CAYMAN ISLANDS LAW BULLETIN

NO. 18

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Cayman Islands Government

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CAYMAN ISLANDS LAW SCHOOL

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 (2000) 18 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.

INDEX

EDITORIAL NOTE

The eighteenth 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 one article, 'The Legal Status of the Illegitimate Child in Matters of Intestate and Testate Succession in the Cayman Islands: The Case for Reform'. This article was written by a recent alumna of the Law School, Mrs Terrence Caudeiron.

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 eleven bound volumes (1952-1979, 1980-1983, 1984-85, 1986-87, 1988-89, 1990-91, 1992-93, 1994-95, 1996, 1997 and 1998.) 1999 Volume 1 is also available in softback format. Despite the presence of this excellent reporting series, it was felt that there was scope for an additional series of reports in the form of a Law Bulletin produced locally and with a minimum of delay between the date of judgment and the report. Discussions were held with Dr. Milner who wholeheartedly endorsed the concept. The aim of the Law Bulletin is not to provide a full reporting service but rather to supply sufficient information about a case to allow practitioners and students to determine whether it is of use to them before immersion in its full text.

The second purpose of the Law Bulletin is to provide a forum in which judges, legal practitioners, academics and law students can express themselves on topics of interest to the legal community.

The current edition contains case summaries of Grand Court judgments delivered in Chambers and in open court by Smellie CJ and Graham, Sanderson and Murphy JJ, and Douglas Actg J, during the period October 23, 1998 – July 5, 2000.

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 transcripts, 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)

CASE SUMMARIES SUBJECT INDEX

Summaries of Judgements of the Grand Court of the Cayman Islands

October 23, 1998 – July 5, 2000

BANKING LAW

Appointment of receivers under section 14(1)(d)(v) of the Banks and Trust Companies Law - Application for directions

His Excellency the Governor-in-Council, Roy McTaggart, Frederico A Golcher v Federated International Bank Limited

Grand Court (697/98)
Smellie CJ
November 5 1998

Legislation

Banks and Trust Companies Law 1989
Bankruptcy Law

Court Rules

GCR Order 30, Rule 8

Authority referred to

Finsbury Bank and Trust Company v Attorney-General [1996] CILR 349

His Excellency the Governor in Council ('the Governor') formed the opinion that the Respondent had failed to comply with the conditions of its Licence and appointed Receivers in accordance with section 14(1)(d)(v) of the Banks and Trust Companies Law, 1989. Application for Directions were made by the Governor and other Applicants.

Held: (order as follows)

(i) Once receivers were appointed under the Banks and Trust Companies Law 1989, the powers vested in them were not be exercised until they had been sanctioned by the Court giving directions (Finsbury Bank and Trust Company v Attorney-General). The reason for this requirement is that the powers of the Receivers are derived in the same manner as those of a Trustee-in-Bankruptcy under s.18 Bankruptcy Law. This Law applied *mutatis mutandis* to the appointment of a receiver, therefore directions were to be obtained from the court before the receiver could act.

(ii) The present state of the law was unsatisfactory and more suitable provisions should be introduced in relation to the receivership or administration of a company conducting banking business.

The Order, including the Directions of the court, were ordered to be gazetted.

SW

CIVIL PROCEDURE

Default judgment – Application to set aside – Abuse of process – Professional Responsibility

BCL v GCIL

Grand Court (113/99)
Murphy J
June 4 1999

Court Rules

Grand Court Rules O 19 O 46 r 6

Authorities referred to

Banque Keyser Ullman v Skandia [1990] 3 WLR 364

Mr Chapman for applicant
Mr Murray for respondent

The attorneys for the parties had been sparring in correspondence for six months prior to a default judgment being handed down. The applicant had become frustrated by the delay. He wrote a letter on March 25 warning that a default judgment would be taken out if a defence were not provided by April 6. The respondent had indicated that he would be away on leave until April 6, and he was absent when the warning letter arrived in his office. Without further warning, the applicant took out default judgment on April 7. The applicant did not notify the respondent of the default judgment until some weeks later.

The applicant sought to set aside a default judgment entered administratively at his request.

Held: (granting the application)

(i) The applicant could not act as both advocate and deponent.

(ii) The court had an inherent jurisdiction to control its own process, and to make appropriate motions.

(iii) 'The application for default judgement in these circumstances amounted to gross sharp practice and an abuse of the court's process. Even had there been little prospect of success in the defence, the same order would have been made in order to register the Court's disapproval of the way in which the default judgment was obtained'.

(iv) 'Tactics such as those employed in the present case only served to demean and embarrass the profession and offend the Court. Stupidly aggressive tactics such as those resorted to in the present case only served to retard the process of efficient dispute resolution and waste the time and money of both parties to the litigation'.

(v) Judges, not lawyers, controlled the courts: Banque Keyser Ullman v Skandia.

JE

Extension of time – Presumption of hardship – Unless order

AB v CD et al

Grand Court (104/1995)
Smellie CJ
March 25 1999

Authorities referred to:

Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666

Mr Mc Cahill for the plaintiff
Mr Clifford for the 1st – 7th, 9th and 10th defendants
Mr Ritchie for the 8th defendant

The defendants complained at the plaintiff's seemingly deliberate and calculated failure to comply with an order of the court dated 13th November 1998. On two occasions the plaintiffs had attempted to obtain an extension of time by the simple expedient of filing applications for an extension after the time for compliance with the order of the court had expired. The court accepted the defendants' submissions that the conduct of litigation was no longer to be dictated by the convenience of the parties. The modern approach to case management required that deadlines set by the court were to be met not just in the interests of the parties, 'but also for the more overall effective administration of justice through the courts.'

Held: (dismissing the 8th defendants' application for an unless order and granting the plaintiff's application for an extension of time for the provision of its list of documents, but awarding the defendants the costs of both summonses in any event.)

(i) Where no proper explanation was given for failure to meet court deadlines there was a presumption that the other side had suffered hardship and prejudice unless the defaulting party could show otherwise.

(ii) An 'unless' order is an order of last resort where failure to comply would ordinarily require the imposition of the ultimate sanctions of striking out the defaulting party's case as in Hytec Information Systems Ltd v Coventry City Council. That stage had not yet been reached in these proceedings, but may be the next step in the event of any further default.

DOB

Costs – Indemnity basis

Bonotto v Boccaletti

Grand Court (252/96)
Graham J
June 2 2000

Authorities referred to

Barlett v Barclays Bank [1890] Ch 505
Bowen v Jones [1986] 3 All ER 103
Ingersoll-Rand v Banco Portugues Do Atlantico [1988-89] CILR 189

Mr Phillips for the plaintiff
Mr Croxford QC for the first, second, fourth and fifth defendants
The third defendant did not appear and was not represented

The plaintiff sought an order for costs on an indemnity basis.

Held: (refusing the order sought)

(i) Some of the changes of tack by the plaintiff might have delayed proceedings to some degree and caused some additional items of costs. Those could be considered upon taxation and disallowed.

(ii) Where jurisdiction existed to award indemnity costs, they should not be awarded save in exceptional circumstances. The first defendant had engaged in a whole series of fraudulent and dishonest acts, and the court would have awarded indemnity costs in this case if the court had jurisdiction to do so.

(iii) No such jurisdiction was available: Ingersoll-Rand v Banco Portugues Do Atlantico followed.

(iv) Leave to appeal was granted.

(v) Costs awarded to the plaintiff, to be taxed if not agreed.

(vi) *Per curiam*: The present limitations on the court's powers in respect of costs orders were unsatisfactory and unjust and in certain circumstances would not accord to successful litigants the full recovery of even their minimum proper and necessary expenditure.

SAAC

Action against trustee – Statement of claim

In the Matter of the C Trust, A v B Ltd

Grand Court (634/98, 635/98, 683/98, 684/98, 459/96)
Smellie CJ
August 24 1999

Mr Helfrecht for the plaintiff in 459/96 and 634/98 and 635/98
Mr Foster and Mr Collins for the plaintiff in 683/98 and 684/98 and second defendant in 459/96
Mr Jones and Ms Polance
Mr Hellman for the first defendant

The defendants applied for an order directing the plaintiff to file and serve statements of claim in an action concerning, amongst others, the validity of an amendment of a trust deed and the validity of dispositions made by the trustee pursuant to the amendment.

Held: (ordering statement of claim to be filed and served within one month)

(i) The trustee was concerned to know the case it would have to face, for the purpose, amongst others, of deciding whether to oppose in its own right the challenges made to validity.

(ii) If the trustee were to resign once the case against it was fully pleaded, possible disruption and costs to the trust should be kept to a minimum. This was an issue which had become more urgent with the passage of time.

(iii) The only new issue in favour of the argument for further delay was that new developments for the disposal of a point in the main action had prevented the progression of the main action.

(iv) There was concern over the risk of conflicting outcomes in the different actions, and the preliminary points were not yet resolved and so the impact they would have on the claims in the actions was not yet determinable. However, these two important points could more fairly be addressed in an application for a stay than in the present application.

(v) For these and other reasons, the balance was tipped in favour of the defendant trustee in having its rights observed in being informed of the true nature of the claims it was to answer.

SAAC

Production of documents – Relevance in changed circumstances

L v C Ltd

Grand Court (731/98)
Smellie CJ
Dec 13 1999

Mr Stephens for the plaintiffs
Mr Jones for the first, second, third and fourth defendants

A family trust was set up with shipping as one of the trust's major investments. The ships were managed and operated under contracts with X Co and Y Co. Those companies were owned and controlled by the trustees. It had earlier been proposed and accepted that the trust would be segregated by appointing out the capital of the trust to four subtrusts.

The plaintiffs sought the production by the trustees of the existing management contracts with the companies.

Held: (refusing the directions sought)

Even if the companies were to continue managing the ships after the segregation of the trust, new management contracts would have to be put in place. There was no justification for directions that the contracts be produced, with the attendant costs which would be involved in the professionals having to review them and decide what should be done about them.

SAAC

COMPANY LAW

Liability of auditors – Improper payment of dividends – Opportunity to recover payments

J Ltd (in liquidation) v K

Grand Court (104/95)

Smellie CJ
Jun 12 2000

Authorities referred to

Verner v General and Commercial Investment Trust [1894] 2 Ch 239
Moxam v Grant [1900] 1 QB 88
Towers v African Tug Co [1904] 1 Ch 558
Sasea Finance Ltd v KPMG (Aug 9 1998, New Law Online Cases)
R v Dorset County Council [1995] 2 AC 685

Mr Vos QC for the eighth defendant/applicant
Mr Clifford for the defendants
Mr McCahill for the plaintiff

The eighth defendant (R) applied to strike out the claim of the plaintiff (J Ltd) to recover CHF14.2m.

The following facts were assumed for the purpose of the strike out summons.

The board of directors of J Ltd on June 30 1989 declared dividends in favour of its parent company (U Ltd) totalling CHF25m. Of that sum, CHF14.2m was unlawfully paid out from capital not profits, being based on receivables which would not be recoverable by J Ltd. No money was actually transferred from J Ltd to U Ltd. The payment was made by an adjustment of the joint companies accounts ledger. The payment went in reduction of a debt owed by J Ltd to U Ltd.

At the time of the payment, R was not auditor of J Ltd, but R became auditor subsequently and made an Audit Report for 1989 which was issued on May 23 1990. The audit failed to bring to light the unlawful nature of the dividend payment.

J Ltd claimed that the failure of R to reveal the unlawful nature of the dividend payment constituted a breach of R's duty to J Ltd.

