CAYMAN ISLANDS LAW BULLETIN

NO. 19

JUNE 2001

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The Cayman Islands Law Bulletin is intended to provide an information and reporting service for attorneys and others who may need to be aware of developments in the law of the Cayman Islands. The case summaries which appear in the Law Bulletin are not intended to be exhaustive or authoritative but should be regarded as an index and a record of material which may be of use in legal work. While care is taken in the preparation of material for publication in the Law Bulletin, neither the Cayman Islands Law School nor the Cayman Islands Government accepts responsibility in law for the accuracy of the contents of this issue, nor do the views expressed necessarily reflect the opinions of the Cayman Islands Government.

Citation:

Cases appearing in this volume should be cited as (2001) 19 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 Mr S. Cooper, Cayman Islands Law School, Tower Building, Grand Cayman (345) 244-3536 or e-mail Simon.Cooper@gov.ky.

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EDITORIAL NOTE

The nineteenth edition of the Cayman Islands Law Bulletin will convey to the reader the diverse and complex nature of local litigation. This edition, like other recent issues of the Bulletin, is noteworthy for its case law considering constitutional matters in the Cayman Islands, such as the susceptibility of Cayman bodies to judicial review, the position of the Law Officers of the Crown, and the test for apparent bias. This edition also features two articles. The first concerns the provision of Legal Aid in the Cayman Islands by Mr John Epp, and the second, by Mr Mitchell Davies, discusses the effectiveness of a victim's consent as a defence to battery in criminal law.

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 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. 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 between the date of judgment and the official 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, academics, legal practitioners 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, Graham J, Sanderson J, Panton J and Henderson J, for the period up to 5th June 2001.

Certain transcripts contained insufficient information to be usefully summarized and were therefore omitted. In chambers matters, and elsewhere where appropriate, 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.

Simon Cooper, Law School.

CASE SUMMARIES SUBJECT INDEX

Summaries of Judgments of the Grand Court of the Cayman Islands

CIVIL PROCEDURE

Costs - costs of compliance with Norwich Pharmacal Order - "necessarily and reasonably incurred to secure the observance of the order"

Hampshire Cosmetic Laboratories Ltd v Cayman National Bank Ltd

Grand Court (663/1998)
Smellie CJ
August 6 1999

Authorities referred to:

Norwich Pharmacal Co v Customs & Excise Commissioners [1974] AC 133
Z Ltd v A [1982] 1 All ER 556
Lampleigh v Braithwaite (1616) Hob 105
Searose v Seatrain (UK) Ltd [1981] 1 All ER 806
Clipper Maritime Co Ltd v Mineral Import Export [1981] 3 All ER 664

Mr Murray for the applicant
Mr Boni for the respondent

On the 28th October 1998 Graham J made an order granting Norwich Pharmacal relief to the plaintiff which required the defendant bank to produce evidence. The order also provided that the bank would recover its reasonable costs of compliance. The bank presented its bill, amounting to USD 25,233.96 to the plaintiff who challenged it as being unreasonable and unsubstantiated. This application was by summons for an order directing the plaintiff to pay.

Smellie CJ indicated that he was not prepared to treat this application as a taxation exercise and that, if fees incurred were reasonably incurred they would have to be paid in keeping with the Order of the 28/10/98.

Held: (Reducing the bill of costs by $5490 to reflect a reduction in the bank's internal costs but upholding the legal costs)

(i) A promise to repay expenses of an innocent third party incurred in complying with a Norwich Pharmacal Order is a promise to repay only such expenses as are necessarily and reasonably incurred to secure the observance of the order. Otherwise the promise could be taken as a licence to incur expenses with impunity with the right to recoup them from the plaintiff.

(ii) It is reasonable for a bank to expect to recover the actual costs of its officers being involved in seeing to the observance of an order plus a little extra for the disruption or inconvenience of having their time spent away from normal banking business. However, it is not reasonable that the bank officer responding to such an order should be at the most senior level of the bank where lawyers are to be routinely involved in vetting the final production to ensure proper legal compliance from all points of view. In that scenario, one would expect the more mechanical function involving the bank simply identifying and retrieving the information for presentation to the lawyers to be undertaken by an officer at the appropriate level.

(iii) In future the correct approach is to have the bill of costs incurred in matters such as this referred to taxation at the new rates for application on a party to party basis. This new approach will provide the recovery of reasonable costs, not indemnity costs and will be intended to protect banks and other respondents to Norwich Pharmacal and other discovery orders while assuring plaintiffs that there is a reasonable limit to the costs they will have to pay to respondents. The usual order in the future should be costs to be taxed on the party to party basis, if not agreed.

DB

Wasted costs – compromise – discharge of notice

QU v VW

Grand Court (459/96)
Smellie CJ
December 6 2000

Authorities referred to

Myers v Elman [1940] AC 282
Public Trustee v Cooper (HC-99-04500; 20/12/99)
Marley v Mutual Society Bank [1991] 3 All ER 198
McPhail v Doulton [1971] AC 424
Re Beddoe [1893] 1 Ch 547

Mr Cohen QC for the plaintiff
Mr Farrow for the first defendant
Mr Sher QC and Mr Arthur for the law firm

In 1996 the plaintiff instituted proceedings seeking administration of a trust by the court. She relied amongst others on the ground that the settlor had become

incapacitated at the time he purported to amend the trust. The trustee (the first defendant) had been administering the trust on the basis of the validity of the amendment.

In the course of the proceedings, the court on its own motion issued a notice to the trustee's law firm requiring the law firm to show cause why it should not be ordered to pay the whole or part of the costs of the proceedings, on the grounds that it had been guilty of misconduct. Questions of propriety arose in respect of the following three matters:

(a) The law firm had wrongly stated in correspondence that "the trustee had seen no evidence of incapacity" of the settlor.

(b) There was an on-going failure by the law firm throughout the proceedings to disclose the positive evidence of incapacity which the law firm was aware the trustee had in its records.

(c) When the amendment was found invalid for defective notarisation, three years after the administration proceedings had been commenced by the plaintiff, the law firm (following leading counsel's opinion) advised the trustee to seek to remedy the defect in notarisation without reference first to the court.

The court also issued a notice to the trustee requiring it to show cause why its costs should not be disallowed for payment from the trust fund.

It was brought to the court's attention that the parties, including the law firm, wished to enter compromise negotiations with a view to settling claims between them, including any claims for wasted costs. The court allowed the negotiations to proceed on the understanding that the law firm's response to the notice would be forthcoming in any event.

Held: (discharging the notices to show cause)

(i) In making the statement concerning the evidence of the settlor's incapacity, the law firm did not intend to mislead. The authors of the letter were genuinely referring only to evidence of the settlor's incapacity at the time when the amendment was made, and this point had been made clear on at least one occasion before the court earlier in the proceedings.

(ii) The proceedings were administration proceedings and not hostile. It was the trustee's obligation in such circumstances to make full and frank disclosure by giving the court all information relevant to the exercise of the court's discretion in giving its blessing to the trustee's proposed conduct. Nevertheless, the member of the law firm dealing with the matter had genuinely perceived a dilemma in disclosing a draft affidavit containing personal medical information without the settlor's consent. The decision not to disclose at that stage of proceedings was within the bounds of the reasonable exercise of professional

judgment, although the opportunity could have been taken to seek directions from the court.

(ii) The law firm advised the trustee to remedy the defective notarisation on the assumption that the settlor had had the capacity to execute the amendment. For the law firm to advise this without reference first to court was not the entirely appropriate course when the law firm knew that that assumption was the issue over which the action had been joined before the court for over three years. The court would have been very unlikely to have approved it, given that the result of the amendment would be to prefer certain beneficial interests over others. Another reason why the matter should have been referred to court was that there would inevitably linger questions whether the law firm's actions could have been motivated by self-interest, being fully aware of the implications for themselves and the trustee of the amendment being invalid. However, while the law firm had fallen into error, it fell short of evidence of misconduct by the law firm to justify a wasted costs order.

(iv) For the above reasons, the notice to the law firm would be discharged.

(v) The notice to the trustee would also be discharged because it had become unnecessary to call upon the trustee to show cause upon the outcome of the compromise negotiations by which significant sums were to be recouped for the benefit of the trust by reference among other things to the costs of the action. Had the matter proceeded to trial, it was indicated that the trustee would have pleaded its reliance upon the advice given from time to time by the law firm. However, whether the trustee could properly have relied on such a plea was at best doubtful in the light of comments in Re Beddoe.

SAAC

Liquidation – Whether judge to recuse himself for apparent bias

Re E Corporation (in liq)

Grand Court (379/99)
Smellie CJ
March 19 2001

Authorities referred to

Ex parte Pinochet Ugarte (No.2) [1999] 2 WLR 272
R v Gough [1993] AC 646
Webb v R (1994) 181 CLR 41
Re Rhondda [2000] 3 WLR 1304

Mr Malek QC for the liquidators
The Attorney-General, Mr Mitchell QC, Mr Hall-Jones and Ms Heap for the Crown

The Chief Justice was the judge in charge of the liquidation of E Corporation, a bank. In the context of an ex parte application at which the liquidators alone were represented, certain matters were brought to the attention of the Chief Justice as having a possible deleterious impact upon the liquidation estate. The Chief Justice wrote a letter to the Attorney-General drawing his attention to these matters. The letter was expressed to be for the purpose that "[the Attorney-General] should be aware of the matters in any future decision the Government or the Crown might wish to take in respect of the [E Corporation] and its affairs and which may impact upon the interests of the 'non-tainted' account holders."

Three issues were to be tried: whether the Crown needed leave of the court to institute criminal proceedings against the bank, and if so, whether leave should be given, and on what conditions. The Chief Justice had heard and considered in the context of an earlier ex parte hearing in the liquidation (on March 13, 2001) some of the issues which might be raised in the trial of the current issues, in the event that it were to be determined the leave was required to bring a prosecution against the bank.

The Attorney-General invited the Chief Justice to recuse himself from the trial of these issues. The Attorney-General raised the concern that the words in the Chief Justice's letter could be reasonably taken as betraying a predisposition to the outcome of the matter at this trial of issues.

It was not suggested that there was any impropriety merely in the fact of a liquidation judge seeking to bring relevant matters coming to his attention in the context of a liquidation to the attention of those in authority; nor was it suggested that the Chief Justice had any personal interest in the outcome.

Held: (finding no grounds on which the Chief Justice ought to recuse himself)

(i) The test to be applied was whether the events gave rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge may or could not be impartial in the trial of the issues before him. The letter in no way suggested how any future decision affecting the bank should be taken. On the contrary, it implicitly recognised that those decisions were to be taken by the appropriate decision-makers and sought to bring what may have been relevant information to their attention. The public interest would not be better served by if their decisions had been taken in ignorance of the matters raised in the letter.

(ii) It was not reasonable to apprehend, from the fact that the Chief Justice as liquidation judge was concerned to bring the Attorney-General's attention to matters having a possible deleterious impact upon the liquidation estate, that the Chief Justice had a predisposition to favour the bank on the issues to be tried. The matters of concern in the letter were properly brought to the Chief Justice's attention by the attorney for the liquidators, and not it was not the judge's own

contrivance. They were matters of concern which a liquidation judge would expect to be of interest to the authorities, who were not only to decide upon whether the bank should be prosecuted, but who would also be concerned (having placed the bank into controllership) to ensure that its assets were protected in the public interest and in the interest of legitimate creditors.

(iii) The issues raised in the hearing of March 13, 2001 were in the context of the liquidation supervision, and as to whether the fees and expenses of the liquidators should be approved out of the liquidation estate. These proceedings were of the sort that are usually taken ex parte, and no imputation could reasonably arise simply from the fact that the Attorney-General was not at that stage represented.

SAAC

COMPANY LAW

Company in voluntary liquidation subject to supervision of the court – Whether leave required to institute criminal proceedings against company

In the Matter of X Corporation (in liquidation)

Grand Court (379/99)
Smellie CJ
April 4 2001

Legislation

Companies Law (2000 Revision)
Companies Act 1948
Insolvency Act 1986
Companies Act 1862
Companies Act 1981 (Australia)
Bankruptcy Act (Canada)
West Indies Act 1962
Cayman Islands (Constitution) Order 1992
Colonial Laws Validity Act 1865
Grand Court Law (1995 Revision)
Supreme Court of Judicature (Consolidation Act) 1925
Constitution of Jamaica
Proceeds of Criminal Conduct Law
Penal Code

Authorities referred to

Re Oak Pitts Colliery Co (1882) 2 Ch D 322
Langley Construction v Wells [1969] 1 WLR 503
Deloitte & Touche AG v Johnson (1999)
Thomas Plate Glass Co v Land and Seas Telegraph Corp [1870] LR 11 Eq 248
In re Aro Co Ltd [1980] Ch 196
In Re J Burrows (Leeds) Ltd [1982] 1 WLR 1137
Re Briton Medical and General Life Assurance Association (1886) 32 Ch D 503
R v Dickson and Wright [1991] BCC 719
In Re Rhondda [2000] 3 WLR 1304
Connelly V Director of Public Prosecutions [1964] AC 1254
Director of Public prosecutions v Humphreys [1977] AC 1
Tapper and McKenzie v DPP and A-G of Jamaica (unreported 8/2/1999)
Fialo and Santiago v Regina [1987] CILR 253
Brooks v DPP and another [1994] 1 AC 568
Regina v Damian Francis Eldemire (SCA Cause 101/99)
Food Controller and others v Cork [1923] AC 647
In re General Rolling Stock Co. (1872) LR 7 Ch App 646
Re Linkrealm Ltd (1998)

Authoritative works referred to

Palmer Company Law
Gore-Brown on Companies
Archbold Criminal Pleading, Evidence and Practice
McPherson The Law of Company Liquidation
DeSmith The New Commonwealth and its Constitution
Roberts-Wray Commonwealth and Colonial Law

The Attorney-General, Mr Mitchell QC and Mr Hall-Jones for the Crown
Mr Malek QC for the liquidators

X Corporation was a Cayman Islands banking entity, which had been since 16 June 1999 in voluntary liquidation under the supervision of the Court. On 9th February 2000 criminal charges were brought against certain former employees, officers and a shareholder of X Corporation for offences of money laundering, fraud and conspiracy. On 7th November 2000 the Attorney-General had directed that eight summons be served upon X Corporation relating to a number of charges pursuant to the Proceeds of Criminal Conduct Law and the Penal Code.

The liquidators applied to the Court to determine whether the Crown needed leave of the Court to institute the criminal proceedings against X Corporation.

This raised the following issues for determination by the Court:

(a) Whether the Companies Law s101, which provides that *'when an order has been made for winding up a company no suit, action or other proceedings shall be*

proceeded with or commenced against the company except with the leave of the Court;' applies to voluntary liquidations which are ordered to continue under the supervision of the Court.

(b) Whether s101 includes criminal proceedings.

(c) Whether s101, to the extent that it purports to fetter the exercise of the Attorney General's powers under s16A of the Cayman Islands Constitution, was not in conformity with the Constitution if it requires the Attorney-General to obtain the leave of the Court before instituting and undertaking criminal proceedings against a company in voluntary liquidation.

Held:

(i) S101 had to be read together with the Companies Law s154 which provides that *'any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes (including the staying of action suits and other proceedings) be deemed to be an order of the Court for winding up the company by the Court and shall confer on the Court full authority...to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.'* Accordingly, s101 applies, by virtue of s154, equally to companies in compulsory liquidation ordered by the Court as it does to companies, such as X Corporation, in voluntary liquidation ordered to continue under the supervision of the Court.

(ii) In prohibiting the commencement of proceedings against such a company without the leave of the Court, s101 applies to all proceedings which may be instituted by process of the Court.

(iii) The power of the Attorney-General under s16A of the Caymanian Constitution is a power which can only be exercised in a manner which is consistent with such inherent and statutory powers as are vested in the Court to govern its own process, and s16A(5) which provides that the Attorney General *'In the exercise of the powers conferred on him by this section...shall not...be subject to the direction or control of any other person or authority;'* does not relate to the authority of the Court to control its own process, either as a matter of its inherent powers or as a matter of the special powers given by statute. The primary intention of s16A is to ensure the independence of the Attorney-General in the exercise of his criminal prosecutorial powers and duties, the intervention of the Court in the exercise of its inherent or statutory powers being in no wise to be likened to that sort of interference. Accordingly, section 101 does not offend against the Constitutional authority or independence of the Attorney-General as entrenched by s16A of the Constitution, nor is it repugnant to the constitutional Orders in Council.

(iv) Given its purposive construction as the Supreme Law, there is nothing in the Constitution that holds that in certain special circumstances the Crown's right to institute and prosecute criminal proceedings might not be circumscribed by statute, let alone by the inherent powers of the Court to prevent abuse of its process. Accordingly, the Attorney General did require the leave of the Court

before issuing the summons against X Corporation by which he sought to institute criminal proceedings against it.

DOB

Landholding company – Whether sham - Whether judgment debtor beneficial owner of land – Whether charging order to be ordered over the land

Bonotto v Boccaletti

Grand Court (252/96)
Graham J
March 23 2001

Legislation

Registered Land Law (1995 Revision)

Authorities referred to

Merchandise Transport v BTC [1962] 2 QB 173
Jones v Lipman [1962] 1 WLR 832
Creasey v Breechwood Motors Ltd [1992] BCC 638
Re A Company [1985] 1 BCC 399
Wallesteiner v Moir [1974] 1 WLR 991
Salomon v Salomon & Co Ltd [1987] AC 22
Law Debenture Corporation v Ural Caspian Ltd [1995] Ch 152
Myles v Prospect Properties Ltd [1994-95] CILR 1

Mr Murray for the plaintiff
Ms Bridges for the first and fifth defendants

The plaintiff transferred money to the first defendant, Boccaletti, as agent to make investments in the Cayman Islands. Boccaletti arranged for the purchase of three Cayman Islands condominiums.

Condominium A was purchased using funds from E Co Ltd (the second defendant) and S Corp Ltd, both of which were beneficially owned and controlled by Boccaletti. The condominium was put into the names of Boccaletti and his wife (the fifth defendant). All of the outgoings for the property were paid by, and all rent paid to, S Corp Ltd. Boccaletti then ordered the tenant to pay rent directly to Boccaletti's wife. The ownership of the condominium was then transferred for no consideration to DA Ltd, a company whose shares were owned by Boccaletti's wife.

Condominium B was purchased using funds from S Corp Ltd. The condominium was put into the names of Boccaletti and his wife. All of the outgoings for the property were paid by, and all rent paid to, S Corp Ltd. The ownership of the condominium was then transferred for no consideration to DA Ltd.

Condominium C was purchased using funds from S Corp Ltd. The condominium was put into the name of DG Ltd, a company whose shares were owned by Boccaletti's wife. All of the outgoings for the property were paid by, and all rent paid to, S Corp Ltd. The ownership of the condominium was then transferred for no consideration to DA Ltd.

Boccaletti's wife then transferred her shares in DA Ltd to her three sons.

The plaintiff had an outstanding judgment debt against the defendant. The plaintiff now sought a declaration that Boccaletti had always been the beneficial owner of the three condominiums and sought charging orders against the condominiums. Boccaletti argued that he had no interest in the condominiums, so there was no jurisdiction to award the charging orders.

Held: (granting the declaration and making the charging orders)

(i) Boccaletti was a signatory on the account of DA Ltd for unspecified purposes, and the account was used to pay his credit card charges. These were formerly paid by S Corp Ltd. Boccaletti's claim that he had nothing to do with DA Ltd was a lie designed to hide the truth that he was in reality the owner of DA Ltd, a company which 'danced to his bidding.' The courts were ready to lift the corporate veil when the device of incorporation was used for some improper purpose. After 1986, Boccaletti knew that, in effect, he was stealing the money placed in trust to him by the plaintiff. Flagrant and repeated breaches of trust were committed by him or those under his control. In that context, any corporate shell created by him or those under his control after that time would be pierced to discover the truth. The corporate structure put in place was a mere sham.

(ii) While the Registered Land Law s23 vested the ownership of land in the registered proprietor free from all adverse interests, this section had to be read with s164. The Registered Land Law recognised equitable claims and interests unless they were inconsistent with the Law (Myles v Prospect Properties Ltd). In this case there was nothing in the Registered Land Law to prevent the eye of equity focussing on the real activities of Boccaletti, which were fraudulent throughout.

