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CAYMAN ISLANDS LAW SCHOOL

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

Citation:

Cases appearing in this volume should be cited as (2002) 20 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) 244-3541 or e-mail Simon.Cooper@gov.ky.

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EDITORIAL NOTE

The twentieth edition of the Cayman Islands Law Bulletin will convey to the reader the diverse and complex nature of local litigation. This edition is of particular interest in the area of Criminal Procedure, with decisions of the Chief Justice on the prosecution's duty of disclosure and Mr Justice Graham on the appropriate direction in the event of the defendant's failure to testify. The Law Review section of this edition includes an article by Simon Cooper on the effect of certain provisions in the Registered Land Law and the Companies Law on the holding of Cayman Islands land by corporate bodies.

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 supplement the law reporting system in use in the Cayman Islands. The former 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 case summaries 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, and Kellock J (Acting) for the period up to 23 May 2002.

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

Mareva Injunction – Test and procedure – Duty of full and frank disclosure – Content and form of supporting documentation – Provision of security and undertakings by the plaintiff

X Inc v G and others

Grand Court (5/02)
Kellock J (Acting)
January 17th 2002

Authorities referred to

Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 All ER 213
Third Chandris Corporation v Unimarine SA [1979] QB 645
Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyds Rep 428
Practice Direction [1983] 1 WLR 433
C Corporation v P et al [1994-1995] CILR 189
Associated Leisure Ltd v Associated Newspapers Ltd [1970] 2 QB 450

Works referred to

Gee, Mareva Injunctions and Anton Piller Relief 4th edition (1998)
The Supreme Court Practice 1999

The plaintiff sought a Mareva Injunction against all of the defendants prohibiting them from removing their assets from the Cayman islands and from disposing of, dealing with, or diminishing the value of their world-wide assets until judgment of the cause of action which provided the context for the Mareva application. A writ was issued in the proceedings on the 4 January 2002 but not served prior to this application.

Held: (dismissing the application)

(i) The Court took the opportunity to re-state the requirements to be met in order to obtain a Mareva Injunction as laid down in C Corporation v P et al:

1. Before seeking an ex parte Mareva Injunction a party must understand that the Law requires an applicant to proceed "with the highest good faith". It is imperative that the applicant make full and frank disclosure of all matters in his knowledge which are material for the judge to know (Third Chandris Corp v Unimarine SA). This means that the applicant must make proper inquiries before making the application, and identify any defences to the action or the application that could reasonably be taken by the defendant (Siporex Trade SA v Comdel Commodities Ltd).

2. The affidavit in support (of applications for injunctions) should contain a clear and concise statement:

(a) of the facts giving rise to the claim against the defendant in the proceedings;
(b) of the facts giving rise to the claim for interlocutory relief;
(c) of the facts relied on as justifying the application ex parte, including details of any notice given to the defendant or, if none has been given, the reasons for giving none;
(d) of any answer asserted by the defendant (or which he is likely to assert) either to the claim in the action or the claim for interlocutory relief;
(e) of any facts known to the applicant which might lead the court not to grant the relief ex parte;
(f) of the precise relief sought.

If these rules are not observed the applicant may be deprived of any advantage he may have derived from the making of the ex parte order. It is to be expected that affidavits will be prepared by lawyers. It follows that the Court can expect that those affidavits will be prepared in the light of the relevant requirements of the law.

3. The material filed in support of an ex parte application for a Mareva Injunction must show that the applicant has a good arguable case for the relief sought in the action. The material filed in the instant case was weak in terms of meeting the essential pre-conditions which must be met in order to establish a case for Mareva relief.

4. The material filed must also show a real risk that the judgement sought may go unsatisfied if a Mareva injunction is not granted. The Plaintiff must adduce 'solid evidence' to support that conclusion. Mere unsupported statements to the effect that the deponent to an affidavit fears that assets may be dissipated do not satisfy the law's requirements.

5. Where an application is made for Mareva relief it is usual for the Court to require the posting of security for the undertaking the plaintiff is required to give as to the damages the defendant might suffer. In the instant case, the fact that the plaintiff did not wish to provide the security and incur the cost or exposure to liability that the posting of the security and the making of the required undertakings would involve, spoke volumes as to the real merits of the application.

(ii) Application dismissed.

DB

Professional responsibility – Duty of attorney – Wasted costs order

M v M

Grand Court (D140/99)
Kellock J (Acting)
April 11 2002

The petition, by interlocutory application, sought a declaration that the respondent was the beneficial owner of shares which bore his name. The respondent had, at one time, alleged that the beneficial ownership was in his son, who had the same first and surname, and middle initial, although different middle name. A draft order was sent to the respondent, but no consent was forthcoming. After argument lasting for more than one hour, the attorney-at-law for the respondent indicated that she was engaged only on a 'watching brief' rather than an 'actual brief', and in consequence was not in a position to oppose the application.

Held: (cost order)

(i) The attorney-at-law for the respondent was engaged on an 'actual brief'.

(ii) When called upon by an opponent to state a party's position on any issue, an attorney-at-law was required to do in a precise manner, unless there was a compelling reason for failing to do so.

(iii) Respondent was required to pay forthwith fixed costs in the amount of $500.

JE

Mareva Injunction – Application to vary – Whether sufficient supporting material

Attorney-General v H and C

Grand Court (373/93)
Sanderson J
May 13th 2002

Authorities referred to

PCW Underwriting Agencies Ltd v Dixon and another [1983] 2 All ER 158
The University of British Columbia v Connomos (1989) BCJ number 2269

Ms Wilson for the respondent
Mr McDonough for the first applicant
Mr Quin for the second applicant

This was an application to vary an Order of the Grand Court dated May 23rd 2001 which froze approximately USD 2.1 million. The first applicant sought to vary the order for the purpose of:

1 payment of past and estimated future costs of these proceedings
2 fees to pay the actual and estimated fees of a US attorney acting on the first applicant's behalf in U.S. forfeiture proceedings
3 withdrawal of $6000 per month for reasonable living expenses for the first applicant and his family

The second applicant acting on behalf of two companies, TAC Ltd and TFC Ltd, sought to vary the order to authorise release of monies to pay for the corporate accounts and government filing fees of these two companies

Both applications were opposed by the respondents.

Held:

(i) In respect of the fees for the corporate accounts and filing fees, there was no obligation on the second applicant to pay these fees personally and accordingly the application to vary should be allowed on condition that an officer or director of the companies swear and file an affidavit stating what the company's assets are and that apart from the funds frozen the companies have no other assets or ability to pay the outstanding fees.

(ii) In respect of the first applicant's application for release of legal fees, disbursements and living expenses, the onus was on the applicant to file detailed financial information showing that they have no other source of funds available to meet such expenses and to persuade the Court that such expenses are reasonable (PCW Underwriting Agencies v Dixon and University of British Columbia v Connomos). It was not sufficient simply for the applicant to say that he did not have sufficient funds to pay his monthly living expenses. Application therefore dismissed on the basis that the material filed did not persuade the Court that the first applicant had no other source of funds available in order to meet these expenses. Liberty to re-apply upon filing better and more complete material.

(iii) (Obiter in relation to the first applicant's application:) Based on the material before the Court, the Court was not satisfied that that the proposed expenses were necessary and reasonable.

DB

Default judgment – Failure to acknowledge service or file defence – Whether judgment to be set aside – Factors for consideration

Merz Export Gmbh v Hurlstone Holding Ltd

Grand Court (328/01)
Kellock J (Acting)
September 28 2001 (hearing date)

Authorities referred to

Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc [1986] Lloyds LR 221
Haig v Haig [1885] 31 Ch D 478

Mr Barrie for the plaintiff
Mr Walters for the defendant

By writ of summons, the plaintiff claimed as against the defendant, 'HHL', payment of the balance owing on an invoice for goods sold and delivered in 1993. HHL did not acknowledge service of the writ or file a defence and as a result default judgement was signed. Relying on the decision in Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, HHL sought to have the default judgement set aside.

Held: (declining to set judgment aside)

(i) A defendant faced with a default judgement and, as a result, in need of the court's assistance in order to be relieved of the ordinary consequences of that default, was required to act promptly and to make full and honest disclosure of all the relevant circumstances. On a plain reading of the defendant's affidavit, the default was deliberate and the court ought not to relieve the defendant from the consequences of it, even if the defendant might otherwise have had a good defence to the plaintiff's claim.

(ii) Accordingly the application to set aside the default judgement was dismissed with costs.

DM

Strike-out application – Laches of plaintiff – Whether delay unjust to defendant. Land Register – Rectification of a first registration – Limitation period.

June Smith (Administratix of Alvery Smith, Deceased) v Ellery Smith (Administrator of Samuel Smith Jr, Deceased)

Grand Court
Smellie CJ
March 3 2002

Legislation

Limitation Law 1991
Land Adjudication Law (1997 Revision)
Registered Land Law (1995 Revision)
Public Recorder Law (1996 Revision)

Authorities referred to

Joyce v Joyce [1978] 1 WLR 1170
Allen v McAlpine & Sons [1968] 1 All ER 543
Birkett v James [1977] 2 All ER 801
Williams v Bob Soto's Diving 1992-93 CILR 318
Verrall v Great Yarmouth Borough Council [1981] QB 202
Ebanks v Clark [1992-93] CILR 33
Tito v Waddell (No 2) [1977] Ch 106

Mr Broadhurst for the plaintiff
Mr Helfrecht for the defendant

Works referred to

Halsbury's Laws of England (4th ed. reissue)

As administrators of their respective estates, the plaintiff and defendant, who shared the same grandfather, were pursuing competing claims to 'family land'. The plaintiff sought a declaration to the effect that Alvey Smith Jr was the equitable owner of the land in dispute, and consequential orders rectifying the proprietorship section of the Land Register. The claim was largely based upon the assertion that the plaintiff had paid for the land and had obtained a quitclaim in 1970. The land was registered by way of provisional title in the name of the defendant.

The defendant brought this application to strike out the plaintiff's action on the grounds of inordinate and inexcusable delay and want of prosecution. During the delay, Alvery Smith Jr had died and it was argued that this would irredeemably prejudice the defendant who would not be able to cross-examine him about the factual circumstances of his alleged payment for the land said to have resulted in the issuance to him of the quitclaim. This being an action for the enforcement of an equitable claim to land, and there being no statutory limitation period applicable to the action, the plea in bar upon which the defendant sought to rely was the equitable doctrine of laches.

Held: (refusing to strike out)

(i) While on the facts there may be a prima facie showing of unreasonable delay, the test, that in the circumstances the consequences of the delay must render the grant of relief to the plaintiff unjust, was not satisfied. The Statement of

Claim and Defence and Counterclaim were to be set down for trial at the earliest possible available date.

(ii) Per curiam: Whilst it was true that the process under the Land Adjudication Law which followed cadastral survey and registration under the Registered Land Law was intended to bring certainty and finality to the registration of titles to land, those Laws were not to be construed in such a way as to condone a fraud upon the adjudication process itself and so provisional (or even absolute) title so obtained would be open to review and the register subject to rectification and no statutory limitation period would apply.

DM

Breach of trustee investment duties – Construction of trust deed and applicability of exclusion clauses – Whether suitable for trial as preliminary issues

L v CC Ltd

Grand Court (458/98)
Smellie CJ
January 4 2002

Legislation

Trusts Law (1998 Revision)

Authorities referred to

Tilling v Whiteman [1980] AC 1
Reardon Smith Kline Ltd v Hangsen - Tangen [1976] WLR 989
In Re Z Trust 1997 CILR 248
Armitage v Nurse [1998] Ch 241
Steele v Steele (New Law On Line Case #2010917101 – delivered 27th April 2001)

Mr Eder QC and Mr Stephens for the plaintiff
Mr Briggs QC for the defendants

The plaintiffs were suing the defendants who were their former trustees for damages for various breaches of trust in relation to the trustees' investment duties which were alleged to have arisen since the date of a prior compromise. This was an application by the defendants for directions that certain issues be tried as preliminary issues, so as to avoid a long and expensive trial. Specifically, the defendants sought to have tried as a preliminary issues:

(a) Whether on a true construction of the Revised Deed of Settlement and the Statement of Investment Policy and Guidelines, the allegations amounted to a failure on the part of the Trustees to comply with the Investment Policy;

(b) If the answer to the first preliminary issue was yes, would that preclude the Trustees from relying on exclusion clauses contained in the Revised Deed of Settlement;

(c) Whether the allegations disclosed a case of willful misconduct or willful breach of trust (which would not fall within the exclusion clause).

The defendants having acknowledged that the third issue could not be directed to be tried as a preliminary issue, the plaintiffs argued that the first two preliminary issues were not susceptible of being tried as preliminary issues.

Held: (ordering trial)

(i) Relying on the judgement of Neuberger J in Steele v Steele, it was noted that, before ordering the determination of a preliminary issue, it was necessary for the court to consider a number of competing factors, namely:

(a) Whether the determination of the issue would dispose of the case or any important aspect of the case;

(b) Whether the cost and time involved in pre trial preparation would be significantly reduced;

(c) Being issues of construction, how far could they be determined on agreed facts, given that if there were numerous disputes the issues could probably not be safely resolved until the disputes were resolved;

(d) The extent to which there was a risk that determining the issue would delay and increase the costs of the trial;

(e) In the event of a successful appeal against directions for the trial of preliminary issues, whether the resulting delay and costs might result in nothing being achieved;

(f) Whether, taking into account all the other relevant considerations, it is just to order the trial of the preliminary issues.

(ii) Taking these factors into account, and the dicta of Lord Wilberforce in Tilling v Whiteman, it was held that the first two issues for construction were discrete and amenable to being tried within the confines of a limited and readily identifiable factual matrix. Being issues of construction, the arguments were also amenable to brevity. A trial of the first two issues as preliminary issues was directed.

DM

Costs – Grounds for awarding costs on an indemnity basis

Nike Real Estate Ltd v Luc De Bruyne

Grand Court (222/01)
Kellock J (Acting)
January 23 2002

Authorities referred to

Bonotto v Boccaletti (August 24 2001, unreported, Court of Appeal)
Andrews v Barnes (1888) 39 Ch D 133
Bir v Sharma, The Times, 7 December 1988
Berkeley Administration Inc v Mclelland [1990] FSR 565
Burgess v Stafford Hotel Ltd [1990] 1 WLR 1215
Cepheus Shipping Corporation v Guardian Royal Exchange Assurance plc [1995] 1 LLR 647
Munkenbank & Marshall (a firm) v McAlpine (1995) 44 Con LR 30

Works referred to

McGregor, Damages (15th edition)
Halsbury's Laws of England (4th edition)

Mr Murray for the plaintiff
Mr Alberga QC for the 1st and 2nd defendants
Ms Thompson for the 3rd defendant

On December 31, 2001, Kellock J granted summary judgment in favour of the plaintiff affirming the rescission of a contract for the purchase by the plaintiff from the first and second defendants of a commercial property in George Town and granting damages against all three defendants. This resulted from a finding that the plaintiff had been induced to enter into the contract of purchase and sale by fraudulent misrepresentations for which the third defendant was largely responsible.