J Ltd put forward two arguments. First, it was argued by J Ltd that U Ltd knew that the payment was unlawful, and J Ltd accordingly had a right in law to recover the payment from U Ltd.

Secondly, it was argued by J Ltd that if R had revealed the unlawful nature of the transaction at the time of the 1989 Audit Report, then J Ltd would have been able to secure a rectification of the ledger to eliminate the unlawful part of the payment. It was argued that U Ltd would have agreed to this in its own interest in avoiding a qualified audit report. As both J Ltd and U Ltd were now in liquidation, J Ltd argued that if the ledger were to be amended by the liquidators, that would not constitute a valid repayment. J Ltd therefore argued that through R's breach of duty, J Ltd had lost the opportunity to recover the payment in full from U Ltd.

Held: (ordering that claim be struck out)

(i) J Ltd had to elect whether to pursue a claim based on the loss of a legal right to recover from U Ltd as a recipient knowing of the unlawful nature of the dividend payment, or a claim based on the loss of an opportunity to recover from U Ltd as an innocent recipient. J Ltd could not base its claims on an approbation and reprobation of the averred facts.

(ii) J Ltd would be treated as having elected to pursue the claim based on the loss of a legal right to recover from U Ltd as a knowing recipient. This was because of the averments in the claim made by J Ltd that U Ltd knew of the true state of J Ltd's affairs, including the bad receivables.

(iii) As J Ltd had transferred no assets to U Ltd, the unlawful part of the dividend payment could be reversed by a book entry in the group ledger. The ledger reflected a debt owed by J Ltd to U Ltd of CHF66.9m, but when U Ltd proved in the liquidation of J Ltd to recover its debt, U Ltd would not be permitted to claim that total but only the CHF52.7m properly owed by J Ltd after deducting the unlawful dividend of CHF14.2m. J Ltd would thereby effectively reverse the unlawful payment and would accordingly suffer no loss in respect of which an action could be brought against the auditors.

(iv) J Ltd's pleadings concerning the claim against R in respect of the unlawful dividends were struck out as being frivolous, vexatious, an abuse of process and bound to fail.

SAAC

Winding up petition by creditor – Strike out application – Set-off or cross-claim of company against creditor

Quarry Products Ltd v Austin International Inc

Grand Court (195/00)
Sanderson J
July 5 2000

Authorities referred to

Re Gold Hill Mines (1883) 23 Ch D 210
Mann v Goldstein [1968] 1 WLR 1091
Stonegate v Gregory [1980] Ch 576
Re A Company [1993] BCLC 59
Re A Company [1992] 1 WLR 351
Re Bayoil SA [1999] 1 WLR 147
Re Portman Provincial Cinemas [1991] 1 WLR 157
Banco Economico SA v Allied Leasing and Finance Corporation [1998] CILR 292

In the Matter of Cayman Islands Television and Video Production Company Ltd [1992-3] CILR 332
Greenacre Publishing Group v The Manson Group [2000] BCC 11
Re LHF Wools Ltd [1969] 3 All ER 882
Re FSA Business Software Ltd [1990] BCLC 825
Re A Company (No 006273 of 1992) [1993] BCLC 131
Re A Company (No 006685 of 1996) [1997] BCC 835
British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd [1979] 2 All ER 1063
Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] MLJ 53
Re Claybridge Shopping Co SA [1997] BCLC 575
McDonalds Restaurant Ltd v Urbandivide Co Ltd [1994] 1 BCLC 306

Mr Jones for the plaintiff
Mr Walters for the defendant

The plaintiff company sought to strike out a winding up petition filed by the defendant.

The defendant supplied products to the company, for which the company did not pay. The defendant made a statutory demand then filed a winding up petition. The company claimed it was not indebted since the explosive products supplied by the defendant, it was alleged, failed to achieve the contractual standard. The defendant also refused to pay invoices for other products, which were not defective, on the basis that the company had set-off or a cross-claim for damages arising from the supply of the allegedly defective explosive products. The company estimated its losses to exceed the amount of the defendant's debt.

The company argued that the petitioner did not have *locus standi* to file the petition because the debt was disputed, the dispute concerning the application of equitable set-off rules. The company alternatively submitted that petition should be struck out on the basis that the company had a counterclaim which exceeded the amount of the debt.

Held: (ordering the winding up petition to be stayed)

(i) Whether the company was entitled to dispute the debt either on the basis of equitable set-off or cross-claim depended on whether or not the dispute was *bona fide* and on substantial grounds or whether or not the counterclaim was genuine and serious: Re Bayoil SA followed.

(ii) To conclude that the set-off and counterclaim had no prospect of success, the court would have to disbelieve affidavits filed on behalf of the company. The court was suspicious of various aspects of the affidavits but it was inappropriate at this stage of the proceedings to make such a determination. Re A Company (No 006273 of 1992), McDonalds Restaurant Ltd v Urbandivide Co Ltd applied.

(iii) While there were doubts that the company's set-off or counterclaim would succeed, there was at least a chance that the trial judge would believe the evidence on behalf of the company. Re Portman Provincial Cinemas applied.

(iv) The petition would be stayed pending the resolution of the company's claim.

SAAC

Companies - Liquidation – Departure from pari passu principle

In the Matter of XYYZ (Overseas) Ltd (In Liquidation) and in the Matter of the Banks and Trust Companies Law and the Companies Law (Revised)

Grand Court (248/91)
Graham J
February 16 2000

Legislation

Companies Law (Revised) Ss 163 and 86
Insolvency Act 1986 Sch 4 Part I
Companies Act 1985

Authorities referred to

Re BCCI SA (No.3) [1993] BCLC 1490
Taylor v Morris [1994] BCLC 134
Walker Hare Property Ltd [1968] VR 447
BCCI SA (In Liq.) No.11 [1997] 1 BCLC 80
Scott v Avery [1843-1860] All ER Rep 1
Lee v The Showman's Guild [1952] 2 QB 342
Healy v Minister of Health [1954] 2 QB 239
R v Abbott 2 Doug 553

Mr Clifford and Mr McMillan for the Cayman Liquidators
Mr Moore for the Luxembourg Liquidators

The two XYYZ companies were the subject of a bi-polar liquidation in both the Grand Duchy of Luxembourg and in the Cayman Islands: the companies being called XYYZ SA and XYYZ (Overseas) Ltd. The liquidators for each company concluded a 'Pooling Agreement' on 10th November 1994, which was approved by the court in both jurisdictions. A critical feature of the Agreement was that the *pari passu* principle should apply. There was evidence before the court that the *pari passu* principle was an inviolable precept of Luxembourg law. Cayman law was different in that the court is empowered by s.163 Companies Law to depart from it in certain circumstances. The Cayman liquidators had encountered difficulties because of the multitude of claims from small creditors. Accordingly, they proposed that it would be more cost-effective in the long term to settle the claims of small creditors in full. The Luxembourg liquidators objected that this would offend the *pari passu* principle.

Held: (giving judgment for the Cayman liquidators):

(i) The *pari passu* principle was not an inviolable provision of the law in Cayman or in England. In Re BCCI SA (No.3) Dillon LJ had ruled that where it was not possible to call a creditors' meeting as required by s.425 of the Companies Act 1985, it was possible for the liquidators to exercise their powers of compromise under paragraphs 2 and 3 of schedule 4 of the Act rather than to proceed by way of a Scheme of Arrangement. Dillon LJ had cited with approval the Scottish case of Taylor v Morris to the effect that this was to be given a 'wide meaning' and, accordingly, dismissed the appeal against the Vice Chancellor's decision, ruling that the XYYZ Ltd's pooling agreement and its *pari passu* provisions could be varied despite the fact that a Scheme of Arrangement could not be effected.

(ii) It is a fundamental principle of English and, therefore, Cayman law that no contract, whether sanctioned by the courts or not, can oust the fundamental jurisdiction of the court: *per* the Lord Chancellor in Scott v Avery, as applied by Denning LJ in Lee v The Showman's Guild.

(iii) The Clauses and sub-Clauses of the Agreement were to be read as subject to Clause 3.7 which preserved the 'laws of the Cayman Islands, to the provision of the Cayman directions and to any further directions of the Cayman court,' since this was consistent with the doctrine that any attempt to oust the jurisdiction of the court would be void. The Cayman court retained discretion to depart from the strict terms of the *pari passu* rule provided a substantial and tangible benefit to the liquidation was proved to the satisfaction of the court.

DOB

CRIMINAL LAW – SENTENCING

Sentencing principles – Factors of mitigation – Deterrent function of sentencing

R v Bailey, Baker, Smith and Richards

Grand Court (57A and 57B 2000)
Smellie CJ
May 18 2000

Authorities referred to

R v Tominey (1986) 8 Cr App Rep 161
R v Thomas and Christian [1990-91] CILR 294

The appellant Bailey had been convicted of being an accessory after the fact to robbery and to handling stolen goods, after his admission to having received $12,000, knowing it to be the proceeds of a robbery. The appellant had facilitated the removal of the money to Jamaica for the benefit of the principals to the offence, including one Bogle who remained at large in that country. It was found that Bailey must have known at the time of receiving the money that serious injuries, at least, had been inflicted during the course of the robbery.

In sentencing Bailey, the court had regard to the following factors which worked in his favour:

1. Although 30 years of age, Bailey possessed no previous convictions.
2. Bailey gained no personal benefit from the handling of the money for the benefit of Bogle.
3. Bailey had admitted guilt from early after his arrest and had co-operated with the police and prosecution.

Notwithstanding the foregoing, the court noted its duty, in the interests of deterrence, to disseminate, by the sentences handed down, the very serious consequences for those who assisted in the disposal of the proceeds of serious crime.

The appellant Baker had driven the principal offenders to the scene of the crime. He had been convicted, following his pleas of guilty, to the offences of manslaughter, robbery and being an accessory after the fact to grievous bodily harm. The Crown had accepted Baker's evidence that he had no prior knowledge that the principals were carrying guns. His evidence was that he did foresee, however, that his principals would use some form of bodily force if they met with resistance. In relation to the charge of being an accessory after the fact, the evidence indicated that even after becoming aware that serious injury might have been inflicted upon the security officers, Baker continued to assist his principals by driving the getaway vehicle.

In sentencing Baker, the court had regard to the following facts which worked in his favour:

1. Baker was 39 years of age at the time of the offence and had no previous convictions.
2. Baker had admitted guilt at an early stage and had co-operated with the authorities. Such co-operation was in the face of threats made against him, a factor entitling him to a significant discount in sentence.

As against the foregoing, the court noted its duty to ensure that the sentence imposed reflected the fact that, however unforeseen by Baker, death had been unlawfully caused.

The appellant Smith, who had been absent from the Island at the time the robbery was committed, had pleaded guilty to conspiracy to commit robbery, handling stolen goods and possession (subsequent to the robbery) of unlicensed firearms used by the principals.

In sentencing Smith, the court had regard to the following facts which worked in his favour:

1. He possessed no previous convictions.
2. He admitted guilt soon after his arrest and co-operated with the authorities.

The appellant Richards had been convicted, as a principal, of the offence of murder. He had also been found guilty, as an accessory, to the offences of causing grievous bodily harm (to the non-fatally injured security guard), robbery and illegal possession of firearms. There were no mitigating factors to be taken into account in sentencing Richards. What had occurred was a robbery of the most serious kind with death and serious injury resulting. Indeed, Richards' conduct in the immediate aftermath of the robbery was of an aggravating nature. In abandoning one of the (loaded) firearms in a vacant lot in Windsor Park, Richards had shown 'wanton disregard for the safety and life of others', including children. Moreover, the court found no genuine evidence of contrition on the part of Richards.