(iii) It was declared that Boccaletti was and always had been beneficial owner of the three condominiums which were legally owned by DA Ltd. Charging orders nisi were ordered over all of the properties.

SAAC

CONFIDENTIALITY LAW

Disclosure by bank of confidential information to overseas inspectors – Protection of bank's clients' identities

Re Ansbacher (Cayman) Ltd (No.2)

Grand Court (69/00)
Smellie CJ
May 17 2001

Legislation

Confidential Relationships (Preservation) Law
Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978

Authorities referred to

Attorney-General v Bank of Nova Scotia [1985] CILR 418
Re Bank of Credit and Commerce International (Overseas) (in liq) [1994-5] CILR 56
Tournier v National Provincial and Union Bank of England [1924] 1 KB 461
Government of India v Taylor [1955] AC 491
Banque des Marchands de Moscou v Kindersley [1951] 1 Ch 112
Re State of Norway's Application (No. 1) [1987] QB 433
Re State of Norway's Application (No. 2) [1990] 1 AC 723
Bolkiah v KPMG [1999] 2 AC 222
Re Ansbacher (No. 1) [1998] CILR 169
Re Frankfurt Police [1999] CILR 1
Re Codelco [1999] CILR 42
Re H [1996] CILR 237
Re Balador Silk Ltd [1965] 1 All ER 667
Re Astec (BSR) [1998] 2 BCLC 556
Morris v Director of the Serious Fraud Office [1993] CR 372
First American Bank v Zayed [2000] CILR 57
Re BankAmerica Trust and Banking Corporation (Cayman) Ltd [1992-3] CILR 574

Mr Jones for the applicant
Mr Alberga QC and Mr Ashenheim for a former client of the applicant
Mr Todd QC and Mr Boni for a former client of the applicant
Mr McCahill for a client of the applicant
Mr Bueno QC and Mr Robinson for the Inspectors
Mr Hall-Jones for the Attorney-General as amicus curiae

Ansbacher sought directions in respect of the disclosure of confidential information under section 4 of the Confidential Relationships (Preservation) Law so as to avoid

potential criminal liability for the proposed disclosure of information contrary to section 5 of the Confidential Relationships (Preservation) Law.

On the application of the Irish Minister for Enterprise Trade and Employment, the Irish High Court made an order pursuant to the Irish Companies Act 1990 appointing Inspectors to investigate and report upon business allegedly conducted in Ireland. The order required the Inspectors, inter alia, "to identify as far as possible all of the parties who are ... clients of the Company or who otherwise assisted in the carrying out of the business at the relevant time." Notice of the Irish High Court order was received by Ansbacher.

Ansbacher deemed it to be its own interest to co-operate with the Inspectors in their inquiry and intended to do so by disclosing certain information held in respect of its Irish resident clients. It was acknowledged that the information intended to be disclosed was confidential information governed by the Confidential Relationships (Preservation) Law. Ansbacher therefore brought this application for directions under section 4 of the Law.

Ansbacher sought directions enabling it to co-operate with the Inspectors by disclosure of specific information which it had identified and selected from its Irish resident client files sufficient in its view to assist the Inspectors in their inquiry.

Ansbacher argued that the court had jurisdiction to entertain an application for directions under section 4 as, in compliance with that section, it intended to give evidence in or in connection with a proceeding (or a preliminary matter leading to or arising out of a proceeding) being tried, inquired into or determined by any court, tribunal or other authority.

Ansbacher acknowledged that for directions under section 4 it had to show a legitimate interest to protect in its intention to give the confidential information in evidence. Ansbacher submitted that if the purpose of the inquiry was simply to investigate the conduct of Ansbacher's Irish affairs, then providing the information would not be contrary to Cayman Islands public policy; although if the objective of the inquiry was to identify clients so that they could be investigated by the Irish Revenue then that would be contrary to public policy and common law principle.

Ansbacher argued that a failure to make the directions sought would lead to the risk that Ansbacher might face a possible winding-up order or other remedial order from the Irish High Court, such as an order for the Inspectors' costs. While Ansbacher argued that it was not, and never had been, amenable to the jurisdiction of the Irish High Court, and so such an order should have no legal effect, it could nevertheless carry serious consequences for Ansbacher's reputation worldwide and its ability to do business.

The Inspectors asserted that their inquiry was only about Ansbacher's business in Ireland, and that the identities of the clients were necessary in order to interview them about the nature of the business Ansbacher conducted on their behalf. The Inspectors were not able to accept qualified disclosure which did not identify the Ansbacher clients, as this would be contrary to their terms of appointment in the Irish High Court order.

The Inspectors stated that their inquiry was not about prosecuting anybody for tax fraud. However, they added that there was an allegation against Ansbacher that it had operated to evade Irish revenue laws, and that any refusal to allow the Inspectors properly to investigate Ansbacher by examination of its customers could be construed as turning a blind eye to revenue frauds. No allegation of tax evasion against any particular client of Ansbacher was notified to the court.

The Attorney-General as amicus curiae advised that there was jurisdiction to make the directions under section 4, and that it was in the public interest for the Grand Court to assist the Inspectors in keeping with the commitment to judicial comity. It was explained on behalf of the Attorney-General that Government policy was that mutual legal assistance in regulatory matters be afforded, and that the procedure adopted by the Irish Minister and the court-appointed Inspectors' powers were similar to the functions discharged by the Cayman Islands Monetary Authority.

The Attorney-General also advised that Ansbacher should be directed to disclose the information sought subject to conditions, which might involve the Inspectors seeking an assurance from the Irish High Court that the confidentiality of legitimate Ansbacher depositors be respected.

Objections to Ansbacher's application were raised by certain clients of Ansbacher who would be affected by the disclosure. The objectors argued that there was no jurisdiction to entertain a section 4 application on the following grounds: first, there was no "proceeding" as required by section 4, since the Inspectors' inquiry was not a "court, tribunal or other authority." Secondly, the Inspectors' inquiry did not fall within any of the categories of dispute descibed in section 4(6).

The objectors also argued that the application was an abuse of process on the following grounds: first, because Ansbacher was seeking a collateral advantage for itself in disregard of its duty of confidentiality to assist an investigation, where Ansbacher itself refused to acknowledge that it was amenable to the jurisdiction of the Irish High Court and the Inspectors. Secondly, a direction to disclose would be oppressive where Ansbacher had not notified all those clients who would be affected, thereby denying them the chance to object and be heard. Thirdly, the ambit of the inquiry was tantamount to a "fishing expedition." Fourthly, after disclosure, there might be residual civil liability on Ansbacher to its clients in respect of its breach of confidentiality.

The objectors also argued that there was, objectively and realistically, no legitimate interest of Ansbacher to protect by disclosure, but merely the motivation of fear of reprisals.

The objectors also argued that if the remit of the Inspectors was to be confined to the nature of Ansbacher's business activity, there would be no need to identify individual clients at all.

The objectors also argued that to the extent that the Inspectors' inquiry was intended to determine whether and if so to what extent Ansbacher assisted its Irish resident clients

to evade Irish taxes, the inquiry was seeking to enforce foreign revenue laws in breach of common law principle and public policy.

The objectors raised their concerns that an order for disclosure would lead to the likely widespread publication of their identities with severe implications for their privacy and reputations, and, in light of the media comment, would create a prejudicial presumption of tax fraud.

Held: (ordering qualified disclosure)

(i) There was jurisdiction to entertain Ansbacher's application under section 4. The Inspectors in the conduct of their inquiry were not a "court, tribunal or other authority" as their function was solely to inquire and report, not to adjudicate. Nevertheless, the Inspectors were acting in the course of proceedings before the Irish High Court, and the evidence Ansbacher proposed to give was therefore in connection with proceedings being inquired into by the Irish High Court. Furthermore, the description of disputes in section 4(6) was not definitive of the types of proceedings for which evidence may be directed to be given.

(ii) It was necessary under section 4 to show that Ansbacher had some important and defensible interest to protect in requesting the disclosure so as to co-operate with the Inspectors. Ansbacher succeeded in this by showing sufficient interest in avoiding harm to its reputation that might follow from an adverse report by the Inspectors.

(iii) If disclosure of the clients' identities to the Inspectors were ordered, the Grand Court could have no way of vouchsafing the subsequent confidentiality of the information unless the Irish High Court agreed to order restrictions against abuse, and there was no reason for thinking that the High Court would make such an order. The clients would be left under the cloud of possible unauthorised disclosure.

(iv) The clients had not been shown to have done anything wrong. There must be at least specific and provable allegations of civil liability or criminal wrongdoing against a person before confidential information about his affairs might be divulged. The court would reject any request for disclosure which may proceed upon a presumption of reproachable objective. No change in this policy had been effected by the publication of statements of policy commitments to the Organisation for Economic Co-operation and Development on tax enforcement.

(v) The application was not an abuse of process in trying to secure to Ansbacher a collateral advantage. Ansbacher's purposes in seeking disclosure were frankly stated to the court, and the decision was in the court's discretion, taking account of the interests of all parties and the interests of the administration of justice. If the applicant showed insufficient interest when compared to those with conflicting interests, this should be dealt with by refusal of the directions sought and not by refusal on the ground of abuse of process.

(vi) The application was not an abuse of process on the ground that Ansbacher's failure to notify the clients oppressively denied them of the chance to object. Section 4 contemplated that proceedings would be ex parte, and in this case the court had already made an order setting out Ansbacher's obligations in respect of giving notice of its application to the clients.

(vii) There could be no residual contractual or equitable liability for breach of confidence in disclosing information pursuant to and in keeping with directions given by mandatory court order under section 4.

(viii) The Inspectors' inquiry concerning the Ansbacher clients was tantamount to a roving inquiry not designed to establish or support any specific allegations of fact which had been raised bona fide with adequate particulars, but to obtain information which may lead to obtaining evidence in general support of allegations which had not yet and which may never be brought. Without the power under section 4 to impose conditions on the direction to disclose, Ansbacher's application would have been rejected.

(ix) It was not essential for Ansbacher to disclose the actual identities of the clients. Disclosure of information sufficient to establish the nature of the business Ansbacher did with the clients and how it was conducted should effectively serve to show Ansbacher did not conduct illegal banking business.

(x) Ansbacher was directed to divulge the confidential information to the Inspectors for the purposes only of their inquiry and their report to the Irish High Court; references to names, addresses, and any descriptions or other references which may disclose the identities of the clients were to be deleted and substituted by alphabetical letters, numbers or symbols representing such persons, the key to which was to be restricted to Ansbacher, its legal advisers and the Grand Court.

SAAC

CONTRACT LAW

Contract – Wrongful termination – Commissions due under the contract

Cupidon v Re/Max First Realty of Cayman Ltd and another

Grand Court (441/1997)
Sanderson J
August 15 2000

Mr Samuels-Brown and Mr Polack for the plaintiff
Mr Alberga QC and Mrs Dacosta for the defendant

The plaintiff entered an agreement with the first defendant dated 29 November 1993 ("the Agreement") whereby the plaintiff was engaged as a real estate agent. The Agreement was silent as to the commission arrangements. However, the parties operated an arrangement whereby the plaintiff was entitled to commission as follows: (1) 100% of the real estate commission if the plaintiff acted both as selling and listing agent; (2) 50% commission if the plaintiff obtained a listing for a property but another realtor or agent found a purchaser; (3) 50% commission if the plaintiff found a purchaser for a property listed by another realtor or agent.

The plaintiff acted as selling agent for a property known as Commonwealth no9. The plaintiff introduced a purchaser to the property. She then left the island and the defendant assisted in the sale. A sale price of $1 million was agreed. A 5% commission on the sale amounted to $50,000, of which the plaintiff alleged that she was entitled to 25%. The plaintiff further alleged, however, that second defendant, without her consent, agreed with the vendor to reduce the commission to $35,000. She received the sum of 25% of the reduced commission plus $1000; the latter being expressed to be paid in order to assist with expenses in respect of her son who was receiving medical treatment in Miami.

The plaintiff was also the selling agent in relation to Palms no9. At the time the sale was concluded the plaintiff was off island and another RE/MAX agent, Ms Coleman, assisted. The plaintiff agreed with her that she would be paid 40% of the plaintiff's commission and the plaintiff would retain 60%. A sale price of $435,000 was agreed. A 7% commission on the sale amounted to $30,450, of which the plaintiff alleged she and Ms Coleman were entitled to one half. The second defendant, without the consent of the plaintiff, agreed with the vendor to reduce the commission to $15,000 and to pay part of the stamp duty ($693.29). The plaintiff then received the sum of $7,500 less $346.65 (half of the stamp duty).

The plaintiff secured the listing of Avalon no23. On 31 March 1994, the defendant terminated the Agreement, prior to Avalon no23 being sold. The selling agents, Rainbow Realty, were paid 50% of the commission, with 50% for the listing agent. The defendant contended that since the sale took place after the agreement with the plaintiff terminated, the plaintiff was not entitled to 50% of the commission. Instead the plaintiff was paid 20% of the listing agent's commission as a 'referral fee' in accordance with the CIREBA rules.

Following a meeting between the defendant and the plaintiff to discuss various issues, the defendant terminated the Agreement for cause on 31 March 1994,, alleging that the plaintiff had failed to conduct her business in accordance with the Agreement and was disruptive of the RE/MAX office. In particular, it was alleged that the plaintiff solicited customers outside the office. Further, that she paid Ms Coleman 40% of the commission on the sale of Palms no9, instead of 50%, as required by a memorandum dated 13 January 1994 from the defendant to the plaintiff which stated that, "If an agent assists another agent while they are off the island a referral fee of 50% on the agents commission is paid to the assisting RE/MAX agent (on the listing or the selling side)."

Clause 8B of the Agreement provided that it could be terminated (1) by RE/MAX, for cause, immediately and without notice, in the event that the Contractor defaults or otherwise fails to conduct his business in accordance with the terms of this agreement or engages in conduct which is disloyal or disrupts the office or is likely to bring discredit to the RE/MAX name or (2) by either party without cause, at any time, upon the giving of sixty days advance written notice to the other.

The following issues were before the court:

1. The plaintiff alleged that the letter of agreement dated 12 January 1994 was void as it was entered into on the basis of duress, undue influence, fraud, misrepresentation and conspiracy between the defendants to defraud the plaintiff of her rights.
2. The plaintiff claimed that certain commissions remained unpaid. In particular, she contended that she was the selling agent for two properties (the Palms, no9 and the Commonwealth no9). Further that she was entitled as the listing agent to commission of 50% on the sale of a property (Avalon no23) but was only paid 20%.
3. The plaintiff alleged that the defendant wrongfully terminated the Agreement.
4. The plaintiff claimed damages arising from interference by the defendant with certain contractual relations.
5. The plaintiff sought the repayment of expenses incurred.

Held:

(i) The letter of agreement dated 12 January 1994 was a lawful variation of the Agreement. There was no evidence before the court that any duress had taken place and the allegations as to fraudulent misrepresentation were unfounded. There was no evidence to support a finding that the defendant misled or attempted to conspire with anyone in order to injure the plaintiff.

(ii) In relation to the sale of Commonwealth no9, the defendant did not act unlawfully by agreeing with the vendor to reduce the sale commission without obtaining the permission of the plaintiff. The parties to the listing agreement were entitled to vary it by mutual consent. The plaintiff had agreed to accept the sum of $9750 representing her share of the commission on the sale of this property.

(iii) In relation to the sale of Palms no9 the defendant was entitled to agree a reduced commission with the vendor, but was not entitled to deduct any amount in respect of the stamp duty from the plaintiff's commission.

(iv) In relation to the sale of Avalon no23 the defendant had acted lawfully in retaining the listing agent's commission and remitting only 20% to the plaintiff under the CIREBA rules.

(v) The conduct alleged against the plaintiff was not sufficient to justify termination of the Agreement for cause. Further, the defendant failed to warn or indicate the seriousness with which he viewed her conduct prior to termination taking place. The plaintiff was thus entitled to damages representing the sum that she would

have earned during the 60 days notice period provided in the Agreement. This was assessed at $7000. The claim for expenses was dismissed.

(vi) In view of the unfounded, but serious, allegations made by the plaintiff, she was ordered to pay the costs of six days at trial. The defendant was ordered to pay the costs of the remaining two days at trial.

SW

CRIMINAL LAW

Possession of drug – Whether cocaine under Misuse of Drugs Law – Certification as cocaine hydrochloride

Roberts v R

Grand Court (179/98 & 180/98, SCA 4/00)
Graham J
October 20 2000

Legislation

Misuse of Drugs Law (2000 Revision) Ss 7(2) and 7(3)
Evidence Law (1995 Revision) S 27(1)(b)

Authorities referred to

Nicoletta v R (1990) CILR 152
Hydes and Ebanks v R (1980-82) CILR 335

Mr Small for the appellant
The Solicitor-General for the Crown

Roberts appealed against his sentence of 11 years imprisonment imposed for possessing cocaine hydrochloride with the intent to supply. A search of Roberts' house and garden in Cayman Brac by the Drugs Squad yielded a box containing the drugs. Prior to the search, Roberts claimed that he had thrown the drugs in the sea. After the discovery of the drugs, Roberts claimed he had thrown those drugs away and had thrown the remaining quantity in the sea. Later Roberts told a Police Sergeant that he had given the remaining quantity to another individual. The issues at Roberts' trial concerned the veracity of the police officers in respect of finding the drugs and the alleged admissions made by Roberts.

Held: (rejecting the appeal)

(i) As the learned trial judge had seen the witnesses and been able to assess their demeanour, she was entitled to come to the conclusions that she did. An Appellate Judge should not interfere with the findings of the trial judge unless they are patently flawed.

(ii) Having regard to the dictum of Harre J in Nicoletta v R, the Evidence Law (1995 Revision) s27(1)(b) and the Misuse of Drugs Law S 7(2), the Certificate of Analysis, Exhibit No. 3, was properly received in evidence at the trial.

(iii) The Crown's fresh evidence that "cocaine hydrochloride" is a salt of cocaine and therefore subject to the Misuse of Drugs Law was accepted. The technical admission in evidence that the Certificate of Analysis used the terminology "cocaine hydrochloride" and the information alleged the possession of "cocaine" would cause no prejudice to the Appellant: Hydes and Ebanks v R.

(iv) The fresh evidence from the Appellant's attorney that the actual weight of the cocaine in Exhibit 3 differed from the weight suggested by the police was not accepted on grounds of relevancy.

(v) As there was no appeal in respect of the sentence imposed, no comment was made.

AF

Criminal Appeal from summary court - Conviction based on a theory of facts never advanced by Crown - Failure of magistrate to critically examine evidence or give reasons why it was accepted

R v Samuels and another

Grand Court (91/1999)
Sanderson J
March 29 2001

Legislation

Customs Law (1997) Revision
Criminal Procedure Code s52

Authorities referred to
R v Redman [1994] Crim LR 914
R v White [1987] Crim LR
R v Robson [1992] Crim LR 665

Bertolino v R [1990-91] CILR 112
Smith (AE) v R [1988-89] CILR 162
Aqui v Pooran Maharaj (1963) 34 WIR 282
R v Helner [1984-85) CILR 178
Selvanayagam v University of West Indies [1983] 1 All ER 824
Bookers Stores Ltd v Mustapha Ally (1972) 19 WIR 230
R v Randy Merren & Gilroy B Merren (unreported) Grand Court June 20 2000 60/99

Mr Small QC for the appellant Samuels
Mr Akiwumi for the Crown

The Appellant was convicted of evading duty by dealing in uncustomed goods, evading duty by being in possession of uncustomed goods and failure to comply with Customs notices served on him. He was acquitted of a charge of smuggling cigars.

At trial the Crown had alleged that Mr Samuels was involved in smuggling 84 boxes of cigars into Grand Cayman on board the motor vessel "Black and Blue" on the 11 March 1997 and that he and his co-defendant had sold these the following day.
In addition to the 84 boxes of cigars, customs officers searched premises occupied by the appellant on the 28 April 1997 and discovered 170 boxes of Cuban cigars.

The Crown led evidence that Mr Samuels made a statement to customs officers to the effect that the cigars had been acquired by him, over a period of 9 months, from others who had brought them to the country under their duty free allowance.

The Crown's theory of the case was that both the 84 boxes and the 170 boxes of cigars were smuggled into the Cayman Islands by the appellant and his co-defendant on the motor vessel "Black and Blue" and that the statement of the appellant was adduced only to show he was lying when he made the statement, which the Crown argued, was evidence of guilty knowledge.

