to supply	28/96	4267/95	4 yrs imp (sentence reduced from 6 Yrs imp by G.C. & affirmed by CA).
Poss of Cocaine with intent to supply Poss of Cocaine with intent to supply	26/96 26/96	4134/95 4135/95	3 yrs imp + $500 fine or 2 mths imp. 3 yrs imp (Conc)(Sentence reduced from 4 yrs on charge 4134 by G.C. & affirmed by CA).
Poss of Ganja with int to supply	63/98	633/96	7 yrs imp. Forfecture of motor vessel.
Imp of Cocaine Poss of Ganja Imp of Cocaine Smuggling Cocaine	03/98 03/98 03/98 03/98	1392/97 1393/97 1394/97 1395/97	10 yrs imp. 6 mths imp (conc). 10 yrs imp (conc) + $200 fine or 1 month imp. 10 yrs imp (conc). (Sentence of 10 yrs imp restored by CA)
Poss of Cocaine int to supply	04/98	1907/96	3½ yrs imp + $150 fine
Poss of Cocaine int to supply.	06/98	2012/94	9 yrs imp.
Import of Cocaine	47/97	1795/97	8 yrs imp.
Poss of Cocaine int to supply. Failing to give urine test.	43/97 43/97	2451/95 2453/95	3 yrs imp. 3 mths imp (conc). (Sentence reduced from 4 yrs by CA)
Imp of Cocaine Poss Cocaine int to supply	44/97 44/97	4391/96 4392/96	4½ yrs imp. 4½ yrs imp (conc).
Imp of Cocaine	37/97	307/97	8 yrs imp + $950 fine or 3 mths imp.
Poss of cocaine int to supply	38/97	4913/97	3 yrs imp.
Poss of Ganja int to supply	40/97	991/97	18 mths imp + forfeiture of bicycle. (Sentence reduced from 2 yrs by CA)
Imp of Cocaine Imp of Cocaine	71/98 71/98	4765/97 4762/97	8½ yrs imp. 6 yrs imp (conc) (Rec for deport)
Being conc in the imp of Cocaine	54/98	4389/96	4½ yrs imp (18 mths susp for 2 yrs) + fine of $1500 or 6 mths imp in default (sentence inc. from 2 yrs by G.C. & affirmed by CA)
Being conc in the imp of Cocaine	59/98	2367/97	3½ yrs imp (Sentence red. From 4½ yrs by G.C. & affirmed by CA)
Imp of Cocaine	65/98	2366/97	7 yrs imp.
Import of Cocaine Destroying Evidence	23/98 23/98	2047/97 2049/97	8 yrs imp. 6 mths imp (consec).
Poss Cocaine Int to Supply	34/97 34/97	277/96 276/97	4 yrs imp. 2 yrs imp (consec).
Poss Cocaine Int to Supply Poss Cocaine Int to supply Poss Cocaine Int to supply Failing to give urine specimen	31/97 31/97 31/97 31/97 31/97	4026/94 4028/94 4030/94 4024/94 4032/94	4 yrs imp + $3,000 fine or 6 mths imp. 4 yrs imp (conc). 4 yrs imp (conc). 4 yrs imp (conc). 6 mths imp (conc). (reduced from 7 yrs imp by G.C. & affirmed by CA)
Poss of Cocaine int to supply	14/98	2012/94	11 yrs imp.
Poss of Ganja int to supply	60/98	5312/95	7 yrs imp + forfeiture of motor vessel.
Poss of Ganja int to supply	61/98	5310/95	7 yrs imp.
Poss of Ganja int to supply	64/98	631/96	7 yrs imp.
Poss of Ganja int to supply	62/98	5308/95	7 yrs imp.

Offence	Criminal App No.	Case No.	Sentence
Burglary	18/98	27/97	6 mths Imp + activation of 12 mths susp sentence. (Sentence reduced from 9 mths by CA)
Burglary Att. Burglary	08/97 08/97	60/97 60/97	3 yrs Imp. 12 mths Imp (conc).
Burglary Burglary Handling stolen goods Handling stolen goods Acc after fact to burglary Burglary Burglary	27/98 27/98 27/98 27/98 27/98 27/98 27/98	2709/97 2708/97 2711/97 2712/97 2713/97 92/97 93/97	12 mths Imp. 18 mths Imp. (consec) 6 mths susp for 2 yrs. 6 mths Imp (conc). 9 mths Imp (Conc) + $100 comp order. 12 mths Imp (conc). 18 mths Imp (conc). 18 mths Imp (conc).
Burglary	37/98	14/98	2 yrs Imp. (Inc from 12 mths by CA)
Burglary Burglary	52/98 52/98	98/97 99/97	12 mths Imp. 12 mths Imp (conc) + activation of 6 mths susp sentence.
Burglary Burglary	45/98 45/98	4017/97 4016/97	2 yrs Imp. 1 yr Imp (consec).
Burglary Att. Burglary Att. Robbery Burglary Burglary	01/99 01/99 01/99 01/99 01/99	63/98 63/98 64/98 65/98 65/98	1½ yrs Imp. 1½ yrs Imp (Conc). 2½ yrs Imp (consec) (Red from 3½ yrs by CA). 1½ yrs Imp (conc). 1½ yrs Imp (conc).
Burglary Att. Burglary	06/99 06/99	63/98 63/98	12 mths Imp susp for 2 yrs. 9 mths Imp susp for 2 yrs.
Robbery Grievious Bodily Harm	30/97 30/97	02/97 02/97	3½ yrs Imp. 2 yrs Imp (conc).
Robbery	42/97	2072/96	5 yrs Imp.
Robbery Poss of Firearm	14/97 14/97	09/97 09/97	6 yrs Imp. 6 yrs Imp (conc).
Robbery Robbery	39/97 39/98	50/97 62/97	5 yrs Imp. 4 yrs Imp.
Att. Robbery	73/98	43/98	6 yrs Imp.
Theft	45/97	38/97	6 mths Imp (susp).
Handling Stolen Goods Handling Stolen Goods	02/99 02/99	59/98 59/98	6 mths Imp. 6 mths Imp. (conc) (reduced from 9 mths by CA)
Handling Stolen Goods	08/98	3354/97	22 mths Imp + (restitution order to victim)
Theft (7 counts)	19/98	57/95	Total Imp 12 mths + 18 mths Imp on count 5, susp for 2 yrs.
Obtaining Property by Deception (5 counts)	34/98	39/97	Total sentence 9 mths Imp, susp for 2 yrs.
Theft Theft Theft	32/98 32/98 32/98	3781/97 3780/97 3779/97	2 yrs Imp. 2 yrs Imp. (conc). 2 yrs Imp (conc).
Handling Stolen Goods Handling Stolen Goods	11/98 11/98	61/96 61/96	12 mths Imp. 18 mths Imp (conc).
Theft (7 counts)	56/98	1674/97	15 mths Imp susp for 2 yrs + comp order of $400 per mth or 30 days Imp
Theft False Acts	55/98 55/98	39/97 39/97	18 mths Imp (9 mths susp for 2 yrs) 6 mths Imp susp for 2 yrs. Compensation order of $16,475 within 3 mths of release or 6 mths Imp.
Theft Theft	03/99 03/99	59/98 59/98	9 mths Imp. 9 mths Imp (sentence reduced from 15 mths by CA).
Poss Unlicensed Firearm	46/98	43/97	2½ yrs Imp (sentence reduced by CA from 5 yrs Imp).
Poss Unlicensed Firearm	49/96	22/95	3 yrs Imp + activation of 6 mths susp sentence.
Poss of Firearm with Intent to A/A an Offence	47/98	43/97	10 yrs Imp.

Offence	Criminal App No.	Case No.	Sentence
Poss of Unlicensed Firearm with intent to commit Offence	48/98	43/97	7 yrs imp.
Imp of Firearm without Permit	57/98	17/98	6 yrs imp.
Poss of Unlicensed Firearm	57/98	17/98	6 yrs imp (conc) Rec for deportation.
False Acting (3 counts)	32/98	3778/97	2 yrs imp on each count, concurrent with 3781/97
Theft	32/98	3355/97	2 yrs imp (conc).
Theft (8 counts)	21/98	01/98	Total sentence: 3½ yrs imp.
Forgery	21/98	01/98	1 yr imp (consec).
Altering Forged Document	21/98	01/98	1 yr imp (conc).
Theft	31/98	34/94	6 mths imp.
Making Docs. without auth	31/98	34/94	6 mths imp (conc).
Making Docs. without auth	31/98	34/94	6 mths imp (conc) + costs order of $3,000 or 3 mths imp + comp order of US$1239 or 3 mths imp (Payment within 10 mths of release date).
Theft	23/97	61/95	4 yrs imp.
Theft	23/97	61/95	4½ yrs imp. (conc) + comp order of $500,000 or 6 mths imp.
Theft	23/97	61/95	3½ yrs imp (conc).
Theft	23/97	61/95	3½ yrs imp (conc).
Theft	20/98	57/95	18 mths imp.
Theft	20/98	57/95	12 mths imp (conc).
Theft	20/98	57/95	18 mths imp (conc).
Theft	20/98	57/95	12 mths imp (conc).
Going Equip to Cheat	53/98	2051/98	10 mths imp (rec for deportation).
Making docs without auth	53/98	2052/98	10 mths imp (conc).
Att to obtain Pec adv by dec	53/98	2053/98	10 mths imp (conc).
Making docs without auth	53/98	2054/98	10 mths imp (conc) (sentences reduced from 18 mths on each count by CA).
Carrying Offensive Weapon	09/98	3634/94	3 mths imp.
Resisting Arrrest	09/98	3635/94	3 mths imp (conc).
Ass Occ Actual Bodily Harm	09/98	1110/95	18 mths imp, 9 mths susp (consec), + $500 comp order or 2 mths imp.
Carrying Offensive Weapon	09/98	1111/95	3 mths imp (conc).
Grievous Bodily Harm	35/98	61/98	5 yrs imp (red from 7 yrs by CA).
Threatening Violence	35/98	61/98	3 yrs imp (conc).
Grievous Bodily Harm	38/98	24/97	4 yrs imp.
Grievous Bodily Harm	30/98	55/96	3 yrs imp.
Grievous Bodily Harm	69/98	36/98	10 yrs imp.
Attempted Robbery	69/98	36/98	10 yrs imp (conc).
Possession of Firearm	69/98	36/98	10 yrs imp (conc)(sent reduced by CA from 12 yrs imp)
Grievous Bodily Harm (recklessness)	76/98	54/98	7 yrs imp.
Defilement girl under 16	52/97	10/97	2 yrs imp
Defilement girl under 16	51/97	10/97	9 mths imp (sent reduced by CA from 15 mths).
Defilement girl under 16	17/98	05/98	6 mths imp (sent reduced by CA from 18 mths)
Defilement girl under 16 (4 counts)	49/97	08/97	2½ yrs imp.
Causing Death by D Driving	43/98	68/95	18 mths imp.
Causing Death by D Driving	43/98	68/95	18 mths imp (conc) + 5 yrs disqualification (sent reduced from 3 yrs imp by CA).
Causing Death by D Driving	15/97	13/96	2 yrs imp, disqualification for 6 yrs.
Causing Death by D Driving	50/96	18/95	3 yrs imp, disqualification for 8 yrs.
Refusing to Provide Urine Specimen	33/98	608/98	3 mths imp + act of 6 mths susp sent for previous similar offence (consec).
Failing to Surrender to Bail Condition	33/98	609/98	1 mth imp (conc).

Offence	Criminal App No.	Case No.	Sentence
Causing Death by D Driving	36/97	06/96	3 Yrs Imp + 7 yrs disqualification (sent reduced by CA from 3½ yrs Imp).
Causing Death by Reckless Driving	50/97	55/97	15 mths Imp + 6 yrs disqualification (sent reduced by CA from 2 yrs Imp).
Murder	10/96	16/94	Life Imp.
Murder	09/96	16/94	Life Imp.
Manslaughter	07/98	25/97	Life Imp.
Manslaughter	09/97	31/96	10 yrs Imp (reduced from 13 yrs by CA).
Rape Robbery Assault A.B.H.	16/96 16/96 16/96	04/95 04/95 04/95	11 yrs Imp. 6 yrs Imp (conc). 3 yrs Imp.
Rape Rape	02/98 02/98	42/96 42/96	12 yrs Imp. 12 yrs Imp (conc).
Escaping Lawful Custody	50/98	23/98	9 mths Imp.
Escaping Lawful Custody	49/98	23/98	9 mths Imp.
Resisting Arrest Assaulting Police Officer	32/97 32/97	3546/94 3548/94	1 mths Imp, susp for 2 yrs. 1 mth Imp, susp for 2 yrs (consec) (Applying proviso to S.9 Court of Appeal Law 1996 (Revision)).
Fabricating Evidence	04/99	53/98	2½ yrs Imp.

MD

CRIMINAL PROCEDURE

Criminal offence in US – US Government request under MLAT for injunction to freeze bank accounts containing assets alleged to be proceeds from offences – Proper procedure – Proceeds of Criminal Conduct Law

In The Matter Of The Proceeds Of Criminal Conduct Law 1997 And
In The Matter Of The Mutual Legal Assistance (USA) Law 1986 And
In The Matter Of William J Mcorkle Et Al

Grand Court (315/97)
Zacca P, Georges and Collett, JJA

July 30 1998

Authorities referred to

In the Matter of the Mutual Legal Assistance (USA) Law 1996 and in the Matter of Ryan S. Sherman and others – cause 56/96
Carlton A Ltd v Commissioner of Works [1945] 2 All ER 560

Legislation

Proceeds of Criminal Conduct Law 1997
The Mutual Legal Assistance (USA) Law 1986
Proceeds of Criminal Conduct (Designated Countries) Order 1997
The Interpretation Law 1995

Mr Bulgin and Mr A Akiwumi for the appellant
Mr Jones QC, Mr Quin and Mr J Lawless for the respondents

This was an appeal brought by the Attorney General against the decision of the Grand Court. Harre CJ had granted a restraining order in respect of certain assets, allegedly the proceeds of the respondent's criminal conduct, pursuant to the PCCL and in response to a request from the USA pursuant to the MLAT. This restraint order was discharged, at the *inter parties* hearing, but Harre CJ granted leave to appeal, and stayed the execution of his order pending the determination of this appeal.

The Chief Justice had set aside the *ex parte* restraint order on two grounds:

1) That the PCCL did not have retrospective effect, and
2) That no proceedings in the designated country had been instituted within seven days of the application in Grand Cayman; such proceedings were required by para 5(3) of the schedule to the PCCL. The Chief Justice had ruled against the respondent on 5 other grounds which been had urged in that action. The notice filed by the respondents in the instant action was that the judgment could be affirmed not only on the two grounds in which he had

found in their favour, but also on the 5 grounds in which he had ruled against them.

The main questions to be determined by the Court of Appeal were:

1) Whether the PCCL had retrospective application and
2) Whether para 5(3) of the Schedule to the PCCL had been complied with.

