CAYMAN ISLANDS LAW REVIEW

ISSUE 1 SUMMER 2016

EDITORIAL BOARD

GENERAL EDITOR **MITCHELL DAVIES**

Director, Truman Bodden Law School

DEPUTY – EDITOR ***MERYL THOMAS***

Lecturer, Truman Bodden Law School

HON CHARLES QUIN QC

Judge of the Grand Court, Cayman Islands

HON ROBIN McMILLAN

Judge of the Grand Court, Cayman Islands

ANU ARORA

Professor of Law, Liverpool University

PETER ROWE

Emeritus Professor of Law, Lancaster University

JAMES BAGNALL

Consultant, Ogier, Grand Cayman

CASE NOTE CONTRIBUTORS:

DEBORAH BARKER – ROYE (DBR)

Deputy Director, Truman Bodden Law School

ERIK BODDEN (EB)

Associate, Conyers, Dill and Pearman, Grand Cayman

MITCHELL DAVIES (MD)

Director, Truman Bodden Law School

NAN ERB (NCE)

Associate, Walkers, Grand Cayman

ANDREW JACKSON (ASJ)

Associate, Appleby, Grand Cayman

LEYLA JACKSON (LJ)

Senior Lecturer, Truman Bodden Law School

CHRISTOPHER LEVERS (CAL)

Senior Associate, Mourant Ozannes, Grand Cayman

RHIAN MINTY (RM)

Senior Lecturer, Truman Bodden Law School

CHERYL NEBLETT (CAN)

Director, Cayman Islands Law Reform Commission

MATTHEW ROLLINSON (MCR)

Assistant Director, Truman Bodden Law School

MERYL THOMAS (MT)

ANDREW WOODCOCK (AW)

Lecturers, Truman Bodden Law School

Preface

This is the inaugural edition of the Cayman Islands Law Review, which will be published twice a year, in summer and winter. The Review is edited and published by the Truman Bodden Law School with help from members of the legal profession.

The purpose of the review is three-fold. Firstly, to bridge the gap that exists in the law reporting system in the Cayman Islands. The Cayman Islands Law Reports date back to 1952 and are firmly established as an excellent and important legal tool for the legal profession, students and those researching Cayman Islands Law. Nevertheless, there are cases that are not reported in the Cayman Islands Law Reports, which will be covered in the Review, and it is hoped to extend the scope of the Review to include, for example, judgments of the Labour Tribunal and Labour Appeals Tribunal. Moreover, the Review will provide timely summaries of cases that, at a later date, may be reported in the Cayman Islands Law Reports. Secondly, to provide carefully annotated cases which remove extraneous material leading to ease of reading and understanding for the reader. They are not, however, intended to be a full reporting service. Thirdly, and perhaps most importantly, the Review seeks to raise the profile of scholarship of the law of the Cayman Islands, providing a forum for research and debate by the publication of articles and commentaries on the law.

The current edition contains case summaries from 1st November 2015 to 6th February 2016. Full transcripts of the case can be found at www.judicial.ky/judgments:unreported-judgements

All comments and contributions are welcome. Articles, case-notes or summaries should be submitted to the editor for consideration at Mitchell.Davies@gov.ky.

Mitchell Davies
4 October 2016

TABLE OF CONTENTS

CASE NOTES:

Citation:

Case summaries appearing in this volume should be cited as (2016) (1) CILRv followed by the page number

Printed and bound in Great Britain by
www.cmpbookprinting.co.uk
Poole and Luton

CIVIL PROCEDURE

Tempo Group Limited and Others v Fortuna Development Corporation and Others

Civil procedure – strike out application – abuse of process – extended res judicata rule

Court of Appeal **CICA No: 14/12**
Chadwick P, Mottley and Campbell JAA
November 5th 2015

Cases referred to

Henderson v Henderson (1843) 3 Hare 100
Johnson v Gore-Wood [2002] 2 AC 1
CVC/Opportunity Equity Partners Ltd v Demarco Almeida [2002] CILR 77
Dexter Ltd v Vlieland-Boddy [2003] EWCA Civ 1425
Aldi Stores Ltd v WSP Group plc [2007] EWCA Civ 1260
Stuart v Goldberg Linde [2008] EWCA Civ 2
In re Strategic Turnaround Partnership Ltd [2008] CILR 447
Henley v Bloom [2010] 1 WLR 1770
Camulos Partners Offshore Ltd v Kathrein & Co [2010] 1 CILR 303

Mr R Hacker QC, Mr P McMaster QC and Mrs K Pearson for the Appellants
Mr S Phillips QC, Mr M Imrie and Mr J Golaszewski for the Respondents

Facts:

The case concerned an interlocutory appeal from an Order of the Grand Court dated April 4 2012 dismissing the Appellants' summons to strike out the proceedings which the Respondents had commenced against them.

The proceedings before the Grand Court concerned a dispute between the three principal owners of Fortuna Development Corporation, namely Tempo, New Frontier and Wynner. The Respondents (Plaintiffs) had sought a declaration that an extraordinary meeting and the resolutions which were purportedly passed therein removing Tempo and its principal, Dr Chen, from participating in the management of Fortuna were, respectively, invalid and void. Breach of fiduciary duty and minority oppression were also alleged.
The Appellants sought to strike out those proceedings *inter alia* on the basis that they were plainly and obviously an abuse of process: they contended that the proceedings offended against what is sometimes called the 'extended' form of the *res judicata* rule, since the Respondents had previously commenced winding

up proceedings based upon the same complaints which had been struck out upon the Court having been satisfied that the Appellants (as Respondents to the petition) had made a reasonable offer to buy out the Petitioner pursuant to an agreed valuation procedure (the *O'Neill v Phillips* procedure); moreover, the Petitioner had refused the offer after allegedly having sought to obstruct the valuation process, and the Appellants submitted that it was not open to it to raise the same complaints which had grounded its petition in a subsequent writ action.

The learned Judge dismissed the summons, holding *inter alia* that it was in the interests of all parties concerned that the Petitioner should accept the *O'Neill v Phillips* procedure and that the effect of it having done so was that it was denied a judicial finding on the issues of which it complained; the Petitioner was entitled to reject the offer, the Appellants should have anticipated that it and its co-plaintiffs might subsequently ask the Court for relief in respect of the unadjudicated complaints and their doing so was hardly redolent of unjust harassment, unfairness or an abuse of the Court's process. In reaching that conclusion on the question of whether the subsequent action was abusive, the learned Judge took a broad, merits-based approach, applying the judgment of the English House of Lords in *Johnson v Gore-Wood*.

Held (appeal dismissed)

Whilst the grounds of appeal and legal submissions were broad, the Court of Appeal was able to state its reasons for dismissing the appeal shortly:

(i) As argued by the Respondents, the relief sought in the extant proceedings could not have been sought in the winding up petition: all that could have been sought by the petition was a winding up order.

(ii) Even if the extant proceedings had been commenced at about the same time that the winding up petition was presented (as the Appellants submitted they should have been), that would not have led to the issues being tried before the beginning of 2011, at the earliest.

(iii) The Court below had struck out the winding up proceedings because Tempo had agreed to participate in a valuation process, and Tempo was obliged to accept that the offer was fair and reasonable, notwithstanding that some 22 and a half months had passed between the valuation date and the date of the offer, because that was the effect of its agreement to participate in the process. It was, however, important to bear in mind that, in striking out the petition, the Court had expressed no view on the

merits of the issues raised in the petition, and no view on the true value of the shares in Fortuna in November 2007.

(iv) As argued by the Respondents, there was no basis for contending that the terms on which the petition was stayed in November 2004 reflected a broader agreement or understanding that, in the event that the Petitioner rejected any offer made following the valuation, Tempo would no longer pursue in a subsequent writ action whatever rights it might have in respect of the complaints set out in its petition.

(v) In those circumstances, the Court was required to ask itself whether it was an abuse of process for the Respondents to pursue the extant proceedings: in the circumstances, no such abuse had occurred.

ASJ

Caribbean Utilities Company, Ltd v Westtel Limited t/a Logic

Civil procedure – injunction – trespass – breach of contract

Grand Court **Cause No: G115/15**
Mangatal J
August 14th 2015

Cases referred to

American Cyanamid Co. v Ethicon Ltd [1975] AC 396
Patel v Smith [1987] 1 WLR 853
Official Custodian for Charities v Mackey [1985] Ch 168

Mr P McMaster QC and Mrs J Hale-Smith for the Plaintiff
Mr K Broadhurst, Ms Yvonne Mullen and Mr P Broadhurst for the Defendant

Facts:

The Plaintiff is the sole provider of electricity services in the Cayman Islands and owns approximately 18,000 transmission and utility poles situated across the Islands. Each utility pole holds electrical cables, which the Plaintiff uses for electrical transmission and distribution. The poles are however also capable of being used to carry aerial cables used by telecommunications service providers, which may be attached in what is called the 'Communications Space'.

Before 2012, the Plaintiff would process the applications by and grant permits to telecom providers for attachments in the Communications Space. Since that time, its wholly-owned subsidiary, Datalink Ltd, has performed that function pursuant to an agreement between them: under that agreement (the "Datalink Agreement"), Datalink may itself apply to the Plaintiff for licences and then grant sub-licenses to telecom providers permitting them to make attachments in the Communications Space.

The Defendant is a provider of television, telephone and internet services within the Islands. It entered into an agreement with Datalink (the 'Logic Agreement') in July 2013, under which it would submit applications to Datalink for permission to make attachments in the Communications Space with a view to permission being granted.

The Plaintiff commenced proceedings against the Defendant in July 2015 claiming injunctive relief and damages on the bases that the Defendant had made numerous unauthorised attachments to the poles, and that the process of attaching was a trespass, which the Defendant had refused to cease despite having been asked to do so. The Plaintiff complained that, where an attachment is made without proper prior inspection and any necessary make ready work being completed, serious safety and structural risks could arise. The Defendant contended that Datalink was aware of all of the attachments which it had made without formal permission, and that in some instances the Plaintiff had even assisted it with performing the structural work which needed to be completed to make those attachments; further, that it had no option but to proceed without formal approval, given that it was obliged to complete its works before February 2017 and Datalink had inordinately delayed the processing of its applications.

The Plaintiff sought an interlocutory injunction restraining the Defendant from making further attachments and carrying out work on the poles pending the trial of the action or further Order.

Held (application dismissed)

(i) It was unclear why Datalink was not a party to the action, or why the trespass claim had been pleaded as a trespass claim *simpliciter* without any reference to the Datalink and Logic Agreements. As argued by the Defendant, the claim required the Court to determine whether the Defendant had breached the Logic Agreement in making the attachments which the Plaintiff complained of: it was to be noted that the Logic Agreement provided its own commercial remedies.

(ii) Applying the guidance provided by *American Cyanamid*, the questions to be addressed were whether:

1) there were serious issues to be tried;
2) damages would be an adequate remedy; and
3) if damages would not be adequate, where the balance of convenience lay?

(iii) Having regard to the parties' conduct over time – particularly the evidence that the Plaintiff was fully aware that the Defendant was making and paying for attachments prior to obtaining permission because of Datalink's delays in granting permission, that no application had been rejected, and that the Plaintiff itself had performed structural work which the Defendant required prior to permission having been obtained – it could not be concluded that the attachments made in advance of a permit being granted were clearly a trespass: there were accordingly serious issues to be decided in the action.

Damages would be an adequate remedy for the Plaintiff in all he circumstances, and there was no suggestion that Logic would be unable to pay: *American Cyanamid* indicated that an interlocutory injunction would not normally be granted in those circumstances.

In the event that the ruling regarding adequacy of damages was proved to be wrong, the court considered the application of the balance of convenience test . In this respect, there was no evidence that any specific unauthorised attachment which the Defendant had made had given rise to any safety concerns; indeed, the Plaintiff would have been expected to have asked the Court to order the removal of all unauthorised attachments if it had such pressing safety concerns. Prudence dictated that the *status quo* was to be preserved where other factors appeared even, and the *status quo* prior to the application was that the attachments had been taking place for almost a year with the knowledge of both parties. The Plaintiff had accordingly failed to demonstrate an urgent need for an interlocutory injunction.