Held: (sentence as follows)

(i) Taking into account the factors in his favour, in particular his sincere contrition, Bailey would be sentenced to four years' imprisonment in respect of the offence of handling stolen goods. A concurrent term of 18 months would be imposed in respect of the offence of being an accessory after the fact to robbery. Total sentence: four years imprisonment.

(ii) Baker was one of the 'inner circle' of conspirators. The authorities indicated that the appropriate range of sentence for a killing which had occurred during the course of a robbery was approximately 18 – 22 years: R v Tominey. A lesser sentence (14 years) was imposed in R v Thomas and Christian but that was nine years previously and violent crime had increased since then. Neither decision had been concerned with the type of mitigating circumstances cited in the present case. Taking into account, in particular, the accepted fact that Baker had no knowledge that his principals were carrying guns, the sentence for the offence of manslaughter would be 13 years imprisonment. Concurrent sentences of 10 years' and two years' imprisonment were imposed, respectively, for the offences of robbery and being an accessory after the fact to grievous bodily harm.

(iii) Smith would be sentenced to 9 years' imprisonment for the offence of unlawful possession of a firearm. The tariff of 10 years' imprisonment, noted by the former Chief Justice, was intended to apply to less aggravated circumstances of illegal firearm possession. The present sentence was arrived at by allowing the mitigating factors to produce a discount of five years from a sentence which would otherwise have been 14 years. Concurrent sentences of 6 years' and 4 years' imprisonment were imposed, respectively, for the offences of handling stolen goods and conspiracy to commit robbery.

(iv) Richards would be sentenced to a mandatory life sentence in respect of the offence of murder. Richards would also be sentenced to concurrent terms of imprisonment of 18 years' for robbery, 14 years' for illegal possession of firearms and 10 years' for causing grievous bodily harm. There were no factors of mitigation applicable to this appellant.

MD

Possession with intent to supply ecstasy – Appeal by Crown against sentence – Sentencing principles to be applied

R v Tibbets

Grand Court (7/2000)
Smellie CJ
June 1 2000

Legislation

Criminal Procedure Code 163

Authorities referred to

A-G's Reference (No 4 of 1989) (1990) 90 Cr App Rep 366
R v Warren and Beeley [1996] 1 Cr App Rep (S) 233
R v Allery (1993) 14 Cr App Rep (S) 669
R v Catterall (1993) 14 Cr App Rep (S) 724
R v Bryant (1993) 14 Cr App Rep (S) 707
Lieberman v R (1999) (unreported)

Ms Rowley for the Crown
Mr McGrath for the respondent

The respondent had been convicted before a magistrate on his plea of guilty to five charges of possession, and possession with intent to supply, controlled drugs ('Ecstasy', phencyclidine and cocaine) and of failing to provide a urine specimen. For the offence of possession of ecstasy with intent to supply, the respondent was sentenced to 18 months' imprisonment, 12 months of which was ordered to be suspended. He also received a concurrent sentence of six months' imprisonment for supplying ecstasy, and a like sentence for possession of phencyclidine. In respect of the remaining offences, the respondent was sentenced to a further term of two months imprisonment or to a fine of $500 in respect to each.

Pursuant to s.163 Criminal Procedure Code, the Crown appealed against the sentence imposed by the magistrate in respect of the offence of possession of ecstasy with intent to supply.

Held: (Allowing the appeal and increasing the sentence)

(i) The respondent's evidence that he was not intending to distribute the drug for profit, was not a factor deserving of a substantial discount in sentence.

(ii) Ecstasy was classified by the legislation as a hard drug and the court would be mindful of the primary sentencing objective of deterrence in such cases.

(iii) Even taking into account the circumstances of the respondent's addiction and his previously good character, the sentence imposed by the magistrate, who had not been referred to important English authorities, was unduly lenient and was therefore wrong in principle. A-G's Reference (No 4 of 1989) applied.

(iv) The need for deterrence as a response to the emergence of new designer drugs, displayed by the English authorities, was equally apposite in Cayman. According to the English case law, the appropriate range of sentence on facts such as the present would be of the order of 4- 6 years imprisonment: R v Allery; R v Catterall; R v Bryant. Much larger quantities of the drug had led to the imposition of longer sentences of imprisonment of up to 14 years, even on a first conviction and following a guilty plea: R v Warren and Beeley. Individuals were put on notice that future trafficking of ecstasy would be dealt with by imposition of this level of tariff locally.

(v) In the present circumstances, however, the imposition of a much greater tariff than 18 months' imprisonment would be 'unusually primitive'. The magistrate's sentence in the present case might have been influenced by the ruling in an earlier local case (Lieberman v R) where an 18 month term of imprisonment was imposed. This ruling might also have operated to create an expectation in the respondent. For the foregoing reasons, the partly suspended sentence imposed would be quashed and a sentence of 18 months imprisonment substituted.

MD

Crime – Importation of cocaine - Sentencing

Grizzel v R
Robinson v R

Grand Court (SCA 55/97 and 29/98)
Murphy J
October 23 1998

Authorities referred to

Campbell v R (SCA 70/95)

Mr Furniss for the first appellant

Mr Sampson for the second appellant
Ms Rowley for the respondent

Grizzel and Robinson appealed against their sentences imposed respectively for the importation of cocaine and involvement in the same importation. Grizzel, a Jamaican national, was detained at Owen Roberts Airport, where he admitted to swallowing pellets of cocaine. A search of Grizzel's person yielded a piece of paper with Robinson's name on it. When the immigration authorities contacted Robinson, she claimed that she knew Grizzel and would be responsible for him in the Cayman Islands. Grizzel received a sentence of seven years, whilst Robinson was sentenced to four-and-a-half years.

Held: (dismissing the first appeal and allowing the second)

(i) Having regard to the decision in Campbell v R, it was appropriate to consider the dominant place of deterrence in sentencing where drug offences were committed for profit; the desirability of giving credit for assistance given to the authorities; and the great concern surrounding the importation of drugs into this jurisdiction. A sentence of seven years was nonetheless applicable in Grizzel's case.

(ii) Robinson had no prior convictions, received no reward for her participation, made a full confession and ultimately pleaded guilty. She was not the prime mover behind the importation and could be distinguished from somebody who co-ordinated the travel or met the courier. Whilst she was still involved, the extent of her involvement did not merit a sentence of four-and-a-half years imprisonment. However, although her involvement consisted of little more than a telephone call, this was nonetheless serious and would have to attract a significant period of incarceration. A sentence of three-and-a-half years imprisonment would be substituted.

VC

CRIMINAL PROCEDURE

Driving whilst intoxicated - Judicial discretion to dismiss charge – When exercisable- Inconsistency in provisions – s.41 Penal Code and S. 74 Criminal Procedure Code

Hydes v Attorney General

Grand Court (62/2000)
Smellie CJ
April 17 2000

Legislation

Traffic Law S 71(1)(b)

Penal Code S 41
Criminal Procedure Code Ss 66 and 74

Authorities referred to

Palmer's Case (1785) 1 Burr 445
Ex parte Copeland (1852) 22 LJ Bank 17
R v Briggs (unreported)

Ms Rowley for the Crown
Mr Furniss for the appellant

The appellant had been convicted of the offence of driving whilst intoxicated, contrary to s.71(1)(b) Traffic Law. In proceedings before the magistrate, the appellant had attempted to attribute his intoxication to medication which he had taken for his condition of non- insulin dependent diabetes. This contention was rejected by the magistrate on the basis of the medical evidence, and she accordingly declined to exercise any discretion in not entering a conviction against the appellant. Counsel for the appellant nevertheless appealed the ruling of the magistrate, arguing that she had wrongly declined to exercise a discretion invested in her under s.41 Penal Code. Counsel contended that where extenuating circumstances existed, s.41 invested the summary court, in a case such as the present, with a discretion to dismiss the charges, even if considered proved.

The Chief Justice pointed out, on appeal, that on the basis of the factual findings of the magistrate there was an absence of the sort of extenuating circumstances required by the Law. Nonetheless, the Chief Justice acknowledged that there existed some confusion over the extent of the discretion invested in the court in a case where, as here, a prosecution was brought under s.71 Traffic Law. The Chief Justice accordingly proceeded to analyse the relationship between s. 41 Penal Code, s.74 Criminal Procedure Code and s.71 Traffic Law. In particular, the difficulty lay in the fact that whilst s.41 Penal Code conferred a discretion on the summary court to dismiss charges against the accused on the grounds of expediency, this discretion was expressly excluded from any prosecution contrary to s.71 Traffic Law by a proviso to s.74 Criminal Procedure Code.

Held: (dismissing the appeal)

(i) The learned magistrate had, quite properly, ruled against the accused on the application of the medical evidence. There was, accordingly, no basis for the exercise of any judicial discretion in the present circumstances, even were it found to exist.

(ii) There existed an inconsistency in the Law between s.41 Penal Code and s.74 Criminal Procedure Code. S.71 Traffic Law created a mandatory term of disqualification from driving. To construe s.41 as contended for by counsel for the defence would amount to an abrogation of the policy of deterrence underpinning s.71. The magistrate's refusal to countenance this result could not

be faulted; s.41 was to be treated as deferring to the policy of the Traffic Law; Palmer's Case and Ex Parte Copeland applied. R v Briggs, which was not to be taken as authority for the exercise of discretion in the context of the instant offence, distinguished.

(iii) The legislative provisions considered did present a conundrum, which would be best resolved by legislative amendment.

MD

Commencement of criminal proceedings - Summary proceedings - Time limits - Section 77 Criminal Procedure Code - Section 49 Misuse of Drugs Law - Meaning of 'evidence sufficient to justify prosecution'

R v Eldermire

Grand Court (101/99)
Sanderson J

Legislation

Misuse of Drugs Law
Criminal Procedure Code

Authority referred to:

R v Bryan Gayle (unreported)

Mr Roberts for the Crown
Mr Furniss as *amicus curiae*

This was an appeal against the decision of the learned Magistrate to dismiss proceedings against the accused for possession of ganja on the grounds that the Crown had failed to commence proceedings in time.

The Crown alleged that, on November 15 1998, whilst a serving inmate at Northwood prison, the accused was found in possession of 67 packets of vegetable matter resembling ganja. When questioned by the authorities, the accused said that he had nothing to hide.

The vegetable matter was submitted to the government chemist. On March 29 1999 the chemist produced a Certificate of Analysis under the Misuse of Drugs Law. In May 1999 the file was passed to the Legal Department and Crown Counsel determined that there was sufficient evidence to lay charges. Charges were not, in fact, laid until September 10, 1999.

When the matter came before the court of first instance, the defence relied upon s.77 Criminal Procedure Code claiming that the Crown had failed to commence proceedings in time.

Section 77 Criminal Procedure Code states :

'Except for a longer time especially allowed by law, no offence which is triable summarily should be triable by a Summary Court unless the charge or complaint relating to it is laid within 6 months from the date on which evidence sufficient to justify proceedings came to the actual or constructive knowledge of a competent complainant.'

One exception to s.77 is provided by s.49 Misuse of Drugs Law which provides:

'Notwithstanding the provisions of any law prescribing a time within which proceedings may be commenced, any proceeding for an offence under this law may be commenced either within the time so prescribed or within 3 months from the date on which evidence sufficient in the opinion of the Attorney-General to justify a prosecution for the offence comes to his knowledge, which ever time is the longer, and for the purposes of this section a certificate purported to be signed by the Attorney-General as to the date on which such evidence came to his knowledge shall be conclusive evidence thereof.'

The Crown stated that the Attorney-General had evidence sufficient to justify a prosecution, pursuant to s.49 Misuse of Drugs Law, by the end of May 1999.