The issue of costs now fell to be determined. The plaintiff sought, and the defendants opposed, an order for costs on an indemnity basis.

Held: (Ordering that all three defendants should pay all of the plaintiff's costs on the indemnity basis)

(i) (As conceded by all defendants' counsel) as a result of the decision of a majority of the Court of Appeal in Bonotto et al v Boccaletti, the Grand Court has jurisdiction to award costs on an indemnity basis in appropriate cases.

(ii) It was open to the court to make such an order if it could be said that the party against whom the award is sought has been found to have engaged in conduct which can be regarded as deliberately dishonest and which amounts to an abuse of the process of the court.

(iii) Conduct which for one purpose may be regarded as an abuse of process may not necessarily be considered so for other purposes: e.g. for the purpose of founding an award of indemnity costs.

(iv) Where the court found that the party against whom the award of indemnity costs is sought had in fact put forward a case in which they had no genuine belief as to the matters which they urged the court to find to be the truth then the charge of abuse of process could be made out to the extent necessary to justify an award of indemnity costs.

(v) In the instant case, several findings made in the original summary judgment proceedings bore directly on the costs question and justified a finding that there had been dishonesty and abuse of process such that it was appropriate to make an order that all of the defendants should pay all of the plaintiff's costs on an indemnity basis:

(a) The plaintiff had been induced to enter into the contract by fraudulent misrepresentations and non-disclosures, mainly on the part of the 3rd defendant;

(b) The 1st and 3rd defendants had conspired in advance of the original hearing to deceive the court on fundamental issues that they were well aware the plaintiff was raising in relation to those misrepresentations and non-disclosures.

AS

Damages – Interim payment – Order 29

Ebanks v Cayman Cultural Foundation and others

Grand Court (154/01)
Kellock J (Acting)
April 16 2001

Legislation

Grand Court Rules, O 29 R s 10 11

Authorities referred to:

British and Commonwealth Holdings plc v Quadrex Holding Inc [1989] 3 All ER 492
Andrew v Schooling [1991] 3 All ER 723

Mr McCann for the applicant
Mr Murray for the respondent

It was alleged that the applicant, a minor, was seriously injured in 1998 at an event organized by the defendants known as Cayfest. It is alleged that during the launching of a boat, a rope and shackle broke free and struck the applicant, whereupon his skull was fractured. It is alleged that the applicant's mental capacity was impaired and that his future earning capacity was limited. The applicant sought an interim payment of damages.

Held: (order granted)

(i) Order 29 Rules 10 and 11 contemplate an interim payment of damages where the court is satisfied that 'if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant' and the defendant has sufficient resources.

(ii) The test in British and Commonwealth Holdings plc v Quadrex Holding Inc was applied. An order to pay some money or damages claimed was to be based on a good ground in the evidence for believing that the defence set up a sham defence, or the court was prepared 'very nearly' to give judgment for the plaintiff in circumstances akin to summary judgment under Order 14. Interim damages must be limited to a reasonable proportion of the damages which in the opinion of the court are likely to be recovered. See also Andrew v Schooling.

(iii) Payment in the amount of $95,000 was ordered to be made to the applicant's next friend (mother) to assist defraying medical bills and other special damages.

(iv) Costs to the applicant.

JE

Appeal to Court of Appeal from Grand Court – Applicable principles

G Ltd v B

Grand Court (434/01)
Kellock J (Acting)
Apr 26 2002

Legislation
Court of Appeal Rules (2001 Revision)

Authorities referred to

Panier SA v Burns (Grand Court 205/01, December 5 2001)
Practice Direction [1991] 1 All ER 186

Mr Giglioli for the Plaintiff
Mr Allen for the Defendant

G sought leave to appeal to the Court of Appeal against a decision of the Grand Court.

G and B entered a contract dated July 1997 for the sale of tenanted land. The contract required that B pay to G the purchase price by certain instalments of principal and interest on certain dates. After a period, B started to pay instalments after the due dates. G then, in accordance with the contract, demanded that B pay all the outstanding sums due under the contract. B did not comply with this demand.

On March 29 2001, G's attorney sent a letter to the tenants stating (1) that B had no authority to act for G, (2) that rents must be paid directly to G's attorney, and (3) that in default the tenants would be liable to eviction and action to recover the unpaid rents.

On May 2 2001, G served notice of its election, in accordance with the contract, to treat the contract at an end, to resume possession of the property free from any interest of B, and to keep all payments already made by B.

G sought summary judgment for the payment of the sums which were accrued but unpaid prior to May 2. The defendant sought dismissal of the plaintiff's action. The Grand Court dismissed the plaintiff's claim. The plaintiff sought leave to appeal.

Held: (declining leave to appeal)

(i) The Grand Court was often in the best position to judge whether the case was one where there should be an appeal. If the court was in doubt whether an appeal would have a real prospect of success or involved a point of general principle, the safe course was to refuse leave to appeal. It would be open to the Court of Appeal to grant leave. Practice Direction (1991) followed.

(ii) Reviewing the merits of the application for leave to appeal, and following the guidance in the Practice Direction (1991), leave to appeal would be refused.

(iii) Costs to be taxed if not agreed and payable by G to B forthwith after determination of quantum.

SAAC

Costs – Conditional fee – Legality - Public policy considerations

National Trust for the Cayman Islands v Planning Appeals Tribunal

Grand Court (368/00)
Sanderson J
February 26 2002

Legislation:

Penal Code s2(a)
Judicature Law (1995 Revision) s24
Grand Court Rules Order 55

Authorities referred to:

Awwad v Geraghty & Co (a firm) [2000] 1 All ER 65
Thai Trading Co (a firm) v Taylor and another [1998] 3 All ER 65
Wallersteiner v Moir (No 2) [1975] 1 All ER 849
Cayman and others v Hexagon Trust Company (CI) Ltd (1st October 2001)
de Lasala v de Lasala [1979] 2 All ER 1146
R v Miller (Michael) (unreported, April 24th 1998, CA 32/98)

Works referred to:

The White Paper on Legal Services: A Framework for the Future (Cm 740-1989)

Mr DaCosta for the appellant
Mr Schofield for the respondent

The third respondent, Humphreys (Cayman) Ltd, sought an order that there should be no costs awarded against it.

The respondent reasoned that there was no contract between the appellants and their counsel to pay fees and accordingly that it should not have to pay costs to the appellants. In the alternative, it argued that even if an agreement was found to be present between the appellants and their counsel it was unenforceable as it was a conditional fee that was contrary to public policy.

Held: (awarding costs to appellant)

(i) A contract did exist between the appellants and their counsel. That contract was on the conditional basis of the appellants claim being successful.

(ii) English common law established that a normal conditional fee agreement is contrary to public policy as it is unacceptable for a solicitor / barrister to acquire a financial interest in the outcome of any case.

(iii) The court recognised the possible public policy concerns based on English common law (Wallersteiner v Moir (No2) and Awwad v. Geraghty & Co (a firm)):

(a) The public interest in the highest quality of justice outranks the private interests of the litigants. It is particularly important that lawyers should not place themselves open to temptation to behave contrary to the best traditions.

(b) The concept of a normal fee is an elusive term. Some solicitors' normal fees are greatly larger than others for what appears to be the same work.

(c) It is difficult and undesirable to answer the question whether an agreement is against public policy, given that it would lead to very detailed examination in each case of solicitors' cost structures.

(d) If solicitors' practices exist on the basis of conditional normal fee agreements with clients this would presumably lead to normal fees being considerably higher if such arrangements were not acceptable in the profession.

(iv) The court must encourage attorneys and solicitors to give their services to meritorious causes. In this case, there was an application by the National Trust of the Cayman Islands to the court in respect of a decision being made by the Planning Appeals Tribunal. No financial reward was expected above that of a normal fee if successful.

(v) The Grand Court was not obliged to follow the English common law approach, despite its great persuasive authority, if it was inappropriate to local circumstances: de Lasala v de Lasala, R v Miller (Michael). Having regard to local circumstances, it was held that the English common law approach should not be followed in this particular case. It was in the public interest, in these circumstances, that the normal conditional fee agreement be valid given that there was never any consideration of financial reward by legal counsel.

(vi) The court on this basis awarded costs to the appellant.

JS

Company liquidation– Evidential requirements to enable court to tax liquidators' fees

Re T Ltd (in liquidation)

Grand Court (217/01)
Kellock J (Acting)
January 29 2002

Authorities referred to

Re High Risk Opportunities HUB Fund Ltd, 521/1998, September 22 2000, Sanderson J
Re Great Britain Mutual Life Assurance Society (1880) 16 Ch D 246

Works referred to

Halsbury's Laws of England (4th edition)

Mr Andrews for the Liquidators
Mr Walton for the Petitioner

By summons filed November 16 2001, the court-appointed liquidators of T Ltd, who were formerly the provisional liquidators, sought the court's approval of the fees and expenses of "the joint provisional liquidators" up to October 2 2001 when the winding up order was made. T Ltd had several large shareholders. The largest single registered shareholder was U Ltd.

The summons was returnable on November 22 2001 and came before Graham J. Graham J ordered that the petitioner U Ltd, and any other shareholders of the company were to serve any objections to the provisional liquidators' fees they might have by December 28 2001. The liquidators were entitled to respond to any such objections by January 11 2002. Graham J then adjourned the application until January 24 2002, when it came before Kellock J.

Kellock J commented that he had not been provided with a bundle and that he was only able to consult the court file in order to prepare for the application. He observed that the documentation before him was incomplete and otherwise defective in several respects. The court file contained, *inter alia*, the following: the petition filed April 23; the supporting affirmation of C (a resident of Taiwan); another C affirmation; the reports of the provisional liquidators dated June 11 2001 and September 21 2001; the affidavit of Mr S (one of the liquidators) in support of the November 2001 application. The file did not contain the exhibit to Mr S's affidavit stated to be a "Fee Taxation Report", nor the exhibits to the C affidavits. When provided with a copy of the exhibit to Mr S's affidavit (the fee taxation report), Kellock J concluded that it did not (at least alone) begin to satisfy the court's requirements (as set out below). Kellock J further observed that there

was no evidence that Graham J's order had been served on anyone or otherwise made known to the shareholders nor was there any evidence of objections.

In the face of Kellock J's concerns, counsel profferred correspondence (which Kellock J did not accept) purporting to relate to the provisional liquidators' fees. Counsel also asserted that Graham J intended, when making the order of November 22 2001, to approve the liquidators' fees and expenses subject only to being satisfied that the persons interested in the liquidation did not have any objections. Further, counsel contended that the application was not to be regarded as a "taxation" despite the key exhibit to Mr S's affidavit being entitled "fee taxation report".

Kellock J consulted Graham J, who advised that he had had no intention of "rubber-stamping" the application. Rather, had the application come before him on January 24, 2002, he would have proceeded to hear it and then to decide whether or not the liquidators' fees were reasonable and proper whether or not there were any objections thereto.

Held: (Adjourning the application)

(i) The application was to be regarded as a taxation of the provisional liquidators' fees and expenses, as stated on the summons filed November 16 2001. The court had been provided with no authority in support of counsel's submission to the contrary.

(ii) It was not appropriate for the court to consider the correspondence concerning the provisional liquidators' fees that counsel attempted to submit informally at the hearing. The rules concerning evidence on motions were clear and ought to be observed, particularly when, as in this case, at least one of the letters was long and full of detail.

(iii) What the law requires applicants to provide by way of evidence in support of an application for the court's approval of provisional liquidators fees and expenses is summarised generally in Halsbury's Laws of England, 4th edition, volume 7(3), paragraph 2256:

"The remuneration of the provisional liquidator, other than the official receiver, must be fixed by the court from time to time on his application. In fixing his remuneration, the court must take into account:
(1) the time properly given by him, as provisional liquidator, and his staff in attending to the company affairs;
(2) the complexity, or otherwise, of the case;
(3) any respects in which, in connection with the company's affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;
(4) the effectiveness with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and,
(5) the value and nature of the property with which he has to deal."

In Re High Risk Opportunities HUB Fund Ltd, 521/1998, September 22 2000, Sanderson J (at p. 9) referred to the matter in this way:

"What the Court has not been given, is sufficient detail to allow it to determine if these amounts charged are reasonable. The fees incurred may be quite reasonable. They are definitely quite significant but in order to be found to (be) reasonable the liquidator must provide the court with sufficient information to allow it to gauge their reasonableness. What is required will vary depending on the circumstances of each case. In this case, however, the least that the court requires for the period in question is:
(1) a description of what work has been done and the relative complexity or sophistication of the work;
(2) the number of hours expended and the respective hourly rates;
(3) an explanation as to why the work was necessary and what it was intended to achieve;
(4) what has in fact been achieved as a result of the work performed. In particular what work has the liquidator done that has resulted in assets being realised and disposed of to the benefit of the estate and how has that work effected the prospects of realising further assets."

(v) Based on the authorities referred to above, before the court should be asked to approve liquidators' fees and expenses every effort should be made by the applicant to provide the court with proper evidence which clearly shows what was done, why it was done, why it was appropriate to do that work, and what the results have been.

(vi) Additionally, one of the liquidators should be present before the court, so as to allow examination by the court if appropriate (passage of Jessel MR in In re Great Britain Mutual Life Assurance Society (1880) 16 Ch D 246, 254 cited with approval).

(vii) The documentation before the court was fragmentary, unclear and contradictory in a number of material respects. It did not provide the information required by the court. Moreover, neither liquidator was present.

(viii) In the circumstances, it was not possible for the court to hear the application, which, therefore, would be adjourned.

AS

Editorial Note: For a further case concerning Company Law, see also In the Matter of Eurobank, noted under the heading of Criminal Procedure.