ASJ

<u>Trustee in Bankruptcy of the Estate of Don Foster</u>

Costs - unsuccessful claim by Trustee in Bankruptcy - personal liability of the trustee for costs

Grand Court **Cause No: FSD 11 of 2015**

Mangatal J

February 8th 2016

Cases referred to

BPE v Gabriel [2015] UKSC 39
Re Pacific Coast Syndicate Limited [1913] Ch 26

Mr P McMaster QC and Mr A Jackson for the Plaintiff
Mr I Huskisson for the Defendants

Facts:

P, the Trustee in Bankruptcy, accepted that GKF, the first Defendant in this case, should have its costs in defending the claim, subject to the costs occasioned by the late service of a witness statement. P argued that this witness statement should have been served with the rest of GKF's evidence. As a result, P argued that the costs were increased.

GKF's counsel argued that a Trustee in Bankruptcy is personally liable on an adverse costs order, subject to an indemnity from whatever assets are in the estate. – *BPE v Gabriel* and *Re Pacific Coast Syndicate Limited*.

Held (order as follows)

(i) Although the witness statement was late, it arose from P's counsel's approach during a very extensive opening of the case. Therefore no sum fell to be deducted from GFK's entitlement to costs.

(ii) The decision in *BPE* applied in the instant case. The Trustee therefore was to pay GKF's costs subject to a right of indemnity against the insolvent estate to the full extent of the assets.

MT

DD Growth Premium 2X Fund (In Official Liquidation) v RMF Market Neutral Strategies (Master) Limited

Civil practice and procedure – application for security for costs of an appeal – sub-section 19(2) of the Court of Appeal Law (2011 Revision) – section 74 of the Companies Law (2013 Revision)

Court of Appeal **Cause No: CICA 24/2014 (was FSD 33/2011)**
Mangatal J
May 29th 2015

Legislation referred to

Court of Appeal Law (2011 R)
Companies Law (2007 R)

Cases referred to

Re Bancredit Cayman Limited [2009] CILR 578
Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 (CA)

Mr N Meeson QC, Mr B Hobden and Mr R Charles for the Applicant/Respondent to the Appeal.Mr P McMaster QC and Mr J Snead for the Appellant/Respondent to the Application.

Facts:

DD Growth Premium 2X Fund (In Official Liquidation) (the 'Appellant') was incorporated in the Cayman Islands on 2nd February 2007 as an exempted company which set out to carry on business as a private investment fund. On 29th May 2009, the Appellant was put into official liquidation. RMF Market Neutral Strategies (Master) Limited ('RMF') was incorporated in the Cayman Islands on 12th March 2001 and operates as a fund of hedge funds. RMF held redeemable shares in the Appellant.

The Appellant contacted RMF and demanded repayment of certain redemption proceeds paid to RMF. RMF commenced proceedings by way of originating summons (dated February 21st 2011) which sought a declaration that it was not required to repay such funds to the Appellant. The issue came before Smellie CJ in the Grand Court from 24th – 26th September 2014 and judgment was handed down on 17th November 2014. The Appellant subsequently appealed against the judgment of Smellie CJ.

This case concerned an application by RMF against the Appellant for security for costs of the appeal under S.19(2) of the Court of Appeal Law (2011 Revision).

S.19(2) states:

'The appellant shall, at the time of lodging the notice of appeal required by subsection (1), deposit in the Grand Court the sum of fifty dollars as security for the due prosecution of the appeal together with such further sum as security for costs of the appeal as a Judge of the Grand Court may direct, and such security for costs may be given by the appellant entering into a bond by himself and such sureties and in such sum as the Judge of the Grand Court may direct, conditioned

for the payment of any costs which may be awarded against the appellant and for the due performance of the judgment of the Court.'

Security for Costs

The ability of the Appellant to obtain further funding was, per Mangatal J (adopting the expression of Mr Meeson QC): 'the crux of the matter.' The Appellant was pursuing the case on appeal: whilst 'wholly insolvent and devoid of cash.' The Appellant had relied on funding arrangements in order to advance their claim against RMF.

The Appellant's attorneys contended that an order to provide security for costs would stifle an appeal with genuine merit because the Appellant would be financially unable to furnish the relevant funds necessary to comply with such an order. In addition, the Appellant's attorneys contended that the fund's lack of cash was a result of the redemption payments to RMF and that, in effect, the Appellant's want of means had been brought about by RMF's conduct. Further, the Appellant's attorneys contended that although the security for costs application was being made at the very earliest stage of the appeal, it was pointed out that no attempt had been made to obtain security in respect of the costs of the Grand Court case.

Counsel for the Applicant relied on s. 74 of the Companies Law which states:

'Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given.'

Relying on the opinion of the Judicial Committee of the Privy Council in *Re Bancredit Cayman Limited* it was submitted that although s.74 referred to a 'Defendant' as opposed to a 'Respondent', it should apply in either case.

Further, it was submitted that where a claim is brought by an insolvent company in liquidation, s.74 is engaged and *prima facie*, security for costs should be provided by the liquidator because, self evidently, the company has insufficient assets to pay costs. It was further submitted that the Court of Appeal should take into account the fact that the Appellant had been unsuccessful in their initial claim in the Grand Court in relation to this matter. In addition, it was submitted that it would be *prima facie* an injustice to RMF to allow an appeal to the Court of Appeal to proceed without security for costs when any potential future judgment in favour of RMF would be unenforceable . The sum of these submissions amounted to an assertion that an insolvent Appellant had a heavy burden to discharge should it attempt to resist an order for security for costs when pursuing a matter on appeal.

Importantly, RMF submitted that where an Appellant argued that an order for security for costs would stifle an appeal, it was necessary for the Appellant to establish not only that it was unable to furnish security for costs from its own resources, but also that it was unable to raise the money elsewhere. In this respect, it was submitted that the Appellant had failed to discharge this obligation fully as it had multiple very wealthy investors, including high net worth individuals, banks and other institutions capable of potentially funding future litigation.

Mangatal J's Analysis of the Issues:

1. Mangatal J agreed that in scenarios where a security for costs order is sought against an insolvent company on appeal, s.74 was clearly relevant and that *Re Bancredit Cayman Limited* supported that position.

2. Mangatal J agreed with Cousel for the Applicant that RMF's application gained considerable strength and traction from its victory in the Court below, and there was reason to believe that the Appellant would be unable to pay RMF's costs were RMF to succeed on appeal.

The English Court of Appeal decision in *Keary Developments Ltd v Tarmac Construction Ltd* was found to be particularly helpful in providing guidance in the interpretation of s.74. Mangatal J noted that although the equivalent English provision discussed in *Keary* was wider than the Cayman provision, it was sufficiently similar to aid in the analysis of s.19(2). Mangatal J summarised the relevant principles from *Keary* as follows:

'1. The Court has a complete discretion whether to order security, and accordingly it will act in light of all the relevant circumstances.

2. In considering all of the circumstances, the Court will have regard to the appellant's chances of success, though it should not go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.

3. The possibility or probability that the appellant will be deterred from pursuing its claim by an order for security is not, without more, a sufficient reason for not ordering security. Indeed, in relation to companies governed by the Companies Law, Parliament having worded section 74 the way it did, it must have been envisaged that the order might be made in respect of a company that would find difficulty in providing security.

4. In considering the application for security for costs, the Court must carry out a balancing exercise. On the one hand, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security. This must be placed against the possibility of injustice to the Respondent if no security is ordered and the appeal fails and the Respondent finds itself unable to

recover from the appellant the costs incurred in resisting the appeal. The Court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company. This is particularly the case when the failure to meet the claim might in itself have been a material cause of the plaintiff's impecuniosity. But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company uses its inability to pay costs as unfair pressure on the more prosperous company.

5. Before the Court refuses to order security on the grounds that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence. However, such a case is likely to be far rarer than those cases in which the Court will require evidence from the appellant to make good the assertion that the claim would probably be stifled by an order for security for costs. Further, the Court should consider in the case of an appellant company, not only whether the company can provide security out of its own resources to continue the appeal, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the appellant company, it is for the appellant to satisfy the court that it would be prevented by an order for security from pursuing the appeal.

6. The lateness of the application for security is a circumstance which can properly be taken into account, however, what weight to give it must depend upon the circumstances. It is proper to take into account the fact that costs have already been incurred without there being an order for security. Nevertheless, it is appropriate for the Court to have regard to what costs may yet be incurred.

7. The Court in considering the amount of the security that might be ordered will bear in mind that, provided it is more than simply a nominal amount, the amount ordered is not bound to be substantial.'

Held (order as follows)

(i) It could not be said that there was no real prospect of success because, amongst other things, the grounds of appeal involve matters of law, including the construction of' statutory provisions. It was not necessary to discuss the merits of the case as it could not be said that there was a high degree of probability of success or failure.

(ii) The fact that no security for costs application had been made to the Grand Court, had no impact on the validity of RMF's application for security for costs on appeal.

(iii) The Appellant's claim that the actions of RMF may have, in

part, contributed to the Appellant's impecuniosity was a circular argument and would be disregarded.

(iv) The perhaps 'most decisive factor in this application' was the question of whether an order for security for costs would stifle the Appellant's case because it would be unable to provide the required funds. On the facts, this was not a case where the Court could properly draw such an inference without direct evidence of the same.

On the basis of the indirect evidence before the Court, there was nothing which re-inforced the contention that the investors were unable to pay security for costs, in any sum whatsoever. The Appellant had not provided sufficient information regarding the identity of its investors or evidence to show that such investors were unable, as opposed to unwilling, to put up funds in respect of security for costs. It was not enough to simply present evidence that the Appellant could not meet an order for security for costs from its own resources.

(v) There was not a sufficient evidential basis to show that RMF's application for security for costs was an attempt to stifle the appeal. This position was bolstered by the prior judgment of the Grand Court in RMF's favour. The onus was on the Appellant to furnish the Court with sufficient evidence to show that a genuine claim would, as a result, be stifled.

(vi) The Appellant was ordered to provide US $80,000 as security for costs of the appeal and to deposit it at the Grand Court within 28 days of the date of the Order. The Appellant was allowed to apply for an extension of time before the expiry of the aforementioned 28 day deadline. In the absence of an application for extension of time or the provision of the aforementioned sum within the specified timeframe, the appeal would be dismissed.

The Appellant was to pay 75 per cent of RMF's costs of the security for costs application.

EB

In the Matter of Torchlight Fund L.P.

Validation orders – relevance of solvency - reasons for disposition of property must be shown to be ones which an intelligent and honest director could reasonably hold - orders for injunctive relief – scope- principles to be applied
Grand Court FSD 103/2015
Clifford J
January 22nd 2016

Legislation referred to

Companies Law (2013 R)

Cases referred to

Re Burton & Deakin [1977] 1 All ER 631
In the matter of Fortuna Development Corporation [2004-2005] CILR 533
In the Matter of Cybervest Fund [2006] CILR 80
American Cyanamid Co v Ethicon Ltd [1975] AC 396

Kelly and Four Others v Fujigmo Limited, Port Authority and Attorney General [2012] 2 CILR 222

Mr R Hollington QC instructed by Mr B Hobden and Mr E Bodden for Torchlight Fund LP and the General Partner

Mr G Moss QC (appearing by via video-link) instructed by Mr D Butler and Ms J Williams for the Petitioners

Facts:

Torchlight Fund L.P. ('Partnership') is an exempted limited partnership which is registered in the Cayman Islands. The Partnership was managed by Torchlight GP Limited ('General Partner') which is an exempted limited company in the Cayman Islands. On 25th June 2015, Aurora Funds Management Ltd (as trustee for the Bear Real Opportunities Fund), Crown Asset Management Ltd and the Accident Compensation Corporation of New Zealand (collectively the 'Petitioners') issued a winding up petition on the 'just and equitable' basis to wind up the Partnership. Amongst other things, the Petitioners alleged multiple grounds that, if proved, justified the Petition; for example that the Petitioners had lost trust and confidence in the General Partner and that the General Partner was acting in a manner which was prejudicial to the interests of the limited partners. On the basis of an Order dated 31st July 2015, the winding up proceedings were to continue on an *inter partes* basis between the General Partner and the Petitioners (and the Partnership itself would only be a nominal participant).

This case concerned two applications made by the parties:

1. The Partnership's application that the Court grant a validation order (*per* s.99 of the Companies Law (2013 Revision)) which would apply to the Partnership's payments and/or dispositions of property 'made in the ordinary course of business'.