At trial the appellant denied making the statement in question and stated, in his defence, that he acquired the 170 boxes of cigars from various suppliers in Grand Cayman including a Mr Steele.

The Crown, in its opening, evidence in chief, cross examination and final argument, always took the position that the appellant had brought all of the cigars in on board the motor vessel "Black and Blue".

The learned Magistrate rejected the Crown's case that the defendant was involved in smuggling and acquitted him of this charge, but convicted him of being in possession of and dealing with uncustomed goods, on the basis that the appellant's statement to the customs officer was true.

On appeal against conviction, counsel for the appellant submitted that:

(1) Given that this theory was never advanced by the Crown, the appellant was not given an opportunity to lead evidence in respect of, or argue against that theory.

(2) In coming to the conclusion he did, the learned Magistrate accepted the evidence of a witness, Mr Steele, who denied ever selling cigars to the appellant, without critically analysing or giving any reasons for why his evidence was accepted. Counsel asserted that Mr Steele's evidence was fundamental to the Crown's case and that it was contradicted by three different witnesses.

Held: (allowing the appeal and ordering a retrial)

(i) In respect of ground one, where a tribunal has convicted on a basis that was not advanced by the Crown, it must, as a matter of fairness invite submissions from both the defence and prosecution on that new aspect of the case. The defendant might have been convicted if the theory relied upon by the Court had been advanced as an alternative but this was not the position in the instant case. It follows that the conviction for dealing in and the conviction for being in possession of uncustomed goods must both be set aside.

(ii) In respect of ground two, the learned Magistrate accepted the evidence of Mr Steele, which was contradicted by three witnesses, without offering an explanation or reason why it had been accepted in these circumstances. Following the authority of a number of cases cited (as above), as a minimum the judgement of a Summary Court should, as well as complying with the requirements of section 52 of the Criminal Procedure Code, set out the points of determination, the decisions thereon and the reasons for the decisions. If within the broad issue of credibility, there is a narrower issue which has to be determined, and shown to have been determined, before the broad issue can be said to have been fairly tried, that issue must be expressly dealt with in the judgement. In the instant case, there was no analysis of the conflicts and discrepancies in the evidence that the particular circumstances of the case required and no reasoning offered as to why certain evidence was accepted. In this case it was necessary that that analysis be done and the reasoning of the learned Magistrate provided. Accordingly for this reason, as well, the conviction for dealing in and the conviction for being in possession of uncustomed goods must both be set aside.

(iii) The conviction for failing to respond to customs notices should stand.

(iv) Retrial ordered.

VC

CRIMINAL PROCEDURE

Mutual legal assistance – Misuse of Drugs Law – Restraint order – Variation

A-G v C

Grand Court (373/93)
Sanderson J
May 23 2001

Legislation

Misuse of Drugs Law 1975
Mutual Legal Assistance (United States of America) Law 1986
Misuse of Drugs (Drug Trafficking) (Designated Countries) Order 1991
Grand Court Law
Grand Court Rules

Authority referred to

Re Mutual Legal Assistance Law (Cause 767/99, Unreported, August 3, 2000)

Mr Bulgin and Ms Wilson for the Attorney-General
Mr Alberga QC and Mr Robinson for the defendant

In 1993 the Grand Court ordered that certain sums held on deposit at a particular bank were to be frozen under the Misuse of Drugs Law 1975, following proceedings in which it was alleged that the sums, which were held in the names of companies controlled by the defendant C (a lawyer), represented drug money. C now sought to have the order varied so as to have released to him approximately 25% of the funds on the basis that (1) the original order was made without jurisdiction, and (2) the US had agreed that that proportion of the funds be released since it was not money of the alleged drug smuggler but rather C's and C's other clients' money.

The Crown argued that variation of the earlier order was discretionary and the court in this case ought not to vary.

Held: (setting aside the original order)

(i) The Misuse of Drugs (Drug Trafficking) (Designated Countries) Order 1991 Law s16G(11) required that the an application for a restraint order under s16G(3)(a) be supported by an affidavit which must indicate when it is intended that the relevant proceedings shall be instituted in the designated country. This section was mandatory and could not be waived or abridged by the court, unlike some of the Grand Court Rules.

(ii) The affidavit material did not say that proceedings would be instituted or were to be instituted against C, nor did it say when any proceedings were likely to be commenced. The order would therefore be set aside. With respect to the 75% of the funds alleged to money of the alleged drug smuggler, further submissions from the Crown would be heard as to whether a restraint order should be made at this time.

SAAC

EVIDENCE

Evidence – Privilege – Priest and penitent

R v Powell and Ebanks

Grand Court 39A & B/00
Henderson J
January 9 2001

Legislation

The Evidence Law (1995 Revision)

Authorities referred to

R v Hay (1860) 2 F& FS 933
Broad v Pitt (1828) 3 Cox 518
R v Gilham (1828) 1 Mood 186
R v Griffin (1853) 6 Cox 219
Ruthven v deBour (1901) 45 SJ 272
Wheeler v Le Marchant (1881) 17 Ch.D 675
Normanshaw v Normanshaw (1893) 69 LT 468
Attorney General v Mulholland and Foster [1963] 2 QB 477
British Steel Corporation v Grenada Television Ltd [1981] AC 1096
In Re an Enquiry [1988] 2 WLR 33
R v Gruenke [1991] 3 SCR 263
Hunter v Mann [1974] 1 QB 767
R v Payne [1963] 1 WLR 637

Authoritative works referred to

Cross on Evidence
Archbold Criminal Pleading, Evidence and Practice

The first and second Defendants were jointly charged with murder. The Crown had reason to believe that the second Defendant had confessed his role in the murder to a pastor, H, a Minister in the United Church of Christ. The Crown served a witness summons on H requiring her to attend and give evidence at the trial.

H applied to set the summons aside arguing that any relevant evidence she could give was protected by a priest-penitent privilege. The Crown objected to the setting aside of the summons and argued that there was no general or class privilege protecting priest-penitent communications.

Held: (dismissing the application to set aside the witness summons)

(i) There is no general or class privilege protecting priest-penitent communications. The issue is best approached on a case by case basis.

(ii) An answer will not be compelled unless the answer is relevant, proper, and necessary to the course of justice.

(iii) The Court retains an overriding discretion to refuse to compel a witness to answer where to do so would violate a confidence. Further, the Evidence Law s28 permits a court to exclude evidence in criminal proceedings where its admission would operate unfairly against a defendant. Such unfairness may arise where the admission of the evidence would violate a confidence. Whether the court's discretion will be exercised in favour of exclusion will depend upon a consideration of all the circumstances, including the nature of the confidential relationship and the probative value of the evidence.

(iv) Inn view of the gravity of the charge and the high probative value that a confession might have a voir dire is appropriate to determine the probative value of the second Defendant's communications with H. Once all the relevant circumstances are known the parties are at liberty to contend for or against the exercise of the court's discretion to exclude the evidence.

DOB

Confession evidence - partly exculpatory and partly incriminating - admissibility -not recorded simultaneously - failure to give full caution - effect of unlawful detention without charge - whether confession product of oppression or of threat, promise, inducement made or held out to the defendant by any person in authority - court's discretion to exlude evidence, which, if admitted would operate unfairly against the defendant

R v Ebanks and Powell

Grand Court (39/2000)
Henderson J

January 18 2001

Legislation

Evidence Law (1995) Revision

Authorities referred to

The Judges Rules
R v Godinho (1912) 7 Cr App R 12
R v Bass [1953] 1 All ER 1064
R v Sang (1980) 69 Cr App R 282
R v Priestley (1966) 50 Cr App R 183

Mr Stevens for the defendant Ebanks
Mr Kinch QC for the Defendant Powell
The Solicitor-General for the Crown

The defendants were jointly charged with murder. A statement was taken from Powell on February 9, 2000 in which he admitted participating in the robbery of the victim but accused Ebanks of wielding the knife which inflicted the fatal wound. This statement was shown to Ebanks. Prior to reading the statement, Ebanks was given a full caution and he demonstrated an awareness and understanding of the caution by repeatedly answering "no comment" to questions posed to him after reading the statement.

On February 17, 2000 officers attempted to interview Ebanks again. When asked if he was willing to answer the officers' questions, Ebanks said "no". One of the officers reminded Ebanks that he did not need to say anything but no formal caution in the words of the Judges' Rules was given at any time on the 17 February. Ebanks was given Powell's statement again and he read it. Before Ebanks said anything of substance about what was in Powell's statement there was a long conversation with the officers during which Ebanks spoke about his past, his use of drugs and his religious and spiritual beliefs. After ensuring that the conversation was not been taped or written down, Ebanks said, "If I am to talk the truth I would go to jail." He said he "wanted to walk out of there a free man as he did not kill Curtis Seymour" and accused Powell of doing so. After having read the Powell statement, Ebanks said " three quarters of it are lies." When asked which part of the statement was a lie, he began to give his version of events. This conversation lasted one hour and, at the request of Ebanks, was not recorded or simultaneously written down. After the interview the officers prepared their witness statements together.

On Voir Dire, Counsel for Ebanks sought to have Ebanks' statement (which was partly exculpatory and partly incriminating) excluded on these grounds:

(a) that it was the product of an inducement made or held out by a person in authority and hence involuntary;
(b) that it was not preceded by a full and correct caution in the terms set out in the Judges' Rules, and the manner in which it was taken was unfair;

(c) that, in the circumstances as outlined above and due to the fact that at the time of the making of the statement Ebanks had been in custody without charge for approximately two weeks, the statement was the product of oppression and therefore involuntary.

Held: (allowing the statement in evidence)

(i) The statement must be excluded unless the Crown succeeds in proving, beyond reasonable doubt, that it was not the product of any threat, promise, or inducement made or held out to the defendant by any person in authority. In the instant case there was no threat or promise or inducement which could have any impact on the admissibility of the statement. The statement was a product of an operating mind. Mr Ebanks understood what he was saying and intended to communicate the things he said.

(ii) The submission that the lack of formal caution on the 17 February amounted to an inducement because it was a misrepresentation that Mr Ebanks could talk with impunity, was rejected. He was cautioned properly and understood the nature of that caution on the 9 February. On the 17 February the officer had reminded Ebanks that the law did not require him to answer. This comment was not an inducement made or held out by a person in authority to Ebanks.
Neither was the providing of Powers statement to Ebanks an inducement within the meaning of decided cases. A defendant is entitled to know what a co-defendant is accusing him of having done. There is nothing inappropriate about handing, without comment, the written statement of one defendant to another.

(iii) As to the court's discretion to exclude evidence, which, if admitted would operate unfairly against the defendant (Evidence Law 1995 Revision s28), there was nothing unfair in the manner in which this confession was obtained. It is likely that Mr Ebanks spoke because, among other reasons, he believed what he said could not be used in evidence. The police did not induce him to believe that. He had been cautioned properly on the 9 February, recalled the effect of the caution, and knew he was not obliged to incriminate himself. There was nothing unfair in the police allowing him to speak in circumstances where he may have assumed, albeit erroneously and contrary to the words of the caution on February 9, that he could do so with impunity. Furthermore, the officer's inability to relate everything that the defendant said was not fatal to admissibility. It is permissible for a police officer to give the gist of what was said rather than the precise words, although such a course is, for obvious reasons, undesirable. It was also permissible for the two police officers to compare their recollection as to what was said when drawing up their witness statements immediately afterwards.

(iv) At common law, a confession is regarded as having been obtained by oppression if it was the product of something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary. The enquiry is essentially subjective. One must determine what oppressive conduct was brought bear on the defendant. One must assess the impact of that conduct upon him. One must

have regard to his mental, psychological and perhaps physical makeup. It is a question of looking at his ability, or lack of it, to speak with a free will and with the intention of communicating what he has to say. A lengthy period of detention, whether lawful or unlawful, may in some circumstances have the effect described. Where the detention is unlawful and where the unlawfulness is known to, and understood by the defendant, that may well add to the oppressive effect of the detention. In the instant case, assuming, without finding, that the detention was unlawful, the court was of the view that it had no impact on the defendant. He showed considerable presence of mind on February 17, insisting that the conversation was not tape recorded, his answers showed a considerable mental acuity, opposite of the state associated with oppressive conduct. There was none of the mental and emotional deterioration that is associated with oppression. The statement was not the result of oppression or, in particular, the unlawful detention of the defendant. The statement was not obtained by unfair means. An unlawful detention of significant duration is certainly unfair in the large sense, but there was no causal link here between that unfairness and the obtaining of the evidence.

DB

FAMILY LAW

Ancillary relief – Injunction against removal – Parental agreement and the welfare of the child

PRC v RMC and AS

Grand Court (D71/2000)
Henderson Actg J
In Chambers
August 25 2000

Legislation

Matrimonial Causes Law (1997R) S 20

Mr McCann for the petitioner
Ms Nervik for the respondent
Co-respondent did not appear

The petitioner and respondent were married in 1990 and had two daughters, now aged 6 and 4 years. Both parties were professionals. In May 2000, the respondent suddenly sold her car and went abroad with the two children using one-way airline tickets. The petitioner received no warning that this was about to occur. The petitioner located the

respondent and the children, and a foreign court ordered that the children were to be returned to this jurisdiction. The foreign court, by consent, ordered that if the respondent returned to this jurisdiction as planned, that she would have 'day-to-day' care of the children. The petitioner sought an order restraining the respondent from removing from the jurisdiction the two children without permission. The respondent brought a cross-application seeking an order for interim care and control of the children.

Held: (application granted)

(i) In the light of her earlier actions, the respondent was restrained from removing the children from the Cayman Islands jurisdiction without the written consent of the petitioner or leave of the court.

(ii) The respondent sought an order for interim care and control of the children, arguing that she was best suited to care for them and that the apparent agreement between the parties recorded in the consent order of the foreign court should determine the issue. The court found that the issue was to be determined solely on the basis on the best interests of the children. Regard was to be given to the respective parenting abilities of the parents, the degree to which each had been the primary care giver in the past, and the degree of attachment each parent had to the children and the children to the parent. The application was dismissed with liberty to reapply when appropriate evidence could be placed before the court.

(iii) An independent report by the Social Services Department would have been of assistance to the court. However, the court was informed that such reports might not have been completed in a timely fashion, having caused a delay of one year in other cases. The parties were urged to retain private experts for the purpose of writing a welfare report.

JE

Ancillary relief – Traditional marriage – Matrimonial home

HS v CS

Grand Court (D90/1995)
Smellie CJ
In Chambers
November 1 2000

Legislation

Matrimonial Causes Law (1997R) s21

Authorities referred to

White v White [2000] 3 WLR 1571
Wallhead v Wallhead (1979) 9 Fam Law 85
Backhouse v Backhouse [1978] 1 All ER 1158

Mr Roy for the petitioner
Ms Nervik for the respondent

The parties were married in 1974 and separated in 1989. The petition was proved in 1995. The union produced two children who were adults by the time of the hearing. These children had continued to live in the matrimonial home with the respondent, their father. Each party had young children with other partners. Before the separation, the respondent worked outside of the home and the petitioner was a housewife. Thereafter, each worked outside of the home. The petitioner was finishing construction of the new home in which she resided. The respondent was finishing construction of the matrimonial home, which had been suitable for habitation since 1985. The matrimonial home (which had been financed by him) was registered solely in his name. Each party contributed equally to the maintenance of the children of their union until the children became adults. The court was asked to determine the equitable division of the matrimonial home.

Held: (order for the petitioner)

(i) The law did not impose a presumption of equality of division of assets. However, there was to be no bias in favour of the money-earner and against the housewife and child-carer. 'Whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness required that this should not prejudice or advantage either party when considering (the principles) relating to the parties' contributions', per Lord Nicholls, White v White.

(ii) The parties occupied the matrimonial home for four years until their separation. It had a value of $108,000 in 1989 and, at trial, a value of $221,000. The improved value of the matrimonial property was attributed to the efforts and expenditures of the respondent. In consequence, the value for the purpose of division was taken to be $108,000 (Wallhead v Wallhead, and Backhouse v Backhouse).

(iii) An equitable division of the value as between the petitioner and respondent at the time of separation was respectively one-third and two-thirds. The lump sum payment was found to be a significant additional liability for the respondent, who continued to pay off debts relating to the home. The lump sum would assist the petitioner towards the substantial completion of her new home, relieving her of the need to seek a bank loan.

JE

IMMIGRATION LAW

Immigration - s52(1) and (2) Immigration Law (2001) Revision - Power to detain - Whether detention lawful

Nezary, Hussani and Yusufi v The Queen

Grand Court (316/01)
Graham J
June 5 2001

Legislation

Immigration Law (2001) Revision

Authorities referred to

R v Turnbull [1977] 65 Cr App R 242
Elsworth Grant & Cherry Chin v Principal of John A Cumber Primary School and the Chief Education Officer Court of Appeal February 2001 (unreported)
R v Ministry of Defence ex parte Smith [1996] 1 All ER 257

Mr Thompson, Mr Aiolfi and Mr McGrath for the plaintiffs
The Solicitor-General and Mr Roberts for the Crown

According to Immigration Department records, on the 20th August 2000, three men travelling on Pakistani passports landed at Owen Roberts Airport for a period of eight days. Their flight had originated in Havana Cuba. There was no record of those persons having left the island at the end of the eight day period. The three men had indicated that they intended to stay at Adams Guest House. Enquiries showed that three men, later identified by staff of that guest house as the plaintiffs in this case, had stayed at the guest house on the 20th August 2000 and had checked out of the guest house on the 21st August 2000.

On the 22nd August 2000 a resident of South Sound telephoned the Central Police Station to report that the plaintiffs in this case had knocked on his door and told him that they had just arrived by ship from Turkey and believed that they had arrived in Canada. The plaintiffs were taken to the Central Police Station where they were searched and found to be in possession of $600 US and $74 CI. They were later interviewed by the Chief Immigration Officer and his deputy. In interview, assisted by interpreter, they claimed that they were Shia Muslims, a minority group in Afghanistan. It was established that their native tongue was Farsi, a language spoken by the minority Hazari people of Afghanistan. It was claimed by the plaintiffs that they had taken an overland trip from Afghanistan to Turkey where they embarked on a Turkish ship bound for Canada., a journey taking 15 or 16 days. When they arrived in the Cayman Islands they were told that they had arrived in Canada.

The plaintiffs were detained, after an initial period of detention in the Central Police Station, at HMP Northward. According to the affidavit of the Chief Immigration Officer, this was done on the authority of an order made by an Immigration Officer under Immigration Law (2001) Revision s 52(2) which states:

"A person liable to detention or detained under subsection 1 may, with the leave of an Immigration Officer, be temporarily granted permission to land without being detained or, if detained under that subsection may be released from detention, pending a decision whether to grant him permission under section 47 but this shall not prejudice a later exercise of the power to detain him."

The detention order itself demonstrated that the detention was to commence on the 21st August 2000 and the detainees were to be held until the 6th December 2000. The Solicitor-General, for the Crown, submitted in argument that the legal basis for detention was actually section 53 of the Immigration Law which, unlike s52, does not impose a limitation upon the period of detention.

Enquiries continued to be undertaken by the Immigration Department, in liaison with other international authorities, in order to establish the true identities of the plaintiffs.

On or about the 6th December 2000, the plaintiffs applied for political asylum in the Cayman Islands.

According to the second affidavit of Mr Forster, the Prison Director, the detention orders were never renewed as such but senior officials of the Immigration Department informed Mr Forster orally that it continued to be the intention of the Immigration Department that the plaintiffs should be detained at HMP Northward. No written order of renewal was made.

The question before the Court is whether or not the detention of the plaintiffs was unlawful.

Held: (ordering release)

(i) The detention was authorised under Immigration Law (2001) Revision s52(2), which mandates strictly limited, temporary detention. It should be read as placing an obligation upon the Immigration Officer constantly to keep under review the question of detention of the detainee and deciding, in the circumstances of the case, whether or not that person shall continue to be detained or can be released upon such terms as appropriate. When a decision is taken to deprive a person of his liberty or to extend a period of deprivation of liberty, a conscious decision must be taken within the framework of subsection 2 and weighing the relevant considerations. A written order must be made which should be communicated not only to the Prison Director but to the detainee as well. The court would expect that formal orders would be made in this way in the future.