CRIMINAL LAW

Assault occasioning actual bodily harm - Threatening violence - Attempted murder - Causing grievous bodily harm – Uncorroborated evidence of complainant making inconsistent statements - Ingredients of offences - Proof of intention - Relevance of Nedrick virtual certainty direction - Weighing of evidence indicating intention - Multiplicity of convictions – Contempt application

R v Bernard

Grand Court (43/00)
Sanderson J
July 22 2002

Legislation

Penal Code Ss 86 192(1) 201 214
Evidence Law S 18 (C)

Authorities referred to

R v Howell [1982] QB 416
R v Walker and Hayles [1990] Crim LR 44
R v Nedrick [1986] 3 All ER 1
R v Moloney [1985] AC 905
R v Hancock and Shankland [1985] AC 455
R v Woollin [1999] 1 Cr App Rep 8
R v Lynch [1996] ECSCJ 47
R v Clayburn Ebanks (72 of 2002)
R v Prince (1986) 30 CCC (3d) 35
R v Logeman (1978) 5 CR (3d) 219
R v Earle (1980) 24 Nfld & PEIR 65
R v Pinkerton (1979) 46 CCC (2d) 284
Krug v The Queen (1985) 2 SCR 255

Authoritative work cited

Archbold, Criminal Pleading Evidence and Practice

Mr Roberts for the Crown
The defendant in person
Mr McGrath Amicus Curiae

The present prosecution of the defendant for four offences arose out of three separate incidents. The four Counts were as follows: i) assault occasioning actual bodily harm, ii)

threatening violence, iii) attempted murder and iv) causing grievous bodily harm. The complainant in relation to Counts i), iii) and iv) was the defendant's then wife, Mrs. Bernard (the "first complainant"). The complainant in relation to Count ii) was a colleague of the first complainant, Mr. McHayle, (the "second complainant'). Before considering the evidence, the learned trial judge, who was sitting as a judge alone, cautioned himself as to the following matters:

(a) As the defendant was unrepresented (although having the benefit of the advice of the *amicus curiae* if desired) his failure to testify would not result in any adverse inferences being drawn, although such was allowed for by the Evidence Law;

(b) As the defendant was a person of previous good character, he was entitled to the benefit of judicial notice being taken of this fact, leading to the presumption that his previous good record might mean that he was less likely than might otherwise have been the case to commit the offences alleged;

(c) Whilst the defendant had during the course of the trial conducted himself in such a way that much of the Crown's case had to be led in his absence, such conduct was irrelevant in determining his liability for the offences charged. Such conduct would, however, form the basis of contempt proceedings which would be heard after the conclusion of the trial.

The facts which gave rise to the present charges were as follows.

Count 1: Assault Occasioning Actual Bodily Harm:

The first complainant was an employee at Plantation Village Beach Resort. The second complainant was an employee at Plantation Village at the same time. The defendant conceived the idea that the first complainant and the second complainant were having an affair. Matters had reached the point that in order to keep the peace at home the first complainant had told the defendant that she no longer spoke to the second complainant. On December 21st the defendant had visited Plantation Village and had overheard the first complainant say "good morning" to the second complainant. A confrontation between the defendant and the first complainant ensued and this was continued and escalated that evening at the matrimonial home. The first complainant testified that during the evening she was beaten or kicked by the defendant on more than 10 occasions. It was also alleged that the argument was continued later that evening whilst the couple were in the defendant's car. The first complainant further averred that her efforts to jump from the moving car were thwarted by the defendant holding on to her. It was the first complainant's testimony that only after the car had come to a standstill did she get out. Following the intervention of a passer-by, the defendant drove off.

When the police arrived, the first complainant, not wishing to get the defendant into trouble, refused to give them his name and, indeed, denied that it was her husband who had assaulted her. She then spent the night at a friend's house, arriving home early the next morning where the argument with the defendant continued. The police were called

and the defendant was taken into custody. The first complainant then obtained medical treatment with her being found to have extensive facial swelling and bruising of about 4-5 inches on her right arm.

In his cross examination of the first complainant, the defendant referred to her original statement that the injuries had not been caused by the defendant and alleged that in making the accusations against him she had been lying to protect her sweetheart. The defendant further asserted that the first complainant's injuries had been caused by her jumping from the moving car. The first complainant denied that she had a sweetheart and re-iterated that the car had come to a standstill by the time she was able to get out of it.

Count 2: Threatening Violence:

Mr. McHayle was the complainant of this Count. He gave evidence that on December 22nd the defendant visited Plantation Village and told the complainant he wanted to talk to him. The defendant then told the complainant that Mrs. Bernard had lied to him in telling him that she no longer spoke to the complainant, although he had witnessed her doing so the previous day. The complainant testified that the defendant then stated that if he lost his wife he would kill him. An altercation then followed with the defendant becoming increasingly heated. Before leaving, the complainant alleged that the defendant stated that he would go to the complainant's house and kill his family. The complainant had responded, with a smile on his face, "I bet you never come". Notwithstanding the fact that he was smiling, the complainant asserted that he felt very upset and frightened by this encounter.

The Crown's case was that the defendant's conduct amounted to an offence contrary to s.86 Penal Code involving, *inter alia*, an intent to alarm, coupled with the commission of a breach of the peace. The defendant's case was that it was the complainant who had threatened him.

Count 3: Attempted Murder:

Mrs. Bernard was the complainant of this Count, the facts in support of which took place some four and one half months later. The complainant asserted that after the December assaults she moved out of the matrimonial home, but by March 2000 she had asked the police not to prosecute the defendant. Whilst she had not moved back into the matrimonial home, by this time intimate relations had resumed between them. On May 2nd the parties had lunch and the defendant asked the complainant to iron some shirts for him. The complainant's evidence was that on the drive home the defendant began to argue with her about her refusal to move back into the matrimonial home. The complainant made it clear to him that she would not do so unless he received counselling.

The argument continued at home whilst the complainant was in a bedroom ironing the defendant's shirts. The complainant asserted that the defendant then punched and kicked her and then threw her on the bed. He then picked up a machete, a butcher's knife and a paring knife which he had placed outside the bedroom door and stabbed the

complainant in the chest with the butcher's knife. The complainant further testified that the defendant also stabbed her above the left breast, in her head, above her right eye and that he cut both her hands as she was trying to fend off the attack. All of these allegations were supported by the physical and medical evidence, including a blood stained butcher's knife which was recovered at the scene.

The complainant asserted that when the attack was over the defendant repeatedly blamed her for what had happened. After a lapse of several hours from the time of the assault, the complainant testified that, at length, she persuaded the defendant to take her to hospital, but only after agreeing to fabricate a story that she had been found by the defendant after having been attacked by a jealous woman whose boyfriend she had been said to be having a relationship with. Before arriving at the hospital, the complainant averred that the defendant threatened to kill her and all her family and friends in the Cayman Islands if he were arrested. Whilst in the presence of her husband at the hospital the complainant maintained the fabricated story, but once alone with the police she alleged that it was her husband who had attacked her.

The attending doctors subsequently gave evidence to the court testifying to the seriousness of the injuries inflicted upon the complainant. Indeed, it was stated that the stab wound to her chest was just a few centimeters from her heart and had caused one of her lungs to collapse; had she not received medical treatment the injury would have been fatal. The medical examination also revealed that the complainant had sustained: an 8cm laceration to her face; a 5cm laceration above her right eye; a 7cm wound to her right hand, severing the tendons; a 5cm laceration to the back of her head; severe blood loss and clinical shock.

The defendant's case was that the complainant had attacked him and that her injuries had been caused by him acting in self-defence. He also relied upon her having given different versions of the incident at the hospital, claiming that this, together with the medication she had been on, made her an unreliable witness. In blaming him, the defendant asserted, she was part of a conspiracy with others (including, *inter alia*, the police and the court) to get a divorce, "put me away in prison" whilst maintaining her Caymanian status.

Count 4: Grievous Bodily Harm:

In the present count the Crown sought to rely upon the same facts which were cited in support of the attempted murder charge to support a charge against the defendant of causing grievous bodily harm.

The question for the court was whether it would be legally correct to convict on both Counts where the offences derived from the same facts. The common law in England and in Canada was in conflict. The English position was understood by the court to be that a defendant could be convicted of multiple offences arising from the same facts, but that the practice would normally be for the sentence for the lesser offence to run concurrently with the sentence for the greater. Conversely, in Canada, multiple convictions would not be allowed providing that there existed a sufficient factual or legal nexus between the charges.

Held: (convicting the defendant on Counts 1-3 and directing a stay of proceedings in respect of Count 4)

(i) Whilst it was dangerous to convict an accused on the uncorroborated evidence of a complainant where that individual had made prior inconsistent statements, there was ample corroboration of the complainant's injuries in the allegation of assault occasioning actual bodily harm from medical reports, the photographic evidence of police, and the statement of the complainant's friend with whom she had stayed on the night of December 21st.

(ii) None of the defendant's attempts to attack the complainant's credibility had been successful in causing the court to doubt her honesty. The reasons for the complainant having told untruths to the police and the defendant were accepted by the court.

(iii) The offence of assault occasioning actual bodily harm had accordingly been established by the evidence, namely that: a) the defendant assaulted the complainant on December 21st; b) he intended to assault her; c) her injuries were not caused by the complainant jumping from the moving car; and d) the complainant suffered actual bodily harm as a result of the assault.

(iv) The offence of threatening violence (against Mr. McHayle) had been made out. Referring to *Archbold* Criminal Pleading, Evidence and Practice and to R v Howell, a breach of the peace (an element of the s.86 offence) was committed, *inter alia*, where a person is in fear of being harmed through an assault.

(v) Approving the definition of assault as set out in *Archbold* (including the requirement of proof of a "hostile intention" on the part of the defendant and the apprehension by the complainant of immediate unlawful violence), the elements of the offence had been satisfied on the present evidence. The defendant had made the threats with the requisite intention and the fact that the complainant had laughed did not mean that he had not taken the threats seriously.

(vi) Whilst, in relation to the attempted murder charge, there were some inconsistencies in the complainant's evidence, and she admitted having told lies to the police and others, she had told the truth on every material issue. The complainant's evidence had also, in part, been corroborated by the evidence of the hospital staff and police.

(vii) In order to find the defendant guilty of attempted murder, it was necessary for the Crown to prove the existence of an intention to kill on his part at the time of committing the *actus reus*. This *mens rea* was accordingly more narrow and higher than that required to be established for the offence of murder. (R v Walker & Hayles).

(viii) In establishing whether the defendant possessed the necessary intention to kill on the present facts which involved a direct attack on the victim, the Nedrick/Woollin virtual certainty test was inappropriate. (R v Lynch followed).

(ix) Applying an unexplicated definition of intention (the simple direction), and having regard to all the relevant circumstances, including what the defendant himself said and did, the question remained, did the defendant have the intention to kill? The most significant fact was that the defendant had stabbed the complainant in the chest, barely missing her heart. The obvious inference from this fact was that at the time of this act the defendant intended to kill the complainant. His having placed the weapons outside the bedroom door was evidence of a deliberate plan which was more likely evidence of an intention to kill than to injure.

It was necessary, however, to take account of all the facts, both before and after the infliction of the first stab wound to the chest, to assist in determining the defendant's intention at the time of this act. In this connection, it was important to recognize that the injuries inflicted subsequent to the first assault were not life-threatening and were probably inflicted with an intention only to injure. On the other hand, the magnitude of the subsequent injuries may well have been reduced due to the defensive actions taken by the complainant.

It was also to be recognized that, whilst the defendant waited several hours before taking the complainant to hospital, he did eventually do so and it was this action which ultimately saved her life. There was no explanation favourable to the defendant, however, as to why he waited so long before seeking medical help. The inference to be drawn from his conduct subsequent to the attack was therefore that the defendant was not interested in saving the complainant's life, but was simply waiting to see if she would die. When she did not die it was only after he was persuaded that he would not go to jail that he had an apparent change of mind and sought medical help for her. It was also to be remembered that both before and after the assaults of May 2nd the defendant had threatened to kill the complaint. Taking into account all of the foregoing circumstances, the evidence of the defendant's intention to kill was overwhelming. It followed that he was guilty of the third Count as charged.

(x) The s.201 offence of causing grievous bodily harm did not require proof of any intention to cause such harm (R v Clayburn Ebanks). The question remained, however, whether it was legally correct to convict on this Count on the same facts used to support the attempted murder charge. Applying the extensive jurisprudence offered by the Canadian authorities (in preference to the English approach), and in particular that of R v Prince, multiple convictions would not be allowed where there existed a sufficient factual or legal nexus between the charges. On the present facts there was sufficient correspondence between an intention to kill with the knife and an intention to assault with the knife to satisfy the legal nexus test. Wherever a single wrongful act met the criteria in Prince (but not otherwise) the legislative intent was for that act to be the subject of a single conviction. It followed therefore that the law did not allow for multiple convictions in a case such as the present.

Even if the legal nexus test were not satisfied on the present facts it would be wrong to convict on both counts as Count 3 required a finding that the defendant had an intention to kill whereas Count 4 required only an intention to commit an assault. A stay would be entered in respect of Count 4 to allow the appellate court to set aside the stay and enter a conviction on this Count (the *actus reus* of which was clearly established) in the event that the present analysis of Prince was found to be incorrect or the conviction on Count 3 set aside.

(xi) During the course of the proceedings the defendant had conducted himself in such a way for it to be *prima facie* contemptuous. He was advised of this fact and told that at the end of the case he would be required to show cause as to why he should not be held in contempt. The defendant would be required to do so on the date when the present matter was set for sentencing. If he wished to have another judge hear the contempt application he would be heard on that matter at that time.

MD

Editorial note:

(i) At the sentencing hearing heard on September 3rd 2002, the defendant was sentenced to 14 years imprisonment.

(ii) It is noteworthy, as the present ruling confirms, that the offence of causing grievous bodily harm, contrary to s.201 Penal Code, has been interpreted to be an offence of constructive liability. The effect of this is that once the accused has committed an assault possessing mens rea for that offence, liability for the consequence of grievous injury becomes purely a matter of causation. Such a construction is the more objectionable when it is discovered that the s.201 offence carries a maximum sentence of life imprisonment.

For "constructive" liability the reader may therefore wish to substitute "strict" liability as illustrated by the following example:

D, for a prank, approaches V from behind, and discharges a fire cracker (or explodes a paper bag in his ear) at close range. This causes V to fear for his personal safety, and in his attempt to escape the apparent hazard, he stumbles over a protruding tree root and cracks his skull. Providing D possesses the mens rea for the assault, (why else other than to scare V did he do it?) all the ingredients of the s.201 offence are (remarkably) satisfied, with D being exposed to a potentially lengthy jail term.

The above example graphically illustrates the unacceptability of creating offences (particularly those which are serious) whose mens rea need not correspond to the result for which the accused is held accountable (murder, as currently defined in England and Cayman is another such offence). It can only be considered untenable to hold an accused responsible for a result which he may never have foreseen, far less intended, especially when the consequences of conviction are potentially so serious. It is therefore

hoped that the decision of the Grand Court in Clayburn Ebanks will be revisited or, better still, that s.201 Penal Code be revised to expressly inject into it a correspondence of mens rea with result. It is noteworthy that the equivalent English offence which also carries a maximum sentence of life imprisonment (s.18 Offences Against the Person Act 1861) requires proof of an intention to bring about the prohibited consequence, usually grievous bodily harm. Even s.20 of the English Act (carrying a maximum sentence of 5 years' imprisonment) requires proof of at least recklessness (subjectively defined) as to the causing of some harm (R v Mowatt [1967] 3 All ER 47). As such, it has a stricter mens rea requirement than the much more serious s.201 offence.