Held: (Appeal dismissed on the ground that proceedings were not instituted in the courts of the designated country within 7 days of the application for the restraint order in the Grand Court)

(i) Section 2(4) PCCL provided 'this law confers any power on any court in connection with offences committed before the commencement of this law or proceedings against a person for an offence instituted before the commencement of this law'. This provided a cut-off date before which the provisions of the PCCL could not be applied, 23 December 1996 – the date the law came into force. The argument urged on behalf of the Attorney General was that s.2(4) applied only to the law itself and not to the attached Schedule. In other words that the section should be read as if the words 'in the Cayman Islands' were inserted in the relevant parts. Justification for this unusual course was said to be that failure to adopt this position would lead to manifest obsurdity.

It was to be emphasised that MLAT did not create enforceable obligations in the Cayman Islands, it was an agreement to provide assistance in respect of certain matters. In addition, Art 162 of MLAT provides that such assistance should be rendered '. . . to the extent permitted by their respective laws'. It was not manifestly absurd that the powers were not retrospective in their application, particularly when they were not retrospectively imposed as regards crimes committed in the Cayman Islands themselves.

(ii) The Grand Court did have jurisdiction to make the restraint order which was sought. According to the very clear terms of s.2(4) of the PCCL the Law did not have retrospective effect and there was no doubt that from the language of s.2(4) the legislature intended that there should be a cut-off date. Where a single offence was committed prior to the coming into force of PCCL and a sum of money obtained as a result of that offence was deposited immediately into a Cayman Islands bank account, s.2(4) would prohibit a Court from restraining in any way the control of that fund. However, where as in the instant case, there existed ongoing activity which fell within the definition of criminal conduct, which involved related activity *before* the commencement of the PCCL, the whole being the part of the common design, then a purposive interpretation of the PCCL would not lead to a denial of assistance by reason of a broad interpretation of the prohibition against retroactivity.

(iii) Paragraph 5(1) of the Schedule to the PCCL conferred on the Grand Court powers to make a restraint order where proceedings had been instituted against the defendant in a designated country and the proceedings had

not been concluded, and either an external confiscation order had been made or it appeared to the Grand Court that there were reasonable grounds for thinking that such an order may be made in such proceedings.

Paragraph 5(2) provided that such powers were also exercisable where the Grand Court was satisfied that proceedings will be *instituted* in a designated country within 7 days of the *application* for an order under paragraphs 6(1) or 7(1).

The correct interpretation of the word 'application', in the context of paragraph 5(2) of the Schedule to the PCCL, was that the application was made when the summons were filed and not when the application was actually before the Court. There would be no difficulty in ascertaining this date because there would be a date-stamped document in the Registry attesting to that. There was no room for the interpretation that the computation of the time period should commence from the date on which the order was actually made, as the words used in the Law were very clear - 'within 7 days of the *application for an order*...' (CA's emphasis).

(iv) The Grand Court was to act on the basis that it was satisfied that proceedings would be instituted within 7 days. Adherence to the prescribed time frame was clearly of the essence. If, at a hearing of an application to set aside the order, (even in the absence of notification by the Attorney General), evidence emerged that proceedings had not been instituted within 7 days, the judge would be obliged to set the order aside.

In computing time for these purposes the relevant provisions were to be found in the Interpretation Law. Section 8(a) excluded, for computation purposes, the day of the application for the order with the result that the time began to run from Wednesday, 21 May 1997. Section 8(d) applied because the period exceeded 6 days, which meant that excluded days would be reckoned in the computation of time. On that basis, the period lapsed on Tuesday, 27 May 1997. The evidence was that Civil Forfeiture Proceedings *in rem* were instituted in the Middle District Court in Florida on Wednesday, 28 May 1997 and were accordingly out of time and the Chief Justice was therefore entitled, and indeed obliged to discharge the order under paragraph 5(3)(b) of the Schedule to the PCCL.

(v) The respondents failed on the other five grounds when they raised in support of the decision of the learned trial Judge.

(vi) Responsibility to be awarded 50% of the costs of the appeal

RC

Bail pending appeal – Principles to be applied

Stephanie Nicoletta v Attorney General

Grand Court (2450/94, 2637-38/94)
Smellie CJ

May 5 1998

Authorities referred to

Watton v R (1979) 68 Cr App R 293
R v Neal (1986) Times January 29
Carol Fox Seales v R

Ms Lumsden for the applicant
Mr Akiwumi for the Crown

The applicant sought bail pending her appeal of sentence to the Court of Appeal. She was convicted of an offence involving a breach of trust in the amount of $1240, and sentenced to 9 months imprisonment and ordered to pay $3,000 in court costs to the Crown.

Held: (granting bail on conditions)

(i) Bail should not be granted pending an appeal unless the sentence was, at least *prima facie*, shown to be manifestly harsh or excessive, or was shown to be substantially served before the appeal could be heard: Watton v R.

(ii) The court was not to attempt to determine the outcome of the appeal. It was not to leave the Court of Appeal with a pre-determined result. Consequently, even if the sentence was *prima facie* wrong in the sense that the length of incarceration was too long, but a shorter period of incarceration was likely to be found appropriate, it was inappropriate to order the release of the applicant before the shorter period was served: R v Neal.

(iii) The Court of Appeal was likely to take the view that an immediate term of imprisonment was wrong in principle. The applicant had no previous convictions. The amount involved was small and full restitution was offered. She had employment waiting in spite of her conviction. She was willing to abandon her appeal on conviction. However, she did not enter a guilty plea.

(iv) Reference by the Crown to other allegations against the applicant were wholly improper in this context.

(v) The decision of the Court of Appeal in Carol Fox Seales v R was given after sentence was pronounced in this case. In that case, the Court ordered a suspended sentence upon an immediate plea of guilty to theft of $40,000 in breach of trust.

(vi) The primary objective of sentencing is rehabilitation and not retribution.

JE

Striking out for want of prosecution - Prejudice and inordinate delay - Abuse of process

X v Y Ltd

Grand Court (73/95)
Smellie J
May 3 1999

Legislation

Limitation Law (1996 Revision)

Court Rules

Grand Court Rules 1995

Authorities referred to

Williams v Bob Soto [1992-93] CILR 318
Harveys v Scott Cause 763 of 1990 (unreported)
Birkett v James [1977] 2 All ER 801
Hayes v Bowman [1989] 2 All ER 293
Guinness Mahon v Washington International Bank [1984] CILR 167
Grovit and others v Doctor and others [1997] 2 All ER 417

Mr Roy for the plaintiff
Mr Walton for the defendant

This was an application by the defendant to strike out the plaintiff's claim for want of prosecution. The plaintiff's claim concerned an action for money had and received by the defendant bank in respect of some $37,000 which, it was alleged, had been improperly debited against the plaintiff's account. The background to the application was as follows. The plaintiff's cause of action arose on 22nd December 1992. The writ was filed on 22nd February 1995. A defence was served on 30th March 1995, and on 9th November 1995 directions were given, *inter alia*, that the action should be set down for trial within 3 months, and that the plaintiff should provide security for the defendant's costs in the sum of $5000. Subsequently, in January 1996, the defendants sought disclosure of how the plaintiff came by cheques which the defendant alleged were forged. No further procedural steps were taken by the plaintiff and on 19th January 1999 the defendant filed an application to strike out. It is significant to note that by the time of the defendant's application the plaintiff's cause of action was statute barred.

Held: (dismissing the application)

(i) Although the plaintiff's excuse for not taking steps to prosecute the action was unacceptable and there was an inordinate delay, the issue was whether inordinate delay by itself justified striking out the plaintiff's claim.

(ii) In the past it would have been necessary for the applicant to show, in addition to inordinate delay, serious prejudice or detriment, having regard to the principles enunciated in Birkett v James . Whilst greater speed was required in prosecuting an action where there had been significant pre-action delay, the applicant must still show some prejudice to his case additional, to that inevitably flowing from the plaintiff's tardiness in issuing the writ and as resulting from his inordinate delay. Although in Hayes v Bowman the court recognised that such prejudice could arise where delay resulted in a significant increase in the amount of plaintiff's potential damages, there was no evidence of any such prejudice to the defendant in this case, notwithstanding the accruing interest on the plaintiff's claim which could be dealt with by the defendant bank internally as a book-keeping exercise. Furthermore, it could not be argued, as in Guinness Mahon v Washington International Bank that the delay had had an adverse effect upon the business of the defendant bank, in the general reputational sense.

(iii) Recent developments in case law, in particular, Grovit and others v Doctor and others, suggested that where the plaintiff's conduct amounted to an abuse of process, the case could be struck out even in the absence of prejudice to the defendant. In such cases the Court, in exercise of its inherent jurisdiction, and out of concern to protect the general integrity of the process of the Court and of its ability to deliver justice to all litigants, was entitled to dismiss the action. However, in this case the evidence fell short of demonstrating that the plaintiff's conduct amounted to such an abuse of process. In reaching this conclusion, it was significant that the plaintiff had shown tangible signs of commitment to prosecuting the action by reason of its payment of $5,000 into court as security for the defendant's costs.

DOB

FAMILY LAW

Ancillary Relief - Division of assets - Joint names

Ebanks-Hammond v Hammond

Grand Court (D113/97)
Douglas Actg J
March 12 1999

Legislation

Matrimonial Causes Law (1997) S 22
Authority referred to

Preedy v Preedy [1988-89] CILR 90

Mrs Nervick for the petitioner

Mr Allen for the respondent

The petitioner sought an order transferring the matrimonial home into her name alone. The matrimonial home was built on land given to the petitioner by her father, and with the exception of $2500 paid for by the respondent, the petitioner during their joint occupancy. The title was placed in joint names to satisfy a condition of a bank loan. The respondent occupied the home alone since 1988 by forcing the petitioner to leave. He had collected rental income from a tenant of one room. He had paid the mortgage since his sole occupation. Various loans and expenses were secured against the property leaving equity of $40,000.

The respondent claimed an entitlement to fifty per cent of the gross value. He submitted that the transfer of the title in the home into their joint names raised the presumption that the petitioner was making a gift to the respondent.

Held: (order in favour of the petitioners)

(i) The case of Preedy v Preedy was distinguished. The presumption of a gift between spouses of a share in the property was rebutted. The respondent had done nothing to assist in enhancing his claim. The contribution of $2500 was erased by the years in which he lived in the house.

(ii) The respondent gained sole possession of the property through his own wrongdoings, creating a situation from which neither equity nor the law would allow him to profit.

JE

Ancillary Relief - Division of assets - Caymanian status - Joint names

Sciamonte v Sciamonte

Grand Court (D57/1997)
Douglas Actg J
April 27 1999

Legislation

Matrimonial Causes Law (1997) S 22

Authority referred to

Preedy v Preedy [1988-89] CILR 90

Mrs Thompson for the petitioner
Ms Brooks for the respondent

The petitioner brought an application for ancillary relief. The parties were married in 1979. The petitioner was Caymanian by birth and after the marriage the respondent was granted status. The matrimonial home was built on land given to the petitioner by her father. It was occupied by the petitioner and her children by

a first marriage while under construction. The home was almost completed at the date of the second marriage. Approximately three months after the second marriage the petitioner transferred the title to the property into the parties' joint names.

The respondent was a share holder in two companies. The number of shares held in company A was small. The number of shares held in company B was substantial. He was given sixty per cent of company B's shares on the basis that he would act as its local partner.

Held: (for the petitioner)

(i) Local jurisprudence held that while a marriage subsisted, in the absence of any evidence of a contrary intention, the placing of title of the matrimonial home in the parties' joint names raised the presumption that the husband was making a gift to the wife of a share in the beneficial ownership: Preedy v Preedy. The entitlement was not predetermined and would depend on the circumstances of the marriage and their breakdown. The same rule applied in the case of a donor wife.

(ii) The court was free to distinguish between the structure and the land for the purpose of beneficial interest. The interest earned by the respondent in the land was negligible. No funds or effort was expended by him on its improvement. The respondent was entitled to a fifty per cent share in the house, which was found to be worth $65,000.

(iii) The shares in company A were acquired shortly after the marriage. The petitioner was entitled to forty per cent of their valve.

(iv) The shares in company B were acquired in recent years. Without his Caymanian status he would not have been able to acquire the majority share for no monetary consideration. His ability to acquire status was dependent on his marriage to the petitioner. Therefore the petitioner was entitled to thirty per cent of his majority share.

JE

Ancillary Relief - Division of assets - Award for personal injuries

Parsons v Parsons

Grand Court (D76/96)
Smellie CJ
March 1 1999

Legislation

Matrimonial Causes Law 1997 Ss 18 and 22
Authorities referred to

Wagstaff v Wagstaff [1992] 1 All ER 275

Baker v Baker [1995] 2 FLR 829
Miller v Miller [1980-83]CILR n 6

Mrs Hernandez for the petitioner
Mrs Nervik for the respondent

The parties were married in November 1987. The petitioner was aged 23 years and the respondent, already a widower, aged 25. The petition for divorce was proven in December 1996 and an order for the custody, care and control, and interim maintenance of the children was made in January 1998. The Court was asked decide the ancillary matters pertaining to property.

The respondent was seriously injured in an automobile accident in which his wife and parents were killed. The compensation received served as the main capital base upon which he and the petitioner drew during the marriage. He was employed throughout his second marriage, in spite of back pain. He stated that he earned a salary of approximately $1500 per month but this was in dispute. The petitioner earned $ 3,000 per month and had completed more formal education. The respondent's disclosure, and evidence as the value of his assets, was argued not to be satisfactory.

Held: (for the petitioner)

(i) Adverse inferences may be drawn against a party whose evidence is not candid: Baker v Baker. His income would be set at $2800 per month.

(ii) The respondent claimed that all property and chattels bought out of the proceeds of his personal injury award, and all inherited properties, should be segregated from this proceeding and declared as his property. This was rejected in accordance with the wording of the Matrimonial Causes Law Ss 18 and 22, and Miller v Miller ; Wagstaff v Wagstaff .

(iii) Bearing in mind the needs of the children, equity in the matrimonial home was to be divided equally between the parties.

JE

LAND LAW

Overriding interest - Registered Land - Circumstances in which established - Effect of Inquiry – Trigger of proviso

Millwood and Millwood v Brown and Brown

Grand Court (377/98)
Murphy J
December 2 1998

Legislation

Registered Land Law (1995 R)

Land Registration Act 1925
Court Rules

Grand Court Rules Order 113

Authorities referred to

Strand Securities Ltd v Caswell [1965] Ch 958
Abbey National Building Society v Cann [1991] 1 AC 56
Re Boyle's Claim [1961] 1 WLR 339
Williams & Glyn's Bank v Boland [1980] 2 All ER 408
Hunt v Luck [1901] 1 Ch 45
Hodgson v Marks [1971] 2 All ER 684
Bridges v Mees [1957] 1 Ch 475
Richards v Delbridge (1874) LR 18 Eq 11
Milroy v Lord (1862) De GF&J 264
Re Ward [1968] WAR 33
Scoones v Galvin & Public Trustee [1934] NZLR 1004
Brunker v Perpetual Trustee Co (1937) 57 CLR 555
Mascall v Mascall (1984) P & CR 119
Re Rose [1952] Ch 499
Re Fry [1946] Ch 312

Authoritative works

Riddall Introduction to Land Law, (4th ed)
Underhill & Hayton Law Relating To Trusts And Trustees, (15th ed)

Mr Taylor for the applicants
Mrs Brooks for the respondents

The applicants were the registered proprietors pursuant to a sale of the property in question. The respondents had been in possession of the property since April 1998. An application was made for summary possession pursuant to Order 113.