(ii) Consistent with the finding of fact as to the false information which the plaintiffs felt obliged to rely upon and the deception practised by them on the Immigration authorities, efforts were still being made in the initial period to establish the identity of the plaintiffs. In view of these difficulties, the initial period of detention (to the 6th December 2000) was reasonable and could be described as temporary and thereby in accordance with the law. However, the detention of the plaintiffs from the 6th December 2000 until their release was unlawful.

(iii) Order granting the immediate release of the plaintiffs

(iv) No order for costs against the Crown.

(v) Legal Aid taxation and certificate for three counsel given the complexity of the case.

DB

PLANNING LAW

Judicial Review of Developments Advisory Board – Function of Board

The Proprietors of Strata Plan No 103 v The Developments Advisory Board

Grand Court (446/00)
Henderson J
October 25 2000

Legislation

Development and Planning (Amendment) (Developments Advisory Board) Law 1997
Development and Planning Law (1999 Revision) Ss 6 8 11 51

Authorities referred to

R v Criminal Injuries Compensation Board, ex parte Lain [1967] 2 All ER 770
R v Criminal Injuries Compensation Board, ex parte Tong [1977] 1 All ER 171
Transkei Public Servants Association v Government of the Republic of South Africa [1996] 1 LRC 118
Rees v Crane [1994] 1 All ER 833
Kirk Freeport Plaza Ltd v Immigration Board [1997] CILR 502
Cortina International Ltd v Planning Appeals Tribunal (unreported) Cause 101/99 Sept 13 2000

Authoritative works
De Smith Judicial Review of Administrative Action 5th ed London 1995 para 9-012
Lewis Judicial Remedies in Public Law London 2000 para 4-028

Mr Lamontagne QC and Mr DaCosta for the plaintiffs
Mr Hall-Jones for the first defendant
Mr Hill QC and Mrs Myers-Khouri for the second defendant

The plaintiff sought judicial review of a recommendation made by the Developments Advisory Board (DAB) together with a review of the decision making process.

The second defendants had applied to the Central Planning Authority (CPA) for planning permission. The plaintiffs objected unsuccessfully before the CPA and then appealed to the Planning Appeal Tribunal (PAT). The appeal was allowed on the ground that the CPA had not sought a recommendation from the DAB, and the application was remitted to the CPA. On the same day, the CPA decided to secure a recommendation of the DAB. This decision was taken without notifying the plaintiffs.

The following day, the DAB convened and orally recommended to the CPA that the application be approved. This decision to recommend was taken without notifying the plaintiffs. Six days later, the CPA reconsidered the application in the light of the DAB's recommendation, and granted planning permission. No appeal lay against the decision of the DAB to recommend planning permission. The plaintiffs appealed to the PAT. This appeal had not been heard when the present application for judicial review of the DAB's action was brought.

In the present application, the plaintiff argued that the DAB had breached its duty to act fairly in a number of ways, including its failure to consider certain matters, its failure to consult government departments and agencies, its failure to provide a written report of its recommendation, and its failure to notify the plaintiff of the hearing and give it an opportunity to be heard.

The DAB argued that it was not amenable to judicial review since it was not itself the decision-making body but merely made recommendations. The DAB further argued that even if it were amenable to review, no order should be made since the plaintiff could pursue an alternate remedy by appeal to the PAT.

Held: (setting aside the DAB recommendation)

(i) It was well-established that some officials or bodies whose only function was to provide a report or opinion were nevertheless amenable to review. Whether a particular official or body was immune from judicial review depended on the facts of the individual case, including the following factors: whether the report was given pursuant to express statutory mandate, the importance of the mandate accorded to the body, whether some subsequent condition had to be satisfied before the report could have any effect on legal rights, the number of procedural steps to be taken after the report and before the ultimate decision, and the degree to which the report was likely to influence the ultimate decision.

(ii) The DAB's mandate to consider issues of national importance, its composition (including the CPA chairman, Director of Planning, Chairman of Immigration Board and Chairman of Trade and Business Licensing Board), and the requirement that the DAB consider only the largest proposed developments, demonstrated that it was intended to play a role of considerable importance in governance, and was not intended to duplicate the work of the CPA. These factors, and the likely influence of its recommendation on the ultimate decision indicated that the DAB should not be immune from review.

(iii) The availability of an appeal against the CPA's decision to the PAT did not bar an application for judicial review of the DAB. While there was a statutory right to appeal a decision of the CPA, the appeal could only be based on the four statutory grounds, none of which would avail the plaintiff in this case. Therefore the alternate remedy of appeal was not in any sense equivalent to a judicial review of the DAB, and so would not deprive the plaintiff of its right to judicial review.

(iv) The expedition shown by the DAB in reaching its recommendation was not material from which the court could infer that the DAB failed to consider matters within its mandate. Therefore this ground did not indicate that the DAB had acted in breach of its duty to act fairly.

(v) While the DAB was required by statute to consult government departments and agencies, this referred to consultation by the DAB on an on-going basis. There might be no need on an individual application for specific consultation with those departments and agencies. Therefore this ground did not indicate that the DAB had acted in breach of its duty to act fairly.

(vi) Counsel for the first defendant properly conceded that the absence of a written record of the DAB's recommendation to the CPA was a jurisdictional error which rendered its recommendation a nullity. Therefore the DAB recommendation would be set aside and the application remitted to the CPA so that it could obtain an appropriate recommendation in writing from the DAB.

(vi) *Per curiam*: The plaintiffs had the right to an opportunity to object before the CPA, but not necessarily before all those bodies whose advice fell to be considered by the CPA. The statutory 21-day time limit for submission of the DAB's recommendation to the CPA was evidence that the DAB should not be delayed by the need to hear from objectors. In any event, the plaintiff's objections were of a purely local nature, such as noise and increased traffic, which did not fall within the DAB's mandate to consider questions of national importance. Furthermore, even if the DAB owed a duty to the plaintiff to consider its objections, its duty had been satisfied since the plaintiff's written objections to the CPA had been transmitted by the CPA to the DAB.

SAAC

Planning Appeal - Application for extension of time - Factors to be taken into account

FHH v THE PLANNING APPEALS TRIBUNAL and THE CENTRAL PLANNING AUTHORITY

Grand Court (92/01)
Panton J (Ag)
In Chambers
March 16 2001

Legislation

Development and Planning Regulations (1998) Revision, Reg 24

Authorities referred to

Ratnam v Cumarasamy and Another [1964] 3 All ER 933
Finnegan v Parkside Health Authority [1998] 1 All ER 595

Mr Jackson for the applicant
Mr Warner for the respondents
Mr Lamontagne QC and Mr Panton for the intervenors

The Central Planning Authority refused the applicant's application for planning permission on the ground that the width of the proposed access road was not satisfactory to accommodate the traffic likely to be generated by the development. The Planning Appeals Tribunal accepted that the decision of the Central Planning Authority was both reasonable and correct in law, relying particularly on the failure of the applicant to comply with Regulation 24 of the Development and Planning Regulations.

The applicants contended that Regulation 24 was inapplicable and that they should be permitted to proceed with an appeal, even though the time limit for such an appeal had elapsed.

Held (allowing an extension of time for filing an appeal):

(i) The following factors apply in relation in considering an enlargement of time for filing an appeal:

(a) Rules of Court providing a time table for the conduct of litigation must be obeyed.
(b) Where there has been non-compliance with the timetable, the Court has a discretion to extend time.
(c) In exercising its discretion, the court will consider the length of delay, the reasons for the delay, whether there is an arguable case for an appeal, and the degree of prejudice to the other parties if time is extended.

(d) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.

(ii) In the instant case, the fact that one of the applicant's directors lives mostly outside of the Cayman Islands and that the other director had been outside of the Cayman Islands for most of the material time for lodging an appeal, resulting in an inability to resolve whether there should be an appeal, was not of itself sufficient cause to extend the time for filing an appeal.

(iii) Notwithstanding the lack of a good reason for the delay, where that delay is measurable only in days and there is a serious legal point that is worth arguing, justice demands that the time for filing an appeal should be extended.

(iv) Order granted extension of time for filing appeal for a period of 7 days.

(v) Costs awarded to respondents and objectors to be agreed or taxed

VC

TORT LAW

Negligence – Personal Injury – Damages

GE v MAH

Grand Court
Smellie CJ
August 30 2000

Legislation

National Pensions Law 1998

Authorities referred to

Smith v Leech Brain & Co Ltd [1962] 2 QB 405
Camus v Williams July 18, 1996 (unreported)
Allen v Ebanks [1998] CILR 190
Yates v Ratke [1997] CILR 448
Smith v Manchester Corporation (1974) 17 KIR 1
Froom v Butcher [1976] 1 QB 286
Wright v British Railways Board [1983] 3 WLR 211

Authoritative Works

Kemp and Kemp on Damages
Munkman Damages for Personal Injury and Death (10th ed, 1996)

Mr Sykes for the plaintiff
Mr Murray for the defendant

The plaintiff, who was not wearing a seatbelt, sustained injuries when her vehicle was hit from behind by the vehicle driven by the defendant. She suffered whiplash injuries of the most severe kind, followed by uncontrollable tremors and an exacerbation of a degenerative condition affecting the joints of the neck, with a prognosis of the spine becoming fused. The plaintiff was a 55 year old woman who was socially and physically active, engaging in pursuits such as snorkelling and dancing. She was employed full time at Bayside Watersports.

Held: (awarding damages as follows)

(i) An award would be made in respect of pain and suffering and loss of amenity, reflecting the severity of the case and the risks of a worsening of the plaintiff's condition ($30,000).

(ii) Special damages were awarded in respect of medical expenses to the date of the trial ($18,515), car rental while the plaintiff's vehicle was being repaired ($1457), loss of earnings (adjusted upwards to reflect pension contributions since June 1999 when the National Pensions Law came into effect) ($83350), household help ($4600).

(iii) In assessing future loss of income the multiplicand to age 65 would be $18040 per annum for lost earnings, plus a net salary increase of ten per cent, ($18491) and $902 per annum for lost pension contributions to age 60, giving a total of $203401.

(iv) Other future losses comprised the cost of household help for ten years up to age 65 ($11500); cost of physiotherapy at a rate of one treatment per annum over her life expectancy of 18 years at $300 per annum ($5400) and a nominal sum for medication ($2000).

(v) Smith v Manchester damages (disadvantage in the job market) reflecting the risk of future disadvantage should the plaintiff's condition deteriorate further ($15000).

(vi) Damages were reduced by ten per cent to reflect the plaintiff's contributory negligence in failing to wear a seatbelt ($37,522).

SW

Dishonest breach of trust - Corporate trustee - Breach of trust – Concurrent tortious liability to beneficiary in negligence

Publishers Representatives Ltd v UBS (Cayman Islands) Ltd

Grand Court (478/99)
Sanderson J
October 6 2000

Authorities referred to

Drummond-Jackson v BMA [1970] 1 All ER 1094
Wenlock v Moloney [1965] 1 WLR 1238
Royal Brunei Airlines Sdn Bhd v Tan [1995] 3 WLR 64
R v Ghosh [1982] QB 1053
Cowan de Groot Properties Ltd v Eagle Star Trust plc [1992] 4 All ER 700
King v Victor Parsons & Co Ltd [1973] 1 WLR 29
Armitage v Nurse [1998] Ch 241
Nocton v Lord Ashburton [1914] AC 932
Derry v Peek (1889) 14 App Cas 337
Walker v Stones [2000] 4 All ER 412
Three Rivers District Council v Governor & Company of the Bank of England (No.3) [2000] 2 WLR 15
El Ajou v Dollar Land Holdings Ltd [1994] 1 BCLC 464
Downsview Nominees Ltd v First City Corporation Ltd [1993] 3 All ER 626
CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] AC 1013
Caparo Industries plc v Dickman [1990] 2 AC 605
Murphy v Brentwood District Council [1991] 1 AC 398

Authoritative works

Scott on Trusts (4th Ed)

Ms Proudman QC and Mr Walters for the plaintiffs
Mr Timms for the defendant

The defendant sought to strike out portions of a statement of claim which alleged firstly fraud or dishonesty and secondly negligence.

The facts assumed for the purpose of the strike out application were as follows. The defendant had been the corporate trustee of a pension trust, of which the second plaintiff was a beneficiary.

While the defendant remained trustee, an employee of the defendant committed frauds and serious irregularities in relation to other trusts managed by the defendant. The employee, R, resigned but before his resignation the defendant's auditor investigated R's dealings. Unexplained irregularities were discovered and reported to the managing director.

R became shareholder and managing director of CC Trust Company. The defendant then retired as trustee and CC Trust Company was appointed trustee in its place by the first plaintiff. At the time of the present application, the first plaintiff had become the trustee.

The plaintiffs issued a statement of claim alleging fraud by the defendant in (a) failing to disclose to the first plaintiff that the defendant knew or had strong grounds to suspect that R was guilty of fraud and (b) retiring as trustee with a view to replacement by CC Trust Company, thus causing and permitting R to obtain control of the trust assets, thereby putting the assets at risk in deliberate or reckless disregard of the beneficiaries' right to have such assets managed by an honest, fit and proper trustee.

The plaintiffs also alleged negligence by the defendant in failing to exercise reasonable skill and care in and about the management, care and control of the trust assets.

The plaintiffs alleged that if the defendant had disclosed to the first plaintiff what it knew about R's conduct, then the first defendant would not have appointed CC Trust Company, and the losses it subsequently suffered would have been avoided.

In the present application to strike out the allegation of fraud or dishonesty, the defendant argued that the alleged failure to advise the first plaintiff of what it knew did not constitute dishonesty at law. The defendant also argued that even if the acts or omissions did constitute dishonesty, the plaintiffs failed to identify which officers of the defendant company acted dishonestly. It was argued that if dishonesty was a state of mind then it was necessary to find an individual dishonest, not merely the company as a whole.

In arguing to strike out the allegation of negligence, the defendant argued that this was not a proper cause of action because there was no common law duty of care independent from and concurrent with its duties as trustee.

Held: (refusing to strike out)

(i) It was inappropriate at this stage to make a determination whether an honest person in the position of the defendant would have communicated with the first plaintiff concerning R, or would have asked further questions of R, or sought advice (Royal Brunei Airlines Sdn Bhd v Tan, Armitage v Nurse, Walker v Stones considered). The strike-out application on this ground would therefore be dismissed.

(ii) Combining innocent acts of individuals within a company could not create a dishonest act by the company. The doctrine of 'directing mind' attributed to the company the mind of an individual who managed and controlled its actions. The

dishonest conduct by the company had been pleaded and particularised, alleging that the defendant company had knowledge of the conduct of R. Therefore the dishonesty claim should not be struck out, notwithstanding that the plaintiffs were unable to say which individual within the defendant company made the decision not to disclose what it knew to the first plaintiff.

(iii) Despite the warning in Downsview Nominees Ltd v First City Corporation Ltd against extending the ambit of the tort of negligence to supplant or supplement equitable duties, there were nevertheless clearly some circumstances where the courts had recognised contemporaneous and independent duties in tort, contract, equity or by statute. There was no binding authority that a beneficiary could not sue a trustee for negligence, therefore the pleadings in negligence should not be struck out.

SAAC

Costs order – Attorney-General declining to represent charity – Trustees seeking pre-emptive costs order to represent interests of charity

Re CF, Re AF;
B Trust Co Ltd v Attorney-General

Grand Court (277/94)
Smellie CJ
March 23 2001

Authorities referred to

Ludlow v Greenhouse (1827) 1 Bli NS 17
Re Buckton [1907] 2 Ch 406
McDonald v Horn [1995] 1 All ER 961
Alsop Wilkinson v Neary [1996] 1 WLR 1220
Re Hall [1995] CILR 456
Re Biddencare Ltd [1994] 2 BCLC 160
Re Moritz [1960] 1 Ch 251
Re Eaton [1994] 1 WLR 1269
Re Ojjeh Trust [1992-93] CILR 348
Lloyds Bank International (Cayman) Ltd v Byleven Corp [1995] CILR 519
Re Spurling's Will Trusts [1966] 1 WLR 920
Re Beddoe [1893] 1 Ch 547
Re Dalloway [1982] 1 WLR 756
Re Evans [1986] 1 WLR 101
Re Butlin's Settlement [1976] 1 Ch 521
Briggs v Intergitas Trust Management (Cayman) Ltd [1989] CILR 456
Re Atkinson's Will Trust [1978] 1 WLR 586

Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531
Yat Tung Co v Dao Heng Bank [1975] AC 581
Barclays Bank v Quitsclose Investment Ltd [1970] AC 567
Watts v Asset Co Ltd [1905] AC 317
Government of India v Taylor [1955] AC 491

Authoritative works referred to

Picarda The Law and Practice Relating to Charities
Blackstone Commentaries on the Laws of England
Underhill & Hayton The Law Relating to Trusts and Trustees
Snell's Equity

Mr Etherton QC for the plaintiff trustees
Mr Nugee QC for the second defendant
Mr Vos QC for the third defendant

The trustees sought directions as to what steps they might appropriately take, in particular, whether they might continue to press the claim of charity to the assets they now held, and to allow their costs out of the assets.

The trustees were trustees of certain assets which they received as trustees of the AF trust. The assets had earlier been held by the CF trustees, who made a purported transfer of the assets to the AF trustees, expressed to be by way of resettlement by the CF trustees pursuant to their powers as CF trustees, with the approval of TM, the trust advisor.

WH had initiated English litigation in which it was alleged that WH, in his capacity as representative of the estate of AJ, was entitled to the assets held by the AF and CF trustees. He contended that the trusts on which CF and AF held the assets were void, and that the beneficial interest in the assets resulted to AJ's estate since AJ was the original settlor of the assets. Although the assets had apparently been settled by TM, WH argued that TM had been acting as nominee for the true settlor, AJ, possibly in an attempt to evade or avoid investigations by the Norwegian central bank and revenue authorities.

Faced with the English proceedings, the trustees brought an action in the Grand Court seeking a determination of the validity of the CF and AF trusts, to which WH and C (as representative of the deceased TM) and the Attorney-General were parties. On appeal, the Privy Council held that the CF trust was not a valid charitable trust, but that the CF trustees held the assets on resulting trust for the true settlor of CF. While WH conceded the validity of AF as a duly constituted charitable trust, the Privy Council did nevertheless state that the validity of the AF trusts was immaterial since, if the CF trust was void, the purported vesting of the CF assets in the AF trustees would be invalid, and the assets would at all times be held by the AF trustees on resulting trust for the settlor of CF.

The question remained as to the identity of the beneficiary now entitled to the assets held by the CF trustees. WH would maintain the argument that the true settlor was AJ and so his estate was entitled under a resulting trust. C would argue that the true settlor was TM and so his estate was entitled under a resulting trust. E would argue it was entitled as being a former owner of the assets. Finally, the AF trustees would argue for a trust in favour of charity.

The AF trustees now sought directions. The Attorney-General filed a statement in response to the court's concern to ascertain the his position. The Attorney-General concluded that he had taken the matter on behalf of charities "as far as possible through the courts". He indicated that the Governor-in-Council had instructed him on policy grounds, and he had decided, not to take further steps in the action. He stated that the role of protector of charity in the Cayman Islands fell on the Governor acting on the advice of the Executive Council. He further added that he would be available as amicus curiae.

With the support of C, the AF trustees sought a pre-emptive costs order in relation to the dispute concerning the identity of the true beneficiary, since the costs would be reasonably and properly incurred in their trusteeship because the Attorney-General had declined to represent further the interests of charity in the proceedings. WH and E argued that the interests of charity had been sufficiently represented in the proceedings in the earlier appeal to the Privy Council, and that no further representation should be funded from the assets at the expense of the fund which WH and E respectively claimed.

Held: (granting order for costs to trustees)

(i) The Attorney-General's decision not to represent charity (on the correctness and appropriateness of which the court would not now make any pronouncement) should not be conclusive or restrictive of the claim to have the interests of charity represented as a subject of the current proceedings. While the Crown must be primarily regarded as the guardian of the public interest in charity, the court had an overriding duty to see that justice was done. The AF trustees would be permitted to represent the interests of charity.

(ii) The basic principle in hostile trust litigation was that the court would not make a pre-emptive costs order for any side without exceptional circumstances (Alsop Wilkinson v Neary). While it was exceptional that charity was not to be afforded the protection of the Crown, this was only one factor. It was necessary to show that charity's claim was cogent enough to justify an order: the proper test was whether, on the legal merits, there was such a chance of success as to render it desirable in the interests of justice that the proposed expenditure be allowed.