On the issue whether these proceedings were commenced within the time prescribed by the relevant legislation, the learned Magistrate ruled that they were not commenced in time and dismissed the charge.

The Crown's appeal was founded on two grounds:

1. That s.49 Misuse of Drugs Law provided that the Crown would have 6 months from the end of May 1999 within which to commence proceedings because the section specified that the proceedings must be commenced either (a) within 3 months of the Attorney-General having evidence sufficient to justify a prosecution or, (b) pursuant to s.77 Criminal Procedure Code, within 6 months from the date on which evidence, sufficient to justify proceedings, came to the knowledge of a competent complainant, whichever was the greater.

2. That the six month period required by s.77 Criminal Procedure Code, would not have commenced to run until March 29 1999, the date when the chemist issued a Certificate of Analysis and it was only then that there was sufficient evidence to justify proceedings.

Held: (dismissing the appeal)

(i) Section 49 Misuse of Drugs Law was not to be interpreted to mean that the proceedings could be commenced within 6 months from the date on which the Attorney-General had knowledge of sufficient evidence to justify a prosecution.

That period was 3 months. The limitation period of 6 months began to run when evidence, sufficient to justify proceedings, came to the knowledge of a competent complainant.

(ii) There was evidence sufficient to justify commencement of proceedings when the accused acknowledged possession of the vegetable matter and responded that he had nothing to hide without denying that the vegetable matter was ganja. It was not necessary to await positive analysis of the vegetable matter before justifying commencement of proceedings. Therefore the 6 month period began to run on November 15 1998.

(iii) The words 'sufficient to justify proceedings' did not require a standard of proof as high as beyond reasonable doubt. It was sufficient if there were reasonable and probable grounds for believing that the accused committed the offence. If the evidence was sufficient in the mind of an unbiased, right-thinking person, then proceedings would be justified.

DB

Restraint order – Release of living and legal expenses

In the Matter of the Proceeds of Criminal Conduct Law 1996 and Eurobank and Taves

Grand Court (409/99)
Douglas Actg J
October 27 1999

Legislation

Proceeds of Criminal Conduct Law 1996 S 10

Authorities referred to

Re Peters (1988) 1 QB 871

Authoritative works

Mitchell, Taylor and Talbot On Restraint Orders 2nd Ed
Gee Mareva Injunctions, 4th Ed

Mr Murray for the applicant
Mr Akiwumi for the respondent

The applicant sought a variation of the restraint order against him to allow him to pay his living and legal expenses in the amount of US $9300 per month and $40,000 respectively. Also, he sought to include in his claim for living expenses a single payment

of $43,000. He wished to satisfy his contractual obligation to pay for a helicopter kit ordered in advance of the restraint order.

Held: (granting application in part)

(i) The general principle was that a defendant was entitled to access to his money for ordinary and reasonable living expense. A decision as to what amount was ordinary and reasonable would depend on the facts of each particular case: Mitchell, Taylor and Talbot paragraph 3-128. The affidavit evidence supported a living allowance of US $5,500 per month.

(ii) The applicant submitted that if he did not pay the balance due on the helicopter kit, he would lose $4800 paid as a deposit. The amount claimed would not be allowed as it fell outside of the term 'living' expenses: Gee at page 326. A different view might have been taken if the applicant was in the business of trading helicopter kits.

JE

EVIDENCE

Evidence – Taking of deposition at request of foreign court – Right to cross-examine witnesses

In the Matter of The Evidence (Proceedings in Other Jurisdictions) Cayman Islands Order 1978 and in the Matter of a Civil Proceeding now pending before the Drammen City Court: The Estate of the Late AB under Public Administration by XX v U Brothers & Co. Ltd, CD and EF

Grand Court (686/1999)
Smellie CJ
April 5 2000

Legislation

Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978
Confidential Relationships (Preservation) Law S 4
Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

Authorities referred to:

Voluntary Purchasing Group v Insurco [1994-5] CILR 84
First American Corporation et al v Sheik Zayed Bin Sultan Al-Nahayan et al (Cause 347 of 1997 unreported judgment delivered on May 21, 1998)

Mr Mc Grath for the applicants (the first and second defendants respectively in the Drammen proceedings)
Mr McLaughlin on behalf of the Estate of AB
Mr Foster for the Trustees of the E Foundation and SR
Mr Walton for the Z Trust
Mr Helfrecht individually as witness and as agent of the Attorney-General on matters relating to the Confidential Relationships (Preservation) Law

The Court of Drammen, Norway, had requested the taking of evidence by way of deposition from the witnesses, William Helfrecht and SR. The action before the Norwegian court concerned a claim for damages brought by the estate of AB against the defendants. The plaintiff alleged that before his death AB had built up a considerable fortune outside Norway and at the time of his death the greater part of his foreign assets were in the Panama-registered company CTC Ltd. The defendants contested this. In 1976 a foundation was established in the Bahamas for the purpose of owning the shares in CTC Ltd. Eighty per cent of the shares were transferred to the foundation called C Foundation and the remainder were transferred to another shareholder. The C Foundation was subsequently restated as a Cayman Islands trust and its assets were transferred to and settled upon the trust of the E Foundation, another Cayman Islands trust. The plaintiffs alleged that C Foundation was established on the basis of funds owned by AB, but that this did not entail a genuine transfer of the assets in CTC Ltd. It was, therefore, argued that these assets belonged to AB's estate and, to the extent that they had been used up since 1976, must be made good by the defendants.

The request of the Drammen Court attached a list of questions approved by that court by agreement of the parties joined in the action before it. It was conceded by the witness Mr SR that he should be deposed subject to certain objections with regard to the breadth and lack of specificity of some of the questions and to their speculative or 'fishing' nature.

Held: (granting the request of the Drammen court and directing the witnesses to answer the questions redacted as shown in the annexes to the order)

(i) The Court had the power to allow or disallow a request in whole or in part provided that the Court did not embark upon a process of so re-structuring, re-casting or rephrasing the request that it became different in substance from the original request: Voluntary Purchasing Group v Insurco.

(ii) Questions which were framed so as not in and of themselves to elicit evidence for use in the Drammen proceedings, but for the purpose only of putting in train a possible line of inquiry which might lead to such evidence, amounted to impermissible 'fishing' and would not be allowed: First American Corporation et al v Sheik Zayed Bin Sultan Al-Nahayan.

(iii) The Request would not be so interpreted as to permit cross-examination of the witnesses, notwithstanding the 'clarification' of the request by the Drammen Court so as to permit cross-examination. Article 3 (f) of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters provided that, 'A

letter of request shall specify (f) the Questions to be put to the person to be examined or a statement of the subject-matter about which they are to be examined (emphasis supplied).' Thus the parties were put to an election and the Drammen Court had elected the listing format, which precluded cross-examination.

DOB

FAMILY LAW

Custody of minor – Hague Convention – Access - Maintenance

Ritch-Carlson v Carlson

Grand Court (572/99)
Douglas Actg J
May 2 2000

Legislation

Guardianship and Custody of Children Law (1996 Revision) S 7
Guardianship of Minors Act 1971
Child Abduction and Custody (Cayman Islands) Order 1997
Hague Convention on International Child Abduction

Authorities referred to

Dipper v Dipper (1980) 1 FLR 286
Jussa v Jussa (1972) 1 FLR 881

Authoritative work cited

Rayden On Divorce (13th ed)

Mrs Hernandez for the plaintiff
Mr Roy for the defendant

The plaintiff sought custody, care, control and maintenance of the minor child of her marriage to the defendant. The plaintiff was a Caymanian, while the defendant was a citizen of the United States. The couple lived together in the United States until 1998, when it was agreed that the plaintiff should return to the Cayman Islands with the child. In May 1999, while living in the Cayman Islands, the plaintiff filed a Petition for dissolution of marriage and other relief in the Family Division Circuit Court in Miami. The Court in Florida did not, however, have jurisdiction over the child. In the Grand Court of the Cayman Islands, the plaintiff sought to obtain sole custody of the child. The

defendant wished to have his rights reserved and sought an order for joint parental custody.

Held: (granting sole custody to the plaintiff)

(i) In view of the fact that the two parties lived in different countries and were apparently at loggerheads with each other, it was in the best interests of the child to award sole custody to the plaintiff.

(ii) Neither parent had a pre-emptive right. Giving sole custody to one party did not pre-empt the other's rights: Ormond LJ in Dipper v Dipper.

(iii) Since the child was already a Ward of Court, the child could not be removed from this jurisdiction without the express permission of this Court. Further protection was also provided by the Hague Convention, which had been implemented in the Cayman Islands by the Child Abduction and Custody (Cayman Islands) Order 1997.

(iv) The defendant would be granted access at alternate Easter and Christmas vacations and for two-thirds of the summer vacation. The defendant must undertake to return the child to the Cayman Islands on the dates specified in accordance with the terms of the agreement and undertake to pay the costs of such visits.

(v) The maintenance of the child should be shared by working parents according to their ability. Accordingly, the defendant was ordered to pay US$600.00 maintenance per month, half of the child's educational, medical, dental and optical expenses and the costs of these proceedings.

VC

Family – Divorce – Application for lump sum payment

Stephanie Amelta McLean v John Bonwell McLean and Gladwyn Denise Eden

Grand Court
Douglas Actg J
April 4 2000

Legislation

Matrimonial Causes Law (1997 Revision)

Authorities referred to

Duxbury v Duxbury [1987] 1 FLR 7
Wachtel v Wachtel [1973] 1 All ER 829

Dart v Dart [1996] 2 FLR 296

Authoritative work cited

Rayden on Divorce (15th ed)

Mrs Nervik for the petitioner
Mr Boni for the respondent

The petitioner and respondent had been married for twenty-eight years. Divorce proceedings were commenced in 1990, although it was not finalised due to attempts at reconciliation between 1990 and 1997. The petitioner sought a lump sum payment of $250,000, all other matters relating to disposition of matrimonial property having already been settled between the parties. Following this disposition the petitioner's net share of the matrimonial assets would amount to $218,165.22 (34.90%). The respondent's net share would amount to $407,004.07 (65.10%), which included the possession of ten matrimonial properties and a half interest in another. At the date of the ruling both parties were gainfully employed. The petitioner occupied the matrimonial home along with one child who had not yet attained the age of majority. The respondent had agreed to pay maintenance for that child and one other child who was continuing further education overseas.

Held: (granting a lump sum payment in the sum of $80,000)

(i) There was no express power to make lump sum payments in the Matrimonial Causes Law. Such a power could, however, be inferred from the wording of s.22(e) Matrimonial Causes Law and the court would not hesitate to make such an order in the proper case.

(ii) In deciding whether to make such order the court would take into account all the circumstances of the case. In particular, whether the respondent had the capital assets available to meet the lump sum order: Lord Denning MR in Wachtel v Wachtel.

(iii) The wife's share was usually between 30-50%, depending upon the length of the marriage and the wife's contributions thereto. The court, however, was not fettered by this percentage; it would look to the needs of the party rather than to a strict mathematical calculation in accordance with s.19 of the Matrimonial Causes Law. The 'needs' of the parties may be equated with the 'reasonable requirements' of the parties: Dart v Dart.

(iv) On the facts, the sum requested by the petitioner was grossly unreasonable and inordinately unrealistic. A lump sum of $80,000 was ordered.

