CAYMAN ISLANDS LAW BULLETIN

NO. 21

MARCH 2004

CAYMAN ISLANDS LAW SCHOOL

Cayman Islands Government

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

Citation:

Cases appearing in this volume should be cited as (2004) 21 CILB, followed by the page number.

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 Director of Legal Studies, Cayman Islands Law School, Tower Building, Grand Cayman or e-mail Mitchell.Davies@gov.ky.

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EDITORIAL NOTE

The Bulletin of Cases of this edition contains many recent examples of the divergent topics of litigation on the Cayman Islands. Of particular interest are the important judgments delivered by the Chief Justice on the predicate crimes for money laundering offences and other aspects of the money laundering offences (see *The Queen v Stewart et al* on pages 25 and 28) and decisions on the admissibility of evidence (see *The Queen v Stewart et al* on page 28, *R v Edwards* on page 34 and *Re Fraser* on page 36).

The current edition contains case summaries of Grand Court judgments delivered in chambers and in open court by Smellie CJ, Henderson J, Sanderson J, Edwards J, Levers J and Kellock J for the period up to 20 February 2004. In chambers matters, and elsewhere where appropriate, an attempt has been made to protect the identity of the parties.

The Law Review segment of this edition includes an article by Dr John Epp on Legal Aid Provision in the British Overseas Territories which deals with some of the aspects of the Report on Legal Aid prepared for the 2003 Attorneys-General Conference in the Turks and Caicos Islands. Ms Santedicola and Dr Epp have reported on the Access to Justice Project concerning the development and facilitation of *pro bono* legal work in the Caribbean. Mr Mitchell Davies has contributed a paper on criminal law examining the recent decision of the House of Lords in *R v G*.

The Law Review segment is designed 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 CILB is edited and published by the Cayman Islands Law School, its publication having been approved by the Legal Advisory Council in October 1989. The bulletin of cases is intended 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 summaries in the form of a Bulletin of Cases 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 Bulletin of Cases 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.

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.

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ADMINISTRATIVE LAW

Judicial review – Bias – Disqualification of judge

Mohanty v Health Services Authority
Bromley v Health Services Authority

Grand Court (428/02, 604/02, 863/02) and (625/02)
Sanderson J
February 20 2003

Authorities

Arab Monetary Fund v Hashim (1994) 6 Admin LR 348
Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1 QB 577
R v Sussex Justices ex parte McCarthy [1924] 1 KB 256
R v Gough [1993] 2 WLR 884
Locabail (UK) Ltd v Bayfield Properties Ltd and another [2000] 1 All ER 65
Cleane Ply Ltd v Australia and New Zealand Banking Group Ltd [1999] VSCA 35
KFTCIC v Icori Estero SpA (Court of Appeal Paris, 28 June 1991, International Arbitration Report Vol 6 #88/91)
Vakauta v Kelly (1989) 167 CLR 568

Authoritative works

Halsbury's Laws of England

The Plaintiffs, two doctors, sought judicial review of certain administrative decisions, made by the Defendant, which affected their employment and privileges. The Defendant, however, sought disqualification of the judge on the basis that there could be a reasonable apprehension that the judge would not be impartial. Firstly, the Defendant claimed that the judge had previously been in dispute with it, and that this gave rise to a reasonable apprehension of bias. In the alternative, the Defendant asserted that, even if the judge's dispute was in fact with the Governor's office (and not with the Health Services Authority or its predecessor); it was still related to health care issues. As such, the Defendant claimed that the dispute could still give rise to a reasonable apprehension of bias.

Held: (rejecting the merits of the application but nonetheless disqualifying himself)

(i) As a matter of fact, the judge had not been in dispute with either the Health Services Authority or its predecessor.

(ii) The judge's contractual discussions with the Governor, whilst concerned with health care issues, did not give rise to reasonable apprehension of bias (the test asserted by counsel for the Defendant) or a real danger of bias (per Lord Goff in R v Gough, referred to as the definitive case).

(iii) The Defendant was not motivated by any legitimate reasonable apprehension of bias. Instead, this course of action was intentionally taken for the purposes of securing a judge who it was thought might be more favourable to their position. Having concluded that the Defendant was so motivated, it was then impossible for the judge to be impartial and it was therefore necessary, for this reason, for the judge to then disqualify himself from the trial.

VC

CIVIL PROCEDURE

Attorneys – Duties as Officers of Court – Compensation for Loss

A-G v C

Grand Court (373/93)
In Chambers
Sanderson J
April 7 2003

Legislation

Legal Practitioners Law (2002 Revision), s 5
Grand Court Law (1995 Revision), s 11
Grand Court Rules, O 29 1a, r 2(1)

Authorities

Re Hillard ex p Smith (1845) 2 Dow & L 919
United Mining & Finance Corp Ltd v Bedner [1910] 2 KB 296
Brendon v Spiro [1938] KB 176
Marsh v Joseph [1897] 1 Ch 213
Brydges v Branfill (1842) 12 Sim 369
Re Dangar's Trusts (1889) 14 Ch D 178
Ezart v Lister (1842) 5 Beav 585
Todd v Studholme (1857) 3 K & J 324
Dixon v Wilkinson (1859) De G & J 508
Simmons v Rose (1862) 31 Beav 1

Re Spencer (1870) 21 LT 808
Slater v Slater [1897] 1 Ch 222n
Batten v Wedgwood Coal & Iron Co (1886) 31 Ch D 346
Franklands v Lucas (1831) 4 Sim 586
Myers v Elman [1940] AC 282
Ibbs v Holoway Bros [1952] 1 All ER 220
Wilkinson v Wilkinson [1963] P 1
D v D [1963] 1 WLR 194
Re Carroll [1902] P 2
Re Harrison's Estate [1895] IR 259
Re Ward (1862) 31 Beav 1
Re Butler (1866) 1 Ch App 607
Schmitten v Faulks [1893] WN 64
Bath v Bath [1901] 1 Ch 460
Re Williams' S.E. [1910] 2 Ch 481
Re Aitken (1882) 4 B & Ald 47
Ex p Bodenham (1838) 8 Ad & E 959
R v Smith (Martin) [1974] 1 All ER 651
R & T Thew Ltd v Reeves (No.2) [1982] 3 All ER 1086

Authoritative work

Cordery on Solicitors, 10 ed, para 463

Mr McDonough for the second defendant
Mr R Alberga for the X law firm
Ms Corbett for the Z law firm

An injunction was issued by the Grand Court against the first and second defendants, freezing their funds held at an account at ABTC, a bank and trust corporation. The first defendant later successfully applied to have certain of the moneys released to him. This was embodied in an order dated 23 May 2001. At the time of that application, it was not confirmed whether the relevant funds held by ABTC were in US currency or Canadian currency. Accordingly, the court's order was given in two alternative limbs: if the funds were held in US dollars, one mode of calculating the sums to be released to the first defendant was prescribed, whereas a different mode of calculating was prescribed if the funds were held in US dollars.

The first defendant was represented by the X law firm. He wrote to his attorney (A) at the law firm, giving instructions as to how much should be payable in accordance with the two alternative modes of calculating.

ABTC was represented by Z law firm. ABTC instructed the Z law firm that the relevant fund was held in Canadian dollars. However, after performing the calculation in Canadian dollars, ABTC erroneously stated the final figure in US dollars.

The Z law firm then contacted A at the X law firm, advising that the funds were held in Canadian dollars. However, the Z law firm repeated the error made by ABTC by stating the final figure in US dollars.

On receipt of this advice, A assumed that final figure had been calculated correctly by ABTC and then converted into US currency. It did not occur to A that the final figure was mistakenly stated in the wrong currency. A sought instructions from the first defendant, forwarding a copy of the letter from the Z law firm. The first defendant, knowing that the fund was held in Canadian dollars, then submitted to A a recalculation of the final figure made on the assumption that the fund was held in US dollars. This figure was passed by A to the Z law firm. A believed the discrepancy between the ABTC figure and the recalculated figure proposed by the first defendant to have been arisen on the basis of accounting information. A was unaware of any mistake.

ABTC finally paid out a sum which, due to the misstatement of currency, was approximately US$180,000 too much. The overpayment error was not noticed by the Z law firm or A. A did not check the calculations as he assumed that they had been accurately calculated by the professional bankers. However, prima facie it appeared that the first defendant was aware of the miscalculation in his favour.

In the current proceedings, the second defendant sought an order against the X and Z law firms to repay the amount of the overpayment.

The second defendant contended that the attorneys of both law firms owed a duty to the court, as officers of the court, to ensure that the order of 23 May 2001 was complied with; in particular, that they were under a duty to take reasonable steps to ensure that only the correct amount authorised by the court was released to the first defendant. Furthermore, it was contended that when A had written to the Z law firm, A had positively represented that the miscalculated sum was owing. It was contended that the court had summary jurisdiction to order compensation against the attorneys for the loss to the second defendant: s5 Legal Practitioners Law (2002 Revision) and s11 Grand Court Law (1995 Revision). It was also contended that it was not necessary for the attorney actually to be involved in the proceedings before the court: Re Aitken, Ex p Bodenham, R v Smith (Martin).

The second defendant did not allege any impropriety or malfeasance on the part of the attorneys.

The attorneys contended that the proceedings should be struck out as an abuse of process. It was contended that the court had no summary jurisdiction to make a compensatory award of damages founded in simple negligence in the absence of a breach of duty owed to the court itself or in relation to matters before the court which fall short of the conduct required of an attorney.

Alternatively, it was contended that even if the court had jurisdiction, it should not be execrised in a summary way because the negligence issue required a trial for proper determination. Alternatively, it was contended that the summary procedure should not be permitted because (i) the overpayment could be recovered from others (namely the first defendant and ABTC), and (ii) the money may not have belonged to the second defendant since it was subject to a claim by the US government. Furthermore, it was contended that (i) no impropriety or malfeasance had been suggested or proved, and (ii) ABTC was not named as a party to the proceedings, and its attorneys (the Z law firm) were never involved in the proceedings and were not attorneys of record in the matter.

Held: (setting aside the summons seeking summary repayment)

(i) While there was a dispute as to whether the second defendant or the US government was entitled to the funds, the claim of the US government had not yet been proved. Until that time, the second defendant maintained the right to protect the property which may ultimately be his. He had a sufficient interest to bring the present application.

(ii) The court has jurisdiction to control the officers of the court, and to do so in a summary way. The court may do so when the remedy sought is disciplinary in nature. The current procededings, however, were not disciplinary but compensatory.

(iii) The court has jurisdiction summarily to make a payment order against one of its officers in the following circumstances:

(a) Where the complaint and application is disciplinary in nature; where there has been some form of malfeasance or misconduct and a monetary award is appropriate.

(b) Where an officer of the court has breached a duty to the court through inadvertance or negligence. It is not necessary that the officer be counsel of record or actually appear in proceedings before the court. It is sufficient that the officer is involved with a proceeding of which the court is seised.

Officers of the court always owe a duty to the court to take reasonable steps to obtain their clients' compliance with court orders: Myers v Elman. What is reasonable will depend on the circumstances of the case. It may not require anything more than telling the client what the order says; it would not likely involve monitoring to see if compliance was made.

(iv) In the present circumstances it would not be right to invoke the jurisdiction. The conduct of the attorneys was not so clearly negligent or in breach of their duties to the court that the proceedings should be heard summarily. Furthermore, it would be inappropriate to hear the case summarily when other potential means of recovery were available to the second defendant (namely by action against ABTC and the first defendant). The exercise of the court's jurisdiction is discretionary and should be exercised only where the court sees no injustice would be done to the attorneys by it. In the present circumstances, would be an injustice to the attorneys to order payment when there appears a strightforward remedy against ABTC and the first defendant. This approach is supported by the cases which determine that the amount to be recovered from the lawyer is limited to the amount which is not likely to be recovered from others: Re Dangar's Trusts, Todd v Studholme, Dixon v Wilkinson.

SAAC

Summary judgment – Material non-disclosure in an insurance contract

Royal Sun Alliance Insurance v Dawson

Grand Court (141/02)
Sanderson J
January 7 2003

Legislation

Rehabilitation of Offenders Law (1998 Revision) s4

Authorities

CVC/Opportunity Equity Partners Ltd v Demarco Grand Court Cause no 389/99 (unreported, reasons October 2/01)
Swain v Hillman [2001] All ER 91
National Westminster Bank Plc v Daniels and others [1994] 1 All ER 156

Mr R McDonough for the Plaintiff
Mrs S Brooks for the Defendant

The Plaintiff applied for summary judgment seeking a declaration that it was entitled to rescind its contract of insurance with the defendant on the basis of a material misrepresentation in the application for insurance. It was alleged that the defendant failed to disclose the fact that her husband, as primary driver, has 15 convictions for motor vehicle offences including 4 for driving whilst intoxicated.

The defendant accepted that the signature on the insurance form was hers could not recall signing the form. She stated that she was certain she did not provide some of the information on that form and assumed that it was filled in by an employee of the plaintiff from other information contained in its files. The issue, therefore, was whether the material information was on the form when she signed it.

The plaintiff did not file an affidavit in support of summary judgment from the clerk who dealt with the defendant's policy, on the basis that she had no recollection of the actual transaction and could give evidence only of the usual practice. Notwithstanding this, the plaintiff asked for summary judgment on the basis the defendant's affidavit was not credible.

Held (dismissing the application for summary judgment):

(i) The appropriate test to be applied under Order 14 applications was recently re-affirmed in CVC/Opportunity Equity partners Ltd v Dermarco where the Court approved the test enunciated by Lord Woolf in Swain v Hillman and referred to the case of National Westminster Bank v Daniels. Summary judgement will be granted where the defence has no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification as they speak for themselves. The Court should consider whether there is a "realistic" as opposed to a fanciful prospect of success. To put it another way, "Is there a fair or reasonable probability of the defendant having a real or *bona fide* defence?" as stated in National Westminster Bank.

(ii) Before being able to conclude on the issue of whether the defendant is credible, and thus whether the defendant has a real prospect of success, the Court would require affidavit evidence from the clerk outlining her usual or invariable practice.

(3) Plaintiff's application dismissed with liberty to re-apply upon filing further affidavit evidence.

(4) Costs in the cause.

DB

Service of writ out of the jurisdiction – Contract governed by Cayman law – Non-compliance with procedural requirements of foreign law – Curing irregularity in service – Staying proceedings on the basis of the doctrine of forum non conveniens

Velox International Investments v Jorge Peirano Facio;
Trade & Commerce Bank v Juan Peirano;
Trade & Commerce Bank v Dante Peirano

Grand Court (670/671 and 672/2002)
Edwards J Actg

February 27 2003

Legislation

Grand Court Rules Order 2 r1, Order11 rr 1 5 and 6, Order 12 r 8.

Authorities

Ferrarini SwpA v Magnol Shipping Co Inc (The Sky One) [1988] 1 Lloyds Rep 238
Golden Assurance Ltd and World Mariner Shipping SA v Martin (The Golden Mariner) [1990] 2 Lloyds Rep 215

Mr Ritchie and Mr Terziano for the defendants
Mr Walters and Mr Freeman for the plaintiffs

The defendants in these three separate actions were all members of a family controlling the Velox group of companies having business interests in South America. In 1989 the Velox group incorporated Trade & Commerce Bank ("TCB") in the Cayman Islands. TCB carried on banking business in Uruguay through Latinur SA and TCB Mandatos SA.

The Argentine financial crisis in 2001/2002 caused a run on TCB which resulted in it being placed into liquidation in August 2002 with another member of the Velox group, Velox International Investments ("VII"), being wound up on the same date. On September 6th 2002 TCB commenced proceedings against i) Juan Peirano and his wife (cause 671 of 2002) to recover US$13.9m, which it was alleged was owed jointly and severally by the couple to TCB; and ii) Dante Peirano (cause 672 of 2002) to recover US$132.8m which it was alleged Dante owed to TCB. On the same date, VII had commenced proceedings against Jorge Peirano Facio (cause 670 of 2002), a director and sole shareholder of VII, to recover US$48.3m representing loans allegedly made by the company to him.

By orders made on September 11 2002, the Grand Court granted leave in respect of causes 670 and 672 to serve Jorge and Dante personally in Uruguay, service to be effected, in accordance with local law, by a notary public. On the following day an *ex parte* order was granted in cause 671 for substituted service on Juan Peirano's Cayman attorneys.

Three issues fell for the court's consideration in connection with the legitimacy of the foregoing proceedings:

1. Whether service *ex juris* on Jorge and Dante had been effected in accordance with the terms of the court orders granting leave;
2. Whether the mode of service on Jorge and Dante complied with the laws of Uruguay where service of the originating process was to be effected;
3. Whether the Grand Court had jurisdiction to determine the issues brought against Juan and Dante by TCB, or whether the actions should be stayed on the grounds of *forum non conveniens*.

In relation to the first two issues it had been alleged that service upon the defendants had not been properly effected in accordance with the requirements of the law of Uruguay. In particular, the defendants argued that there not been compliance with requirements of local law that service be: i) of documents translated into the Spanish language; and ii) effected by a qualified notary public. These contentions were supported by expert evidence.

In this connection, the defendants relied upon Order 11 rule 5(2) Grand Court Rules which provides that:

"Nothing in...any order...of the Court made by virtue of [this rule] shall authorize the doing of anything in a country in which service is to be effected which is contrary to the law of that country."

This rule had been applied by the English Court of Appeal in The Sky One [1988] in preventing service of a writ of the English High Court in Switzerland in circumstances where English procedure would have constituted a criminal offence according to Swiss law.

Held: (allowing service *ex juris* and finding the Grand Court to be the *forum conveniens*)

(i) Whilst the requirements of the law of Uruguay had not been strictly complied with, the orders of service did not involve doing anything which was "contrary to the law of that country" within the meaning of Order 11 rule 5(2). The present case was therefore readily distinguishable from The Sky One where service would have amounted to a criminal offence under local law.

(ii) It was abundantly clear that the defendants to each of causes 670 and 672 had knowledge of the Grand Court proceedings, having been represented by Cayman counsel in interlocutory proceedings since September 2002.

(iii) Accordingly, the discretion conferred upon the court by Order 2 rule 1 to cure any irregularity in service would be exercised as each defendant had effectively been served even though the orders for service out of the jurisdiction had not been followed to the letter.

(iv) Accepting the argument of the plaintiff in cause 672, the Grand Court possessed a discretion to exercise jurisdiction over the defendant pursuant to Order 11 rule 1(1)(d)(iii) on the basis that the contract between the parties was governed, by its terms or by implication, by the law of the Cayman Islands. This determination was reached notwithstanding the fact that no written contract relating to the moneys advanced could be identified. In these circumstances, it was appropriate for the court, in the absence of evidence to the contrary, to make the inference from TCB's standard banking documents that the contract between the parties was governed by Cayman law.

(v) Contrary to the arguments of the defendants, there existed no basis upon which, in exercise of its *forum non conveniens* discretion, trial in the Cayman Islands should properly be stayed. The onus was upon the defendants to establish (applying The Spiliada [1987] AC 460) that their favoured *fora* (the courts of Argentina or Uruguay) were clearly or distinctly more appropriate for the trial of the action than the courts of the Cayman Islands. This they had failed to do, not least because, by their own evidence, Jorge was said to have been imprisoned in Uruguay as a result of a government vendetta against him and Juan had abandoned his residence in Argentina out of fears for his personal safety. Such jurisdictions were "hardly a climate in which the parties can be confident their positions will be vigorously prosecuted before the courts or adjudicated fairly".

MD

Editorial Note: On January 8th 2004 the Grand Court (cause 670 of 2002) granted an application for summary judgment against the estate of Jorge Peirano Facio (who had died since the conclusion of the above proceedings) in the sum of US$48.3m.

Jurisdiction by submission - Ex parte injunction – When appropriate – Duty of full disclosure – Criteria to be applied in considering whether to discharge injunction – Sufficiency of damages in lieu of injunction – Balance of justice

Wicklow Distributors Inc v Air Atlantic De Honduras

Grand Court (268 of 2003)
Levers J
February 20th 2004

Authorities

Guinness plc v Saunders [1988] 1 WLR 863
Brinks Mat Ltd v Elcombe [1988] 1 WLR 1350
T J Smith & Nephew Ltd v 3M United Kingdom plc [1983] RPC 92
Cayne v Global Natural Resources plc [1984] 1 All ER 225

Mr McDonough for the plaintiff
Mr Hill QC and Mr McField for the defendant

The plaintiff had leased two aircraft to the defendant. The present dispute concerned the lease of a Hawker Siddeley aircraft under final terms that were incorporated in a letter dated April 15th 2002. The defendant failed to make payments under the lease, alleging that one of the aircraft's engines had been damaged on delivery causing the defendant to expend moneys on its repair. By notice dated October 2002, the plaintiff terminated the lease alleging the defendant's non payment of amounts due according to the terms of the lease. In response to the defendant's allegation that the aircraft engine

was damaged on delivery, the plaintiff replied that the lease agreement placed an obligation on the defendant to inspect the aircraft and that the maxim *caveat emptor* was applicable. On April 21st 2003, with the aircraft temporarily in the Cayman Islands, the plaintiff sought an urgent *ex parte* injunction for the seizure of the aircraft within the jurisdiction. Although the plaintiff had not commenced proceedings against the defendant within the Cayman Islands at the time of the *ex parte* application, the application was granted subject to the plaintiff entering into an undertaking to file proceedings the following day. In order to protect the interests of the defendant, the plaintiff was also required to enter into an undertaking to abide by any order of the court and to lodge with the court an unlimited banker's guarantee to cover any damage which the injunction might unjustifiably cause to the defendant.

On 31st July 2003 counsel for the defendant filed a summons seeking, *inter alia*, a declaration that the Grand Court lacked jurisdiction in respect to the dispute; the discharge of the injunction and leave to file an amended defence to the claim. A central plank of the defendant's case was that in making the *ex parte* application the plaintiff had failed in their duty to provide full disclosure to the court of all material facts. In particular, it was submitted that the plaintiff had failed to apprise the court: i) of the defendant's allegation that the plane was delivered in an unairworthy state; ii) that the defendant had provided the plaintiff with a $200,000 security deposit; iii) that litigation had earlier been commenced in Miami where the plaintiff's application for an injunction had been refused; and iv) that by the express terms of the lease agreement, jurisdiction was conferred on the courts of Ontario, with the interpretation of the lease being expressly subject to Ontario law.

Held: (discharging the injunction)

(i) The court possessed jurisdiction over the subject matter of the dispute as the defendant had submitted (by filing a defence to the claim) to the jurisdiction of the court and, in addition, had a place of business in the Cayman Islands.

(ii) Although the defendant had submitted to the jurisdiction of the court, this had occurred in circumstances where there had previously been the absence of a full disclosure by the plaintiff.

(iii) In such circumstances the court had to determine whether it should exercise its discretion in favour of continuing or discharging the injunction. The factors to be taken into account included a consideration of whether, if the injunction were discharged, damages would be an adequate remedy for any successful claim of the plaintiff. A principal consideration on the present facts concerned the ability of the defendant to pay in the event of it being met with an adverse judgment. Given that a security deposit was being held by the plaintiff and that a further mortgage was in place, it was to be concluded that the defendant had sufficient funds to cover any adverse damage award.

(iv) A further consideration was to determine where the balance of justice in the case lay. In particular, the question which arose for determination was whether the continuation of the injunction would work an injustice to the defendant. The considerable delay which had elapsed since the grant of the injunction, not being attributable to the fault of either of the parties, was not a relevant consideration. However, the fact that there had been an absence of full disclosure in circumstances where damages would be an adequate remedy militated towards a decision being made in favour of the defendant provided the balance of justice, in all the circumstances, lay with it. It did, and the injunction would accordingly be discharged.

MD

COMPANY LAW

Liquidation – Final dividends – Compromise or arrangement
Liquidation – Final dividends – Constitution of classes of creditors/members

In The Matter of Euro Bank Corporation (In Liquidation) and In the Matter of Section 150 of the Companies Law (2002 Revision)

Grand Court (379/99)
Henderson J
May 13 2003

Legislation

Companies Law (2002 Revision), s86

Authorities

Re Humber Iron Works and Ship Building Company (1869) LR 4 Ch 643
Re Lines Brothers Ltd in Liquidation [1983] 1 Ch 1
In Re UDL Argos Engineering & Heavy Industry CL Ltd and Others [2001] 4 HKCFAR 358

Mr Jones QC for the applicant, ex parte

Upon an ex-parte application by the joint liquidators of the bank, Henderson J authorised the payment of a final dividend to the admitted creditors at the rate of 20 cents on the dollar, resulting in full payment of what was owed to the depositors and creditors. The bank also proposed a compromise or agreement with its creditors under

Companies Law (2002 Revision) s.86. Henderson J approved the convening of a meeting of the scheme participants and gave certain directions establishing a procedure for consideration of the proposed scheme. These reasons explain two aspects of his decision.

The first aspect relates to whether this was a 'compromise or arrangement' within s.86.

The second aspect is the definition of the relevant classes, proposed by the liquidators to be shareholders and scheme participants.

Held:

(i) Cayman Islands law recognised an entitlement to post-liquidation interest in depositors and creditors whose contracts provide for it. The proposed scheme asked those depositors with a contractual right to interest to set those rights aside in exchange for an interest payment calculated in accordance with the arrangement. For some creditors, that meant giving up a right to interest to which they would otherwise be entitled. For others, it would mean receiving an interest payment larger than their contractual entitlement and, in some cases, receiving such a payment where there was no entitlement at all. The scheme therefore was in substance a 'compromise or arrangement' between the bank and its creditors of the sort contemplated by s.86. The court therefore had jurisdiction to give directions for the consideration of the proposed scheme.

(ii) Applying the general rule laid down In Re UDL Argos Engineering & Heavy Industry CL Ltd and Others [2001] 4 HKCFAR, the principle upon which the classes of creditors or members were to be constituted was that they should depend upon the similarity or dissimilarity of their rights against the company and the way in which those rights were affected by the scheme, and not upon the similarity or dissimilarity of their private interest arising from matters extraneous to such rights. The relevant classes were therefore the shareholders and the scheme participants, as defined by the liquidators on the application.