(iii) That test was satisfied by the trustees, taking account of (amongst others) the following factors:

(a) The overall impact of the trustees' costs on the assets (which were large) would not operate to the great detriment of the ultimate beneficiary if it turned out not to be charity.
(b) Without the costs order, the interests of charity would not be effectively represented.
(c) Although the Privy Council found the assets were held on resulting trust for the true settlor, prima facie that person was TM, and his representative argued in favour of the trustees' costs order.
(d) The trustees had an arguable case in favour of charity, which was at least as prima facie tenable as that to be put for the AJ estate.

SAAC

CONSENTING TO BATTERY UNDER A MISAPPREHENSION

Mitchell C Davies
Director of Legal Studies, Cayman Islands Law School

Prompted by a rash of decisions focusing upon the validity of consent in recent years, this paper examines the circumstances in which the absence of consent will form the basis of criminal liability in the context of sexual and non sexual offences. Whilst certain common law jurisdictions ascribe an extensive role to the circumstances in which mistake may destroy a victim's consent,[1] the recommendation of the English Law Commission in their most recent Consultation Paper on the subject[2] to retain the existing and limited English rule, has much to commend it. This would preserve the doctrine that criminal liability will not necessarily result simply upon proof that V would not have agreed to the activity had he/she been aware of all the attendant circumstances. This approach is rooted in the leading English case of *Clarence*[3] where the application of this principle led the Court for Crown Cases Reserved by a 9-4 majority to conclude that no criminal liability arose where consensual sexual intercourse between Clarence and his wife, the victim, had caused her to become infected with his venereal disease. This was so even though the accused alone was aware that he was suffering from the disease. The statement of principle is to be found in the leading majority judgment of Stephen J who observed:

"It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the words, and without qualification."[4]

The concern of the majority was that the floodgates would be opened if ever criminal liability was held to arise based upon a principle of "suppression of the truth". Stephen J gave the following example (at 524):

"To seize a man's hand without his consent is an assault; but no one would consent to such a grasp if he knew that he risked small-pox by it, and if consent in all cases is rendered void by fraud, including suppression of the truth, such a gesture would be an

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[1] As, for example, in many of the Australian jurisdictions. In New South Wales and Victoria the Crimes Act 1900 and the Crimes (Rape) Act 1991, respectively, hold consent to be vitiated (for the purposes of rape) where the victim, who is aware that the conduct proposed is sexual intercourse, is induced to believe that it is necessary for "medical or hygienic purposes." This is consistent with the similarly wide rule asserted by the Saskatchewan Court of Appeal in *Harms* (1944) 2 DLR 61 (discussed below). Likewise, in Australian Capital Territory the Crimes Act 1900 provides that there is, in general, no valid consent where it has been given following a fraudulent misrepresentation of any fact made by another party. The effect of mistake upon consent does not appear to have been yet raised in argument before the Cayman courts.

[2] "Consent in the Criminal Law" Law Commission Consultation Paper No 139 (1995).

[3] (1886-90) 16 Cox CC 511.

[4] Ibid at 526-527.

assault occasioning actual bodily harm as much as the conduct of the prisoner in this case."[5]

A contemporary prosecution founded upon facts similar to those present in *Clarence* charging unlawful and malicious wounding or inflicting grievous bodily harm, contrary to s.20 (or s.18) Offences Against The Person Act 1861, would be unproblematic, assuming both *mens rea* and causation to be established. Where death has resulted, murder or manslaughter charges would be appropriate, subject to the proof of the same elements. In the case of both fatal and non fatal offences, any question of the victim's consent to the intercourse is largely irrelevant to the prosecution.[6] Considerations of consent become centrally relevant however (and causation irrelevant) once it be considered whether a defendant knowingly suffering from venereal disease or AIDS could be convicted of rape or sexual assault in such circumstances.

The discussion of the sexual offences presupposes that the victim has been knowingly exposed to a risk of infection, but has not necessarily sustained any injury. Where the disease has been transmitted by the accused, the result crimes already alluded to may also have been committed. With the "critical level"[7] marking the limit of the defence of consent, being set by their Lordships in *Brown*[8] just above (and relevant only to) assault and battery, issues of consent will be irrelevant to liability in result crimes unless the definition of the offence requires proof of one of these elements.[9]

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[5] Ibid at 524. It will be argued that the principle is not that all suppression of truth is irrelevant to the efficacy of consent, but rather that its relevance is to be confined to those circumstances where the suppression affects the nature of the act consented to.

[6] It having been accepted in Hawkins Pleas of the Crown 8th Ed (1824) that consent was irrelevant wherever the victim was "maimed" (defined as being "rendered less able in fighting either to defend himself or to annoy his adversary"). This general principle, focusing on the magnitude of the injury, was confirmed by their Lordships in *Brown* [1993] 2 All ER 75, with the "critical level" for the operation of the defence of consent being set just above assault and battery. The presence of consent was the focus of the majority ruling in *Clarence* (1886-90) 16 Cox CC 511 where, in the context of a s.20 charge, it was held that there could be no infliction of grievous bodily harm in the absence of proof of an assault. It is now clear, however, that "inflict" and "assault" are no longer to be considered synonymous: *Wilson* [1984] AC 242. For all practical purposes, "inflict" has been belatedly recognised as being indistinguishable from "cause": *Ireland & Burstow* [1998] AC 147. Whilst the actual decision in *Clarence* is therefore now wrong, the limited role ascribed by the majority to the effect of mistake has been applied by countless subsequent decisions in England and throughout the commonwealth, and remains, in England, good law. This definition has been proposed to be retained by the Law Commission in their Consultation Paper No 139 (1995), "Consent in the Criminal Law".

[7] Per Lord Mustill in *Brown* [1993] 2 All ER 75 at 103.

[8] Ibid.

[9] An example of a result crime where such considerations have force and where, accordingly, the victim's consent will operate as a defence is that of constructive manslaughter where the unlawful act relied upon is an assault or a battery. Cf *Lamb*

The most recent recommendations of the Law Commission contained in their Consultation Paper "Consent in the Criminal Law"[10], to retain the rule in *Clarence*[11] after some considerable changes of position,[12] are to be welcomed. The same may be said of the Law Commission's central recommendation that a uniform rule governing the effect of mistake upon a victim's consent should be applied irrespective of the nature of the offence.[13]

The urgent need for a statutory prescription of the circumstances when mistake will have the effect of destroying consent has been prompted by the recent Court of Appeal decision in *Tabassum*[14] which has blurred the distinction between mistakes going to the nature of the act which are sufficient to negative consent, and mistakes as to collateral issues, such as the "quality" or attributes of the defendant, which traditionally are not.

The Nature/Character of the Act Criterion.

(1) The English Authorities:

The clearest exposition of the categories of mistakes capable of destroying consent is to be found in Stephen J's judgment in *Clarence*.[15] Having referred with approval to the Irish case of *Dee*,[16] Stephen J declared:[17]

[1967] 2 All ER 1282. Cf s.47 OAP Act 1861 which has not been held to so require: *Donovan* [1934] 2 KB 498; *Brown* [1993] 2 All ER 75.

[10] Law Commission Consultation Paper No 139 (1995) at paragraphs 6.18 and 6.79.

[11] (1886-90) 16 Cox CC 511.

[12] The provisional recommendations arrived at in the Law Commission Consultation Paper No 134 (1994), "Consent and Offences Against the Person" were that, in the context of non fatal offences against the person, consent induced by the defendant's fraud as to "any aspect of the transaction" would be ineffective (paragraph 26.2). In all other cases of (self-induced) mistake, the victim's consent would be negatived where the accused was aware of that mistake (paragraph 27.2). These recommendations would have effected a reversal of, inter alia, the decision in *Clarence* and rightly prompted expressions of concern by a number of respondents to the Consultation Paper (see paragraph 6.17 of Consultation Paper No 139).

[13] Including, but not limited to sexual offences: ibid at paragraphs 1.27, 6.78 and 6.79.

[14] [2000] 2 Cr App R 328.

[15] (1886-90) 16 Cox CC 511.

[16] 14 Ir.L.R.C.L. 468 which, in differing from a number of English authorities (see infra n.21), clarified the law in the personation cases, thereby confirming that rape is an offence whose hallmark lies in an absence of consent rather than the use of force.

[17] (1886-90) 16 Cox CC 511 at 527. The nature of the act concept is well illustrated in the following illustration: X consents to be struck by Y with a pillow which Y states to be filled with feathers, but which he knows to also contain a brick (*South African Criminal Law and Procedure* Vol 1 (1983) at p.377). By contrast, a representation by Y that the pillow was filled with foam would produce a qualitative error only, having no bearing on V's consent.

"..the only sorts of fraud which...destroy the effect of a woman's consent...are frauds as to the nature of the act itself, or as to the identity of the person who does the act. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done...I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters."

Likewise, Wills J observed that rape, which, absent consent, he considered would have been made out on the facts before him was:

"...where the woman does not intend that the sexual act shall be done upon her either at all, or, what is pretty much the same thing, by the particular individual doing it."[18]

Accordingly, as the concealment of venereal disease in *Clarence* went neither to the nature of the act nor to the identity of the actor, the victim's consent to sexual intercourse, unlike her person, remained inviolate.

The principle that in order for consent to be negatived the mistake must go to the nature, and not merely the quality of the act had been successfully invoked by the prosecution in *Case*[19] and *Flattery*[20] to secure, respectively, indecent assault and rape convictions.[21] The impressionable victims in each case had been informed by the defendants that their ailments[22] could be alleviated by, respectively, medical treatment and a "surgical operation". On this pretext, the defendants proceeded to have sexual intercourse with their victims who, in reliance upon the representations made, put up little or no resistance. In *Case*, Wilde CJ expressed the governing principle succinctly:

"..[W]hat she consented to was something wholly different from that which was done, and, therefore, that which was done, was done without her consent. I am not prepared to say that (such instances) might not be cases of rape..."[23]

Likewise in *Williams*[24] a choirmaster was convicted of rape and indecent assault, having represented to his two impressionable victims that the sexual act was a procedure effective in testing their breathing capabilities.

Conversely, the mistake in *Linekar*[25] went to a qualitative or collateral matter, leaving the reality of the victim's consent untouched. Here, the jury determined that the

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[18] (1886-90) 16 Cox CC 511 at 520.
[19] (1850-51) 4 Cox CC 220.
[20] (1858-61) 8 Cox CC 388.
[21] The idea that consenting and not resisting are synonymous prevailed however in a series of 19th century cases starting with *Jackson* (1822) Russ and Ry 487. This view was not finally discredited until the enactment of the Criminal Law Amendment Act 1885. See infra at p.60.
[22] The victim's propensity to fits was said by the defendant in *Flattery* (ibid) to be curable by the breaking of "Nature's string".
[23] 4 Cox CC 220 at 223.
[24] [1923] 1 KB 340.
[25] [1995] 3 All ER 69.

accused was guilty of raping the victim, a prostitute, in circumstances where, following an act of consensual sexual intercourse, the accused had failed to pay for the services rendered as previously agreed. The Court of Appeal, applying *Clarence*,[26] properly overturned the conviction, ruling that the victim's consent to the act performed prevented any assault from having taken place. In other words, the mistake, not affecting the character of the act, was irrelevant for the purposes of rape.[27]

(2) The Commonwealth Authorities:

The importance of the foregoing English decisions lies in their insistence that qualifying kinds of mistake only are capable of vitiating consent. This logic has been embraced by most commonwealth jurisdictions. In certain respects the English rules have been informed and further explicated by their application in decisions of, particularly, the Australian and Canadian courts. For example, certain of the English authorities place emphasis upon the fraudulent nature of the inducing conduct,[28] it is clear, however, as acknowledged by the High Court of Australia in *Papadimitropoulos*,[29] that the governing principle, judged from the perspective of the victim, rests upon the existence of a *relevant mistake* of fact:

"...[I]n considering whether an apparent consent is unreal it is the mistake or misapprehension that makes it so. It is not the fraud producing the mistake which is material so much as the mistake itself."

Indeed, it was the inability of the prosecution to identify a *relevant* mistake (one going to the nature of the act or the identity of the actor) on the facts of *Clarence* which there led to the acquittal. Likewise, it was the correspondence of the *nature* of the act complained of with that which was consented to which led the High Court of Australia in *Papadimitropoulos*[30] to quash the accused's rape conviction. The victim had engaged in sexual intercourse with the accused after he had deceived her into believing that they were validly married. Applying the principle in *Clarence*, the High Court ruled,[31] however, that the mistake as to status was a merely collateral matter, having no impact

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[26] Indeed, Stephen J had given ((1886-90) XVI Cox CC 511 at 527) as a reason for dismissing the charges before him the inability to separate such facts from "acts of prostitution procured by fraud, as for instance, by promises not intended to be fulfilled." The Criminal Law Revision Committee in their 15th Report on Sexual Offences (Cmnd 9213) (1983) agreed (at paragraph 2.25) that such instances should not amount to rape. See infra at p.61.

[27] This is not to suggest that the accused's conduct should be free from censure: see infra at p.64.

[28] Including, for example, *Clarence* and *Linekar*.

[29] [1957] 98 CLR 249 at 260.

[30] Ibid.

[31] Reversing the majority decision of the Court of Criminal Appeal of Victoria. The decision of the High Court has been confirmed by s.36 (f) Crimes (Rape) Act 1991 which requires, *inter alia*, that the mistake is with regard to "the sexual nature of the act".

upon the reality of the victim's consent to the act of intercourse itself.[32] The principle cogently expressed by the court in reaching this conclusion was that:

"...[O]nce the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape...the essential inquiry [is] whether the consent is no consent because it is not directed to the nature and character of the act."

The decision in *Papadimitropoulos* was applied more recently by the Court of Appeal in Victoria in *Mobilio*[33]. Here it was held that an unnecessary intimate examination by a qualified radiographer, performed for sexual gratification, was nonetheless lawful since the act performed was that which had been consented to, albeit on the assumption that it was clinically necessary. This was an irrelevant mistake: the victim's consent was not "deprived of reality if she believed the applicant proposed to do the act solely for a medical diagnostic purpose and ..he actually did it solely for his own sexual gratification."[34]

Similar reasoning to that adopted in the Australian cases is evident in the decision of the Supreme Court of Canada in *Bolduc and Bird v The Queen*[35] where the court held that the presence at a vaginal examination of the gynaecologist's friend, on the false pretext that he was a medical student, had no effect upon the character of the act which had been consented to. Although this decision has been critisised by the Law Commission,[36] it is submitted that the decision is correct since the intimate examination performed by the medically qualified principal was the very act consented to by the victim and, as in *Mobilio*, was unaffected by his sexual motive.

It follows from the foregoing authorities therefore, that consent which is lacking in comprehension as to the nature of the act is not real consent. Indeed, this principle lies at the heart of the early English decisions discussed already.[37] It is not that suppression of the truth is irrelevant to the issue of consent, but rather that its relevance is limited to those circumstances where the suppression (for e.g. the true nature of D's identity) changes the character of the act.[38] This principle applies *a fortiori* where there is not

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[32]This decision is unsurprising for, as observed by Otton LJ in *Richardson* [1998] 3 WLR 1292 at 1296, any other outcome would have supported a conviction for rape of every bigamist. Cf the observation, to like effect, of Stephen J in *Clarence* (1886-90) 16 Cox CC 511at 527.

[33] [1991] 1 VR 339. This decision has since been reversed in Victoria by s.36 (g) Crimes (Rape) Act 1991 which includes as a relevant category of mistake the induced belief that "the act is for medical or hygienic purposes".

[34] Ibid at 352.

[35] (1967) 63 DLR 82.

[36] Law Commission Consultation Paper No 134 at paragraph 25.4.

[37] See, supra, text at notes 19, 20 and 24.

[38] Consistent with the demands of logic, a mistake as to a (medically qualified) defendant's motive should continue to be regarded as irrelevant. A prurient motive, as in *Mobilio* [1991] 1 VR 339 and *Bolduc and Bird* (1967) 63 DLR 82, for eg, does not transform the nature of the act. See, *contra*, the *obiter dicta* of Lord Ackner in *Court* [1988] 2 All ER 221 at 230.

only suppression of the truth, but positive misrepresentations of facts known by the accused to be material in informing the victim's decision. This situation fell for consideration in *Maurantonio*[39], where the majority of the Ontario Court of Appeal held the defendant, a bogus doctor, to be guilty of six counts of indecent assault, in circumstances were he had performed intimate examinations upon complainants who had given their consent in reliance upon his representations that he was medically qualified.

A Departure From Orthodoxy: Mistakes As To Quality.

The English and Commonwealth authorities so far discussed are remarkable for their doctrinal clarity and consistency in approach. Once directed in terms of the 'nature of the act' criterion, juries have been able to characterise, with a large measure of uniformity and predictability, those categories of mistake which go to the substance of the transaction and those which are collateral only to it. Indeed, in *Richardson* Otton LJ was able to declare[40]:

"It is our considered view that the common law has developed as far as it can without the intervention of the legislature. For the better part of a century, the common law concept of consent in the criminal law has been certain and clearly delineated. It is not for this court to attempt to unwrite the law which has been settled for so long."

Set against this impressive backdrop, two decisions fall for considerations which challenge the central premise of *Clarence* that mistakes as to collateral matters are irrelevant to the question of consent. In blurring the nature of the act /quality of the act distinction, first the Saskatchewan court[41] and more recently and directly the English court,[42] has significantly extended the reach of the criminal law. In so doing, the suppression of truth criterion, so properly rejected in *Clarence* and which had lain dormant in English law for over 110 years, has now been aroused with the attendant dangers alluded to by Stephen J.[43]

The Saskatchewan Court of Appeal first warned of this development in *Harms*[44] where it was required to apply the definition of rape contained in s.298 Canadian Criminal Code which required the mistake to extend to *both* the nature and quality of the act in order for it to be effective in destroying consent.[45] In *Harms*, the powerful defence case rested upon the undisputed fact that the victim was fully cognisant that the act

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[39] (1968) 65 DLR (2d) 674.
[40] [1998] 3 WLR 1292 at 1298.
[41] *Harms* (1944) 2 DLR 61.
[42] *Tabassum* (2000) 2 Cr App Rep 328.
[43] See dicta in text at note 5 supra.
[44] (1944) 2 DLR 61.
[45] Professor Sir John Smith in his commentary to *Tabassum* [2000] Crim LR 686 at 688 rightly points out that the use of the conjunctive "and" would seem to *narrow* the circumstances in which consent is negatived.

proposed was that of sexual intercourse.[46] In a liberal interpretation of s.298 by the trial judge, the jury were directed, however, that such knowledge did not preclude a conviction of rape within the definition of the Code. Accordingly, the jury held the defendant to be guilty of rape when, having failed to disabuse the complainant of her belief that he was a doctor, he informed her of the need to engage in sexual intercourse with him for pathological reasons. Consent to engage in sexual intercourse for such purposes was not, it was held, consent to engage in the same act for purely carnal purposes. Thus, somewhat unconvincingly, it was determined that in the language of the Code the nature (indisputably, the quality) of the act had changed, thereby vitiating the victim's consent.[47]

The ascription of such an artificially broad definition to the term "nature of the act" was confirmed by the Saskatchewan Court of Appeal, which clearly regarded the acquittal of the accused in such circumstances to be untenable.[48] Mackenzie JA extracted[49] from the English authorities the general principle that fraud as much as force was apt to destroy consent, leading him to arrive at a definition of the nature of the act markedly at variance with that employed in the English authorities which he purported to be applying. In the learned judge's view, the nature of the act extended to:

"...the purpose which rendered her submissive to it and by the effect she was moved by the prisoner to believe would result therefrom."[50]

Such Delphian utterances are an inevitable consequence of blurring the nature/quality distinction. This criticism would have been avoided (and the efficacy of the victim's

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[46] In this important respect *Harms* is readily distinguishable from the triumvirate of English authorities previously considered: *Case*, *Flattery* and *Williams* supra at notes 19, 20 and 24 respectively.

[47] More ingenuously, the Court of Appeal in *Tabassum* [2000] 2 Cr App Rep 328 admitted (at 337) that the mistake with which it was concerned went to the quality (and not the nature of the act). More worryingly, this was held to be enough to vitiate consent.

[48] In the view of Mackenzie JA ((1944) 2 DLR 61 at 65) there existed "ample evidence to enable the jury to conclude that but for his deceitful and disintegrating importunities the complainant would not have yielded to the prisoner".