SW

Family – Divorce – Matrimonial property - Maintenance

Joseph Bryan v Merill Bryan

Grand Court (D75/1998)
Douglas Actg J
April 28 2000

Legislation

Matrimonial Causes Law (1997 Revision)

Authorities referred to

Wachtel v Wachtel [1973] 1 All ER 829
Ebanks v Ebanks [1992-3] CILR 294

Ms Brooks for the petitioner
Mrs Nervik for the respondent

The parties were married for almost thirty years. The matrimonial assets amounted to an estimated sum of $1,011,391.42. The respondent sought sole ownership of the matrimonial home and an equal share of the balance of all other properties, after liquidation of mortgages amounting to $281,352. The petitioner resisted this division of the matrimonial assets since this would require the sale of income bearing properties, including a property at Northward (the former matrimonial home) and would leave the petitioner with barely sufficient funds to purchase a home.

The petitioner retired in 1994 and the couple moved to Cayman Brac to reside in a property on land which they had received as a joint devise. Using the petitioner's retirement money ($192,102) they purchased two beach properties for rental income (subject to a bank mortgage of $138,000) and paid off the mortgage on the Northward property which was then rented out. The respondent dealt with the rental (including the income) of the two Cayman Brac beach properties. The petitioner alleged, however, that the respondent refused to fully inform the petitioner about the income derived from the properties. This allegation was supported by evidence from the rental agency. As a result of the dispute, the couple ceased cohabiting. The court granted the petitioner maintenance of $300 per month, but this was later varied due to misinformation from the respondent as to the petitioner's income. On 29 September 1998 the court ordered the net income from the Cayman Brac beach properties to be equally divided, although this never took place.

At the same time, allegations were made that the respondent was molesting the tenants at Northward and she was restrained, by a court order dated 20 July 1998, from going within one hundred yards of the property. On 25 September 1998, the court ordered that the income from the Northward property be used to service the bank mortgage. It was alleged that in fact the respondent diverted the income from the Northward property into her own account with the effect that the mortgage was unpaid. Despite

the restraining order, she moved into the property when the tenants vacated in May 1999, thus eliminating the rental income. The bank threatened to foreclose. The respondent adduced medical evidence of sickness and inability to work and medical bills totalling over $5000. The evidence indicated that the respondent was likely to need surgery on her knees in the future.

The respondent sought an order as to the disposition of all the matrimonial property and an order as to maintenance.

Held: (ordering division of assets only, as follows)

(i) The court's duty was to act in accordance with s.19 of the Matrimonial Causes Law. In this case, the court deemed it appropriate to order a clean break between the parties. Accordingly, no order for maintenance was made.

(ii) The respondent should be put in such a position whereby she could acquire funds for future medical expenses without having to dispose of any property that came into her possession as a result of this ruling. The mortgages were to be repaid by the proceeds of sale of one of the Cayman Brac beach properties, which would yield a balance of approximately $108,000 to be equally divided between the parties. The petitioner was required to vacate the property upon the sale of that property.

(iii) The respondent would remain residing in the Northward property, which would be transferred into her sole name. Three further parcels of land in Cayman Brac would be transferred into the sole name of the respondent. The respondent would also keep two other parcels of land that were not disclosed during the proceedings but which were in her sole name and were acquired during the marriage. Her total assets would be $460,000.

(iv) The remaining Cayman Brac property would be transferred into the sole name of the petitioner. His total assets will be $440,000.

(v) Furniture and personal items were to be divided between the parties. If the parties were unable to agree on distribution such assets were to be sold and the proceeds divided equally.

SW

Family – Maintenance – Variation – Age limit

SGM v RAM

Grand Court (D74/96)
Douglas Actg J
December 21 1998

Legislation

Matrimonial Causes Law (1997 R) Ss 22 (1)(f) and 23 (1)

Mr Mostyn QC for the petitioner
The respondent appeared in person

Matters relating to matrimonial property and a number of the issues relating to the children of the parties to the marriage were settled by Consent Order in 1997. The order provided for further guidance as requested. The petitioner sought an order as to the appropriate maintenance for the children and, directions regarding schooling, for the child JM, who was afflicted with the learning disability dyslexia.

JM had attended a school in the United States and later one in Canada. The Canadian school eventually was unable to further assist, and JM was enroled in a second American school which promised innovative treatment with pharmaceutical supplements. The responded objected on the basis that the medication proposed was not an acceptable treatment regime, and the cost of certain treatments suggested were unreasonably high. The overall fees were projected to be $100,000 annually. An alternative school was suggested.

The second child, aged 20 years, was attending college. Medical expenses were also the subject of dispute.

Held: (order granted in part)

(i) The alternative school was an appropriately equipped residential school and, as such, JM would attend that school at the expense of the respondent.

(ii) Maintenance for JM was set at $6,334 per annum or $528 per month, payable only during the periods when JM was living with the petitioner.

(iii) The first order did not address educational expenses relating to the second child, who was at that time 19 years old. Therefore the court had no jurisdiction to make an order, given the express wording in the Law.

(iv) The consent order stated that the respondent would reimburse the petitioner for 'reasonable' medical expenses relating to the children. The list of expenses for medical attendance and prescription drugs were unreasonable and reflect poor judgment. Reimbursement was refused, and no further medical expenses were to be claimed from the respondent.

JE

Family – Divorce – Matrimonial property – Lump sum

ESS v GCS

Grand Court (D60/96)
Douglas Actg J
May 30 2000

Legislation

Matrimonial Causes Law (1997 R) Ss 19 and 22(b)(e)

Authorities referred to

Wachtel v Wachtel [1973] 1 All ER 829

Authoritative work cited

Rayden on Divorce 15th Ed

Ms Merren for the petitioner
Mr Garcia for the respondent

The parties were married for 18 months. There were no children of the marriage. The parties sought a clean break. The court was asked to determine whether a lump sum order to the petitioner was appropriate and, if so, the amount of the lump sum payment. The respondent argued that he had given the petitioner sums over the period of the marriage to satisfy any reasonable claim.

Held: (granting the application)

(i) The court was obliged to consider whether or not to order the payment of a lump sum in every case where application for that relief was sought. If capital assets were available to meet the likely lump sum order, the Court should not hesitate to make such an order: Rayden paragraph 102 and Wachtel.

(ii) The evidence established that the respondent had paid some amounts, and that he enjoyed some advantages in return which had pecuniary value, such as rent-free housing in her home.

(iii) There were sufficient assets to allow for a lump sum order. The petitioner's needs and deserts, and the length of the marriage, were important considerations in assessing the amount of the order. The term 'needs' was to be distinguished from the term 'requirements', the former being a more realistic and usually lower assessment. The deserts of the petitioners included her entitlement to a civil servant pension in the years ahead.

(iv) A lump sum order in an amount less than requested by the petitioner was appropriate.

JE

TRUSTS

Trust protector – Power of veto

In the Matter of the C Trust, A v B Ltd

Grand Court (459/96)
Smellie CJ
December 7 1998

Mr Brodie QC for the plaintiff
Mr Timms for the Trustee
Mr Foster and Mr Collins for the guardian *ad litem* of the second defendant

A trust deed was varied by the settlor under an express power to vary so as to add the following clause as Article 9.4:

"The Trust Protector shall have a power to veto any and all financial transactions involving funds or assets of the Trust Estate valued at Five Thousand United States Dollars or more [various exceptions followed] which the Trustee or any successor Trustee might wish to enter for or enter in on behalf of the Trust, within seven days after the date that the Trust Protector receives written notice of such transaction. In the event that the Trust Protector waives objection of the transaction in writing prior to the expiration of the seven day period, or at the expiration of such seven day period, whichever is sooner, the Trustee is hereby authorised to enter into the transaction with all due deliberate speed."

The trustee sought clarification as to the true nature of the power to be exercised in relation to specific transactions to be entered into for the payment of the fees and expenses of the guardian *ad litem* of the settlor who was the second defendant.

Held: (clarifying nature of power)

(i) The power was a power of veto and not a power which could properly be exercised in a pre-emptive manner but one that required the protector to consider whether or not to veto. In the absence of a veto exercised in that manner, the trustee would be at liberty to proceed with the transaction.

(ii) The power was confined to the exercise of a veto within seven days after receiving written notice of the particular transaction and the exercise had to be

in respect of the particular transaction or transactions of which the protector had been notified in writing. There was no power pre-emptively to veto categories of transactions or any transaction not specifically notified to the protector in writing and there was no requirement that the trustee first had to obtain an approval in writing before being authorised to enter into the transaction.

SAAC

Variation of trust – Division of trust fund into new trusts

L v C Ltd

Grand Court (731/98)
Smellie CJ
November 2 1999

Authorities referred to

Chapman v Chapman [1954] AC 429
Re Steed's Will Trusts [1968] 1 All ER 487
Re T's Settlement Trusts [1964] Ch 158
Re Seale's Marriage Settlement [1961] 1 Ch 574

Underhill & Hayton Law of Trusts and Trustees 15th ed.

Mr Steinfeld QC and Mr Stephens for the plaintiffs
Mr McDonnell QC for the first, second, third and fourth defendants
Mr Bolton for the fifth and seventh defendants
Mr Duckworth for the sixth, eighth, ninth, tenth, eleventh and twelfth defendants
Ms Warnock-Smith for the thirteenth defendant

A family trust was set up with shipping as one of the trust's major investments. The beneficiaries comprised four branches of the settlor's family. Amongst the family branches there was a divide between those who were confident in the retention of shipping as an appropriate investment and those who were not. The division led to a great deal of disagreement and disharmony. With the objective of putting an end to litigation and disagreement, the beneficiaries negotiated the segregation of the trust fund. All beneficiaries and those representing the interests of minor and unborn beneficiaries were in favour of segregation.

It was proposed that four new subtrusts be created out to which would be appointed capital to reflect and preserve the beneficial entitlements of the four branches of the settlor's family and in such a manner as far as possible not to alter the beneficiaries' interests or expectations under the discretionary powers. The present distribution policy of the trustees was a fair indication of what the beneficiaries' expectations should be.

Two members of one branch of the family had been involved in the management of the trust. It was argued on behalf of their branch that the release of possible future claims against them was fundamental to the whole matter of segregation.

Held: (approving the proposed variation)

(i) The court had power to approve the arrangements for segregation of the trust on behalf of minors and unborn beneficiaries under s.72 Trusts Law (1998 Revision). The court acknowledged the debate concerning whether a completely new resettlement fell outside the statutory power to vary, but found that on the present facts the power to approve was available.

(ii) The proposed variation was in the best interests of the beneficiaries as a whole. The proposed variation was for the benefit of the minors and other contingent beneficiaries since it allowed distributions directly for them and allowed flexibility to be afforded to the new trustees to consider whether shipping was an appropriate investment for each subtrust.

(iii) The existence of the beneficiaries' opposing views as to investments, the trustees' commitment to shipping, the lack of confidence in the trustees, the consequential detriment to the administration of the trust, and the family disharmony, together justified an order for segregation.

(iv) The release from liability of the two persons involved in the management of the trust was not fundamental to segregation. The court was sympathetic to the need to assure their branch of the family that the new trustees would not embark on a 'witch hunt' against the present trustees and trust advisors, but it was wrong in principle to direct or approve any sort of blanket release which purported to protect the two persons from any sort of future claim which might properly be brought in the interests of the beneficiaries of the new settlements in circumstances where it was impossible to anticipate what such claims might be.

SAAC

Division of trust fund amongst new trusts – Appointment of capital to new trusts

L v C Ltd

Grand Court (731/98)
Smellie CJ
March 16 2000

Authorities referred to

Gisbourne v Gisbourne [1874-80] All ER 1698
Jones v Maynard [1951] 1 All ER 802
Re Clore's Settlement Trust [1986] 2 All ER 272

Hillas v Drake [1944] Ch 235
Re Vestey's Settlement Trusts [1950] 2 All ER 891
Gilbey v Rush [1906] 1 Ch 11
Re Gibson's Settlement Trusts [1981] 1 All ER 233
Re Walker [1901] 1 Ch 879

Authoritative works

Theobald on Wills 15th ed.
Underhill & Hayton Law of Trusts and Trustees 15th ed.