DM

Liquidation – Proof of creditors' claims

MS Bhatti and Sons Inc v Wight

Grand Court (408/2001)
Kellock J
April 8 2003

Legislation

Trusts Law (1998 Revision)
GCR Order 102, rule 17
Insolvency Rules 1986, SI 1986 No 1925

Authorities

In re Van Laun [1907] 2 KB 23
Anklesaria v BCCI (Overseas) [1999] CILR 43
In Re Kentwood Constructions Ltd [1960] 2 All ER 655

Authoritative works

Phipson on Evidence (15th ed.)

Mr Simon for the applicants
Mr McMillan for the respondents

BCCI (Overseas) had its registered office in the Cayman Islands and ceased operations in July 1991. The respondent was appointed its Receiver and BCCI (Overseas) was put into liquidation by court order of January 1992.

BCCI (Overseas) had opened a branch in Monrovia, Liberia in 1979. Both applicants carried on business in Monrovia and in June 1990 both were customers of BCCI (Overseas) with accounts at the bank's branch in Monrovia.

The applicants applied to the Grand Court pursuant to Order 102, rule 17 and the Insolvency Rules 1986, SI 1986 No1925, Ch.9, Section A, Rule 4.83 for a reversal of the rejection of the proof of the debts of the applicants by the respondents.

Held:

The decision of the liquidators was reversed and the applicants' proofs were ordered to be admitted in full.

The law is as stated by the editors of Phipson, in these words:

'As a general rule, courts may act on the testimony of a single witness even where there is no other evidence which supports it. Indeed where in a civil case such testimony is unimpeached the court should act on it... Similarly, as a general rule, the courts may act upon duly proved documentary evidence without such testimony at all...'

'But common sense and experience suggest, however, that there are certain categories of witnesses and certain types of evidence which it is dangerous to rely on if they are not supported by other evidence.'

If the respondents in this case, or liquidators in any other case, suspected a creditor's claim to be fraudulent, they were entitled, if not obliged, to investigate and to require the creditor to cooperate in that investigation and respond to all reasonable requests for information.

However, liquidators were not entitled simply to sit back and to refuse to be satisfied as to the *bona fides* of any claim. If the respondents' case was that the applicants' claims were fictitious, which is to say fraudulent, it was up to the respondents to allege and prove that case. It was not up to the applicants to satisfy the respondents that their claims were legitimate beyond whatever unknown and unknowable subjective or arbitrary standard the respondents demanded as the price for being 'satisfied'.

AS

CONFLICT OF LAWS

On conflict of laws, see also Wicklow Distributors Inc v Air Atlantic De Honduras under **CIVIL PROCEDURE**.

Entitlement of "wife" on intestacy – Validity of marriage – Recognition of Cuban marriage decree – Evidence of Cuban decree

M v C and another

Grand Court (108 / 2001)
Levers J
October 14 2003

In Chambers

Legislation

Matrimonial Causes Law ss 7 and 8
Evidence Law s12
Cuban Family Law Articles 43 45 and 47

Authorities

Re Glubb, Bankfield v Rogers [1900]
Adams v Adams [1941] 1 All ER 334

Authoritative works

Halsbury's Laws of England 4th edition

Mr DaCosta for the applicant
Mr Farrow for the caveators

The intestate met the applicant, a Cuban national, in Havana in 1997. At this time the intestate was married, but separated from his wife who, along with the two adult children of that marriage (the caveators), lived in Grand Cayman. Thereafter, the intestate made frequent visits to Cuba to visit the applicant who also often visited the intestate (at his expense) in Grand Cayman. In February 1998 the applicant, whilst in Cuba, met an Italian national, R, whom she married in February 1998. It was the applicant's evidence that this marriage was arranged by the intestate in order that the applicant would be given permission to leave Cuba. This opportunity was apparently not taken, however. In August 2000 the applicant went through a ceremony of marriage with the intestate in Grand Cayman which she claimed the intestate to have encouraged on the basis that the Cuban marriage "would not matter" in the Cayman Islands. On August 20th the applicant returned to Cuba whereupon she filed for divorce from R. The applicant gave *viva voce* evidence that in September 2000 the Cuban court whilst granting the divorce at the same time annulled the marriage on the grounds that she and R had never lived together. It was the applicant's contention therefore that the marriage to R being void, she was free to marry the intestate in August 2000 and was accordingly, at the time of the present proceedings, his lawful widow. In that capacity she claimed to be entitled to: i) various *inter vivos* gifts which the intestate had provided her with by making her the beneficiary of certain insurance policies and pension funds; and ii) the intestate's estate.

The caveators are the two sons of the intesate who claimed to have remained close to their father and who maintained that the applicant's purported marriage to their father was a marriage of convenience motivated by a desire for financial gain. It was further their case that the ceremony of marriage between the intestate and the applicant was bigamous and accordingly invalid. To this end, inconsistencies in the applicant's evidence were pointed to, chief amongst these being that, contrary to what had been stated in her *viva voce* evidence, the applicant's subsequent affidavit evidence indicated that the marriage to R had not been annulled until May 2002. A further concern which was emphasized to the court was the authenticity of the documents which had been produced as evidence of the Cuban court's marital decrees. In order for the decree to be recognized as authentic, s12 Evidence Law required it to have been either sealed with the seal of the foreign court or to have been signed and attested to by the judge of that court.

Held: (ruling in favour of the caveators)

(i) The first question to be addressed was whether the applicant was the lawful widow of the deceased. The answer to this question depended upon the validity of the Cuban decree. If valid, the further question would arise, namely whether

the marriage had been annulled (*ab initio*) by order of the Cuban court or merely dissolved by decree of divorce.

(ii) It was plain from the terms of s.7 Matrimonial Causes Law that the applicant's nationality and habitual residence in Cuba rendered any authenticated judgment of the Cuban court effective in the Cayman Islands.

(iii) None of the documents produced in evidence satisfied the requirements of s. 12 Evidence Law. In particular, the document purporting to be the annulment document did not do so. The lack of authentication of the documents combined with the contradictory evidence of the accused (even having taken into account that English was not her first language) made it impossible to accept with any certainty that the Cuban marriage had been annulled.

(iv) The applicant was not therefore the lawful widow of the intestate with the Cayman ceremony of marriage being bigamous.

(v) The second question was whether the applicant should be allowed to retain the gifts made to her by way of insurance and pension benefits. The evidence indicated that these gifts were made to the applicant as the wife or fiancée of the deceased. Such gifts could be set aside if there existed cogent evidence that the applicant had misled the deceased into making these gifts. Whilst great circumspection was to be exercised by the court before making such a determination, the gifts had induced by the applicant's misrepresentation that she was free to marry the deceased. She was not. The applicant was accordingly not entitled to benefit from any of the *inter vivos* gifts.

MD

CONTRACT LAW

Rescission – Fundamental breach – Misrepresentation – Damages

Duval and Duval v Evans and Evans

Grand Court (GC585 of 2001)
Sanderson J
May 19 2003

Mr Chapman for the plaintiffs
Mr Allen for the defendants

In March 2001, the plaintiffs and the first defendant entered into an oral agreement to purchase a newly constructed home for the price of CI$299,000. The plaintiffs paid CI$15,000 to the first defendant before completion. They also purchased appliances and fixtures at a cost of CI$6,716.40, which they installed in the house. In addition, the plaintiffs spent approximately CI$4,170 in painting and landscaping the property. The purchase and sale of the house ultimately did not complete. The defendants subsequently sold the property to another purchaser for CI$300,000.

The plaintiffs claimed:

(a) Rescission of the contract and return of the CI$15,000 paid, plus CI$6,716.40 for the appliances and fixtures, plus interest;

(b) Alternatively damages in the amount of CI$15,000, CI$6,716.40 and CI$4,170, plus interest.

The key issues were:

(a) Did the parties agree that the contract be rescinded and that the first defendant repay the CI$15,000 and CI$6,716.40 to the plaintiffs?

(b) Alternatively, were the plaintiffs entitled to rescind the contract as a result of either misrepresentation or fundamental breach?

(c) In the further alternative, were the plaintiffs entitled to damages for breach of contract, conversion or the return of monies had and received?

Held:

Having examined the evidence, the following findings were made:

1. There was no mutual agreement to terminate the contract and refund the CI$15,000 and CI$6,716.40. There was an acceptance by the first defendant that the sale would not be proceeding and he did agree that he would refund the CI$6,716.40 upon the sale of the property.

2. The plaintiffs were entitled to rescind the agreement as a result of misrepresentation. The first defendant had advised that the house had a value of CI$500,000 (in fact CI$325,000) and was 3,500 square feet (in fact 3,100 square feet). Both of these representations were material, relied upon by the plaintiffs and incorrect.

3. With respect to the claim for fundamental breach, neither the failure to complete the work sooner, the moving of a septic tank, nor the failure to obtain the occupancy certificate, were sufficient to constitute a fundamental breach.

The plaintiffs were therefore entitled to rescission of the contract based on the misrepresentation of the first defendant. They were entitled to the return of the CI$15,000. The plaintiffs were further entitled to payment of CI$6,716.40 being the amount they spent on fixtures and chattels, on the basis that the first defendant agreed that he would repay them this amount. The plaintiffs were not entitled to return of the amount of CI$4,170 for painting and gardening. That work was done for their benefit and there is no evidence that it was requested by the first defendant or increased the value of the property. The first defendant did not receive the money and there was no legal basis for claiming that amount from him.

AS

Contract – Arbitration clause – Implied terms – Void or voidable

Cayman General Insurance Company and NEM (West Indies) Insurance Ltd v Divi Hotels Inc

Grand Court (262/03)
Levers J
August 21 2003

Legislation, Rules and Practice Directions

Grand Court Rules Order 14(a)
Arbitration Act 1889
Arbitration Act 1934

Authorities

Heyman v Darwins Ltd [1942] AC 356
Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592

Mr Joseph for the plaintiffs
Ms Corbett for the defendants

Through their agents, Marsh, the Defendants had entered into an insurance agreement with the Plaintiffs. Under the agreement, the Plaintiffs provided insurance coverage for the Defendants' Hotel Complex, including risk or loss that might be caused by a variety of perils, including hurricanes and fire.

The Plaintiffs attempted to avoid the policy on the basis that there had been a material misrepresentation and/or non-disclosure by the agents, Marsh. Clauses included in the policy then gave rise to differences between the parties as to the appropriate form of redress.

The Plaintiffs contended that they were entitled to avoid the policy and furthermore, that the Arbitration Clause contained in the agreement should be interpreted narrowly, so as to be superseded by an Overseas Jurisdiction Clause, which had been incorporated into the agreement. Notwithstanding that the Overseas Jurisdiction Clause was only mentioned in the policy and not laid out in full, the Plaintiffs claimed that it was well known to the agents, Marsh, and that as such, the Court can construe the clause under GCR Order 14(a), so as to hold that a Court in the Cayman Islands had jurisdiction to resolve this dispute.

The Defendants argued that they were not bound by Marsh's knowledge of the Overseas Jurisdiction Clause and that the clause, not having been discussed by the parties at the time the policy was issued, had not been incorporated. Were the Court to find that the Overseas Jurisdiction Clause had been incorporated under the heading, "Service of Suit in the Jurisdiction," the Defendants argued that the terms of that clause were so uncertain as to be unworkable. As such, the dispute that has arisen between the parties ought to be determined by arbitration.

Held: (referring the dispute to arbitration)

(i) The dispute contained a mixture of legal and factual issues and the Court would only take away the arbitrator's responsibility where there was a question of law alone.

(ii) Non-disclosure did not automatically avoid the contract; it only made it voidable. Where the contract was illegal, this would nullify the Arbitration Clause contained in the contract. However, where the contract was simply voidable, as was the case here, the parties were bound to arbitration by virtue of their common intention, as evidenced by the incorporation of the Arbitration Clause.

(iii) The intention of the parties to go to arbitration could not be displaced by reference to an Overseas Jurisdiction Clause, under a subheading Service of Suit, without any details of that clause being annexed to the policy.

VC

CRIMINAL LAW

Money laundering – Proceeds of crime – Predicate offence

The Queen v Stewart, Cunha, Burges and Donegan (In the Matter of Lawrence Shapiro)

Grand Court (6/01)
Smellie CJ
October 6 2003

Legislation

Proceeds of Criminal Conduct Law (2000R) Ss 1(5) 5(3) 22(1) 22(2) 24
Drug Trafficking Act 1994 Ss 2(3) 4(1)a

Authorities

Simpson [1998] 2 Cr App R (S) 111
Dickens [1990] 2 QB 102
Smith (1989) 11 Cr App R (S) 290
Banks [1997] 2 Cr App R (S) 110
R v Selvage (1985) Cr App R 333
R v Murray (GE) 75 Cr App R 58
R v Firetto [1991] Crim LR 208
In the Matter of Crystal Ltd 2002 CILR 497
R v Allen [2000] 2 All ER 142

Mr Mitchell QC and Mr Talbot for the Crown
Mr Hill QC and Mr Thompson for the first Defendant
Mr Cox and Mr Freeman for the second Defendant
Mr Burke QC and Mr McGrath for the third Defendant
Mr Sharkey QC and Mr Furniss for the fourth Defendant

The sixth count of the indictment charged the second, third and fourth Defendants with the offence of assisting Lawrence Shapiro to launder the proceeds of his criminal conduct. These allegations also supported a more general conspiracy, identified in count one of the indictment, by the bank and various customers, to launder money.

For the purposes of both the first and the sixth counts of the indictment, the Crown therefore sought to rely upon the conduct of Dr Lawrence Shapiro. The Crown alleged that Dr Shapiro, who, along with his father had established a company (Sunshine Travel Ltd) in the Cayman Islands, both then sought to transfer funds to that company from the United States, in order to prevent Dr Shapiro's recently divorced ex-wife from obtaining any of these by way of further recourse through the Florida Courts.

To this end, Dr Shapiro gave monies from his clinics' earnings to his parents, who bought money orders in denominations of US$500 throughout Florida, thereby evading reporting requirements, which they then brought to the Cayman Islands for deposit in the Sunshine Travel account at Eurobank. On one occasion, US$300,000 in money orders was brought by the Shapiros. This money was accepted for deposit by the fourth Defendant, even though it was the bank's policy to only accept cash or cash equivalents amounting to US$10,000 in any calendar year from any single client. Instead the US$300,000 was placed in a safety deposit box, and the fourth Defendant made daily deposits of less than US$10,000 into the Sunshine Travel account. The prosecution alleged that that this was done with the knowledge and approval of the third defendant (her immediate superior) and the second Defendant (the general manager of the bank).

According to the prosecution, the arrangement constituted an attempt to defraud Dr Shapiro's ex-wife and/or other unspecified creditors and to pervert the course of justice; that Dr Shapiro's father's involvement meant that it became a conspiracy to defraud and pervert the course of justice; that the defendants within the bank must have known about or suspected this; and this amounted to the predicate offences necessary to prove the money laundering allegations in counts one and six of the indictment.

Held:

(i) Since the money was earned lawfully, it could not be said to be the proceeds of crime, unless an offence had subsequently been committed.

(ii) In the context of a criminal trial, it was impermissible to argue that, were Dr Shapiro's ex-wife to bring a further claim against him in the future, it would have been his intention to defraud her and pervert the course of justice in so doing. Such an intention could not be inferred; nor could if be inferred that the Defendants were aware of this intention and had set about assisting him.

(iii) Since no proceedings were imminent or no investigations which could or might bring about proceedings were in progress in relation to Dr Shapiro's conduct, no course of justice had been embarked upon such as could have been perverted.

(iv) The mere moving of assets abroad could not in itself give rise to a tendency to pervert the course of justice, which was necessary to prove an attempt to pervert the course of justice.

(v) An agreement and intent to defraud could not be inferred simply from the failure in and of itself to declare the money. Not only was there no evidence to support the fraudulent intent; but a further problem would arise, since the monies could still not be considered to be the proceeds of crime. Only a benefit might be obtained and a benefit, in the sense of property (including a pecuniary advantage) obtained as a result of or in connection with the commission of an offence; is not the same as and is not to be confused with proceeds of crime.

(vi) The prosecution could not therefore rely evidentially upon the Shapiro account as containing the proceeds of a predicate offence in respect of which the defendants might be convicted of money laundering or conspiracy to launder.

VC

CRIMINAL PROCEDURE

Criminal procedure – Money Laundering – Evidence – Ambit of a conspiracy count – Requirement of proof of predicate criminal activity – Similar fact evidence – Burden of proof of necessary mens rea – Discretion to exclude evidence.
Severance and case management in complex criminal proceedings.
Duplicity.
Retrospectivity of the PCCL.

The Queen v Stewart, Cunha, Burges, Donegan

Grand Court (6/01)
Smellie CJ
June 14 2002

Legislation

Proceeds of Criminal Conduct Law (2000R)
Misuse of Drugs Amendment Law 1989

Authorities

R v Greenfield 57 Cr App R 849
R v El Kurd (unreported, Court of Appeal of England (Criminal Division), No. 1999018484/23, 26th July 2000)
DPP v P [1991] 2 AC 447
R v Pettman (unreported 2 May 1985)
Makin v AG for NSW [1894] AC 57
AG Hong Kong v Siu Yuk Shing [1989] WLR 256
R v M (P.A.) [2000] 1 WLR 421
R v Sawonuik [2000] 2 Cr App R 220
R v Asif (1986) 82 Cr App R 123
R v Butler (Diana) 2000 CLR 835
Re McCorkle 1998 CILR 224
R v Jones (J) and others 59 Crim App R 120
Verrier v DPP [1967] 2 AC 195
R v Hammersly 42 Cr App R 207
R v Simmonds [1969] 1 QB 685
R v Cohen and others The Independent July 29 1992 CA
R v Kellard, Dwyer Wright [1995] 2 Cr App R 134
R v Colle (1992) 95 Cr App R 67
R v Griffiths and other [1996] 1 QB 589
R v Sang [1980] 2 AC 402

R v Powell 1980 –83 CILR 277
R v Keen unreported Nov 5 1999 CA (990571152)

Mr Andrew Mitchell QC and Mr Talbot for the Crown
Mr Michael Hill QC for the defendant Stewart
Mr Geoffrey Cox for the defendant Cunha
Mr Trevor Burke QC for the defendant Burgess
Mr Neil Sharkey QC for the defendant Donegan

The defendants faced charges under the Proceeds of Criminal Conduct Law. The indictment contained eight counts. The first alleged a conspiracy to launder money; namely that the defendants agreed that they would enter into or be otherwise concerned in arrangements whereby money laundering would be facilitated. The remaining seven counts on the indictment alleged substantive money laundering offences contrary to section 22 of the Proceeds of Criminal Conduct Law (2000R). This hearing was to determine a number of important preliminary points in advance of the trial which was listed for July 2002.

The preliminary points raised were as follows:

(1) *Proof of predicate criminal activity.*

The prosecution argued that, in order to prove the conspiracy it was not necessary for the prosecution to prove that any of the accounts dealt with by the defendants at the bank actually held the proceeds of any predicate crime in order to prove the agreement to enter into or otherwise be concerned in arrangements for money laundering purposes. The prosecution further relied on the English Court of Appeal decision of R v El Kurd, where it was held that a jury can properly convict upon an indictment for alternative counts of conspiracy to launder the proceeds of drug trafficking, or of criminal conduct other than drug trafficking, without the evidence specifying precisely what predicate offence had been committed but where, from all the circumstances, the jury was bound to conclude that the money was the proceeds of one crime or the other. On this basis, the prosecution argued it would be wrong for the Court to insist upon proof of the existence of predicate criminal activity.

(2) *Admissibility of evidence of events pre-commencement of the proceeds of Criminal Conduct Law (Dec 23rd 1996).*

The particulars of the count allege a conspiracy which was entered into and participated in between the 23rd December 1996 and 31st May 1999. The question then is, should the prosecution be allowed to adduce evidence relating to bank accounts and the defendants' activities in the period prior to 23rd December 1996? The defendants argued that events prior to 23rd December 1996 were ex facie not relevant, and were prejudicial as a species of inadmissible similar fact evidence in that the evidence was being sought to be adduced without the prerequisite "strong probative force or nexus" for admissibility (DPP v P). They further argued that to allow the introduction of such evidence would

offend the spirit of section 2(4) PCCL insofar as it would allow the Courts to apply the law retrospectively.

The Prosecution argued that evidence of such prior events was relevant to show the manner in which the defendants conducted the business of the bank in the past, without any proper regard for whether the source of funds coming into the bank may have been criminal conduct. This was allegedly done despite warnings to the contrary by regulators, and despite the Misuse of Drugs Amendment Law 1989 and established Codes of Practice. Finally, in this regard, the prosecution submitted that the evidence of prior conduct and events was necessary and important to the jury's understanding of the nature of the conduct of the defendants after the 23rd December 1996 being unchanged from before, despite the advent of the PCCL. The prosecution submitted that it is probative of the understanding, as between the defendants running the bank, that if they were to receive the proceeds of crime, they would carry on as they had before.

(3) *Random selection of accounts.*

The defendants argued that the prosecution should only state to the jury that the accounts it intends to rely on represent a random cross-section of the accounts at the bank, if indeed the accounts were selected by a demonstrably random method.

(4) *Power to exclude evidence due to the manner of its obtainment.*

The defendant Donegan sought exclusion of certain dairy entries contained within a dairy that was seized outside the ambit of the search warrant.

Held:

(i) It was necessary for the prosecution to prove that the accounts dealt with by the defendants at the bank actually held the proceeds of a predicate crime in order to prove the agreement to enter into or otherwise be concerned in arrangements for money laundering purposes. On the drafting of the conspiracy count, it was not sufficient for the prosecution solely to establish that the manner of dealing with accounts at the bank was such that the jury could properly infer that the defendants had agreed to be concerned in arrangements for money laundering purposes. It would be unfair, in the circumstances of this case, to adduce evidence about the activity within the bank about specific accounts, leaving the jury to infer that the defendants must have agreed to launder dirty money as alleged, knowing or suspecting that they were in fact dealing with the proceeds of crime without some evidence from which it could be inferred that the accounts in fact held the proceeds of crime. The defendants, moreover, should not be left with the evidential burden of showing that there was no such predicate criminal activity, if in fact there was not, for the purpose of showing that there was no basis for the requisite knowledge or suspicion on their part.

Before the prosecution might invite the jury to conclude in respect of any substantive count that the underlying activity was predicate criminal activity, it will not be sufficient for the prosecution to invite the jury to conclude that the defendants, or any respective defendant, must have suspected, and so be on guard, in the absence of evidence from which it might first be inferred that there was in fact some predicate crime. (El Kurd)

The prosecution will have to be able to demonstrate that the jury would first be "bound to conclude" that the predicate activity was such indictable criminal activity (El Kurd). Only then will the prosecution be allowed to invite the jury to conclude that the necessary knowledge or suspicion – as a matter of inference – must have resided in the defendant's mind. This will mean that the prosecution must adduce evidence to prove that the underlying predicate activity was indeed criminal, or inescapably as a matter of inference criminal, within the meaning of the PCCL. The prosecution have charged a conspiracy – a positive agreement – to launder the proceeds of crime, not a conspiracy to launder the proceeds irrespective of whether, or being reckless as to whether, they might be the proceeds of crime.

(ii) Applying Colle, where a defendant is charged with a substantive offence of money laundering it is for the prosecution to prove the state of knowledge required by the law in accordance with the normal standard of proof. That is the primary burden of proof. It remains on the prosecution, notwithstanding that if the defendant wishes to rely on the special statutory defences allowed by the law the defendant has the onus of proving such defence ie: not having the particular state of mind mentioned in the law on the balance of probabilities.

The conspiracy count should be amended to reflect the statutory requirement of the element of mens rea of the alleged conspiracy to launder money, ie: the knowledge or suspicion in the minds of the defendants that during the period of the conspiracy, the persons with whom they dealt were either then engaged or had been engaged in criminal conduct or had benefited from criminal conduct.

(iii) The test for the admissibility of similar fact evidence was stated in the seminal judgment in Makin v AG for NSW and the dicta from Makin which received reaffirmation of the Privy Council in AG of Hong Kong v Siu Yuk Shing in 1989.

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would other wise be open to the accused. The statement

of that general principle is easy, but it is obvious that it may be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

The traditional way of drawing that line has become to ask the question: does the probative value of the evidence outweigh its prejudicial effect?

Applying Makin to the facts of this case, it would not be competent for the prosecution to rely upon past reproachable conduct for the purpose of leading to the conclusion that the defendants are persons likely to have committed the conspiracy alleged in Count 1.
However, the evidence is admissible even if prejudicial, if it is relevant to an important issue before the jury. Due to the potential prejudice, even if evidence of background might be useful to the jury's understanding of the issues in the indictment "a limit must be set" as per R v Butler (Diana)

Setting a limit in this case would be done as follows:

(a) Category A accounts – where predicate criminal activity and dealings with accounts were concluded by 23rd December 1996 evidence of such dealings is inadmissible on the principle that the probative value of this evidence is outweighed by its prejudicial effect.

(b) Category B accounts (the McCorkle exception) – where predicate criminal activity and dealings with accounts continued beyond the 23rd December 1996, the proof of that continuum, from beginning to end, is legitimate and such evidence is admissible.

(c) Category C accounts - evidence relating to the dealings on accounts which came into existence post 23 December 1996, allegedly involving the proceeds of predicate criminal activity committed before 23rd December 1996 would be admissible.

(d) Category D accounts - evidence relating to accounts which came into existence after 23rd December 1996 and involving alleged proceeds of predicate crime committed post 23rd December 1996 would clearly be admissible.

(e) Evidence relating to events prior to December 23 1996, not relating to specific accounts and dealings, but which would be relevant to show the defendants' state of mind as parties to the alleged conspiracy would be admissible. For example, evidence of warnings by regulators, managers and employees, absence of systems to prevent money laundering before December 23rd 1996 continuing post December 23rd.

(iv) In relation to the issue of retrospectivity, the admission of evidence of conduct or events prior to the 23rd December 1996 would not offend the spirit of the PCCL section 2(4). This section confines the exercise of the powers conferred upon

the Courts by the PCCL so as to apply only to *offences* committed after the PCCL commenced and to ancillary proceedings in respect of such offences. The jurisdiction and power of the Court by which it determines the admissibility of evidence do not depend upon the provisions or the powers vested in the PCCL.