2. The Petitioners sought an injunction to restrain the disposition of any of the Partnership's assets and in particular, to restrain the Partnership from the disposition of the sale proceeds from the Partnership's recent sale of its interest in Local World Holdings Limited.

The S. 99 Validation Order

The Partnership sought a validation order which is typically sought in solvent winding up scenarios allowing the Partnership to continue to make payments and/or dispositions in 'the ordinary course of business'.

S. 99 of the Companies Law (2013 Revision) states:

'*When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void.'*

Clifford J analysed the English authorities cited by counsel for the Partnership before considering Cayman Islands authority on the matter. Chief amongst the latter is *In the matter of Fortuna Development Corporation* which relied upon *Re Burton & Deakin*. In *Fortuna*, Henderson J summarised the relevant principles as follows:

'*Thus, there are four elements which must be established before an applicant is entitled to a validation order. First, the proposed disposition must appear to be within the powers of the directors. There is no dispute about that here. Secondly, the evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company. There is no dispute here that the directors do have that belief. Thirdly, it must appear that in reaching the decision the directors have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourthly, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold.'*

Further, Henderson J expanded upon the meaning of the concept of 'reasonableness' for the purposes of these principles:

'*The test the applicant must satisfy is not high. Nevertheless, there must be a body of evidence which, viewed objectively, establishes that the decision is one*

which a reasonable director, having only the best interests of the company in mind, might endorse.'

The principles established in *Fortuna* were further expanded upon in *In the Matter of Cybervest Fund*. In the present case, Clifford J noted that the facts of *Cybervest* were particularly analogous to the current case because there Smellie CJ had refused to approve a validation application on the basis that there was evidence of financial impropriety in spite of the fact that the company itself was solvent.

Smellie CJ expanded upon the *Fortuna* principles in providing additional guidance in relation to validation applications in respect of solvent entities where there is evidence of financial impropriety. He noted:

'*There is another consideration to add to this list, in light of the concerns raised in this matter, although arguably it is subsumed within the third and fourth elements. This would be whether irregularities in the conduct of the affairs of the company can be shown, even if the company is clearly solvent, as is alleged here.'*

The Applications for Injunctive Relief

The scope of the injunction originally sought by the Petitioners had significantly narrowed. The first head of the injunction originally sought concerned specifically the Local World transaction. The proceeds of the Local World transaction had in all likelihood already been received and spent by the Partnership and this matter, on this basis, was not further considered in the ruling.

The second head of the application related to a more general injunction sought by the Petitioners which would, if ordered, have required the Partnership to seek approval for any proposed disposition whatsoever from the Petitioners, or to make a validation application to the Court with evidence in support. Following the judge's criticism of the width of the originally proposed injunction, counsel for the Petitioners sought an injunction with reduced scope, requiring that the Partnership seek approval when making dispositions to related parties, either by obtaining the Petitioners' consent or by making an application to Court with evidence in support.

The general principles to be applied in ordering injunctive relief had been authoritatively set out in *American Cyanamid Co v Ethicon Ltd*. These principles were subsequently summarised by Smellie CJ in *Kelly and Four Others v Fujigmo Limited, Port Authority and Attorney General* as follows:

'(a) Whether there is a serious issue to be tried. The Court's task on this point is to decide whether the Petitioners' case "shows any real prospect of succeeding";

(b) Whether damages are an adequate remedy;

(c) Whether any loss to the defendant needs to be and if so can be met by an award of damages, in respect of which the applicant may be required to give an undertaking to indemnify the defendant for any such damages found wrongfully to have been caused by the injunction; and

(d) Taking into account all the circumstances of the case, and if there is any doubt about the adequacy of the respective remedies in damages, where the balance of convenience lies.'

Held (order as follows)

The validation application:

(i) Having analysed the substantial financial evidence presented by the Partnership to demonstrate its solvency and relying upon the authorities cited, the notion that solvency by itself could justify a validation order was rejected.

(ii) The Court expressed reservations in making a broad validation order for payments/dispositions in the 'ordinary course of business' rather than in relation to particular transactions.

(iii) The evidence put forward (in the form of a list) in relation to various payments made by the Partnership since the presentation of the winding up petition 'in the ordinary course' was inadequate. In particular, there was a lack of evidence showing that payments appearing on the list were 'necessary or expedient and in the interests of the Partnership'. Inadequate information had also been provided in relation, for eg, to certain specific payments; for example that relating to loan payments in relation to the loan from Credit Suisse.

(iv) Applying *Cybervest*, the General Partner was required to furnish satisfactory proof concerning the necessary or expedient nature of the relevant payments. It was also necessary to show on the basis of the evidence that the justifications for the payments were ones that an honest and intelligent general partner could reasonably have had. Note was also to be taken of Smellie CJ's additional guidance in *Cybervest relevant* when there exist allegations of financial impropriety.

(v) Applying the foregoing principles, the Partnership's application for a validation order would be dismissed with costs.

The injunction application:

(vi) Approving the revised injunction order sought by the Petitioners, it was noted that, in its revised form, the order would minimise the adverse impact on innocent third parties such as Credit Suisse, with whom the Partnership had entered into a loan agreement.

Applying the principles set out in *American Cyanamid Co to the present case*:

On the present facts, there existed no doubt that there were serious issues to be tried, including alleged related party transactions.

Damages would not be an adequate remedy. In the event that payments were made to related parties of the General Partner, although such payments would be void, it might prove difficult for the Petitioners to recover the monies either because those other parties might not be able to repay the sums or due to the multi-jurisdictional nature of the parties whom offshore partnerships often transact with. The combination of these factors meant that any action(s) to recover monies might be rendered nugatory or non-economical to pursue.

Moreover, the Partnership could be adequately protected through an undertaking in damages: there was no doubt as to where the balance of convenience lay, taking into account the reduced scope of the order sought by the Petitioners.

Granting the Petitioners' application for an injunction to restrain the General Partner from disposing of Partnership assets with parties/persons related to the General Partner unless the General Partner first made an application to the Court or obtained the Petitioners' consent to do so.
The costs of this application were awarded, being the Petitioners' costs in the Petition.

EB

COMPANY LAW

In the Matter of China Shanshui Cement Group Limited

Winding Up Petitions – strike out – ability of directors to petition for winding up of company – approach to decisions of co-ordinate court

Grand Court **Cause No: FSD 178/15**
Mangatal J
November 23rd 2015

Cases referred to

In Re Inkerman Grazing Pty Ltd (1972) 1 ACLR 102
Re Emmadart Ltd [1979] 1 Ch. 540
Re Interchase Management Services Pty Ltd (1992) 9 ACSR 148
Re Fernlake Pty Ltd (1994) 13 ACSR 600
Miharja Development SDN BHD v Heong (1995) 4 MSCLC 91 285
In re Global Opportunity Fund [1997] CILR-N-7
Banco Economico SA v Allied Leasing and Finance Corporation [1998] CILR 102
Re First Virginia Reinsurance Ltd (2003) 66 WIR 133
Re Spectrum Plus [2004] 2 WLR 783
Re Trans Pacific Corporation (2009) 72 ACSR 327
In Re Xinhua Sports & Entertainment Ltd (unreported, 2011)
Re China Milk Products Group Ltd [2011] (2) CILR 61
Re Alibaba.com [2012] (1) CILR 272
Lornamead v Kaupthing Bank hf [2013] 1 BCLC 73
In Re Dyxnet Holdings Limited (CICA, unreported, 20 February 2015)

Authoritative works referred to

Halsbury's Laws of England 5th Edition Vol. 11
*Fordham QC***,** Judicial Review Handbook, 5th Edition

Mr M. Crawford and Ms A. Perry for China Shanshui Cement Group Limited
Mr S Moverley-Smith Q.C., instructed by Mr U. Payne and Mr O. Payne for Tianrui (International) Holding Company Limited
Mr S. Moverley-Smith Q.C, instructed by Mr. M. Kish for China Shanshui Investment Company Limited
Mr G. Manning and Mr G. Cowan for Taconic Opportunity Master Fund LP, Claren Road Asset Management LLC and ASM Connaught House Fund LP
Mr N. Lupton and Ms F. MacAdam for Asia Cement Corporation
Mr J. Golaszewski and Ms A. Dixon for Clearwater Capital Partners

Facts:

China Shanshui Cement Group Limited (the 'Company') was an exempted non-resident company incorporated in the Cayman Islands but which had its headquarters in the People's Republic of China.
At the material time, the Company's principal creditors were holders (the 'Noteholders') of its US$500,000,000 7.50 per cent Senior Notes (the 'Notes) issued by it in or around March 2015.

On 10 November 2015, although the Company was balance sheet solvent (in that its assets far exceeded its liabilities), the Company presented a winding up petition (the 'Petition') on the grounds, *inter alia*, that it was unable to pay its debts within the meaning of s. 92(d) of the Companies Law (2013 Revision) (the 'Law'). The Company also sought, at the same time, the appointment of joint provisional liquidators pursuant to s. 104(3) of the Law.

It was common ground between the parties that the directors of the Company caused the Company to present the petition without obtaining a shareholder resolution approving this step. It was also common ground that the Company's articles of association did not expressly permit the directors to do so without first obtaining such a resolution.

The Company's majority shareholders were China Shanshui Investment Company Limited ('CSI') and Tianrui (International) Holding Company Limited ('Tianrui') which, on 17 November 2015, jointly filed an application seeking an order that the Petition be struck out as being an abuse of the Court's process (the 'Strike Out Application') on the ground that the Company had no standing to present, and the Court had no jurisdiction to hear, the Petition.

The Parties' Positions

S.94(1)(a) of the Law provides that an application for the appointment of liquidators can be made by a company. S.94(2), in turn, provides that where expressly provided for by a company's articles of association, the directors of a company may apply to the court for the appointment of liquidators in the name of the company without first obtaining sanction of its shareholders.

CSI and Tianrui (the 'Shareholders') argued that, properly construed, Ss 94(1)(a) and (2) of the Law meant that a Company's directors will only have authority to cause the Company to present a petition where (a) they have obtained a valid resolution of the Company's shareholders sanctioning them to do so or (b) there is an express provision of the Company's articles of association permitting the Directors to so act without the sanction of the Company's shareholders, relying on the dicta of Brightman J in the decision of the English High Court in *Re Emmadart Ltd* [1979] 1 Ch 540 (as approved in the Grand Court decision of

Banco Economico SA v Allied Leasing and Finance Corporation [1998] CILR 102):

'The practice which seems to have grown up, under which a board of directors of an insolvent company presents a petition in the name of the company where this seems to the board to be the sensible course, but without reference to the shareholders, is in my opinion wrong and ought no longer to be pursued, unless the articles confer the requisite authority…'

In this case, as (a) the Directors had failed to obtain a resolution of the shareholders resolving that the Company should present the Petition; and (b) there was no express provision in the Company's articles of association permitting the directors to cause the Company to do so without shareholder approval, the Shareholders contended that the Directors had no authority to present the Petition. As a result, they argued that the Petition must be struck out.

The Company, in opposition to the Strike Out Application, relied upon the Grand Court decision of *Re China Milk Products Group Ltd* [2011] 2 CILR 61 in which Mr Justice Jones QC held that directors of an insolvent company are entitled to apply to the Grand Court for the appointment of liquidators in the name of the company without reference to its shareholders irrespective of whether the power to do so is provided within the company's articles of association:

'Having regard to this overall legislative objective, it is clear that the legislature must have intended to abolish or circumscribe the rule in In re Emmadart Ltd, because it does not distinguish appropriately between solvent and insolvent companies…

In my judgment, upon the true interpretation of s. 94(1)(a), the directors of an insolvent company…are entitled to present a winding up petition on behalf of and in the name of the company…without reference to the shareholders…and irrespective of the terms of the articles of association.'

The Company argued that the decision in *Re China Milk* should be followed. It is established practice that a court should follow a decision of courts of equal standing unless convinced that the other decision was wrong. The Company contended that *Re China Milk* was not wrongly decided and should be followed in the instant case with the result that the Strike Out Application should be dismissed.

In the alternative, the Company argued that, even if *Re China Milk* was wrongly decided, Article 18 of the Company's articles of association were sufficiently wide to fall within the ambit of s.94(2) of the Law such that a shareholders' resolution was not required.