A like concern to the one presently expressed has been articulated in England with regard to the limited mens rea applied to Offences Against The Person Act 1861, s.47 which, in common with s.201 offence, requires proof only of an intention (or recklessness) to commit an assault (R v Savage, R v Parmenter [1991] 4 All ER 698). As has been emphasised, unlike the s.47 offence, s.201 carries a maximum term of life imprisonment, thus making the present entreaty for reform the more urgent.

CRIMINAL LAW (SENTENCING)

Sentencing – Crown appeal against lenient sentence – Drugs trafficking offences – Rehabilitative rather than deterrent approach

Regina v E

Grand Court (316/01)
Smellie CJ
January 10 2002

Authorities referred to

R v Djahit [1999] 2 Cr App R (s) 142
R v Derry Ebanks (unreported, 3 Dec 1999)

Mr Roberts for the Crown
Mr Lloyd Samson for the respondent

This was an appeal by the Crown against sentences imposed upon the respondent in the Summary Court.

The respondent was sentenced by the Learned Magistrate after being tried and convicted of the offences of possession of cocaine (1.845g) with intent to supply and possession of ganja (1.277g) with intent to supply. The sentence imposed for the offence involving cocaine was two years imprisonment suspended for two years and for the offence involving ganja, 9 months imprisonment suspended for two years.

Other offences to which the respondent pleaded guilty were dealt with at the same time. These did not involve an element of trafficking but personal consumption. The respondent had relevant previous convictions for offences of refusing to give a specimen and for possession of ganja.

Held: (upholding the sentence imposed by the Learned Magistrate)

(i) Notwithstanding that the respondent had failed to show contrition in having to be tried to conviction and despite his previous convictions for possession and consumption, the Learned Magistrate was entitled to exercise her discretion in treating the case in an exceptional manner. The Learned Magistrate had identified three factors of significance before passing sentence:

(a) That, unlike a great majority of defendants that come before the courts charged with similar offences, the defendant had not re-offended whilst on bail;
(b) the defendant had complied with the terms of his bail requiring him to go to counselling;
(c) he had found himself gainful employment.

Citing the case of Djahit, the Learned Magistrate had concluded that the defendant's personal circumstances could serve to persuade the Court to reduce his sentence for what may be termed as "low-level dealing" and further that if a defendant were able to show that he was no longer addicted to drugs, as this defendant had done, a further reduction could be allowed.

(ii) Serious though drug trafficking offences are, they do not carry mandatory terms of immediate imprisonment. While the sentencing tariffs and guidelines are to be followed and rigorously applied, they are not cast in stone. There must be room for dealing with the exceptionally, or even, unusually difficult case where a Court might properly conclude that the interests of justice would be best served by allowing a defendant the chance to become rehabilitated.

(iii) Where there is low-level dealing and the personal circumstances of the defendant suggest a potential for rehabilitation, an emphasis upon rehabilitation rather than deterrence is not wrong in principle.

(iv) However, in all but the most exceptional or unusual cases of possession with intent or other form of trafficking in hard drugs, an immediate and significant term of imprisonment will be the consequence as recognised in R v Derry Ebanks.

DB

CRIMINAL PROCEDURE

Liquidator's role – Criminal proceedings – Duty of prosecution – Pre-trial disclosure

In the Matter of Eurobank (in liquidation)

Grand Court (379/99)
Smellie CJ
January 22 2002

Legislation

Criminal Procedure and Investigation Act 1996 Ss 3 7 9

Authorities referred to

R v Brown [1998] 1 Cr App R 66
R v Keane [1994] 1 WLR 746
R v Ward (1993) 96 Cr. App R 1
R v Melvin (unreported December 20 1993)
R v Maguire and others (1993) 94 Cr App R 133
R v Sansom and others (1991) 92 Cr App R 113
R v Lawson (1989) 90 Cr App R 107

Works referred to

Attorney-General's Guidelines (1982) 74 Cr App R 302
Archbold Criminal Pleading Evidence & Practice (1995 ed) para 4-268

Mr Jones for the Liquidator
Mr Akiwumi for the Crown
Mr Thompson for the defendant Stewart in related criminal proceedings
Mr McField for the defendant Taves in related criminal proceedings
Mr Walters for the defendant Cunha in related criminal proceedings

The Liquidator (Eurobank) brought an application for directions upon the invitation of the Court given in the context of an earlier pre-trial hearing in related criminal proceedings. In those criminal proceedings, four defendants were charged with conspiracy and related money laundering offences in respect of their alleged conduct as former employees or officers of Eurobank. A fifth defendant, Taves, was charged in relation to his dealings with certain accounts which were held at the bank either on his, or his son's Kenneth Taves', behalf. Kenneth Taves was charged in this jurisdiction but was not indicted, as he was awaiting sentencing in California for related offences there.

The status of the Liquidator evolved from being a third party to the criminal proceeding (with very limited duties of production to the Court or the Crown), to a co-defendant not to be prosecuted until after the trial of the individuals (as per the order 15th November 2000, having no duty of disclosure other than notice of alibi) to being the primary witness for the Crown. The Liquidator and the defendants who were former employees or officers of Eurobank had access to relevant, and potentially relevant, confidential business records that were not seen by the defendant Taves.

Prior to the application the defendants (including Taves) and the prosecution had agreed to the production and disclosure of a schedule of documents (being relevant to the criminal proceedings) to the defendants (excepting Taves) held by the Liquidator, and notionally, by the Crown. The conspiracy and money laundering charges against the former officers and employers were to be based on hundreds of thousands of documents and materials generated in many transactions. The Crown initially had agreed to vet for relevancy the scheduled documents (and the court so ordered on 30 November 2001), but due to time and resource limitations sought an alternate arrangement was sought wherein the Liquidator would produce the scheduled documents to the defence (excepting Taves) without vetting. The court was required to determine the principles and practicalities of the law of pre-trial disclosure in criminal proceeding before giving directions to the Liquidator. The court was mindful of its duty of fairness, and the need for proper case management and the fast approaching trial date.

Held: (application granted)

(i) The Liquidator, being the primary Crown witness notionally placed into the control of the prosecution any materials relevant to the case even though the prosecution team had not read or taken delivery of all the materials. Any doubt in the present case was removed by the Order of 30th November 2001.

(ii) Those representing the Crown must act as Ministers of Justice. It was inappropriate for the prosecution team not to move quickly to review the materials which were at their disposal (R v Sansom and others). The prosecution was expected to identify before trial the documents upon which it intended to rely. Both the prosecution and the defence had a duty to co-operate with the Court in its efforts to manage the proper, timely disposal of a case.

(iii) Although the Criminal Procedure and Investigation Act 1996 was largely based on common law principles, it did not apply locally. The common law principles stated by the House of Lords and the Court of Appeal were strongly persuasive.

(iv) The main speech on behalf of the House of Lords made by Lord Hope in R v Brown was applied to this jurisdiction: 'If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. ... The great principle is that of open justice. It would be contrary to that principle for the prosecution to withhold from the defendant material which might undermine their case against him or which might assist his defence' (p.70E).

(v) Material which might assist the defence was not limited to evidence which would obviously advance the defence case. The defendant was to be afforded the opportunity of considering all the material evidence which the prosecution had gathered (R v Ward).

(vi) The test of materiality found in R v Melvin and adopted in R v Keane was applied. Information was material in the realm of disclosure if it was 'seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).' Disclosure may be required not only because it has some bearing on the offence(s) charged but also because it has some bearing on the surrounding circumstances of the case. R v Lawson.

(vii) The Crown may seek to withhold evidence which is not exculpatory on the grounds of the public interest or another recognised basis, and the court may rule on that issue. R v Keane.

(viii) The duty of disclosure on the prosecution existed whether or not a specific request was made by the defence and it continued at all stages throughout the criminal proceedings. Counsel was not to be excused on the basis that he was not made aware of material information. R v Maguire and others.

(ix) The content of the disclosure made by the prosecution as between defendants was variable and dependant on the circumstances, as in this case as per Taves.

(x) Failure by the prosecution to disclose material evidence was capable of constituting a material irregularity at trial. R v Maguire and others.

(xi) To assist the prosecution in complying with its duty in complex cases it was appropriate for the defence to provide an indication of its defence. Adopting R v Keane (p.752G): 'the more full and specific the indication the defendant's lawyer give of the defence or issues they are likely to raise, the more accurately both prosecution and judge will be able to discuss [where objection is taken to disclosure by the prosecution] the value to the defence of the material'. The defence had properly assisted in this regard.

(xii) In cases which involved unwieldy or voluminous amounts of prosecution unused material, eg exceeding 50 pages or being unsuitable for copying, the defence attorney was to be given an opportunity to inspect it at a convenient location, and to receive copies of selected material, subject to public interest immunity. Guided by the original (UK) Attorney General's Guidelines.

(xiii) Once the duty of prosecution has been satisfied the investigation and preparation of the defence case is a matter for the defence. R v Brown.

(Editorial note: This order was also made in the course of the related criminal proceedings of R v Stewart, Cunha, Burgess, Donegan, Taves.)

JE

EVIDENCE

Trial on Indictment – Evidence Law s18(c) – Defendant failing to testify – Inferences permissible to be drawn by the jury – Direction to jury in relation to a mixed police interview

Regina v Herman Byrd and others

Grand Court (24/01)
Graham J
April 15 2002

Legislation

Evidence Law (1995R)

Mr Roberts and Ms Smith-Andalcio for the Crown
Mr Samson for the defendant

The Defendant was charged, inter alia, with two offences of arson contrary to s 250 Penal Code. The offences allegedly arose out of the prison riots on the 30th September 2000. One of the counts related to the alleged arson of a classroom, the other of a prison truck.

In interview, the defendant denied both charges but admitted to cutting the hosepipe of a fire tender being used to quash the truck fire. The defendant decided neither to testify at trial nor to call any witnesses on his behalf.

The issue arose as to how the jury should be directed on the defendant's failure to testify.

Held:

(i) In relation to a defendant's failure to testify, the jury should be directed in accordance with s18(c) of the Evidence Law, which states:

Section 18
"Every person charged with an offence, and the spouse of a person so charged, is a competent witness for the defence at every stage of a proceedings, whether the person so charged is charged solely or jointly with any person:

Subsection (c) provides:
"The failure of any person charged with an offence, or the spouse of such a person, to give evidence shall not be made the subject of any comment by the prosecution but the Court or jury may draw any reasonable inference from such a failure"

(ii) Graham J noted that it had been suggested to him that s18(c) of the Evidence Law had never been implemented by the courts and that it had lain fallow. For this reason he ruled that the direction given to the jury in this case should be published in a formal judgment.

The direction is as follows:

"Herman Byrd did not give evidence. He is entitled to take that course. The burden of proof being always upon the Crown. He is entitled to say to the Crown "prove your case against me if you can". The fact that Byrd has exercised his right not to give evidence proves nothing in itself. In itself, it is entirely neutral. In respect of the interview record he has made, which I have just read out to you, admissions are made or what you decide were admissions. There are also denials. (The admissions that were made were in respect of the cutting of the hosepipe).

Ladies and gentlemen, you must take the interview as a whole but you may think that where admissions were made, for example egging on the prisoners or the cutting of the pipe, they are more likely to be true because he has made an admission against his interest. Where he makes denials, they ought to be considered by you, but they have less weight because, of course, they are not supported by his giving evidence on oath in the witness box before you. In other words, there are matters that he has chosen not to support by giving evidence about them. Ladies and gentlemen you will have to look at the statement as a whole, as I have said, and judge it.

There is a further matter for you to consider which I have just dealt with by my reading out the statement of our law. If you were to decide that the evidence on any particular matter, for example the alleged arson on the classroom, or the evidence as to his alleged setting fire to the truck, creates a case for him to answer, or on either of those matters, you may think that the defendant would have gone to the witness box to give an explanation, or an answer to it or them, but, if in your judgment the only sensible reason for his decision not to give evidence is that he had no explanation to give or none that would stand up to cross examination, then it would be open to you to hold his failure to give evidence against him. That is to say, to take it into account as an additional support for the prosecution's case, it is for you to decide whether in all the circumstances you draw that inference or you do not.

Ladies and Gentlemen, you must make a separate decision in respect of each of the alleged arsons. The Crown has got to prove its case against Herman Byrd so that you are sure of it. You are entitled, having put yourself through the mental

exercise that I have suggested to you, to decide whether you take his failure to go into the witness box and give an explanation about these matters against him. But before you do you will have to be satisfied individually on the alleged arson of the classroom and/or the alleged arson of the truck that there exists a strong prima facie case against him so that you would expect him to give an answer to it. I repeat, the fact that he has not gone into the witness box does not itself strengthen the prosecution's case one iota."

(iii) In the event, the jury acquitted the accused on the alleged arson of the classroom but convicted him of the arson of the prison truck.

DB

(Editorial note: The significance of a defendant's failure to testify was also noted in R v Bernard, summarised under Criminal Law.)

FAMILY LAW

Ancillary relief – Maintenance – Division of assets – Equality principle – Behaviour – Violence – Lump sum

PQ v RS

Grand Court (D44/98)
Smellie CJ
January 30 2001

Legislation

Matrimonial Causes Law (1997 Revision) S 19
Matrimonial and Family Proceedings Act 1984 S 3

Authorities referred to

Jones v Jones [1975] 2 All ER 12
Kyte v Kyte [1987] 3 All ER 1041
White v White [2000] 1 All ER 1

Ms Brooks-Hurst for the petitioner
Mr Boni for the respondent

The parties, both in their mid-fifties, were married for five years, and there were no children from their union. The respondent brought relatively little to the marriage in terms of assets. The petitioner had rental income in the amount of $1500 per month from a property. The petitioner was in poor health and had suffered a disability of the spine as a result of the respondent's violence towards her. Medical evidence indicated that she could not work as she previously had as a secretary. The respondent earned a salary of $4500 per month in addition to pension and health benefits. Also he had a major share in a service company. The parties sought the resolution of matters ancillary to their divorce.

Held: (application granted)

(i) The respondent was required to disclose the affairs and records of his small company as his own entitlements, actual or potential, were relevant under the Matrimonial Causes Law.

(ii) In the absence of clear evidence and full disclosure, the court found against the respondent, and assumed that he would receive dividends from the company in the future.

(iii) The conduct of the respondent was taken into account pursuant to the phrase in section 19 of the Law, 'the deserts of the parties'. 'The term ... connotes an unrestricted obligation and discretion in the court ultimately to do what is just between the parties.' The wording of the Matrimonial and Family Proceedings Act 1984 was different, but general guidance was found in Jones v Jones and Kyte v Kyte.