[49] Ibid at 68. In the course of his judgment, Mackenzie JA cites (ibid at 65) the example of a teetotaller who takes alcohol on medical advice given in order to treat some physical disorder. This, it was observed by the learned judge, could only be considered to be a medical act (and not one of "pleasurable indulgence") excluding the possibility of any allegation that the actor's principle of temperance had been compromised. Quite so, but the real point, with respect, challenging the ruling in *Harms*, is that no allegation could properly be made that the taking of alcohol in these circumstances was non consensual.

[50] [1944] 2 DLR 61 at 65. The dicta of Hartt J in the Ontario Court of Appeal in *Maurantonio* ((1968) 65 DLR (2d) 674) was similarly unconvincing, it being observed (at 682) that the "nature and quality" language of s.298 Canadian Criminal Code extended to: "...those concomitant circumstances which give meaning to the particular physical activity in question".

consent confirmed) had the dictum of Lord Hewart CJ in *Williams*[51] been applied. In setting out with clarity the limits of the effect of mistake (in the context of the offence of rape), His Lordship exposes the error of *Harms*:

"[W]here (the complainant) is persuaded that what is being done to her is *not the ordinary act of sexual intercourse* but is some medical or surgical operation in order to give her relief from some disability from which she is suffering, then that is rape although the actual thing that was done was done with her consent, because she never consented to the act of sexual intercourse." (Emphasis added).

Contrary to the reasoning given in *Harms*, it is impossible to deny that, in outcome, a mistake as to a purely qualitative issue (the "quality" of the intercourse) was allowed, contrary to the legislation, to nullify consent.[52] Having once established that the victim's consent was not induced by fear or intimidation, the only question which should have been left to the jury in *Harms* was whether that consent, in the language of the High Court of Australia in *Papadimitropoulos*,[53] was "comprehending and actual". With it being common ground that the complainant fully comprehended the nature of the act, that should have been regarded as conclusive evidence pointing to the defendant's acquittal.[54]

Until very recently it may have been possible to simply dismiss the decision in *Harms* as an inconsequential aberration of the Canadian court. The recent decision of the English Court of Appeal in *Tabassum*[55], however, suggests that the Saskatchewan Court of Appeal may, after all, have had it right. Indeed, the English Court of Appeal's decision goes further in *expressly* permitting a mistake as to a purely qualitative matter to invalidate consent.[56]

In *Tabassum*, the appellant, who possessed no formal medical training, had separately represented to three women that he was medically trained in the field of cancer and was

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[51] [1923] 1 KB 340 at 347. See, to like effect, the dicta of Wilde CJ in *Case*, supra at n. 20.

[52] The Law Commission (Consultation Paper No 134 (1994)) cogently expressed the court's dilemma in such cases in stating (at para. 25.4) "What many feel is an unwelcome licence to fraudulent persons can only be avoided by reasoning of the most artificial nature as to the 'nature' of an act." Cf the solutions advocated infra in the conclusion to this paper.

[53] Supra n.

[54] The decision in *Harms* is questioned by both the editorial head note to the case itself and in the dicta of the High Court in *Papadimitropoulos* where, having referred to the "medical treatment cases" it is observed ([1956] 98 CLR 249 at 260): "One may perhaps think that the facts (in *Harms*) went outside the limits of those cases."

[55] [2000] 2 Cr App Rep 328.

[56] Despite the difference in reasoning, it is clear that, in outcome, *Harms* and *Tabassum* are *ad idem*: a mistake which in reality in *both* cases went to a purely qualitative issue (the quality of the intercourse/the attributes of the actor) was held to be enough to destroy consent to perform an act which was fully comprehended and which in fact resulted.

intending to do a study in the area of breast cancer with a view to developing a medical database. He requested the complainants' participation in the study which included the completion of a questionnaire, the taking of blood pressure and pulse readings, the use of a stethoscope and, in two of the cases, a breast examination. The two women whose breasts had been examined had formed the mistaken belief that the appellant was a doctor, although they had not challenged him as to this fact. This belief was reinforced by the appellant's use of a stethoscope and what appeared to be a doctor's bag. A third complainant, who had been examined by use of the stethoscope, had been informed by the appellant, in response to her questioning, that he was not a doctor. All complainants averred that they would not have submitted to the appellant's examination had they known that he was not medically qualified. Expert evidence was admitted which indicated that certain of the questions on the questionnaire were irrelevant to breast cancer research, as were various aspects of the examination, including the use of a stethoscope and the taking of blood pressure and pulse readings.

The appellant's defence to three counts of indecent assault was that each complainant had given her consent to physical examination, which had been performed in order to demonstrate the correct technique to them. The appellant further argued that he believed that his previous employment experience, which included working as an oncology hospital representative for a large pharmaceutical company, justified his description of himself as being medically trained. Whilst working for this company, he had scored 86% in an examination largely relating to breast cancer.[57] He maintained that he had never deliberately misled any of the complainants. There was no evidence or allegation of sexual motivation against the appellant who throughout denied that his motives were in any way improper. The jury, however, consistent with the trial judge's directions on the key issues of consent and the absence of need to establish a sexual motive,[58] convicted the appellant of three counts of indecent assault.

Rose LJ, giving the judgment of the Court of Appeal, affirmed the convictions of the appellant, characterising the present case as one where there existed "consent to the nature of the act but not its quality".[59] In reasoning which is not conspicuous for its clarity, His Lordship considered that the principle applied in *Flattery* and *Harms* dictated

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[57] His employment with this company had subsequently been terminated, however, following his decisive failure of a subsequent test on cancer.

[58] Rose LJ approved ([2000] CR App R 328 at 337) the trial judge's direction that sexual motive was irrelevant, citing the House of Lords decision *Court* [1988] 2 All ER 221. That decision holds, however, that it is only where the circumstances of the assault are unambiguously indecent that *mens rea* becomes irrelevant. Where, as in *Court*, the conduct is ambiguous, *mens rea*, in the form of *intention* to commit an indecent assault is required. It is submitted that the conduct in *Tabassum* was ambiguous; it may or may not have been indecent depending upon D's (unestablished) motive. Rose LJ's statement (at 335) that because D "had no medical qualifications, he could not have been touching the complainants breasts for a proper medical purpose" is both insupportable and irrelevant. Until D's evidence that he was compiling a database to be used by doctors was rejected, his purpose had quite clearly not been shown to be indecent.

[59] Ibid at 337.

the dismissal of the appeal on the present facts: consent given for therapeutic purposes was not consent to perform a sexual act.[60] The critical matter, glossed over by the Court of Appeal however, is that *Flattery* and *Harms* were each decided on the much narrower principle that the mistake had caused the nature of the act to change. It is plain therefore that neither case is authority for the rogue principle applied in *Tabassum* that consent directed to an act whose character is fully comprehended and which corresponds with that which results is liable to be defeated by a qualitative error.

Indeed, applying *Tabassum*, the offence of rape would now appear to be made out in the following circumstances:[61]

D, a gynaecologist, acting in collusion with P, agrees to conceal from P's wife, V, that she is pregnant by P. V, thus deceived, agrees to have sexual intercourse with P solely for purposes of procreation. P's purpose in fact is purely carnal. According to *Tabassum* and *Harms*, P's misrepresentation as to the *quality* of the intercourse renders P susceptible to a charge of rape and D as an accomplice to this offence.

Moreover, if *Tabassum* is correct, both *Clarence* and *Linekar* were (unthinkably) wrongly decided with each defendant liable for conviction of rape. On this footing, any suppression of the truth, even though only affecting the quality of the act, will operate to vitiate consent. Stephen J's small-pox afflicted postulant [62] is now guilty of a battery, as is any like actor who knows that he is suffering from a contagious disease which is capable of transmission by physical contact. Moreover, if the facts of *Richardson*,[63] where the defendant dentist had continued to practise despite having been suspended from practise by the General Dental Council, were to be argued on the basis of a qualitative distinction,[64] the s.47 offence would now, contrary to the ruling of the appeal court, be established. The consequence of accepting the errant ruling in *Tabassum* is therefore that a consistent line of English authority, spanning over 100 hundred years since the opening chapter was penned in *Clarence*, is wrong. For all these reasons, it is to be hoped that an early opportunity will present itself to the Court of Appeal to revisit its unsatisfactory ruling in *Tabassum*.

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[60] As has been asserted by Professor Sir John Smith in his commentary to *Tabassum* ([2000] Crim LR 686 at 687), it is hard to reconcile the absence of any evidence of sexual motivation with the court's conclusion that the examinations by the appellant were sexual in nature.

[61] Prior to *Tabassum*, s.3 Sexual Offences Act 1956 would (if any) have been the appropriate charge in these circumstances: procuring sexual intercourse by false pretences. This offence, which *Tabassum* would make redundant, is characterised by the *absence* of any need to show that the mistake changed the nature of the act.

[62] Supra n.5.

[63] [1998] 3 WLR 1292.

[64] The prosecution had argued, unsuccessfully, that the identity of the actor had changed. See infra at pp.62-63.

The Identity of the Actor Criterion.

It is clear, following *Clarence*, that a particular type of mistake, one which goes to the identity of the actor, has the capacity of destroying consent. The principle at issue here is not an absolute one, however, as not all such mistakes will have this effect. The complainant who submits to sexual intercourse, having been induced to do by D's false representation that he is a pop star or actor for example, has clearly made a mistake as to identity, but this should not be sufficient to convert the intercourse into a battery. The complex initial question which arises therefore is how to identify when a mistake as to the identity of the actor will have the effect of destroying consent. It is suggested that the answer to this question lies once again in examining whether, from the perspective of the complainant, the mistake has changed the character of the act. On this premise, it is the constancy or otherwise of the nature of the act which will *always* provide a measure for testing the validity of consent. Only where the act consented to (whether due to a mistake as to the identity of the actor or otherwise) is *materially* different from that which occurs is it factually accurate to conclude that the character of the act has changed.

An apparently straightforward illustration which would appear necessarily to satisfy this test is provided by the so-called personation, cases where the complainant has been induced to consent to sexual intercourse by the false representation that the other party is her husband/boyfriend. In such a case it is manifestly clear that the mistake as to identity cannot but impact materially on the nature of the act itself: consent to sexual connection with one's partner, X, is not consent to the same connection with a stranger, Y.[65]

Regrettably, however, for as long as the nature of the act criterion has produced consistency in outcome, this category of mistake has generated confusion. A line of authority traceable back to *Jackson*[66], decided in 1822, had determined that the hallmark of an absence of consent was resistance.[67] Accordingly, obtaining sexual intercourse by impersonating the complainant's husband was held not to be rape. This principle[68] was applied in *Barrow*[69] by the Court of Criminal Appeal as recently as 1868 and although strongly doubted in *Flattery*[70], was not finally abolished until the enactment of the Criminal Law Amendment Act 1885. This provision is now contained in s.1(3) Sexual Offences Act 1956. Although s.1 was amended in 1994,[71] the provision in

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[65] It follows that such cases are therefore instances of rape. Cf s.1(3) Sexual Offences Act 1956 which provides for this outcome only where the individual impersonated is the victim's husband. See discussion *infra* at n.76 *et seq.*

[66] (1822) Russ and Ry 487; *Saunders* (1838) 8 C & P 265.

[67] Remarkably, this reasoning was accepted in 1994 by the Pennsylvanian Supreme Court: *Commonwealth v Berkowitz* 641 A.2d 1161.

[68] Although inconsistent with the much more enlightened reasoning of the Court of Criminal Appeal in *Case* (1850-51) 4 Cox CC 220. See, *contra*, the later decision of the Irish court in *Dee* (1884) 14 Ir LR 468).

[69] (1867-71) 11 Cox CC 191.

[70] (1875-77) 13 Cox CC 388 at 392-393.

[71] A new section 1 was inserted by s.142 Criminal Justice and Public Order Act 1994.

s.1(3) remains true to its 1885 ancestry and continues to limit rape to the circumstance of impersonation of the complainant's *husband*.[72] Quite unacceptably, this controversial provision[73] suggests that a type of mistake as to identity (the belief that D is V's boyfriend) which undoubtedly changes the character of the act,[74] does not operate to destroy the complainant's consent for the purposes of the offence of rape.[75]

Prior to the amendment to s.1 in 1994, however, the principle, considered to be settled by both the courts[76] and the Criminal Law Revision Committee[77], was that consent obtained by impersonating any male was equally apt to destroy consent. Indeed, in *Elbekkay*,[78] decided before the 1994 amendment, the court held that the original language of the 1885 Act had been designed specifically to resolve the doubts caused by the husband personation cases. Accordingly, the Court of Appeal ruled that s.1 did not prevent the conclusion that, at common law, impersonation of the victim's boyfriend is rape. The outstanding question is whether *Elbekkay* will be considered to have been overruled by the 1994 Act's confirmation of s.1 in this respect. It has already been remarked *obiter* in *Richardson* that it has.[79] The academic view, pointing to the lateness

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[72] In the Cayman Islands, s.125 Penal Code is to like effect. The position in Scotland is equally limited: s.4 Criminal Law Amendment Act 1885. Most of the Australian states, by contrast, have statutory rules which allow mistakes as to identity (without qualification) to vitiate consent: s.61R(2) Crimes Act 1900 (New South Wales); s.36 Crimes (Rape) Act 1991 (Victoria); s.92P The Crimes Act 1900 (Australian Capital Territory). Cf s.347(1) Queensland Criminal Code. The predominant Australian approach is mirrored by s.129A New Zealand Crimes Act 196. S.265(3)(c) of the Canadian Criminal Code achieves this result by recognising an unqualified doctrine of fraud to nullify consent.

[73] Ashworth has commented (Principles of Criminal Law, 3rd ed., p.357): "Since the identity of one's sexual partner may be assumed to be of fundamental significance, it is surely unjustified to give effect to this only where the mistake concerns whether the man is the woman's husband."

[74] Cf the facts of *Richardson* [1998] 3 WLR 1292 *infra*.

[75] There would be nothing to prevent bringing an indecent assault charge in such circumstances, but it is clearly undesirable that "consent" should take on a different meaning depending upon whether rape or indecent assault is charged.

[76] The principle expressed by both Wills and Stephen J in *Clarence* (16 Cox CC 511 at 520), for example, makes no issue of the status of the individual who is being impersonated. See, further, the *dicta* of Morland J, approving the views of the Criminal Law Revision Committee, in the course of delivering his judgment in *Linekar* [1995] 3 All ER 69 at 73.

[77] 15th Report on Sexual Offences (Cmnd 9213) (1983) where it was stated (at para. 2.25): "We see no reason to distinguish between consent obtained by impersonating a husband and consent obtained by impersonating another man, so that latter case should also constitute rape." This logic was embraced by the Law Commission in their 1989 Draft Criminal Code (Law Com No 177) at clause 89 (2)(b)(ii).

[78] [1995] Crim LR 163.

[79] Per Otton LJ at [1998] 3 WLR 1292 where his Lordship stated of the amended s.1(3) (at 1297): "However this only covers the type of case where the woman is legally

of the hour at which the amendment to s.1 was made[80], is more optimistic, concluding that the courts may be prepared to regard it as a "governmental and parliamentary blunder".[81] Force is added to this conclusion when it is recognised that to give s.1(3) a literal interpretation would be contrary to principle, in confirming the efficacy of consent although the nature of the act has changed. This would be to produce a principle equally objectionable (for the opposite reason[82]) to that asserted in *Tabassum*. The following absurd results would ensue: D who persuades V to have sexual intercourse with him by falsely promising to buy her a diamond necklace is guilty of rape (*Tabassum*);[83] but D who persuades V to have sexual intercourse with him by impersonating her boyfriend is not.

The leading English identity case is *Richardson*[84] in which the Court of Appeal ruled that the concept of identity[85] is not so refined a matter as to extend to an individual's current entitlement to practice dentistry. This, with respect, must be correct and is entirely consistent with the pre-*Tabassum* nature of the act principle: the nature of the act will not be caused to change by an essentially qualitative error which goes to the defendant's standing with a professional association. Accordingly, the appellant dentist who had continued to practice despite having been suspended by the General Dental Council was not guilty of assault occasioning actual bodily harm. The consent of her patients was unaffected by their misunderstanding of her status.

The facts of *Richardson* are readily distinguishable from the case of a bogus dentist or doctor[86] performing medical procedures for which they are unqualified. In such a case it is clear that consent is absent with the mistake extending to true identity of the actor, thereby transforming the nature of the act. This reasoning was applied by the Supreme Court of Tasmania in *Woolley v Fitzgerald* [87] where the defendant, masquerading as a doctor, had entered a hospital ward and performed a medical examination on the complainant. The falsehood of the fundamental representation that the accused was

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married and for some reason believes that the person with whom she is having sexual relations is her husband when in fact he is not."

[80] Nicola Padfield has ventured the view that ((1995)(2) Archbold News 5) the reason for the omission lies in the fact that the Bill was "debated late at night with a dwindling number of peers".

[81] Per Smith and Hogan's *Criminal Law* (9th ed. at 458).

[82] Whilst *Tabassum* is unduly harsh to defendants (in allowing consent to be vitiated although the nature of the act has not changed), a literal reading of s.1(3) would be unduly lenient on boyfriend impostors.

[83] Cf the decision of the High Court of Australia in *Papadimtropoulos* [1957] 98 CLR 249 (supra): "...[C]onsent induced by fraudulent representations made by the man as to his wealth (or) position of freedom to marry the woman...is nevertheless consent".

[84] [1998] 3 WLR 1292.

[85] Which was to be ascribed its dictionary definition (ibid at 1297): "the condition of being the same".

[86] Cf *Maurantonio* (1968) 65 DLR 2D 674 supra.

[87] [1969] Tas SR 65.

medically qualified[88] caused both the identity of the actor and character of the act to change, leaving the court in no doubt that the accused had committed a battery. *Fitzgerald* as much as *Elbekkay,* is best explained on the basis that in each the fundamental mistake of the complainant went to the very core of the "transaction".

Conclusion.

The rejection of the wide doctrine of mistake applied in *Tabassum* would, admittedly, impair the law's ability to visit particular criminal sanctions upon individuals such as Messrs Clarence and Linekar whose conduct is quite clearly deserving of punishment. As the Court of Appeal's decision in *Richardson* demonstrates, however, this is the necessary consequence of ensuring that offences are not allowed to be overstrained in their ambit in order to censure behaviour which is indisputably reprehensible.[89] The return to orthodoxy advocated in this paper does not mean, however, that such miscreants will necessarily go unpunished. In *Richardson*, an offence existed[90] which, had it not been time barred could have been prosecuted; likewise in *Linekar*[91] an alternative offence existed[92] which was not put to the jury.

More generally, it is submitted that in such cases (including *Clarence, Linekar* and *Tabassum*) it would be possible to charge the accused with attempting to commit the offence whose definitional elements had legally been consented to. Following the decision of the Court of Appeal in *Khan,*[93] it is clear that an attempt may be committed where the accused intends the prohibited conduct and is reckless[94] as to a relevant circumstance. Applying these requirements to the facts of *Clarence* and *Linekar*, attempted rape could successfully be prosecuted in each case subject to proof that the accused - (i) intended sexual intercourse, (ii) where he was at least reckless as to whether the victim consented.[95] In considering (ii), the defendant's suppression of any fact which he believed might have been material in securing the victim's consent, will be cogent evidence of his recklessness to this circumstance. Applying these principles, a

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[88] Cf *Tabassum* [2000] 2 Cr App R 328 which was not argued on the identity point presumably because it was thought to be arguable that the representation there made (qualification to perform a breast examination) was genuinely made.

[89] "[I]t is quite wrong to bring within (the ambit of rape) forms of evil conduct because they wear (sic) some analogy to aspects of the crime and deserve punishment..." Per Otton LJ [1998] 3 WLR 1292 at 1298.

[90] S.38 Dentists Act 1984 (practising or holding oneself out to practise when not qualified).

[91] [1995] 3 All ER 69.

[92] S.3 Sexual Offences Act 1956 (procuring sexual intercourse by false pretences).

[93] [1990] 2 All ER 783. *Khan* was followed in *A-G's Reference (No 3 of 1992)* (1993) 98 Cr App Rep 383.

[94] In *A-G's Reference (No 3 of 1992)* (ibid) *Khan* was extended in holding, in the context of a charge of attempted aggravated arson, that recklessness was to be defined by reference to the wide test established in *Caldwell* [1982] AC 341.