(v) In relation to the effect of section 2(4) PCCL on the prosecution of substantive offences, should the prosecution wish to prosecute a substantive offence of money laundering based upon predicate activity which commenced before 23rd December 1996, they may only do so if that predicate activity also continued after 23rd December 1996. (McCorkle followed.)

(vi) A count for conspiracy should not be included with counts charging a substantive offence if the inclusion will result in unfairness to the defence (R v Jones J and Others). Further, as a general rule, where there is an effective and sufficient charge for a substantive offence, a charge of conspiracy is undesirable: Verrier v DPP. To these rules, exceptions apply. In a case of complexity in which the interests of justice can only be served by presenting to a jury an overall picture which cannot be achieved by charging a relatively small series of substantive offences, then a count for conspiracy as well as sample substantive counts may be permissible: R v Hammersey and R v Simmonds. Further, on the assumption that the conspiracy count is to be properly included, it may be just to allow the substantive counts to cater for the possibility that one or other of the alleged co-conspirators may be acquitted of the conspiracy.

(vii) In a complicated case, the trial judge has the ultimate responsibility for ensuring that the indictment is one about which a manageable trial can be conducted and case law requires that the Judge is robust in the use of his power of severance to secure this (R v Cohen and others) If a Judge, on the examination of the material before him, considers that the prosecution's presentation of the case proposed will impose an undue burden on the Court and jurors, and is therefore contrary to the interest of justice, he has a duty to require the prosecution to recast their approach, even if this entails an adjournment.

(viii) In relation to the random selection of accounts to be adduced in evidence, the prosecution should only state to the jury that the accounts it intends to rely on represent a random cross-section of the accounts at the bank, if indeed the accounts were selected by a demonstrably random method. If the accounts selected represent instead only a concentration of those accounts which, after extensive audit, were found to relate to or contain questionable activity or proceeds, the jury should be told that.

(ix) Notwithstanding that the Court does not accept the pretext given for the seizure of Ms Donegan's diary in the first place, given the specific and narrow ambit of the warrant relied upon, the law is such that there is no basis for exclusion of the entries found in it, save for the principle of relevance (R v Sang).

(x) *Per curiam*: The prosecution have conceded that, at the appropriate time, the Court might direct the jury that, if they are left in doubt that a particular

defendant's dealing with clients or accounts was on the basis that the defendant believed or suspected no more than that the client was seeking to evade taxes, then the jury might not convict based on that evidence. Given this concession, it is not necessary to rule as a matter of law, at this stage, whether tax evasion is a predicate crime for the purposes of the PCCL.

DB

EVIDENCE

On Evidence, see also **The Queen v Stewart, Cunha, Burges, Donegan** noted under **CRIMINAL PROCEDURE**, and **M v C** noted under **CONFLICT OF LAWS**.

Evidence - Admissibility of computer generated records of telephone traffic – Circumstances in which Cayman practice will follow that of the common law of England

Regina v Damean Dwayne Edwards

Grand Court (Indictment number 35/00)
Edwards J
March 18 2003

Legislation, Rules and Practice Directions

Evidence Law Section 23
Evidence LawSection 35
Criminal Procedure Code Section 111
Interpretation Law Section 40

Authorities

R v Shephard [1993] AC 380 (HL)
Donoghue v Stevenson [1932] AC 562 (HL)

Mr Mon Desir & Mr Wilson for the Crown
Mr Miskin QC and Mr Aiolfi for the Defendant

In the trial of the defendant for murder, before judge alone, the Crown sought to adduce, *inter alia*, certain computer-generated records of telephone traffic between the defendant's cell phone and another cell phone (which the Crown said belonged to a

certain Sheldon Brown). When explained through expert evidence the calls were sought to be adduced to prove the identity of the telephones used and the times and locale of certain calls, which were material to the Crown's case.

The Crown relied on section 23 of the Evidence Law, s111 of the Criminal Procedure Law and section 40 of the Interpretation law as the bases for its submission that the current common law of England is the law of the Cayman Islands. Thus, the Crown relied on the case of R v Shephard as setting out the applicable English common law in relation to reception of computer generated records.

The defence applied to have the computer-generated records excluded on the basis that there was no basis for their admission in Cayman law. The defence submitted that the simultaneous enactment in the Evidence Law 1978 of section 23 relating to admissibility of 'certain records in criminal cases' and section 34 relating to admissibility of documents 'produced by computers' in civil cases, the Cayman legislature must be taken to have, by omission of any parallel provision to section 35 for criminal cases, implicitly prohibited, by failing to make provision for, the admission of computer generated records in criminal cases. In the defence submission, it would be an absurdity to conclude that the legislature intended to impose the reliability and authenticity safeguards in section 35 of the Evidence Law regarding the admission of such records in civil cases while imposing none in criminal cases.

In response, the Crown argued that s35 (computer records in civil cases) could be seen as an amendment to the Grand Court Rules which provide for the admission of certain types of records, whilst the legislature was content to leave the common law in place as regards the admission of computer-generated records in criminal cases as part of the wider class of business records embraced in section 23.

Held (Admitting the computer-generated records):

(1) Section 23 cannot encompass automatically generated records from a computer of the type in issue in this case. Section 23 is limited to a 'record...compiled...by persons', not machines. Section 35 by contrast, specifically deals with 'a document produced by a computer' whether or not the information reflected in the document is supplied to the computer 'with or without human intervention' and whether or not the document itself is produced by the computer with or without such human intervention.

(2) The finding that section 23 does not address admissibility of computer-generated records in criminal cases, does not imply that the legislature intended to prohibit such admission under any circumstances. Such a sweeping prohibition would require an express legislative expression of intent. Rather, the legislature was content to allow the common law of criminal evidence, as developed by the Courts, to impose any necessary safeguards regarding the admissibility of such evidence.

(3) The starting point for considering what is the Cayman common law regarding computer-generated records in criminal cases, is section 40 of the Interpretation Law. In the light of a lack of binding authority in Cayman law, and as the Cayman Islands has the status of a dependant territory, one is to look to the common law of England. However, one ought to be cautious in adopting English common law which has been extensively modified by statute in England. In this case, since the issue had an overlay of United Kingdom legislation, the common law was unlikely to be clearly stated without that overlay in any judicial decision.

(4) In the circumstances, it was fair to presume that s35 of the Evidence Law as re-enacted in 1995 represented the Cayman legislature's current view of what local circumstances required in respect of the admission of computer generated records in civil cases. Thus, computer-generated records may be admitted in a criminal case where, at minimum, the provisions of section 35 are met. It may be that additional safeguards as to reliability and authenticity are appropriate in light of special considerations arising in a criminal case.

(5) After a voir dire (18th March 2003), the expert evidence of Mr Myles (a Cable & Wireless Manager for Cayman) demonstrated to the satisfaction of the court that the criteria for admissibility under section 35 were met. The law, even the Criminal Law, does not require that any record, computer generated or otherwise must be infallibly accurate in order to be admitted. The computer generated records were thus admissible as being produced by a computer that was 'operating properly' in the sense that it produced records of sufficient reliability to meet Cable & Wireless' own standards.

DB

Application under the Proceeds of Criminal Conduct Law – Requirement for live testimony - Use of live tele-video link

In the matter of an application by the Attorney General pursuant to the Proceeds of Criminal Conduct Law (2000R)
And in the matter of Donald Fraser
An application by Gillian Fraser

Grand Court (1/1999)
Smellie CJ
November 4 2003

Legislation, Rules and Practice Directions

Proceeds of Criminal Conduct Law 2000R
GCR Order 38 r2 (3)

Civil Procedure Rules Part 32 Practice Direction

Authorities

Garcin and Others v Amerindo Investment Advisors Ltd and others [1991] 1 WLR 1140
Wallace (executor of the estate of Lambert) and Lemard, Ramsay and others) SCCA No 127198, judgement delivered 29th November 1999
Australian Competition and Consumer Commission v World Netsafe Pty Ltd 119 FCR 303 [2002] FCA 526
McDonald v Commissioner of Taxation [2002] ATC 4271
Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd [2000] FCA 1261
B v Dentists Disciplinary Tribunal [1994] 1 NILR 95
Rowland and Morgan v Bock [2002] 4 All ER 370

Mr Ramon Alberga QC for the Applicant, Gillian Fraser
Mr Stephen Hall-Jones and Miss Cheryl Richards for the Attorney General

In these proceedings Mrs Gillian Fraser applies to the court for release from earlier restraint orders made by the Grand Court of the Cayman Islands on 25th October 2000 and 20th May 2001, of assets which the Crown asserts belong to her husband Mr Donald Fraser. Mr Donald Fraser is charged with various offences of fraud and money laundering.

By way of preliminary issue, Mrs Gillian Fraser applied, on affidavit, to the court for permission to give her evidence under cross examination via televideo conference link rather than being physically present in person.

Mrs Fraser stated that it was just and proper to allow her evidence to be given in this manner on the basis that indications had been made in an affidavit, served by the Crown, that she is suspected of involvement in criminal offences. Mrs Fraser therefore submitted that it is likely that she will be arrested and charged with criminal offences should she enter the jurisdiction to pursue this civil matter. Mrs Fraser was fearful that, should this be so, she would not be permitted to leave the Cayman Islands until the completion of a lengthy and expensive criminal trial and in the meantime, whilst asserting her innocence of criminal allegations, she could secure no remedy from the Court in this matter. Mrs Fraser undertook to pay the initial costs involved in giving evidence through live link, subject to her right to recover them against the Crown if she succeeds in this matter.

The Crown objected to the application in the following terms:

(1) That the ordinary rule is that witnesses are to be personally present in Court and that the onus rests upon the applicant to show some good reason why the accommodation requested should be granted;

(2) That there are good reasons for the ordinary rule such as the opportunity it affords for the direct three-dimensional observation of the witness' demeanour and deportment going to the important matters of credibility and veracity;

(3) As a party to the application, the applicant should be obliged, having invoked the process of the court in support of her cause, to be amenable to the ordinary process of the Court. That it is not just and proper that the applicant should be able to refuse to attend in person, thus avoiding the criminal process of the Court, even while seeking the benefit from its civil process.

The question for the Court was: do the circumstances as described by Mrs Fraser justify deviation from the ordinary rule, which is that persons who are required to testify attend in person to give evidence before the court?

Held:

(i) The Court is mindful of the modern approach to the conduct of business of the Court. The overriding objectives of the Court require not only that matters be justly resolved, but also that they be resolved in an expeditious and economical matter. The preamble to the Revised Rules of Court (GCR 1995 revision) at paragraph 4 (2) (k) state that in furthering the overriding objectives, the Court's duty in managing proceedings will include 'making appropriate use of technology.' The appropriate use of technology is to be the norm not the exception. Emphasis is to be placed upon what is 'appropriate'.

(ii) Mere convenience to a witness or party will not be sufficient basis, if the use of technology will detract in any meaningful way from the efficacy or even the dignity of court proceedings. While the mere convenience of the video link should not be allowed to dictate its use, the modern approach to the management of cases favours the use of technology in appropriate circumstances and each case must be considered in its own context. A judgement must be made in every case in which its use is to be considered, not only as to whether it would save costs, but also as to whether its use will be beneficial to the efficient fair and economic disposal of the case.

(iii) Save for adding the reminder that the personal attendance of a witness in Court is to be preferred unless there is good reason to depart from the established practice; the Court adopts the pragmatic views expressed in the cases listed above, as referred to by the Court.

(iv) Application granted subject to the condition that Mrs Fraser assumes the initial expenses and that arrangements are in place to ensure the presentation of all documents required for her testimony in a manner which will ensure both the efficient management of her cross examination and of the trial.

(v) The English Civil Procedure Rules part 32 Practice Direction Annex 3: *Video Conferencing Guidance* is a very useful guide and one which will shortly be adapted for issuance by way of local practice directions for similar purposes.

DB

FAMILY LAW

Ancillary relief - Division of assets - Liabilities - Clean break - Maintenance

E v E

Grand Court (D57/2002)
Levers J
May 14 2003

Legislation

Matrimonial Causes Law 1997 Rev ss 19 22

Mrs Thompson for the plaintiff
Mr Boni for the respondent

The petitioner and respondent were married in 1993 in Canada. After moving to the Cayman Islands, the relationship deteriorated, and the parties separated in 2001. Divorce proceedings were commenced in 2002. The petitioner and respondent consent to an order of joint custody of the child (born in 1996), with care and control to the petitioner. The respondent was a well-educated banker. The parties also agree to an equal division of the family assets valued at $128,000. The issue between the parties were liabilities and maintenance.

Held: (granting order)

(i) The court favoured a clean break between the parties in a cases in which adequate financial resources allowed it.

(ii) Money borrowed from the father of the respondent to deposit in the joint Registered Retirement Saving Plan opened in Canada some years earlier was deducted from the value of the asset before its division.

(iii) The petitioner was likely to struggle financially during the transition to being a single parent. The respondent was ordered to pay the petitioner the sum of $350 per month as maintenance for one year.

JE

Ancillary relief – Division of assets – Testamentary gifts – Equality – Maintenance

X v X and Y

Grand Court (D181 /2002)
Levers J
October 23 2003

Legislation

Matrimonial Causes Law 1997 Rev Ss 19 22
Matrimonial Causes Act 1973 s 25
Family Law (Scotland) Act 1985 Ss 9 (1) 10(1)

Authorities

White v White [2001] 1 AC 596
Lambert v Lambert [2003] 2 WLR 631 (CA) (leave refused [2003] 1 WLR 926)

Mr Boni for the plaintiff
Mr McGrath for the respondent

The petitioner and respondent were married in 1993, separated in 2002 and divorced in 2003. There are no children of the marriage. From 1993 to 1998 the parties worked in companies owed by the respondent's family, but they accumulated no assets. In 1998 the respondent's father died leaving the respondent $950,000 (net) worth of properties, companies and investments. From 1998 to 2000 the parties operated one of the companies. They enjoyed a lavish life style and purchased a home, which at the date of the hearing had a net value of $143,000. The balance of the assets were 'inherited' property.

After the parties separated, the petitioner accepted employment at a salary of $2500 per month with a local company. She seeks forty per cent of the inherited property on the basis that she contributed to the enhancement of the properties and businesses. The respondent offered $100,000 in full satisfaction of her claim, including maintenance to adjust to her new life.

Held: (granting order)

(i) Section 19 of the Matrimonial Causes Law required the court to 'have regard first of all to the best interests of any children of the marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties'. The 'deserts of the parties' is purely the conduct of the parties towards each other and nothing more should be imported into the words.

(ii) It had been contended that the concept of equality of distribution could be interpreted by analogy to the Scottish statutory provisions. By section 9 (1) Family Law (Scotland) 1985, the Scottish Court was required to divide the net value of matrimonial property fairly. Section 10(1) defines 'fairly' as equally. Section 10(4) excluded from matrimonial property gifts or inheritance from a third party. This is to be contrasted with the position in England where inherited property or property from a third party was to be taken into account in the division of matrimonial assets. The local legislation was closely aligned with the English legislation, but gave the court a large measure of discretion.

(iii) The court would look to inherited property forming part of the matrimonial assets as liable for distribution only where the matrimonial property was insufficient to meet one party's needs and arrive at a fair distribution.

(iv) The cases of White v White and Lambert v Lambert were distinguished as the marriage was of a much shorter duration, and the parties in those cases had both significantly contributed to the accumulation of the family assets.

(v) The petitioner was not entitled to subsidize the future quality of her life style by taking from his testamentary gifts. The respondent was ordered to pay a lump sum of $103,000, (assuming the equity was realised from the sale of the house) of which $30,000 represents maintenance of $500 per month for 5 years.

JE

Editorial Note: with reference to 'deserts of the parties' see PQ v RS (2002) 20 CILB 37 and H v H [1999] CILR 552.

Ancillary relief - Irregular income - Change of circumstances - Letter to Immigration Department

D v D

Grand Court (D152/2000)
In Chambers
Smellie CJ
October 14 2003

Legislation

Matrimonial Causes Law 1997 Rev Ss 19 22

Mr Chapman for the plaintiff
Mrs Brooks for the respondent

During the hearing of July 23 2003, the respondent sought a variation of the order of the Grand Court made January 14, 2003 requiring him to pay support payments to the petitioner for the benefit of his two children in the amount of $1400 per month. He applied on the basis of a change in circumstance, in that his employment as a tradesman, and therefore income, was irregular. He also sought relief from the court for the actions of the petitioner in writing a letter to Immigration Department writing against his application for a work permit. The court heard evidence from the person who held the respondent's work permit, and his new co-habitee.

The matrimonial home was in the names of both petitioner and respondent. It was occupied by the petitioner. The loan secured by a mortgage was in her name alone. The petitioner sought an order to have the home transferred into her name alone.

The order of July 23, 2003 was clarified by an addendum dated October 14, 2003.

Held: (granting order)

(i) The support payment was reduced to $900 per month, of which $300 per month was to be applied to the arrears. The payment of $900 per month was to continue, through the court's office, until each child respectively attained the age of 16 or 23 whilst the child remained in full-time education.

(ii) The respondent was ordered to maintain a strict record of all of his income.

(iii) The petitioner was granted leave to apply for a review of the support payments in April 2004 or January 2004 if the respondent was granted Caymanian Status before that date.

(iv) The home was ordered transferred to the petitioner, but she must seek leave of the court before selling it, as it is the 'roof over the children's heads'.

(v) The petitioner's attorney was directed to write a letter to the Immigration Board on behalf of the petitioner in support of the respondent's application to become self-employed at the end of his current work permit.

(vi) The respondent's attorney also was directed to write a letter to the Immigration Board in support of the respondent's application, as it is in the interests of the children that he reside here so that they could have contact with their father.

(vii) A large amount of money had been spent on legal fees. The court decided not to attempt to analyse whether the litigation had been conducted reasonably. Instead, an order for costs was made taking all circumstances into account including the ability to pay costs. The respondent was ordered to pay one-half of the petitioner's costs only insofar as those were reserved in these proceedings (including earlier applications) and up to the date of the grant of her legal aid certificate. This amount was added to the sum of arrears and was also to be paid over time.

JE

Ancillary relief – Distribution of assets – Custody, care and control of children

O v O

Grand Court (D6/2002)
Levers J
June 20 2003

Legislation

Matrimonial Causes Law 1997 Rev Ss 19 22

Authorities

Milne v Milne unreported No 2162/1973 July 10 1974 High Court Trinidad & Tobago
C v C (Financial Relief; Short Marriage) [1997] 2 FLR 26

Mrs Nervick for the plaintiff
Mr Connell for the respondent

The petitioner was aged 65 and the respondent aged 44. They formed a relationship in 1995, and she gave birth to their child in March 1996. They were married in Grand Cayman in April 1996. Her marriage to the petitioner was her third, but this marriage was the respondent's first. By October 2001 the marriage had broken down irretrievably. The respondent filed for divorce in January 2002 and answer and cross-petition was filed in March 2002. The petitions were proved in July 2002.

The respondent worked as a sales assistant in Las Vegas during 1993-1995. She also was able to work as a receptionist and had obtained employment earning $600 per month. Both parties have health problems.

The petitioner inherited substantial properties from his aunts.

Held: (granting order)

(i) The paramount consideration in issues of custody was the welfare of the child. Milne v Milne. While the respondent was involved in an extra-marital affair, and had a new boy friend, leaving the petitioner as the better example of proper morals, the child was very young. The respondent does not ignore any parental obligations. Therefore an order of joint custody was appropriate. The respondent was ordered to consult the petitioner on educational, religious and medical decisions concerning the child.

(ii) The respondent cared closely for the child and assisted the child with his school work. If care and control were to be given to the petitioner the child was to be cared for by a helper. Care and control of the child was given to the respondent,

with generous contact to the petitioner. If the respondent wished to reside apart from the Islands, the question of care and control must be revisited.

(iii) The petitioner must pay $400 per month in support of the child.

(iv) In determining the proper distribution of the matrimonial assets, the court had a wide discretion and the goal of a fair division.

(v) The duration of the marriage was an important consideration in the division of assets. The case of C v C (Financial Relief; Short Marriage) as that case involved a sick child. In view of the short duration of the marriage, the respondent did not have a greater claim to assets on the basis that she has care and control of the child.

(vi) The respondent's needs are accommodation, medical costs, and expenses relating to child care responsibilities.

(vii) Section 19 included the consideration of 'the deserts of the parties' which meant that the court had a wide discretion to do what was equitable by taking into account general factors including the conduct of the parties towards each other prior to, during and after the marriage, but 'most importantly during the marriage'. The conduct of the respondent was taken into account. The conduct included here extra-marital affair, her failure to tell the petitioner that she was married twice before, her constant demands on the petitioner for money, her attitude to spending money, her use of the petitioner's credit facilities without his permission, her admitted perjury at trial, and her attempt to deceive the petitioner and the court concerning the origin of her disease.

(viii) The respondent did not help with the petitioner's business, but she did maintain the home which was built twenty years before the marriage. She made no contribution to the matrimonial assets.

(ix) The respondent was to occupy the matrimonial home until the child reached age 17, or she remarries. The petitioner was ordered to pay the 'taxes and insure' the premises and the vehicle which she must be allowed to have. The petitioner was ordered to pay maintenance for the respondent in the amount of $400 per month for two years, and for one-half of her medical bills for one year.

JE

Child abduction - Hague Convention - Immediate return

W v W and W

Grand Court (129/2003)
Kellock (Act J)
March 17 2003

Legislation

Child Abduction and Custody (Cayman Islands) Order 1997
Civil Aspects of International child Abduction Hague 1980, Art 13 18 19

Authorities

Re K [1995] 1 FLR 977
Re N [1991] 1 FLR 413

Authoritative works

Halsbury 4th ed vol 5(3) para 1214
Beaument and McEleavy *The Hague Convention on International Child Abduction* (1999) pp 29-30

Mr McCann and Mr Freeman for the plaintiff
Mr Connell and Ms Merren for the defendants
Ms Look Loy for the Central Authority

The plaintiff applied for an order directing the return of his two minor children to Georgia USA.

The plaintiff and the first defendant were residents of Georgia and citizens of the USA when they married in Georgia in 1991. Their union produced two children, born in 1994 and 1995. The parents were divorced in 1997 by order of the Superior Court of Georgia. The Superior Court ordered 'primary physical custody' to the first defendant, and 'secondary physical custody' to the plaintiff, with 'joint legal custody of the minor children' and reasonable access.

The first defendant married the second defendant in Georgia in 1999. The following year, disputes concerning access arose and a court application was filed. In October 2000, the defendants left Georgia with the children without informing the plaintiff or the court. They settled in Grand Cayman, where the defendants secured employment. In December 2000, the Superior Court awarded sole custody to the plaintiff. In March 2003 the plaintiff discovered that the children and the defendants were residing in Grand Cayman. The Grand Court rejected the testimony of the defendants on all matters contradicted by the plaintiff, including an alleged risk of violence in the plaintiff's home. The defendants attempted to alienate the children from the plaintiff, and to encourage the children to regard the second defendant as their father. The children showed signs of indoctrination against the plaintiff.

Held: (granting order)

(i) USA was a signatory to the Hague Convention.

(ii) The defendants removed the children from the USA for the purpose of permanently depriving the plaintiff of access to the children and of them to him.

(iii) The goal of the Hague Convention was to 'protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures for their prompt return to the state of their habitual residence'. Article 19 states that ' A decision under this Convention concerning the return of the child shall not be taken to be a determination of the merits of the custody issue.'

(iv) Beaument and McEleavy stated, 'It is the interests of children collectively that the Convention seeks to further by returning wrongfully removed and retained children to their home environment. Once there, a substantive hearing can be held to investigate the merits of the actual case.'

(v) Where a child was wrongfully removed, the duty of the Grand Court to order the return of the child to the country of habitual residence was almost absolute. (Halsbury).

(vi) Article 13 applied in this case. Where proceedings were commenced more than one year after the abduction, the court may decline to make an order for removal if it the removing party demonstrated that the child was settled in its new environment. Similarly, an order may be declined if it was established that the person seeking the order acquiesced, consented to the removal, or there was a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

(vii) The interpretation of Art 13(b) by Wall J in Re K was quoted with approval. The risk of harm must be 'a grave risk of substantial harm' before the removal would be refused. Notice was to be taken of the power of the court in the jurisdiction of habitual residence to protect children in the period pending final resolution of custody issues in that court.

(viii) The burden of establishing the conditions in which the court might refuse to return the children, which rests on the defendants, was 'a high one'.

(ix) The term 'settled' was to be given its ordinary meaning. Re N. Young children were more likely to adapt to changes, including homes, schools and friends. The children in question were not settled to such a degree that their return could not be ordered.

(x) In the event the children were settled, the general provisions empowering the court with an overriding discretion, found in Article 18, was paramount to the provisions in Article 13.

(xi) To facilitate for the children a smooth transition from the defendants to the plaintiff, the children were placed in the care of the parental grandparents for the interim period, including the journey to the USA. Supervised access was

granted to the defendants. The children were made wards of the court until their arrival in the USA.

(xii) Cost on indemnity basis against the defendants.

JE

Child custody - Welfare and relocation

M v H

Grand Court (D45/2002)
Levers J
April 4 2003

Legislation

Guardianship and Custody Law 1996 Revision s 7(1)

Authorities

Simpson v Candappa [1978] 25 JLP 444
Payne v Payne [2001] EWCA Civ 166
Re A v A (Child Removal from Jurisdiction) [1979] 1 FLR 380
Johansen v Norway [1996] 23 EHRR 33

Ms Merren for the petitioner
Ms Da Costa for the respondent

After a period of cohabitation, the parties moved to Grand Cayman in March 1998. The petitioner and respondent married in December 1999. Their union produced two children, born in 1997 and 1999. The respondent was employed in the service industry and the petitioner cared for the children full time, a decision taken jointly for the benefit of the children. The petitioner left the matrimonial dwelling in March 2002, with the children, and leased an apartment. She filed a petition for divorce alleging various acts, but in April 2002, the petition was revised. A divorce, by consent, was then granted.

In August 2002, an interim order was made providing custody of the children to the Respondent and allowing him to take the children to the Netherlands, his domicile, to allow him to take new employment. The Respondent, and the children, planned to live with his sister until he could establish his own home. The Netherlands provided good education and social programmes for children. The petitioner's status on the island since the divorce was that of a 'visitor'. She was not able to obtain employment, and was dependent on her new boyfriend for support.