Mr Steinfeld QC and Mr Stephens for the plaintiffs
Mr Jones for the first, second, third and fourth defendants
Mr Tidmarsh for the fifth and seventh defendants
Mr Duckworth for the sixth, eighth, ninth, tenth, eleventh and twelfth defendants
Ms S Warnock-Smith for the thirteenth defendant

The settlor created a trust fully discretionary as to both income and capital. The settlor's widow was a beneficiary. The first generation beneficiaries comprised the settlor's children. The second generation beneficiaries comprised the settlor's grandchildren. Pursuant to express powers, the trustees had set up LLCF, a foundation for the carrying out of the charitable and benevolent wishes of the settlor, and appointed it as a beneficiary of the trust.

The trustees had made distributions under the trust in accordance with a Distribution Policy.

Certain first generation beneficiaries had previously challenged the validity of the trust and the settlement of assets on the trust. A compromise had been effected by the payment of trust capital to the claimants and also to the other first generation beneficiaries.

The beneficiaries fell into four family branches. There had been divisive disagreement between the branches which was so deep as to indicate the need for the separation of the financial affairs of the opposing branches. An order for segregation of the trust into four subtrusts, one for each family branch, had been made, and the powers of the trustees surrendered to the court. The current application was to determine the nature of the segregation.

Three alternative models were proposed for determining the basis for appropriating the trust fund to the four subtrusts:

(a) Full Hotchpot Model. This would involve an equal distribution of the assets to the four subtrusts with full hotchpot for all distributions already made by the trust, including the sums paid by way of compromise to the first generation beneficiaries. This model was abandoned at trial.

(b) Full Expectations Model. This would involve the court making a 'once and for all' decision of what should be the beneficiaries' legitimate expectations in respect of future distributions, and using this as the basis for an actuarial computation. The allocations for each existing beneficiary would be identified and the remainder would be split equally between the subtrusts.

(c) Hybrid Hotchpot Model. This would involve an allocation for each of the first generation of beneficiaries based on an actuarial computation of their expectations in respect of future distributions, and a similar allocation for the LLCF. The balance would be allocated equally to the subtrusts with hotchpot for all previous payments at present day value to the second generation beneficiaries. The expectations of the settlor's widow would be met equally as a first call upon each of the four subtrusts.

The hotchpot models were challenged on the grounds that they would effect in practice a reversal of the trustees' earlier decisions, and were predicated on a principle of equality which contravened the proper principles for distribution under the trust deed and the distribution policy.

Large appointments of capital to the LLCF were challenged on the ground that it was not the settlor's intention to benefit charity only for charity's sake, but also in the interest of the beneficiaries being themselves allowed to benefit charity. It was therefore argued that all the trust capital referable to charity should not be appointed to the LLCF, but at least some should be retained for appointment to the new settlements, from which appointments to charity could be made.

Held: (ordering the basis for appropriating the trust fund to the subtrusts)

(i) The Full Hotchpot model was rejected. It was inappropriate since the payments under the compromise did not reflect an actuarial computation of the value of the recipients' expectations of income or capital in the trust. The model was also precluded by an earlier court order amending the trust terms so that in respect of trust distributions, 'no account shall be taken of the advances, appointments and payments directed to be made' pursuant to the compromise.

(ii) The Full Expectations model was rejected. It required a relatively high and unsafe degree of reliance upon the assumptions used in the actuarial calculations, which may or may not be borne out. Depending on the way events materialised, it could cause substantial imbalances between the subtrusts and could well visit inequity upon some beneficiaries over the trust period. Moreover, by making allocations based on beneficiaries' expectations under the discretionary distribution policy, the model in effect treated the expectations (in the context of what were to be discretionary settlements) as though they were fixed interests, an approach that would strongly favour the current beneficiaries.

(iii) The Hybrid Hotchpot model was accepted. It did not suffer the problems of the other models, and would best achieve the ideal that the second generation beneficiaries would go into their respective subtrusts upon equal footings. The objective was to give the second generation beneficiaries of one branch of the

family the benefit which they had not received, but which their cousins in the second generation of another branch had received by way of advancements from the trust. Unless these past payments were brought into account now, the disparity between the branches would never be redressed, and this would contravene the intention expressed in the trust deed that all the second generation beneficiaries should have the same expectation of benefit on a stirpital basis as the heads of stock.

(iv) The doctrine of hotchpot would not effect a reversal of the trustees' prior decisions. The current case was distinguishable from Gisbourne since the discretionary powers of the trustees had been surrendered to the court. The decision to hotchpot would itself be an exercise of the trustee powers, not a check or control on previous exercises of the power. Hotchpot did not reverse or override earlier decisions, but adjusted imbalances created by them. Accordingly hotchpot would not be denied on this ground.

(v) The doctrine of hotchpot would not, by substituting equality as the basis for distribution, contravene the expressed principles for distribution, since the terms of the trust deed did not demand the application of those principles to any distributions made to second generation beneficiaries prior to reaching the age of 21.

(vi) There was no indication in the trust deed or memoranda of wishes of the settlor having in mind his family's moral obligation to serve charity. It was clear that in providing for the setting up of LLCF he had in mind his own, personally-felt, moral obligation. As the settlor's family continued to grow and prosper, it would share in the work of the LLCF. This would relieve the family of such moral obligations to serve charity with which they might otherwise be burdened. There was no reason to depart from these intents and purposes of the settlor. The family beneficiaries would continue to be wealthy people in their own right and would be able to meet any personally-felt moral obligations to serve charity as each branch of the family might perceive those obligations. Re Clore's Settlement Trust considered.

(vii) In arriving at the present day value of the past distributions to the second generation beneficiaries which were to be taken into hotchpot, the assumed investment rate of return would be 6%. A higher rate, reflecting the experience of the trust over the past distribution period, would overlook the fact that a reasonable beneficiary would have been entitled to reinvest his distributions in a more conservative manner than the trust fund utilised. On the other hand (approving the commentaries in Theobald on Wills 15th ed., pp.572, 576 and Underhill & Hayton 15th ed., p.515) the traditional rate of 4% was too low nowadays.

(viii) The rate of expected investment return used in calculating the future expectations of the first generation beneficiaries and the LLCF would be 9%. The amount of income would be the present level of distribution index-linked for

inflation. There would be no assumptions of periodic increases of income. Surpluses would be treated as accumulated to capital.

(ix) On the death of the widow and each of the first generation beneficiaries, all payments to or on their behalf would cease so that the remaining beneficiaries of the subtrusts would have no expectation of a continuation of payment.

SAAC

Enforceability of trust claim – Reliance on illegality – Origin of settlor's funds

Bonotto v Boccaletti

Grand Court (252/96)
Graham J
May 9 2000

Authorities referred to

United City Merchants (Investments) Ltd v Royal Bank of Canada [1983] 1 AC 168
Tinsley v Milligan [1994] AC 369
Wilson Smithett and Cope v Terruzi [1976] QB 683
Mansouri v Singh [1986] 1 WLR 1393
Westdeutsche Landesbank Girozentrale v Islington BC [1996] AC 669
Muckleston v Brown (1801) 6 Ves Sen 52
Bowmaker Ltd v Barnet Instruments Ltd [1945] KB 65
Ferrett v Hill (1854) 15 CB 207
Taylor v Chester LR 4 QB 309
Alexander v Rayson [1936] 1 KB 169

Mr Phillips for the plaintiff
Mr Croxford QC for the first, second, fourth and fifth defendants
The third defendant did not appear and was not represented

The plaintiff and first defendant were engaged in business in Italy. The plaintiff wanted to invest abroad and transferred substantial sums to the defendant for deposit to a Cayman Islands bank account. The plaintiff instructed the first defendant to use funds from the account to buy a villa in the Cayman Islands in the name of a Cayman Islands company. This was done, the villa being bought in the name of E Co. The surplus funds were then transferred from the account to the account of E Co.

The incorporation of E Co was arranged by the first defendant through a company formation agent. The initial subscribers and directors of E Co were corporate nominees. The nominees declared that they held the shares on behalf of the plaintiff, his wife and daughter as beneficial owners.

Once the villa had been acquired, the first defendant, acting without instructions, secured the resignation of the nominees from E Co. The nominees transferred to him all the shares in E Co and he personally took over as secretary and director of E Co. He withdrew the balance remaining in the bank account of E Co.

The plaintiff sought a declaration that the first defendant held the entire share capital of E Co on trust for the plaintiff, his wife and daughter, alternatively damages, and a declaration that E Co held its property on trust for the plaintiff.
The first defendant argued that the court should decline the relief sought because of the circumstances of the creation of the original funds in Italy. The plaintiff had dishonestly evaded Italian personal and corporate tax and it was argued that the export of the funds was illegal for contravention of the Italian exchange control laws restricting currency transactions.

Held: (granting the declaration)

(i) The declaration by the nominee shareholders of E Co created a trust of the shares in favour of the plaintiff, his wife and daughter. Where such a clear statement of the beneficial interest was set out, there was no room for a resulting trust in favour of the settlor. When the shares were transferred to the first defendant, the rights of the beneficiaries remained. The first defendant was not a purchaser for value.

(ii) The expert evidence showed that any contract which might have come into being by the handing over of the cash from the plaintiff to the defendant was illegal under Italian exchange control laws and would not be enforced by the Italian courts. The proper law of the contract was Italian.

(iii) The Bretton Woods Agreement, a treaty to which the UK was a signatory, was extended to the non-Dominion territories of the British Commonwealth by Order in Council in 1946 and was accordingly part of the law of the Cayman Islands. The Bretton Woods Agreement provided that certain contracts which contavened exchange control regulations of one member would be unenforceable in the territories of any member. A contract involving the handing over of Lire in Italy for illegal export and exchange into US dollars would be unenforceable in the Cayman Islands as a clear breach of the terms of the Bretton Woods Agreement.

(iv) Although any contracts for the export of the plaintiff's funds would be illegal and unenforceable, the plaintiff sought to enforce a beneficial interest in the shares of E Co, and there was the clearest distinction between trying to enforce the Italian agreement and seeking to enforce the terms of a Cayman trust in a Cayman company. The plaintiff did not need to rely on any illegal contracts to prove his claim to a beneficial interest in the shares under the trust declared by the nominee. Tinsley v Milligan applied.

SAAC

The Legal Status of the Illegitimate Child in matters of Intestate and Testate Succession in the Cayman Islands: the Case for Reform.

The recent case, **Re the Estate of B,**[1] has served to heighten awareness in the Cayman Islands regarding the legal status of the illegitimate child, at least with respect to the issue of intestate succession. The case addressed the question of whether illegitimate children could claim an inheritance in circumstances where their natural father had died without making a will. Mr. Justice Murphy stated that the issue was of importance to all concerned. It was also important to the law of the jurisdiction, as the question as to whether illegitimate children could share in intestacy, in circumstances such as these, had never been before the Courts.[2] Those having an undisputed interest were the wife and two legitimate children of the marriage. The Court noted that under the common law, illegitimate children could not claim inheritance and therefore would need "statutory assistance".