The Company had further argued that instead of striking out the Petition, the Court should allow for substitution of a creditor as Petitioner under Order 3 , rule 10 of the Companies Winding Up Rules 2008 ('the CWR'). The Company argued that CWR Order 3, rule 10 should be read disjunctively, and should not be limited to substitution only where a creditor initiates a petition for winding up, relying upon the decision of Jones J in *Re Xinhua Sports & Entertainment Ltd* as referred to in *China Milk*. It was further argued that if the Court were to find no power of substitution to exist, the Court retained an inherent power for substitution.

Counsel for the Majority Shareholders offered no rebuttal until such an application was put forward, but argued that certain contractual bars existed which would prevent the creditors from seeking to bring a petition for the winding up of the Company.

Finally, the Company also contended that, in any event, the Court should not follow the principle in *Re Emmadart* as there were a number of jurisdictions where *Emmadart* had been rejected, or not followed, including Australia, Malaysia and Bermuda.

Held (ruling in favour of the majority shareholders)

(i) The judge accepted that, in the interests of judicial comity and certainty, a judge of first instance should follow a decision of another judge of first instance (*Re Alibaba.com* [2012] 1 CILR 272). However, that practice would not be followed where he is convinced that that judgment was wrongly decided, even in circumstances where the judgment is long-standing and persons' affairs have been ordered by reference to it (*Re Spectrum Plus* [2004] 2 WLR 783).

(ii) In the present case, the judge considered that *Re China Milk* was wrongly decided and should not be followed. While the Law had been revised since the decision in *Banco Economico*, s.94(1)(a) was in materially the same form as it was at that time. Accordingly, there was no reason why the rule in *Re Emmadart* would not continue to apply. Further, although the Law was amended to include s. 94(2) since the decision in *Banco Economico*, it did not change matters as it simply provided statutory confirmation of the principle recognised in *Re Emmadart*: where the articles of association of a company expressly authorise its directors to present a winding up petition on its behalf, a shareholders' resolution authorising them to do so will not be required. Accordingly, upon a proper reading of Ss 94(1)(a) and 94(2) of the Law, which were clear and unambiguous, the Directors would only have authority to cause the Company to present a petition where: (a) they

have obtained a valid resolution of the Company's shareholders sanctioning them to do so or (b) there is an express provision of the Company's articles of association permitting the Directors to so act without the sanction of the Company's shareholders. Moreover, s.94(2) was applicable applies to all companies, not just to solvent companies (*China Milk* not followed).

(iii) There was no significant distinction between Article 18 of the Company's articles of association and the terms of the relevant articles at issue in *Re Emmadart* such that Article 18 was not sufficiently broad as to fall within the ambit of s.94(2).

(iv) Although the decision in *Re Emmadart* was '*a remarkably unpopular decision*', the principles stated therein and previously applied in the Cayman Islands were left intact by the amendments to the Law when properly construed. In those circumstances, the judge considered that it would be wrong to decline to apply the rule in *Re Emmadart*.

As no application was made for substitution, it was determined that there was no need to consider this argument.

(v) The Petition was struck out.

NCE and CAL

IN THE MATTER OF THE INTEGRA GROUP

Company Law – valuation of share value – management buy-out – dissenting shareholders' entitlement – appropriate method of share valuation – fair value distinguished from market value

Grand Court **Cause No. FSD 92 of 2014**
Jones J
April 13th – 17th and May 26th 2015

Legislation referred to

S. 238 Companies Law (2013 R)

Cases referred to

Cyprus Anvil Mining Corp v Dickson (1986) 8 BCLR 145
Brant Investment Ltd v KeepRite (1987) 60 OR (2d) 737

Weinberger v UOP Inc (1983) 457 A.2d 701

Authoritative works referred to

International Valuation Standards
International Financial Reporting Standards

Facts:

Integra Group Ltd ('the Company') was incorporated in the Cayman Islands on 15 March 2004, and was actively involved as an oil field services provider in the Russian oil market. During the period 2004 to 2009, the Company engaged in an aggressive acquisition programme, to the point that, by 2009, it was one of the leading oil field service providers in the Russian market. However, from 2010, the Company began diversification into a wider range of services within the oil market.

In 2013, it was decided by members of the Company's management team that they wished to purchase the balance of shares in the Company in order to take control of the Company's activities. Pursuant to s. 238 of the Companies Law (2013 Revision) ('the Law'), an independent appraisal of the value of the shares was obtained from Deutsche Bank, which set the value of the shares at US$10 per share.

A minority of shareholders, representing approximately 17 per cent of the share value of the Company, objected to the valuation provided by Deutsche Bank. The effect of the objection was that, pursuant to s. 238(9) of the Law, the Company was obliged to petition the Court for an assessment of the fair value of the shares.

This case represents the first such instance in the Cayman Islands in which the Court was required to assess the fair value of shares, pursuant to s. 238 of the Law. The principal issue to be determined was the appropriate methodology to apply in determining the value of the shares. In doing so, the Court heard expert evidence as to the valuation of the shares from both the Company and the dissenting shareholders.

Held (order as follows)

(i) It was noted that the Law was heavily influenced in its drafting by equivalent legislation in force in Canada and Delaware. That being the case, the Court found that relevant jurisprudence from

Canada and Delaware as to the valuation of shares under provisions equivalent to s. 238 should be considered highly persuasive.

(ii) Valuation is a fact-based assessment, and should be determined by the circumstances of each individual case. However, dissenting shareholders should not consider the process to be one which will grant them a 'bonus', but simply a fair assessment of the value of the shares as at the date of acquisition. While expert evidence is of assistance to the Court, it is not binding, and the final determination is to be made by the Court, with the assistance of the expert testimony.

(iii) A distinction was to be drawn between 'market value' and 'fair value'. The Law provides that the value applied is to be a 'fair value', which is the estimated price that a willing party would be likely to pay for the asset. This is a more broad approach to valuation than 'market value', and in that respect tends to marginally favour the dissenting shareholders.

(iv) After considering the different approaches to valuation which could be adopted in the present case, it was accepted that the appropriate methodology was that of the 'market value approach'. This approach considers not only the value of the specific shares in question on the open market – in this case, the London Stock Exchange – but also the value of shares of companies of a similar nature. The Court should not however rely exclusively on the market value of the specific shares, as this could be artificially inflated or deflated by extrinsic circumstances.

In the present case, whilst accepting the market value approach in principle, the specific detail of the expert evidence adduced by the dissenting shareholders was not beyond criticism. Therefore, although the approach was accepted, the Court would apply its discretion in determining the value of the shares at US$11.70 per share.

(v) In determining a fair rate of interest payable by the Company, pursuant to s. 238(11) of the Law, the fair and equitable means of calculating interest was the mid-point between the Company's cash return rate, and the Company's borrowing rate.

AW

Simon Conway and David Walker (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Limited) v Scandinaviska Enskilda Banken AB (Publ)

Application by joint provisional liquidators to declare payments made with a view to a preference of one creditor over other creditors – controlling mind of the company - redemption proceeds become liability of the company upon the redemption date regardless of grace period to pay redemption proceeds in the company's offering circular – NAV affected by fraud is not itself sufficient to vitiate the NAV – common law defences not available under statutory claim under s.145

Grand Court **Cause No: FSD 0098/2014**
Clifford J
December 4th 2015

Legislation referred to

Companies Law (2013 R) Ss.93 139(1) & 145(1)
Company Winding Up Rules Order 12 rule 2
Companies (Amendment) Law 2007 S.168
Bankruptcy Law (1997 R) S.111(1)
Companies Act 1948, S.320
Insolvency Act 1986 S.239(3)
Judicature Law (2013R) S.34

Cases referred to

Hollington v Hewthorn & Co Ltd. [1943] KB 587
In the matter of FIA Leveraged Fund [2013] (1) CILR 152 (CICA)
Culcross Global SPC Limited v Strategic Turnaround Master Partnership Limited [2008] CILR 447; [2010] 2 CILR 364 (CICA); [2010] UKPC 33 (Privy Council)
Hick v Raymond Reid [1893] AC 22
Rennie v Sudbury Homes (Holdings) Ltd [2007] EG 296
Astea (UK) Ltd v Time Group Ltd [2003] EWHC 725
Peregrine Systems Ltd v Steria [2005] EWCA Civ 239
Socimer International Ltd v Standard Bank London Ltd [2008] 1 Lloyd's Rep 558
West LB AG v Nomura Bank International plc [2010] EWHC 2863 (affirmed in [2012] EWCA 495
Jones v Sherwood Computer Services plc [1992] 1 WLR 277

FIA Leveraged Fund v Firefighters' Retirement System 1 August 2012, CICA Appeal No 6 of 2012
Primeo Fund (in official liquidation) v Michael Pearson as Additional Liquidator of Herald Fund SPC (in official liquidation) FSD 27 of 2013, 12th June 2015
Fairfield Sentry Limited v Migani [2014] UKPC 611
RMF Market Neutral Strategies (Master) Limited v DD Growth Premium 2X Fund [2013] 2 CILR 361
Jetivia SA v Bilta (UK) Limited [2015] UKSC 23
Re Hampshire Land Company [1896] 2 Ch 743
21st Century Logistic Solutions v Maysden Limited [2004] EWHC 231
Re MC Bacon [1990] BCLC 324
Segoes Services Limited (in Liquidation) v Oeoka, Kameski and Highland Consulting Limited [2006] CILR Note 1
Re Kushler Limited [1943] 1 Ch 248
Re Matthews Ltd [1982] 1 Ch 257
In re Sarflax Ltd [1979] Ch 592
Re Cutts [1956] 1 WLR 728
In re Cohen [1924] 2 Ch 515
Re Titan Investments Limited Partnership (2005) ABQB 637
The Trustee of the Property of New, Prance & Garrard v Hunting [1897] 2 QB 19
Peat v Gresham Trust Limited [1934] 2 AC 252
Rose v AIB Group (UK) plc [2003] 1 WLR 2791
4 Eng Limited v Roger Harper and others [2009] EWHC 2633
Charles Terence Estates Ltd v The Cornwall Council [2011] EWHC 2542
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548
Niru Battery Manufacturing Company v Milestone Trading Limited [2002] EWHC 1425
Holman v Johnson (1775) 1 Cowp. 341 cited in *Tinsley v Milligan* [1994] 1 AC 340

Authoritative works referred to

Sealy & Millman: Annotated Guide to the Insolvency Legislation 2015
Goode Commercial Law 4th edition
Goode The Avoidance of Transactions in Insolvency Proceedings and Restitutionary Defences

Mr D Lord QC instructed by Mr S Folpp for the Plaintiffs
Mr D Chivers QC instructed by Mr S Dawson and Mr K McGriele for the Defendant

Facts:

The Plaintiffs are the Joint Official Liquidators ('the JoLs') of a Cayman Fund, Weavering Macro Fixed Income Fund Limited ('the Company'). The Defendant (Skandinaviska Enskilda Banken AB (Publ) ('SEB') was an investor in the Company.

The directors of the Company ('the Directors') were Stefan Peterson ('Stefan') and Hans Ekstrom ('Hans'). Magnus Peterson ('Magnus'), the brother of Stefan and step-son of Hans, was a director of Weavering Capital (UK) Limited ('WCUK'), the Company's investment manager. There had been three previous sets of proceedings involving matters relevant to these proceedings, namely proceedings brought by the JoLs against the Directors in Cayman ('the Directors' Proceedings'), proceedings brought by the administrators of WCUK against Magnus and others in England and criminal proceedings brought against Magnus in England in which Magnus was convicted of fraud and sentenced to imprisonment.

The Company's principal investment consisted of interest rate swaps ('the Swaps') pursuant to the terms of a standard ISDA Master Agreement purportedly entered into by Hans on behalf of the Company (although he denied that it bore his signature) which, based on evidence presented in this case, were fictitious paper transactions used by Magnus to present a picture of a fund showing sustained growth in order to attract and maintain investors.

In the months prior to liquidation, the Company made three redemption payments to SEB which were material to the proceedings; the first on 19 December 2008 ('the First SEB Redemption Payment'), the second on 2 January 2009 ('the Second SEB Redemption Payment') and the third on 11 February 2009 ('the Third SEB Redemption Payment') (together 'the SEB Redemption Payments').

During October 2008, the Company received redemption requests, including requests from SEB which were processed on the 1 December 2008 Redemption Date, for shares whose NAV (net asset value) totaled US$138.4 million. On 17 December 2008 Magnus directed the administrator to pay a select number of investors who had redeemed their shares, including the First SEB Redemption Payment.