The petitioner displayed erratic behaviour during the proceedings and was determined by the court to be not emotionally or psychologically stable.

The respondent sought a final order of custody, care and control.

Held: (granting order custody to the parties jointly, and care and control to respondent)

(i) In determining issues of custody and care of children, the welfare of the child was the paramount consideration. The process to determine the welfare of the child involved balancing relevant factors.

(ii) No presumption existed in law that a young child is better left to the care of her mother. However, if all factors are equal, often it will be in the best interest of a young child to be left to the care of her mother: Simpson v Candappa.

(iii) Stability is an important factor in the welfare of a child. In this case, the petitioner was not employed and was relegated to the status of visitor in the Islands. She did not present a fixed proposal regarding the manner in which she would support and care for the children. Her demeanour in court evidenced poor judgment and a short temper, which did not instill confidence in the court with respect to her ability as a primary care giver.

(iv) Access between the non-resident spouse and the children was important, but the welfare of the children was paramount. While the right of access would be curtailed with an order of custody in favour of the respondent, modern travel and communications would lessen impact of this result. Payne v Payne; Re A v A (Child Removal from Jurisdiction).

(v) The court adopted the statement of ECtHR in Johansen v Norway , 'the court will attach particular importance to the best interests of the child, which ...may override those of the parent.'

(vi) Access was granted to the mother during holiday periods, and the respondent was ordered to pay half of the fares required for the children. The respondent was ordered to consult the petitioner pertaining to all major medical and educational issues, and to provide news of important developments.

JE

LAND LAW

Quitclaim deed – Effect
Rectification of Land Register – Provisional title

Smith v Smith

Grand Court (5/96)
Sanderson J
April 7 2003

Legislation

Registered Land Law (1998 Revision), ss 24, 140
Public Recorder Law (1996 Revision), s 11
Land Adjudication Law 1971, s 16

Authorities

Smith v Milbourne (Unrep, Plaint 19/73, Grand Court)
Cook-Bodden v Kirkconnell [1992-3] CILR 89
Ebanks v Clarke [1992-3] CILR 33
Saunders v Anglia Building Society [1971] AC 1004

Mr P Broadhurst and Mr K Broadhurst for the plaintiff
Mr Helfrecht for the defendant

On his death in 1927, the lands of SSS were inherited by his son, SSJ. On the death of SSJ in 1944, the lands passed to CS as administrator of the estate of SSJ. However, CBS (the sister of SSJ) purported to transfer one of the parcels of land to ASS in 1961. ASS later purported to transfer the land by gift to ASJ.

On discovering the purported transfers from CBS to ASS and on to ASJ, CS sought to resolve the matter by a quitclaim. The quitclaim in favour of ASJ was eventually signed in 1970 by JS, who had taken over from CS as administrator of the estate of SSJ. The quitclaim was recorded in the office of the Public Recorder.

On the death of JS, the administration of the estate of SSJ was taken over by ES.

Despite the quitclaim, ES claimed the land at the time of land adjudication, on the basis of long possession. ES was recorded as owner, and was entered as first registered proprietor with provisional title in the land register.

In 1984, an agreement was signed between ES and ASJ. In the document ASJ (who was in occupation of the land) admitted that he had no claim to the land, and that he recognised ES as undisputed owner. In the same document, ES promised to pay to ASJ $30,000 "out of the goodness of his heart" and $3,000 towards rent on vacating the land. On the same day, ASJ signed a receipt for the sum of $200 "for loan to be deducted from any payment to be made by ES in the future." Further cheques were written by ES in favour of ASJ, totalling $525.

In 1988, ASJ lodged a Restriction against the land register for the parcel to prevent dealings until the matter was resolved. In 1996, ASJ commenced the current proceedings for rectification of the land register pursuant to s24 Registered Land Law to insert ASJ as registered proprietor with absolute title. The action was continued after ASJ's death by his administratrix, JDS.

The plaintiff JDS contended as follows:

(a) That the title of ASJ was perfected by the execution and recording of the 1970 quitclaim deed, that the 1984 document was ineffective on the ground of non est factum, and that the land register should accordingly be rectified to reflect the title of ASJ.

(b) That the quitclaim had no relevance since it was signed before the land had been paid for by ASJ, or because it had not been followed by conventional conveyance.

(c) That the claim of ASJ was barred because of his failure to make his claim at the time of land adjudication.

(d) That the 1984 document was valid and binding.

(e) That in consequence the Restriction against dealings should be removed from the land register (if so, there would be no need to enforce the 1984 agreement).

Held: (declaring entitlement to ownership)

(i) The recording of the 1970 quitclaim was effective to pass legal title to ASJ without a conventional conveyance. Smith v Milbourne followed.

(ii) In Cook-Bodden v Kirkconnell it was established that there could be no rectification of the land register under s140 Registered Land Law on the basis of mistake during the course of adjudication. Rectification of a first registration of title was available only in circumstances of fraud or mistake subsequent to adjudication. In Ebanks v Clarke the court distinguished Cook-Bodden v Kirkconnell and recognised that a fraud upon the adjudication process would be open to review. In the current case there was no proof of fraud.

(iii) Cook-Bodden v Kirkconnell would be distinguished in the current case. In that case the registered proprietor had been registered with absolute title. in the current case the registered proprietor was registered with provisional title. The

title could be rectified in the current case pursuant to s24 Registered Land Law, which dealt with provisional titles. In respect of provisional titles, s24 conferred on the court no discretion in relation to the enforceability of prior rights.

(iv) The evidence failed to support the allegation that the 1984 agreement was ineffective on the ground of non est factum.

(v) The 1984 agreement operated as a form of quitclaim by ASJ in favour ES. Therefore ES was legally entitled to obtain ownership of the land. However, in order for that transaction to be completed, ES must pay the promised total sum of $33,000, after deduction of the $525 already paid. No representations had been made concerning interest.

SAAC

Entitlement under informal trust – Family home

C Bank v M and N

Grand Court (928/00)
Henderson J
July 22 2003

Legislation

Registered Land Law, ss. 28(g), 64, 72
Land Registration Act 1925, section 70(1)(g)

Authorities

Williams & Glyn's Bank v Boland [1980] 2 All ER 408
Lloyds Bank v Rossett [1990] 1 All ER 1111

Ms Heap for the plaintiff
Ms Whittaker-Myles for the second defendant

The application involved a contest between the Plaintiff Bank and the Second Defendant over priority to funds from the sale of a matrimonial home.

The First Defendant was the sole registered proprietor of a piece of land upon which the matrimonial home was built. There was no evidence that his wife, the Second Defendant, made any financial contribution to the acquisition of the property, to the construction of the home, or to its upkeep before 1996. In 1986, the husband charged his interest in the property to X for a loan in the amount of CI$70,000. The Charge named both husband and wife as Chargors and was executed by each of them. The

loan was used to construct the matrimonial home. The Charge was transferred by X to the Plaintiff Bank in June 1994. By Variation of Charge, in August 1994, the husband increased the amount of the charge by CI$120,000. The wife was not aware of the variation and the money was used to finance the husband's business. By March 1996, the husband was in default of payment and the Bank demanded payment. By Transfer of Land, in August 1996, the husband conveyed the legal title to the property to himself and his wife. After that time, she made payments to the Bank. In 1999, the husband and wife were divorced and the Court ordered the property to be sold and the net proceeds to be divided equally between the husband and the wife. The property was later sold and the proceeds were held in trust pending resolution of this dispute. The wife argued that she had an overriding interest in the property which entitled her to priority over the Bank with respect to its claim for repayment of the additional CI$120,000, loaned to her husband in August 1994.

Held:

(i) There was no evidence to support a finding that, as of the date of the Variation of Charge, the wife had any minor or equitable interest in the property.

(ii) A constructive or resulting trust can not arise solely from the fact that a lending institution required a spouse who was not a registered proprietor to sign a Charge of the property.

(iii) Applying the principles laid down in the House of Lords in Lloyds Bank v Rosset [1990] 1 All ER 1111, the claim of the wife to any equitable interest in the matrimonial home was rejected because there was no evidence of any 'agreement, arrangement or understanding reached between [the husband and wife] that the property was to be shared beneficially coupled with detrimental action or alteration of position on the part of the person claiming the beneficial interest or, failing that... direct contributions to the purchase price by the person claiming the beneficial interest from which a constructive trust could be inferred.'

(iv) Accordingly, the application of the Bank for payment to it of the proceeds of sale would be allowed.

DM

SUCCESSION LAW

Due execution of will – Whether prior will revoked by destruction – Doctrine of dependent relative revocation

In the Matter of an Application Under Sections 4 and 42 of the Succession Law (1995 Revision)

Grand Court (12 of 2003)
Kellock J Actg
May 30 2003

In Chambers

Legislation

Wills Law s15
Succession Law ss4 and 42

Authorities

Re Dadds (1857) Deane 290
Re Jones [1976] 1 Ch 200
Re The Estate of Davies [1951] All ER 920
Re Bunn [1926] All ER 626

Authoritative works

Halsbury's Laws of England 4th edition

Mr Farrow for the applicants
Ms Brooks for the respondent

In April 1991 the deceased made a will providing a legacy of $15,000 to his daughter, the respondent with the residue of his estate to be divided amongst F, T, K and D. In December 2001 the deceased, who had been diagnosed with terminal cancer, instructed his attorneys to draw up a new will ("the 2002 will"). Being too ill to attend his attorneys offices in person, the instructions for the 2002 will were relayed to the attorneys by F. This will repeated the legacy of $15,000 to the respondent who was also devised a portion of the deceased's real estate. A further legacy of $5,000 was given to the deceased's common law wife, with the residue of the estate being left to the benefit of F, T, K and D. It was common ground that the 1991 will was properly executed. Upon probate being sought for the 2002 will however, it became apparent that this will had not been properly executed, as the two witnesses to this will had failed to sign their signatures in each other's presence as required by s.6 Wills Law.

The question which remained was whether, as argued by the applicants, the 1991 will was therefore left intact (the express revocation clause contained within the 2002 will falling with 2002 will itself). The argument put forward by the respondent was that the 1991 will had been effectively destroyed by F acting on the deceased's instructions following what was then presumed to have been the due execution of the 2002 will. Counsel for the applicants, relying on the doctrine of dependent relative revocation,

argued that the 1991 will (a copy of which had been retained by the deceased's attorneys) had been only conditionally revoked, the condition being the validity of the 2002 will. It soon emerged, however, that a more fundamental question required answering, namely whether the 1991 will had been effectively revoked at all, it being established that F had destroyed the 1991 will at the bank, where it had been retained, in the absence of the deceased.

Held: (finding for the applicants)

(i) The 2002 will had not been validly executed.

(ii) The purported revocation of the 1991 will by destruction had not been effective as such destruction had not taken place in the presence of the deceased, as required by s.15 Wills Law. Accordingly, the 1991 will was to be admitted into probate.

(iii) Whilst it was not therefore necessary to decide whether if revocation of the 1991 will had been achieved it would have amounted to an absolute of conditional revocation, the authorities favoured the conclusion that such revocation would have been conditional.

MD

TORT LAW

On misrepresentation, see **Duval v Evans** under **CONTRACT LAW.**

TRUSTS LAW

On informal trusts, see **C Bank v M and N** under **LAND LAW**.

Trustee investment – Construction of trust deed and investment statement – Construction of exculpatory provisions

L v CC Ltd

Grand Court (458/98)
Smellie CJ
July 30 2003

Legislation

Trusts Law (1998 Revision)

Authorities

Reardon Smith Kline Ltd v Hansen Jangen [1976] WLR 989
ICS Ltd v West Bromwich Building Society [1998] 1 WLR 896
In re Moritz dec'd [1960] Ch 251
In Re Z Trust [1997] CILR 248
Mettoy Pension Trustees v Evans [1990] 1 WLR 1987
Armitage v Nurse [1998] Ch 241
Re Vickery [1931] 1 Ch 572
Liverpool City Council v Irwin [1977] AC 239
Learoyd v Whitely (1877) 12 App Cases 727

Authoritative works

Halsbury's Laws of England (4th ed. reissue)
Lewin on Trusts (17th ed.)
Underhill and Hayton, Law of Trust and Trustees (16th ed.)
Lewison on Interpretation of Contracts (2nd ed.)

Mr Kaye QC and Mr Stephens for the plaintiffs
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.

Following an earlier application by the defendants for directions that certain issues be tried as preliminary issues in which a trial of a number of issues was directed (noted L v CC Ltd (2002) 20 CILB 12), the current application concerned issues of construction relating to the provisions of a Revised Deed of Settlement and a Statement of Investment Policy and Guidelines (SIPG). The two specific issues for consideration were:

1. Whether on a true construction of the relevant documents, the trustees were under an obligation to diversify the assets of a fund, so that they would be denied the protection of the exculpatory provisions of the Deed if they failed to do so, once they no longer held the belief or were in doubt whether those assets could generate an adequate long term return on the capital employed?

2. Whether on a true construction of the relevant documents, a failure by the trustees to comply with provisions of the SIPG disentitled the trustees from relying upon certain particular sub-clauses of the Deed?

Held:

(i) The following principles of construction would be applied:

1. The Deed and SIPG must be construed in accordance with their own terms and having regard to the intention of the parties, as that intention might be discerned to have existed at the time they were approved by the Court, by reference, among other things, to the factual context.

2. Evidence of the factual matrix is only admissible as an aid to construction if available to all the parties in question, at the time it was made.

3. The construction must be a purposive one enuring to the fulfillment of the purposes of the trust instruments considered as a whole.

4. Any construction which would defeat the purpose of the trusts or would result in the abrogation of the 'irreducible core' of the trustees' obligations of honesty, loyalty and good faith, or in the trustees being able to prefer their own interests, is to be rejected.

5. In seeking the proper construction, trustees must observe and comply with the terms of the settlement and must act within the bounds of the powers conferred upon them by law or by the terms of the trust instrument itself.

6. Terms are only allowed to be implied as are strictly necessary to give efficacy to what is expressed.

(ii) The terms would be construed so as to give the following answers to the two specific issues for consideration:
1. Yes.
2. Yes.

DM

Legal Aid Provision in the British Overseas Territories 2002.

Derek O'Brien and John A Epp

The following limited scope summary is based on the report prepared for Attorneys General Conference, Turks and Caicos, 17 February 2003 by John A Epp, Derek O'Brien and Terrence Caudeiron, *Legal Aid Provision in the British Overseas Territories and the Commonwealth Caribbean 2002* (CI Law School, Grand Cayman, 2003).

1. INTRODUCTION.

Historically, the attention given to legal aid provision for the poor in the British Overseas Territories (OTs) has varied greatly amongst the various OTs. In some OTs, almost no provision has been made for publicly funded legal services, and almost no comment has been made about the situation. In others OTs, such as the Cayman Islands, provision has been made for publicly funded legal services, and the level of funding is regularly debated in the Legislative Assembly. In the light of the recent statement by the British Government that the OTs should abide by international human rights norms (White Paper, FCO, *Partnership for Progress and Prosperity: Britain and the Overseas Territories*, Cm 4264, 1999), the issue of publicly funded legal aid now is centre stage.

Below is an outline of legal aid provision in those OTs with active legal aid schemes, of which there are seven in all: Gibraltar, the Falkland Islands, Saint Helena, Bermuda, the Cayman Islands, the British Virgin Islands, and Turks and Caicos. In this brief summary there is no attempt to analyse the situation in the OTs as it is the purpose of this summary simply to inform readers of the situation at the close of 2002.

Brief mention can be made of Anguilla and Montserrat. Anguilla has a population of 12,500 and has approximately 30 practising lawyers. Montserrat has a population of 4,500 with six lawyers working in private practice. Neither jurisdiction has statutory provision for legal aid, although publicly funded legal assistance has been provided in the past to defendants charged with murder, on an *ad hoc* basis. In such cases the court has assigned a lawyer to represent the defendant. The lawyer's fees have been paid by the Government. In Anguilla, 'there have been no murder cases...under the legal aid provisions since 1998', according the Attorney General, the Hon. R. Scipio.[1] In Montserrat, 'the most recent case was September 2002 and before that July 1999...', according to the Attorney General, the Hon. E. Henry-Greer.[2]

[1] Letter to authors March 31, 2003.
[2] Email to authors February 10, 2003.

2.1 GIBRALTAR[3]

2.1.1 Background

Gibraltar has a population of approximately 28,000 people. There are approximately 120 lawyers in private practice on the island.

The origins of the current legal aid scheme are to be found in the Legal Aid and Assistance Ordinance, which came into effect on the 1st January 1961.[4] The Ordinance was modelled on three English statutes: the Poor Prisoners' Defence Act 1930, the Summary Jurisdiction (Appeals) Act 1933 and the Legal Aid and Advice Act 1949. The Ordinance provides for 'legal aid' in criminal proceedings[5] and 'legal assistance' in civil proceedings,[6] using a judicare delivery model.[7]

2.1.2 Governance and administration

While the Chief Justice is authorised to make rules for the more efficient administration of the system,[8] the Registrar of the Supreme Court,[9] and the clerk to the justices in Magistrates' Court[10] are responsible for the day to day administration of the civil and criminal legal aid schemes respectively.

2.1.3 Legal Aid in Criminal Proceedings

2.1.3.1 Method of Application

Applications for legal aid in criminal proceedings are usually made to the Magistrates' Court in person, although the clerk to the Magistrates will accept postal applications.[11] If the proceedings are subsequently committed for trial to the Supreme Court, the Magistrate may extend the legal aid certificate to cover representation in the Supreme Court, or a separate application may be made to the Chief Justice.[12] Applications may also be made to the Magistrates for legal aid for an appeal to the Supreme Court by any person convicted by the Magistrates' Court of an offence punishable with imprisonment.

If the application is successful counsel is assigned by the court from a panel prepared and maintained by the court in accordance with the Legal Aid and Assistance Rules 1961.[13] The rules

[3] The authors gratefully acknowledge the assistance of Sharon Peralta, Crown Counsel, Gibraltar.
[4] Legal Aid and Assistance Ordinance 1960 ('Ordinance') No. 23.
[5] Ordinance, s. 2.
[6] *Ibid.*, s. 11.
[7] *Ibid.*, s. 3.
[8] *Ibid.*, ss. 10 and 18.
[9] Legal Aid and Assistance Rules 1961 ('Rules') r. 3.
[10] *Ibid.*, r. 12.
[11] Ordinance, s. 6.
[12] There is no provision for contribution by applicants for legal aid, *ibid.*, s. 3.
[13] Rules 4(1)(2).

require the court to consider any representation by the person aided concerning his/her preference of lawyer. In the absence of a representation which appears ought to be given effect to, a lawyer from the panel is assigned on a strict rotational basis.[14]

2.1.3.2 Scope

Subject to financial eligibility,[15] legal aid is available to all those charged with indictable offences[16] and to those charged with an offence which is punishable on summary conviction with imprisonment.[17] Legal aid covers both preparation[18] and representation at the preliminary hearings and at trial. Legal aid is available for appeals in criminal matters before the Court of Appeal[19] and the Privy Council.[20] It is also available for appeals against conviction or sentence in the Magistrates' Court for offences punishable by imprisonment.[21] In exceptional circumstances, where it is in the interests of justice, legal aid may be granted for an appeal to the Supreme Court from a conviction in the Magistrates' Court on any other offence.[22]

There is, as yet, no duty counsel programme and legal aid does not include attendance at a police station when a person is first arrested.

2.1.3.3 Eligibility

Financial eligibility for legal aid is not determined by reference to a pre-determined statutory formula, but lies within the discretion of the court. If the application is refused, the applicant may be entitled to re-submit the application to the Chief Justice: for example, on an appeal to the Supreme Court.[23]

2.1.4 Legal Aid in civil proceedings

2.1.4.1 Method of application

Applications for legal assistance are submitted in writing to the Registrar of the Supreme Court.[24] The Registrar then refers applications to an independent lawyer to investigate the merits of the case and report back to the Registrar. If the Report is favourable and the applicant satisfies the eligibility test (see below) the Registrar may issue a certificate.[25] The certificate may be issued subject to a financial contribution by the assisted person.[26] When making the application

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[14] *Ibid.*, r. 4(2).
[15] Ordinance, s. 3(3).
[16] *Ibid.*, s. 3(1).
[17] *Ibid.*, s. 4, excepting imprisonment in default only of payment of a fine.
[18] It includes attendance at prison.
[19] Ordinance as amended by Ordinance 2001 No. 6, s. 3A(1)(b). The Court of Appeal heard two criminal appeals in 2001.
[20] *Ibid.*, s. 3A(1)(2).
[21] Ordinance, s. 5(1).
[22] *Ibid.*, s. 5(2).
[23] *Ibid.*, s. 5(3).
[24] *Ibid.*, s. 14(1).
[25] *Ibid.*, s. 14(3)(4).
[26] According to the Chief Justice, a contribution is never required, in practice, because the legal aid authorities recognise that the financial eligibility limits are excessively stringent, letter to the authors February 13, 2003.

applicant may select a lawyer from the panel prepared by the Registrar.[27] If no such selection is made the Registrar selects a lawyer from the panel to represent the applicant.[28]

2.1.4.2 Scope

With the exception of certain categories expressly excluded under Schedule I Part II, legal assistance is available for all civil proceedings, provided that the Registrar is satisfied that the applicant has reasonable grounds for taking, defending or being a party to the proceedings. Legal assistance includes representation by a solicitor and, so far as necessary, by a barrister and covers preparatory advice and assistance as well as advice and assistance in connection with the proceedings.

Legal assistance is available for appeals to the Supreme Court from decisions of the Magistrates' Court in civil matters, and from decisions of the Supreme Court to the Court of Appeal.[29]

2.1.4.3 Eligibility

Financial eligibility is determined by reference to a statutory formula. Legal assistance is available only to those persons whose income does not exceed £5000 per annum and whose capital does not exceed £350.[30] The eligibility limits have been strongly criticised.[31] The last time the threshold was increased was 1990.[32] The average income in Gibraltar is now £12,000-15,000 per annum,[33]

Even if the applicant falls within the financial eligibility limits the Registrar may decline if the applicant has a reasonable expectation of obtaining financial or other help from a body of which he is a member.[34]

2.1.4 Funding

Funding for both the legal aid and legal assistance schemes is provided annually by the Government from the Consolidated Fund. The annual budget from 1st April 1998 to date is set out in the table below.

[27] Ordinance, s. 15(1).
[28] *Ibid.*, s. 14(2).
[29] Ordinance as amended by Ordinance 2001 No. 6, s 12. The Court of Appeal heard seven civil appeals in 2001.
[30] Ordinance s. 13. The Governor may change the amount by giving notice in the Gazette, *ibid.*
[31] Interview of Gibraltar Bar Association President Anthony Provasoli, January 7, 2003.
[32] Ordinance 1990 No. 47 s. 2(a).
[33] Above n. 39.
[34] Rules, r. 15.

Year	Amount in GIBP*	Amount in USD
1998-1999	193,722	320,000
1999-2000	321,525	517,000
2000-2001	277,344	421,000
2001-2002	401,321	593,000
2002-2003	515,596	773,000

*The Gibraltar pound is at par with the British pound. US$ 1= GBP 0.60 in 1998, US$ 1= GBP 0.62 in 1999, US$ 1= GBP 0.66 in 2000, US$ 1= GBP 0.69 in 2001, US$ 1= GBP 0.67 in 2002.

The Fund includes the financial contributions received from assisted persons[35] and such costs as are recovered from the unsuccessful party in civil proceedings, which are payable directly into the Fund.[36]

Funding is not capped and both the legal aid and legal assistance budget receive equal priority. [37] However, the Chief Justice has recently expressed concern that the fees payable under the legal assistance scheme consumed approximately eighty per cent of the Fund, and that a large portion of this figure was spent in family cases. [38] The Legal Aid Committee of the Gibraltar Bar Association shares this concern. [39]

2.2 FALKLAND ISLANDS[40]

2.2.1 Background

The Falkland Islands have a population of 2,500 persons and two lawyers are in practice.

A non-statutory legal aid scheme was first established in 1993. Prior to the introduction of the scheme, the only form of legal assistance available to the poor was based on *pro bono* services provided by the lawyers practising on the islands. The current version of the scheme provides for representation in criminal and civil proceedings; advice and assistance on a range of matters; and advice at the police station. The scheme is based on a judicare model.

[35] Ordinance section 13(2)(a) allows the Registrar to waive fees and charges normally payable to the court, and section 14(4) allows the Registrar to require a legally assisted person to pay those fees and charges.
[36] Ordinance, s. 13(2)(c).
[37] Interview of Chief Justice Schofield, January 7, 2003.
[38] *Ibid.*
[39] Interview of James Neish QC, Chairman of the Bar Association's Committee on Legal Aid, January 7, 2003. Committee member David Hughes noted that while approximately £600,000 had been spent during the past two years under the Ordinance, only £70,000 was spent on criminal legal aid, interview, January 8, 2003.
[40] The authors gratefully acknowledge the assistance of Senior Magistrate Nick Sanders, Falkland Islands.

2.2.2 Governance and administration

Originally administered by the Attorney General, the scheme has been administered by the Senior Magistrate since 2002. It is based on a framework of rules that were devised in consultation with the Attorney General, legal practitioners, and the Senior Magistrate. Details of the scheme are provided in 'Letter of Agreement' ('LOA') between the Senior Magistrate and the participating lawyers.

2.2.3 Legal Aid in criminal proceedings[41]

2.2.3.1 Method of application

Those in need of representation in criminal proceedings may approach either of the two firms participating in the scheme, who will assist them, if necessary, in the completion of the relevant application form.[42] The application must then be submitted to the Senior Magistrate, accompanied by a Declaration of Means, and a form of authority permitting the Senior Magistrate to check with the office of the Commissioner of Taxation[43] that the financial information provided by the applicant is correct. If the application is approved, the court guarantees payment of the lawyer's fees and disbursements in accordance with an agreed tariff.

2.2.3.2 Scope

Legal aid for representation in criminal matters is available in connection with 'relevant proceedings'. Relevant proceedings are defined in paragraph 2 of the LOA to include: indictable offences; either way offences which are likely to be tried on indictment; cases where the accused has been remanded in custody; cases where, upon conviction, the court is considering imposing a custodial sentence; and, in other cases, where it is in the interests of justice. In determining whether it is in the interests of justice the *Widgery* criteria are applied.[44] In addition, the Court of Appeal may award legal aid in criminal appeals, subject to a contribution by the appellant in accordance with the general eligibility provisions.[45]

Free advice and assistance at the police station is also available to all persons who are attending either under arrest or voluntarily in connection with an imprisonable offence.[46] This is not subject to a 'means' test.