(iv) The case of White v White was distinguished as one party had brought almost all of the assets to the marriage. The petitioner had purchased the matrimonial home with the proceeds of the sale of other properties and a bank loan, although it was registered jointly. After the breakdown of the marriage the property was improved by the respondent in the value of $45,000. The petitioner was awarded the matrimonial home without compensation to the respondent. The lack of compensation was intended 'partially to compensate her loss due to his conduct'.

(v) An award of maintenance was made in the lump sum amount of $40,000, reflecting the likely net savings after a period of five to ten years of employment as an experienced secretary.

JE

In the Matter of the Guardianship and Custody of Children Law and in the Matter of Two Minors

Grand Court (201/98)
Kellock J (Acting)
January 18 2002

Legislation

Guardianship and Custody of Children Law (1996 R) S 19

Authority referred to

Barnardo v McHugh [1891] AC 388

Mr Furniss for the applicant father
Ms Brooks for the respondent mother

Proceedings were commenced by the grandfather seeking his appointment as guardian of his two grandsons and for an order granting to him their custody, care and control. Graham J ordered *ex parte* that the children be made wards of the court, and granted care and control to the applicant. Later it was agreed by the parties that for the proceedings to continue under the provisions of the Guardianship and Custody of Children Law it was appropriate that the court order *nunc pro tunc* that the father be made the applicant.

The parents of the children were never married, and subsequent to their relationship each were married to other people. There was some violence by the applicant towards the respondent during the course of their relationship. In 2001, Smellie CJ enjoined the applicant from engaging in inappropriate conduct towards the respondent. The respective spouses were not able to function civilly in the presence of the other or the extended families.

The children, now aged 7 and 6 years, were cared for from birth to ages 3 and 2 years by the paternal grandparents. Since that time they were moved back and forth between the parties.

Held:

(i) The common law as stated in Barnardo v McHugh favoured the desire of the mother in determining custody of children born out of wedlock. The language of section 19 of the Guardianship and Custody of Children Law superseded the common law, and in consequence the welfare of the children was the paramount consideration.

(ii) Social Enquiry Reports were to be used to assist the court in making an order. The children were to remain wards of the court until further order. The custody and day to day care and control of the children was made the joint responsibility of the parties.

(iii) The parties were to attend mediation sessions to assist them to resolve their issues and work towards co-parenting the children, and the grandparents and the parents were to attend family therapy sessions.

(iv) The youngest child was to reside with the respondent, and after an adjustment period of one month, the oldest child was to begin to reside with the respondent.

(v) The respondent was granted 'liberal' access, but the order enjoining him from inappropriate behaviour was continued.

(vi) Liberty to apply in the event of a significant change in circumstances.

JE

Ancillary Relief – Maintenance – Division of assets – Equality principle

TH v SH

Grand Court (D163/98)
Smellie CJ
August 31 2001

Legislation

Matrimonial Causes Law (1997 Revision) S 23

Authority referred to

White v White [2000] 3 WLR 1571

Ms Nervik for the petitioner
Ms Brooks-Hurst for the respondent

The parties were married in December 1988 and they were divorced in November 1999. Their union produced four children ranging in age from 12 to 4 years of age. The petitioner had a son from an earlier relationship, who became a child of the marriage and was 16 years of age, at the date of the hearing of the ancillary matters, being July 10 2001. The respondent agreed that the continued occupation of the matrimonial home by the petitioner and the children was appropriate.

Held: (granting order)

(i) The parties were granted joint custody of the children with the petitioner being awarded daily care and control of the children and occupation of the matrimonial home. The suitability of the parenting skills of the parties was raised in the social welfare report. In consequence, the parties were ordered to engage in mediation and counseling, and the family mediator and counselor was ordered to report the results of the sessions to the court.

(ii) The respondent had a monthly income of $7800 and the petitioner, engaged part-time by a new employer, had a monthly income of $2000. The respondent was ordered to pay monthly maintenance for the five children in the amount of $500 per child. Maintenance for the child, aged 16, was ordered to continue until the age of 21 years provided that he continued to purse full time education. The same order was applied to the younger children in the event they pursued full time education.

(iii) The parties were given liberty to apply for variation on all ancillary issues during the minority of any of the children.

(iv) While the respondent did not concede the point that the petitioner had contributed as much as the respondent to the development of the family construction business, the respondent did not disagree with the applicability of the 'principle of equality of treatment', pronounced by the House of Lords in White v White. The respondent was allowed to continue operating the family construction and property development company (including responsibility for its debts), but was ordered to transfer his interest in the matrimonial home to the petitioner free and clear of the bank mortgage (currently serviced at $1633 per month), and to repay the company's indebtedness to the petitioner over 48 months beginning upon the retirement of the mortgage.

JE

Divorce – Bars to divorce.
Ancillary Relief – Maintenance.

SW v KW

Grand Court (D101/97)
Kellock J (Acting)
January 15 2002

Ms Thompson for the petitioner
Personal appearance by the respondent

Legislation

Matrimonial Causes Law (1997 R) Ss 10 19

Authority refered to

Henderson v Henderson [1944] AC 49

The parties were married in 1995, separated in August 1997, but resumed cohabitation from late December 1997 until June 2001. The divorce petition, based on adultery, was proven on 12 December 1997, but the divorce order was postponed until the resolution of the ancillary relief issues. A child was born to the parties in 1999. An interim maintenance order of $200 per month was made in November 2000. During the proceedings the child was diagnosed as suffering from pervasive development disorder, and, subject to further evaluations may require special treatment which was expected to be expensive. The parties jointly owned an apartment complex which was subject to a large mortgage. The equity in the complex was predicted to be $220,000, of which the petitioner sought 70 %. The respondent failed to pay the interim maintenance order and the petitioner sought an accounting and payment of the arrears from the proceeds of the sale of the complex.

Held: (declaration and ancillary relief)

(i) While the petition was proven the divorce was not granted as the ancillary relief matters had not been determined, see Matrimonial Causes Law s 10 and rule 19. Condonation was not a bar to divorce unless the statute expressly provided; which it did not. Alternatively, the judgment of Viscount Simon LC in Henderson v Henderson applied to excuse the conduct of the wife and allow the granting of the decree. Viscount Simon said (at p 53) 'It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse...'.. In spite of the extended cohabitation, no party took issue. There was no bar to the divorce in this case.

(ii) The petitioner was awarded care, custody and control of the child of the marriage, with reasonable access to the respondent.

(iii) The respondent's income was found to be $2060 per month, and taking into account his living expenses, he was ordered to pay the petitioner for the maintenance of the child $400 per month.

(iv) The respondent was to receive 50% of the net income from the apartments until the sale of the apartment complex could be concluded, but he was ordered to vacate within 21 days the apartment that he occupied rent-free.

(v) The parties were ordered to retain a broker to sell the apartment complex, and to sign the transfer of property forms in the event that the broker advised that a reasonable arrangement for the purchase was made.

(vi) The court deferred the final orders pending the completion of the sale of the apartment complex.

JE

IMMIGRATION LAW

Caymanian status – Naturalisation – Residency – Moratorium directed by Governor in Council - English law relevant to the Cayman Islands

Warren v The Immigration Board

Grand Court (327/01)
Graham J
April 10 2002

Legislation

Immigration Law (2001 Revision) Ss 17 and 18
Caymanian Protection Law 1984 Ss 18(1), 19(5) and 71(3)
Bill of Rights 1689 Article 1
Colonial Laws Validity Act S2

Authorities referred to

Cooper v Stewart (1889) 14 AC 296

Works referred to

Roberts-Wray Commonwealth and Colonial Law
Davies The Legal System of the Cayman Islands

Mrs Brooks-Hurst for the plaintiff
Mr Hall-Jones for the defendant

The plaintiff, a Honduran national, was married to a Mr. D.E. Warren on the 11th September 1980. Mr. Warren was also a Honduran national, although he had lived in the Cayman Islands since 1962. On 8th October 1990, the plaintiff was granted a Certificate of Naturalisation as a British Dependent Territory citizen and subsequently, two months later she applied for Caymanian status on the basis of this naturalisation.

The then Caymanian Protection Board (now Immigration Board), acting in accordance with a Direction made by the Governor of Council, believed that they were precluded

from granting status either on the basis of naturalisation or residency. Instead, having mistakenly assumed that Mr. Warren had Caymanian status, the Board decided to grant Mrs. Warren status on the basis that she was the spouse of a person who possessed Caymanian status and had been ordinarily resident in the Islands for a period of three years immediately preceding her application.

On 1st September 1998, the plaintiff obtained a decree absolute of divorce from her husband and on 28th October 1998, she applied to the Immigration Board continuation of her Caymanian status in spite her divorce. On 28th March 2000, following the discovery by the Board of the mistake in relation to Mr. Warren, the plaintiff was informed that the decision to grant her status in 1990 therefore void. Accordingly, the plaintiff was directed to apply for a work permit. Upon appeal to the Governor, the plaintiff was advised to pursue the matter in the Courts.

Leave was granted by Sanderson J on the 2nd October 2000 to challenge the legality of the revocation of her status and to challenge the purported moratorium on the granting of status on the basis of naturalisation and residency.

Held:

(i) Notwithstanding that the plaintiff had since been granted Caymanian status on the basis of her naturalisation on 21st November 2001, the Court could still determine whether the decision to revoke the plaintiff's status and the moratorium itself were lawful.

(ii) The date of effective settlement in the Cayman Islands was 1734 and the settlors brought with them all suitable English laws in force at the time of settlement. This, it was found, included the Bill of Rights and in particular, Article 1, which provides that "the pretended power of suspending Laws or the execution of Laws by regal authority without consent of Parliament is illegal." It follows that the Direction form the Governor in Council establishing the moratorium on the granting of status based upon naturalisation and residency was in breach of the Bill of Rights.

(iii) Even if the Bill of Rights had not been enacted, the Direction was still unlawful, since it purported to direct the Board to ignore the law. The Governor in Council was required to fix an annual quota and once that was done, it was the duty of the Board to implement it.

(iv) Accordingly, no proper adjudication of the plaintiff's application for Caymanian status on the basis of naturalisation took place until the recent grant in 2001. The decision of the Board to change the basis of the plaintiff's initial application without consulting her breached the rules of natural justice and the subsequent decision to award status in 1990 was made on the basis of mistakes both as to fact and law and was thus ultra vires and without legal effect. The Court cannot, however, speculate what might have happened had the moratorium not been in place and as such, no damages can flow from the decision of the Board that the original grant of status was void.

(v) The Board will pay half of the plaintiff's costs to be taxed if not agreed.

VC

LAND LAW

Sale of apartment to be constructed – Vendor inadvertently overstating area of apartment – Whether specific performance to be ordered

Micro Industries Inc v Condoco Grand Cayman Resorts Ltd

Grand Court (721/01)
Sanderson J
May 14 2002

Legislation

Grand Court Rules O 70
Evidence (Procedure in Other Jurisdictions) (Cayman Islands) Order 1978
Supreme Court Practice (1999)

Authorities referred to

Bellotti v Chequeres Development Ltd [1936] KBD 89
Watson v Burton [1956] 3 All ER 929
Eastwood v Ashton [1915] AC 900
Wallington v Townsend [1939] 2 All ER 225
Webb v Nightingale (1957) 169 EG 330
Horne v Struben [1902] AC 454
Day v Wells (1861) 30 Beav 220
Wood v Scarth (1855) 2 K & J 33
Thomas Bates & Son v Wyndhams [1981] 1 WLR 505
Johnson v Agnew [1979] All ER 883
Carpenters Estates Ltd v Davies [1940] 1 All ER 1
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1 All ER 664
Coca-Cola Corp v Finset International Ltd [1998] QB 43
Wernets LDC v Codoco Grand Cayman Resort Ltd (Grand Court, Cause 332/01, 1 October 2001)
National Westminster Bank v Daniel [1994] 1 All ER 156
Banque de Paris et des Pays-Bas (Suisse) SA v de Narary [1984] 1 Lloyd's Rep 21
Charnjit Singh Gill v Don Marvin Seymour (Court of Appeal, Appeal 16/01)

Works referred to

Lewison The Interpretation of Contracts
Treitel The Law of Contract

Mr Broadhurst for the Plaintiff
Mr Dobyn for the Defendant

The plaintiff applied for summary judgment for specific performance of a contract of sale and purchase of a condominium apartment.

The apartment was not constructed at the time of agreement. The written agreement, dated 7 February 2000, provided that apartment contained "approximately 5490 square feet of livable area... the relative layout of which apartment is shown on appendix B." Appendix B stated that the total area was 5490 square feet. Appendix B showed the dimensions of various rooms apparently drawn to scale, so that the dimensions of the whole area could potentially be calculated.

The plaintiff purchaser paid a deposit of $1.55m. The discrepancy came to light in August 2000. The defendant asserted that the figure of 5490 square feet was a mistake resulting from a calculation error by an architect, and that the correct area shown in Appendix B was to be calculated at 4444 square feet, a difference of 19.05%. The plaintiff commenced proceedings for breach of contract, claiming specific performance or damages.

The defendant argued-
1. that the difference in size fell within the meaning of the word "approximately";
2. that the contract was to be construed so as to base the calculation of the square footage on the plan in Appendix B. Since it contained the true dimensions of the apartment, it should take priority over the wording of the contract referring to "approximately 5490 square feet";
3. that there was a mistake;
4. that there was a triable issue whether specific performance might be awarded at trial.

Held: (declining summary order for specific performance)

(i) A difference of 19% was not within the meaning of "approximately." There was a real and marked difference, and the size of an apartment was a key factor in a decision to purchase.

(ii) The agreement's reference to the drawing was intended to show the layout of one room to another, their locations, etc, and it was not intended to depict the exact dimensions of the apartment. Accordingly the dimensions on the plan in Appendix B should not be construed as dominant over the square footage stated in the agreement.

(iii) There was no mutual mistake. The plaintiff had not mistakenly agreed to 5490 square feet. That was exactly what it had bargained for and what the contract specified.

(iv) The defendant did intend to convey an apartment of 5490 square feet but that intention was based on a unilateral mistake caused by miscalculation. The defendant could not rely on such a unilateral error to avoid its contractual responsibilities. For such a defence the defendant would have to show that the plaintiff was aware of the mistake and failed to alert the defendant. That was not applicable here.

(v) Specific performance was an equitable remedy and the court was entitled to consider all factors that equity required to be examined, including hardship and mistake. Unilateral mistake may not constitute a defence to damages, but could be a defence to specific performance. Undue financial hardship on the defendant could also justify a refusal of specific performance.

(vi) A property's uniqueness was a factor to be considered in determining whether or not to order specific performance. Because the defendant was willing to construct an apartment of 4444 square feet with the other features that the made the apartment unique, there was a triable issue whether the altered square footage was of sufficient importance or uniqueness to allow specific performance or merely damages.

(vii) The defendant would be allowed to defend the claim for specific performance but not the damages claim.