The root of this litigation was a dispute between the respondent, Craig, and his sisters Sharon and Michelle. In March 1990, the siblings' mother transferred the property to herself and Sharon as joint proprietors. On November 25th 1997 a 'Transfer of Land' form was prepared indicating that the mother and Sharon 'in consideration of natural love and affection' were transferring the property as to a one fifth share each for the mother, Sharon and Craig and as to two fifths share to Michelle. The transferors apparently signed this form. All the transferees, except Craig, apparently signed the form. The signatures were apparently certified but the transfer was never registered.

Shortly thereafter, the mother apparently executed a will which purported to bequeath, *inter alia*, 'my one fifth share' of the property to Craig. No original of this will was placed in evidence. The will had never been probated and the signature of the mother on the will differed from the signature on the form.

The mother died in December 1997 and the property vested in Sharon as the surviving joint proprietor. As of February 10th 1998 Sharon alone appeared on the register. In April 1998, she approached the applicants and offered to sell them the property explaining that she had inherited it from her mother. At about the same time Craig and his wife moved into the property.

The applicants never inspected the interior of the property, relying instead upon an appraisal they had commissioned at the request of the prospective chargee and Sharon's claim to be in possession. They did not know that Craig was in occupation until after the sale was completed. The transfer to the applicants took place on April 29 1998. The transfer and new charge in favour of the chargee was registered on May 5, 1998.

The applicants asserted their right to possession by virtue of the fact that they were the registered proprietors. The respondents claimed an overriding interest under s.28(g) of the Registered Land Law. (This provision was essentially the same as s.70(1)(g) of the Land Registration Act.) Section 28 provides 'Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register ... (g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed.'

Held: (order in favour of applicants)

(i) The onus was on the respondents to demonstrate two things. First, that they had a 'right' which was recognised by in law or equity. Mere occupation did not create a right that did not pre-exist. Strand Securities v Caswell. The respondents claimed a two fifths interest - one fifth by way of constructive trust based on the partially executed transfer form and one fifth by way of equitable interest derived from the purported will. Secondly, that they were in actual occupation at the relevant time. (The date of registration was the governing date, except in the context of overriding interests. Abbey National B.S. v Cann.)

Notice, or otherwise, of the respondents' occupation on the part of the applicants, as registered proprietors, was not relevant in this context, as s.28 overrides the common law doctrine of notice as it pertains to unregistered land. Williams & Glyn's Bank v Boland. The mere fact of occupation was by itself deemed to be notice. If an interest existed and if the holder of it was in actual occupation then the interest was overriding and binding upon a purchaser.

A purchaser would not be subject to an overriding interest 'where inquiry is made of such person and the rights are not disclosed.' In the instant case the applicants sought to rely on the fact that inquiry had been made of Sharon. However, inquiry must be made of the person actually claiming the right, in the instant case Craig, and not just of the registered proprietor or person claiming to be in possession. Hodgson v Marks.

(ii) In seeking to establish the existence of a 'right' the respondent sought to rely upon the partially executed transfer form and the purported will. The applicants contended the former to be an incomplete gift, and therefore void on the basis of Richards v Delbridge and Milroy v Lord, i.e. equity cannot perfect an imperfect gift. However, the court referred to Underhill & Hayton and a line of authority which it had made available to counsel. The principle to be derived from this line was i.e. where a donor has done all that is necessary for him to do to effect a transfer (e.g. executing the transfer form and delivering it to the donee) except for one final step (e.g. registering the transfer), then exceptionally the donor himself will be treated as holding the property on trust for the donee. Re Rose. However, the proviso to the principle was that if any act remains to be done by the donor to complete the gift at the date of the donor's death, the courts will not compel his personal representative to do the act and the gift remains incomplete and fails. The respondent argued that the partially executed transfer form was sufficient basis for the court to conclude that the donors had done all in their power to complete the transfer. Mascall v Mascall was distinguished from the instant case because the transfer form had been delivered to the donee. In addition, the respondents did not know about the transfer form until after the sale. The court noted the importance of the fact that the purported transfer was not pursuant to a contract but an intended gift which could have been revoked. The court applied the objective test provided by Mascall and Re Rose (ie the point of no return was when the donor had delivered the indicia of title and had put them beyond his power to recover or reclaim.) Delivery to any donee was not sufficient in this case as the mother was both donor and donee. Accordingly, the respondent did not possess an equitable or any other interest in the property.

(iii) It was conceded by the respondent that unless the joint proprietorship of Sharon and her mother had been severed, or properly transferred before the mother's death, the property passed by right of survivorship to Sharon and could not have formed part of the mother's estate. The submission that such severance was effected by the (partial) execution of the transfer form was not accepted and, accordingly, the claim to a pre-existing equitable interest under this head also failed.

RC

Whether submissions to Land Registrar - 'Bringing an action' for the purposes of s37(2) of the Registered Land Law (1995 Revision)

Ryan and Ryan v Bodden (as administrators of the estate of Astley Kendal Ryan deceased)

Grand Court (624/96)
Harre CJ
April 3 1998

Legislation

The Registered Land Law (1995 R)

Court Rules

The Grand Court Rules Order 14 rule 12

Mr McDonough for the defendant
Mr Lamonthagne QC and Mr Adams for the plaintiffs

This action comprised a claim by the plaintiffs for a declaration that the decision of the Registrar of Lands of 3rd November 1994 ordering that land in Little Cayman be partitioned equally between the plaintiffs and the defendant, was obtained by the fraud of the defendant and one of her privies. The action originated as an application by the defendant for summary judgment pursuant to Order 14 rule 12 Grand Court Rules, and had been adjourned on 27th November 1997, to allow for amendment of the statement of claim. The application fell to be considered on the basis that the hypothesis of fraud was true, but that any investigation of that would be a matter for trial.

The plaintiffs contended that an agreement dated February 17th, 1982 amounted to an agreement by the defendant to transfer part of her half share of the land to their father, Astley Kendal Ryan, and they requested that the Registrar transfer that part to them, in their capacity as administrators of the estate of the deceased, prior to any partition of the parcel taking place. The defendant certified to the Registrar in writing that she had never agreed to transfer any part of her half-share in the land and that the agreement between the deceased and herself was that they were each to receive one half of it. The defendant's husband also gave a certificate in support of his position and asserted that and to the effect that the handwriting on the agreement of February 17th, 1982 was not that of the defendant. The Registrar found, after a comparison of the defendant's handwriting on Registry forms with that of the agreement of February 17th, that the latter was not in the defendant's hand, and that consequently the land was not subject to an overriding interest or trust and ordered that the defendant was entitled to an unencumbered half share.

Held: (order as follows)

(i) There were issues of law and fact present which needed to be determined at trial.

(ii) The agreement of February 27th, 1982 amounted to an unregistered contract for the disposition of an interest in land, on which no action may be brought unless s.37(2) of the Registered Land Law was complied with, that the agreement or some memorandum or note thereof, was in writing and was signed by the party to be charged. The alleged agreement did not comply with s.37(2).

(iii) The plaintiffs, however, in making their submissions to the Land Registrar were not 'bringing an action' on a contract for the disposition of land.

(iv) What the Registrar's finding would have been if he had made a finding of travel against the defendant was a matter for speculation.

(v) Costs awarded to the plaintiff.

(vi) Leave to appeal granted.

RC

PLANNING LAW

Planning Appeals Tribunal – Adequacy of reasons given for decision – Whether appellants prejudiced by way of the decision of Tribunal or its stated reasons.

In The Matter Of The Grand Court Rules 1995 0.51 And
In The Matter Of The Development And Planning Law (Revised) Appeal Rules And
In The Matter Of An Appeal Pursuant To Section 43 (4) Of The Development And Planning Law (1995 Revision) And
In The Matter Of Land At West Bay Beach South Block 13B Parcel 194

Grand Court (637, 638, 639, 640/97)
Graham J
December 16 1997

Legislation

The Development and Planning Law (1995 R)

Authorities referred to

Bolton Metropolitan District Council and others v Secretary of State for the Environment and others – (Unreported)

Mr Druce on behalf of the 1st 2nd & 3rd appellants
Mr McMillan on behalf of the 2nd respondent
Mr Chapman on behalf of the 3rd respondent
The 3rd appellant and 1st respondent not appearing.

This was a planning appeal against the decision of the Planning Appeals Tribunal. The Appeals Tribunal had upheld an earlier decision of the Central Planning Authority which had approved a proposed development by Seven Mile Suites Ltd. The grounds for appeal were that the Appeals Tribunal had failed to come to a judgment with respect to whether or not the proposed development was at variance with the Development Plan; The Tribunal had failed to provide reasons, or had provided reasons which the appellants considered inadequate, and that the combined effect of these two points was that they demonstrated a flaw in the Tribunal's approach to the matter.

The Tribunal gave as the reasons for it's decision the following:

1. The decision of the CPA was not erroneous in law.

2. The decision of the CPA was not unreasonable, and

3. The decision of the CPA was not contrary to natural justice.

Held: (order as follows)

(i) In order to upset the decision of the Appeals' Tribunal it was necessary to show that the proceedings before the Tribunal were such that the appellants were unable to put their case or that the Tribunal either did not listen to, or consider, the arguments put forward by them. In addition, to demonstrating that the Tribunal's decision was defective, the appellants had to show that they had suffered substantial prejudice by reason of such defect.

(ii) It was not open to the Appeals Tribunal to consider the planning merits of the application at large, but only where the decision of the Central Planning Authority was at variance with the Development Plan; no such variance was set out in the Appeal papers and there was no finding that the development was outside the scope of the Development Plan.

(iii) From the records submitted to the Court, it was determined that the thrust of the appellant's argument before the Tribunal was aimed primarily and substantially at the 'bulk' of the building. There was no mention in the Chairman's note that planning consent should be revoked pursuant to s.43(1)(d) Development and Planning Law because the proposed development failed to accord to the Development Plan. In addition to submissions regarding the 'bulk' of the building, the appellants had sought to bring to the attention of the Tribunal other 'material considerations', e.g. over development, loss of amenity and traffic – which they submitted should be read into the legislation. The Court was satisfied that the Tribunal had rejected, and by law were required to reject, that submission.

(iv) With regard to the adequacy, or otherwise, of the reasons given by the Tribunal for the decision, the Court was referred to Bolton v Secretary of State Environment. Here it was stated that such tribunals must 'state their reasons in sufficient detail to enable the reader to know what conclusion [has been] reached in the 'principal important controversial issues'. Given that the issue of whether or not the proposed development was at variance with the Development Plan was not argued before the Tribunal, or was at best, a peripheral issue, the reasons given by the Tribunal for their decision, although brief, were not deficient.

(v) In light of the above, and the appellant's inability to persuade the Court that they had suffered substantial prejudice, the Tribunal's ruling was upheld.

RC

Application to strike out statement of claim - Limitation - Survival of Action for benefit of estate - Fatal Accidents action for dependency

Estanislao Cruz-Martinez v Carolyn Cupidon (as administratrix of the estate of Dean Alfred Knight dec'd)

Charles Emerson Boxwell and Parrots Landing Water Sports Park Ltd v Aleta Jo Sturdivant and Mellon Bank NA

Court of Appeal (25/98)
Zacca P Kerr and Collett JJA
April 15 1999

Legislation

Lord Campbell's Act 1946
Law Reform (Miscellaneous Provisions) Act 1934 (UK)
Limitation Act 1980 (UK)
Estates Proceedings Law 1995 Revision S 5
Torts Reform Law 1996 S 4
Limitation Law 1996 Ss 13 14 44

Authoritative works cited

Halsbury's Statutes

Mr Jones and Mr Grierson for Estanislao Cruz-Martinez
Mr Alberga QC and Mr Murray for Carolyn Cupidon
Mr McDonough for Charles Emerson Boxwell
Mr Murray for Parrots Landing Water Sports Park Ltd
Mr Chapman for Aleta Jo Sturdivant and Mellon Bank NA

The defendant appealed against the judgment of Graham J in refusing to strike out, as being statute-barred, the claims of Carolyn Cupidon in Cause No. 144 of 1997 and Aleta Jo Sturdivant and Mellon Bank NA in Cause No 134 of 1998. The defendants sought to rely upon a limitation period set out in s.5 Estates Proceedings Law 1995 and in s.4(1) Torts Reform Law 1996 of one year from the date of death. Graham J at first instance had concluded that this limitation period could not stand alongside a three year period from the date of death provided for by section s.13(4) Limitation Law 1996.

Held: (dismissing the appeal and upholding the decision of Graham J)

(i) The Limitation Law 1991 was intended to be a reforming statute, modelled upon the Limitation Act 1980 (UK). Section 13(5) Limitation Law is in direct conflict with the provisions of s.5 Estates Proceedings Law and s.4(1) Torts Reform Law, in that inconsistent limitation periods are set down. Unfortunately, when the Limitation Law 1991 was enacted in the Cayman

Islands, by an oversight, the old time limits in respect of the survival of actions and fatal accidents litigation remained intact.

(ii) Since the Limitation Law provision was in conflict with the earlier statutes, this should have been a simple case of implied repeal. A further factor to consider, however, was the operation of s.44(1) Limitation Law 1991, which if read literally, would operate to preserve the limitation periods in the Estates Proceedings Law and the Torts Reform Law. The Court could either adopt a literal construction or a purposive construction in interpreting s44(1). A purposive approach was preferred in line with the mischief rule of statutory interpretation, since this reading of the words would remedy the mischief of a short one year limitation period in the case of survival of personal injury claims and fatal accident litigation which the Limitation Law 1991 was designed to cure.

(iii) Accordingly, there was a three year limitation period from the date of death in such cases and the claims of the plaintiffs were not time barred.