By the end of December 2008, Magnus and WCUK sought legal advice as there was insufficient cash to meet the full December redemption debt. Investors were informed that due to illiquidity of the markets and the fact that the Fund had received redemption requests for over 30 per cent of its NAV only 25 per cent of the remaining December 2008 redemption debt would be paid but that the balance would be paid by the end of January. On 2 January 2009, the Second SEB Redemption Payment was made and the Company incurred further redemption obligations.

The Third SEB Redemption Payment in February 2009 resulted in payment of the entirety of sums due to SEB pursuant to its redemption requests. However, by then the Company had in excess of US$134 million in outstanding redemption obligations, including the balance of the December 2008 redemption debt in addition to the entirety of the January and February 2009 redemption debt.

In the proceedings, the JoLs sought (i) a declaration that the three SEB Redemption Payments were invalid on the basis that the payments were made by the Company at a time when the Company was unable to pays its debts with a view to giving SEB a preference over other creditors; and (ii) an order that SEB return the payments plus interest.

Preference Payments

S.145(1) of the Companies Law ('the Law') provides that every payment made by any company in favour of any creditor at a time when the company is unable to pay its debts (as proved to the satisfaction of the Court) with a view to giving such creditor a preference over others shall be invalid if made within six months immediately preceding the commencement of liquidation.

The argument as to whether the SEB Redemption Payments constituted preference payments focused on five key issues:

1. *Whether the Company directed the payments to be made to SEB*

Pursuant to the Company's articles of association ('the Articles), the redemption process was under the control of the Board of Directors. The Board, could, however, delegate this power to other persons.

The Company argued, based on the transcripts of the Directors Proceedings, that at all times Magnus and WCUK managed and controlled the Company as evidenced *inter alia* by: a) the lack of effective Board Meetings; b) the forgery of Hans' signature by Magnus on the 2005 ISDA Master Agreement; and c) the Directors' lack of involvement in critical decision making, including their non-involvement in the redemption process during the last few months prior to the liquidation of the Company.

SEB argued that there was no delegation of board authority to Magnus by the *de jure* Directors and further that the JoLs failed to produce any evidence that the Company acting through its Board authorized Magnus to choose which creditors would receive redemption payments.

2. *Whether the Company was unable to pay its debts at the time of each of the SEB Redemption Payments*

The test of inability to pay debts under s.93(3) is one of commercial insolvency, a so-called cash flow test, rather than a balance sheet test. It is based on a company's present inability to pay debts as they fall due (*FIA Leveraged Fund*).

The judge concluded that he was satisfied that the JoLs discharged their burden of proving that on the dates of each of the SEB Redemption Payments that the Company was unable to pay its debts. Nonetheless, it was still necessary to resolve two legal issues raised on behalf of SEB:

First, SEB contended that there were no redemption debts that the Company was unable to pay until the 30-day grace period referred to in the Company's offering memorandum ('the OM) had expired. Under the Articles, a redeeming shareholder became a creditor from the Valuation Point on the Redemption Day and thus a provable debt was owed to the redeeming investor from the Redemption Day (*Strategic Turnaround*). However, SEB argued that because the OM provided that redemption payments are '*generally made within 30 calendar days after Redemption Day*', while redeeming shareholders became creditors of the Company on the relevant Redemption Day, they did not become current but, rather, only prospective creditors as of that date.

The Company countered by referring to Lord Mance's conclusion in *Strategic Turnaround* that the Redemption Date can be referenced as the date on which the Redemption Price is crystallized and from which the Price is deemed to be a liability of the Company and that the 30-day grace period had no legal bearing on the liability which arose on that date.

Second, SEB argued that the published NAVs were wrong on account of Magnus' fraud. The NAVs were not valuations at all, or at least not binding valuations and thus none of the redeeming shareholders became creditors of the Company so the Company was not insolvent when the SEB Redemption Payments were made. SEB further argued that NAV will not be binding if there is there is: '*some conduct…which can be imputed to the company which has the effect of vitiating the contract with its members* (*Primeo*).

The Company countered in arguing that the Privy Counsel in *Fairfield Sentry* held that the NAV per share on which the Redemption Price is to be based must be the one determined by the Directors at the time, whether or not the determination was correctly assessed. The Company also relied on the decision in *DD Growth*, a case where NAV was grossly overstated as a result of fraud in circumstances similar to the Swaps in this case, where the Chief Justice did not suggest that that the redeemers, whose redemption entitlement was calculated on overstated NAV, were not creditors for that sum or that the fund was not insolvent for that reason.

3. W*hether the SEB Redemption Payments were made with a view to preferring SEB over the other creditors*

English authorities on the previously similar regime set out in in s.320 of the UK Companies Act 1948 apply to the law of fraudulent preferences in Cayman Islands law as evidenced by the Chief Justice's extensive reliance upon the House of Lords decision in *Re Cutts* when he proclaimed the principles to be applied (in *DD Growth*):

(i) 'the onus is on the person alleging a fraudulent preference to prove that the payment was made with the intention of preferring the payee over his other creditors;
(ii) the Court may draw the inference of an intention from all the facts of the case; and
(iii) intention must be the principal or dominant intention although there might be a valid distinction between an intention and motive for that intention.'

The Company argued that the absence of any direct evidence from the debtor of an intention to prefer is by no means fatal (*In re Cohen*) and that intention is objective in that '*a man is taken to intend the necessary consequences of his action*' (*Re MC Bacon Ltd*): if payment was made at a time when the person orchestrating the payment knew that the company was unable to pay its debts (for example, if he knew that liquidation was likely or even inevitable) then, in the absence of any other explanation for the payment (such as pressure), the necessary intention to prefer should be inferred objectively.

SEB argued that the law requires proof that payments were made 'with a view to giving a preference' which requires more than the fact that there has been a preference but also the state of the mind of the person who made it (*Hunting* and *Peat*).

4. A*vailability of a defence of voidable preference including change of position*

SEB argued that s.145 does not provide a statutory remedy if a payment is proved to be preferential. As such, the JoLs could only recover a payment by seeking restitution based on common law principles of unjust enrichment (*Rose* and *4 Engl Limited*) which would then be subject to common law defences such as change of position (*Charles Terence Estates*). SEB argued that because it had paid away the redemption proceeds to its investors, it was no better off than it was before it received the payment of such proceeds or alternatively that it had changed its position in good faith, in reliance on the receipt of the redemption proceeds.

5. *Whether, for illegality and public policy reasons, the claim should not be allowed*

SEB argued that if the Court determined that Magnus was the controlling mind of the Company such that his knowledge and intentions must be imputed to it,

then the JoLs' claims failed on illegality and public policy grounds on the fundamental principle that a court will not lend its aid to a litigant whose cause of action is founded on an illegal act (*Holman v Johnson*). SEB argued that it would be repugnant to found an action on an allegation that the proceeds of fraud should have been divided *pari passu* between the beneficiaries of the fraud.

SEB also argued that the JoLs could not sue on behalf of creditors whose claims were based on the fraudulent NAV. If the NAV was not set aside by virtue of the fraud, then there was no evidence that the Company's members, rather than the unpaid redeeming creditors, would benefit.

The Company argued that it did not rely on Magnus' fraud to found their claim, but rather, relied on the redemption contracts which gave rise to the legal liability and even if Magnus' knowledge was imputed to the Company for the purposes of the redemption contracts, authority existed that it would be perfectly possible for a company to rely on attribution of a person's knowledge for one purpose whilst disclaiming attribution of that same person's knowledge for another purpose (*Jetiva*).

The Company further argued that, contrary to what had been suggested by SEB, the JoLs were not seeking to divide the proceeds of a fraud equally between creditors who were beneficiaries of the fraud, but sought to ensure that all creditors would share equally on the proper basis of *pari passu* distribution.

Held (finding for the Applicants)

(i) The Directors, in effect, delegated authority in relation to redemption payments to Magnus and as such he acted as a *de facto* director of the Company and was the controlling mind of the Company in making such payments.

(ii) The thirty day grace period had no bearing on the material position of solvency for the purpose of the claims in these proceedings.

(iii) The fact that NAV is affected by fraud is not by itself sufficient to vitiate the NAV (*Fairfield Sentry* and *Primeo* followed) and the JoLs discharged their burden of proving that on each of the dates of the SEB Redemption Payments, the Company was unable to pay its debts.

(iv) The SEB Redemption Payments were all made in the knowledge on the part of Magnus that the Company was unable to pay its debts and the JoLs proved to the satisfaction of the Court that the payments were made with the intention of preferring SEB

over other creditors whose debts existed at the date of each payment to SEB.

(iv) Common law defences are not available under a statutory claim under s.145 and there is no discretion of the Court to make any other order.

(v) If a creditor is paid out of turn, such that there is a preference within the meaning of s.145(1), then the expected consequence will be a liability to make repayment. Public policy in this case supported recovery and as such the NAV had to stand to allow recovery of redemption payments made in accordance with it.

(vi) Each of the SEB Redemptions Payments was found invalid and the judge ordered SEB to repay the total sums plus interest pursuant to s.34 of the Judicature Law (2013 Revision).

NCE

DD Growth Premium 2X Fund (In Official Liquidation) v RMF Market Neutral Strategies (Master) Limited [2015 (2) CILR 141]

Companies—shares—redemption—payments out of share premium in order to redeem company's own shares not 'payment out of capital' under Companies Law (2007 Revision), s.37(5)(b)—company therefore not required to be solvent prior to making such payments (as required by s.37(6)(a))—s.34 strongly indicates that such payments not to be considered as "out of capital," and no express wording to contrary in s.37

Court of Appeal **Cause No: CICA 24/2014**
Martin, Field and Moses JAA
November 20th 2015

Legislation referred to

Ss 34 and 37 of the Companies Law (2007 R)

Mr P McMaster QC and Mr J Snead for the Appellant
Mr P Smith and Mr B Hobden for the Respondent

Facts:

DD Growth Premium 2X Fund (In Official Liquidation) (the 'Appellant') was incorporated in the Cayman Islands on 2nd February 2007 as an exempted company which set out to carry on business as a private investment fund. On 29th May 2009, the Appellant was put into official liquidation. RMF Market Neutral Strategies (Master) Limited (RMF) was incorporated in the Cayman Islands on 12th March 2001 and operates as a fund of hedge funds. RMF held redeemable shares in the Appellant.

The Appellant contacted RMF and demanded repayment of particular redemption proceeds paid to RMF. RMF commenced proceedings by way of originating summons (dated February 21st 2011) which sought a declaration that it was not required to repay such funds to the Appellant. The issue came before Smellie CJ in the Grand Court from 24th -26th September 2014 and judgment was handed down on 17th November 2014. The Appellant subsequently appealed against the judgment of Smellie CJ.
This case concerned a complex issue of statutory construction, namely whether a payment by a company out of share premium to redeem an investor's redeemable shares constituted a payment out of 'capital' for the purposes of s.37(6)(a) Companies Law (2007 Revision).

S.37(6)(a) states:

'A payment out of capital by a company for the redemption or purchase of its own shares is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary course of business.'

Further, Ss.37(5)(a) and (b) state:

'(a) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if so authorised by its articles of association, make a payment in respect of the redemption or purchase of its own shares otherwise than out of its profits or the proceeds of a fresh issue of shares.

(b) References in subsections (6) to (9) to payment out of capital are, subject to paragraph (f), references to any payment so made, whether or not it would be regarded apart from this subsection as a payment out of capital.'

Grand Court Decision

The primary argument made by the Appellants in the Grand Court was that the redemption proceeds paid to RMF should be clawed back under s.37(6)(a) because they constituted payments out of capital as they were paid out of the share premium account when the Appellant was insolvent. Smellie CJ disagreed with this reasoning.

The Chief Justice argued that if companies were to treat all redemptions of shares as payments out of capital that would result in unintended consequences because in the event of insolvency any redemption proceeds paid would be subject to claw back. Smellie CJ reasoned that the power of the fund to suspend redemptions offered sufficient protection.
The Chief Justice then considered the law relating to payments from the share premium account in more detail. This is substantially covered by s.34 which states:

'(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the value of the premiums on those shares shall be transferred to an account called 'the share premium account'. Where a company issues shares without nominal or par value, the consideration received shall be paid up share capital of the company.