SAAC

Sale of apartment to be constructed – Sale to be made to company as yet unincorporated – Rescission of contract – Proper party to serve notice to rescind

XXX LDC v V Ltd

Grand Court (332/01)
Kellock J (Acting)
Oct 1 2001

Legislation

Grand Court Rules O14
Companies Law (2001 2nd Rev) s81

Authorities referred to

Home & Overseas Insurance Co Ltd v Mentor Insurance UK Co Ltd [1990] 1 WLR 153
National Westminster Bank v Daniel [1994] 1 All ER 156
Banque de Paris et des Pays-Bas (Suisse) SA v de Narary [1984] 1 Lloyd's Rep 21

Mr Broadhurst and Mr Broadhurst for the Plaintiff
Mr Moses and Mr Joseph for the Defendant

The plaintiff applied for summary judgment for $1.05m paid to the defendant pursuant to a contract of sale and purchase of a condominium apartment. The plaintiff claimed that the contract had been rescinded according to its terms.

CB negotiated for the purchase of the apartment with the vendor's sales manager. CB indicated that she would need a partner to join in the purchase. Initially both the vendor and CB understood that the final sale would be to a company to be incorporated in the Cayman Islands by the name "XXX LDC". The contract of sale was originally drawn up with the purchaser's name as "XXX LDC", but the letters "LDC" were deleted as that company had not yet been incorporated. Nevertheless, the testimonium clause was signed "XXX a Cayman Islands corporation per pro CB Director."

CB paid a deposit of $1.05m pursuant to the contract. The company XXX LDC was then incorporated as planned. The company claimed it had ratified the pre-incorporation contract in accordance with the Companies Law. At a later point, the company sought to rescind the contract. The basis for rescission was an express term allowing the purchaser to rescind if the vendor failed to become the registered proprietor of the leasehold title of the property within twelve months of the payment of deposit.

The vendor acknowledged that it had not become registered proprietor within the requisite time period, but argued that there was no right to rescission as the current registered proprietor of the lease held it on trust for the vendor, who was entitled to call for a formal lease.

The vendor also argued that the contract was made with a partnership of the name "XXX", and was not a contract on behalf of the company "XXX LDC". The vendor argued that, according to express contractual provision, the benefit of the contract could not be assigned to the plaintiff without the defendant's consent, and therefore XXX LDC could not rescind and demand repayment.

Held: (ordering repayment)

(i) The documents providing for XXX LDC's entitlement to call for a transfer of the legal title to the leasehold were not put in evidence, and could not be sustained. The right to rescind could not be disputed on this ground.

(ii) When CB executed the agreement she intended to do so on behalf of the company to be incorporated. The use of the name 'XXX' (without 'LDC') in the contract merely reflected the fact the company had not by then been

incorporated. When the vendor took the view that it was contracting with a partnership under the name 'XXX' rather than with a company to be incorporated, this view was not communicated to CB or her partners, and could not be relied upon. The contract was therefore to be treated as entered into on behalf of the then unincorporated company XXX LDC as purchaser, rather than by a partnership.

(iii) The right of rescission had been properly exercised. Judgment for plaintiff for $1.05m with interest at 8% from the date of the notice of rescission.

SAAC

Sale of land – Contract requiring staged payments – Rescission of contract by vendor – Whether vendor entitled to claim unpaid arrears of the staged payments after rescission

G Ltd v B

Grand Court (434/01)
Kellock J (Acting)
Jan 21 2002

Legislation

Grand Court Rules O15
Penal Code s106

Authorities referred to

R v Burgess (1886) 16 QBD 141
Haynes v Hirst (1927) 27 SRNSW 480
Stockloser v Johnson [1954] 1 QB 476

Works referred to

Halsbury's Laws of England
Spry Equitable Remedies

Mr Giglioli for the Plaintiff
Mr Allen for the Defendant

G issued a writ inter alia for the sum of $97,918.37 in respect of payments due under a contract for the sale of land dated July 1997.

By the agreement, B agreed to purchase a group of tenanted apartments from G. The contract required that B pay the purchase price by certain instalments of principal and interest on certain dates.

After a period, B started to pay instalments after the due dates. G's attorney wrote to B to induce her to pay the instalment arrears, and to induce her to turn over the rents (to which G was not entitled). G then, in accordance with the contract, demanded that B pay all the outstanding sums due under the contract. B did not comply with this demand.

On March 29 2001, G's attorney sent a letter to the tenants stating (1) that B had no authority to act for G, (2) that rents must be paid directly to G's attorney, and (3) that in default the tenants would be liable to eviction and action to recover the unpaid rents.

On May 2 2001, G served notice of its election, in accordance with the contract, to treat the contract at an end, to resume possession of the property free from any interest of B, and to keep all payments already made by B.

G sought payment of the sums which were accrued but unpaid prior to May 2.

Held: (declining summary judgment against defendant and dismissing plaintiff's claim)

(i) On rescission, the contract only provided for G to keep "instalments paid". Applying the principle *expressio unius exclusio alterius*, there was no contractual entitlement to sue for instalments due but unpaid at the time of rescission.

(ii) Furthermore, to rescind and seek further sums in damages would constitute the pursuit of fundamentally inconsistent remedies. This was true notwithstanding that the contractual provision for rescission was expressed to be without prejudice to other remedies. Haynes v Hirst followed.

(iii) Accordingly, G was not entitled to recover the sums in arrears but unpaid.

(iv) For the same reasons, G was equally unable to recover the property outgoings (including insurance and utilities) which G paid out after taking possession.

(v) Until May 2 2001, G had no entitlement to recover possession from B or disregard her entitlement. So any money received between March 29 to May 2 2001 must be repaid to B with interest. The contractual provision for rescission constituted no bar to B's claims in contract or tort.

(vi) Because B's conduct, while acting in person, was characterised by delay and by filing documents which were not in the proper form, there would be no costs to either party.

SAAC

Editorial Note: For a further case concerning Land Law, see Smith v Smith, noted under the heading of Civil Procedure.

PLANNING LAW

Planning permission – Breadth of existing access road – Objection of adjacent owner.
Planning permission – Duty of tribunal to give reasons.

Frank Hall Homes Ltd v Planning Appeals Tribunal et al

Grand Court (171/01)
Graham J
March 14 2002

Legislation

Roads Law (1998 Revision)
Development and Planning Law (1999 Revision) s51
Development and Planning Regulations (1998 Revision) r24
Development Plan 1977

Authorities referred to

Flannery v Halifax Estate Agencies Ltd [2002] 1 All ER 373
Seven Mile Beach Resort Ltd v Planning Appeals Tribunal [1997] CILR

Works referred to

Bennion Statutory Interpretation
Mr Alberga QC and Mr Jackson for the Appellant
Ms Julene DaCosta-Banks for the Planning Appeals Tribunal and Central Planning Authority
Mr Wade DaCosta for the third to eighth Respondents

The appellant applied for planning permission to develop an apartment complex. The original plan envisaged that access to the development would be by an arterial road through an adjacent complex, but this plan was abandoned after objections, and the appellant put forward to the Central Planning Authority the submission that access to the proposed apartment complex should be through Brook Lane.

Brook Lane was 20 feet wide. It was classified as a public road, but was overgrown and used only as a driveway to a private house. The house owners objected to the application on the grounds of the environmental effects and the effect of traffic on the enjoyment of their property.

The application for planning permission was rejected on the grounds that-
(a) the width of Brook Lane was not satisfactory to accommodate the traffic generated by the proposal; and
(b) the traffic generated by the proposal would lead to traffic conflict in the arterial road.

The appellant appealed to the Planning Appeal Tribunal. The Planning Appeal Tribunal dismissed the appeal. The Planning Appeal Tribunal interpreted the Development and Planning Regulations (1998 Revision) r24 so as to require the rejection of a planning application unless the minimum breadth of the relevant road was 30 feet.

The Development and Planning Regulations (1998 Revision) r24 state that "Planning applications involving the provision of new public roads or the extension of existing private roads on frontage developments or an existing road shall comply with the following conditions... (f) minimum road reserves shall be thirty feet..."

In the Grand Court, the appellant argued that the Planning Appeal Tribunal's interpretation of the regulation constituted a mistake of law in requiring the minimum 30 feet breadth as a precondition for planning permission. The appellant submitted that the regulation should be read as if written "Planning applications involving the provision of new public roads or the extension of existing private roads on frontage developments on an existing road shall comply with the following conditions... (f) minimum road reserves shall be thirty feet..."

The appellant also argued that the Roads Law invested the developer with a legal right to use Brook Lane for whatever purpose he desired, and accordingly any planning considerations or objections from adjacent owners should not be considered.

Held: (confirming the decision of the Planning Appeal Tribunal)

(i) In its application to existing roads, the Development and Planning Regulations (1998 Revision) r24 should be read as requiring a breadth of 30 feet as a precondition to the grant of the relevant planning permission. This interpretation accorded with common sense and good planning practice. Accordingly the interpretation by the Planning Appeal Tribunal involved no mistake of law.

(ii) The Roads Law did not confer the entitlement contended by the appellant. The appellant's construction would drive a coach and horses through the Development and Planning Regulations, the Development Plan and normal planning considerations. The Roads Law would not be interpreted as conferring on the developer the right to defeat the planning legislation.

(iii) Although the Planning Appeal Tribunal's written ruling gave no evaluation of the merits of the rival arguments, the Planning Appeal Tribunal had given no discernible weight to the objections on behalf of the owners of the house on Brook Lane. The lack of written reasons by the Planning Appeal Tribunal would not lead to the reversal of its decision on the grounds that a material issue had not been dealt with, provided that the applicant had not been substantially prejudiced by the lack of reasons. A fortiori no appeal would be allowed when the court found that no material issue remained. The decision of the Planning Appeal Tribunal was therefore confirmed.

(iv) Concern was expressed over the ruling of the Planning Appeal Tribunal. In future the chairmen of statutory tribunals should have regard to the guidance concerning their duty to give reasons in Flannery v Halifax Estate Agencies Ltd.

SAAC

TORT LAW

Negligence – Liability admitted – Assessment of damages – Facial scarring

C and D v B

Grand Court (127/01)
Kellock J (Acting)
April 15 2002

Ms Nervik for the plaintiff
Mr Collins for the defendant

The plaintiff C, an infant, was assisted in the proceeding by his mother, the second plaintiff, D. On June 15 1998 the infant was attacked by a Rottweiler dog which was under the care and control of the defendant. The plaintiffs commenced and served proceedings, and no defence was filed. Accordingly the defendant was deemed to have admitted liability and a default judgment seeking an assessment of damages was issued in 2001.
The infant plaintiff was extremely upset by the attack and he was bleeding profusely from wounds to his scalp and head. At hospital, he was treated by two doctors for 2 1/2 hours. Later he was treated by a child psychotherapist for nightmares and fright and recurring headaches. A medical doctor also assisted in attempting to address the headaches. As a result, the infant had difficulty in completing his schoolwork, and his mother determined that it was in his best interest to have him repeat an academic year. The adult plaintiff incurred medical expenses and home care expenses as a result of the attack.

Held: (granting order)

(i) During the assessment hearing the court noted that the scarring to the scalp was covered by hair, but that facial scarring was clearly visible. The scalp remained sore. Expert evidence confirmed that, at the time of the attack, the wounds were extremely painful.

(ii) Expert evidence concerning the causation of 'migraine' headaches was incomplete, yet the court decided that the headaches were caused by the attack.

The prognosis for a reduction in the frequency of the headaches was uncertain. Damages for pain and the loss of amenities of life was set a $50,000.

(iii) The adult plaintiff was awarded $20,400 for past medical expenses and $20,400 for past home care given to the infant, plus costs.

JE

TRUSTS

Fraud – Breach of equitable obligation – Monetary proceeds in bank account – Constructive trust

Corporacion Nacional Del Cobre de Chile v Interglobal Inc

Grand Court (541/95)
Smellie CJ
May 23 2002

Authorities referred to

Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133
Attorney General of Hong Kong v Reid [1994] 1 AC 324
Lister & Co v Stubbs [1890] 45 ChD 1
Phipps v Boardman [1967] 2 AC 46
Aberdeen Railway v Blaikie 2 Eq Rep 1281
News Bureau v Cohen [1988-1989] CILR 196
Works referred to

Chitty on Contracts (28th ed.)

Mr Graham Ritchie for the plaintiff
No appearances on behalf of the defendants

In separate proceedings brought in the Grand Court, earlier orders were made granting *Norwich Pharmacal* relief to the plaintiff in this case, 'Codelco' (reported at [1996] CILR 1). As a result, Codelco obtained confidential information from two international banks carrying on business in Grand Cayman. That information enabled Codelco to commence an action to trace and recover moneys which it identified as some of the proceeds of a massive fraud believed to have been perpetrated against it by the second defendant, Juan Pablo Davila Silva, 'Davila', its former chief futures trader, and others, in a secret and dishonest scheme of bribery, kickbacks and money laundering. It was found that Davila and his wife held a joint bank account and that they also jointly owned and controlled the first defendant, Interglobal, which also had an account at the same bank.

It was found as a fact that payments to Davila represented his share of commissions or other secret profits or bribes.

The plaintiff sought an order that the balance of funds standing to the credit of the Interglobal account was held on constructive trust for the plaintiff and that such sum, together with any accrued interest, be paid forthwith by the first defendant to the plaintiff together with such further interest as might accrue thereon down to the date of payment. It was argued on behalf of the plaintiff that this sum represented what was left of the proceeds of fraud perpetrated by Davila, along with others, including his brother in law, the second defendant.

Held:(declaring trust)

(i) Applying Attorney General of Hong Kong v Reid, where a fiduciary accepts bribes and other illicit payments as an incentive for his breach of duty, he not only becomes a debtor for the amount of the bribes to the person to whom the duty was owed, he also holds the bribes and any property acquired therewith on constructive trust for that person. It matters not whether the payment represented a bribe or some other kind of secret profit or commission. It also matters not whether the fiduciary's principal suffers any loss as the result of the fiduciary's actions. A person in a fiduciary position is not allowed to put himself in a position where his interests and duty conflict.

(ii) Codelco was thus entitled to a declaration that the balance standing to the credit of the Interglobal Account was held by Interglobal on behalf of Davila on constructive trust for Codelco. Furthermore, the balance standing to the credit of the Interglobal Account together with all interest earned down to the date of payment was to be paid to Codelco.