SW

Application to dismiss the claim of the plaintiff under GCR O.14 r2 and O.18 r19 - Legal test which must be satisfied in order to dismiss a claim

OLTD (in Liquidation) v D and Others

Grand Court (104/95)
Smellie CJ
October 14 1998

Court Rules

Grand Court Rules Order 14 rule 1
Order 14 rule 12
Order 18 rule 19

Authorities referred to

Drummond-Jackson v British Medical Association [1970] 1 WLR 688
National Westminster Bank plc v Daniel and others [1994] 1 All ER 156
Crib v Reed [1997] CILR N4
Argentine Holdings v BA Hotel [1997] CILR Part 1 90
Wenlock v Maloney and others [1965] 1 WLR 1238
Banque de Paris et des Pays-Bas (Suisse) SA v de Naray (1984) 1 Lloyd's Rep 21
Caparo Industries plc v Dickman [1990] 2 AC 605
Hedley Byrne v Heller [1964] AC 465
Henderson v Merritt Syndicates Ltd [1995] 2 SC 145
Smith v Eric S Bush [1990] 1 AC 831
Deloitte Haskins & Sells v National Mutual Life Nominees Ltd [1993] 2 All ER 1015
JEB Fastener v Marks Bloom & Co [1983] 1 All ER 583
Barings plc v Coopers & Lybrand [1997] 1 BCLC 427

Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse [1998] LS Gaz 2 R 32
In Galoo Ltd (in liquidation) v Bright Graham Murray (a firm) [1995] 1 All ER 16
Berg Sons & Co Ltd v Adams [1993] BCLC 1045

Authoritative works cited

Jackson and Powell on Professional Negligence (4th Ed)
Chitty on Contract (25th Ed)

Mr Brindle QC for 1st-7th and 9th-10th defendants
Mr Hildyard QC for the plaintiff

The plaintiff claimed damages in contract and tort against the defendants on the basis of their alleged negligence in auditing the financial affairs of the plaintiff, and sought to recover damages for the economic losses which they claimed to suffer as a consequence. The defendants sought to (1) dismiss the plaintiff's claim and enter judgment for the defendants pursuant to GCR Order 14 rule 12, as the plaintiff's claim had no prospect of success or (2) strike out the pleadings of the plaintiff pursuant to GCR Order 18 rule 19, on the basis that they disclosed no reasonable cause of action. The defendants averred that the wording of Order 14 rule 12 meant that the plaintiff must show that the case had merely prospect of success. By contrast, the plaintiff argued that the test was the need to show a *prospect* of success.

Held: (denying the application)

(i) The primary objective of Order 14 was the timely disposition of cases in which there was no prospect of a defence (Order 14 rule 1) or a claim (Order 14 rule 12) succeeding.

(ii) The following *dicta* of Patterson J in Crib v Reed, in relation to Order 14 rule 12, was approved: 'It gives the defendant the right to terminate proceedings against him in a summary manner by showing that the plaintiff's claim has no prospect of success...'.

(iii) A defendant's action for summary dismissal under Order 14 rule 12 implied the reverse of the test required by Order 14 rule 1, where the plaintiff applied for summary judgment. There the defendant was required to satisfy the Court that there was a fair and reasonable probability of having a credible defence, not merely that there was a faint possibility of a defence. The words of Ackner LJ in Banque de Pays et des Pays-Bas (Suisse) SA v de Naray were cited with approval: 'The Court must ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or *bona fide* defence.'

(iv) Following this *dicta*, in order to ascertain whether the plaintiff had shown a fair or reasonable prospect of success, the court adopted, in reverse, the same standard as that which must be shown by a defendant under Order 14 rule 1.

(v) On an examination of the affidavit evidence, it was clear that: (a) the court could not safely conclude that the plaintiff had no fair or reasonable prospect of showing a case in contract against the defendant auditors; and (b) in relation to the tort claim, various issues, such as knowledge by the defendants of the plaintiff's reliance on them, could not properly be determined at the summary stage before full discovery had taken place; and (c) the causation issue, based upon the test in Galoo Ltd (in Liquidation) v Bright Graham Murray, would be a difficult one for the plaintiff to prove on the facts of the case, but should nevertheless be subject to full legal argument at trial.

SW

Application for leave to appeal against on aspect of the judgment of Smellie CJ dated 16 August 1998 - Test of causation in case of auditor's negligence where alleged fraud by respondent's employee.

O Limited (in Liquidation) v D and others

Grand Court (104/95)
Smellie CJ
November 16 1998

Court Rules

Grand Court Rules Order 18 rule 19

Authorities referred to

In Galoo Ltd (in liquidation) v Bright Graham Murray (a firm) [1995] 1 All ER 16
Mr Clifford for 1st-7th and 9th-10th defendants
Mr McCahill for the plaintiff
Mr Ritchie for the 8th defendant

The plaintiff claimed damages for economic loss in contract and tort against the defendants on the basis of alleged negligence in auditing the financial affairs of the plaintiff. In a previous application, Smellie CJ rejected the applicant's motion to dismiss the plaintiff's claim pursuant to GCR Order 14 rule 12 or Order 18 rule 19. The defendant sought leave to appeal against one aspect of the said judgment, on the ground that some of the economic losses alleged by the plaintiff were in fact caused by the fraud of a shadow director of the plaintiff's parent company ('R'), and therefore the plaintiff would not be able to satisfy the modern test of causation set out in Galoo Ltd (in Liquidation) v Bright Graham Murray: the alleged breach of duty must be the effective or dominant cause of the plaintiff's loss. The applicant argued that in the case of certain specified alleged losses, since the fraudulent acts of R were the proximate cause, the plaintiff's case, at best, was that the audit report failed to alert the directors as to the true financial state of the company and so they took no steps which might have deterred R from his fraudulent conduct. The defendants contended that this was a discrete point of law which should have been dealt with as such by Smellie CJ in his previous

judgment. Furthermore, the point could be dealt with summarily, thus reducing the costs of defending those heads of damages at trial.

Held: (granting leave to appeal)

(i) The Galoo test was applicable to the issue of causation in this case. The issue of whether (assuming there was a factual link between the negligent audit and the facilitation of fraud) the negligence could ever be regarded for the purposes of causation as the effective or dominant cause of the losses, where fraud was the proximate cause, was a legal point suitable for early determination. It was a discrete issue which could properly be the subject of an appeal on a point of law.

(ii) Costs in the cause.

(iii) Directions given as to future conduct of the action.

SW

Breach of statutory duty - Ex turpi causa

Cayman Water Company v Cayman Hotel and Golf Inc and Ellesmere Britannia Ltd

Grand Court (703/96)
Graham J
March 3 1998

Legislation
Water (Production and Supply) Law 1996
Water (Production and Supply) Law 1979 S 12
Interpretation Law 1995 S 47
Authorities referred to

X (minors) v Bedfordshire CC [1995] 3 All ER 353
Cutler v Wandsworth Stadium Ltd [1949] 1 All ER 544
Lonhro Ltd v Shell Petroleum Co Ltd [1981] 2 All ER 456
Groves v Wimborne [1898] 2 QB 402
Euro-Diam Ltd v Bathurst [1990] 1 QB 1
Saunders v Edwards [1987] 2 All ER 651
Tinsley v Milligan [1993] 3 All ER 65

Mr Alberga QC and Mr Ashenheim for the plaintiff
Mr Croxford QC for both defendants

This was an application to strike out the Statement of Claim. The plaintiff was granted a licence under the Water (Production and Supply) Law (1996 Revision) to supply water and alleged that the defendants, in contravention of the Water (Productions and Supply) Law 1979, had supplied water for reward to, *inter alia*, the Hyatt hotel, golf course and Britannia condominiums. The plaintiff alleged, *inter alia*, that the defendants were in breach of s.12 of the aid Law, which provided for

a criminal sanction following conviction for contravention, and that this entitled them to a right to sue for damages.

The defendant sought to:

1. Strike out this allegation in the Statement of Claim on the basis that no private law remedy was intended by Parliament; and

2. Strike out the whole Statement of Claim on the basis of *ex turpi causa non oritur actio,* since by failing to fulfil their obligations to produce potable water and to own the plant in which the water was produced, they were trading outside the scope of their licence, and therefore the plaintiff's behaviour was such that public policy should prevent them from recovering damages.

Held: (Granting an order to strike out the part of the Statement of Claim depending upon alleged breach of statutory duty, but refusing to strike out the whole pleading)

(i) Generally, breach of statutory duty does not give rise to a private law cause of action unless the statutory duty was imposed for the protection of a limited class of the public and Legislative intended to confer the right of a private action upon members of that class. In construing the statute, regard could be had to factors such as other remedies provided by the statute which would usually indicate that the only remedy was that stated. Exceptionally, it might still be possible to show that a private remedy was intended even though an alternate sanction is provided by the statute (Lord Browne-Wilkinson in X (minors) v Bedfordshire CC). On the facts of the case, while the plaintiffs fell within the category of a limited class of persons, there was no indication of an intention by Parliament to give a right of private action or a right to take action against anyone interfering with the plaintiff's right to supply water. The only sanction provided therefore was a criminal one.

(ii) The Court of Appeal's decision in Euro-Diam Ltd v Bathurst was in point. There Kerr LJ stated that the courts will not assist a plaintiff who has been guilty of illegal or immoral conduct of which the court should take notice, where it would be an affront to the public conscience to grant relief because the court would thereby be assisting or encouraging the plaintiff in illegal conduct. On the basis of the evidence before the court, it seemed that the plaintiff was trading outside the terms of the licence but it was not possible to conclude at this stage what breaches may have been committed by the plaintiff, sufficient to justify striking out the pleading on the basis of public policy under the maxim *ex turpi causa*.

SW

Assessment of damages - Personal injury action

Christopher Allen v Stephen Ebanks

Grand Court (178/96)
Harre CJ

June 1 1998

Legislation

Judicature Law 1995 S 34

Authorities referred to

Rubens v Walker (1946) SC 215
Wells v Wells [1997] 1 WLR 652
Mills v British Rail Engineering Ltd (1992) PIQR 130
Hunt v Severs [1994] 2 All ER 385
Taylor v O'Connor [1971] 1 AC 140
Mallet v McMonagle [1969] 2 All ER 178
Hodgson v Trapp [1988] 3 All ER 870
Woods v Francis [1986] CILR 207
Smith v Manchester Corporation [1974] 17 KIR 1

Authoritative Works Cited

Kemp & Kemp on Quantum of Damages
Ogden Tables
Munkman - Damages for Personal Injury and Death (10th ed)

Mr Garnham for the plaintiff
Mr Lamontagne QC for the defendant

On 13 April 1995 the plaintiff, aged 19 years, was injured by the admitted negligence of the defendant in a road accident. He sustained severe injuries and as a consequence his left leg was amputated above the knee. The plaintiff was an active person who played a variety of sports. He was a hard worker and had two jobs. He was attending a course in Electronic Analysis which would qualify him to repair slot machines. Judgment was entered on 28 October 1996 and this hearing dealt with the assessment of damages.

The plaintiff claimed:

1. General damages for pain, suffering and loss of amenity, together with interest

2. Special damages for losses to the date of trial, including medical expenses and loss of earnings

3. Damages for future loss including
   a) loss of future earnings
   b) future costs of medical treatment and evaluation
   c) future costs of therapy
   d) future costs of equipment including prostheses
   e) costs of retaining an employment fund manager

Held: (awarding damages in US$)

(i) General damages - Referring to *Kemp & Kemp on the Quantum of Damages*, the sum of $US110,000 would be awarded, taking into account the fact the the plaintiff was a resident of the US and had to return to the US for treatment. Interest was awarded on general damages at the rate of 2% from 2nd April 1996 to the date of judgment.

(ii) Special damages to the date of trial - these were either expressly agreed or not subject to contention except in relation to the expense incurred in obtaining the first prosthesis. The plaintiff had made an unsuccessful attempt to obtain a prosthesis and the trial judge awarded $19,107.64 as he was satisfied that the plaintiff was justified in making a second choice of prosthesis (Rubens v Walker). The plaintiff did not pursue his claim for interest on special damages.

(iii) Future loss and expense – the approach would be referring to the Court of Appeal's decision in Wells v Wells, adopted the approach of applying a multiplier consistent with that rate of interest discounted on the capital sum arrived at as the multiplicand. The plaintiff contended for a whole life multiplier of 19.8 and a working life multiplier of 18.7; the defendant contended for a multiplier of 16. Using the Ogden Tables, it was found that a whole life multiplier of 19 and a working life multiplier of 18 should apply, on the basis that there was no evidence that the plaintiff's life was shortened by the injury and his life expectation was therefore to age 75, with 53 years remaining.

As to the multiplicand, in relation to the purchase and maintenance of the prostheses, the judge accepted that the plaintiff would need 14 such prostheses at 4 yearly intervals and therefore allowed a 5% increase for technology up to the time of the third purchase of the primary prosthesis when its notional price would be $40, 825. This gave a multiplicand of $9,963. An award of $189, 297 ($9,963 x 19) was made.

(iv) Loss of future earnings - an award of $117,000 ($6500 x 18) was made.

(v) Loss of Earning Capacity - an award of $120,000 was made on the basis of the principle in Smith v Manchester Corporation.

(vi) Provision for fund management - an award of 1% of the value of the fund multiplied by the lifetime multiplier of 19, amounting to $301, 256 was made.

(vii) Damages were further awarded for future treatments and medical problems, evaluations, therapies, equipment, home modification and maintenance costs.

SW

Negligence - Death - Quantification of Damages

Carolyn Violet Carter (Administratrix of the Estate of Delmar Vendryse Carter) v Douglas Dawson and Anne Brenda Dawson and Others

Grand Court (29/96)
Smellie CJ
June 18 1998

Legislation

Torts (Reform) Law 1996 Ss 234(1)
Estates Proceedings Law 1995
Public Passenger Vehicles Regulations 1995
Legal Aid Rules r 15 1997

Authorities referred to

Harris v Empress Motors Ltd [1983] 3 All ER 561
Hunt v Severs [1994] 2 All ER 385
Woods v Francis [1986] CILR 207
Wells v Wells [1997] 1 All ER 673
Cookson v Knowles [1978] 2 WLR 978
Taylor v O'Connor [1970] 1 All ER 365
Mallett v McMonagle [1969] 2 All ER 178
Young v Percival [1974] 3 All ER 677
Pickett v British Rail Engineering Ltd [1979] 1 All ER 774

Authoritative works cited

Munkman on Damages 9th ed
The Ogden Tables Facts and Figures 1997
Specimen Life Tables
Kemp & Kemp 1995 ed

Mr Alberga QC and Mr Taylor for the plaintiff
Mr Allen for the 1st 2nd and 3rd defendants
Ms Collins for the 4th defendant

On January 29, 1995, due to the negligent driving. the 1st defendant struck the vehicle being driven by the deceased and killed him. The plaintiff sought quantification of damages arising from the accident under the Torts (Reform) Law 1996 in relation to the dependancy of the plaintiff and under the Estates Proceedings Law for loss of expectation of life on behalf of the estate. The second and third defendants were joined to the action as beneficial and registered owners of the car being driven by the first defendant. The fourth defendant was joined for the purposes of contesting the assessment of damages. Another cause of action was initiated by the fourth defendant seeking declaratory relief that the insurance policy was null and void at the time of the accident.

At the date of the accident the deceased was sixty-two years old, in excellent health and had never missed a day of work. He was a foreman of the Public Works

Department as well as the holder of a taxi operators' permit which he used to supplement his income. His intentions were to retire from the Public Works Department at age 65 and then operate his taxi full time for as long as he was physically able. It was agreed by all parties that the deceased's income would not have substantially changed after retirement due to these factors.

Held: (for the plaintiff)

(i) The claim brought by the minor step-grandchildren as additional dependants was dismissed because there was no statutory cause of action for such dependants under the Torts (Reform) Law. Section 2 clearly set out the relationships that fell within the definition of dependant and the relationship of step-grandchild did not qualify. As a result, a deduction of one third would be used to reflect moneys which the deceased would have spent on himself instead of one quarter, the standard deduction where the dependants include a family unit of children: Harris v Empress Motors Ltd.