That "statutory assistance" was available in s. 35 of the Succession Law 1995 R., relating to succession rights between illegitimate children and their parents. Subsection (3) and (4) relate specifically to fathers and their illegitimate children. Essentially, the subsections require proof of paternity. Such proof could only take the form of an affiliation order made under the Affiliation Law 1995 R., or any other law relating to affiliation previously in force in the Islands. Since the deceased had never been the subject of affiliation proceedings, his illegitimate children were denied an inheritance. The Court commented on the apparent unfairness of the situation that allowed an illegitimate child to claim an inheritance where an affiliation order was in place, but not where a natural father had acknowledged paternity and supported his children voluntarily. Importantly, the Court found as a fact, based on the unchallenged affidavit evidence of the natural mother that B was the applicants' father.

This paper focuses on the legal position of the illegitimate child in matters of intestate and testate succession in the Cayman Islands, the latter only briefly. It considers whether an affiliation order as currently the only test of paternity in inheritance matters is sufficient. The paper does not enter into a discussion as to whether the Cayman Islands should follow the UK's lead and dispose of all legal disabilities with respect to illegitimate children. Reforms in the UK and other jurisdictions will be used substantially for contrast. Whether the government of these Islands participates in an overall removal of as many forms of discrimination as possible between marital and non-marital children, is really a matter of policy. However, it must be remembered that reform is not an exercise of merely academic interest. On the contrary, it affects the legal rights of real people.

It is true that the law has in some respects, attempted to equate the position of the illegitimate with the legitimate child, for example, in custody[3] and maintenance matters.[4] Mr. Justice Murphy suggested that where the protection of children were involved, the court might strain for an interpretation in their favour but not where proprietary rights

[1] Cause No. 664 of 1998. Heard in Chambers, 18 October 1999.
[2] Fn. 1. Pg. 2.
[3] S. 2 Guardianship and Custody of Children Law 1996 R.
[4] S. 3 & 4 Maintenance Law 1996 R.

were being created, as with succession.[5] He declined to follow Collett, C.J. who held in **Re M**[6] that periodic payments under the Matrimonial Causes Law for the child of a void marriage should be made even though the child was by law illegitimate. The Court in **Re M** (supra) was concerned to adopt the construction most beneficial to the child.

Studies show that besides legal differences, there are social and economic differences. It is said that the real discrimination suffered by children in one-parent families is poverty, more so than being the consequence of their parents being unmarried. In Cayman, the ratio of two-parent households to one-parent households is 1.4: 1.[7] If poverty is the real problem, it becomes that more important that an illegitimate child is not denied an inheritance, no matter how small.[8]

The Factual Background:

It is useful to have some appreciation of the number of individuals who might be disadvantaged by the Succession Law as it now stands.

There are on average 548 births per annum in the Cayman Islands.[9] Table 1 shows births recorded by status of mother. On average, 57 percent of children were born in wedlock. Therefore, on average 43 percent of births in those years were outside of wedlock.

Table 1: Births according to Status of Mother.[10]

Status of Mother

Year	Married	Unmarried	Divorced	Widowed	Separated	Not Stated	TOTAL
1990	266 (54%)	178	13	0	4	29	490
1991	274 (54.8%)	167	19	1	7	32	500
1999	376 (62%)	190	25	2	5	2	600

At its most conservative, that is, using only those births listed in the "unmarried" column, as a percentage of total births, the illegitimacy rate in the Cayman Islands is about 34 percent. Of course, not all persons born outside of marriage remain illegitimate. A person may become legitimated by the subsequent marriage of his parents,[11] or by adoption.[12] There are no reliable statistics on legitimated children since it is not customary to re-register children after the subsequent marriage of their parents. The number of adoptions is also negligible, there being only two in 1999.

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[5] Fn. 1. Pg. 13.
[6] (1989) 1 LB 80.
[7] Status of the Family 1994. Pg. 24 Vol. 1.
[8] S. 10 Affiliation Law - Order ceases at age 15 years. May be extended to 17 years. No secured orders.
[9] Appendix 1- Perinatal Statistics.
[10] Supplied by Registrar of Births and Deaths. 1992-8 unavailable.
[11] S.2 Legitimation Law 1997 R.
[12] S.15 Adoption of Children Law 1996 R.

Illegitimacy then is a notable feature of the society and therefore a significant number of Caymanians are or may be affected by the present law.

Intestate Succession:

At common law, an illegitimate child was not entitled to succeed on the intestacy of ascendant or collateral relations. In addition, if he died intestate only his wife and issue could succeed to his estate. Section 35 of the Succession Law 1995 R., has modified the common law position but only in a very narrow way. In general, an illegitimate person can now inherit on the intestacy of either of his parents and they from him. However, there is an apparent distinction between the mother and father of an illegitimate child. Additionally, even with this "statutory assistance," the child still cannot take on the death intestate of any remoter ascendant or any collateral relations. In effect, therefore, he is treated as having no grandparents or brothers and sisters in that he cannot take on the intestacy of any of these nor can they take on his. It will not matter how close the relationship may have been.

Under s.35 (1), where an illegitimate child's mother dies intestate, the child (or his issue[13]) is entitled to any interest in her estate, which would be due to him *as if* he had been born legitimate. The statute operates to deem him legitimate and therefore he claims on an equal footing as her legitimate issue. Section 35(2), also operates to deem the child legitimate on his death intestate and the mother the only surviving parent. Therefore, the father has no claim to the child's estate where the mother is still alive.

Section 35(3) and (4) operate in almost the same way as subsection (1) and (2) with respect to being treated as legitimate. However, as already discussed, for father or child to succeed on each other's intestacy, the father must have been subjected to affiliation proceedings. In effect therefore, if there is no affiliation order and child is the only surviving relative, the estate passes as *bona vacantia* to the Crown.

Clearly, the law treats unwed mothers quite differently from fathers of illegitimate children. Subsections (3) and (4) were only added to the pre-existing subsections (1) and (2)[14] by the Succession (Amendment) Law 1983. Therefore, limited rights of intestate succession between father and child are relatively recent. In summary then, illegitimate children are limited to succession between their spouse, issue and parents. This is further limited by the necessity for an affiliation order where the child seeks to claim from his father. Lastly, those children acknowledged voluntarily by their parents, in the absence of an affiliation order, are unable to inherit.

Murphy J. sought to explain the possible intent of the s.35 (3) and (4) policy. Gleaning from the statute, he expressed the view that rights on intestacy were only to be available where a natural father was legally obliged to support an illegitimate child. Alternatively, that participation in the estate could only occur after a full enquiry into

[13] 'Issue' or 'child' presumed legitimate under statute and common law: Watson–Morgan v Grant [1990-1991] CILR 1981.
[14] Succession Law 1975 (Law 18 of 1975).

paternity, of the kind envisaged by the affiliation law. The Affiliation Law, he said, clearly contemplated the right of participation by the putative father himself, which would not be possible after his death.[15] This does seem unfair since a natural father may never be legally obliged to support his illegitimate child. In the absence of an affiliation order, where the mother of an illegitimate child marries, responsibility for maintenance becomes that of the husband.[16] While the putative father's legal obligation may never arise, an illegitimate child is still required to support the person registered as his father in certain circumstances.[17] Affiliation orders may also be made in the absence of the respondent,[18] albeit that the complainant's evidence must be corroborated to the satisfaction of the court.

It is interesting to contrast the legal status of illegitimate children in Cayman with their counterparts in the UK following the Family Law Reform Act 1969 (FLRA 1969). Part II of the Act brought about a substantial degree of improvement in the succession rights of illegitimate children both under intestacies and under wills. An illegitimate child became entitled to share in the intestacy of both his parents, on an equal footing with their legitimate issue. It also allowed both parents of an illegitimate child to be equally entitled to share in his intestacy. Section 14 drew no distinction between those who were recognised by their natural parents and others. It would be a matter of proof in each case that the claimant was the child of the intestate. As in Cayman, illegitimate children were still not entitled to succeed on the intestacy of ascendant or collateral relations. Section 14 (4) FLRA 1969 presumes that the father of an illegitimate child has predeceased him, unless the contrary is shown. In effect, the presumption places the burden of proof upon the man claiming to be entitled to succeed as the intestate's father. In other words, parentage must be proved on the paternal side.

Section 1 Family Law Reform Act 1987 (FLRA 1987), laid down the general principle that, in the absence of a contrary intention, a relationship between two persons is to be construed without regard to whether either of them is or is not legitimate. This rule applies to future enactments and relates specifically to matters of succession on intestacy. Thereafter, illegitimacy became irrelevant in determining the rights of succession of an illegitimate person, or to the estate of an illegitimate person or the right to succession traced through an illegitimate relationship. Since the rights of intestate succession were also extended to all relatives of an illegitimate deceased on the paternal side, the presumption in s.14 (4) FLRA 1969 was preserved and extended to all such relatives. The distinction between legitimate and illegitimate children continued to persist with the enduring need to establish paternity in the case of the latter.

The requirement as regards proof of paternity under Cayman's Succession Law 1995 is therefore similar to other jurisdictions. The question is whether the affiliation order should constitute the only method of proof of paternity and whether there should be other methods which would facilitate the determination of paternity after death.

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[15] Fn. 1. Pg. 8.
[16] S. 3 Maintenance Law 1996 R.
[17] S. 5 Maintenance Law 1996 R.
[18] S. 5 Affiliation Law 1995 R.

The Affiliation Law 1995 R., provides the only procedure[19] by which a man may be adjudged the putative father of a child. When an order is made, it simultaneously adjudges a man to be the putative father of a child, and orders him to pay a sum of money weekly or otherwise towards the maintenance of the child born out of wedlock.[20] Historically, the affiliation order had its genesis out of a concern that children receive support from someone. It became a distinctive procedure related only to illegitimate children. Time limits were imposed because maintenance was dependent upon a finding of paternity and it was thought that proceedings should be barred in cases where the evidence might have become stale.[21] By using the affiliation order in inheritance matters, the result is that paternity must be established before death. The requirement that paternity should be pronounced before death, amounts to a much stricter rule than if a six-month time limit were imposed on proof of paternity after death.[22]

Between 1990 and 1999 the average number of affiliation orders granted was 56.[23] A comparison between the number of affiliation orders granted and the number of children born out of wedlock is shown in Table 2.

Table 2:

Year	Born Out of Wedlock	Number of Affiliation Orders	Minimum %	Maximum %
1990	178 (224)	25	14	11.2
1991	167 (226)	45	27	19.9
1999	190 (224)	72	38	32.14

The figures on the left indicate the number of children born to "unmarried" mothers taken from Table 1. The figures in brackets represent all other categories combined from the same Table. In 1999, there were 190 illegitimate births with a corresponding 72 orders.[24] Therefore, only 38 percent of children who could potentially obtain orders actually did. If all other categories of mothers are included, the percentage drops to 32.14 percent. While the number of orders has increased, for succession purposes, the gap between actual and potential orders is certain to have negative repercussions.

One reason for comparatively few applications is that a mother might already be receiving adequate support from the child's father or from some other source. That other source may be from the child's stepfather. Section 3 of the Maintenance Law 1996 R., provides that every man has a duty to provide for every child, whether born in wedlock or not, which his wife may have living at the time of her marriage. If a mother had sought an affiliation order before her marriage, the putative father's obligation

[19] Interestingly, s.14 (3) (c) Immigration Law accepts affidavit evidence as proof of paternity.
[20] Affiliation Law 1995, s.2.
[21] Law Com. No. 118. Para. 6.12.
[22] S. 4 Inheritance (Provision for Family and Dependents) Act 1975 – limit of four months and where proof of parentage is sometimes necessary.
[23] Appendix 2.
[24] Although not all are necessarily related to births in that year.

survives the marriage.[25] As discussed, if the mother had failed to seek an order before her marriage she is prevented from seeking one on behalf of the child after such marriage, since her husband is now responsible to maintain the child. This confirms that the affiliation order was designed with maintenance as its primary objective and not really for inheritance purposes. The effect for inheritance purposes is that a child in these circumstances can never claim on the intestacy of his putative father. Nor can he claim on the testate death of his stepfather, unless expressly provided for.[26]

The nature of affiliation proceedings deters some mothers from making a complaint. They can be unpleasant and embarrassing. Others feel that the amount of the maintenance payment is not worth the effort since it is calculated by taking account of the means of the parties and all the circumstances of the case.[27] To vary the order both must return to court. Sadly, the most troubling explanation for so few orders, is that of sheer ignorance with respect to the importance of the order.