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[41] While exact case statistics are not available, it is estimated that 60% of the grants of legal aid are for criminal matters.

[42] The prescribed application form is set out in Schedule 1 to the Letter of Agreement ('LOA'). One hour of advice can be given to eligible persons under the Advice and Assistance program without prior approval, LOA, para. 5.

[43] *Ibid.*, para. 9(b).

[44] The addition criteria are: conviction would lead to loss of his livelihood or serious damage to his reputation; the determination of the case may involve consideration of a substantial question of law; the accused may be unable to understand the proceedings or to state his own case because of his inadequate knowledge of English, mental illness or other mental or physical disability; the nature of the defence is such as to involve the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution; or it is in the interests of someone other than the accused that the accused be represented, *ibid.*, para.2.

[45] *Ibid.*, para. 4(b).

[46] *Ibid.*, para. 5.

2.2.3.3 Eligibility

Financial eligibility is determined by reference to the financial criteria set out in paragraph 4 of the letter of agreement. The criteria are based on the applicant's disposable capital and income. Depending on capital and income applicants may be eligible but subject to payment of a contribution. In exceptional cases, an applicant who does not qualify on the basis of their capital or income may nonetheless be eligible if the Senior Magistrate agrees or, in the written opinion of the Chief Justice or the Summary Court, he is deemed to be in need of legal representation and his means are such that he cannot reasonably be expected to finance his legal costs.[47]

2.2.4 Legal aid in civil proceedings

2.2.4.1 Method of application

Although different application forms are used, the method of application for representation in civil and family proceedings is the same as for representation in criminal proceedings. For advice and assistance in civil matters (see further below) a combined application and claim form is used.

2.2.4.2 Scope

In addition to a 'merits' test, representation in civil proceedings is limited to relevant proceedings',[48] which are defined under the LOA to include any civil proceedings, save for certain excepted categories.[49] Perhaps the most important of the excluded categories is defended divorce proceedings. The merits test requires at least an even prospect of success, although it may be reduced in matters of wider public importance.

The scheme also provides for advice and assistance in connection with 'relevant matters' which are defined under paragraph 2 of the LOA to include any legal issue arising in or relating to the Falkland Islands, which is not being litigated out of the jurisdiction.[50] Only those who qualify for legal aid with no contribution are eligible for advice and assistance. Up to one hour of advice and assistance can be given without obtaining prior authority. Any further advice and assistance requires prior authority and must be justified. It is unlikely that lawyers will be authorised to give more than two hours' advice and assistance.

2.2.4.3 Eligibility

The financial eligibility limits are the same as those for determining eligibility in connection with representation in criminal proceedings. In exceptional cases, applicants who wish to bring a constitutional motion may qualify without any contribution and without reference to the income eligibility limits.

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[47] *Ibid.*, para. 4(viii).
[48] *Ibid.*, para. 2.
[49] *Ibid.*, para. 2(i)-(xvi).
[50] *Ibid.*, para. 1(a). Certain legal issues are excluded from the scheme.

2.2.5 Funding

The scheme is primarily funded by the government.[51] The amount of funding available each year is fixed as part of the Judicial Department Budget. If the budgeted amount is not sufficient to meet claims submitted under the scheme, the Senior Magistrate will apply to the Standing Finance Committee for additional funds.[52] The costs of administering the scheme are met from the Court's general operational budget.

The following chart contains details of government funding for the past three years.

Year	Amount in FKP*	Amount in USD
2000-01	30,000	45,600
2001-02	30,000	44,400
2002-03	42,500	63,750

*The Falkland pound is at par with the British pound. US$ 1= GBP 0.66 in 2000, US$ 1= GBP 0.69 in 2001, US$ 1= GBP 0.67 in 2002.

2.3 ST HELENA[53]

2.3.1 Background

St Helena has a population of 5,500 persons. There are no lawyers in private practice on the islands. The only active lawyers on these islands are the Public Solicitor and those in the employment of the Government.

Prior to the creation of the Office of the Public Solicitor in 1998,[54] members of the public in need of legal advice and representation who could not afford to instruct lawyers privately off-island had to rely on the advice and assistance of one of the four appointed Lay Advocates.[55] These are members of the public with some experience of legal and business matters who are considered to be 'fit and proper to hold office' and who are willing to serve the community by providing legal advice on a more or less voluntary basis.[56] Lay Advocates are now appointed by the Public Solicitor after consultation with the Justices of the Peace.[57] While the Lay Advocates continue to play an important role in the provision of free legal advice and representation to the public in St Helena,[58] it is now the Public Solicitor who leads legal aid services and carries the largest

[51] Any costs recovered on behalf of the assisted person from the losing party are paid into the general revenues of the government.
[52] LOA, para. 13.
[53] The authors gratefully acknowledge the assistance of the Colin Forbes, the Public Solicitor.
[54] Legal Aid and Advice Ordinance, 1997, c. 17, in effect January 16, 1998, amended in An Ordinance to Amend the Legal Aid and Advice Ordinance, 1997, (2002) c. 3 in effect March 27, 2002 ('LAAO').
[55] Lay Advocates Ordinance, 1986, c. 13, in effect November 1, 1986, amended by Ordinance c. 15, 1997 and consolidated in the 2001 Revision c. 13 ('LAO').
[56] Lay Advocates are paid a retainer of £50 per month, £20 per court appearance and travel expenses.
[57] LAO, s. 3.
[58] There are two Lay Advocates resident in Ascension.

caseload.[59] The Office of the Public Solicitor is currently staffed by one qualified lawyer and an administrative assistant.

2.3.2 Governance and administration

The holder of the Office of Public Solicitor is appointed by the UK Department for International Development (DfID) for a period of two years, but unlike other civil servants he is not bound by Public Service Orders. However, the office holder can be removed by the DfID, if the host government advises the DfID that the Public Solicitor is for any reason no longer acceptable to them.

In addition to ensuring the provision of legal services to eligible applicants, the Public Solicitor plays a significant role in the organisation of the provision of advice by Lay Advocates. First, the Public Solicitor is responsible for the appointment and removal of persons to and from the office of Lay Advocate.[60] Second, the Public Solicitor is required to supervise Lay Advocates in the performance of their duties.[61] While Lay Advocates do receive some training in a formal setting on a monthly basis, the Public Solicitor is required to provide reasonable assistance to Lay Advocates in their research or enquiries regarding questions of law, including access to the office library.[62] Third, the Public Solicitor serves as a trustee of the Legal Assistance Fund,[63] and with the other trustees, may pay honoraria to Lay Advocates.[64] Finally, the Public Solicitor is authorised to assign a Lay Advocate to assist a legally aided person (in the event that both parties to proceedings have applied for legal aid).[65]

In the event that there is no subsisting appointment to the office of Public Solicitor or the Public Solicitor is away from St Helena, Lay Advocates are entitled to the full co-operation and assistance of the Legal and Lands Department in their research and enquiries concerning questions of law.[66]

The first two Public Solicitors interpreted the scope of the office broadly to include a component of public legal education. In excess of twenty newspaper articles have been written for publication in the *St Helena Herald* by the officeholders.

[59] On average, the caseload of the Public Solicitor is 150 cases.
[60] LAO, s. 3.
[61] *Ibid.*, s. 6.
[62] *Ibid.*, s. 4(1)(b).
[63] *Ibid.*, s 8(2).
[64] *Ibid.*, s 12(a).
[65] *Ibid.*, s 9(b).
[66] *Ibid.*, s. 4(1)(b). This can create a conflict of interest in criminal proceedings as the prosecutors work in the Department of Legal and Lands.

2.3.3 Legal aid in criminal proceedings

2.3.3.1 Method of application

Application is made directly to the Public Solicitor, using the prescribed form.[67]

2.3.3.2 Scope

The LAAO requires the Public Solicitor to provide advice and representation to all persons where a conviction is likely to result in a custodial sentence.[68] Advice includes advice upon arrest, if the accused exercises his right to consult a lawyer. Initial advice is usually given using the telephone. In most cases the Public Solicitor will then attend the Police station or Prison. Representation covers attendance at all stages of the proceedings, including the appellate stage.[69]

2.3.3.4 Eligibility

While the LAAO makes provision for means testing,[70] and for contributions to be paid by those entitled to legal aid, [71] the regulations required to give effect to these provision[72] have not yet been implemented. This state of affairs is likely to change in the near future, however, when the Legal Aid and Advice (Amendment) Ordinance 2001 comes into effect. When this occurs, action also will be taken to bring the regulations into effect, and the Public Solicitor will employ a means test in determining financial eligibility. However, advice at the police station will continue to be given regardless of means.

2.3.4 Legal aid in civil proceedings

2.3.4.1 Method of application

The method of application is the same as for criminal proceedings.

2.3.4.2 Scope

Civil proceedings are defined as including 'any civil proceedings in which the aided person is or intends to be a party, including appellate proceedings'.[73] However, the Public Solicitor may refuse assistance in simple, unmeritorious or trivial matters.[74]

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[67] LAAO, s. 6(2).
[68] *Ibid.*, s. 8(3). A much wider service is provided pursuant to the general authority given in section 4.
[69] The Public Solicitor may continue proceeding to the Privy Council if sufficient funds were made available from the UK Legal Assistance Fund to meet the cost of instructing English lawyers.
[70] LAAO, s. 9.
[71] *Ibid.*, s. 8(1).
[72] *Ibid.*, s. 16.
[73] *Ibid.*, s. 5.
[74] *Ibid.*, s. 10. While advice is not given in complex commercial matters, assistance is given to persons in areas of contract, tort, family and divorce, wills, the purchase of property and issues of employment. The term 'person' is defined as 'natural person', and the Public Solicitor has interpreted this phrase to mean unincorporated businesses

2.3.4.3 Eligibility

As noted above, there is currently no 'means test' for determining eligibility. Under the new regulations, individuals may be required to pay a financial contribution towards the cost of providing legal advice and assistance. The level of such contribution will be in accordance with a schedule determined by the Governor-in-Council in consultation with the Public Solicitor. It is, however, anticipated that initial advice will remain free of charge. The Public Solicitor has indicated that he expects the regulations to reflect his desire that some services will continue to be provided free of charge and that any contribution payable will be 'low'.[75]

2.3.5 Funding

The salary of the Public Solicitor is paid by DfID. The office expenses and the salary of the administrative assistant are paid by an annual grant provided by the St Helena Government. Together, approximately £106,500 (USD 140,000) per annum is expended on legal aid.

Contributions payable by assisted persons under the new regulations will be paid into the general revenues of the St Helena Government, as will any contributions made by successful aided persons under section 13 of the LAAO.

2.4 BERMUDA[76]

2.4.1 Background

Bermuda has a population of approximately 64,000 people, and approximately 330 lawyers practise on the island.

Before the introduction of a statutory legal aid scheme under the Legal Aid Act of 1980, the only legal services available to the poor consisted of *pro bono* services provided by individual lawyers on an *ad hoc* basis. The scheme introduced under the Legal Aid Act 1980 ('Act') is based on the judicare model and provides for legal advice and assistance and legal representation in both criminal and civil proceedings.[77]

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for the purposes of giving advice. He will advise on lawful dismissal, and other business related issues, including the sale of a business.

[75] For example, the draft provides that the cost of a civil trial to recover damages following a road traffic accident would be £20 for a person having a family income of between £3,500 and £6,500 and savings not exceeding £2000. A plea in mitigation would attract a fee of £10 while a trial would attract a fee of £20. (The St Helena pound is at par with the British pound.)

[76] The authors gratefully acknowledge the assistance of Peter Miller, Senior Legal Aid Counsel.

[77] C. 56.

2.4.2 Governance and administration

The scheme is administered by a Legal Aid Committee.[78] The Committee comprises 5 members appointed by the Minister responsible for Social Services[79] after consultation with the Chief Justice, one of whom is appointed Chairman. The Chair must be held by a judge or magistrate.[80] Two of the five members are nominated by the Bar Council, one member is a nominee of the Institute of Chartered Accountants and the other person is someone with relevant experience of social work.

Although the Committee has overall responsibility for administration of the scheme,[81] it has delegated the day-to-day management of the scheme to the Senior Legal Aid Counsel, [82] who reports to the Committee at its weekly meetings.

One of the functions of the Committee is to prepare and maintain, in consultation with the Bar Council, a list of lawyers who are able and willing to represent applicants and assisted persons.[83] There are currently 12 lawyers on the criminal roster, but seven lawyers handle the vast majority of the work. There are similar numbers on the other rosters for civil and matrimonial proceedings.[84]

2.4.3 Legal aid in criminal proceedings

2.4.3.1 Method of application

Application must be made in the prescribed form to the Registrar, or to the Court before which the accused is charged, and the Registrar or the court then refers the application to the Committee. Each application must be accompanied by a statutory declaration, verifying the facts stated in the application.[85]

Once a certificate is granted by the Committee, it will assign an lawyer from the appropriate roster maintained by the Committee.[86] When assigning a lawyer to a case, the Committee is required to have regard to the following principles.[87] First, the assignment must be appropriate to the nature of the proceedings for which the certificate is granted. Second, the need to distribute work evenly between lawyers appearing on the roster. Third, so far as is consistent with the first and second principle the Committee is required to give effect to any preference expressed by the applicant.

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[78] *Ibid.*, s. 4.
[79] *Ibid.*, s. 2.
[80] *Ibid.*, s. 4, sch. 1, para. 1(1)(2).
[81] *Ibid.*, s. 5(2).
[82] The Committee has proposed that the legislation be enacted to expressly authorise the delegation of the Committee's functions, see Legal Aid Committee, *Annual Report 2002*, para. 2.
[83] Act, s. 5(1).
[84] Some general practitioners are on both panels.
[85] Act, s. 8.
[86] *Ibid.*, s. 12(1).
[87] *Ibid.*. s. 12(2).

2.4.3.2 Scope

Subject to means, legal aid must be granted for any offence specified in the Second Schedule to the Act, and for appeals in connection with such offences.[88] The Second Schedule includes all of the more serious crimes, and any other offence for which on a first conviction the offender may be liable to imprisonment for five years or more. The Committee has a residual discretion[89] to grant legal aid to any applicant who does not qualify as of right because he is not charged with an offence specified in the Second Schedule, if the Committee considers that 'it is in the interests of justice' for the accused to be legally aided.[90] Thus, the interests of justice may require legal aid for appeals against conviction of non-scheduled offences,[91] applications for leave to appeal, and presenting, or responding to, an appeal to the Court of Appeal and Privy Council.[92] In considering applications relating to appeals, the Committee may seek an opinion of a lawyer on whether it is appropriate for the appellant to be granted legal aid.[93]

A form of duty counsel scheme exists for defendants who appear unrepresented before a Magistrates Court, charged with an offence which qualifies for legal aid.[94] It is proposed that duty counsel scheme be extended to allow advice and assistance to be given to suspects while detained at the police station.[95]

2.4.3.3 Eligibility

Financial eligibility, including any contribution payable by the assisted party is determined by reference to the disposable income and capital limits set out in section 10(1), which are in turn calculated by reference to the criteria set out in the Third Schedule of the Act. The income and capital limits have not changed since 1989. However, the eligibility limits are currently under review and it is proposed that they will be increased shortly.[96] In determining eligibility the Committee may make further inquiries, and require the applicant to attend personally before the Committee.[97]

2.4.4 Legal aid in civil proceedings

2.4.4.1 Method of application

The method of application is the same as for criminal proceedings.

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[88] *Ibid.*, s. 10(2).
[89] *Ibid.*, s. 10(3).
[90] *Ibid.*, s. 10(3). In urgent situations, certificates are available for a temporary period, *ibid.*, s. 10(4).
[91] *Ibid.*, s. 3(1)(c).
[92] *Ibid.*, s. 3(3) adds the requirement of 'special circumstance' to the interest of justice test.
[93] *Ibid.*, s. 9(e).
[94] *Ibid.*, s. 7.
[95] Above n. 82, para. 4.
[96] *Ibid.*
[97] Act, s. 9.

2.4.4.2 Scope

In civil proceedings, the Committee may grant legal aid to individuals where it is in the interests of justice to do so.[98] This includes civil proceeding generally in the Supreme Court or a court of summary jurisdiction,[99] and appellate courts[100] including the Privy Council.[101] The Act contains no guidelines that might assist the Committee in determining when it is in the interests of justice for legal aid to be granted.

2.4.4.3 Eligibility

The method is the same as for criminal legal aid.

2.4.5 Funding

Funding for the legal aid scheme is primarily provided by the government.[102] This is supplemented by the financial contributions received from assisted persons,[103] and costs awarded in favour of assisted persons in civil proceedings, which are paid into the Consolidated Fund. In addition section 13A provides that a charge will apply to any monies or property recovered by the assisted party in excess of $5,000.[104] This will be used to defray the sums paid by the Government to the assisted party's lawyers under the legal aid certificate.

Set out in the Table below is a summary of funding for the stated periods taken from the *Annual Reports*.

Year	Amount in US$
1999-00	$582,000
2000-01	$574,732
2001-02	$598,604

2.4.6 Additional legal services for the poor

In addition to the legal aid scheme, there is a *pro bono* clinic,[105] which is staffed by two lawyers on a voluntary basis and open for two hours one evening a week. The number of clients attending each session varies from between 6 and 12. The matters dealt with are typical of those dealt with by community clinics and include family law, housing and employment matters.

[98] *Ibid.*, s. 10(3).
[99] *Ibid.*, s. 3(1)(b).
[100] *Ibid.*, s. 3(2).
[101] *Ibid.*, s. 3(3) adds the requirement of 'special circumstance' to the interest of justice test.
[102] *Ibid.*, s. 6.
[103] Payments made into the consolidated fund in 2002, totalled $22,177, above n. 82, para. 4.
[104] The charge does not apply to money or property recovered in or a s a result of matrimonial proceedings.
[105] The clinic is held in a Community Centre supported by the Department of Youth, Sport and Recreation.

2.5 CAYMAN ISLANDS[106]

2.5.1 Background

The Cayman Islands has a population of approximately 40,000 and there are approximately 250 lawyers engaged in private practice.

Originally, the only provision for legal aid was to be found in the Poor Person (Legal Proceedings) Law 1945, which allowed a poor person, who was a party to legal proceedings in the Grand Court, to be excused payment of court fees, and to be immune from orders for costs. Subsequently, the Poor Person (Legal Proceedings) Law 1961, made provision for 'the legal representation of poor persons in civil suits.' A more comprehensive scheme, based on the judicare model was, finally, introduced under the Poor Persons (Legal Aid) Law 1975.[107] The Act extended the scope of legal aid to include a variety of criminal offences listed in a Schedule to the Act, and to taking or defending civil proceedings in the Grand Court.[108] Due to lack of public awareness, however, the scheme was little used in its early years and it was not until the 1990s that the scheme could be described as fully operational.[109]

2.5.2 Governance and administration

Subject to the approval of the Governor, the Chief Justice is responsible for designing the rules which govern the operation of the scheme.[110] The Clerk of the Court ('the Clerk') is responsible for the day-to-day management of the scheme, although he assigns most tasks to a deputy known as the 'Legal Aid Officer'.

The Clerk is required to keep a panel of lawyers who have agreed to accept legal aid assignments from the Clerk.[111] The Chief Justice must approve the lawyer as suitable before his/her name is placed on the panel. Currently, there are ten lawyers registered on the panel for criminal proceedings, but six of them handle the vast majority of the cases. Twenty lawyers are on the panel for civil proceedings.

2.5.3 Legal aid in criminal proceedings

2.5.3.1 Method of application

Application is made to the Clerk, using the prescribed form.[112] Having determined that the accused is financially eligible, the Clerk refers the application to a judge of the Grand Court, who makes the final decision on whether a legal aid certificate is to be issued. The court may also

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[106] The assistance of Chief Justice Smellie QC is gratefully acknowledged.
[107] Law 14/1975, s. 3(d).
[108] *Ibid.*, s. 3.
[109] P. Hill, *Criminal Procedure in the Cayman Islands* (Law Reports International: Oxford, 1992) 117.
[110] Legal Aid Law (1999 Revision), s. 6 ('Law'). The current rules are contained in The Poor Persons (Legal Aid) Law, 1975: The Legal Aid Rules 1997 ('Rules').
[111] Rules, r. 6(5).
[112] Practice Direction no. 5 of 1999.

grant a legal aid certificate of its own motion to accused who have been charged with a scheduled offence, if the court considers that the interests of justice require that the accused be legally represented.[113]

If a certificate is granted a lawyer will be assigned from the panel to act for the assisted person.[114] In practice the Clerk usually tries to assign the lawyer selected by the accused, so long as that lawyer is available. If for any reason the assigned lawyer does not accept the case, the Clerk will contact the next lawyer on the panel.

2.5.3.2 Scope

Legal aid in criminal proceedings may be granted to those charged with indictable offences, either-way offences which are tried on indictment, and any other scheduled offence, whether tried summarily or on indictment.[115]

Legal aid may also be granted for appeals from conviction in Summary Court to the Grand Court,[116] and for appeals from the Grand Court to the Court of Appeal.[117] Although there is no express provision in the Legal Aid Law or the Court of Appeal Law for legal aid to be granted for appeals to the Judicial Committee of the Privy Council, the Attorney General has, in two recent cases,[118] provided funding from his departmental budget.

2.5.3.3 Eligibility

Applications for legal aid must be supported by a statement of means and such other documents as the court may require for the purpose of verifying the statement of means.[119] In determining whether the accused has the means to instruct a lawyer privately, the court is required to have regard to the amount of the accused's disposable income and capital (disregarding the value of his sole or main residence); his ability to obtain employment, and the likely cost of the proceedings. The Legal Aid Rules do not, however, prescribe the actual financial limits above or below which the accused will or will not qualify for legal aid. An assisted person who is convicted may be required to pay a contribution towards the cost of his representation.[120]

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[113] Rules, r. 7(2).
[114] Rules, r. 6(5).
[115] Law, s. 3.
[116] *Ibid.*, ('taking or defending action in the Grand Court').
[117] Court of Appeal Law (1996 Revision) s. 10.
[118] *Randall* v *R*, (2002) CILR 254; *R* v *Carlyle Roberts*, (2002) CILR 130.
[119] Law, s. 7(1).
[120] Rules, r. 8.

2.5.4 Legal aid in civil proceedings

2.5.4.1 Method of application

The Legal Aid Rules lists the documents that must be submitted upon an application for legal aid in civil proceedings.[121] A certificate may be granted subject to conditions, which may include a payment into court of a sum of money as a contribution towards the cost of representation.[122] If the certificate is granted the Clerk will assign a lawyer from the panel on the same basis as for criminal proceedings.

2.5.4.2 Scope

The Law states that legal aid 'shall' be granted to any person who desires to take or defend proceedings in the Grand Court, subject to means.[123] However, the Rules provide that a certificate will only be granted 'if the Court is satisfied that the applicant appears to have a reasonable prospect of succeeding on the merits of the case.'[124]

Legal aid is not available for civil proceedings in the Summary Court. This may reflect the fact that the jurisdiction of the Summary Court in respect of civil matters is limited to claims, the monetary value of which does not exceed $2,000.

2.5.4.3 Eligibility

The method for determining eligibility is the same as for criminal proceedings, save that in determining whether the applicant has the means to instruct a lawyer privately, the court is required in addition to have regard to the nature and complexity of the proceedings or intended proceedings.[125]

2.5.5 Funding

The legal aid scheme is primarily funded by the Government. The annual amount expended by the Government on the scheme from 1997 to date is set out in the table below:

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[121] *Ibid.*, r. 11. The documents include, a statement of means and such documents as the Court my require for the purpose of verifying its contents; a statement of facts upon which his case rests; any attorney's opinion on the merits of the case.
[122] *Ibid.*, r. 12.
[123] Law, s. 3 (b).
[124] Rules, r. 12(1).
[125] Law, s. 12(2)(d).

Year	Amount in US$
1997	510,000
1998	516,000
1999	667,200
2000	672,200
2001	900,000
2002	1,164,000

2.5.6 Additional legal services for the poor

During the latter half of the 1990s, the Business and Professional Women's Club ('BPWC') of the Cayman Islands became very active in the campaign against domestic violence. In addition to organising public education campaigns to raise awareness of the problem of domestic violence, the BPWC identified that there was a significant gap in the legal aid provision for victims of domestic violence, because the Legal Aid Law does not cover assistance for civil matters in Summary Court, which deals with applications for non-molestation and exclusion orders.

In order to fill this gap the Legal Befrienders Clinic was established, in December 1997. Initially the clinic was only able to open one evening a month, but in early 1999, the clinic began to offer service in person on a fortnightly basis. In July 1999, the clinic opened the Befriender's phone line, which allowed advice to be given over the telephone on three afternoons a week. As the service has expanded, the advice given has been extended to include other matters, such as financial provision and issues surrounding immigration status post-divorce. [126]

2.6 BRITISH VIRGIN ISLANDS[127]

2.6.1 Background

The British Virgin Islands (BVI) has a population of 21,300. There are 85 lawyers in private practice.

There is no statutory provision for legal aid. Up until 2001, the Government provided a limited form of legal aid by paying a small fee to counsel for representing defendants charged with murder. In December 2000, as a result of many years of discussions, a Memorandum of Understanding ('MOU') was agreed between the Government and the BVI Bar Association

[126] This coincided with an expansion in the number of volunteers to all time high of 20 lawyers. In the period 1999 up until 2002 the clinic has assisted an average of 88 clients each year, interview and email from assistant Tammy Ebanks-Bishop, February 4, 2003.

[127] The authors gratefully for the assistance of Hélène Lewis, President of the BVI Bar Association.

('BVIBA') for the establishment of a legal aid scheme. The scheme is based on a modified version of the judicare model, and envisages a partnership between Government and the BVIBA, with private lawyers agreeing to provide services at reduced fees and the Government providing the funding. The scheme covers a limited range of criminal and civil matters.