DM

Breach of trust by personal representative – Trust moneys banked and pledged as security – Recovery of funds by replacement personal representatives

Johnson and Nason (Executors of Beukenkamp, Deceased) v Watt

Grand Court (580/01)
Kellock J (Acting)
February 11 2002

Legislation

Confidential Relationships (Preservation) Law (1995 Revision)

Authorities referred to

Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548
JR Thomson v Clydesdale Bank Ltd [1893] AC 282
MacMillan Inc v Bishopsgate Investment Trust plc [1995] 1 WLR 978
London Joint Stock Bank v Simmons [1892] AC 201
Union Bank of Australia Ltd v Murray-Aynsley [1898] AC 693
Bank of New South Wales v Goulburn Valley Butter Company [1902] AC 543
Gray v Johnston (1868) LR 3 E & I Appeals 1
Bentinck v London Joint Stock Bank [1893] 2 Ch 120

Works referred to

Warne & Elliott Banking Litigation
Paget Law of Banking (11th ed)
Penn & Shea The Law Relating to Domestic Banking (2nd ed)
Halsbury's Laws of England (4th ed)
Goff & Jones The Law of Restitution (5th ed)

Mr Jones for the plaintiffs
Mr Magner for the fifth defendant

The first defendant, Watt, was the sole executrix and trustee of Dr Beukenkamp's will. In breach of trust, she began to distribute the doctor's funds to herself. In February 2001, she opened an account with the fifth defendant, CIBC Bank & Trust Co (Cayman) Ltd 'CIBC' into which she deposited US $170,000 of Dr Beukenkamp's money. This money became a hypothecated fixed deposit which was pledged to CIBC as part of the security required to support a loan to Café del Sol Ltd (a restaurant business) of CI $190,000. When the beneficiaries under Dr Beukenkamp's will became aware of the fraud, steps were taken to replace Watt as executrix of the estate. Following an amended grant of probate, the plaintiffs, as replacement executors, commenced this action.

The plaintiffs' initial claim against CIBC was limited to a claim for an order to produce documents relating to the US $170,000 deposit and the disposition of those monies. The plaintiffs later amended the writ of summons, without the leave of the court, by extending their claim to a claim for payment of US $170,000 plus damages, as a claim for money had and received.

CIBC resisted the application for summary judgment on both procedural and substantive grounds.

Held: (granting order)

(i) As CIBC had no notice of any defect in Watt's title to the money or any reasons to suspect that she was not entitled to make the deposit, CIBC ranked in priority to the plaintiffs in its claim to the US $170,000. However, if it turned out that

the money was not required as security, there was no reason why it should not be returned to the plaintiffs, together with accrued interest (if any).

(ii) Having determined that the writ was validly amended, it was declared that CIBC held the sum of US $170,000 together with any interest and subject to any fees which would have accrued to the first defendant by reason of the deposit by her of US $170,0000 to an account at CIBC or in respect of any product of that deposit subject to CIBC's right to use such money or the product thereof as security for a loan to Café del Sol Ltd as conferred or purportedly conferred by the first defendant in 2001.

(iii) The plaintiffs were entitled to an accounting of the interest and fees referred to above and any and all other transactions undertaken or to be undertaken by CIBC in relation to the money described above or the product thereof.

DM

Escheat and Landholding Capacity of Corporations

Simon Cooper
Cayman Islands Law School

This paper will look at some of the issues relating to the holding of land in the Cayman Islands by companies incorporated domestically or by the law of a foreign jurisdiction.

A. STATUS OF THE COMPANY

A company may be incorporated under the law of the Cayman Islands or under foreign law. Of the companies incorporated under Cayman Islands law, various types fall to be considered.

(1) Companies Incorporated in the Cayman Islands by the Companies Law

Of the various types of corporation incorporated in the Cayman Islands, the most commonly encountered must be companies created pursuant to or governed by the Companies Law 2001 (2nd Rev). The Companies Law provides for the incorporation within the the Cayman Islands of companies which are formed and registered under the provisions of the Law, and for the recognition of companies incorporated and recorded under previous Cayman Islands company laws. These companies fall into two main classses – Ordinary Class and Exempted Class. The Ordinary class company may be "local"[1] or "non-resident".[2] If the objects of the company are to be carried out mainly abroad, then the company may be registered as Exempted.

For both ordinary class and exempted class, the Companies Law provides a general rule that the company has capacity to hold land in the Cayman Islands. That principle applies even if there is some limitation on the company's landholding capacity under the company's constitution:

> "... no disposition of real or personal property to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to ... dispose of or receive the property..."[3]

Accordingly, even if the Memorandum of Association of a company incorporated in the Cayman Islands under the Companies Law contains a restriction barring the company from holding land, the company nevertheless has capacity to hold the land. However, this general rule in favour of landholding capacity is overridden by special exclusion under the Companies Law: the company has no power to hold land if the company is

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[1] Local ordinary companies are essentially those carrying on business in the Cayman Islands: ss.2(1), 4, 5 Local Companies (Control) Law (1999 Revision).

[2] Non-resident ordinary companies are essentially those actually certified (or deemed to be certified) by the Financial Secretary that the company does not, and does not intend to, carry on business in the Cayman Islands: ss.2(1), 2(3) Local Companies (Control) Law (1999 Revision) and s.2(1) Companies Law (2001 2nd Revision).

[3] s.28 Companies Law (2001 2nd Revision).

empowered to issue bearer shares, certificates or coupons[4] (although the company may be exempted from this provision by certification of the Financial Secretary[5]). The legal consequences of this lack of power to hold land will be considered later (Part C).

(2) Corporations Incorporated in the Cayman Islands not by the Companies Law

Cayman Islands law recognises corporations owing their existence to domestic laws other than the Companies Law. Such corporations may be incorporated, for example, by a separate statute or charter. The capacity of such bodies to hold land may be governed by the instrument of incorporation: trade unions, for instance, (although not actually corporations) have an express provision in their statute which permits them to hold up to one acre of land.[6]

Apart from any specific limitation on landholding capacity under the corporation's constitutional instrument, there is the general restraint found in section 154 of the Registered Land Law. This states:

> "Notwithstanding that it may be empowered to do so under the law of any other jurisdiction or by its memorandum of association (by whatsoever name so called), a body corporate (by whatsoever name so called) which is not-
> (a) an existing company, as defined in section 2(1) of the Companies Law;
> (b) formed and registered under the Companies Law; or
> (c) registered as a foreign company under Part IX of the Companies Law,
> has no power to be registered as a proprietor or in any other manner to hold land in the Islands."

The difficulty here is that corporations incorporated in the Cayman Islands which are not formed under the Companies Law do not fall within any of the exceptions (a), (b) or (c), and so would appear to be subject to the incapacity, unless granted specific statutory exemption. However, the marginal note in the Registered Land Law indicates the intended scope of the section – "Prohibition on certain *foreign* bodies corporate holding land" (emphasis added). If the marginal note influences the ambit of the section, then corporations incorporated in the Cayman Islands not under the Companies Law should still be capable of holding land.

(3) Companies Incorporated Abroad

A company may be recognised by Cayman Islands law as a corporate entity even though it is incorporated pursuant to the incorporation laws of a foreign country. To determine the capacity of a foreign incorporated company to hold land in the Cayman Islands, it is necessary to isolate three types of foreign incorporated company.

(i) First, where a company incorporated abroad establishes a place of business or carries on business within the Cayman Islands, then it is required to register itself in the

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[4] s.32(1) Companies Law (2001 2nd Revision).
[5] Proviso to s.32(1) Companies Law (2001 2nd Revision).
[6] s.12(1) Trade Union Law (1998 Revision).

Companies Registry of the Cayman Islands.[7] According to the Companies Law, such a registered foreign company has power to hold land in the Cayman Islands.[8]

(ii) Secondly, where a company incorporated abroad is a registrable foreign company, but defaults in its registration requirements (including the requirement to pay annual fees[9]), then the company has no power to hold land in the Cayman Islands.[10]

(iii) Thirdly, where a company incorporated abroad never establishes a place of business or carries on business within the Cayman Islands, then it too has no power to hold land in the Cayman Islands.[11]

The provisions in the Companies Law concerning the lack of power to hold land in the Cayman Islands are repeated by the Registered Land Law[12], which also adds that the company has no power to be registered as a proprietor of land. The consequence of this lack of power to hold land will be considered later (Part C).

(4) Mortmain

At common law, foreign corporations could hold land without restriction, but in England there were passed the statutes of mortmain, restricting the entitlement of foreign corporations to hold land without Crown licence. The acquisition of English land beyond the entitlement led to the land being susceptible to forfeiture to the Crown.[13] While old English statutes may be applicable to Cayman Islands without express extension[14], the decision in *Balbao Atlantico SA v. Registrar of Lands*[15] has confirmed that the mortmain statutes do not form part of the English statute law received into Cayman Islands law.

B. CONFLICT OF LAWS AND CAPACITY

Where a company is incorporated in the Cayman Islands under the Companies Law and the company's constitution states that its capacity to hold land is limited, then (as mentioned above) the constitutional provision is ineffective in law to affect its ownership and dispositive powers once the company has acquired land, although it may affect internal matters of corporate governance. In contrast, where a company is incorporated abroad, there may be a conflict between the Cayman Islands laws concerning power to

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[7] s.204 Companies Law (2001 2nd Revision).
[8] Proviso to s.205(1) Companies Law (2001 2nd Revision).
[9] Proviso to s.205(1) Companies Law (2001 2nd Revision).
[10] s.205(1) Companies Law (2001 2nd Revision).
[11] s.205(1) Companies Law (2001 2nd Revision), reversing *Balbao Atlantico SA v. Registrar of Lands* [1984-5] CILR 304.
[12] s.154 Registered Land Law (1995 Revision).
[13] *A.-G. v. Parsons* [1956] AC 421.
[14] See E.W. Davies, *The Legal System of the Cayman Islands* (1989), chapter 4; s.40 Interpretation Law (1995 Revision).
[15] *Balbao Atlantico SA v. Registrar of Lands* [1984-5] CILR 304.

hold land and the foreign laws concerning the general powers and capacity of the company.

Two potential conflicts may arise. First, the law of the jurisdiction where the company is incorporated (*lex domicilii*) may confer on the company power to hold Cayman Islands land, contrary to the Cayman Islands law embodied in the Companies Law and Registered Land Law which declares that the company has no power to hold Cayman Islands land. This conflict of laws is resolved by the principle that the law of the jurisdiction in which the land is situated (*lex situs*) prevails over *lex domcilii*[16] and so the company has no power to hold Cayman Islands land. This is clearly illustrated in the English cases involving Irish companies that had become proprietors of land in England. The Irish law of capacity permitted the holding of land, but the English law of mortmain invalidated the holding of land. It was held that *lex situs*, the law of England, prevailed.[17]

The second possible conflict of laws is that the company's *lex domicilii* may declare that the company has no power to hold Cayman Islands land, contrary to the Cayman Islands law embodied in the Companies Law and Registered Land Law which permits the company to hold Cayman Islands land.

In this event, a leading work on conflicts says that the conflict of laws is resolved by the principle that the company's capacity is governed by *lex domicilii*, and *lex situs* or *lex causae* "can only have a limiting effect" on capacity, "for a legal person cannot anywhere exercise any greater power than is given to it by the legal system to which it owes its existence."[18] This rule would again lead to the conclusion that the company has no power to hold the land. However, if the approach suggested in Dicey & Morris were followed, then the integrity and reliability of the Land Register would be compromised. Accordingly, it is submitted that the more accurate description is provided in Halsbury: "if the transaction is ultra vires the lex domicilii, then the effect of the lack of lex domicilii capacity is a matter for the law of the transaction."[19] It is submitted that Dicey & Morris's statement must be limited to cases where *lex situs* is merely permissive as to capacity rather than compulsory as to the vesting of property; where, in contrast, *lex situs* positively compels the vesting of land in a corporation through the indefeasibility provisions of the land registration system, as under the Cayman Registered Land Law, then the company's restrictive *lex domicilii* must be overridden by *lex situs*. The result then is that the foreign company may hold Cayman Islands land despite any restriction on capacity contained in *lex domicilii*.

C. THE LEGAL CONSEQUENCES OF LACK OF POWER TO HOLD LAND

Certain provisions of the Companies Law[20], as noted above, declare that a company has no power to hold Cayman Islands land. Although there is no statutory explanation of the

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[16] Dicey & Morris, *The Conflict of Laws* (ed. Collins, 2000, 13th ed), para. 30-022.
[17] *Morelle Ltd v. Wakeling* [1955] 2 QB 379; *A.-G. v. Parsons* [1956] AC 421.
[18] Dicey & Morris, *The Conflict of Laws* (ed. Collins, 2000, 13th ed), para. 30-022; cited with approval in *Argentine Holdings (Cayman) Ltd. v. Buenos Aires Hotel Corp. S.A.* [1997] CILR 90, 103.
[19] Halsbury's Laws of England, Conflict of Laws 9(2)(i), para. 988.
[20] ss.32(1) and 205(1) Companies Law (2001 2nd Revision).

legal consequences of lack of power to hold land, these "powerlessness provisions" are supplemented by section 205(2) of the Companies Law, which applies whether the ground for lack of landholding power arises because the company is incorporated abroad[21] or because it is a company incorporated in the Cayman Islands which is empowered to issue bearer shares.[22] Section 205(2) allows the Governor-in-Council to order such a company to transfer the land to a person who does have power to hold land and become registered as proprietor of the land. If a company fails to obey the order, the Companies Registrar may apply to court for an order that the land shall vest in the Financial Secretary.[23] The following part of this section will consider the difficult relationship between the "powerlessness provisions" and the "order provision" in section 205(2).

(1) The effect of loss of power to hold land on the company

(a) Termination theory

One problem for the interpretation of the Companies Law is the relationship between the "powerlessness provisions" which state that a company does not have power to hold land, and the "order provision" in section 205(2) which states that the company may be ordered to transfer land. The problem lies in the interpretation of the phrase "lack of power to hold". This would appear at first glance to indicate that a powerless company cannot in law ever receive a transfer of land, or, if the company is disqualified after receiving a valid transfer of land, then it immediately ceases to hold the land, although of course the company would remain as registered proprietor in the Land Register until removed. If the company's rights terminate in this way, the Companies Law does not indicate that any other entity takes over the company's rights in the land, and so the land must presumably pass to the Crown through the law of escheat (or bona vacantia if the company holds a lease of the land and if leases fall within the meaning of "land"[24]). This interpretation of the provisions might be called the "termination theory", reflecting the immediate termination of the company's rights in the land, followed by escheat to the Crown. The termination theory was recognised in obiter dicta of the Grand Court in *Jones v. Registrar of Lands*[25], but was apparently not the subject of contested arguments by counsel.