(2) The share premium account may be applied by the company subject to the provisions, if any, of its memorandum or articles of association in such manner as the company may, from time to time, determine including, but without limitation—

(a) paying distributions or dividends to members;
(b) paying up unissued shares of the company to be issued to members as fully paid bonus shares;
(c) any manner provided in section 37;
(d) writing off the preliminary expenses of the company;
(e) writing off the expenses of, or the commission paid or discount

allowed on, any issue of shares or debentures of the company; and

(f) providing for the premium payable on redemption or purchase of any shares or debentures of the company: Provided that no distribution or dividend may be paid to members out of the share premium account unless, immediately following the date on which the distribution or dividend is proposed to be paid, the company shall be able to pay its debts as they fall due in the ordinary course of business; and the company and any director or manager thereof who knowingly and willfully authorises or permits any distribution or dividend to be paid in contravention of the foregoing provision is guilty of an offence and liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years.'

Smellie CJ noted that under s.34(1), shares with a nominal value were considered part of a company's capital and did not form part of the share premium account. Therefore, by analogy Smellie CJ reasoned that as a general rule, the share premium account did not constitute part of a company's capital.

The Chief Justice asserted that s.34(2) supported this position for two reasons:

1. Under s.34(2)(f), the share premium account could be used to cover payments due on redemption proceeds (amongst other things);

2. The only sub-category of payment/expense in s.34(2) which was subject to a solvency requirement was the payment of dividends or distributions under s.34(2)(a). On that basis, it was reasoned that the other sub-categories of payment/expense in s.34(2) were not subject to a solvency requirement.

Smellie CJ concluded therefore that the share premium did not constitute 'capital' and that as a result, payments made out of the share premium account to cover the payment of redemption requests did not come within the ambit of the prohibition on the use of 'capital' for the payment of redemption proceeds under s.37(6)(a).

Furthermore, Smellie CJ argued that such a position was supported by later amendments to s.34 which expressly stated that the usage of

share premium for the purposes of payment of redemption proceeds did not constitute a usage of capital. Hansard reports relating to later amendments to the Companies Law (2007 Revision) were cited in support of this position.

Held (order as follows)

(i) The Chief Justice had been wrong to use amendments to the Companies Law subsequent to the 2007 revision and to consult Hansard as a tool for aiding in the interpretation of the law. The use of Hansard was misconceived because it concerned legislation which sought to amend the Companies Law after the 2007 Revsion. The usage of Hansard was also inappropriate as the Chief Justice had sought it out on his own volition after the close of submissions.

(ii) Nevertheless, the Chief Justice's analysis of s. 34 was substantively correct. As s.34(1) provided that shares with a nominal value were considered part of a company's capital, by way of analogy, the share premium account did not form part of the capital of a company. Great importance was to be placed on the fact that under s.34(2)(f), the share premium account could be used to cover payments due on redemption proceeds (amongst other things). The language used ('providing for') in s.34(2)(f) gave the provision a broad application beyond simply making an accounting provision for the payment in future but also the actual payment out of the share premium account. Furthermore, the fact that only the payment of dividends or distributions under s.34(2)(a) were subject to the solvency demonstrated the following:

'Thus, s.34(2) strongly suggests that it was not the legislative intention that payments by a company out of share premium in respect of the redemption or purchase of its own shares were to be swept into the extended definition of capital contained in s.37(5)(b) and thereby made subject to the solvency requirement in s.37(6)(a).'

(iii) It was not accepted (as argued by Counsel for the Appellant) that if payments from the share premium

account for the payment of redemption proceeds did not constitute a payment from 'capital', due to s.37(5), it would be an unworkable situation because there would be nothing to subtract from the total of available profits and the proceeds of any fresh issue of shares. Not only would this be inconsistent with the above- favoured construction of s.34 (supported by Ss 37(3) (e) and (f)), but there was, further, insufficient legislative intention to demonstrate that the intended effect of s.37(5)(b) was to characterise payments made out of share premium to cover redemption payments as being out of 'capital'.

(iv) Accordingly, payments out of a company's share premium account in relation to redemption requests for redeemable shares did not amount to payments 'out of capital' for the purposes of s.37(5)(b) Companies Law (2007 Revision). Therefore, the solvency requirement (specified in s.37(6)(a)) did not apply. This position was strengthened by s.34 which provided that payments out of a company's share premium account did not constitute payments of capital. In particular, the fact that s.34(1) specified that shares without nominal value were to be treated as capital indicated that, generally speaking, share premium should not be treated as capital. Furthermore, s.34(2)(f) expressly provided that share premium (but not capital) could be used to satisfy redemption requests in relation to redeemable shares. Ultimately, the extent of the solvency requirements set out in s.34(2) only required a company to be solvent when making payments out of the share premium account in scenarios relating to the payment of distributions or dividends.

(v) S.37(5)(c) did not shed any light on the issue of whether payments out of the share premium account would indeed by characterised as being sourced from capital because it solely concerned payments out of capital.

(vi) It was noted that it was common commercial practice to issue redeemable shares in many Cayman Islands open-ended investment companies and this had been kept in

mind when interpreting ss.34 and s.37. This, however, had led the Court below to incorrectly opine that investors in Cayman Islands funds would not have an expectation that they would always be able to submit redemption requests and receive the redemption proceeds when the relevant fund suffered financial difficulties due to certain mechanisms such as the ability of the fund's managers to suspend redemptions.

EB

CONTRACT LAW

Dr Stephen Gay v Mr. Marlon Collins

Loan – duress – presumption of advancement

Grand Court **Cause No: G0086/2014**
Panton J
September 7th and 9th 2015

Case referred to

Seldon v Davidson [1968] 1 WLR 1083

Mr C Flanagan for the Plaintiff
Mr D Brady for the Defendant

Facts:

The Plaintiff and the Defendant were friends, and shared the Plaintiff's apartment. The Defendant did not pay the Plaintiff in respect of this arrangement. The Defendant moved out of the apartment and the Plaintiff lent the Defendant CI$130,983.69 during the period April 2005-May 2012. A document signed by both parties on 12th May 2012 reflected the nature of the oral agreement between the parties, and contained a term which stated that monthly repayments would commence on 1st August 2012, and continue until the outstanding amount was repaid. The Defendant failed to honour the terms of the agreement with the result that the Plaintiff made a formal demand for repayment on 14th May 2014. Proceedings were commenced for recovery of the debt on 5th June 2014 in which the Plaintiff claimed the sum of CI$130,983.69, pre-judgment interest, post-judgment interest and costs. The Defendant argued that he had signed the agreement under duress and without taking legal advice. The Defendant further argued that he had advanced CI$33,000 to the Plaintiff in an effort to help him when he was experiencing financial difficulties; this money was said to be given over in anticipation of a loan that did not materialise. The sums that the Defendant received from the Plaintiff were, according to the Defendant, 'part of the expression of brotherhood that existed between them.' Moreover, the Defendant argued that he had never given the Plaintiff any assurance that he would repay the sums of money and that there was no intention to enter into legal relations. The Defendant accepted that he had received the monies, but stated that they were not given as loans. He argued that he had signed the document out of frustration and anger with the Plaintiff, and felt that the Plaintiff had abused him.

Held (finding for the Plaintiff)

(i) The burden of proof in all the above issues lies with the Defendant.

(ii) The Defendant was required to demonstrate that he was under duress in order to negate the effect of the document.

(iii) *Seldon v Davidson* confirms that where money has passed there is *prima facie* an obligation to repay the money, in the absence of the presumption of advancement.

(iv) Duress involves a degree of compulsion and fear exerted on a person, thereby causing that person to act in a manner in which he would not have otherwise done. There is required to be a fear of personal suffering, either actual or threatened. The person causing the suffering or fear must have acted illegally. This was not the case here. The Defendant was an accountant of 18 years' standing who had signed a document without protest. There was nothing to invalidate the document.

(v) The Defendant was required to honour his obligation.

MT

CRIMINAL PROCEDURE

In The Matter of an Application for a Variation of a Restraint Order Pursuant to Section 46 of the Proceeds of Crime Law (2014)
In The Matter of Brian De Wit and Others

Proceeds of Crime Law 2014 – restraint order– requirements and procedures for applying for a restraint order – variation of restraint order - test to be applied for grant and continuation of restrain order.

Grand Court **Cause No: POCL 8 OF 2014**
Williams J
June 8th 2015

Legislation referred to

Proceeds of Crime Law (2014R)

Cases referred to

Compton v CPS [2002] EWCA Civ. 1720
Windsor and others v R [2011] EWCA Crim 143
Re AJ and DJ (unreported CA, 9th December 1992)
Jennings v CPS [2005] 4 All ER 391
Ghani v Jones [1969] 3 All ER 1700
Ministry of National Defence, Republic of China v Wang and others (G276/13 unreported, 13th June 2014)
Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd (1999) TLR 762
Director of the (Admin) Assets Recovery Agency v Singh [2004] EWHC 2335

Authoritative works referred to

Trevor Millington and Mark Willians, Proceeds of Crime – Law and Practice of Restraint, Confiscation, Condemnation and Forfeiture, 2nd Edition

Mr N Dixey & Mr C. Flanagan for the Applicant
Ms T Salako, Crown Counsel for the Director of Public Prosecutions

Facts:

On the 17th October 2014, Quin J granted *ex parte* a restraint order pursuant to s.46 of the Proceeds of Crime Law 2014 in relation to a number of named individuals including the applicant. The order contained details of a number of accounts, but did not, at the time of the original grant, detail the account which is

the subject matter of this variation application, namely an account held by the Applicant at RBC Dominion Securities Global Ltd. On 13th January 2015, Quin J renewed the restraint order, this time specifically restraining the Applicant's relevant account with RBC Dominion Securities Global Ltd.

At the hearing on the 17th October, Quin J considered the supporting affidavit sworn on the 17th October 2014. The affidavit exhibited the unsealed indictment in the US District Court Eastern District of New York. The indictment included an allegation against the Applicant of conspiracy to commit securities fraud and money laundering. The content of the affidavit in support of the restraint order was primarily a reproduction of the content of the indictment.

The Office of the DPP had undertaken to serve each Defendant with a copy of the original *ex parte* restraining order and supporting affidavit within seven days of the order being made, however that order was not served on the Applicant. The Applicant became aware of the order when he provided RBC Cayman ('the bank') with wire instructions for the funds in the RBC account to be sent to his bank in Canada as the Applicant and his wife were relocating back to Canada. On the 30th December 2014, the bank notified the Applicant that it had received a restraining order against the Applicant's account and that this meant that the funds could not be wired out. A copy of the restraining order was provided to the Applicant by the Bank on 6th January 2015.

At the hearing of the application to renew the restraint order on the 13th January 2015, Quin J read the affidavit of an officer in the case sworn on the 7th January 2015, which included at paragraph 12(b) an allegation that the Applicant had attempted to liquidate the assets of the RBC account by transferring them to a bank account in Panama City, Panama. It was later conceded by Crown Counsel that the officer had been wrong to state this in his affidavit and that it may have created an incorrect impression in Quin J's mind that the Applicant intended to dissipate the funds to Panama rather than to Canada where he was now resident. The officer's affidavit also wrongly indicated that the Applicant had been given notice of the *inter partes* renewal hearing.

What was not before Quin J at the renewal hearing was the judgment of Benjamin CJ, sitting in the Supreme Court of Belize, dated 10th November 2014, discharging a restraint order made by him on the 24th September 2014. The restraint order had been obtained by the Belize Financial Investigation Unit following a request by the US Department of Justice under the Mutual Legal Assistance and Cooperation Act in Belize. The proceedings in Belize had been grounded on the same US indictment that grounded the investigation and application for a restraint order in these proceedings in the Cayman Court. The Defendants in the Belize proceedings were also the Defendants in the proceedings before the Cayman Court. Crown Counsel informed the Court that she had only become aware of the Belize judgment when she received the

Affidavit of the Applicant sworn on the 20th May 2015 in these proceedings. Crown Counsel conceded that if she had been aware of the Belize Judgment it would have been provided by her to Quin J '*as that is the Crown's obligation.*'

On the 13th January, Quin J renewed the restraint order with an expiry date of 14th April 2015. The Order was renewed by Quin J on the 10th April 2015 with an expiry date of the 28th April 2015.