[95] It is no defence that due to the legally effective consent of the victim in each case the full offence could not have been committed: S.1(2) Criminal Attempts Act 1981.

charge of attempted indecent assault could have been brought in *Tabassum,* where the appellant's assertion of the genuineness of his claim that he was medically trained would be tested in answering (ii) above.

Accordingly, it is submitted that the Law Commission's consideration[96] of whether an individual who untruthfully represents that he has received negative test results for HIV or other sexually transmitted diseases is unnecessary. Likewise, the Law Commission's question as to whether such a fraudulent misrepresentation, as coming "close to affecting the nature of the act itself"[97] should be treated as an exception to their preferred general rule[98] that consent should only be vitiated according to the *Clarence* principle, should receive a negative reply. Such an exception once admitted would profoundly limit the rule itself. In raising these questions, the Law Commission made no reference to *Khan* which, it is submitted, would address such concerns[99] in allowing a charge of attempted rape to be brought in these circumstances.

The possibility of prosecuting attempt in such cases does not however detract from the force of the Law Commission's central provisional proposal that an offence of procuring consent by deception should be enacted.[100] It would thereby become an offence, punishable with a maximum of five year's imprisonment, to procure a person's consent by deception[101] to any act which would be an offence in the absence of such consent. Such an offence would have the significant jury advantage of being less technical than that of attempt. Moreover, the proposed deception offence also has the considerable merit of requiring the proof of definitional elements which correspond directly to the type of conduct which should properly be proscribed, such as that of Messrs Clarence and Linekar. At the same time, the requirement that the deception must be deliberate or reckless would put the Crown to the proof of their case in circumstances where the accused may have been acting innocently, such as *Tabassum.*

It has been argued that in all cases of apparent consent where the mistake of the complainant is in issue, the invariable gauge of the efficacy or otherwise of that consent calls for a consideration of whether the mistake brought about a change in the nature of the act. Contrary to the ruling in *Tabassum,* it is submitted that there exists only one category of relevant mistake, that which brings about a change in the nature of the act consented to. In other words, where the activity consented to is different in character from the activity performed, any apparent consent is destroyed, with the conduct revealed to be a battery. It has also been submitted that one particular circumstance which may produce this result is where the mistake relates to the identity of the actor.

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[96] Law Commission Consultation Paper No 139 (1995) "Consent in the Criminal Law" paras 6.19 – 6.21.
[97] Ibid at para 6.19.
[98] Ibid at para 6.18 and the Commission's provisional conclusion 19.
[99] See supra n.52 the observations of the Law Commission made in the course of their 1994 Consultation Paper previously referred to.
[100] Such an offence would be analogous to that of procurement of a woman by false pretences contained in s.3 Sexual Offences Act 1956.
[101] Defined in identical terms to the definition found in s.15(4) Theft Act 1968.

Both the English and Commonwealth decisions considered in this paper, when forensically examined, show a pleasing level of consistency in arriving at the formulation of this principle. Whilst there exists a Canadian analogue to *Tabassum* in *Harms*, even the decision of the Saskatchewan court does not challenge the correctness of the proposition stated above. With *Tabassum* thus marginalised, it is expected that it, together with the unduly restrictive definition of rape contained in s.1(3) Sexual Offences Act 1956, will be treated as aberrations which the strong current of authority requires to be disregarded.

It is fitting that in closing, reference should be again made to the opening chapter of the treatise on mistaken consent in the criminal law, and to its author, Stephen J, who, in *Clarence*, asserted[102] then, as now:

"The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done. As to fraud as to the identity of the person by whom it is done, the law is not quite clear."

[102] (1886-90) 16 Cox CC 511 at 527.

LEGAL AID IN THE CAYMAN ISLANDS

John Epp[1]

A. Introduction

In the Cayman Islands, assistance of those with limited means to have access to legal advice and representation is provided through a legal aid system. The legal aid system is comprised of three components that are detailed below, but can be summarised here.

The first component is the formal legal aid scheme for indigent persons, or persons of limited means, provided for in the *Legal Aid Law (1999 Revision)*. The Law stipulates that the Grand Court is to create rules and administer a legal aid scheme. The service provided under the Law is delivered using the judicare model, wherein the court will issue a certificate to a private attorney that guarantees payment in accordance with the legal aid tariff from the legal aid fund in return for providing advice or representation to the applicant. The judge may approve fully or partially funded legal representation in certain Summary Court, Grand Court and Court of Appeal proceedings.

The second component is the organised *pro bono* attorney service scheme known as the 'Legal Befrienders'. The Legal Befrienders Clinic is a specialised legal advice bureau providing advice to victims of domestic abuse. The Clinic is open one evening each week, and is staffed by volunteer attorneys on a rotating basis. The clinic serves clients by providing free telephone advice on Monday, Wednesday and Friday afternoons, through a call forwarding system into the office of the day's duty attorney. The Women's Resource Centre, funded by the Government, hosts the Clinic.

The third component is the provision of funds by the Attorney General for representation of certain parties involved in proceedings before the Judicial Committee of the Privy Council. These funds are taken from Attorney General's departmental budget, and are granted at his discretion.

In addition to the formal and informal programmes of assistance listed above, the legal profession recognises its obligation to provide *pro bono* services to needy persons, or companies and associations for charitable purposes. Such assistance is provided on an *ad hoc* basis.

B. History of Formal Legal Aid in the Cayman Islands

Legal aid at trial was formalised in the *Poor Persons (Legal Proceedings) Law 1961*[2] wherein the Grand Court was empowered to assign attorneys to assist poor persons 'to take or defend proceedings in the Grand Court', and to reimburse those attorneys for their out of pocket expenses. The 1961 Law was repealed in 1975 and a new expanded legal aid scheme was introduced in the provisions of the *Poor Persons (Legal Aid) Law*,[3] and the *Legal Aid Rules 1975*. Provision was made for a court administered legal aid scheme, using the judicare model, to

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[1] The author gratefully acknowledges the assistance of Terry Beckett and Derek O'Brien.

[2] Amended by the *Poor Persons (Legal Proceedings)(Amendment) Law 1961* (Law 2/1962), and consolidated in the *Poor Persons (Legal Proceedings) Law*, Cap. 127, 1963 ed.

[3] Law 14/1975.

provide advice and assistance in certain civil and criminal matters in Grand Court and in some criminal proceedings in Summary Court.[4] Legal aid for criminal proceedings in both courts was restricted to a list of 19 offences found in the schedule to the Law and, its 'long stop' provision, any offence where the potential punishment was 14 or more years imprisonment.[5] Additionally, the Law provided aid for those wishing to appeal against conviction, and a corresponding change to the *Court of Appeal Law 1975* (now 1996 *Revision*) made provision for assistance in that court in criminal appeals. These provisions provided the foundation for the current legal aid system. However, as discussed below, critics recognised that the legal aid scheme was inadequate.[6] In 1997 the present *Legal Aid Law* was enacted. It was accompanied by revised rules containing much greater detail, referred to as *The Legal Aid Rules 1997*.[7] The *Legal Aid Law 1999 Revision* was published to correct some formatting errors.[8]

Notwithstanding the major changes brought about by the 1975 Law, Piers Hill, a lecturer at the Cayman Islands Law School, made the following criticisms regarding criminal legal aid at the close of the 1980s. Firstly, the coverage was restricted to the limited range of offences found in the list contained in schedule to the Law which were rather arbitrary in scope. For example, and for no apparent reason, the list contained coining offences, and criminal libel, but omitted the charge of theft.[9] Secondly, the system was poorly funded with an unrealistic fee scale for participating attorneys. Ordinarily attorneys were paid the fee of $100 per day for legal aid work,[10] in contrast to the then current standard fee of $100 per hour for attorneys paid privately.[11] Hill observed that, 'The result is that only 14 of the 80 practising attorneys on the Islands take part in the system and only half of those who take part do so on a regular basis; so a large number of defendants will go to prison having received no legal advice or having been inadequately represented by an advocate who has been overextended.'[12] Thirdly, the interpretation of the phrase 'take or defend' proceedings in the Grand Court found in section 3 of the Law was given a narrow interpretation. Hill wrote, 'The section does in fact allow for

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[4] Section 5 of the 1975 Law.

[5] Section 3 of the 1975 Law stated, 'Where it appears to any court before whom there appears any person (a) charged with a scheduled offence; or (b) who desires to take or defend legal proceedings in the Grand Court, that such person has not the means to instruct a legal practitioner to advise or represent him in any relevant proceedings, it shall grant to such person a certificate entitling him to free legal aid, or, as the case may be, subsidised legal aid, for the preparation of his case and generally throughout such proceedings and in an appeal'

[6] Former Chief Justice Hon. Gerald Collett QC pointed out the need for a 'full overhaul' of the legislation in 1988. Memorandum from the Chief Justice to the Probation Officer, September 1, 1988.

[7] Supplement 5 to Gazette 6, 17 March 1997.

[8] Interview with Mrs Virginia Gendron of the Law Revision Office, August 14, 2000.

[9] For example, scheduled offences include assault causing grievous bodily which is a category B offence (triable either-way) with maximum penalty of imprisonment for 5 years; forgery, a category B offence (the general punishment provision applies) the maximum penalty is 3 years imprisonment; exporting a counterfeit coin, a category B offence with the maximum penalty 2 years imprisonment.

[10] Interview with the Chief Justice, Hon. Anthony Smellie QC, on August 9 and 10, 2000. Poor Persons (Legal Aid) Law 1975 Legal Aid (Amendment) Rules, 1986 increased the tariff to $ 70 plus a discretionary uplift fee.

[11] Interview with attorney Mr C S Gill on February 9, 2001.

[12] *Criminal Procedure in the Cayman Islands* (Oxford:Law Reports International, 1992) 117.

legal aid to be granted to any person who is defending legal proceedings in the Grand Court, but by a narrow interpretation which is not justified by the strict wording of the section, the local courts have decided that this does not apply to defendants in criminal proceedings.' The restrictive interpretation was based on the wording of the Memorandum of Objects and Reasons of the Law, and supported by the wording of the forms made pursuant to the rules.[13] Therefore, legal aid in criminal proceedings was restricted to the 19 offences on the schedule and, its long stop provision, any offence where the potential punishment was 14 or more years imprisonment, rather than also including any offence tried in the Grand Court. Fourthly, according to Hill, there existed an 'unwillingness of the bench to encourage a defendant to seek free representation'.[14] Finally, Hill noted that the *Court of Appeal Law* (1975) which provided for the granting of legal aid in criminal appeals to the Court of Appeal, was never used, 'possibly because the provision is not widely known.'[15]

Less information is available regarding the operation of the legal aid scheme in civil proceedings. It is reasonable to assume that the 'unrealistic fees' did nothing to encourage attorney participation in the scheme. However, a few attorneys were willing to take civil legal aid cases. In 1991, civil cases legally aided numbered 103.[16]

Studying the development of legal aid services in the Cayman Islands over the last decade provides not only an insight into the Legal Aid Law, but an insight into the economy and legal culture of the Islands. The events of the year 1991 were important for the legal profession, and they impacted upon its development for the remainder of the decade. In June 1991 the collapse of Bank of Credit and Commerce International occurred. All attorneys were in great demand by well paying institutional clients. Although it would be inaccurate to make an exclusive correlation between BCCI litigation and shortages in legal services to the indigent, the BCCI litigation appeared to be a major factor in two ways. First, all attorneys were busy and were able to demand increased fees. Second, when local firms hired more attorneys, they recruited and trained the new arrivals in corporate commercial and banking practice. Only a few firms insisted that recent graduates spent some time in the Summary Court or gain experience in general private client practice. Of the Summary Court files taken by those attorneys, only a small portion were funded by legal aid.

It was also in the early 1990s that the then Attorney General, Hon. Richard Ground, accepted that the need for assistance by persons of limited means had greatly exceeded the supply of services available both within and outside of the *Poor Persons (Legal Aid) Law* (1975). The Attorney General, along with the Court Office, began canvassing local law firms for suggestions and additional participation in the Legal Aid scheme. Two schools of thought were prominent in the discussion. It was suggested that attorneys pay a levy to increase the legal aid fund and to allow for higher fees to be paid to those attorneys willing to act for legally aided clients.[17] The increase in the fund might have been achieved by a mandatory levy or by a voluntary scheme. A voluntary scheme was considered possible because of the high level of professionalism amongst the Bar, their general prosperity, and the ever present threat that uncooperative firms would become known to the Immigration Department, and thereafter

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[13] Memorandum, above n 5.
[14] Hill, above n. 11 at p 118.
[15] Ibid., at p 119.
[16] Court Statistics 1991, *Cayman Islands Annual Review,* (Government, 1991) p 323.
[17] The law firm of Maples & Calder made the suggestion to the former Clerk of the Court, Mrs Zeena Allen.

would have difficulty obtaining bi-annual work permits for expatriate partners and associates.[18] The other school of thought argued that a general increase in the fund was only part of the solution. They took the position that most civil matters to be assisted by the scheme (which is restricted to Grand Court actions) could be taken by the Bar if some pressure was brought to bear on them. In addition to the pressure arising from the need to qualify for a renewed work permit, it was thought that the court administration would have to be vigilant in contacting various attorneys to encourage their participation in the legal aid scheme even if the fees were below market rates. They regarded the problem that most needed attention as being one of a shortage of attorneys who were willing and equipped to represent criminal clients. The shortage of criminal practitioners could not be addressed by simply offering higher legal aid fees. Rather, more criminal practitioners had to be hired from abroad by local firms, and the firms could then be in the position to offer assistance in more criminal proceedings.[19]

In spite of the wide range of criticisms and discussions that occurred, only a few formal changes were made to the provisions governing the legal scheme in the second half of the 1990s. However, the changes that were made, combined with a new, more liberal, attitude in the courts towards legal aid, had a dramatic impact on the scheme. While the current scheme is described in detail below in Part C, a few important points can be highlighted here. Firstly, it is important to notice that the *Legal Aid Law 1997* did not contain the Memorandum of Objects and Reasons found in the 1975 Law. The Memorandum of Objects and Reasons had been used to support a narrow interpretation of the phrase 'take or defend' proceeding in the Grand Court (found in section 3 of the Law). In consequence it was open to the court to give the phrase the broad interpretation suggested by Hill, and in fact, the broad interpretation has been adopted. Secondly, the former Chief Justice, the Hon. George Harre, made the decision to extend legal aid coverage to include assistance in appeals to the Court of Appeal in civil proceedings, a decision that was open to his predecessors on the original wording. Thirdly, Chief Justice Harre encouraged the court staff to promote the availability of legal aid,[20] and, the *Legal Aid Rules 1997*,[21] made under his authority required attorneys to inform potential clients of the existence of legal aid.[22] Finally, also with regard to the rules, the issue of inadequate fees was addressed. The new rules stipulated increased fees for attorneys participating in the scheme.

Of the criticisms made, but not addressed, one remains very important. The schedule of criminal offences eligible for assistance remains as made in the 1975 Act. Therefore, not only does the list of offences appear to lack a cohesive rationale, the omission of many offences will have the result that many people will be convicted and imprisoned without having the benefit of

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[18] The Bench stayed out of the discussion in an effort to maintain its independence, CJ Smellie, above n 9.

[19] In 1994 there were 124 attorneys licensed to practice, and in 1999, 227 attorneys, *Cayman Islands Annual Report 1999*, (Government, 2000) p 85.

[20] Interview with the Courts Administrator Mr Terry Beckett on July 7, 2000. The current Chief Justice has encouraged even greater public awareness of legal aid. For example, applications are freely distributed from the Court House, along with a pamphlet which provides basic information. Since legal aid is limited to certain categories of cases in the Grand Court, and to scheduled offences in the Summary Court, a brief word about the restrictions is given also.

[21] Supplement 5 to Gazette 6, 17 March 1997.

[22] Ibid., r 6(1); this may address the mischief of the attorney convincing a client to sell the client's home to fund litigation on commercial rates, as the home is exempt from the means test.

legal advice or representation.[23] Chief Justice Anthony Smellie QC has stated that these provisions now are under review.[24]

C. Legal Aid Law 1999R

1. Governance

Returning the to the current provisions, pursuant to the *Legal Aid Law (1999R)* the Grand Court is obligated to administer the legal aid system in the trial courts, and the Court of Appeal.[25] The rules made in 1997 for the 'better carrying out of the Law' remain in force.[26] The model used, as prescribed in Law and Rules, is the judicare model.[27]

a. *Application*

The court, through a senior administrator who is legally qualified, receives and then refers (with a recommendation) the applications to a judge of the Grand Court who will make the decision on whether a certificate is to be given to the applicant for the purposes of retaining an attorney. A person refused legal aid can reapply in the same proceedings if relevant information had been omitted form the original application or on the basis that there has been a material change in the circumstances.

In the event that a person appears before the Summary or Grand Court without representation in criminal proceedings where legal aid may be available, the court may, of its own motion, grant legal aid.[28] It is usual for the initial certificate to be limited to that stage of the proceedings, so that further relevant inquiries might be made before extending legal aid over the entire proceeding.

b. *Panel*

According to the *Legal Aid Rules 1997*, the clerk of the court is required to keep a panel of attorneys who have intimated their willingness to accept briefs under the Law. The Chief Justice must approve the attorney as suitable before his name is placed on the panel. The approval given may be, and often is, restricted to certain areas of practice. The Chief Justice has stated that he takes very seriously the issue of qualification, experience and specialisation in considering panel membership, in spite of the shortage of attorneys willing to take legal aid certificates. Currently the panel of criminal practitioners is made up of ten attorneys, of which five carry the majority of the certificate cases. The panel may be supplemented by counsel

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[23] For example, the Misuse of Drugs Law offences.
[24] Interview with Chief Justice Smellie, above n 9.
[25] Section 3 of the 1997 Law (and 1999 R) is the same as s 3 of the 1975 Law.
[26] Section 6.
[27] S 5 and Rule 6(6). According to the 1999 National Census, the population of the Cayman Islands was approximately 40,000 people.
[28] The magistrate or judge is to consider if the 'interests of justice' require the motion, and whether the person would pass below the means test, r 7(2).

from other jurisdictions on a case by case basis.[29] The panel for civil legal aid comprises 20 attorneys. Given the level of expertise in the local bar, and the limited number of publicly funded civil actions rarely has there been need to bring in outside counsel.

c. *Judicial Peer Review*

The three judges of the Grand Court share equally in the task of determining applications for legal aid. There are no internal standards or directives regarding the manner in which a judge is to exercise his discretion, nor is there a system of peer review. However, in practice a judge may discuss informally with his brother judges borderline applications in civil matters, especially in situations where the annual budget of the fund is becoming depleted.[30] The question of whether a refusal to grant legal aid may be judicially reviewed or appealed (and funded by legal aid) has not been determined.[31]

d. *Treasury*

The court has the responsibility to administer the legal aid scheme, and to create the necessary rules, but the accounts of the attorneys, once approved by the court, are submitted to the Government's Treasury Department for payment. In theory, the Treasury may audit any work done and the bill submitted, but as a matter of convention this has not occurred. In rare cases the Treasury will query what might be properly categorised as a mathematical error.[32]

2. Eligibility

All applications for legal aid are subject to the 'means' test and the assisted person may be required to make a contribution.[33]

In all eligible proceedings, the court must have regard to the following information in deciding whether or not to grant full or partial legal aid to the applicant. The information, supplied on oath, is the amount of the applicant's disposable capital (excepting his main residence) and his ability to obtain employment and the likely costs of the proceedings.[34] The prescribed form of affidavit applicable for all applications[35] requires supporting documents such as bank statements to be attached.[36] No formula has been prescribed in the rules to assist in

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[29] Travel and accommodation expenses are paid in addition to tariff fees. Howard Hamilton QC, Jamaica's Ombudsman and Public Defender, was regularly instructed in serious criminal matters in Cayman.

[30] Interview with Chief Justice Smellie, above n 9.

[31] Interview with the Courts Administrator Mr Terry Beckett, above n 19.

[32] Ibid.

[33] According to the 1999 Census the average annual earned income for a Caymanian in 1998 was $29,500, and the median annual earned income was $24, 484. Women below the median earned on average 6% less than men below the median, quoted in 'Caymanian pay differentials by gender vary' *Caymanian Compass,* 19 April 2001.

[34] *Legal Aid Rules 1997*, r 8 and r 12.