It is submitted that the doctrine of escheat is capable of application even though the Cayman Islands do not have England's feudal heritage of landholding, to which the doctrine has occasionally been attributed. Escheat applies because the Crown, represented by the Government of the Cayman Islands, is the sovereign of the Cayman Islands, and as such has paramount title to all land[26]: "The ownership of land is vested

[21] s.205(2) Companies Law (2001 2nd Revision).
[22] s.32(2) Companies Law (2001 2nd Revision).
[23] s.205(3) Companies Law (2001 2nd Revision).
[24] The definition of land in s.2 of the Registered Land Law does not explicitly address whether leases are included, whereas the disqualification provisions of the Companies Law define "land" as "...immovable property whether freehold or leasehold...": ss.32(3), 205(5) Companies Law (2001 2nd Revision).
[25] *Jones v. Registrar of Lands* [1998] CILR 71, 80 per Smellie J.
[26] See Halsbury's Laws of England, Crown Property 2(4), para. 231.

in the Government of the Cayman Islands subject only to such estates as may have been granted to any person or persons subsequent to the settlement of that colony."[27] As sovereign, the Crown is the body entitled to any asset (including land) when a proprietary estate in the asset ends for lack of a successor, an entitlement which derives from sovereignty rather than feudal law.[28] There are no express provisions in the Registered Land Law governing escheat.[29]

If the termination theory is followed, the provisions in section 205(2) allowing the Governor-in-Council to direct disposal of the land by the company could then be regarded merely as a convenient mechanism for the Crown to vest escheated land directly in a new owner without going through the intermediate step of formally recording in the Land Register the paramount title in the Crown and then the creation of a new estate in the new owner.

However, this immediate termination theory must be able to demonstrate compatibility with the provision in section 205(2) allowing the Governor-in-Council to order the incapacitated company to transfer any land "held by ... it". This section obviously presupposes that the powerless company still "holds land", which appears to contradict the termination theory. The termination theory would then have to require that section 205(2) be interpreted so that the reference to land "held by" the company means land in respect of which the company was *formerly* the holder.

The difficulty with the termination theory is that it is convoluted and it involves a strange disposition of escheated land by the Crown through the medium of a transfer made by the powerless company. Difficulties might arise from the latter point. First, when escheat occurs, the Crown technically does not hold an estate in land but holds the land by virtue of its paramount title[30], and so any disposition following escheat cannot truly be by way of transfer, but only by way of creation of a new estate in land in favour of the new owner, which is difficult to square with the mechanism of disposal in section 205(2). Secondly, escheat at common law clears away certain burdens affecting the title to the estate[31], but if the Crown vests the land in a new owner by way of statutory transfer from the company, all registered burdens will presumably be enforceable against a transferee because of the relevant provisions of the Registered Land Law.

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[27] *Levy v. Administrator of the Cayman Islands* (1963) [1952-79] CILR 42, 46 per Duffus P (Actg). Followed by the Grand Court after the introduction of compulsory registration in *Scott v. Ashwell* (1978) [1952-79] CILR 330 and *Eden v. R* (1979) [1952-79] CILR 406. See also *Mabo v. State of Queensland (No.2)* (1992) 175 CLR 1.

[28] *Veale v. Brown* (1868) 1 NZCA 152 (in which escheat was recognised as applicable to New Zealand so as to vest rights in the Crown as ultimus haeres). See Halsbury's Laws of England, Real Property 6(3), para. 254 and Corporations 6(2), para. 1204.

[29] It appears that the draftsman may have questioned the continued existence of any form of escheat after the abolition of certain types of escheat by the Forfeiture Act 1870 and the Administration of Estates Act 1925. See S.R.Simpson, "A Report on the Registration of Title to Land in Lagos" (1957, Lagos), p.35.

[30] See "Does Feudalism Have a Role in 21st Century Land Law?" (2000) 23 Amicus Curiae 21 (C. Harpum); "Land Registration for the 21st Century" (2001) Law Com. No.271, paras. 11.5-11.25. See also HM Land Registry, Practice Adivce Leaflet No.11 (Oct 2000).

[31] Ibid.

(b) Susceptibility theory

A preferable rival theory to termination theory might be called the "susceptibility theory". This theory gives a restrictive interpretation to the phrase "lacks power to hold land" as used in the powerlessness provisions. "Lack of power to hold land" would be understood to cause two consequences: (i) For companies already holding land, there would be no immediate termination of the company's ownership of the land, and no escheat, but rather the company's land would merely be *subject to being divested* on the order of the Governor-in-Council. (ii) For any purported transfer of land to a powerless company after the provisions come into force, the purported transfer would be ineffective, and title would remain in the transferor.

By this susceptibility theory, the effect of statutory lack of power is merely equated to the susceptibility of the landholding to a divesting order from the Governor-in-Council. If this is taken as the correct reading of the provision, then a powerless company may properly remain on the Land Register as registered proprietor of land, as the company's rights in the land have not terminated, but are merely susceptible to a divesting order under section 205(2) or (3) of the Companies Law. This interpretation is practically more convenient as it maintains the reliability of the Land Register, since the so-called powerless company still maintains its landholding until actually dispossessed pursuant to an order. Furthermore, this interpretation fits with the opening words of section 32(2) of the Companies Law which refer to a "breach" of the powerlessness provisions; the word "breach" connotes that the company does indeed have *power* to hold land but only lacks the *right* to hold land. In this way the opening words of section 32(2) do tend to support the view that the powerlessness provisions do not precipitate an immediate and comprehensive termination of the company's power to hold land.

The two interpretational theories have their weaknesses, but the difficulty is occasioned by the apparently conflicting provisions of the Companies Law: one indicates that the company loses power to hold land, the other indicates that the company retains the power to hold land.

(2) The effect of powerlessness on purchasers from the company

The acquisition of a registered title by a purchaser vests in the purchaser the ownership of the land (or lease, as the case may be) "free from all interests and claims whatsoever but subject- ... to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register."[32] Therefore a purchaser of a registered title from a powerless company would nevertheless receive a good title under the land registration system, despite the vendor's lack of power to hold land, unless the lack of power generates an overriding interest under section 28 of the Registered Land Law.

It is submitted that none of the categories of overriding interests under section 28 come into play so as to affect a purchaser from a powerless company. The only overriding interest that might appear to have any bearing on the issue is paragraph (c) which covers "rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any other law." The right of resumption is the right of the

[32] s.23 Registered Land Law (1995 Revision).

Crown to resume possession of land but it is submitted that it only covers the Crown's right of eminent domain rather than any rights on escheat.

A further provision of potential concern for the purchaser is the Crown saving provision in the Registered Land Law: "Nothing in this Law shall prejudice any of the interests, rights, powers and privileges conferred on the Crown or the Government by any other law." This could be interpreted so as to preserve the enforceability of Crown rights on the escheat of land, despite a transfer of the registered title from the powerless company to a purchaser. However, this interpretation may be refuted by the principles accepted in the English case of *Re Suarez (No.2)*.[33] This case involved land held by Francisco Suarez who died intestate without heirs, thereby causing an escheat to the Crown. However, Pedro Suarez then secured registration of himself, claiming to be heir at law, and claiming the benefit of the indefeasibility section[34] of the land registration statute then in force, roughly corresponding to the Cayman provision.[35] The Crown claimed that its rights on escheat were preserved against Pedro Suarez by virtue of the saving clause, "Nothing in this Act shall affect any right of Her Majesty to escheat or forfeiture."[36] The High Court was reluctant to interpret the provisions in such a way as to make a hazard for the purchaser, and construed the Crown saving clause as merely providing that the Crown's right to escheat endured after the death without heirs of the registered proprietor, but could not prevail against a purchaser protected by the indefeasibility provisions. A similar construction applied to the Cayman Registered Land Law would shield a purchaser from any possible claim of the Crown to escheat.

Another provision of potential concern for the purchaser is the reconciliation provision in section 3 of the Registered Land Law. This declares that "...nothing in this Law shall be construed as permitting any dealing which is forbidden by express provisions of any other law or as overriding any other law requiring the consent or approval of any authority to any dealing." However, this provision is restricted by the principle that a bona fide purchaser for value must be completely safe in relying on the register. This restriction was acknowledged by the principle reformer who promoted the Registered Land Law[37], and this interpretation is confirmed by the historical development of the provision: in a former embodiment[38], the provision also declared that the land registration statute would not "render valid any dealing made invalid by any such law" but these final words were removed so as not to prejudice the position of purchasers and to allow the land registration system to confer good title.

As a procedural precaution to inhibit transfers of land by powerless companies to purchasers, it is the practice of the Land Registry to require a Certificate of Good Standing from the Cayman Islands Companies Registry for all land dealings by a foreign company, which certificate must have been issued within three months of the date of the disposal of the land.

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[33] *Re Suarez (No.2)* [1924] 2 Ch 19.
[34] s.7 Land Transfer Act 1875.
[35] s.23 Registered Land Law (1995 Revision).
[36] s.105 Land Transfer Act 1875.
[37] S. R. Simpson, Land Law and Registration (1976 Cambridge), p.477. Simpson was the Colonial Office Land Tenure Specialist who developed the statute which eventually became the Cayman Islands Registered Land Law.
[38] s.48 Land Registration (Special Areas) Ordinance 1959 (Kenya).

D. THE STRIKE-OFF PROVISION

An independent provision which affects the holding of land by companies is contained in the strike-off sections of the Companies Law. These empower the Companies Registrar to strike a company from the Companies Register in the following cases:

- where he has reasonable cause to believe the company is not carrying on business or is not in operation[39];
- where a company is being wound up and he has reasonable cause to believe that no liquidator is acting[40];
- where a company is being wound up and he has reasonable cause to believe that the affairs of the company are fully wound up.[41]

The consequence of striking-off is dissolution of the company[42], and any property belonging to the dissolved company is thereupon vested in the Financial Secretary for the benefit of the Islands and subject to the disposition of the Governor-in-Council.[43] The court has a power to reinstate the company, in which case the company is deemed never to have been struck off[44] and the land will once again be in the ownership of the company.

These strike-off sections only apply to companies incorporated in the Cayman Islands[45], and not companies incorporated abroad. For companies incorporated abroad, there is a separate provision for removal from the register. If the company ceases to have a place of business in the Cayman Islands it must give notice to the Companies Registrar who will then remove it from the register[46]; alternatively, if the Companies Registrar is satisfied by any other means that the company has ceased to carry on or have a place of business in the Cayman Islands, then again he may remove the company's name from the register.[47] Furthermore, as soon as the company ceases to carry on or have a place of business in the Cayman Islands, it is susceptible to an order from the Governor-in-Council to transfer the land to another person under the order provision.[48]

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[39] s.175(1) Companies Law (2001 2nd Revision).
[40] s.176 Companies Law (2001 2nd Revision).
[41] s.176 Companies Law (2001 2nd Revision).
[42] ss.175(1) and 176 Companies Law (2001 2nd Revision).
[43] s.181 Companies Law (2001 2nd Revision).
[44] s.178 Companies Law (2001 2nd Revision).
[45] See definition of "company" in s.2(1) Companies Law (2001 2nd Revision).
[46] s.212 Companies Law (2001 2nd Revision).
[47] Proviso to s.212 Companies Law (2001 2nd Revision).
[48] s.205(2) Companies Law (2001 2nd Revision).

E. LIQUIDATION AND DISSOLUTION OF CORPORATIONS

(1) Cayman Islands Corporations

(a) When a company incorporated in the Cayman Islands under the Companies Law is voluntarily wound up, its assets are under the disposition of the liquidator, who must distribute surplus property of the company to the members according to their rights and interests in the company.[49] When a company incorporated in the Cayman Islands is compulsorily wound up, its assets are under the disposition of the court, which must distribute any surplus amongst the parties entitled thereto[50]; and the court may seek the assistance of an official liquidator who has power to "do all ... things as may be necessary for winding up the affairs of the company and distributing its assets."[51]

However, if the company is dissolved before its land has been properly disposed of by the liquidator, then the common law rules of law concerning the property must apply in the absence of an express provision in the Companies Law. At common law, any real property (freehold estates in land, whether legal or equitable) will pass to the Crown under the doctrine of escheat. Any personal property (which includes not only personal chattels but also leases of land) will pass to the Crown as bona vacantia.

In contrast to other jurisdictions, there is no express power under the Companies Law for the court or liquidator to disclaim any assets of a company being wound up, despite an equivalent power being expressly conferred upon a trustee in bankruptcy in the case of an individual's bankruptcy.[52] Under the disclaimer regime, on a disclaimer, the disclaimed estate passes to the Crown by statutory bona vacantia, but if the Crown itself then disclaims its entitlement, the estate is terminated and the land promptly escheats to the Crown, freed from any burdens such as mortgages which previously bound the disclaimed estate.

(b) On the dissolution of a Cayman Islands corporation not under the Companies Law, the constitutional document of the corporation, such as its charter or governing statute, may provide for the winding up, dissolution and disposal of property. If, on final dissolution, there still remains with the corporation any property which is not governed by the constitutional instrument, this will pass to Crown by the doctrines of escheat (real property) or bona vacantia (leases and chattels).[53] The former view that the property reverts to the person who made the original grant to the corporation is discredited.

(2) Companies Incorporated outside the Cayman Islands

Birth and death of a company are governed by *lex domicilii* of the company and Cayman law will recognise the incorporation and dissolution of the company in accordance with the laws of the country in which the company is incorporated. Winding up of the company is also a matter for *lex domicilii*, Cayman law recognising the appointment and management of a foreign liquidator.

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[49] s.136(a) Companies Law (2001 2nd Revision).
[50] s.122 Companies Law (2001 2nd Revision).
[51] s.109(h) Companies Law (2001 2nd Revision).
[52] s.105 Bankruptcy Law (1997 Revision).
[53] Halsbury's Laws of England, Real Property 6(3), para. 254.

If the foreign company is dissolved prior to divesting itself of the ownership of Cayman land, then there may be a conflict between the Cayman rules and foreign rules as to the ownership of that property, the Cayman rule being escheat to the Crown, and the foreign rule perhaps being escheat or statutory bona vacantia to the sovereign body of the foreign state. While winding up and dissolution of the foreign company is a matter for *lex domicilii*, it is submitted that the entitlement to unallocated land following dissolution must be a matter for *lex situs*, namely escheat to the Crown as represented by the Cayman Islands Government. With leases of Cayman land, a similar rule should apply: if a foreign company which is the registered proprietor of a Cayman lease is dissolved in its country of incorporation without disposal of the lease, it could be argued that the lease, being personal property, passes as bona vacantia to the sovereign of the country of incorporation. However, this argument must be rejected as the resolution of the conflicts issue here depends on the distinction between movables and immovables, rather than the common law distinction between real property and personal property. Leases, despite being personal property, are treated as immovables for the purpose of conflicts of law and so (as with freeholds) Cayman law should apply *lex situs* to the abandoned lease.

If the foreign liquidator exercises his right under the foreign law to disclaim Cayman land (for example, under foreign legislation permitting disclaimer of onerous property, such as a freehold burdened by lease or mortgage covenants), again this should be regarded as a complete termination of the company's landholding, the land therefore ceasing to come within *lex domicilii* of the company, with the result that *lex situs* should resume application, providing for freeholds to escheat and leaseholds to pass as bona vacantia to the Crown.