On the 28th April 2015, an application for further renewal came before Mettyear J (actg). The Order was renewed with an expiry date of 28th May 2015. The affidavit of the officer in the case, sworn 28th April 2015, in support of the renewal of the restraint order, contained details of the Cayman Islands investigation by reference back to the US indictment. Crown Counsel did not seek to make any detailed submissions in relation to the paragraph referring to the Applicant and conceded that the Crown's application for renewal was primarily based on the information extracted from the US indictment and replicated in the various affidavits.

In the present proceedings, the Applicants sought a limited variation of the restraint order extended by Mettyear J (actg) on the 28th April, to have the prohibition in respect of the Applicant's RBC account lifted. In reality, as recognized by Williams J, this was an application to discharge the part of the order which related to the Applicant. The Applicant's grounds were: (a) that there was no evidence to justify the granting/maintaining of the order; (b) that there was material non-disclosure and procedural flaws in obtaining the order; and (c) that there had been undue delay in charging the Applicant with any offences.

The Crown, on behalf of the Financial Crimes Unit, opposed the application to vary the restraint order and sought a three month renewal of the order.

Held (discharging the part of the order relating to the Applicant, and, in the absence of any application by any of the parties to discharge or vary the parts of the order which had not been varied or discharged, granting a limited extension of the order to 4pm on the 6th July 2015)

(i) The test for obtaining and renewing a Restraint Order under the Proceeds of Crime Law is the same as on an application for a civil freezing order, namely that a good arguable case has been established that the Defendant has benefited from criminal conduct and that he has an interest in the assets in relation to which the application is made. (*Compton v CPS* applied.)

(ii) In the absence of rules in the Cayman Islands setting out the procedures for applying for restraint orders under the Proceeds of Crime Law, and the absence of statutory requirements relating to the content of any affidavit in support of such an application, guidance can be derived from both Part 59.1 of the Criminal Procedure Rules England and Wales and the statutory requirements in s.39(2) of the Money-Laundering and Terrorism (Prevention) Act 2008 which had underpinned the approach of Benjamin CJ in the Supreme Court of Belize judgment considered in this application. The type of details one might expect the Crown to set out in a supporting affidavit when seeking to satisfy the Court that one of the necessary preconditions of making a restraint order have been met include, but are not limited to:

(a) details of the crime for which a person is being investigated and the grounds for believing that he has committed the offence;

(b) a description of the property in respect of which the order is sought;

(c) the name and address of the person who is believed to be in possession of the property;

(d) the grounds for the belief that the property is tainted property in relation to the offence or that the accused derived a benefit directly or indirectly from the commission of the offence;

(e) the grounds for the belief that a forfeiture order or a pecuniary penalty order may be or is likely to be made in respect of the property;

(f) detail regarding any risk of dissipation of assets (applying *Re AJ and DJ)* whilst accepting that there is no requirement set out in the Proceeds of Crime Law requiring the Applicant for a restraint order to establish as a condition precedent to obtaining an order that there exists a risk of dissipation of assets.

(iii) There was no cogent evidence before the Court in support of the statements in the affidavits that there were reasonable grounds to believe that the Applicant's '*association, behaviour and admissions*' which '*identify the companies as being used as a vehicle to launder the proceeds of crime*' or that the Applicant has benefitted from criminal conduct. The disclosed material and evidence presented to the Court arising out of the six

months' Cayman investigation added little to the content of the US indictment such that the Court was unable to determine on its own whether the conclusions of the Crown were cogent. The evidence and material before the Court was not sufficient to satisfy the Court that a good arguable case had been established by the Crown and that there was reasonable cause to believe that the Defendant had benefitted from criminal conduct.

(iv) The greater the period of time since making of the initial restraint order, the greater the expectation of the Court that there should be more evidence forthcoming independent of repeating the content of the US Indictment. A restraint order is a Draconian order as it seriously interferes with the Applicant's rights to deal with his property. The purpose of s.46(4) of the Proceeds of Crime Law is to ensure that investigating officers pursue any investigation diligently. Suspicion is what leads to a restraint order in the first place, but it should not be a ground for extending it beyond a period that may be viewed as reasonable without charges being laid. (Applying Ghani v Jones.) The Crown should provide the Court with a valid reason as to why the investigation has not led to any charges being brought to date and with sufficient information to assist the Court to determine whether the investigation is being conducted or progressed in a diligent fashion.

(v) The Crown is required to give full and frank disclosure of all material facts. This includes any weaknesses in its case of which it is aware and any information that might be favourable to a Defendant. A serious failure by the Crown to comply with this duty may result in an order being discharged. That being said, the public interest in restraint and confiscation of the proceeds of crime mean that the Court should be careful before discharging a restraint order just because there has been a failure to give full and frank disclosure. If a hearing takes place in the absence of the Defendant, it is good practice for the Crown to ensure a full note is taken and served on the Defendant together with the order and the supporting evidence (applying *Interoute*

Telecommunications (UK) Ltd v Fashion Gossip Ltd; Director of the Assets Recovery Agency v Singh).

DBR

Edin McArthur Myles v The Queen

Sentencing – alternative sentencing law (2008 R) section 4(C)(vii) – immediate custodial sentence - abuse of a position of trust, obtaining a pecuniary advantage by deception; obtaining property by deception

Court of Appeal **CACR 021/2014; IND 70/12**
Martin Field and Moses JAA
November 3rd 2015

Legislation referred to

Alternative Sentencing Law (2008 R)

Cases referred to

R v Barrick (1985) 81 Cr. App. R. 78
R v Scott & R v Fyne [2007] CILR 175

Michael Duck QC & Clyde Allen for the Appellant
Patrick Moran, Deputy DPP for the Director of Public Prosecutions

Facts:

The Appellant was convicted of four counts of obtaining a pecuniary advantage by deception and three counts of obtaining property by deception, receiving six months imprisonment for each count to run concurrently and to pay compensation to three victims.

The Appellant was an insurance agent for Derek Bogle Insurance, Deputy Director of the Board of the National Housing Development Trust (NDHT) and a member of the NDHT's Loans Committee Board. The Appellant had signed an agreement to abide by a code of conduct which included a provision that he would not use his office for personal gain.
The Appellant obtained details of loan applicants whom he contacted, dishonestly and falsely representing that they had to obtain life insurance immediately, rather than waiting to see if their applications were successful. The Appellant then sold three such applicants life insurance from which he was to, and in one instance did, receive commission.

The trial judge was required under the Alternative Sentencing Law (2008 Revision) s.4(C)(vii) to consider if there had been an abuse of a position of trust in considering sentence. The trial judge considered that there had been, despite the Appellant neither being employed by the NHDT nor Government. This was due to the Appellant having obligations to the public which involved a high

degree of public trust. Further, that the Appellant's entitlement to commissions was dependent upon applications being successful. Thus a bias, or the appearance of bias was created leading to an egregious breach of the code of conduct signed by the Appellant for whom there was also a definite conflict of interest.

A custodial sentence was passed on the Appellant on the basis of the need for general deterrence given the proliferation of Government committees, boards and tribunals populated by members of the community, irrespective of the Appellant's age and previous good character.

The Appellant appealed against his custodial sentence on the basis that: a) the case was exceptional (*R v Barrick*; *R v Scott & R v Fyne*); b) given the Appellant's previous good character; c) the low sums paid by the victims; d) that there had been no gain given the policies were cancelled; e) the Appellant compensated the victims in full; and that f) the Appellant subsequently lost his license to practice in the insurance industry and had lost his reputation in the community.

Held (appeal dismissed)

> The sentence was neither wrong in principle, nor manifestly excessive. The trial judge was entitled to pass an immediate custodial sentence given that the Appellant was in serious breach of a public trust, rightly described by the trial judge as an 'egregious breach'.

MCR

Raziel Omar Jeffers v The Queen

Murder – judicial summing up – role of the Judge in summing up and directing the jury

Court of Appeal **Crim App No. 6 of 2014; IND 60/10**
Sir George Newman, JA
July 24th 2015

Mr Brian O'Neill QC instructed by Fiona Robertson of Samson & McGrath for the Appellant
Mr Andrew Radcliffe QC instructed by Tricia Hutchinson, Deputy DPP for the Respondent

Facts:

The Appellant was convicted by jury of the murder of the victim, Damion Ming, on 25th March 2010. There was evidence that the assailant left the scene on a bicycle. There was also evidence that two men were at the scene and had left in a vehicle. The two men, it was argued, may either have been the sole principals to the crime, or were accessories to the crime perpetrated by the Appellant. The victim had been shot several times, two shots being the primary causes of death. There was some dispute as to the nature of the events that unfolded at the time of the killing with respect to the order of the shots fired.

The Crown alleged that the Appellant had a motive to kill the victim in that he believed that the victim had entered a relationship with his ex-partner, Meagan Martinez ('MM'). MM gave evidence that the Appellant had confessed to her that he had committed the offence, such evidence corresponding to the sequence of events (and the shots fired) as was supported by the testimony of a pathologist. Furthermore, the detail of the evidence provided by MM was such that it was argued (as she had not being present at the scene) that it could only have been provided to her by the killer. These details included the type of weapon that had been used, the use of a bicycle, and the sequence of shots fired. The Crown argued that this supported the veracity of MM's claim that the Appellant had confessed to her. The defence countered that the information may have been relayed to her by another party who was present at the address at the time when the murder took place. Telephone cell site data evidence had been used which placed the Appellant in the vicinity of the killing at the time that it took place. The Appellant contended that he was nearby, but was not the assailant and his alternative account of his movements and activity was also supported by the cell site data.

The Appellant appealed against his murder conviction on the following grounds:

1. The trial judge failed to give a balanced summing up;
2. The trial judge misdirected the jury on a number of matters;
3. The judge erred in speculating on important matters and thereby invited the jury to reach conclusions based on speculation;
4. That there had been a material non-disclosure by the Crown.

Counsel for the Appellant contended that, despite the absence of direct evidence as to whether the first two shots fired struck the victim, causing him to take cover under a boat (where his body was later discovered), the trial judge deliberately summed up the evidence in such a way as to bolster the apparent accuracy and reliability of MM's evidence and therefore unduly strengthened the Crown's case against the Appellant. Further, that the trial judge played down the evidence of two other possible suspects in the vicinity and undermined a witness who testified to their presence, by drawing attention to inconsistencies between the witness's written statement, and oral testimony, and referring to him as being 'dogmatic'. Further, that the trial judge offered a factual alternative route to conviction by speculating that the two alternative suspects may in fact have been the accomplices of the Appellant.

It was further argued that the trial judge's language, in stating that the jury 'may' reach a different verdict should the evidence not lead them to a position where they were sure of the Appellant's guilt, amounted to a misdirection on the burden of proof on the grounds that the jury should have been directed in clear terms that if they found that the evidence did not lead them to be sure of the Appellant's guilt, then they 'must' (rather than 'may') find him 'not-guilty'. (As opposed to merely stating they 'may' reach a 'different verdict').

Counsel for the Appellant finally argued that the judge's summing up gave a degree of attention to the prosecution's case which far outweighed that given to the defence's case.

The court noted as follows with respect to the role of the trial judge:

'Judges in a criminal case are not mere ciphers. They are not bound to follow and recite the emphasis or the format of the cases presented by respective counsel. It is the judge's obligation to draw together all the evidence which has been advanced in the case. This is a vital function. Juries cannot be expected to have full recall from the days over which evidence has been given, nor, where they have recalled it can it be assumed that they will be able to draw it together, examine it and reflect on it coherently without assistance. The judge's drawing together of the case must be balanced. To be balanced it must take account of all the evidence in the case including any account which the defendant himself has given. The judge must not misrepresent the evidence. But a judge's skill in being able to articulate a case, sometimes perhaps with arguably greater clarity

than either counsel has achieved, will not be unfair unless it is not supported by the evidence of the case. The judge is entitled to present all the evidence in accordance with such logic and coherence as he believes it can bear so long as the jury understand that they are the judges of fact.'

Held (applying the foregoing principles)

The judge did not determine the issue for the jury, but merely drew together admissible evidence relevant to the question before the jury which did not amount to speculation. When drawing attention to the inconsistencies between the written statement and oral testimony of the witnesses as to the presence of two other suspects, the trial judge also drew attention to inconsistencies in the Crown's primary witness, MM. The judge's reference to a witness being 'dogmatic' simply reflected the atmosphere of a particular moment that prevailed at trial, and that, in any event, a witness could be dogmatically right as well as dogmatically wrong.