(ii) The method of calculation to be used in determining the assessment of damages would be the conventional approach, as opposed to the actuarial computation. The actuarial approach could be used as a double-checking device and could provide guidance to judges when arriving at appropriate multipliers, but it should not replace the conventional approach entirely. This was particularly so in the Cayman Islands where the variables and imponderables differ substantially from those circumstances existing in the UK.

(iii) The case of Wells v Wells should be followed in adopting a rate of return on investment at 4.5% of the capital sum.

(iv) The deceased's income was calculated to be CI$40,104 per annum to which the conventional one-third deduction was deducted for his own personal expenses: Woods v Francis. The multiplicand was set at $26,737.

(v) The multiplier was determined by referring to the Specimen Life Tables. A statistical expectation of life for both the deceased and the plaintiff was set at 75 years. A forty percent reduction to the multiplier was taken to reflect the deduction for the contingencies of life which yielded a multiplier of 7.8 years. This postulated the deceased working until his 70th birthday which was rather longer than the average age of retirement. This was due to the fact that the deceased had already attained the age of 62 and clearly had the ability to continue working for several years after the normal age of retirement. The age of 70 was also significant due to the fact that the Public Passenger Vehicles Regulations 1995 imposed a cut off age of 70, beyond which issuance or renewal of a taxi operator's licence is prohibited.

(vi) The conventional award for the loss of expectation of life of CI$2,000 as set out in the Amendment to the Estate Proceedings Law, 1987 were awarded.

(vii) Funeral expenses of $6,777 plus interest of $1,749 were awarded.

(viii) Legal aid should be refunded as per Rule 15 of the Legal Aid Rules 1997.

SW

Editor's Note: The provision within the Public Passenger Vehicles Regulations, referred to at point (v) above, mandating the retirement of taxi operators at age 70 has recently been repealed.

TRUSTS

In The Matter Of The Cotorro Trust
And In The Matter Of The Trust Law (Revised)

Grand Court (153/95)
Smellie CJ
April 7 1998

Authorities referred to

Richardson v Richardson [1989] 3 WLR 865
Romilly v Romilly [1963] 3 WLR 732
Dixon v Rowe (1876) 35 LT 548
Hydes v Foster (1748) 1 Dick 1132
Willcock v Terrell (1878) P 239
Hydes v Hydes (1988) 13 Pd 166

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Halsbury's Laws 4th Ed Vol 6

Mr Ritchie for the plaintiff
Mr Timms for 1st and 2nd defendants.

On January 17 1997, an anti-suit injunction was issued by the Grand Court to restrain the 3rd defendant the daughter of the 2nd defendant from continuing proceedings, instituted in Florida, against the 1st and 2nd defendants. It had been clearly demonstrated to the Grand Court that the Florida proceedings were oppressive and designed to embarrass and pressure the 1st and 2nd defendants, who were already parties to these proceedings and enjoined before the Grand Court, over issues touching upon essentially the same subject matter. The Grand Court was also then found to be the natural and proper forum for resolution of those issues as they related to a trust domiciled in this jurisdiction. The 3rd defendant was given leave to challenge the order but did not. In flagrant breach of the anti-suit injunction she continued the action in Florida. She was unsuccessful in the action at first instance for reasons similar to those that led to the imposition of the anti-suit injunction by the Grand Court, i.e. *forum non conveniens* and oppression.

The writ had been issued and reissued by Douglas J with a prescribed expiry period for a number of reasons. He had been concerned that as the 3rd defendant had no assets, which were or would become amenable to the writ of sequestration as being within the jurisdiction of the Court, the indefinite extension of the writ

would be futile and it was not appropriate for the Grand Court to make ineffective orders.

At the date of this hearing, the 3rd defendant persisted with her breach, the Florida action being pursued on appeal. The Grand Court was satisfied that the 3rd defendant was motivated purely by self interest and had every reason to believe that she would continue unless it was brought home to her that continued disobedience of Grand Court orders would not be tolerated and would result in severe consequences.

Held: (Order that the writ of sequestration be renewed in the general form. Any property seized by means of the writ required to be held until an attempt was made to purge the contempt).

(i) The Court was satisfied that the ramifications of public policy, and newly suggested methods for the writ's enforcement, meant that a change of approach was necessary. In regard to public policy, the Grand Court should not be seen as accepting or condoning contempt of its orders and refusal to reissue the writ would inevitably carry that implication. So long as a continuation of the writ could serve as a deterrent to such flagrant contempt of the orders of the Court the Court was persuaded that public policy required it to be allowed to run in the usual way. Whilst any benefit to any party was incidental to public policy it was, nonetheless, still a factor to consider. The element of ensuring that those who were affected by the contempt did not suffer insofar as the Court could prevent it was, *ipso facto*, justification for continuation of the writ: In Richardson v Richardson the court ordered the sale of the respondent's house to provide the plaintiff with the means by which he could pursue an action against the respondent overseas. That approach was applicable in the instant case as the currency of the writ might enable the plaintiff to pursue the 3rd defendant into complying with the anti-suit injunction.

(ii) The coercive value of the writ itself as a means of compelling the contemnor to obey was also a consideration. Although the order was an injunction and therefore negative in terms, it would ordinarily be practicable that the 3rd defendant's assets be pursued and, if appropriate, seized and held: Richardson v Richardson and Romilly v Romilly per Lord Scarman.

(iii) The only 'asset' of the 3rd defendant known to be amenable to the jurisdiction of the Court was her contingent interest in the trust. If she survived her mother, her entitlement was to one quarter of the income from the trust. However it was accepted that this amounted to an equitable chose in action and not an asset which could be directly sequestered; Halsbury's Laws, 4th ed. Accordingly, the interest was not one that could be directly seized to compel obedience of the Court order.

However, it was submitted by Counsel for the trustee that as there were significant sums due from the 3rd defendant to the 1st and 2nd defendants for costs incurred in these proceedings, any action taken to recover such

sums against the 3rd defendant's entitlements under the trust would, arguably, trigger the forfeiture provisions of the trust deed which created a protective discretionary trust over her entitlements. However, the operation of the discretionary trust if triggered, whilst replacing the 3rd defendant's non-discretionary interest with a discretionary interest, would also remove her entitlement from the operation of the writ with the result that the seqestrators could not go against it: U Laws, 4th ed: Dixon v Rowe. In such circumstances this would be an entirely punitive recourse but one which the Court might come to regard as justified if the flagrant disobedience continued.

(iv) A further tangible reason for continuing the writ arose from consideration of two other possibilities, both of which could arise if the 3rd defendant survived the 2nd defendant. If the interests of the 2nd defendant were carried over into her estate in a form recognised by the Court, (the enforcement of claim for damages or costs arising from breach of the anti-suit injunction) they might become enforceable as against any interest which the 3rd defendant might then have in the trust; Halsbury's Laws 4th Ed: Hydes v Foster, because the interests of the person issuing the writ devolve to their estate. Attempted enforcement of this claim might also operate to trigger the forfeiture clause instead of relieving the indebtedness, but this may well be considered a justifiable outcome for the reasons previously outlined.

The other possibility considered was that the indebtedness arising under the operation of the writ and devolving to the estate of the 2nd defendant could be enforced, not directly against the trust itself therefore not triggering the forfeiture clause, but by way of some mandatory forms of order – Willcock v Terrell.

(v) The hypotheses outlined by the Court in this case were considered only as reasons postulated to show that the writ, if allowed to continue to run, would not be an empty token order, and were not matters which the Court felt it could definitively pronounce on.

RC

Whether monies paid to company under agent/principal agreement held on trust for the principal - Whether controlling director of company liable to principal for causing or permitting the company to commit breaches of trust.

Islena de Inversiones SA de CV (Islena Airlines) v Jefferson Travel Services Ltd

Grand Court (310/94)
Harre CJ
April 22 1998

Authorities referred to

Boston Deep Sea Fishing v Ansell [1888] 34 Ch D 339
Stephens Travel Services Int Pty Ltd v Qantas [1988] 13 NSWLR 331

Canadian Pacific Airlines v CIBC [1987] 42 DLR 375
Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming [1995] 3 WLR 64

Mr Henriques QC and Mr Clement for the plaintiffs
Mr Lamontagne QC and Mr Hampson for the defendants

In August 1991, the plaintiffs appointed the defendants as their agents in the Cayman Islands. This contract of agency was unilaterally terminated by the plaintiffs in June 1994, as a result of their concern regarding the plaintiff's conduct of the agency. Upon termination, the plaintiff's claimed that certain sums were outstanding to them pursuant to the contractual arrangement. It was common ground between the parties that the agent's duties comprised the following: collection of revenue from ticket sales, express letters and excess baggage charges; payments from this revenue of banking fees, fuel bills and general services supplied by CAL. From the gross revenue the agent was entitled to deduct 10% commission and office expenses and a report and accounting of the balance was to be made to Islena at periodic intervals.

The financial reports and balance accounting were supplied only sporadically. It was alleged by the plaintiffs that, in addition to their concerns regarding the irregular reporting system adopted by the defendants, the reports themselves were inaccurate – listing items as having been paid, and therefore deducted from the balance remitted, when they had not in fact been paid.

The defendants' reaction to termination of the agency was to write to Islena demanding certain sums from them in respect of damage to their local reputation and threatening to have their license revoked and to take a court action locally in respect of alleged slander.

The questions which fell to be decided by the Court comprised the following:

1. With what party or parties had the plaintiff conducted its arrangement;

2. What was the period of notice of termination applicable to the agreement;

3. Was the plaintiff entitled in any event to terminate the agreement of notice by reason of breach;

4. Did the agreement give rise to a debtor/creditor arrangement?
5. What would be the appropriate order in relation to any sums found to be owing?

Held: (order in favour of the plaintiffs)

(i) Upon a review of the correspondence and the course of dealing between the parties it was accepted that the contracted parties were Islena and Jefferson Travel Services Ltd.

(ii) The period of notice applicable to the contract by express agreement, or by implication was a reasonable period.

(iii) Notwithstanding this, the breaches of the agreement revealed by the evidence were of such a serious nature that the plaintiff was justified in terminating it without notice.

(iv) The existence or otherwise of a trust depended upon the terms of the agreement.

It was well established that the duties of an agent included the following to:

- keep the money and property of his principal separate from his own and from that of other persons;
- preserve and be constantly ready with correct accounts of all his dealings and transactions in the course of his agency;
- produce to the principal, or to a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs.

The court was referred to a number of modern authorities all of which involved arrangements between airlines and travel agents. In Stephens Travel Services Int. Ltd., J. Quantas and Canadian Pacific Airlines v CIBC it was held that the terms of the respective agreements gave rise to an express trust in favour of the airlines. In both instances certain characteristics, intent, subject matter or objects (the three certainties) had been displayed. In Royal Brunei Airlines Sdn Bhd v Phillip Tan Kok Ming. It was held, by the Judicial Committee of the Privy Council, that where a third party dishonestly assisted a trustee to commit a breach of trust or procured him to do so, the third party would be liable to the beneficiary for the loss occasioned by the breach of trust, even though the third party had received no trust property and irrespective of whether the trustee had been dishonest or fraudulent; that in the context of such accessory liability, honesty was to be judged objectively in the sense that acting dishonestly, or with a lack of probity, meant not acting as an honest person would act in the circumstances and could usually be equated with conscious impropriety as distinct from inadvertent or negligent conduct or carelessness.

Moreover, the third parties' conduct had to be assessed on the basis of his actual knowledge at the time, not what a reasonable person would have known or appreciated, and regard could be had to his personal attributes including experience and intelligence and the reason his conduct. Accordingly, since the defendant had caused or permitted the company to commit a breach of trust by using in the course of its business money held in trust for the airline when he knew that the company was not authorised to do so by the terms of the trust, the defendant had acted dishonestly, and was therefore liable to the airline for the money owed to it by the company.

Although in the three cases cited the imposition of the trust was by express term and, in that respect, they were distinguishable, having reviewed the nature of the arrangement between the parties in the instant case, against

the background of industry practice in different parts of the world it was found that the three certainties were present and that a trust existed.

(v) Applying the test in Tan the Court further found that the 1st defendant had acted dishonestly in causing or permitting the company in which he was the controlling mind to commit breaches of trust. On this basis, both the 1st and 2nd defendants were found to be liable to the plaintiffs.

RC

Challenge to validity of trust - Impecunious minor beneficiary seeking Beddoe-type indemnity to defend action - Factors to be considered - Security for costs - Whether defendant actually a plaintiff for the purposes of Grand Court Rules Ord 23 r1(a)

In the Matter of a Declaration of Trust Dated 19th April 1990 and in the Matter of the Trusts Law (1996 Revision)

Z Private Bank and Trust Cayman Ltd v CM MC & JS

Grand Court (203/97)
Smellie CJ
November 25 1998

Legislation

The Trusts Law 1996

Court Rules

Grand Court Rules Ord 23 r 1(a) r 1(4)
Rules of the Supreme Court 1998 Ord 23 r 1 r 3

Authorities referred to

Re Beddoe [1893] 1 Ch 547
McDonald v Horn [1995] 1 All ER 961
In the matter of the Cotorro Trust [1997] CILR 1
Re Westlock Realisations Ltd [1988] BCLC 354
Lemos v Coutts [1992-93] CILR 460
Evans v Evans & Others [1985] 3 All ER 289
National Anti-Vivisection Society v Doddington (1989) The Times 23 Nov
Alsop Wilkinson (a firm) v Neary [1995] 1 All ER 431
In Re Hall [1994-95] CILR 456
In Re Buckton (No 3) [1907] 2 Ch 414
In the matter of the Aall Foundation (277/94)
Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] QB 609
In Re Emery (Deceased) [1923] P 184
Rose v Epstein and Another [1974] 1 WLR 1565
Moran v Place [1896] P 214

Mr Foster for the plaintiffs

Mr Bolton for the first defendant
Mr Taylor for the second defendant
(The third defendant no longer participating)

This action arose as a result of a challenge to the validity of a trust of which Z Ltd. was the trustee. The trust was challenged in the New York courts, by MC (the second defendant in the instant case and administrator of the estate of the settler), that action lasting for six years before being dismissed on jurisdictional grounds. Action was now being taken in this jurisdiction (albeit on different grounds) and the trustee sought preliminary directions, pursuant to s.45 Trusts Law, with regard to the determination of certain issues. These issues comprised; (1) could protection by way of a pre-emptive costs order, akin to a Beddoe order, be extended to CM, the first defendant, who was an impecunious minor and the only living beneficiary of the trust, and (2) could CM and the Trustee obtain an order for security for costs, under Grand Court Rules Ord 23 r1(a), against MC notwithstanding that he was not styled as plaintiff on the record?

Held : (granting CM a complete pre-emptive order for indemnity for costs from the trust fund, including any order which might be made against him, and further ordering MC to provide security for the costs of CM and the trustee within twenty one days or be barred from further conduct in the proceedings)

(i) It was settled law that where litigation appeared to be *prima facie* proper and in the interests of the trust the trustee were entitled to be reimbursed their costs out of the trust estate whatever the outcome of the litigation; Re Beddoe. In McDonald v Horn it was noted that in certain circumstances this principle would be extended to grant pre-emptive costs orders to other parties to the trust litigation, subject to certain limiting conditions. To be preferred was the approach of Browne Wilkinson V-C in Re Westlock Realisations Ltd where he stated the test to be ' unless satisfied that after trial a judge would be likely to make an order that the costs of all parties are to come out of the fund it cannot in general be right to make such an order at this stage.' Applied in Lemos v Coutts.