[35] Issued under Practice Direction no. 5 of 1999.

[36] Ibid., para 6.

determining financial eligibility, and therefore the court retains a large measure of discretion.[37] It is submitted that specific guidelines addressing financial eligibility should be published.

The following hypothetical example provides some guidance as to the likely manner in which an application may be decided. Assume that the applicant has an annual income of $24,000 per year, and that he has reasonable expenses and obligations of $20,000 per year, no savings, and that he lives in a house that he owns. For the purposes of legal aid, the house is exempt from the considerations. If he applies for legal aid to defend a scheduled charge, it is likely that he will be granted a certificate on the basis that a contribution of $500 is paid in advance. If he applied for civil legal aid, for, say, personal injury compensation or an action on land, the certificate would be granted (assuming a favourable initial opinion) on the condition that the fund be fully reimbursed from the fruits of the settlement or judgment. If the example were changed to indicate that the applicant had no net funds, legal aid to defend a criminal charge would be granted initially without a requirement of contribution. The result in the civil case would remain the same as the initial example.[38]

The legal aid certificate may be discharged, or a contribution may be ordered, if the financial position of the applicant improves to a sufficient level. Unfortunately, the absence of guidelines makes it impossible to predict the degree of change necessary to trigger a discharge or contribution. A certificate may be revoked by the Court if the assisted person has breached contribution requirements, if any.[39]

3. Scope

The types of cases that are covered are more precisely described in criminal cases than in civil matters.[40]

a. Criminal

The court may grant a legal aid certificate to defendants facing criminal charges pursuant to the general rule in section 3 (taking or defending proceedings in the Grand Court) or pursuant to the reference to the schedule. In consequence, a person of limited means who is charged with an offence triable on indictment-only will be tried in Grand Court[41] and 'shall' be granted assistance as a person defending proceedings in the Grand Court. A person of limited means who is charged with an either-way offence, and the mode of trial selection results in a Grand Court trial is also eligible as a person defending proceedings in Grand Court.[42] In the event that the mode of trial selection results in a trial in Summary Court, or if the offence is to be tried only in the Summary Court, and the defendant is of limited means, legal aid 'shall' be granted if

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[37] Interview with Ms. Audrey Bodden, deputy clerk of the court responsible for legal aid, August 21, 2000. As a result of budget constraints, the amount of the contribution will be increased in an amount yet to be determined, interview with Mr Terry Beckett on April 26, 2001.

[38] Interview with Ms. Audrey Bodden, above n 37.

[39] *Legal Aid Rules 1997*, r 13(3).

[40] *Legal Aid Law (1999R)*, s 3.

[41] *Criminal Procedure Code (1995 R as amended in 1998)* ss 4 and 5.

[42] In contrast to the position before 1997, as criticised by Hill, coverage is provided without reference to the list of offences in the schedule, or the long stop rule.

the offence is one listed in the schedule or is one that places the defendant in jeopardy upon conviction of more than 14 years imprisonment.[43]

Legal aid may also be granted for appeals from conviction in Summary Court to the Grand Court, and for appeals from the Grand Court to the Court of Appeal. According to the statistics for 1994-1999, legal aid was granted for an average of 155 criminal cases in the Grand Court per year. In 2000, 214 applications for criminal legal aid were made and 198 were granted. No other criminal legal aid statistics were published.[44] The Summary Court dealt with an average of 5200 cases per year, including motoring offences. The Summary Court regularly sentences convicted unrepresented persons to periods of incarceration.

The Law does not provide for legal assistance before the first appearance of the accused.[45] Therefore there are no legal aid funds for advice in the police station. The profession has not initiated a duty solicitor scheme.

b. Civil

The Grand Court may grant a certificate to a person who desires to take or defend legal proceedings in the Grand Court.[46] The court will consider, in addition to means,[47] whether 'the applicant appears to have a reasonable prospect of succeeding on the merits of the case'.[48] In furtherance of the application, and to assist the applicant to more fully understand his position, the court may grant a partial certificate to cover the provision by an attorney of a written opinion as to the merits of the case.[49]

It is instructive to note that the Law does not limit the granting of applications for civil legal aid to Caymanians or those who are legally resident on the island. The Chief Justice has stated that no informal bars exist, and that subject to the foregoing formal and practical limitations, any application for legal aid based on a matter properly justiciable in the Grand Court would be considered.[50] He holds the opinion that the court has a public duty to hear all who properly petition it, and to assist in that process when possible and appropriate.

The majority of civil certificates arise from divorce petitions based on violent behaviour, and where children are involved.[51] An informal survey of the records of the court reveals that certificates have been granted in the following civil matters:[52] an action based on breach of employment contract, an action for personal injury compensation, an application for

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[43] *The Misuse of Drug Law (1999R)* creates offences which carry serious penalties, ie s 16, but are tried in Summary Court. The 'fourteen year rule' may be used to provide legal aid in these type of prosecutions.

[44] There were, on average, 60 appeals per year from Summary Court to Grand Court.

[45] *Legal Aid Law (1999R)* s. 3.

[46] It is proposed that the civil jurisdiction of the Summary Court will be increased from $2,000 to $25,000 in the upcoming year *CI Judiciary Annual Report 1999/2000* p 19.

[47] *Legal Aid Rules 1997*, r 12(2).

[48] Ibid., r 12(1).

[49] Ibid., r 12 (4)(c).

[50] It is interesting to note that the application form requires the applicant to supply his work permit number in the event that he is not Caymanian.

[51] In 2000, 46 applications for legal aid were made in divorces cases of which 21 were granted.

[52] Interview with Mr Terry Beckett, above n 36.

enforcement of an existing Summary Court maintenance order by the Grand Court,[53] an action to evict an overbearing relative, and an application for judicial review.[54]

Another limitation on the provision of legal aid in civil cases exists that is not stated in the law or the rules. It is necessitated by the finite size of the annual allocation to the fund, and the priority given in the Law to criminal legal aid. The fiscal limit requires the court to consider any meritorious application in light of the current balance in the budget, and the known matters that are likely to give rise to further applications for aid,[55] and some margin of safety for future unknown applications.[56] The Chief Justice has stated that amongst the meritorious applications that would not be accorded a high priority in the light of budget restrictions are actions for defamation, and divorce where no children exist. In the period 1994-1998, on average, legal aid was granted in 200 civil matters per year. The number of grants fell in 1999, to 169, possibly due to the decision of the Chief Justice to no longer allow legal aid for divorce actions that did not include allegations of domestic violence.[57] In 2000, the number of applications made fell to 89 of which 68 were granted.[58]

c. Court of Appeal

The *Court of Appeal Law (1996 R)* provides a special power to that court to provide unlimited funds for the representation of indigent convicted persons pursing appeals where the interests of justice require.[59] This provision is in addition to that found in the *Legal Aid Law (1999R).* It appears from the wording of the section that the court is empowered to set the fee to be paid from general revenue, rather than from to the court's legal aid fund.[60] However, as the Court Administrator has explained, this provision has been rendered ineffective. The ineffectiveness of the provision is a consequence of the decision of the Legislative Assembly to provide no funds to the court for legal aid outside of the legal aid fund of the Grand Court. Therefore, any

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[53] No legal aid is available for civil proceedings in Summary Court.

[54] *Grant* v *John A. Cumber Primary School (Principal)* [1999] CILR 307 ('the school boy dreadlocks case'). The Court of Appeal gave its decision on February 23, 2001.

[55] 'Cayman to host UN rights conference' *Caymanian Compass,* 10 May 2001. For example, after six men were charged with murder, legal aid was granted for the committal hearing, 'Preliminary inquiry underway for six on murder charge' *Caymanian Compass,* 14 February 2001. Four of the accused were committed to the Grand Court for trial and they were granted legal aid, 'Four plead not guilty to murder' *Caymanian Compass,* 4 June 2001.

[56] The court can apply to the Legislative Assembly for a supplemental allocation, but this is a course of action not to be contemplated lightly.

[57] This decision was made in October 1999 after the comments of Mr Roy Bodden, MLA, a vocal critic of legal aid funding for divorce, *Caymanian Compass*, 20 October 1999. According to a response to a parliamentary question on February 23, 2000, the number of applications for legal aid in divorce proceedings was 51, of which 34 were refused. It is likely that the court will be asked to consider an application similar to that in *A v A (Maintenance pending suit: Provision for legal fees)* (2000) *The Times* November 14, [2001] 1 FLR 377 FD, where Holman J ordered the husband to fund his wife's family proceedings against him.

[58] The legal aid officer will tell potential applicants of the restrictions on granting civil legal aid, and of the assistance available at the Legal Befrienders Clinic. This has contributed to the reduction in the number of applications made.

[59] *The Court of Appeal Law* (9/1975), s 7, now s 10 of the 1996R.

[60] Ibid., s 10(3).

funding granted by the Court of Appeal comes from the Grand Court's legal aid fund. For practical purposes, therefore, the applications for aid are administered as if the application had been made pursuant to the 1999R Law.[61]

With respect to assistance in connection with appeals, the Chief Justice has directed that a written opinion as to the merit of the appeal would be funded in certain applications for legal aid. No application for funding to continue an appeal would be granted without an opinion indicating the appeal had merit.[62]

While legal aid in criminal[63] and civil[64] appeals has been given in some cases, the statistics were not available.

4. Financing

a. *Government*

Primary funding is provided annually by the Government. The budget for 2000 was $560,000 (CI 1 = US 1.20). This amount was thought to be adequate to meet the 'needs' that fell within the parameters of the fund as described by the *Legal Aid Law (1999R)*. The historical data for 1999 is a total expenditure of $556,800; for 1998, an expenditure of $429,700; and for 1997, an expenditure of $424,299.[65] For the current year (2001) the Court Administrator is reluctant to state definitively whether the fund will be adequate although the fund has been increased to $750,000. The cautious approach stems from the fact that, as many jurisdictions have experienced in the past, two or three major cases might consume a disproportionate share of the annual budget. In Cayman, at least four major trials are already underway, including a murder case involving four co-accused persons and a major money laundering trial wherein English Counsel is instructed. These cases are likely to have a major impact on the fund.[66] Caution is required for another reason. The Government has recently announced that reduced revenues require it to make a large reduction in all areas of budgeted expenditures. The Government's initial efforts to reduce expenditure currently are focussing on reducing the size of the civil service.[67] However, at least one member of the Executive Council has long held the view that the legal aid fund should be reduced.[68]

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[61] With reference to fees, the *Court of Appeal Rules 1987* (25/1986), r 42 states that the 'fees to be paid to counsel shall not exceed in any case the fees paid to counsel in the Grand Court'.
[62] Courts Administrator, Memorandum to Legal Aid Attorneys 'Appeals', 26 January 2001. The opinion will attract a fee of $50.
[63] For example, in *R* v *Michelle Evans* the appellant was legally aided in her appeal to the Court of Appeal arising from a conviction for causing death by driving. In the event, a new trial was ordered. This was to be her third trial for this alleged offence, and legal aid was granted throughout, *Caymanian Compass*, 8 May, 2000.
[64] *Grant* v *John A. Cumber Primary School (Principal)*, above n 52.
[65] Interview with Mr Terry Beckett, above n 36.
[66] Interview with Mr Terry Beckett on February 5, 2001.
[67] 'Gov't Budget deficit grows', *Caymanian Compass*, 22 March 2001.
[68] Hon. Mrs Edna Moyle, MLA.

b. *Recovery from parties*

The Grand Court has the discretion to require that a legally aided party pay money into the legal aid fund as a condition of assistance during the period of the civil or criminal proceedings. Otherwise, the court may order a contribution at the completion of the trial. Such an order becomes a debt to the court. It can only be recovered by way of action in debt by the Treasury.[69] This leaves the Court Administrator in a difficult position as the cost of recovery greatly reduces the net return. Further, some of the debtors are in prison and without means.[70] In civil proceedings, the court may order the unsuccessful 'unaided' party to pay the costs of the other 'aided' party into the fund.[71] It is the duty of the attorney of a successful aided party to see that funds which come to his client are used first to repay any legal aid charge.[72] It is forecast that approximately $15,000 will be recovered from proceedings completed before 2001.[73]

c. Other funding

There is no provision in the Law to allow the legal aid fund to borrow money, raise funds through activities such as the sale of publications or to accept donations from philanthropists or foundations. Any such donation would be placed in the central treasury, and could be used for any purpose.

d. Payment of Attorneys

The attorneys participating in the legal aid program are paid $100 per hour for work done.[74] This rate is approximately one-half of the hourly rate usually expected for similar work in the private sector by the attorneys. The hourly rate is paid for preparation and court time, with a one hour maximum for waiting time at court.[75] Reasonable provision is made for actual disbursements. According to the *Legal Aid Rules 1997* it is the duty of every attorney to keep accurate record of the advice given, work done, time spent and disbursements incurred.[76] In special cases, the Chief Justice may allow an uplift in the fee for counsel.

5. Choice of Representative

The court officer will invite the applicant in criminal or civil proceedings to state a preference of attorney. If that attorney is on the panel and not 'conflicted out', he will be approached. The attorney will consider his caseload, any potential conflicts and availability. If he agrees to take

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[69] *Legal Aid Rules 1997*, r 8(5) and r 12(6).
[70] Mr Terry Beckett's answer to Mrs Edna Moyle MLA query in Legislative Assembly's Finance Committee, *Caymanian Compass,* 14 December 1999.
[71] *Legal Aid Rules 1997*, r 15; *Carter* v *Dawson* [1998] CILR 204.
[72] Interview with Chief Justice Smellie, above n 9.
[73] *Caymanian Compass,* 10 May 2001.
[74] Legal Aid Rules, r 16.
[75] Memorandum from the Court Administrator to Attorneys dated May 6, 1999.
[76] *Legal Aid Rules 1997*, r 6(2).

the case he will be assigned. Otherwise the officer will contact the next attorney on the panel. If the client has demonstrated that he is difficult, the administrator would, as a matter of courtesy, supply this information to the attorney before he is asked to accept the case. Once the attorney accepts the case, he must represent the assisted person until the matter is completed or the certificate is discharged.[77]

In spite of the administrative and financial burdens that are inflicted on the legal aid scheme when a legally aided defendant seeks to change his attorney, it is usual for the court to allow one change of attorney for cause.[78] A certificate may be revoked by the court if the assisted person is conducting or threatening to conduct the proceedings in a manner which is unreasonable and oppressive.[79]

D. Legal Befrienders

During the latter half of the 1990s, the Business and Professional Women's Club ('BPWC') of the Cayman Islands became very active in the campaign against domestic violence. In addition to initiating public awareness programmes and education of school children regarding the problems of domestic violence, the BPWC began to focus on the applicable laws and their application. One of the conclusions of the study was that legal advice was not available to victims of domestic violence who were without means. *The Legal Aid Law* does not provide assistance for civil matters in Summary Court, and non-molestation orders and exclusion orders in favour of an alleged victim were matters for that court. In consequence, the Legal Befrienders Clinic was established in December 1997 to assist in such applications. Leadership was provided by Sarah Collins-Francis, a local attorney, with the support and assistance of the BPWC.[80] Leadership has passed now to attorney Zeena Merren-Chin. As the clinic was able to attract more volunteers in 1998, its operating schedule was expanded to one evening a month through 1998. In early 1999, the clinic began to offer service on a bi-weekly basis, and, in July 1999, weekly clinics were offered. Also in July, the clinic began the Befriender phone line, which facilitated advice by telephone 3 afternoons a week. As the service expanded, the advice given formally expanded to include matters ancillary to domestic violence, such as maintenance for victims and children, divorce, matrimonial property division, and issues of immigration status post divorce.[81] In 1999, with the commencement of legal advice by telephone, a volunteer drive was held, and an all time high of 20 lawyers volunteered. In 2001, 15 volunteers continue to assist. The clinic began recording the numbers of visits in 1999. In 1999, the clinic volunteers met with 85 females and one male. In 2000, the clinic assisted 73

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[77] Ibid., r 6(7).

[78] For example, see the proceedings in *R* v *Gayle, Caymanian Compass,* 9 September 1999.

[79] Ibid., r 13(3).

[80] Interview with Tammy Ebanks-Bishop of the Women's Resource Centre on August 10, 2000. The clinic opened after the conclusion of the annual 16 Days of Activism Against Gender Violence campaign in November 1997. The 'clinic' uses office space provided by the Women's Resource Centre, a programme of the Ministry of Community Development and Women's Affairs. The Minister is the Hon. Edna Moyle, MLA.

[81] It is reported that some discussions have taken place regarding whether or not the Legal Befrienders' mission statement should be expanded to include non-commercial advice for children and elderly, ibid.

people.[82] By way of comparison to the number of persons now receiving civil legal aid under the Law, it is instructive to recognise that this total is similar, although it is recognised that the number of hours of assistance in advice cases may be less than those used in court proceedings.

E. Attorney General's Fund

The Attorney General, the Hon. David Ballantyne, made a decision early in his administration that, where the interests of justice demand, a portion of his departmental budget earmarked for retaining advice and assistance (for the Government) would be made available to indigent persons appearing as respondents in appeals by the Government to the Judicial Committee of the Privy Council. While on a plain reading of the Legal Aid Law, respondents in such an appeal might be eligible for legal aid from the legal aid fund, the Attorney General recognised the limits of the fund, and undertook this innovative approach, so as to reduce some of the pressure on the fund. The decision to grant funding is made solely at the discretion of the Attorney General. A recent example of funds from the Attorney General's budget being used to fund the legal representation of a respondent before the Privy Council is the matter of *R* v *Carlyle Roberts*.[83]

F. Conclusion

It is respectfully submitted that the formal legal aid system in the Cayman Islands, while limited in its scope, has merit and is administered in an appropriate manner. It is apparent that significant gaps exist in the current assistant schemes and that certain cross-checks and guidelines would improve the administration of the formal legal aid scheme. The following areas of concern have been raised for immediate consideration. First, as the Chief Justice has suggested, it may be appropriate to consider the extension of eligibility for legal aid to all criminal cases where the accused may be sentenced to imprisonment. Until a final decision is made on this suggestion, support for an immediate extension of coverage to cases where the accused is liable to be sentenced to three years imprisonment is found in the comments of Edmund Davies LJ made 25 years ago. 'This court desires to express the view that if a lower court has it in mind, having regard to the gravity of the offence charged or the number of offences which are charged ... to take the view that a heavy sentence [3-5 years] is called for, it is most desirable that the accused person should in those circumstances be offered legal aid.'[84] Secondly, it is submitted that provision should be made for advice to suspects, or those charged, through a scheme of duty counsel at the police station. The right to silence and the right to counsel are undermined without specialist advice in the police station.[85] Oppressive police questioning leading to admissions by the accused may undermine the fairness of the trial. In some cases, the statement of the suspect may cause so much damage to his case that it is irretrievable. Also, duty counsel would serve as an important safeguard against illegal

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[82] Interview with Tammy Ebanks-Bishop of the Women's Resource Centre on June 1, 2001.
[83] This appeal will be heard in Autumn 2001.
[84] Practice Note (Crime: Legal Aid) *R* v *Serghiou* [1966] 1 WLR 1611, 1612.
[85] For a review of the improvements made to the quality of advice given in police stations by paralegals see L. Bridges and S. Choongh, *Improving Police Station Advice*, Research Study 31, (London: Law Society, 1998).

imprisonment, in the sense that it would be more probable that persons illegally detained would come to the attention of, and be assisted by, duty counsel.[86] The provision of advice at police stations is an important feature of the legal aid system in Jamaica. Thirdly, and in consequence of the plan to place the issues of the welfare of children within the jurisdiction of the Summary Court,[87] it may be necessary to extend the scope of civil legal aid to that court or to provide alternate methods of assistance for the parties.

More generally, legal advice should be made available beyond the current structure.[88] Perhaps a partially funded legal advice resource centre to supplement the Legal Befrienders may be appropriate to assist people who have issues arising from regulation of immigration, and residential tenancies. In keeping with the United Nations Decade For Human Rights Education, it is submitted that public legal education programmes should be implemented. The first and most important component of legal assistance is informing citizens of their rights.

[86] For example, a writ of *habeas* corpus was granted recently after 3 men were detained for 8 months, 'Mystery men are Afghans who lied' *Caymanian Compass,* 4 June 2001.
[87] The draft Children Bill 2001 clause 91.
[88] For a useful analysis see the McCamus Report, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, 1997, Toronto: Attorney General of Ontario.