Though it is modest in its ambitions, the MOU is a very interesting document in its own right in that it records both parties' acceptance of some key fundamental principles. Firstly, the BVIBA and the Government expressly acknowledge that the citizens and residents of the BVI cannot have reasonable access to justice or avail themselves of the protection of the law without the benefit of adequate legal services and that there is an increasing number of persons in need of legal services who are incapable of paying for such services. Secondly, the BVIBA expressly acknowledge the moral and social responsibility of members of the BVIBA and other members of the private Bar to ensure the protection of the public's right of access to the courts. Thirdly, the Government expressly recognises its obligations under various international human rights instruments to ensure that all citizens and residents have reasonable access to justice. Finally, the Government expressly recognises that it has a moral and social responsibility to enhance access to the justice system by each and every citizen and resident of the BVI.

2.6.2 Governance and administration

The MOU anticipated that the legal aid scheme would, initially, be administered by a Board, composed of five members, to include: the Registrar of the High Court, the Chief Social Development Officer, two attorneys appointed by the BVIBA and a member of the public 'in good standing with the community as may be agreed on' by the parties.[128] It was envisaged that after the initial undefined period a non-profit making company would eventually be established to take over the administration of the scheme, but to date this has not happened.[129]

2.6.3 Legal Aid in criminal proceedings

2.6.3.1 Method of application

The Board has devised the following procedure in connection with each application for legal aid. The applicant must submit the prescribed form of application, together with a declaration of means, to the designated clerk in the Social Development Department. A means test is administered and the application is referred to the Board. Successful applications are referred to the Registrar who will then assign a lawyer from the pool of lawyers nominated by the BVIBA, who are willing to participate in the scheme.[130]

2.6.3.2 Scope

The scheme is limited to indictable offences, and summary matters only if they are regarded as sufficiently complex.[131] The MOU contains no other guidelines for determining when legal aid will be granted in criminal matters.

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[128] MOU, para.1.
[129] Legal Aid Board (BVI), *Annual Report to April 20 2002*, para. 5.
[130] MOU, para. 5.
[131] *Ibid.*, para. 3.

2.6.3.3 Eligibility

According to the MOU, the Social Development Department is responsible for developing and administering a 'means test' which must be approved by the Government and the BVIBA.[132] However, the MOU contains no guidelines on the operation of the 'means test'. Currently, legal aid will be refused 'where the applicant appears to be able to meet his obligations.'

In its Annual Report the Board has recommended that additional criteria need to be established for determining financial eligibility and that the Department be granted greater powers to investigate applicants' means.[133]

2.6.4 Legal Aid in civil proceedings

2.6.4.1 Method of application

The method of application is the same as for criminal proceedings.

2.6.4.2 Scope

Legal aid is available pursuant to paragraph 3 of the MOU for domestic violence and matrimonial matters, and 'any other matter which in the opinion of the Board is of an exceptional nature to merit Legal Aid.'

2.6.4.3 Eligibility

The method is the same as for criminal proceedings.

2.6.5 Funding

Though precise figures are not known, it appears that for the financial year 2002, an initial sum of US$50,000 was allocated by the Government to the scheme and a supplementary allocation of $10,000 was made later in the year. A total of US$60,000 has been allocated for this year's budget.

2.7 TURKS AND CAICOS[134]

2.7.1 Background

The Turks and Caicos have a population of 18,750 inhabitants, with approximately 93 lawyers engaged in private practice.

[132] *Ibid.*, para. 4.
[133] Above n. 129, para. 6.
[134] The authors gratefully acknowledge the assistance of Chief Justice Ground QC.

There is no primary legislation covering the provision of legal aid. Instead the provision of legal aid is regulated by the Legal Aid Rules 1999, which have been made pursuant to section 16(2)(g) of the Supreme Court Ordinance. The scheme is based on the judicare model, but is restricted in its coverage to a very limited range of criminal offences.

2.7.2 Governance and administration

Overall responsibility for governance of the scheme lies with the Chief Justice. The Registrar of the Supreme Court handles day-to-day administration of the scheme.

2.7.3 Legal aid in criminal proceedings

2.7.3.1 Method of application

The applicant, or his proposed attorney, is required to complete a statement of means in the prescribed form[135] and to verify it on oath before the Registrar or a Justice of the Peace. The application is determined administratively by the Chief Justice. If the application is successful, the attorney selected by the applicant will be assigned, unless he is unwilling or unable to represent the applicant.[136]

2.7.3.2 Scope

In deciding whether or not to grant legal aid for offences triable on indictment the Chief Justice is obliged to take into account: the seriousness of the charges; the likelihood of the applicant being sentenced to a term of imprisonment if convicted; the nature of the case, including its complexity; the age and background of the applicant and any other relevant matters.[137] Legal aid for offences tried summarily is only granted in exceptional cases.[138] This is nowhere defined but in practice, this is limited to cases where the defendant is a juvenile.

2.7.3.3 Eligibility

The Rules provide that an accused will be eligible for legal aid if he is unable to afford to pay privately.[139] There do not appear to be any other criteria for determining financial eligibility.

2.7.4 Legal aid in civil proceedings

Legal aid is not available for civil proceedings.

2.7.5 Funding

Precise figures for Government spending on legal aid are not available. However, the Government does make an annual budgetary provision for legal aid of US$50,000.

[135] Legal Aid Rules 1999, r. 2(4).
[136] *Ibid.*, r. 4(3).
[137] *Ibid.*, r. 3(2). Legal aid is granted, if at all, post-committal, *ibid.*, r. 2(1).
[138] *Ibid.*, r. 8(1).
[139] *Ibid.*, r. 3(3).

R v G and Another: Good Riddance to (R v Caldwell and) Bad Recklessness

Mitchell Davies*

With the publication of the unanimous decision of the House of Lords in *R v G and Another* (hereafter *"G")*[1] a welcome degree of consistency has in recent years issued from their Lordships' House,[2] in the identification of subjective legal fault as being the only acceptable gauge of liability in relation to any offence which is seriously criminal in character. Thus, whether the accused's liability is dependent upon an assessment of his defence of factual mistake[3] or lack of foresight of consequences, the common law gauge of *mens rea* is necessarily subjective.

In relation to the mistake cases, the House of Lords has on two recent occasions affirmed its determination to ensure that, in so far as the statutory language permits, aged-based sexual offences are dependent upon proof of genuine (subjective) culpability[4]. There is compelling logic to the principle being applied that: "When *mens rea* is ousted by a mistaken belief, it is as well ousted by an unreasonable belief as by a reasonable belief."[5] Accordingly, in the context of both s.1 Indecency with Children Act 1960[6] and s.14(2) Sexual Offences Act 1956,[7] the House of Lords has held, respectively in *B v DPP*[8] and *R v K*[9], that convictions for each offence depend upon the prosecution being able to establish the absence of a genuinely held belief by the accused that the victim was at or above the statutorily protected age.[10] In so holding, it is clear that the *Morgan* principle,

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[1] [2003] 4 All ER 765.
[2] *DPP v Morgan* [1976] AC 182 set the modern tone of the Lords, with the *Morgan* principle having since been applied by their Lordships in *B v DPP* [2000] 2 WLR 452 and *R v K* [2001] 3 WLR 471, and by the Privy Council in *Beckford v R* [1988] AC 130.
[3] As to the victim's lack of consent in the context of rape: *DPP v Morgan* [1976] AC 182, or indecent assault : *R v Kimber* [1983] 1 WLR 1118; or as to the victim's age in the context of age-based sexual offences: *B v DPP* [2000] 2 WLR 452; *R v K* [2001] 3 WLR 471, *R v Fernandez* (2002) Times LR, June 26; as to a belief in the need to resort to self defence: *Beckford v R* [1988] AC 130, or a belief in the need to act in the prevention of crime: *R v Williams (Gladstone)* (1983) 78 Cr App Rep 276. This principle is, regrettably, soon to be statutorily reversed in the UK in relation to all sexual offences by The Sexual Offences Act 2003 (which received Royal Assent on November 30th 2003 and is expected to have a commencement date of May 2004). An unfortunate dichotomy will thereafter be created in the UK in the assessment of mistakes, depending upon whether mistake is pleaded in the context of sexual or non sexual offences.
[4] The offence contained in s.6 Sexual Offences Act 1956 (intercourse with a girl under the age of 16) excludes this construction by the express inclusion of a defence requiring, *inter alia*, the belief to have been reasonably held: s.6(3) Sexual Offences Act 1956. Cf locally, s.132(3) Penal Code.
[5] Per Lord Nicholls in *B v DPP* [2000] 2 WLR 452 at 456.
[6] Committing or inciting an act of gross indecency with a child under the age of 14.
[7] Indecent assault on a [factually consenting] girl under the age of 16. Cf. locally, s.130 Penal Code).
[8] [2000] 2 WLR 452.
[9] [2001] 3 WLR 471.
[10] The ruling in *B v DPP* [2000] 2 WLR 452 was predicated upon the principle (per Lord Nicholls at 459) that: "There is no general agreement strict liability is necessary to the enforcement of the law protecting children in sexual matters." The same reasoning, with regard to matters of immigration law, had laid the

applied most significantly for local purposes by the Privy Council in *Beckford v R*[11], is very much alive and well at common law.[12]

R v G: Re-defining Recklessness for the Purposes of Criminal Damage:

The House of Lords in *G* have most recently signaled a determination to remain faithful to the common law's insistence upon proof of true *mens rea* as a condition of liability for serious crime. In so doing, their Lordships have taken what many commentators would regard as the long overdue step[13] of over-ruling the decision of a bare majority of the House of Lords in *MPC v Caldwell*[14] who had re-defined recklessness for the purposes of the Criminal Damage Act 1971 to include an objective element. Whether, by imposing a *purely* subjective test, their Lordships in *G* have gone too far remains to be seen, but will certainly be the charge taken up by the Crown.

As is well known, Lord Diplock and the majority of their Lordships in *Caldwell* defined recklessness for the purposes of the 1971 Act[15] as being evidenced by either: i) the unconscious or ii) conscious taking of an obvious risk. It was with regard to i), the objective species of recklessness, that Lord Diplock's Model Direction, as it came to be known, met with almost universal academic hostility.[16] Those who opposed it cogently pointed to the lack of definitional separation, for all practical purposes, between *Caldwell* recklessness and negligence. Recklessness had consequently become quite incapable of working as a barometer of culpability.[17] This was graphically illustrated in the ruling of the Divisional Court in *Elliott v C (a minor)*[18] who reluctantly[19] held, applying i) above, that the 14 year old defendant of limited intelligence had acted recklessly within the meaning of section 1(1) of the 1971 Act. This conclusion was reached notwithstanding

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foundations for the opinion of Lord Evershed and the Privy Council in *Lim Chin Aik v R* [1963] AC 160 in interpreting s.6(2) Singapore Immigration Ordinance, 1952. In other contexts, such as the control of underage gambling, where it has been found necessary to impose strict liability, this approach is likely to continue: *Harrow LBC v Shah* [1999] 3 All ER 302.

[11] [1988] AC 130.

[12] As acknowledged by Lord Steyn in *G* who paid tribute (765 at 791) to the "congruence of analysis (in) decisions of the House".

[13] Their Lordships in *R v Reid* [1992] 3 All ER 673 had been invited, but declined, to overrule the unanimous decision of the HL in *R v Lawrence* [1981] 1 All ER 974, delivered on the same day as *Caldwell*, which had applied the Model Direction to the (now abrogated) offence of causing death by reckless driving. Previously, the HL had refused leave to appeal the decision of the Divisional Court in *Elliott v C* [1983] 2 All ER 1005 (below) which had applied the objective limb of the Model Direction: [1983] 1 WLR 951.

[14] [1981] 1 All ER 961.

[15] Ibid at 967. The offence of "simple" criminal damage is found locally in Part VIII of the Penal Code, ("Malicious Injuries to Property") s.257, together with the expressed *mens rea* alternatives of intention or recklessness. This offence is the equivalent to that contained in s.1(1) of the 1971 Act. There is no local equivalent of the aggravated offence of criminal damage which is contained within s.1 (2) of the 1971 Act.

[16] The objective limb was defended by Lord Diplock as being necessary as a practical response to the jury's inability to be sure of the accused's actual thought processes: [1981] 1 All ER 961 at 965.

[17] It was such objections which led to the exclusion of the Model Direction from manslaughter with a test of gross negligence being reasserted in its place: *R v Prentice, Adomako & Holloway* [1993] 4 All ER 935; *R v Adomako* [1994] 3 All ER 79.

[18] [1983] 2 All ER 1005.

[19] Per Goff LJ Ibid at 1010.

the fact that due to her impaired cognition and fatigue, she had not understood the extent to which a fire, started with the aid of white spirit, would take hold, with disastrous consequences, both for herself and for the owner of a shed in which she had set the fire in an attempt to keep warm. Applying the Model Direction, the Divisional Court ruled that the risk of damage, being obvious to a reasonable person (albeit not to the defendant), was conclusive evidence of her recklessness.[20] With the House of Lords refusing leave to appeal the *Elliott* ruling, it was clear that notwithstanding the manifest unfairness in outcome, their Lordships were satisfied that a merging, for all practical purposes, of the concepts of recklessness and negligence was desirable, at least in the context of the 1971 Act.[21]

Numerous decisions of the lower courts thereafter faithfully applied the Model Direction in securing criminal damage convictions,[22] but none had to confront the obvious unfairness in outcome which had characterized Ms Elliott's conviction. None, that is, until the Crown sought to bring the full force of *Caldwell* to bear in prosecuting *G* (and his accomplice "R")[23] for criminal damage, alleging their recklessness in causing a fire which resulted in some £1m of damage. Many parallels can be drawn between *G* and *Elliott*, most obviously, the *credible* assertions made by the defendants in each that they gave no thought to the risk of property damage flowing from their actions. In other words, it was asserted that the damage had been caused accidentally, *ergo*, without *mens rea*. Unfortunately, as Miss Elliott found to her cost, the Model Direction did not view it in this way.

G and R, like *Elliott*, were children, indeed much younger children, being barely at the age of criminal responsibility (aged 11 and 12 respectively) at the time they started a fire which was to have such profound consequences. The boys (absent the permission of their parents) had decided to camp out for the night and, in the early morning of August 22nd, 2000, found themselves in a yard adjoining a Co-op shop. There they discovered some old newspapers which they set about reading. Subsequently, they set fire to some of the newspapers, throwing the burning material onto the concrete floor beneath a large plastic rubbish bin. The boys then left the yard, without extinguishing the burning newspapers. The fire subsequently spread to the rubbish bin and from there to an adjacent bin, which was located next to the Co-op shop wall. Ultimately, the fire spread to the eave of the shop, penetrating the roof space and causing the whole of the shop buildings to catch fire, resulting in extensive damage.

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[20] The *Elliott* interpretation of recklessness for the purposes of the 1971 Act was followed, also reluctantly, by Ackner LJ and the CA in *Stephen Malcolm v R* (1984) 79 Cr App Rep 334. To like effect was *R v Coles* [1995] 1 Cr App R 157.

[21] Remarkably, the same view was taken by Lord Roskill in his leading speeches in *R v Seymour* [1983] 2 All ER 1058 (HL) and *Kong Cheuk Kwan v R* (1985) 82 Cr App Rep 18 (PC) in applying the Model Direction (rather than gross negligence) in each case to define recklessness for the purposes of manslaughter. The gross negligence test has since been re-established in manslaughter in place of the Model Direction following the decision of the CA in *R v Prentice, Adomako & Holloway* [1993] 4 All ER 935 and that of the HL in *R v Adomako* [1994] 3 All ER 79.

[22] *R v Coles* [1995] 1 Cr App R 157; *R v Merrick* 1996] 1 Cr App Rep 130; *R v Bell* [1984] 3 All ER 842. As (unsurprisingly) had Lord Diplock himself *in R v Miller* (1983) AC 161.

[23] *R v G and another* [2003] 4 All ER 765.

As a result of this seemingly improbable chain of events, the boys were charged with arson, contrary to sections 1(1) and 1(3) of the Criminal Damage Act 1971[24], with the prosecution alleging that they had acted recklessly. The (seemingly hopeless) defence case was that the boys had not considered there to be any risk of damage due to their genuine assumption that the fires would extinguish themselves on the concrete floor.

Maher J at first instance, with thinly disguised reluctance, directed the jury as to the meaning of recklessness in accordance with the *Caldwell* Model Direction. Maher J's jury direction included the critical instruction that:

"No allowance is made by the law for the youth of these boys or their lack of maturity or their own inability, if such you find it to be, to assess what was going on. So, if it would have been obvious to an ordinary, reasonable bystander that there was a risk of the fire spreading (in the way that it did) to the building, it is irrelevant that you say ...'We don't think it would have been apparent to these boys, even though it might have been apparent to an ordinary reasonable bystander.' It is too bad."[25]

The jury, unable to reach a verdict and incredulous of the direction which they had been given, inquired of Maher J why it was that they were obliged to consider the issue of risk appreciation from the perspective of a reasonable adult person, rather than from the perspective of the children before them. The learned judge's response continued to betray his own sense of disquiet in applying the Model Direction to such cases as the present. His Lordship lamented:

"I am not free to give you a direction on the law which perhaps some of us might like it to be; nor are you free to substitute your own view of what the law is for the law as I have explained it to you. At the beginning of the trial you took an oath to try the case on the evidence presented to you, and part of that involves taking the law from me. That is my function...You may remember, I said that some may feel that it is a harsh test, and there are many who would be sympathetic to that view. But sympathy does not permit me to give you a direction on the law other than as it is."[26]

The following day the jury dutifully returned guilty verdicts in respect of each defendant. Their appeals to the Court of Appeal were unsuccessful, although Dyson LJ, in giving the judgment of the court, observed:

"In our judgment, it is for the House of Lords to decide whether the time has come to revisit the *Caldwell* test. Although we see great force in the criticisms of the first leg of the *Caldwell* test that have been made, it is not open to this court to depart from it."[27]

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[24] Cf s.250 Penal Code which, in the context of the offence of arson, employs the *mens rea* term "wilfully". "Wilful" was defined (for the purposes of s.1 Children and Young Persons Act 1933) by Lord Diplock and the House of Lords in *R v Sheppard* [1981] AC 394 (shortly prior to *Caldwell*) in terms very similar to the Model Direction.

[25] Cited by Lord Bingham in the HL in *G* ([2003] 4 All ER 765 at 770).

[26] Ibid at 771.

[27][2003] 3 All ER 206 at 215.

In refusing leave to appeal to the House of Lords the Court of Appeal, in keeping with its usual practice, left the decision whether the appeal should be taken to the House itself. Subsequently, the Court of Appeal certified the following point of law of general public importance as flowing from its decision:

"Can a defendant properly be convicted under section 1 Criminal Damage Act 1971 on the basis that he was reckless as to whether property was destroyed or damaged when he gave no thought to the risk, but by reason of his age and/or personal characteristics the risk would not have been obvious to him, even if he had thought about it."[28]

In their Lordships' determination to hear the appeal, it was apparent that *Caldwell*'s days were likely to be numbered; the culture of culpability having been embraced by the House in the recent rulings in *B* and *K*[29] was so much at odds with the Model Direction for it to have become a glaring anachronism in the 22 years since *Caldwell* had been decided. The unanimous decision of their Lordships in *G*, with speeches being delivered by Lords Bingham, Steyn and Rodger, confirmed the accuracy of this view.

R v G: The House of Lords' Speeches:

Lord Bingham opened his speech with a close consideration of the origins of the law of criminal damage, commencing with the Malicious Damage Act 1861. As an aid to interpretation of the Criminal Damage Act 1971, His Lordship drew upon the perceived ineffectiveness of the 1861 Act in deterring offences of property damage, together with the reform proposals of the Law Commission expressed in its 1970 Report[30] and draft bill which, in large part, became the new Act. In particular, Lord Bingham noted the Law Commission's central proposal, in recognition of the ambiguity of the archaic term malice,[31] to replace it with recklessness as the gauge of responsibility for unintentionally caused property damage. Of overriding importance to all their Lordships in *G* was the Law Commission's proposed subjective definition of recklessness which had been based upon the meaning ascribed to malice in the leading Court of Appeal authority of *Cunningham.*[32] In other words, it was recognized by their Lordships that the Law Commission advocated a change in the *mens rea* language to be adopted by the 1971 Act, but wished to retain its existing meaning.[33]

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[28] [2003] 4 All ER 765 at 768.

[29] Lord Bingham gave the leading judgment of the House in both cases.

[30] Law Com. No 29: *Offences of Damage to Property*, July 1970.

[31] As illustrated in *Cunningham* [1957] 2 QB 396 and *Mowatt* [1968] 1 QB 421.

[32] [1957] 2 QB 396. Whilst in their Working Paper No 23 of 1969, *Malicious Damage*, the Law Commission refer with approval (para 33(a)) to both *Cunningham* and Professor Kenny's definition of malice, the only attempt at a definition of recklessness appears in paragraph 31of the Working Paper where it is stated: " For the present purpose, we assume that the traditional elements of intention, knowledge and recklessness (in the sense of foresight and disregard of consequences or awareness and disregard of the likelihood of the existence of circumstances) will continue to be required for serious crime." Regrettably no definition of recklessness was included in the Law Commission's subsequent Report, No 29 of 1970, *Offences of Damage to Property*.

[33] This is expressly acknowledged in paragraph 44 of the Law Commission's Report (op. cit., n. 46) where it is stated: "We consider therefore that the same (mental) elements as are required at present should be retained, but that they should be expressed with greater simplicity and clarity." The same point is made in the Working Paper at paragraph 34.

With Parliament having substantially enacted the Law Commission's recommendations, it followed in their Lordships' view that the law makers had intended the term reckless to bear the Law Commission's favoured meaning. It was in excluding *Cunningham* from this inquiry that the majority in *Caldwell* (who, per Lord Bingham, had apparently not been referred to the Law Commission's Report[34]) had erred. Lord Bingham asserted:[35]

"In treating [*Cunningham*] as irrelevant to the construction of "reckless" the majority fell into understandable but clearly demonstrable error. No relevant change in the *mens rea* necessary for proof of the offence was intended, and in holding otherwise the majority misconstrued section 1 of the Act."

Lord Bingham went on to acknowledge however that, without more, the error inherent in the reasoning of the majority in *Caldwell* would not be enough to justify over-ruling an authority of over two decades' standing which had been since approved by the House of Lords[36] and had not been reversed by Parliament. The necessary further evidence of the Model Direction's lack of viability was, however, for Lord Bingham, supplied in the fact that the *Caldwell* principle represented not merely a misinterpretation, but one which ordinary people (including the present jury[37]) would regard as being capable of operating *unfairly* by requiring a defendant to conform to an intellectual standard which, quite blamelessly, he could not hope to achieve. Entirely in keeping with the principle of culpability, central to the rulings in *B* and *K*, Lord Bingham's first concern was therefore to achieve a definition of recklessness which corresponded to a blameworthy state of mind.[38] His Lordship asserted:[39]

"..[I]t is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable...But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication...) one genuinely does not perceive the risk. Such a person may fairly be

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[34][2003] 4 All ER 765 at 784. The majority were well aware of the Law Commission's preferred subjective definition of recklessness however, as their proposal contained in Working Paper No 31, *Codification of the Criminal Law: General Principles: The Mental Element in Crime*, 1970, had formed the basis of Lord Edmund Davies' robust dissent in *Caldwell:* [1981] 1 All ER 961 at 969.

[35] 765 at 784.

[36] In the context of the 1972 Road Traffic Act: *R v Reid* [1992] 3 All ER 673.

[37] The reservations of the jury in *G* were recognized by Lord Bingham (765 at 785) as being a relevant consideration in assessing the continuing validity of the *Caldwell* test: "...it is evident that this direction offended the jury's sense of fairness. The sense of fairness of 12 representative citizens sitting as a jury..is the bedrock upon which the administration of criminal justice in this country is built. A law which runs counter to that sense must cause concern."

[38] It is noteworthy that the Model Direction itself called for an examination of culpability in one situation, that being where considerations of the so-called third mental state or lacuna arose. Thus, even applying Lord Diplock's definition, an accused who foresaw an obvious risk but only went on to act believing *all* risk had been eliminated was not reckless. Cf *Chief Constable of Avon & Somerset Police v Shimmen* (1986) 84 Cr App Rep 7. This principle marked the only distinction between *Caldwell* recklessness and negligence. Whilst the significance of the lacuna is much reduced since *G*, the premise upon which it is founded remains sound and will continue to apply post *G* as indicating an absence of intention to *take* any foreseen risk.

[39] 765 at 784.

accused of stupidity or lack of imagination, but neither of these failings should expose him to conviction of serious crime or the risk of punishment."

Lord Bingham noted[40] that the "shop floor" response to *Caldwell* from academics,[41] judges and practitioners had virtually all been one way with it being almost universally recognized, at least in the context of the Criminal Damage Act 1971,[42] that the Model Direction must be rejected due to its ineptness as a barometer of *culpa*.

In these circumstances, His Lordship concluded[43] that the need to correct the "misinterpretation" of *Caldwell* was compelling. Perhaps surprisingly, Lord Bingham rejected the halfway house solution of modifying the *Caldwell* test by either taking account of the age of the juvenile defendant or by more broadly reworking *Caldwell* (in line with the rape cases[44]), by replacing the inadvertent limb with a test of constructive awareness, (involving an inquiry as to whether the risk would have been obvious to the accused if he had thought about it). Either solution would, in Lord Bingham's judgment,[45] amount to the substitution of "one misinterpretation of section 1 for another". Instead, the *Cunningham* test, advocated by the Law Commission, implicitly accepted by Parliament and applied to the 1971 Act in three pre *Caldwell* Court of Appeal decisions[46] was to be revived.

Lord Steyn's judgment, in more robust language, reflected much the same reasoning, with emphasis again being placed on the subjective meaning which had been ascribed to the term maliciously prior to the 1971 Act, together with Parliament's intention, following the Law Commission, not to disturb this settled principle. In Lord Steyn's view,[47] Lord Diplock had been "unnecessarily dismissive" in rejecting Professor Kenny's definition[48] of malice, notwithstanding its approval by the Court of Appeal in *Cunningham*. This fact, together with the failure of the majority in *Caldwell* to recognise that Parliament's intention had been to apply to the new Act the same definition of legal fault which had applied to the 1861 Act, led Lord Steyn to conclude[49] that:

"In its own terms the majority reasoning in *Caldwell* rests on fragile foundations...The conclusion is inescapable: *Caldwell* adopted an interpretation of section 1 of the 1971 Act which was beyond the range of feasible meanings."