(ii) It was accepted that CM was a minor and that his only assets or means were his interests in the trust itself. Although this action comprised, in essence, administrative proceedings in which the trustee's duty was to be completely open and frank with the Court as to the strengths and weaknesses of the case, there remained the risk that, unless CM was funded in the action, arguments which should be put in his favour and in favour of the wider potential class of beneficiaries might not be put. However unlikely that risk, the beneficiaries had a separate and identifiable interest, apart from the Trustee's, to be represented: Lemos v Coutts. This risk, when taken together with the minority and impecuniously of the beneficiary, were factors which weighed in favour of granting the pre-emptive order: In the matter of Cotorro Trust.

(iii) The basic objection to the granting of a pre-emptive order was that if the challenge was ultimately to succeed, a pre-emptive order for costs in favour of CM would serve only to diminish the fund to which MC would be entitled,

and therefore CM would have been able to litigate at the expense of MC and at no risk to himself. In the instant case however not only was the beneficiary under age and impecunious but he acted in a representative capacity for all beneficiaries' and in the interests of the trust as a whole. Underlying all of this was a consideration of the merits of the case: Evans v Evans and Others, National Anti-Vivisection Society v Doddington, Alsop Wilkinson (a firm) v Neary and In Re Hall.

(iv) The application for security for costs was based on Grand Court Rules Ord 23 r 1(a) on the grounds that MC should be deemed to be the 'plaintiff', that he was ordinarily resident out of the jurisdiction and that, having regard to all the circumstances of the case, it would be just to grant any such order. The primary issue here was whether MC ought to be regarded as being in the position of a 'plaintiff' so as to make him amenable to the rule. Other relevant factors in considering whether the order should be granted were that MC's assets were reported to be in Mexico thus making the enforcement of a costs order against him difficult to enforce: Lindsay Parkinson & Co Ltd v Triplan Ltd, and the likelihood or otherwise of MC's success in this action: In Re Hall.

Case law suggested that, although a matter of discretion, it was the usual rule of practice of the Court to require a foreign plaintiff to give security for costs, because it was ordinarily just to do so. However, this power could only exist if MC could be properly regarded as being in the position of a plaintiff. There being little guidance in the case law regarding this point, the axiom that it would depend on the circumstances of the case came to the fore and accordingly consideration of the real nature of the parties' positions was necessary to determine the issue. Given the history of the matter MC's action in New York, and the costs incurred by the trustee and CM defending it (some $73,000), and the technical challenge to the validity of the trust being maintained in the instant action, the reality of the situation was that MC was in the position of plaintiff. In effect, MC had caused the trustee to seek relief from the Court in the form of the instant action.

RC

"Moving the Goalposts" - The Court of Appeal looks again at the test for setting aside judgments in default

"In the determination of his civil rights and obligations....everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" [1]

In *Day v Royal Automobile Club Motoring Services Ltd*[2] the Court of Appeal was concerned with establishing the correct approach to the exercise of the court's discretion to set aside a judgment obtained in default.

Applications to set aside default judgments are governed by RSC Ord.13, r 9 (Grand Court Rule Order 13, r.9) which provides that the Court may, on such terms as it thinks just set aside or vary a default judgment. The principle underpinning the rule was explained by Lord Atkin in *Evan v Bartlam*[3] thus:

> "...unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure,"

Where the judgment is irregular the defendant is entitled to have the judgment set aside *ex debito justitiae,* subject always to the court's power to correct any irregularity. Where, however, a judgment is regular, a defendant seeking to set aside a judgment has to satisfy the court that he has a defence which "has merits to which the court should pay heed" (per Lord Wright *Evans v Bartlam)*[4].

The meaning of this phrase was considered at some length by Sir Roger Omrod in *The "Saudi Eagle"*[5]. In this case Sir Roger Omrod was at pains to contrast the position of a defendant seeking to set aside a default judgment under RSC Ord. 13, r 9 with that of a defendant seeking leave to defend under RSC Order 14 (Grand Court Rule Order 14). In the latter case a defendant is required only to show *"an arguable case"*. In Sir Roger Omrod's view the standard required on applications to set aside a default judgment was altogether different. A much more rigorous test was to be applied requiring the defendant to show that he "has a real prospect of success". In order to determine this, the Court must, "form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed." In other words, "the 'arguable' defence must carry some conviction."[6] The justification for the distinction, according to Sir Roger Omrod, lay in the fact that where a judgment in default was set aside the plaintiff was being deprived of his proprietary rights in ht judgment.
For a long time, the merits test proposed by Sir Roger Omrod has been taken to be the correct approach in determining applications to set aside judgments in default. However, the viability of applying a merits test at an interlocutory stage was questioned by Lord

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[1] Article 6(1) Human Rights Act 1998
[2] The Times, November 24 1998
[3] [1937] 1 AC 473, 480
[4] *ibid.*
[5] Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc [1986] 2 Lloyd's Rep 221, 224
[6] *Ibid* 223

Justice Dillon in *Allen v Taylor*[7] in which he said that it was impossible to be dogmatic about the extent to which the court must be satisfied of the validity of the suggested defence:

"There must be numerous cases where the issue will turn entirely on an assessment of the facts at trial: each party's case would carry conviction if it stood alone and without conducting a trial the court is not able to say which will succeed."

Notwithstanding Lord Justice Dillon's reservations, the current editors of The Supreme Court Practice 1999 (the 'White Book'), commenting on the apparent divergence of views expressed in *The "Saudi Eagle"* and *Allen v Taylor* submit that the latter, "is not easily reconcilable with the robust approach of *The Saudi Eagle* and is a dilution thereof. The preferred view is that unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on (sic) fact no "real prospect of success" is shown and relief should be refused."[8]

However, in *Day v Royal Automobile Club*, the Court of Appeal took the opportunity of reviewing the authorities, in particular, *The "Saudi Eagle"* and *Allen v Taylor*, and though purporting to agree with the views expressed by Sir Roger Omrod, came down heavily in favour of the more flexible approach recommended in the latter case. In so doing Lord Justice Ward reasserted the supremacy of the trial judge as the ultimate trier of fact, whose function was not to be usurped by the judge at the hearing of an interlocutory application. Accordingly, Lord Justice Ward was "hesitant" to elevate the test on applications to set aside into a test that there was a real likelihood that the defendant would succeed.

It is unlikely, however, that Lord Justice Ward's reservations about the jurisdiction of interlocutory judges will find favour with those in charge of reforming the civil justice system. For, in preferring the somewhat more hawkish approach of *The "Saudi Eagle"*, the editors of the White Book are doing no more than reflecting the dominant ethos of Lord Woolf's proposals for reform, namely that judicial resources are valuable and should not be wasted on cases which cannot demonstrate a sufficiently realistic prospect of success. Thus the new Rule 13, at least in its current draft, provides that:

"The court may set aside or vary a judgment entered in default under Part 12 if:

a) the defendant has a real prospect of successfully defending the claim; or

b) it appears to the court that there is some other good reason why -

i) the judgment should be set aside or varied; or

ii) the defendant should be allowed to defend the claim

A similar approach is to be taken to applications for summary judgment under Rule 24 which provides that:

"The court may give summary judgment against a claimant or defendant on the whole of or on a particular issue if:

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[7] [1992] 1 PIQR 255, 259

[8] Supreme Court Practice 1999 paragraph 13/9/18

(a) it considers that -

(i) the claimant has *no real prospect of success* on the claim or issue;
or

(ii) the defendant has *no real prospect of successfully defending* the claim or issue; and

(b) there is no other reason why the case or issue should be disposed of a trial

This would tend to support the editors' assertions that it is the more rigorous standard advocated by Sir Roger Omrod which represents the true test to be applied on applications to set aside; though it does beg the question of how the court can continue to maintain a distinction between the standard to be applied on Order 14 applications and applications to set aside default judgments as insisted upon by Sir Roger Omrod.

As noted by Lord Justice Ward, the difference in approach is no mere matter of semantics, but represents rather a significant moving of the goalposts which may have, as yet unforeseen consequences in terms of restricting a litigants' rights of access to the full panoply of the court's resources.

The new Civil Procedure Rules 1998, [9] are not as yet in force in Cayman and their introduction still seems a long way off, but there is clearly scope, in the meantime, to develop a local body of jurisprudence on this issue. The question for practitioners is whether the local judiciary will follow the lead suggested by the editors of the White Book or the less hawkish approach advocated by Lord Justice Ward.

DOB

[9] SI 1998/3132

A Synopsis of the 1998 Study of Pre-trial Disclosure in Criminal Proceeding in the Cayman Islands

A. Introduction

The extent of the prosecutor's duty to disclose evidence to the defence before trial in criminal proceedings has not been stated precisely in local statute or case law.[1] Nor has the issue been addressed in practice directives from the court or in guidelines from the Attorney-General. In an attempt to understand the practice of disclosure in criminal proceedings in the Cayman Islands, the authors conducted a study through the medium of interviews of local attorneys who appear in criminal matters.[2] The following summary highlights the common law principles of disclosure, relevant statutory provisions, and the results of our study. By way of contrast, reference is made at various stages of the article to the common law disclosure rules developed in England, and the *Criminal Procedure and Investigation Act 1996 (CPIA)*.[3] It is hoped that a full report of our study will be published by the CI Law School in a booklet early in 2000.

B. Legal Tradition

The courts of the Cayman Islands traditionally have followed common law principles. The Cayman Islands' Court of Appeal has acknowledged that unanimous decisions of the English Court of Appeal are strong persuasive authority locally,[4] as are opinions of the Judicial Committee of the Privy Council arising from cases in other commonwealth jurisdictions.[5] Similarly, the Privy Council has stated that its opinions are to be considered strong persuasive authority locally where similarly worded statutes have been interpreted in other commonwealth jurisdictions.[6] Also, the Privy Council stated that on questions of common law, a decision of the House of Lords was of very great persuasive authority locally because of the common membership of the jurists. This dicta does not apply where circumstances locally make it inappropriate to develop a field of common law in a manner similar to England. Where legislative provisions are common to both jurisdictions, however, a decision of the Lords has the same practical effect as if it were binding locally.[7] This is of particular importance in considering the meaning of the

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[1] Section E below states the existing provisions.

[2] Interviews were conducted during the summer of 1998. The interviewer followed a questionnaire form and noted the responses to specific questions and any other comments provided.

[3] (1996) c 25. The Act mandates a scheme of disclosure by the prosecution to the defence. Initially disclosure is limited to the Crown's case and unused material thought by the prosecutor to undermine its case, s 3. Further disclosure is available, s 7, if the defence provides a statement outlining its position and evidence, s 5. Collection, preservation and disclosure of evidence by the police to the prosecution is addressed in a Code of Practice (SI 1997/1033). The primary assessment of the relevance of information, and what will be forwarded to the prosecutor, rests with the 'disclosure officer', para 2.1, 7.1.

[4] *R v Miller (Michael)*, unreported April 24, 1998, CA32/97.

[5] *Smith v Commr. of Police* [1980-83] CILR 126, 177 CICA.

[6] *de Lasalsa* v *de Lasalsa* [1979] 2 All ER 1146.

[7] *Ibid.*, p 1153 per Lord Diplock.

grounds of appeal (i.e. material procedural irregularity) found in the *Court of Appeal Law*[8] because this statute mirrored England's *Criminal Appeal Act 1968* .[9]

The principles of natural justice are established in statute and case law locally. Procedural regularity is recognised as being important to the administration of justice.[10] In *Bertoli*,[11] Georges JA applied the following words of Lord Bridge in *Lloyd v McMahon*,[12] "[i]t is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional safeguards as will ensure the attainment of fairness." Regularity in proceedings was placed on a statutory footing in the third ground of appeal in the *Court of Appeal Law*.[13] The Court is directed to allow an appeal against conviction due to "a material irregularity in the course of the trial" unless no miscarriage of justice occurred.[14]

C. English Principles, International Trends and Prosecution Disclosure

The English Court of Appeal unanimously confirmed that the duty on the prosecution to disclose information (both material to be used in its case and unused materials) to the defence was rooted in statute and common law. It decided that the court had the power to review any question relating to the sufficiency of the disclosure provided by the prosecution.[15] The existence of the duty was inextricably linked to the principles of procedural fairness in natural justice. The point was made clearly by Glidewell LJ in *Ward*: "They [disclosure obligations] were merely aspects of the defendant's elementary common law right to a fair trial which depends upon the observance by the prosecution, no less than the court, of the rules of natural justice." He went on to state , "We would emphasise that 'all relevant evidence of help to the accused' is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led. We believe that in practice the importance of disclosing unused material has been much more clearly recognised by prosecutors since the publication of the Attorney-General's Guidelines."[16] These comments were quoted with approval by the House of Lords in *Mills and Poole*[17]

Lord Steyn reviewed the roots of the common law right of disclosure in *Brown (Winston)*[18]: "The objective of the criminal justice system is the control of crime, but

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[8] (9/1975)(1996 Revision) s 9.
[9] c 19 s 2.
[10] *Smith, supra* note 5, p 179.
[11] *Bertoli, Eisenberg and Cannistraro v Malone (as Cayman Mutual Legal Assistance Authority)* [1990-91] CILR 58, CICA, aff'd by PC [1992-93] CILR N-1.
[12] [1987] AC at 702-703.
[13] *Supra* note 8, s 9 (1)(2).
[14] Lord Hutton in *Mills and Poole* [1998] 1 CrAppR 43, stated at p 55 "a material irregularity which causes a conviction to be quashed is not a mere procedural irregularity." Also "there is no real distinction between a material irregularity which causes a miscarriage of justice and a feature of the trial which causes a conviction to the unsafe."
[15] *Maguire* (1992) 94 CrAppR 133; *Ward* [1993] 2 All ER 577, 96 CrAppR 1.
[16] *Ibid.*, p 601 All ER.
[17] *Supra* note 14 at p. 58 (per Lord Hutton).
[18] [1994] 1 WLR 1599, 1 CrAppR 191, CA, aff'd, [1998] 1 CrAppR 66, 70 HL.

in a civilised society that objective cannot be pursued in disregard of other values. That everybody who comes before our courts is entitled to a fair trial is axiomatic. Lord Wilberforce stated in *Raymond v. Honey* [1983] 1 A.C. 1, 13, that the right of every citizen to unimpeded access to a court is a basic right. Similarly, the right of every accused to a fair trial is a basic or fundamental right. That means that under our unwritten constitution those rights are regarded as deserving of special protection by the courts. However, in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial. That is the framework in which the development of common law rules about disclosure by the Crown must be seen."[19]

As recently as 1997, the House of Lords determined that well established rules regarding aspects of the prosecution's duty to disclose were to be reviewed, and revised.[20] In adopting the decision of the Supreme Court of Canada in *Stinchcombe*[21] the Lords, in *Mills and Poole*,[22] overturned the rule in *Bryant and Dickson* [23] and continued the call for extensive prosecution disclosure of used and unused materials before trial. Lord Hutton confirmed that the fruits of the investigation are held in trust for the administration of justice, and are not the property of the prosecution.[24]