Magistrate Ramsay-Hale[28] indicates that mothers sometimes withdraw their applications relying upon the putative father's promise to maintain the child. Invariably, the man will admit paternity but no order can be made. To facilitate the mother's return to court when that promise is not kept, the magistrate will adjourn the action *sine die,* thus preserving the action and allowing it to survive the limitation period. The magistrate confirms that there is no appreciation of the significance of the order in future proceedings.

Section 3 of the Affiliation Law is pivotal. For it is here that limitation periods are set. Section 3 (1) (a) provides that a single-woman who is either pregnant or who has had a child may make an application within the first year of the child's birth. The reality of this provision is that it has the effect of non-suiting the complainant after one year. The ramifications are significant. Magistrate Ramsay-Hale strongly believes that this is a matter of public interest because the family's interest is not promoted, with the denial of recourse to the court. Responsible fatherhood is likely to be 'terminated' after one year. The ultimate victim will be the child since the law cannot protect him if the limitation period has expired and no order was ever made.

Section 3 (1) (b) does allow for an application at any time thereafter, where the alleged father has paid money for the child's maintenance at any time within twelve months after the birth of the child in question. Some suggest that a single woman should be advised to obtain at least one maintenance payment, thereby ensuring that it will be possible to apply for an affiliation order at any time in the future. The subsection also covers the situation where the man, mother and child are cohabiting, because it can readily be inferred that the condition is satisfied.[29] Importantly, as with all applications under s. 3, the order is dependent solely upon the mother making the application so that her child will qualify under s.35 Succession Law 1995 R.

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[25] Miller v Nickelson [1986-87] CILR 81.
[26] RHB v Butlin [1992-93] CILR 219.
[27] S. 5 (9) Affiliation Law.
[28] Summary Court, Cayman Islands.
[29] Roberts v Roberts [1962] P. 212.

Lastly, by s. 3(1)(c), if the alleged father has left the Islands within the first twelve months of the child's birth, the mother may make an application at any time within the twelve months next after his return. **Baker v Lawrence**[30] illustrates the ease with which the right to make a complaint may be lost. "Return" in the context of s.3 (1)(c), was said to mean physical presence but not a permanent return. It means a stay long enough to enable the process of the Affiliation Law to be put into operation. On the facts, the child's putative father had returned for the first time in September 1987 spending about a week on the Island. He returned permanently to the Island in February 1989. The Grand Court held that his "return" was in September 1987. Since the application was made in March 1989 and more than a year had passed, it was declared out of time.
An appeal lies only to the Grand Court.[31] There is also no provision for an applicant to seek leave for out of time applications based on either discretion or some objective standard. It is submitted that the Court should be empowered to grant leave to commence proceedings out of time, if it would be unreasonable to apply earlier or if the application of the limitation rule could operate in an arbitrary and harsh way. The inability of obtain out of time orders, can only be detrimental to the child. Even if there was no connection between affiliation orders and succession rights, the question of Affiliation Law time limits need to be revisited.

The question of whether or not time limits should be imposed at all in proceedings, in which paternity is an issue, is a difficult one. On the one hand, there is the potential hardship to the father and to the man, against whom paternity is alleged; on the other, to bar a claim may cause hardship to the child. The Law Commissioners[32] in considering this issue felt that there should be no time limit because liability was only imposed on the man because he was in fact the child's father. Any concern about unjustified stale claims is of much less significance now since there is reliable blood testing available.

While the UK has abolished affiliation proceedings, the Jamaican Status of Children Act 1976 (SCA) with identical provisions as s.1 FLRA 1987 has accepted that an action for affiliation provides one means by which paternity may be established.[33] The Act expressly provides that an affiliation order shall be prima facie evidence of paternity in any subsequent proceedings.

Reforms in the UK and the Caribbean have sought to provide other methods of establishing parentage. These have included blood-testing, registration of births, and 'bare' declarations of paternity by the court where no other relief is sought. Section 23 FLRA 1987 gave the court the power to require scientific tests of its own motion. Instead of blood tests limited to the exclusion of a person as a parent, they are now used to ascertain whether a particular person is or is not a parent. Section 12 of the Affiliation Law empowers the local court, of its own motion, to use *any test* which the court is satisfied is capable of providing evidence that a man is or is not the father of a child. Blood tests are commonly in use in Cayman to ascertain paternity. Consequently, it is feasible to employ blood tests as the basis of 'bare' declarations of paternity.

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[30] (1989) 1 LB 74.
[31] S. 8. Affiliation Law.
[32] Fn. 20. Para. 6.12 – 6.17.
[33] S 3 (1) SCA 1976.

The information provided by a child's birth certificate is used extensively in other jurisdictions where paternity is sought to be proved. Section 26 FLRA 1969, amending the Births and Deaths Registration Act 1953 relaxed the rule that in order to register a child both parents had to attend personally. An entry on the register was stated not to constitute proof of paternity but capable of providing substantial evidence of it. In Cayman, s.19 of the Births and Deaths Registration Law 1996 R., relating to the registration of illegitimate children, both parents are not required to attend personally to register the child. If one parent is unable to attend, a statutory declaration must be furnished. This lends flexibility to the law and allows registration in this respect on par with the legitimate child. Where births are jointly registered, the register becomes an important means of providing evidence of paternity.[34] Presently, there is no provision for re-registration where the father's name had not originally been entered on the birth certificate. This omission is currently under review. It is thought that re-registration will be allowed to take place under the same conditions as first time registration.

In Barbados, the application for a declaration of paternity may be made after the death of the father providing a presumption of paternity exists. This presumption is satisfied where the father's name appears on the child's birth certificate.[35] Birth registration in Cayman is strict and comprehensive. The coupling of declarations of paternity with birth certificate evidence could provide a feasible alternative for proof of parentage.

Another alternative may be to allow the mother of an illegitimate child to enter the father's name on the birth register on the strength of an affiliation order naming him as the putative father.[36] Consequently, registration would not be dependent solely upon the man's acknowledgement of paternity.

At present, the Courts in Cayman have no jurisdiction to make declarations of paternity where no other relief is sought. Section 56 of the Family Law Act 1986 introduced a declaration procedure with respect to non-marital parentage. It was thought that the future entitlement to property might turn upon parentage being established at a time when the best evidence, blood tests, were no longer available. Extensive discussions were had regarding the potential for disruption emanating from such an order and consequently the procedure is now confined to the applicant himself and not extended to third parties.[37] By s. 58(2) of the Act, declarations are binding on Her Majesty and all other persons.

In Jamaica, s.10 SCA 1976 provides the primary mode of establishing paternity under that Act. Section 10(1) allows an application to the High Court or the family Court, for a declaration of paternity where a woman alleges that any named person is the father of her child. Second, where a person alleges that the relationship of father and child exists between himself and any other person. Third, where a person having a proper interest, wishes to have it determined whether the relationship of father and child exists between the two named persons. If proved to the satisfaction of the Court that the relationship

[34] Jackson v Jackson and Pavan [1964] P.25.
[35] S.9 Status of Children Reform Act Cap. 220.
[36] S.10 (c) Births and Deaths Registration Act 1953.
[37] Fn. 21. Para. 10.7 & 10.8.

exists, it may make a declaration of paternity ***whether or not the father or the child or both of them are living or dead.*** By s. 8(4) such a declaration "shall, for all purposes be conclusive proof of the matters contained in it."

Re the Estate of B (supra) has plainly served to highlight the fact that the provisions of s.35 affect real people. It is clear that the affiliation order alone is insufficient to allow for adequate adjudication of paternity with respect to inheritance. Furthermore, future reliance upon it as the sole arbiter of paternity will continue to work injustice. However, as the discussion has indicated, there are alternatives. These allow for someone other than the mother to assume responsibility and for determination of paternity to be made after death.

A brief look at succession under a valid will follows.

Testate Succession:

In contrast to what obtains in intestacy, an illegitimate person has always been able to take benefits under wills or any disposition of property.[38] However, under a strict rule of construction, words denoting a family relationship are presumed to refer only to legitimate children unless an intention to benefit illegitimate children is clearly shown.[39] This rule was expressly abolished in the UK[40] and extends to the whole range of relationships and not simply those of parent and child. Consequently, while the testator is still able to expressly exclude illegitimate children from his will, there is no longer the presumption that he intends to do so.

RHB v Butlin (supra) confirmed the fact that the common law rule still applies here. The case concerned a trust where the word "children" appeared. An illegitimate child seeking to claim was not to be included, even if the application was non-contentious. There had been no legislation to reverse the presumption and the Court had no general power to deviate from the rule. The Court however, alluded to wider policy implications and its effect on the affairs of other families who were entitled to assume that the common law construction still applied. Those who were involved in the offshore trust industry may legitimately have arranged their affairs according to the laws in the Islands.[41] In terms of testate succession more so than intestate succession, economic policy may constitute an important consideration.

Two other rules (often related) serve to restrict the right of illegitimate children to benefit under wills and other dispositions. The first is a rule of evidence, whereby the court would not allow an enquiry into the fact of an illegitimate child's paternity.[42] The second was a rule of public policy. An illegitimate child who was conceived after the date when a disposition took effect was not permitted to take any benefit, however clear it

[38] See Fn. 14. S. 28 Wills Law 1997 R., would presume legitimate child or issue unless provided for.
[39] Ministry of Home Affairs v Fisher [1979] 3 ALL ER 21. P.C
[40] S. 15 FLRA 1969.
[41] Fn. 26. Pg.224 at 5.
[42] Re Homer (1916) 115 L.T. 703.

may have been that illegitimate children were intended in the class of beneficiaries. This rule has been abolished expressly by s.4 of the Property (Miscellaneous Provisions) Law 1994. By implication, as in the UK, the court would have to investigate the fact of paternity of the child, exactly what the second rule forbade. In reality then only the first rule remains in Cayman.

Finally, there is no provision in the Cayman Islands which make it possible for an illegitimate child to challenge the provisions of a will, intestacy or partial intestacy, on the ground that reasonable financial provision has not been made for him. The Inheritance (Provision for Family and Dependents) Act 1975 accomplishes that in the UK.

Conclusion:

Both in terms of testate and intestate succession, the judiciary has stated that reform must be the prerogative of the legislature. Particularly, in terms of s.35 (3) and (4) reform is possible in short order. For those already denied an inheritance, reform will be too late. For those who may need to prove paternity in the future, the provision of alternative methods is crucial.

A motion, aimed at correcting the s.35 anomaly,[43] is shortly to be presented to the Legislative Assembly. Succession rights would not be open to every illegitimate child but only to those who could prove parentage. Affidavit evidence, especially in the case where the father had maintained the child might be acceptable as prima facie evidence of paternity. Where a population is small, as in Cayman, paternity may be easier to corroborate. Finally, whatever new procedures are adopted, they must be marked by their ability to make practical sense and achieve justice.[44]

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