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[40] 765 at 785.

[41] *Ibid*: "..a decision which attracts reasoned and outspoken criticism by the leading scholars of the day, respected as authorities in the field, must command attention."

[42] Cf the in principle support for the Model Direction expressed by their Lordships in *R v Reid* [1992] 3 All ER 673 in the separate context of the (since 1991 defunct) offence of causing death by reckless driving. Indeed, Lord Bingham, somewhat redundantly, noted (765 at 784) that nothing in his speech was intended to throw any doubt on *Lawrence* and *Reid*.

[43] 765 at 785.

[44] *R v Pigg* [1982] 2 All ER 591; *R v Satnam S* (1983) 78 Cr App Rep 149; *R v Thomas* (1983) 77 Cr App Rep 63.

[45] 765 at 786.

[46] *R v Briggs* [1977] 1 WLR 605; *R v Parker* [1977] 1 WLR 600 and *R v Stephenson* [1979] QB 695.

[47] 765 at 789. Echoing the view of Lord Edmund Davies in *Caldwell* [1981] 1 All ER 961 at 969.

[48] Author of *Outlines of the Criminal Law*, with the *Cunningham*-approved definition of malice appearing in its 16th edition, (1952).

[49] 765 at 790.

Furthermore, His Lordship rejected, as being contrary to the intentions of Parliament, the "cynical strategy"[50] of seeking to defend the potential harshness of *Caldwell* by emphasising the judge's ability to respond to unjust convictions by imposing a lenient sentence. In concluding, Lord Steyn objected[51] that the sense of justice of all those who came into contact with *Caldwell*, including jurors, was prone to be offended, indicating that the *Model Direction* had failed the ultimate test of workability in the real world. The inescapable conclusion for His Lordship was therefore that once the potential injustice of the objective limb of the Model Direction was added to the etymological objections, it became manifest that, "in *Caldwell* the law [had taken] a wrong turn" and that the case for departing from it had been "shown to be irresistible".[52]

A Foresight Saga: Advertence And Constructive Awareness Recklessness:

The final speech to be given was that of Lord Rodger who agreed that it was the subjective interpretation of the term reckless which the Law Commission had intended to be applied, with the consequence that *Caldwell* had been wrongly decided. However, Lord Rodger was very much more circumspect in his criticism of the Model Direction in arriving at this conclusion and he admitted[53] that *Caldwell*: "involved the legitimate choice between two legal policies (and that for this reason he) was initially doubtful whether it would be appropriate for the House to overrule it".

His Lordship went on to observe,[54] in language *narrower*, however, than that of the Model Direction that:

"..there is much to be said for the view that, if the law is to operate with the concept of recklessness, then it may properly treat as reckless the man who acts without even troubling to give his mind to a risk that would have been obvious to him if he had thought about it".

In this *dictum* there is evidence of what may have been Lord Rodger's preferred approach,[55] namely to *re-work* the Model Direction into a test of "constructive awareness recklessness", already accepted as the gauge of recklessness in rape and involuntary manslaughter.[56] This would involve the addition of a subtle but important gloss to the Model Direction, requiring the risk to have been obvious to *the accused* if he had stopped to think about it. Indeed, there is support for this approach from Lord Diplock himself who at one point in his speech in *Caldwell* appears to temper the objective limb by defining recklessness in terms of constructive awareness. Linking recklessness to the accused's capacity for risk appreciation, His Lordship stressed that it was necessary for it

[50] Ibid.
[51] 765 at 792.
[52] Ibid.
[53] 765 at 795.
[54] 765 at 794.
[55] Indeed, Lord Rodger notes (765 at 795) that Professor Hart had "demolished" the theory underlying advertent recklessness in his 1961 essay, "Negligence, Mens Rea and Criminal Responsibility", reprinted in his book: *Punishment and Responsibility* (1968).
[56] *R v Pigg* [1982] 2 All ER 591 at 599 (rape); *R v Stone and Dobinson* [1977] 2 All ER 341 at 347 (manslaughter).

to be shown that, "if thought were given to the matter *by the doer* before the act was done, it *would have been apparent to him* that there was a real risk of its having the relevant harmful consequences".[57] (Emphasis added).

This refinement to the objective test represents a compromise, with constructive awareness recklessness occupying the middle ground between advertent and inadvertent legal fault: advertence, although always sufficient, is not required, whilst inadvertence, without more, is not enough. As acknowledged by Lord Rodger, the adoption of such a gloss would have entailed overruling *Elliott v C,*[58] whilst at the same time restoring recklessness to the ranks of true *mens rea*. It would also, not unimportantly, have ensured the acquittals of each of the appellants in the instant case. Of equal significance is the fact that the difficulties of proof inherent in applying a *purely* subjective test,[59] are avoided by expanding recklessness beyond advertence to include constructive awareness. Indeed, recognition of the practical difficulties in applying advertence alone as the gauge of legal fault caused the Model Direction to draw the plaudits of their Lordships in *R v Reid*,[60] in the context of the former statutory offence of causing death by reckless driving. In the course of delivering his judgment strongly endorsing *Lawrence*[61] Lord Goff observed:

" [T]o require a jury to convict a defendant of recklessness only if he had in fact foreseen the relevant risk and nevertheless disregarded it was in reality to impose an impossible task upon juries, since in real life disregarding a recognized risk and failing to address ones mind to the possibilities of risk are states of mind which shade into each other and in many cases are very difficult, if not impossible, to segregate and so identify in any particular case."[62]

Not only is a test of advertence recklessness vulnerable to such practical objections as these, but it is also founded upon the questionable assumption that one who fails to think (but was capable of doing so) is less culpable than one who thought and proceeded to act. Is the speeding driver who *thoughtlessly* crashes his car, causing damage to another's property, deserving of the law's sympathy because he is able to adduce *plausible* evidence that he genuinely gave no thought to the risk?[63] A defendant who *genuinely* only had in mind at the time of the *actus reus*: i) getting to an urgent business meeting; ii) the attractions of a "pretty girl in the car alongside"[64] or iii) being present at the birth of

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[57] [1981] 1 All ER 961 at 964.
[58] [1983] 2 All ER 1005.
[59] "The only person who knows what the accused's mental processes were is the accused himself, and probably not even he can recall them accurately when the rage or excitement under which he acted has passed..." per Lord Diplock in *Caldwell*: [1981] 1 All ER 961 at 965.
[60] [1992] 3 All ER 673.
[61] [1981] 1 All ER 974. Lord Goff's reasoning closely resembles that of Lord Diplock in *Caldwell*: [1981] 1 All ER 961 at 965.
[62] [1992] 3 All ER 673 at 686. Lord Goff further postulated (at 688): "Indeed, I would go further and say that this (objective) category of recklessness on the roads may well be as prevalent as the category in which the driver actually foresees the risk and decides to disregard it." See further Lord Keith's defence of the objective limb, 673 at 674.
[63] Lord Goff in *Reid* [1992] 3 All ER 673 emphatically thought not, stating (at 688): "..in many cases of failing to think, the degree of blameworthiness to be attached to the driver can be greater than that to be attached in some cases to the driver who recognized the risk and decided to disregard it."
[64] Lord Goff's example in *Reid* (673 at 690).

his first child; can expect to meet with varying degrees of sympathy from a jury with the probable outcome, post *G*, that only in case iii) will the defendant's "distraction" be accepted as having genuinely affected his cognition. Following *G*, however, all such actors are now in law equally innocent, and if the evidence of their failure to think is accepted, each must be acquitted, an outcome which underscores the magnitude of the Crown's task in establishing recklessness in the post *Caldwell* era.

Taking as our barometer of justice the views of the average jury member, it is likely, however, that the inclinations of the ordinary person would be that the law ought to recognize each of the above actors as being equally culpable. Applying *G*, this can be achieved only by dint of the jury adopting an *objective*, "he *must have* appreciated the risk (perhaps to then block it from his mind)" approach ("we would have done").[65] Those actors for whom more sympathy is felt will, of course, be acquitted by application of the same comparative human reasoning. The virtual inevitability of recourse to normative standards in deciding such questions was expressly acknowledged by Lord Browne-Wilkinson in his judgment in *Reid* when he stated:

" Save in the rarest cases, it is impossible to prove the state of a man's mind except by inference. Such inference is normally based on what the fact finder..considers to be the likely state of a man's mind given the circumstances of the case."[66]

The espousal of the *Cunningham* test as purely subjective is therefore often disingenuous. If applied honestly, it risks producing unjust acquittals; to work as a reliable indicator of culpability, it must frequently rely upon the adoption of a normative perspective. The test of constructive awareness, by comparison, can only be applied from an objective starting point and as such represents an inherently more honest approach. The answer to the questions whether an actor: a) actually appreciated the obvious risk associated with his conduct; or b) would have so appreciated it had he given thought to the matter can only *presumptively* be answered in *each* case by reference to the objective standard of the jury ("would we have appreciated it?"). Unlike the *Caldwell* test, however, cogent evidence of the accused's intellectual impairment or development which explains why, in differing from the ordinary person, he *could not* appreciate the risk, is of central importance in excluding outcomes of both advertence and constructive awareness recklessness. Lord Bingham's objection[67] that the constructive awareness approach is overcomplicated and speculative becomes hard to accept once it is recognized that the so-called subjective approach is limited by the very same human considerations and is therefore inevitably just as speculative as constructive awareness, more openly, is.

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[65] The jury must, however, be directed, in accordance with the provisions of s. 8 Criminal Justice Act 1967, applicable to recklessness once again, post *G* (as acknowledged by Lord Steyn ,765 at 791), not to assume that a consequence has been foreseen merely because it was a natural and probable outcome, with any inference of foresight, instead, to be drawn from all the evidence.

[66] [1992] 3 All ER 673 at 696. Lord Lane in *Stephenson* [1979] QB 695 at 703 had likewise remarked: "The fact that the risk of some damage would have been obvious to anyone in his right mind in the position of the defendant is not conclusive proof of the defendant's knowledge, but it may well be and in many cases doubtless will be a matter which will drive the jury to the conclusion that the defendant himself must have appreciated the risk." Cf s. 8 Criminal Justice Act 1967, n. 80 above.

[67] 765 at 786.

The most difficult case with which the jury will have to grapple is where the accused, like the postulants already considered, is able to *credibly* assert that he gave no thought to the consequences of his acting in circumstances where his lack of thought does not remove his culpability. It is with respect to such cases that the superiority and greater honesty of the constructive awareness approach stands out. It has already been noted that advertence-recklessness will probably produce a finding of recklessness in respect of actors i) and ii) above, whose evidence jurors may be inclined to disbelieve, whilst actor iii) will probably, by winning the jurors' hearts (and therefore *their* minds), be believed and, as a consequence, adjudged not reckless. A more credulous jury would, however, be likely to acquit all three actors; the defendant's fate is thus exposed as being ultimately dependent upon the vagaries of jury composition.[68]

Whether actor iii)'s desire to be present at the birth of his first child should properly be accepted as a justification for his disregard of other's property interests any more than the excuses offered by actors i) and ii) is at best doubtful. It is not therefore actor iii)'s lack of *culpability* but rather the empathy felt for him by the jury which may be his salvation where the yardstick of advertence is applied. The constructive awareness approach, by comparison, directs the jury directly to the question of *culpa,*[69] thereby probably producing a uniform finding of recklessness in respect of each of the three actors: in the absence of evidence to the contrary, it must be assumed that each actor would have appreciated the obvious risk associated with his acting if he had troubled to think, his failure to do so underscoring his culpability.

It is accordingly contended that their Lordships in *G* went too far in defining recklessness in terms of actual advertence; whilst the new era of recklessness which has dawned is far preferable to that which it eclipsed, real practical difficulties of proof and inconsistencies in jury verdicts may yet force the House of Lords to consider again the vexed question of recklessness. Both Lords Bingham and Steyn[70] were dismissive of the dangers of unjust acquittals flowing from *Cunningham*'s insistence upon actual advertence. It is however noteworthy that Professor Kenny himself, whose definition of malice[71] was applied in *Cunningham*, considered that this interpretation, drawn from the pre 1900 case law[72], was overly narrow. The learned author objected:[73]

"Burning a house by any mere negligence, however gross it be, is as we have seen no crime; (an omission in our law which may well be considered as deserving the attention of the legislature)."

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[68] The partially objective *Ghosh* test of dishonesty has been objected to for similar reasons: *R v Ghosh* [1982] QB 1053.

[69] Culpability was preferred over recklessness as the test of liability by Lord Reid in the civil case of *Herrington v British Railways Board* [1972] AC 877 at 898: "An action which would be reckless if done by a man with adequate knowledge, skill or resources might not be reckless if done by a man with less appreciation of or ability to deal with the situation. One would be culpable, the other not. Reckless is a difficult word. I would substitute culpable."

[70] 765 at 786 and 792, respectively.

[71] Appearing in Kenny's *Outlines of Criminal Law,* 16th Ed.

[72] Including *R v Faulkner* (1877) 13 Cox CC 550; *R v Harris* (1882) 15 Cox CC 75.

[73] Outlines of Criminal Law (16th Ed) at p.163.

G gives renewed significance to Professor Kenny's objection which is further fuelled by the lack of consistency in meaning being applied to recklessness, a state of affairs perpetuated by *G*.

Recklessness Post G: A Continuing Plurality in Approach:

It has for long been objected to that English criminal law has shown itself incapable of portraying recklessness as a concept amenable to a single definition. Indeed, Lord Roskill's exhortation in *Seymour*[74] that there was a "need to prescribe a simple and single meaning [to] the adjective reckless..." was what persuaded him to apply the Model Direction to the common law offence of reckless conduct manslaughter. This period was to mark the zenith of *Caldwell's* influence which was, from the outset, always less than pervasive due to the exclusion of *Caldwell* from the Offences Against the Person Act offences.[75] The Model Direction's decline would quickly follow with Lord Diplock's definition often over the next 12 years[76] being regarded with disfavour due to the harshness of the objective limb. In the result, by 1995 the Model Direction was of significance only to the Criminal Damage Act 1971. With more benign interpretations of recklessness growing up to replace the objective limb, Lord Roskill's hopes for definitional uniformity had proved to be short lived.

The application of *Cunningham* to the Criminal Damage Act 1971 by their Lordships in *G* regrettably does little to improve the definitional consistency of recklessness. Most notably, Professor Kenny's formulation, requiring actual foresight of the proscribed consequence, approved in *Cunningham*, is no longer authoritative in defining malice, at least for the purposes of sections 18 and 20 of the 1861 Act, with the term having been re-interpreted by Diplock LJ in *R v Mowatt.*[77] Indeed, Diplock LJ, in delivering the judgment of the Court of Appeal, emphasized that the approval expressed in *Cunningham* for Professor Kenny's definition of malice was *obiter*. For Diplock LJ, the *ratio* of *Cunningham* to be applied to a charge of malicious wounding, contrary to s.20 OAP Act, was that malice connoted no more than foresight of *some prohibited consequence*. In the context of s. 20, "malice" therefore requires only that it be proved (in order for there to be liability for the result of unlawful wounding or inflicting of GBH) that the accused had foreseen, "that some physical harm to some person, albeit of a minor character, might result".[78] It is instructive to note that the same meaning had been applied to recklessness in the pre-*Caldwell* Criminal Damage Act cases of *Briggs, Parker and Stephenson.*[79] Whilst each of these authorities was over-ruled by the majority in *Caldwell*, their conceptual significance has been revived by *G* due to the adoption in each case of an

[74] [1983] 2 All ER 1058 at 1064.

[75] This was acknowledged expressly by Lord Diplock in *Caldwell*: [1981] 1 All ER 961 at 964-965.

[76] The authorities successfully (and significantly) modified *Caldwell* in the context of rape by substituting a test of constructive awareness for inadvertence: *R v Pigg* [1982] 2 All ER 591; R v *Satnam S* (1983) 78 Cr App Rep 149; *Thomas* (1983) 77 Cr App Rep 63. *Caldwell* was rejected in the context of manslaughter, with gross negligence being re-asserted by the HL in *R v Adomako* [1994] 3 All ER 79. The *Caldwell* test had been made redundant in the road traffic context by the Road Traffic Act 1991, which replaced recklessness with dangerousness as the gauge of liability.

[77] [1968] 1 QB 421.

[78] Ibid at 426.

[79] Reported respectively at: [1977] 1 WLR 605; [1977] 1 WLR 600 and [1979] QB 695.

advertence based approach to recklessness. That none went so far as *G* is evident, however, from the judgment of Lane LJ in S*tephenson* who asserted:[80]

"We wish to make it clear that the test remains subjective, that the knowledge or appreciation or risk *of some damage* must have entered the defendant's mind even though he may have suppressed it or driven it out." (Emphasis added).

By contrast, the advertence model of recklessness favoured in *G* represents the subjective test in its purest form, requiring appreciation of the actual damage caused. This is made clear in Lord Bingham's judgment in his approval of *Profess*sor Kenny's definition of malice[81] as well as by his adoption of Clause 18(c) of the Law Commission's Criminal Code Bill.[82] The latter clause states that a person should be regarded as acting recklessly with respect to a result for the purposes of s. 1 Criminal Damage Act 1971 when: "[H]e is aware of a risk that *it* will occur and it is, in the circumstances known to him, unreasonable to take the risk". (Emphasis added)

Whilst there is perhaps logic in requiring the accused's recklessness to be tied to the consequence in arson cases such as *G*, in recognition of the inherently unpredictable manner in which a fire may spread, to express this as a general rule, or even to make the rule in order to accommodate such cases, is to risk an unacceptable limitation of liability in general. Take the example of Jimmy who is firing his air pistol at a street sign from his bedroom window. Jimmy foresees that the bullet may ricochet from the sign and break a neighbour's nearby window. He is unaware, however, that just inside the window the neighbour has placed a valuable Ming vase. When Jimmy fires the pistol, the bullet breaks: i) the window (foreseen) and ii) the vase (unforeseen). *G* seemingly requires a jury to convict Jimmy only in respect of the broken window if his evidence as to his limited foresight (and, apparently, sight) is accepted. Assuming the vase was not visible from Jimmy's bedroom window, he is responsible only for the damage to the window. This cannot be correct in principle.[83] It is an outcome, however, explicitly accepted on the facts of *G* by Lord Bingham who observed[84] that had the appellants been charged with recklessly damaging the bins alone they would, to this extent, have been found guilty. An application of *Stephenson/Mowatt* would, to the contrary, have resulted in the boys' criminal responsibility for the full loss, assuming Lord Bingham to be correct in his assertion that the initial damage to the bins was foreseen by the appellants.

It is strongly asserted therefore that in order to avoid the risk of unjust acquittals, if actual advertence is to be the gauge of recklessness, it should be the *Stephenson* model, requiring foresight of some damage which is applied, rather than the unacceptably restrictive approach favoured in *G*. By so doing, consistency in principle would be

[80][1979] QB 695 at 704. See further the passage from Lord Lane's judgment in *Stephenson* quoted at n. 81 above.

[81] 765 at 784.

[82] Law Com No 177, 1989.

[83] Principles of transferred malice cannot assist because the result for which Jimmy possessed *mens rea* (breaking the window) has been achieved. But should the position be any different if the window had been open and the only damage was the unforeseen damage to the vase?

[84] 765 at 785.

achieved in the treatment of recklessness in the 1861 and 1971Acts for the first time since the *Stephenson* line of cases was decided in the late 1970's.

Even this welcome development would not achieve the desired consistency in principle across other offences, however, with recklessness in rape and manslaughter having been interpreted more broadly to include the constructively aware actor. Whilst the concept of reckless rape is shortly to be abolished,[85] recklessness according to its "ordinary meaning" was accepted by the House of Lords in *R v Adomako*[86] as being an indicator of responsibility within the broad genus of gross negligence manslaughter. Lord Mackay in *Adomako* was careful, however, to exclude *Caldwell* in this connection,[87] observing that Lord Lane in *R v Stone and Dobinson*[88] and Watkins LJ in *R v West London Coroner*[89] had each defined recklessness with "complete accuracy"[90] in the course of their respective judgments. In *Stone*, Lord Lane had ventured:

"Mere inadvertence is not enough. The defendant must be proved to have been indifferent to an obvious risk of injury to health or actually to have foreseen the risk but to have determined nevertheless to run it."[91]

Lord Lane's definition drew Lord Mackay's praise due to its emphasis of the following two matters in particular: i) inadvertence, *per se*, was insufficient to indicate recklessness; and ii) advertence, whilst sufficient for this purpose, was not to be regarded as the sole gauge of recklessness which would also embrace the actor who failed to think, but who would have appreciated the risk had he troubled to do so. This definition of recklessness, similar to that which has been applied consistently to rape, is, in this respect, conspicuously distinct from the test of advertence recklessness applied in *G*. Subtle variations in the definition of the term reckless have accordingly been perpetuated by *G*, producing a *mens rea* term which is condemned still longer to be subject to discrete context-dependent nuances in definition.[92]

Conclusion:

English criminal law is currently experiencing fundamental change with respect to the mental components applicable to a variety of both sexual and non sexual offences. As

[85] Section 1 Sexual Offences Act 2003, discussed above at Pp 2-3.
[86] [1994] 3 All ER 79 at 88.
[87] Lord Taylor CJ, in the Court of Appeal in *R v Prentice, Adomako and Holloway* [1993] 4 All ER 935 at 940-941 had likewise shown his disapproval of the Model Direction in the context of manslaughter in stating: "It is beyond doubt that, at least since 1982, (*R v Seymour*) the word 'reckless' has caused the courts problems in regard to involuntary manslaughter which would not have occurred had the focus been on gross negligence rather than recklessness."
[88] [1977] 2 All ER 341.
[89] [1987] 2 All ER 129.
[90] Ibid at 87.
[91] [1977] 2 All ER 341 at 347.
[92] Recklessness accordingly requires: i) Foresight of actual damage caused (Criminal Damage Act 1971); ii) Foresight of some personal injury, not that caused (Offences Against the Person Act 1861, s.20); iii) Foresight of serious injury or constructive awareness of that result in the sense that D would have appreciated such a risk had he stopped to think (Reckless Manslaughter, and to like effect, currently, reckless rape.)

has been seen, the courts have made great strides in the context of sexual offences, applying *Morgan, to* ensure that such offences are generally construed as requiring proof of true *mens rea*. Thus, whether the issue for determination is, in the context of rape, whether the accused believed the victim to be consenting, or in an aged-based sexual offence, whether he believed the victim to be above a particular age, the gauge of belief, consistently applied, has been that of genuineness. The same approach to factual mistakes, outside the sphere of sexual offences, was adopted by the Privy Council in *R v Beckford* in determining the availability of the defence of self defence and by the Court of Appeal in *R* v *Gladstone Williams* in the context of the analogous defence of prevention of crime. This approach, which is likely to prevail locally, is a powerful demonstration of the common law's presumption that all serious crimes require proof of *mens rea*. It is also quite patently correct in principle; if a particular belief is recognized as affording a defence to a crime, it is the holding of such a belief which removes culpability, not whether such a belief would have been held by others. Lawton LJ in *R v Kimber* clearly had it right when he emphasized:[93] "..it is the defendant's belief, not the grounds on which it is based, which goes to negative the intent".

As a direct corollary to this statement, it should be recalled that the failure of a defendant to hold a belief which reasonable people would hold is ordinarily described as negligent behaviour. Such an individual's "fault" as Lord Nicholls put it in *DPP v B* "lies exclusively in falling short of an objective standard".[94] However, the courts since *Morgan* have uniformly held that negligence is not sufficient legal fault for the purposes of serious criminal offences. Not so the UK Parliament, regrettably, who in enacting the Sexual Offences Act 2003 have shown complete disregard (and, indeed, contempt) for the *Morgan* principle. It is the *Morgan* principle, of course, which formed the basis of the decision in *G*: the mere negligence of the boys was not to be regarded as sufficient legal fault to render them liable for the serious offences with which they were charged. In so holding, the decision demonstrates a remarkable consistency in approach to *mens rea* by the senior courts across the spectrum of the criminal law. *Morgan* is left untouched, however, to operate in the context of non sexual offences thus, in the UK, creating an unfortunate dichotomy in approach to mistakes of fact depending upon whether such mistake has arisen in the context of sexual or non sexual offences. Providing Cayman's Legislative Assembly are not persuaded to adopt the Crown-friendly *mens rea* principles which pervade the 2003 Act, a unique opportunity for consistency in principle awaits to be seized locally.

It has, however, been suggested in this paper that in ascribing to recklessness a *purely* subjective meaning, *G* has, in this context, taken the principle too far. Unlike the word belief, recklessness, as recognized by Lord Rodger in *G*, [95] is a term inherently susceptible to differing interpretations, each of them defensible. Whilst *Caldwell* had advocated a wide interpretation of recklessness, embracing inadvertence, thereby leading to legitimate criticism on the grounds of unfairness, in adopting the narrow test of advertence in *G*, their Lordships may have allowed the pendulum to swing too far in the accused's favour. So far, that a jury, honest in its task, may well be constrained to acquit persons whom public policy would demand should be convicted. The answer to this

[93] [1983] 1 WLR 1118 at 1122.
[94] [2000] 2 WLR 452 at 456.
[95] [2003] 4 All ER 765 at 795.

legal fault conundrum has been suggested as lying in the compromise solution of adopting for recklessness the constructive (as well as actual) awareness meaning of the term as applied in the context of rape and manslaughter. In so doing, the twin advantages are secured of avoiding the unfairness of *Caldwell* whilst at the same time ensuring the conviction of those for whom culpability has been established.

The ultimate test of *G* will, of course, be how well it works in practice; the fears expressed in this paper are that it may prove to be unworkably restrictive wherever the accused presents a credible reason for why he failed to give thought to an obvious risk of damage. Perhaps their Lordships in *G* were too early entering into the Christmas spirit and gave too much to the two boys before them. More positively, their Lordships' generosity has, in England, caused *Caldwell* to be already a fading memory. It is to be expected that in Cayman it will too become a malevolent ghost of recklessness past. There will be few across the Commonwealth who mourn its passing.