Internationally, the trend in disclosure rules made by common law courts is toward more complete disclosure. For example, the Scottish Court has extended the prosecutor's duty of disclosure in the decision in *McLeod, Petitioner*[25] and the Supreme Court of Canada remains active in refining the rules governing prosecution disclosure.[26]

D. Privy Council, House of Lords, and Prosecution Disclosure Rules

The Privy Council, in the Jamaican case of *Vincent and Franklin*[27] confirmed the importance of pre-trial disclosure by the prosecution in the fair administration of criminal justice. However, it acknowledged that each jurisdiction had to define, in the context of local conditions and resources, its own rules of disclosure. Lord Woolf stated, with reference to Jamaica, that it would be appropriate to end the state of confusion surrounding the rules of disclosure in that jurisdiction. He recommended that the Attorney-General publish guidelines addressing the matter, a route that had been taken by the Attorney-General of England in 1981.[28]

Similarly, the Cayman Islands is left with the task of determining the rules of prosecution disclosure within its boundaries. The local tradition of accepting English appellate decisions as strong persuasive authority may be seen as a strong indication of the direction that the Cayman Islands Court of Appeal might take

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[19] *Ibid.*, p 1606 WLR.
[20] *Mills and Poole*, *supra* note 14.
[21] (1991) 68 CCC (3d) 1.
[22] *Supra* note 14.
[23] (1946) 31 CrAppR 146.
[24] *Mills and Poole*, *supra* note 14, p 62.
[25] 1998 SLT 233.
[26] *Dixon* [1998] 1 SCR 244.
[27] [1993] 1 WLR 862.
[28] Practice Note (Criminal Evidence: Unused Material) [1982] 1 All ER 734.

should the question arise. It is submitted that the forcefulness, and volume, of the decisions of the House of Lords and the English Court of Appeal since the opinion in *Vincent and Franklin* would ensure a higher measure of prosecution disclosure locally than might have been envisaged in the days immediately after *Vincent and Franklin*. The standard likely to be adopted was stated by Lord Hutton: A disclosure rule "[W]hich can, in certain circumstances, operate to cause an injustice at trial leading to an unsafe conviction and the imprisonment of the defendant, which can only be remedied some time later by the Court of Appeal, ... should not continue as part of the common law unless there is a strong countervailing argument to support it."[29] As is demonstrated in the following synopsis of the 1998 study, a significant degree of uncertainty exists as to the rules of disclosure locally. It is submitted that guidance for prosecutors from the Cayman Islands Attorney-General would assist in the administration of justice locally. The guidelines should address proceedings on indictment and summary proceedings. Certainly the extreme sentencing power on summary conviction is an additional argument in favour of wide pre-trial disclosure.[30] It is acknowledged that a system of disclosure as broad and all-encompassing as that found in the rules of the English common law would not be appropriate for the Cayman Islands due to resource limitations. However, practices exposed as inappropriate three decades ago should not be allowed to continue.[31]

E. Study Synopsis

Locally, a comprehensive statement of the rules of disclosure does not exist. Only one judicial pronouncement was uncovered, that being *Parkes (Lucinda)*.[32] It preceded the speech in *Vincent and Franklin* and the decision in *Ward*. In *Parkes*, it was argued that the defence had a right to be informed of the case for the prosecution so that the accused could put forward a full answer and defence. To that end, the attorney requested in writing that the police prosecutor provide the identities of the prosecution witnesses, and copies of their statements. However, at the hearing, the attorney modified his request, seeking only the names of the prosecution witnesses.[33] Magistrate Jackson ruled that "[i]t is a right of a defendant to know the full case against him or her and this right includes to be informed of all Crown witnesses' names whether called or not and not just the actual witnesses called..."

Certain provisions in the *Criminal Procedure Code* [34] address prosecution disclosure in trials on indictment. The prosecution must list on the indictment the name of every witness intended to be examined.[35] Although the indictment may be served on the accused only a few days before trial, early filing of the indictment[36] and the

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[29] *Mills and Poole*, *supra* note 14, p 63.
[30] On conviction in summary proceeding a magistrate may imprison for 15 years a repeat offender in trafficking narcotics, *Misuse of Drugs Law* (13/1973) (1999R), s 16.
[31] Council of the Law Society of England and Wales, "Pre-trial Discovery" *Annual Report of the Law Society 1965-1966*, 124.
[32] Unreported March 3, 1993, SC3026/92.
[33] Reference was made to *R v Hall* (1958) 43 CrAppR 29.
[34] (13/1975) (1995R).
[35] *Ibid.*, s 161, Sch 3, r 1(5).
[36] *Ibid.*, s 108; indictments must be filed within seven day of committal, Grand Court Practice Direction 4/ 99.

committal process[37] provide disclosure of the prosecution case at an earlier date. Also, no witness who has not given evidence at the preliminary inquiry can be called by the prosecution at trial unless the accused has received reasonable notice in writing of the witness's name and the substance of their evidence.[38] Greater communication is encouraged through a Plea and Directions Hearing held early in the session of the Grand Court in which the case is to be heard.[39]

The survey of local prosecuting and defence attorneys who practised criminal law revealed that there was no consistent approach to pre-trial disclosure. Pre-trial disclosure of the prosecution's case was common in trials on indictment. However, with respect to "unused" material, and information which might affect the credibility of prosecution witnesses, no minimum standard was recognised. Some defence attorneys received little or no information. Others manipulated the mode of trial decision to ensure that a short form committal was held to facilitate discovery in cases which might be tried "either-way". In this way, at least the statements of the prosecution witnesses were revealed. Still others reported that they were given all relevant information, both used and unused, in a timely fashion. In matters tried in summary court, pre-trial disclosure to any significant degree rarely occurred, in spite of *Parkes*.[40]

F. The 1998 Study Findings in Brief

1.0 Introduction

The present study was spawned as a result of a perceived need for improvement in the disclosure system. We are extremely grateful for the full cooperation of the Solicitor-General and the Crown Prosecutors and the defence bar.[41] Rather than trying to be too politically correct, the study presents criticism as clearly, but as constructively as possible. Ointment may be found in the fact that no group of participants in the criminal justice process, in any jurisdiction, is above improvement, including those, like ourselves, who train.

2.0 Materiality and Disclosure on Indictment

The leading common law decision on the underlying test for pre-trial prosecution disclosure is the unanimous decision of the English Court of Appeal in *Keane*.[42] The duty of the prosecution was stated in a wide manner by Lord Taylor CJ. Information must be disclosed to the defence if it can be seen "[O]n a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or

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[37] *Supra* note 34, Part IV.
[38] *Ibid.*, s 131. The Evidence Law (13 /1978)(1995R) provides that if the prosecutor wishes to offer finger print evidence against the accused by certificate, the certificate must be served fourteen days before trial, s 25 (2).
[39] Memorandum of the Chief Justice, October 28 1997. This was modelled on England's PDH [1995] 1 WLR 1318.
[40] *Supra* note 32.
[41] Some responses given by the Defence Bar may relate to former prosecutors.
[42] [1994] 1 WLR 746.

(2)."[43] The test was stated in a similar terms in Canada.[44] The CPIA states a much narrower criteria for prosecution disclosure where no complete disclosure of the defence's case has been filed. The primary disclosure obligation relates to details of the prosecution case and "unused" materials which "in the prosecutor's opinion might undermine" the prosecution's case (s 3).

In Cayman, the prosecuting attorneys unanimously agreed that the test applied locally in determining the material to be disclosed to the defence was whether the material was likely to be relevant, in contrast to the wider test seen in *Keane* (i.e. all information except that which is clearly irrelevant). However, only 64% of defence attorneys observed that the narrower test was being applied. Consequently, some defence attorneys believed that the prosecution's discretion regarding which material to disclose was being exercised in a manner wider than actually was the case. Perhaps some defence attorneys would have pressed for wider disclosure had they known of the limitations of the test being applied.

Two other questions flow naturally from this response. First, can the prosecuting attorneys accurately decide what is relevant to the defence without a system of mandatory defence disclosure? This question can be resolved by using the *Keane* test to broaden the scope of disclosure rather than requiring defence disclosure. Secondly, are the courts prepared to review the decision of a prosecutor regarding the extent of disclosure given? The question of judicial review is likely to be answered in the affirmative when one combines the weight of the unanimous decision of the English Court of Appeal in *Ward*,[45] and its firm endorsement of *Leyland JJ ex p. Hawthorn*,[46] with the current trend of the Grand Court in the aggressive use of judicial review.[47]

2.1 Admissibility

The question of the scope of disclosure and admissibility of the evidence is worthy of brief comment. Some defence attorneys felt that if evidence or information was inadmissible then there was no obligation on the prosecution to consider whether it should be disclosed. The decisions in *Keane* and *Stinchcombe* state that admissibility is irrelevant for the purposes of determining disclosure.

2.2 Continuing Duty

All prosecuting attorneys recognised that the duty of disclosure was a continuing duty throughout the entire pre-trial and trial period. This important principle was stated in *Ward*.[48] However, only a small number of defence attorneys were of the opinion that the prosecuting attorneys provided additional disclosure once an initial pre-trial disclosure bundle was provided. Two explanations may be suggested, but neither were directly investigated. Perhaps the prosecutors disclose all that they believe to be properly disclosable in their original disclosure

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[43] *Ibid.*, p 752, adopting Jowitt J.
[44] *Stinchcombe*, *supra* note 21, pp 10-12; *Egger* [1993] 2 SCR 451, 467; *Chaplin* [1995] 1 SCR 727.
[45] *Supra* note 15, at p 601.
[46] [1979] 2 WLR 28.
[47] *Streeter and K Coast* v *Immigration Board* (1998) 17 LB 17.
[48] *Supra* note 15, p 50 CrAppR; *Stinchcombe*, *supra* note 21, p 14, and it is preserved in the *CPIA* 1996, s 9.

effort. Alternatively, they never reexamine the file at a later date with a view to further disclosure.

3.0 Committals

The *Criminal Procedure Code* provides for long and short form committals in matters tried on indictment.[49] Informal evidence indicated that the vast majority of committal hearing were completed by the short form when the accused is represented. The short form committal model used locally resembles the one used in England between the period of 1967[50] and 1982,[51] save a few exceptions.

A stipendary magistrate presides at the hearing. To be admissable in evidence, and therefore facilitate a short form committal, the witness statements must be signed on the oath of the deponent and served on the defence not less than seven days before the committal hearing date.[52] Objections to the statement being tendered in evidence must be made within four days of receipt.[53] During the hearing, the evidence must be read aloud, unless the court orders it to be summarised orally[54] although the magistrate may commit the accused without consideration of the contents of what has been read or summarised.[55] The defence may require a witness to attend to give evidence rather than agreeing to have his statement read.[56] The accused must be present.

To test the validity of the assumption regarding the use of short form committals a few questions were included in the survey. As expected, the respondents reported that in the majority of cases committals were completed 'on the papers'. In some situations, the defence attorney will require the attendance of one prosecution witness. The prosecuting attorneys have taken the attitude that they will facilitate the type of committal requested by the defence. There was no suggestion of bargaining to avoid a long form committal.

4.0 Disclosure of Evidence in Relation to or Originating From the Accused

A series of questions were posed to the attorneys with the purpose of ascertaining the level of disclosure to the defence of materials and information that were generated by the accused. Broadly, this included oral or written statements by the accused to the police, the supply of blood samples, attendance in an identification parade and his criminal record. The respondents were instructed to assume that the matter was proceeding on indictment, and that a short form

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[49] *Supra* note 34, Part V. A long form committal occurs unless short form is agreeable to the parties. The accused must be represented, s 87.
[50] *Criminal Justice Act 1967* c 80 s 1 repealed by Sch 9 and re-enacted as s 6 (2) of the *Magistrates' Courts Act 1980*, c 43; M. Carlisle, "Committal Proceedings in English Criminal Law" (1967-68) 10 CLQ 147.
[51] *Criminal Justice Act 1982* c 48 s 61 allowing the accused to concede committal on the advice of his attorney without the attorney being present.
[52] A committal order must be based on admissable evidence, *Bedwellty Justices ex p Williams* [1996] 2 CrAppR 594 HL.
[53] *Evidence Law*, *supra* note 38, s 26 (1).
[54] *Ibid.*, s 26 (5).
[55] *Criminal Procedure Code*, *supra* note 34, s 87.
[56] *Evidence Law*, *supra* note 38, s 26 (3).

committal had taken place and that a timely request for disclosure had been made.

The defence attorneys reported that it was usual for them to be supplied with a copy of the written statement made by the accused under caution.[57] Further, a majority stated that they almost always were given a copy of the statement of the accused taken when he was thought simply to be a witness. However, a majority of defence attorneys complain that they rarely or never receive a copy of the policeman's note of an oral statement. Some speculated that this situation stemmed from the possibility that not all police keep note books or that the police did not disclose their notes to the prosecution. These explanations were broadly confirmed by the prosecutors.

The majority of defence attorneys stated that they always received from the prosecutor information regarding the criminal record of the accused and outstanding criminal charges. However some defence attorneys complained that this was not made available in spite of their request. The prosecutors reported that this information was always available on request.

In analyzing the disclosure of any procedures used outside of the courtroom to identify the accused, the prosecutors stated that details were always provided.[58] Other than one defence attorney, all who had handled a file where identity processes had occurred indicated satisfactory disclosure from the prosecution.

However, one question exposed a deficiency in the practices of some defence attorneys. Rarely did they request a copy of the initial crime report, a document which the prosecuting attorneys were willing to provide on request (assuming that one had been generated). In *Fergus,* [59] Lord Justice Steyn said that where identification was an issue, it was imperative that the prosecution (and the defence lawyer) be alive to the need to disclose photographs and crime reports.

Medical, forensic and laboratory reports relating to the accused were always disclosed in advance of trial. Often this information would be included in the short form committal bundle, as would statements of the accused under caution.

5.0 Disclosure of Evidence Unrelated to the Accused

The next section of the survey was designed to determine what information was revealed to the defence which did not originate from the accused. Again, the respondents were asked to assume that a short form committal had occurred and that a request had been made by the defence attorney. It is to be recalled that many of these questions will be raised during the Plea and Direction Hearing.

Unquestionably, the investigative resources of the police and prosecution far outweigh those of the defence. Therefore one may suggest that it would be

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[57] The *Judge's Rules*, Home Office Circular No. 89/1978, apply locally as refined in *Evidence Law*, *supra* note 38, s 19 (exclusion of evidence).
[58] *Identification Parades*, RCIP Standing Order C-4, required officers to make detailed records of parades.
[59] (1993) *The Times* June 30 CA. Attorneys who do not call for, and examine, the identification process where strangers are involved, have failed to prepare and present the defence properly according to Lord Steyn.

appropriate for the police to provide the names of witnesses spoken with, but who declined to provide a statement. The majority of the prosecutors stated that they would provide this information if it had been provided to them by the police. However, it appears that this type of information is not provided by the police to the prosecution on a regular basis. Defence attorneys seemed to join in attributing the blame to the police as opposed to the prosecutor. This point, combined with other police practices (i.e. inconsistent use of note books), suggested that police participation and cooperation in a pre-trial disclosure system must be secured.