The Access to Justice and Information Technology Project: First Annual Report 2003-2004

Prepared by Sue Santedicola with assistance from John Epp, April 2004. Dr Epp served as Chairman of the Access to Justice Committee[1] of the Organization of Commonwealth Caribbean Bar Associations,[2] and Ms Santedicola served as a member of the committee.

Overview

During this period the Access to Justice Committee continued its work on phase one of the Access to Justice program as established by OCCBA. Phase one of the program focuses on encouraging more lawyers to do *pro bono* work for poor persons through better use of Information Technology. Once this phase has been established, and the systems are properly organized, the committee will begin work on phase two of the program, which focuses on encouraging governments to properly fund comprehensive legal aid schemes for advice, assistance and representation in criminal and civil proceedings.

This report will address the origin of phase one, the current Information Technology project, and the work done by the Access to Justice Committee. Also the report contains some background information on the status of legal aid in the Commonwealth Caribbean.

Origin

This project first was suggested in 2001 by Peter Maynard, then President of OCCBA. In 2002-2003, the project was moved from the preliminary stage to the operational stage by John Epp, in his role as the Chairman of the *ad hoc* special project committee named the 'Access to Justice and Information Technology Project Committee'. In 2003, Dr Epp accepted the appointment of Chairman of the standing committee on Access to Justice and agreed to continue to move the special project forward as part of the work of the standing committee.

Background

Many jurisdictions in the Commonwealth Caribbean do not have publicly funded legal aid schemes. Table 1 below lists the countries in the Commonwealth Caribbean and notes their population, and whether or not there is legal aid legislation or some free legal assistance in place.

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[1] The Access to Justice Committee of OCCBA included John Epp of Grand Cayman, Nancy Anderson of Jamaica, and Senator Velma Newton of Barbados. Unfortunately Senator Newton was not able to serve for more than a few months, and she was replaced by Sue Santedicola of Grand Cayman. The Committee reported to the Executive through Past President Peter Maynard.

[2] The Executive Committee of OCCBA included Patrick Patterson of St. Kitts, President, Ruggles Ferguson of Grenada, Treasurer, Peter Maynard of The Bahamas, Past President, Hilary Phillips QC of Jamaica, member. Nancy Anderson of Jamaica served as Secretary.

Table 1. Population, legal aid legislation and professional legal aid services in 2002 Source: Studies of John A Epp and Derek O'Brien

Jurisdiction	Population (approx)	Legal aid legislation	Other organised legal aid services	Government funding P/A for legal aid in US$ (approx)
Anguilla	12,500	No	Murder, court-appointed	1999–2002 $0 2003, $10,000
Antigua & Barbuda	71,400	Court of Appeal Rules 1968, murder	Murder, court-appointed	3,500
Bahamas	300,000	Criminal Procedure Code, murder	Serious crime, court-appointed	475,000
Barbados	270,000	Yes 1966/1981	No	750,000
Belize	266,000	No Pending	Murder, court-appointed Clinic 1982	8,600 + Staff lawyer
Bermuda	64,000	Yes 1980	Clinic 1999	575,000
British Virgin Islands	21,700	No	2000 Memo of Understanding	60,000
Cayman Islands	40,000	Yes 1975	Clinic 1997	1,200,000
Dominica	77,000	No Pending	Clinic 2003	52,000
Falkland Islands	2,500	No	1993 Letter of Agreement	59,000
Gibraltar	28,000	Yes 1961	No	670,000
Grenada	90,000	No	Clinic 1987	10,000
Guyana	700,000	Court of Appeal Law for crime appeal	Murder, court appointed Community clinic 1994 Staff lawyer	Clinic 1,750 Staff lawyer salary, and some brief fees
Jamaica	2.6m	Yes 1997	Human Rights Clinic	900,000
Montserrat	4,500 (former 12,400)	No	Murder, court-appointed	0– 12,000
St Helena	5,500	Yes 1997	No	140,000
St Kitts & Nevis	39,000	No	Murder, court-appointed	Unknown
St Lucia	162,000	No	Murder, court-appointed	Unknown
St Vincent & Grenadines	117,000	No	No	0
Trinidad & Tobago	1.3 m	Yes 1976	No	800,000
Turks & Caicos	18,750	Court Rules 1999	No	50,000

As can be seen from Table 1, the scope of publicly funded legal representation often is restricted to serious criminal matters. There are few jurisdictions that have made reasonable provision for representation criminal legal proceeding through statutory schemes. However, even in those countries, rarely is advice at police stations provided (Jamaica is an exception). For example, there is no duty counsel scheme in the Cayman Islands even though the legal aid budget is substantial. This indicates that no jurisdiction in the region has a truly comprehensive legal aid scheme. A further indication of this conclusion related to civil matters. In Jamaica and in the Cayman Islands, for example, legal aid coverage does not extend to civil matters in the Magistrates' Court.

Tables 2 and 3 below provide an overview of the scope of coverage in criminal and civil legal aid in countries throughout the Commonwealth Caribbean at the close of 2002.

We are pleased to report that recently legal aid clinics have been established in Antigua and Barbuda, and Dominica. Also legal aid clinics are soon to open in St Lucia and St Kitts and Nevis. The work of member bar associations in each jurisdiction formed an important part of the impetus in these developments.

Table 2 Scope of assistance in Magistrates' Court, Superior Court, and Court of Appeal for crime cases (Source: Studies of John A Epp and Derek O'Brien)

Jurisdiction	Crime tried in Magistrates' Court	Crime tried in Superior Court	Crime in Court of Appeal	
Anguilla	No	Murder	Murder*	**The model Eastern*
Antigua & Barbuda	No	Murder	Exceptionally*	*Caribbean Supreme*
Bahamas	No	If crime punishable by mandatory incarceration	Yes, serious crime	*Court Act, s51, provides that the Court of Appeal*
Barbados	No	Scheduled offence or Interest of justice test	Issue of public importance needing lawyer	*may appoint a lawyer in any criminal appeal*
Belize	Yes, in Belize City	Murder	Yes, all cases	*"in the interests of*
Bermuda	Scheduled offence or interests-of justice-test	Scheduled offence or interests-of justice-test	Scheduled offence or interests-of justice-test	*justice".*
British Virgin Islands	Involved or complex case	Scheduled offence or Interest-of justice-test	Serious crime or exceptional case*	
Cayman Islands	Scheduled offence	Yes	Yes	
Dominica	Risk of incarceration	Risk of incarceration	No*	
Falkland Islands	Interests-of justice-test	Yes	Yes	
Gibraltar	Risk of incarceration	Yes	Yes	
Grenada	No	No	No*	
Guyana**	Yes, in certain cities	Yes	Interests-of justice-test	***The lawyer providing*
Jamaica	Punishable by imprisonment except drugs or laundering	Punishable by imprisonment except drugs or laundering	Yes	*the services may or may not be paid from*
Montserrat	No	Murder	Unknown*	*public funds*
St Helena	Yes	Yes	Yes	
St Kitts & Nevis	No	Murder	Unknown*	
St Lucia	No	Murder	Unknown*	
St Vincent & Grenadines	No	No	No*	
Trinidad & Tobago	Interests-of justice-test	Interests-of justice-test	Interests-of justice-test	
Turks & Caicos	Youth	Interests-of justice-test	Yes	

Table 3 Scope of assistance in Magistrates' Court, Superior Court, and Court of Appeal for civil cases (Source: Studies of John A Epp and Derek O'Brien)

Jurisdiction	Civil proceeding in Magistrates' Court	Civil proceeding in Superior Court	Civil proceeding in Court of Appeal
Anguilla	No	No	No
Antigua & Barbuda	No	No	No
Bahamas	No	No	No
Barbados	Schedule and interests of justice test	Schedule and interests of justice test	No
Belize	Yes, in Belize City	Yes, in Belize City	Yes, in Belize City
Bermuda	Interests-of-justice test	Interests-of-justice test	Interests-of-justice test
British Virgin Islands	Domestic violence, affiliation, Juveniles	Matrimonial and exceptional cases	Exceptional cases
Cayman Islands	No	Yes, few exceptions, merit test	Yes, Merit test
Dominica	Yes	Yes	No
Falkland Islands	Yes, with restrictions	Yes, with restrictions	Yes, with restrictions
Gibraltar	Enforcement of judgement	Yes, few exceptions	Yes
Grenada*	All matters for women and youth	All matters for women and youth	No
Guyana*	Yes, in certain cities	Yes, in certain cities	No
Jamaica	None apart from clinics	None apart from clinics	None apart from clinics
Montserrat	No	No	No
St Helena	Yes	Yes	Yes
St Kitts & Nevis	No	No	No
St Lucia	No	No	No
St Vincent & Grenadines	No	No	No
Trinidad & Tobago	Domestic violence, affiliation, child issues	Reasonable grounds test, limited topics	Good grounds of appeal test
Turks & Caicos	No	No	No

*The lawyer providing the services may or may not be paid from public funds.

As a consequence of the limited scope of publicly funded legal aid in civil matters, poor persons, especially women in poverty (and in abusive relationships), are unable to gain access to advice or representation. Of course, many other persons could be assisted and many other rights and remedies could be accessed if people knew their rights and had assistance in exercising them. Part of the solution may be found in comprehensive publicly funded legal aid schemes. Another part of the solution may be found in encouraging lawyers to fulfill their professional obligation to complete *pro bono* work for poor persons.

Aims and Plan

OCCBA's Access to Justice Committee is continuing its work on the Access to Justice and Information Technology Project.

The aims of this project are: to inform the public of their rights; to increase the number of lawyers in the region assisting the poor on a *pro bono* basis; to make it less onerous on those lawyers who assist *pro bono* in organized programs; to better organize the administration of *pro bono* service; and to support, network and encourage legal aid clinics.

The plan is straightforward. Information Technology will make it easy and cost-efficient for the aims to be fulfilled. And IT will make it easy to recognize and thank all lawyers who assist the poor *pro bono*.

Each Bar Association will be given a Webpage, and public legal education will be an important part of each web page. IT will facilitate the sharing of templates for posted (and printed) educational pamphlets, and IT will facilitate topic specific on-line discussion groups.

Through the use of email and promotional materials, more lawyers will be encouraged to assist. When the core documents and authorities from each jurisdiction are on-line, and available to lawyers, an application that would have taken four hours to prepare and complete, will only take one hour. It is recognized that more lawyers are willing to give one hour rather than four hours.

Initially the proposed database will contain edited and indexed precedents for use in magistrates' court and case reports from that court. (This will complement CariLaw and its region-wide superior court database.) The precedents will be donated by OCCBA members and vetted by a National Coordinator in each jurisdiction. Additional precedents will be created under the supervision of the Regional Project Committee. Precedents will include, initially, application/affidavit forms for common poverty law and family law matters. (These topics will be expanded as the project matures.)

Many other services will be provided as part of the project, including databases for the administration of a virtual legal aid office. This will greatly reduce the burden on our members who serve in legal aid clinics and bar referral services.

Keys to Success

One key to the success of this project is a well-equipped and well-funded institutional partner who can host the project and supply the infrastructure. Success also depends on funding from sponsors. Funding is needed for hardware and software, Internet access and the creation, editing and indexing of precedents, and the writing of educational materials. The third key to success is the identification, in a systematic fashion, of the depth and breadth of the need for assistance. This requires funding from development agencies. Most importantly, however, the success of the project depends on the willingness of lawyers to honour their professional obligation to assist the poor on a *pro bono* basis. As members of the legal profession read the following pages describing the progress made by the Committee, we challenge the members to do their part.

Institutional Partner

Nova Southeastern University School of Law (www.nsulaw.nova.edu) was selected as the best-suited institution to serve as the institutional partner for this project. It is the 'number-one wired' law school in America, and it is one of three Florida institutions that have joined together in a Caribbean Law Initiative.

Dr Epp traveled to Fort Lauderdale in January, May and July, 2003 and met with the officers of Nova with a view to completing a Memorandum of Understanding. The completed MOU states that Nova, for 5 years, will supply, among other things, technical support, server space, databases and Webpage design. The MOU was executed in September 2003 in Florida, and ratified by OCCBA as its Annual Meeting in Barbados in September 2003.

The Committee is most grateful for the attendance of three representatives of Nova at the Barbados conference. The representatives were Associate Dean Bill Adams and Foreign Law Librarian Rhonda Gold, and Webguy Jason Rosenberg. We look forward to a long and successful relationship with Nova.

Development Funds

The Inter-American Development Bank has graciously agreed to fund a grant of US$100,000. The Agreement (a technical cooperation agreement) was formally executed at the Bank's office in Nassau after a special resolution of the Executive Committee. The agreement requires OCCBA members to assist in kind to the amount of US$20,000.

The initial proposal, written by Dr Epp, sought a grant of US$140,000 to assist on a number of fronts. The proposal for funding passed the initial screening process in early 2003 and the Bank assigned a Mission Team to investigate the organization and the project. Representatives of the Bank met with Messrs. Epp and Maynard during the summer of 2003 and Dr Epp made the formal presentation. In due course, the Mission Team went to Nova and met with Dean Bill Adams. The Mission Team, in addition to being very impressed with Nova's facilities, assessed the value of Nova's contribution as US$100,000.

The Mission Team worked with Dr Epp in refining the grant application. After consultation with the Committee the revised bid was submitted. Thereafter, the Mission Team attended the Barbados conference and met with OCCBA's Executive and President Patterson. After the conference the Mission Team went to Jamaica to complete further investigation and to have discussions with key persons involved in legal aid and the legal profession.

In order to achieve its objective, the technical cooperation agreement will finance the following activities (quoting from the Bank's document):

> **1. Comprehensive Assessment.** Consultants [as defined by the Bank] will be hired to undertake a comprehensive assessment to determine, among other issues, the demand for legal aid services, coverage of existing legal aid providers, local regulations affecting the legal profession, costs of administrative and judicial procedures, legal aid providers' current information technology infrastructure, level of official support for legal aid systems, and a short feasibility study on Internet connectivity by local providers. In addition to contributing to the literature in the region on this issue, this assessment will serve as an important input for future activities. These activities will include information gathering, design of training program, data base design, prioritization of needs and outreach campaigns to be implemented during and after the execution of this project.
>
> **2. Training Program.** Resources will be made available to OCCBA for the development and execution of a training program for each National Coordinator, select members of the Bar Associations and practitioners who will act as OCCBA's local counterparts for this operation. The project will also finance follow-up training activities (workshops) as recommended by the initial assessment. The project will cover logistical and travel related expenses for these workshops.
>
> **3. Regional Coordination.** Resources will also be provided to OCCBA in order to support a regional program coordinator and his/her travel expenses. As the project will include several jurisdictions in the English-speaking Caribbean and various levels of capacity at the local level, it will be essential to have a central focal point to coordinate the gathering of information, quality control, training workshops and overall project management. In addition to the above, the duties of the Regional Coordinator will also include organizing publicity, disseminating

project information to OCCBA members, serving as liaison with participating organizations, supervising the preparation of training materials and certifying their quality, and coordinating the posting of initial materials to the web site developed for the initiative.

In the event that the three components are successfully completed, then the Bank will, without obligation, consider further funding.

Sponsors

Many sponsors have been approached over the last three years. To date the following sponsors have given a positive reply.
International Bar Association Foundation provided a cheque in the amount of US$7000 (contacted by Dr Maynard);
International Bar Education Trust pledged US$4000 (contacted by Dr Maynard);
Cayman Islands Law Society provided a cheque in the amount of CI$2000 (US$2400);
Caymanian Bar Association pledged CI$2000 (US$2400);
Two dial up Internet lines have been pledged by Cable and Wireless Ltd in the following jurisdictions: Anguilla, BVI, Cayman Islands, Montserrat, Turks and Caicos. (Jamaica is open to further representations. Others may assist.)

Potential Sponsors

The Canadian International Development Agency (CIDA) entered into a major project focussing on the Eastern Caribbean in 2001. The project was a cooperative effort between jurisdictions in the OECS and CIDA with the goal of encouraging Judicial and Legal Reform (JLR). A project office was established in St Lucia, under the direction of Jennifer Astaphan. Dr Epp met with Jennifer Astaphan in St Lucia December 2002. After a period of reflection, discussions began, and in the summer of 2003 it was agreed that JLR project would assist. Project worker Francis Letang attended the Barbados conference and met with Dr Epp for detailed discussions. It was agreed that upon the submission of a detailed proposal, funding in the amount of US$120,000 would be forthcoming. Under the direction of and with the assistance of the Committee, Kimbert Solomon wrote the proposal. Valuable input was given by Committee members and José Laurant, Director of the new legal aid clinic in Antigua and Barbuda, and Irmin Stephens, Director of the new legal aid clinic in Dominica. The proposal was submitted in October 2003. The following is extract from the proposal:

This project is designed to enhance access to justice for poor persons, particularly women, resident in the independent states of the OECS. It aims to achieve this goal through three related strategies. First, the project will create and deliver generic and jurisdiction specific public legal education materials in the independent OECS, thereby informing residents of their legal rights, and routes to satisfactory remedies. Second, the project will support new and existing legal aid clinics in the independent states of the

OECS by organizing the attachment of senior law students to the clinics (or Bar Association office - the association's president's office - where no clinic yet exists) thereby adding manpower. The manpower will be used for general duties, providing authors for the public legal education materials, providing authors for basic memorandum of law and court application precedents. Third, the project will allow senior law students to be tutored in and experience, the skills necessary to work with poor persons, thereby encouraging a new group of (young) lawyers in the discipline of assisting the poor.
With the support of the OECS Judicial and Legal Reform Project, OCCBA's Access to Justice Project will begin the steps necessary to have law students in the legal aid clinics (or Bar Associations offices) during the summer of 2004 and 2005. The Access to Justice Committee seeks a grant of US$122,000.

Unfortunately the JLR project has been suspended, and the office in St Lucia is now closed. Control of the commitments made has been transferred to the Canadian High Commission Office in Barbados. Initial discussions with that office have proved to be promising, but no final position has been taken on the Committee's proposal.

Pro Bono Students

In May 2003 Dr Epp met informally with representatives of the Law Foundation Ontario and the organization Pro Bono Students (Canada). As a result of these discussions Dr Epp and Ms Santedicola wrote proposals for funding from the Law Foundation and for assistance from Pro Bono Students. The Law Foundation was not receptive, due to its own jurisdictional restrictions. However Pro Bono Students were very receptive. After an exchange of correspondence, Dr Epp traveled to Toronto in November 2003 and met with the National Coordinator, Pam Shime. Through her office law students willing to assist in the creation of materials for the project's database will be organized. Each Law School with a group of student volunteers will be assigned to a specific Caribbean jurisdiction. The group will work under the supervision of the National Coordinator.

Pro Bono Law of BC

In November 2003, an NGO established by the Law Society of British Columbia and the Canadian Bar Association, called Pro Bono Law of BC, replied to a proposal for assistance sent by Dr Epp. Pat Pitsula, the Executive Director of Pro Bono Law of BC indicated that it was working on a project similar, but that it had hired an additional staff person (Anne Beverige) to progress the project. Technical advice as needed was pledged.

Demonstration of Website

During the Barbados conference, Nova's head Webguy, Jason Rosenburg, unveiled OCCBA's new website as hosted by Nova. The demonstration featured the Access to Justice page, and the database pages. Precedent examples gathered by Dr Epp, with the

assistance of Caymanian Attorney Zena Merren and Court Clerk Valdis Foldats, were down loaded and displayed. Also, the virtual legal aid office was displayed, including client application and information pages. The site may be visited at www.nsu.aw.nova.edu then add /occba/ then click on Access to Justice or add /accesstojustice.cfm.

Delegates viewing the presentation were very impressed by the demonstration. Constructive criticism was made and Jason undertook to rework some areas. Of particular note were issues relating to protecting client identity and confidentiality. It was agreed that unique client numbers might be the way forward. Dr Epp provided detailed instructions for revision of many small, but important, parts of the website in autumn 2003. Implementation of those suggestions was delayed due the extremely heavy workload experienced by Jason Rosenberg due to the virus attacks of late 2003.

National Coordinators

Since the conference, the Committee has worked toward identifying National Coordinators. To date the following persons have agreed to serve, subject to final affirmation by the committee: Guyana, Teni Housty, Jamaica, Nancy Anderson, St Vincent, Nicole Sylvester, Turks and Caicos, Don-Hue Gardiner. Discussions about service as National Coordinators have began with José Laurant, Antigua and Barbuda, Irmin Stephens, Dominica, and Zena Merren, Cayman Islands.

Dr Epp met with the Legal Aid Committee of the BVI Bar Association in February 2004, although no nomination has yet to be made. In April 2004, reminders were sent to Bar Associations.

The following is the draft Description of Duties for the National Coordinator.

Description of Duties

The National Coordinator will assist the Regional Coordinator and researchers to ascertain the specific needs in his/her jurisdiction, to prioritize the needs in the light of the Project's goals, and to execute the action plan.

In executing the action plan, the duties of the National Coordinator will include organizing local publicity, serving as a liaison with lawyers, supervising the preparation of materials and certifying their quality, and sending materials to the Regional Coordinator for review and onward transmission to Nova for use on the database.

Publicity

The duty of publicizing the project will include customizing to local conditions standard circulars sent from the Regional Coordinator, and then transmitting the material to bar members and press outlets.

Liaison

As the liaison between the Regional Coordinator and the local jurisdiction the National Coordinator will network with lawyers, encourage their continued support for the Project and record the names and contact details of lawyers who are currently willing to assist persons on a *pro bono* basis. The list of those lawyers willing to assist should be updated annually after renewed promotional activities.

Supervise

The National Coordinator will supervise (or delegate to appropriate persons) the preparation of public legal education materials, court application forms, supporting affidavits and draft orders, short memorandum of law in the areas of law chosen for emphasis in any given year.

In year one, the focus is on domestic violence, maintenance, affiliation and poverty law topics. In many cases, this will mean assigning the task to a law student, often under the supervision of his law tutor. It is likely that the total number of items generated for the data base per country will be 50, with an average length of 2 pages, for a total of 100 pages.

Certify the final product

Final drafts of the material will be gathered by the National Coordinator (or delegate) for review, with a view to certifying that the material is appropriate for use by others, including law students working in legal aid clinics and lawyers working for no fee or reduced fee.

Uploading the material to Nova

Once the material has been reviewed and certified as correct by the National Coordinator, the materials are forwarded to the Regional Coordinator, and then to Nova for placement on the data base.

Attend annual meeting

Each year all national coordinators will meet to review progress on the project under the supervision of the Regional Coordinator. It is likely that funding will be available to pay for travel related expenses. During the review, information will be exchanged on successes and problems in the systems and, how best to approach the resolution of those problems.

The role of National Coordinator is one that is very important to the success of the project. This is reflected in the fact that the IDB has allocated funding for the training

(including travel expenses) of National Coordinators. Service as a National Coordinator will be considered *pro bono* work of the highest merit.

There is no question that National Coordinators will be held in the highest regard. To ensure appropriate credit is given for these efforts, a letter of commendation will be sent from OCCBA to each Chief Justice recognizing the contributions of local National Coordinators. Additionally those who serve as National Coordinators will be recognized on OCCBA's website, and each Bar Association's website. No further *pro bono* work will be asked of National Coordinators.

Identification of National Coordinators must be the priority.

Letters of Participation

To complete the records of the Committee, it is necessary for each Bar Association, and each Legal Aid Clinic, or other NGO seeking assistance, to provide a formal letter of participation. To date, in spite of many oral expressions of interest and/ or participation, letters have only been received from the following: Antigua and Barbuda Legal Aid Clinic, Bahamas Eugene Dupuch Law School Legal Aid Clinic, Belize Bar Association, Cayman Islands Legal Befrienders Clinic, Cayman Islands Law Society (with financial support), Caymanian Bar Association (with financial support), Dominica Legal Aid Clinic, Guyana Legal Aid Clinic, Jamaica's Norman Manley Law School Legal Aid Clinic, Montserrat's Attorney General, and St Vincent's Bar Association. In April 2004, reminders were sent to Bar Associations.

Priority

Our priority now must be to identify and confirm National Coordinators for each participating country by the end of May 2004. To this end, emails will be sent by Dr Epp to all Bar leaders asking for their formal expression of participation and their nomination of a National Coordinator. It is likely that training for National Coordinators will take place during the autumn of 2004. While this process is taking place, Nova will be asked to update the web site and to post announcements of persons selected.

Concerns

The Committee expressed concern over the following issues. The first concern arose from Executive's degree of responsiveness to the Committee. The Committee felt that on occasion the Executive did not in a timely manner answer questions submitted. Also important decisions relating to the project were not taken in a timely manner, or if taken promptly, decisions were not communicated to the Chairman promptly. Secondly, in relation to letters of participation, Executive members have not filed letters of participation on behalf of their own Bar Associations, or identified National

Coordinators. Finally, in relation to logistics, Dr Maynard undertook to open a bespoke bank account for the project, but this is yet to be done. As a result the Cayman Law Society's cheque became stale dated, and letters of explanation had to be written by the Committee to this sponsor. (The same situation arose with the International Bar Foundation.) Also the pilot program scheduled for Cayman had to be delayed.

The Committee was pleased to have from President Patterson an indication that every effort will be made to ensure timely communication between the Executive and the Committee. Also, the Committee was pleased to have an indication from Dr Maynard that he would soon complete the steps necessary to open the bank account.

Gratitude

The Committee hereby expresses its appreciation to those who have assisted the Committee in its work during the past year. These persons include Senator Velma Newton, Barbados, Irmin Stephens, Dominica, José Laurant, Antigua and Barbuda, Zena Merren, Valdis Foldats and student Kimbert Solomon, all of the Cayman Islands, and Francis Letang, St Lucia. A special note of gratitude is necessary for the special efforts of the Mission Team from the IDB, Bahamas IDB Officer Trevor Boothe, the representatives of Nova, and the sponsors. It is appropriate to make note of the extraordinary contribution of Dr Epp to the success of this phase of the project.

Conclusion

During the period 2003-2004 the Access to Justice Committee has moved the Access to Justice and Information Technology Project forward. An institutional partner was found, development funding was secured and additional sponsors were enlisted. The high degree of success can be attributed to the efforts of the Committee as a whole. Hundreds of hours were spent. While there is much work to be done, phase one of the project is well on its way to implementation. It is forecast that, if the members of the legal profession do their part, the project could be operational within the next year.