Forensic, medical and laboratory evidence which did not relate to the accused was routinely disclosed by the prosecutors. Only one defence attorney reported receiving this information for the first time at trial.

Both the prosecution and the defence attorneys replied positively to the question of copies of documents, photographs and other material which the prosecution intended to introduce into evidence. Also, the existence of search warrants was regularly reported by the prosecution to the defence as part of pre-trial disclosure.

All prosecuting attorneys reported that they always facilitate the inspection by the defence of any evidence that was seized. However, over one-quarter of the defence attorneys stated that a positive response to their request depended on the prosecutor involved.[60]

The revelation of matters pertaining to the credibility of prosecution witnesses has been explored extensively in other jurisdictions. Lord Steyn stated in summary form the common law pertaining to this issue.[61] The Crown is obliged to disclose any previous inconsistent statement,[62] request for reward,[63] or previous conviction of a prosecution witness[64] to facilitate the assessing of the reliability of that witness.

Police witnesses are to be treated no differently according to the English Court of Appeal. In *Guney*, the defence justifiably sought to be informed of any convictions and disciplinary findings against any police officers involved in the case to assist in assessing their credibility.[65]

Locally, prosecuting attorneys reported that they almost invariably provide information regarding the criminal record of proposed prosecution witnesses to the defence where it may have some bearing on the case. However, one-third of the defence attorneys claimed that they rarely or never obtained this information without a court order. Some reported that access to these details were emphatically denied by some prosecutors.

The House of Lords stated that the investigation of defence witnesses was the responsibility of the defence. Lord Hope explained that it would be too much of a

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[60] Some of the defence replies may relate to a former prosecutors.
[61] *Brown*, *supra* note 18, p 1607 CA, appr'd by Lord Hope p 73 HL.
[62] *Baksh* [1958] AC 167 PC; *Romain* (1992) 75 CCC (3d) 379 (Ont.Gen.Div).
[63] *Taylor* (1993) 98 CrAppR 361, 368 CA; *MacKay* (1992), 16 CR (4th) 351 (BCCA) leave to appeal to SCC refused (1993) 150 NR 393 (note) SCC.
[64] *Collister and Warhurst*, 39 CrAppR 100 CCA; *Thambian* (July 19, 1994), Doc. C14888 (Ont CA).
[65] [1998] 2 CrAppR 242.

burden to expect the prosecution to find and disclose (usually required on short notice) evidence which might affect the credibility of potential defence witnesses.[66] Even when an alibi notice was given in a timely manner, there is no duty on the prosecution to disclose evidence which undermines the credibility of the alibi witness.[67] The limits arise from the division of responsibility inherent in the adversarial system. Lord Hope stated, "A defendant is entitled to a fair trial, but fairness does not require that his witnesses should be immune from challenge as to their credibility. Nor does it require that he be provided with assistance from the Crown in the investigation of the defence case or the selection, on grounds of credibility, of the defence witnesses." [68]

Locally, prosecuting attorneys generally contended that when a potential defence witness was made known to them, they would readily disclose information which might undermine that witnesse's credibility. Of the few defence attorneys who provide advance disclosure of the name of the defence's witnesses, it was generally affirmed that the prosecuting attorney's did reveal this information.[69] It was encouraging to see this result. A great deal of time and resources, which otherwise may have been wasted on a ill-fated defence case, and therefore trial, has been preserved.

Unhappily, a related issue revealed a more restricted prosecution practise. Of particular note was the question of the disclosure of any assistance given to prosecution witnesses. Assistance was explained to include among other things financial assistance, reduction in the seriousness of the charge faced by the witness in other proceedings or sentence-bargaining in other proceedings. Over one-half of the defence attorneys interviewed stated this information was rarely or never provided. However, the vast majority of the prosecuting attorneys claim to disclose this information. It was apparent that all attorneys understand the importance of this type of information. It is respectfully submitted that there can be no valid reason for not disclosing it to the defence. If this information is not disclosed in each instance, then defence attorneys must reconsider whether such issues must be raised in questioning during long form committals. This would lead to the unfortunate result of many long form committals being held that could have been avoided through the adoption of consistent disclosure practices.

In summary, some defence attorneys reported receiving less information than that received by their colleagues. Citizens who are accused of crimes would be better served, as would the reputation of the administration of justice, if disclosure was uniform. This, in conjunction with the inconsistency that can result from the high turn over in the prosecution service, provide good reasons for the establishment of comprehensive guidelines regarding the pre-trial disclosure of evidence.

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[66] *Brown, supra* note 18, p 76 HL.
[67] *Williams (Michael)* unreported April 15, 1994 CA appr'd in *Brown, ibid.*, at p 77 HL.
[68] *Brown, supra* note 18, p 75. Neither would it be discloseable under s 7 of CPIA 1996 as the court found that this information was not material which would "assist the defence's case".
[69] Alibi and the number of defence witnesses are topics which are canvassed, with mixed results, at the PDH, discussion with Crown Counsel A. Akiwumi, February 1, 1999.

6.0 Unused and Irrelevant Material

Each criminal investigation generates a folio of information that may or may not have any relevance to a particular proceeding. From the "fruits of the investigation" the police and prosecutor select evidence which will be used in the prosecution case. Additional information is selected for disclosure to the defence as it may be relevant to the defence case. Questions were posed to local attorneys to determine the type of "unused" information or material that the prosecution may, or may not, disclose to the defence on the basis that it was, or was not, relevant under the local (narrow) materiality test.

The first questions addressed statements taken from witnesses whom the prosecution did not intend to call. The common law rules of England provide that all statements taken from witnesses should be disclosed to the defence.[70] In the event that no statement was taken, then the name, address, and a synopsis of the information obtained should be provided to the defence. The interviews revealed many important points, a few of which can be highlighted here. First, prosecutors reported that the police do not disclosure the details of those spoken with, unless the person made a statement. Consequently, potentially important information never reached the office of the prosecutor, and therefore it was impossible for him to exercise his discretion regarding disclosure. Second, if a statement is made and not relied upon by the prosecution, the prosecution attorneys reported that they will always disclose the statement to the defence. Inherent in this response must be the addendum that the statement must appear to be "relevant" as opposed to the broader test in *Keane* of "not clearly irrelevant". The replies of the defence attorney's support the assertion of the necessity to recognise this qualification. Less than half report being provided regularly with statements of witnesses whom the prosecution do not intend to call.

The House of Lords recently revised the law regarding prosecution disclosure of statements by witnesses which the prosecutor perceived to be unreliable.[71] For years the Crown had relied on the rule in *Bryant and Dickson*[72] which restricted the Crown's duty of disclosure to only the name and address of a witness who had given a statement as to material aspects of the case but whom the prosecution believed to be unreliable. However, the Lords found that the common law now required the prosecution to supply to the defence copies of these statements.[73] *Stinchcombe*[74] also arises out of a situation where the Crown refused to disclose a statement given by a witness whom they regarded as not worthy of credit. The Supreme Court of Canada ruled that the statement should have been disclosed, and on the facts, the lack of disclosure of the statement of the witness (who had given evidence favourable to the defence at the committal) to the police (given after the committal) was an important factor in the defence's decision not to call the witness. This evidence might have affected the outcome. Therefore the court directed new trial and the disclosure of the statements.

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[70] *Ward*, *supra* note 15, p 25 CrAppR, appr'd in *Mills and Poole*, *supra* note 14, p 58.
[71] *Mills and Poole*, *supra* note 14.
[72] *Supra* note 23.
[73] This is consistent with disclosure under s 7 of CPIA 1996, as they might assist the defence case.
[74] *Supra* note 21.

In answer to the question of the provision of prior inconsistent statements all prosecutors stated they always provided the inconsistent statement. Approximately one-half of defence attorneys agreed. However others replied that they "rarely" or on occasion received the statement in question. In spite of the disparity in the report of the defence attorneys, the overall result is encouraging. The *Mills and Poole* cases were very recent opinions. However, to ensure consistency, the suggested Guideline should direct the provision of prior inconsistent statements given by witnesses whom the prosecution does not propose to call due to unreliability.

The remaining issues which were explored in this section included the provision of copies of documents, photographs, and the like, and also the opportunity provided to inspect items seized, in situations where the prosecution did not intend to introduce the evidence. Prosecution attorneys reported that there was a high degree of disclosure of these matters when requested. However, over one-third of the defence attorneys asserted that they either rarely or never obtained accommodation on either of the foregoing issues. Clearly, a more consistent approach would enhance the administration of criminal justice.

It is apparent that there is a need to address issues of cooperation in the provision of disclosure between the police and the prosecutors. This will require the cooperation of the offices of the Commissioner of Police, the Chief Secretary and the Attorney-General.

7.0 Defence Disclosure

The common law does not impose an obligation on the accused to disclose its defence prior to the close of the case for the prosecution, except through indirect means in the defence of alibi. Alibi evidence will be of lesser weight in the event that the defence did not reveal its evidence pre-trial. To encourage defence attorneys to address the issue, the question of an alibi defence is raised during the Plea and Directions Hearing.

Defence attorneys reported that when an alibi defence was contemplated, most did provide pre-trial disclosure to the prosecution. However, the prosecuting attorneys reported that rarely (or never) had they received advance notice of an alibi defence. With regards to defence witnesses likely to testify on other issues, including expert witnesses, the majority of defence attorneys reported, and the prosecuting attorneys confirmed, rarely (or never) were witnesses statements, or even witness names, provided by the defence.

Even though there is merit in the concept of defence disclosure, it cannot be seriously considered until prosecution disclosure is provided in a more complete manner on a consistent basis. Any call to adopt this aspect of the CPIA should be resisted.[75]

[75] *CPIA 1996* , *supra* note 3, mandates defence disclosure under the threat of limited prosecution disclosure and adverse comment.

8.0 Prosecution Disclosure in Summary Proceedings

Magistrates conduct proceedings where the law requires the charges to be tried summarily. In category B offences, which may be tried either-way, a magistrate will preside wherein the election has been made for summary trial.[76] The maximum sentences which could be passed by the Magistrate at the time of the survey were imprisonment for two years and a fine of one thousand dollars pursuant to section 6 *Criminal Procedure Code* (each now doubled[77]) or imprisonment of 15 years and a fine of twenty thousand dollars pursuant to the *Misuse of Drugs Law*.[78]

Simply stated, there does not appear to be a pre-trial disclosure system for cases which are to be tried summarily. Despite the fact that defence attorneys will almost always request disclosure of the prosecution's case in summary trials, prosecuting attorneys were not consistent or predictable in the provision of detailed disclosure, and in all but exceptional cases, did not provide details of the prosecution's case. The quest for disclosure of unused material was not probed.

An accurate synopsis of the prosecution's case will be the first step in assisting the accused in his right to put forward a full answer and defence, or allowing him the opportunity to appreciate the case against him for the purposes of an early guilty plea and the consequential reduction in sentence. Over one-half of defence attorneys reported that they usually were provided with an accurate synopsis of the circumstances of the offence. All prosecution attorneys, on the other hand stated that they almost always provide this synopsis. Some defence counsel reported that disclosure of this synopsis was dependent upon the particular prosecution counsel involved.[79]

In the Summary Court, almost two-thirds (63%) of defence attorneys rarely or never are provided with the names of prosecution witnesses who have given statements. This result was unexpected in light of existing precedent. As noted previously, Magistrate Jackson ruled in *Parkes (Lucinda)*[80] that "it is a right of a defendant to know the full case against him or her and this right includes to be informed of all Crown witnesses' names whether called or not and not just the actual witnesses called..."

Copies of witness statements are often not provided. There are exceptional cases, but both prosecution and defence attorneys agree that in general these statements are not always provided and for the majority of defence attorneys these are either rarely or never provided. When asked for an explanation, some prosecution attorneys suggested that pre-trial disclosure was not required in summary proceedings due to the opinion in *Vincent and Franklin*.[81] However, there seems to be a misunderstanding of this case. It clearly stated that it is contrary to fundamental principles of the common law tradition not to provide

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[76] *Criminal Procedure Code*, *supra* note 34, s 4.
[77] *Criminal Procedure Code (Amendment) Law, 1998* (16/1998) s 3.
[78] (13/1973) (1995R), s 17, repealed and re-enacted as *MDL* (1999R), s 16.
[79] Prosecutors reported that a copy of the synopsis is not provided to an accused who is not represented.
[80] *Supra* note 32.
[81] *Supra* note 27.

copies of these statements in all but petty summary matters, even in small jurisdictions.[82]

We anticipated that in the event that prosecutors did not provide a copy of the statement of the witness to defence attorneys, at the very least, a summary of the anticipated evidence of the witness would be disclosed. However, when the question was posed the answers from both sides demonstrated that a précis of a witness statement is usually not provided in this jurisdiction.

The study revealed that defence attorneys were at a disadvantage from the outset in providing advice in proceedings in the Summary Court. More fundamentally, the accused was greatly hindered in exercising his fundamental right to provide full answer and defence to the charge. It was an acknowledgment of this problem which led Simon Brown LJ to state,[83] and Rose LJ to confirm,[84] that Magistrates should apply the same disclosure principles and, to a large extent, the same disclosure rules, found in cases proceeding on indictment. Similarly, the *CPIA 1996* provides the same disclosure rule ("primary disclosure") in summary proceedings as is found in indictable matters.[85] It is respectfully submitted that a system of pre-trial disclosure of the case of the prosecution should be adopted in summary proceedings. In the barest form, perhaps copies of the statements of witnesses for the prosecution (subject to any justifiable concerns regarding PII and witness protection) should be provided when the trial date is set. It would be appropriate for this matter to be addressed in a guideline drawn and published by the Attorney-General.

9.0 Summary

From the 1998 study it was concluded that the Attorney-General of the Cayman Islands, would greatly assist in the proper administration of justice by publishing guidance for prosecutors relating to the pre-trial disclosure of evidence in criminal proceeding. It is recommended that the guidelines address proceedings on indictment and summary proceedings. If reference was to be made to the Guidelines of the Attorney-General of England made in 1981, it would be important to acknowledge the need to modify the guidelines in three principal ways. The guidelines must recognise the primacy of courts in decisions to disclose and include an exhaustive statement of the prosecution duty in light of the recent refinement of the common law rules. The issue of disclosure by the investigators to the prosecutors must be addressed also.[86] It is acknowledged that a system of disclosure as broad and all encompassing as that found in the English common law would not be appropriate for the Cayman Islands.

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[82] *Ibid.*, p 871.
[83] *Bromley Magistrates, ex p Smith* [1995] 4 All ER 146 (QBD).
[84] *South Worcestershire Magistrates ex p Lilley* [1995] 4 All ER 186, 192.
[85] In Canada, the leading Court of Appeal, decided that the basic principles and practice of disclosure found in proceedings on indictment should be applied to summary proceedings (*Kutynec* (1992) 7 OR (3d) 277 (Ont CA).
[86] An example is found in England's National Operational Standards 1994.
[87] By John Arnold Epp and Catherine Ryan.