The judge was entitled to make clear the different ways in which the evidence of the two other suspects could be interpreted in the light of other evidence; either as acting independently of the Appellant, or being his accomplices. He had not therefore advanced a new way of interpreting factual evidence, but had articulated obvious ways in which the evidence could be viewed and drew attention to ambiguities surrounding it.

When the trial judge referred to the fact that the jury 'may reach a different verdict', the judge was not giving a direction on the burden and standard of proof, which he had already done, but was rather part of a lengthy direction in relation to circumstantial evidence.

That the emphasis in summing up on the prosecution's case was inevitable in such a case whereby the defence was denying that the Appellant was at the scene at the time of the offence. The trial judge had fairly presented the competing contentions of both the prosecution and the defence to the jury.

The claim of non-disclosure constituted less than a makeweight in the argument and was not borne out.

The Queen v Devon Jermaine Anglin

Murder – judge alone trial – identification evidence

Grand Court **IND 0070/2010**
Quin J
November 23rd – 27th and 30th and 4th and 7th - 10th December 2015

Legislation referred to

Ss 181 and 194 Penal Code (2007 R)
S. 15(1) and (5) Firearms Law (2008 R)
S. 129 Criminal Procedure Code (2014 R)
S. 149 Police Law 2010)

Cases referred to

R v Turnbull K Richards v R [2001] CILR 496
R v Dave Kennedy Whittaker (2006) Cr App R
R v Thompson [1977] NI 74
Randy Martin v R (2010) Crim App R
R v Thain [1985] NI 457

Mr Andrew Radcliffe QC and Ms Elizabeth Lees, Senior Crown Counsel on behalf of the DPP
Mr David Fisher QC, and Ms Lucy Organ, Samson & McGrath for the defence.

Facts:

On Monday February 15th 2010 at 8.00pm the four year old victim, Jeremiah Barnes, was murdered by a gunman at Hell Gas Station, West Bay, whilst in the backseat of a motor vehicle which had just refueled at the gas station and was being driven by his father, Andy Barnes. It was common ground that the intended victim of the shooting was Andy Barnes, who was occupying the front driver's seat of the vehicle. The fatal bullet had passed through the open driver's window of the vehicle, missing Andy Barnes, and traveled through the driver's headrest striking the victim in the head, killing him immediately. A second bullet hit the right front passenger door as the car being driven by Andy Barnes sped away from the gas station. After driving away from the gas station Andy, and his wife, Dorlisa Barnes who was sitting in the passenger seat, became aware that Jeremiah had been fatally injured in the shooting. Thereupon Andy Barnes drove to West Bay police station and informed the police that his son had been murdered by the Defendant.

Andy and Dorlisa Barnes had grown up with the Defendant and knew him well. Indeed, Andy Barnes and the Defendant had formerly been good friends growing up, but their friendship had turned sour after they each became involved in rival West Bay gangs. Their relationship deteriorated to one of enmity following the murder in September 2009 of Carlo Webster, a good friend of Andy Barnes, which Barnes attributed to the Defendant.

The indictment charged the Defendant with three counts:

1. Murder: contrary to S 181 of the Penal Code (2007R);
2. Attempted Murder contrary to S 194 of the Penal Code (2007R);
3. Possession of an unlicenced firearm contrary to S 15 (1) and (5) of the Firearms Law (2008R).

Having heard the evidence, Quin J, sitting without a jury, accepted that the case against the Defendant depended wholly on the eye witness identification of Andy and Dorlissa Barnes, the victim's parents. The evidence of a third eye witness, a petrol pump attendant, was inconclusive, with him stating that the gunman's mask obscured his face, leaving him unable to even be sure of the murderer's gender. Whilst there existed other evidence which was capable of corroborating the parents' eye witness testimonies, for the reasons set out below, such other evidence was found to be unsafe and unreliable.

Held (not guilty of all counts)

(i) In a trial dependent wholly or mainly on eye witness identification, challenged by the defence, it was necessary for the jury (or judge in a judge alone trial) to be reminded of the need for special caution before accepting such evidence with a need for careful scrutiny of such evidence, conscious of its inherent weakness and fallibility [applying Lord Widgery's guidelines in *R v Turnbull* (1977) applied in *R v Devon Anglin* (2014)]. It was also important to be mindful of the fact that a mistaken witness can be a convincing witness and that more than one witness may be mistaken. It was also to be remembered that mistaken identification can occur even of close relatives or friends;

(ii) Andy Barnes' evidence capable of supporting his eye witness identification was unreliable and would be rejected for the following reasons:

His evidence that he had seen the Defendant in the motor vehicle from which the gunman alighted was inconsistent with subsequent statements and would be rejected.

Andy Barne's evidence describing the Defendant's clothing was incorrect and conflicted with the clothing of the gunman depicted on CCTV footage at the gas station. It also conflicted with the description supplied by Dorlissa Barnes and the petrol pump attendant. The argument of the defence that Barnes had seen the Defendant earlier in the day and had clothed him in the clothes he had previously been wearing to implicate him, was a forceful one. It was accepted that Barnes believed that the Defendant was going to kill him before he could exact revenge for the killing of his friend, Carlo Webster. Barnes was by his own admission a former drug dealer and he conceded that the Defendant may have feared for his own safety from Barnes. Barnes also accepted that his (Barnes') history meant that he was a person who was 'at risk of violence' and had enemies (other than the Defendant) who might wish him harm.

Barnes's evidence that he had seen the Defendant's face despite the fact, confirmed by the CCTV footage, that the gunman had been wearing a mask or 2 bandanas, was unreliable. This also conflicted with the evidence of the third eye witness, the petrol pump attendant, who was unable to identify any relevant features of the gunman. Furthermore, any opportunity that Barnes had to observe the gunman (like that of Dorlissa) was necessarily very fleeting.

(iii) Dorlissa Barnes' evidence capable of supporting her eye witness identification that she had clearly seen the gunman's (uncovered) face and identified it as that of the Defendant, was inconsistent with the CCTV footage and was unreliable and would be rejected.

(iv) The potentially strong corroborating value of gun-shot residue ('GSR') evidence relating to gun-shot residue that had been found on the Defendant and in the Honda car used by the gunman was unreliable as there was a risk that innocent GSR contamination had taken place either at the police station custody area or by reason of the fact that the police officers who arrested the Defendant were armed officers. This risk was confirmed by both the GSR experts for the Crown and the defence who had stated: 'overall there is a significant chance

that some or all of the GSR on Devon Anglin's clothing and in the Honda...is not from the shooting on the 15th February 2010'.

(v) On the totality of all the evidence, the eye witness testimonies of Andy and Dorlissa Barnes were unreliable, inconsistent and unsafe to be relied upon. The case presented by the Crown had not been proved beyond all reasonable doubt.

(vi) For these reasons, the Defendant was to be acquitted of all three counts on the Indictment.

MD

The Queen v James Romano Whittaker

Robbery – judge alone trial – identification evidence

Grand Court **IND 0105/2014**
Quin J
June 8th 9th 10th and 16th 2015

Legislation referred to

S.129 Criminal Procedure Code (2014 R)
S. 242(1) Penal Code (2013 R)

Case referred to

R v Turnbull [1977] Q.B. 224

Mrs Tanya Lobban-Jackson, Senior Crown Counsel on behalf of DPP.
Mr Crister Brady of BRADY, Attorneys at Law for the defence.

Facts:

The Defendant elected to be tried by judge alone pursuant to s.129 Criminal Procedure Code of the Cayman Islands. He pleaded not guilty to a charge of robbery contrary to s.242(1) Penal Code (2013 Revision) with respect to the theft of a leather handbag and its contents, and an iPhone 5S.
The robbery occurred in the early hours of Saturday 22nd November 2014. Two witnesses, JA and MP, identified the Defendant both by photograph (at different times with the Defendant's picture being differently numbered in each) and in separate identification parades (the composition and use of which the Defendant objected to). At the time of the robbery, the Defendant was subject to an

Electronic Monitoring Device Tag ('EMDT') and a curfew. At around the time of the robbery there had been an EMDT violation. The Defendant put forward two different accounts as to how this had occurred: that he had removed the EMDT, and that he had placed tin foil around it (which interferes with the GPS monitoring system).

The Defendant asserted that he was not the assailant, but gave two differing accounts as to his whereabouts during the robbery. There were no witnesses to support his alibi.

The defence contended that the identification evidence did not satisfy the guidelines in *R v Turnbull* (1977) in that there were issues with, and discrepancies in, the evidence of JA and MP. These included that: a) the witnesses had not stated that the Defendant had a scar on his nose; b) the witnesses gave different estimations of the duration of the robbery, ranging from 2 to 3 minutes to fifteen minutes; c) the Defendant had objected to the identification parade containing Jamaicans; d) the Defendant had been required to wear a blue shirt and the assailant had worn a blue hoodie; and e) the area where the offence took place was dark, and that JA and MP's views were obscured by the hoodie.

Held (convicting the Defendant)

(i) The EMDT was not in operation at the time of the robbery in circumstances where the Defendant admitted to placing tin foil around it in the absence of a reasonable explanation as to why this had been done.

(ii) The Defendant's claims as to his whereabouts at the time of the robbery changed and were unsupported by any evidence.

(iii) The Defendant had been in breach of a curfew that by his own admission he had little regard for.

(iv) The scar on the Defendant's nose was not obvious; the trial judge himself could not see it when the Defendant was in the witness box.

(v) The Defendant had been evasive and generally unreliable in his testimony, whereas the witnesses JA and MA had been calm, unshaken and clear, and did not claim to be able to see the Defendant's face at times when they could not have done so. They had not sought to embellish the evidence. The discrepancies in JA's and MA's estimation of the duration of the

robbery was understandable, given the circumstances of a violent robbery with no ability to check and assess the time. JA and MA were witnesses of truth and that their evidence was reliable.

(vi) The evidence established the guilt of the Defendant beyond all reasonable doubt.

MCR

The Queen v Jeffrey Barnes

Rape – aggravated burglary – adverse pre-trial publicity - adequacy of jury directions

Court of Appeal **IND 87B/11**
Mottley, Morrison and Field JAA
July 21st and 22nd 2015

Legislation referred to

Article 3 Cayman Islands Bill of Rights
S. 7(1) Cayman Islands Constitution Order 2009
Order 77A rule 3(a) Grand Court Rules
Ss 78 and 244 Penal Code (2010 R)
S.148 Police Law (2010 R)

Cases referred to

Randall v The Queen [2002] UKPC 19
R v Emil Savundranayagan and Walker [1968] 3 ALL ER 439
R v Malik (1968) 52 Cr App R 140
R v Kray and Others (1969) 53 Cr App R 412
Attorney General v MGN Ltd [1997] 1 ALL ER 456
Montgomery v HM Advocate and Another [2003] 1 AC 641
Stuurman v HM Advocate (1980) JC 111
R v Abu Hamza [2007] QB 659
R v West [1996] 2 Cr App R 374
R v B [2006] EWCA Crim 2692
Abdulla v The UK (Application no 30971, June 30, 2015)
R v Ali [2011] 3 All ER 1071
R v O'Leary (1986) 82 Cr App R 341
R v Edmonds and Others [1963] 2 QB 142

Ms Cheryll Richards QC DPP and Ms Candia James for the Crown
Mr Michael Wood QC and Mr Nicholas Dixey, Nelsons, for the defence

Facts:

The Appellant had been originally charged on a single indictment dated January 2012 with seven counts of rape, attempted rape, aggravated burglary and abduction stemming from three separate incidents involving three separate complainants. In February and August 2012, counts 4-7 were severed from the original indictment, with the appellant ultimately pleading guilty to counts 5-7. This left counts 1-3 with which the present proceedings were concerned. The indictment was therefore left containing one count of aggravated burglary and two counts of rape, all of which the Appellant denied. The Appellant was convicted of all counts and in September 2013, he was sentenced to life imprisonment. In July 2015, the Court of Appeal granted the Appellant's application to appeal against these convictions. His appeal against sentence was set down to be dealt with separately. The present proceedings therefore concerned the Appellant's appeal against conviction only.

The grounds of appeal were as follows:

1. That by reason of pre-trial publicity adverse to the Appellant, the trial judge should have stayed the trial as an abuse of process of the court; alternatively that the trial judge's directions to the jury were insufficient to cure any prejudice against the Appellant caused by the pre-trial publicity to ensure that he received a fair trial;

2. That the trial judge had given inadequate directions to the jury in relation to the elements of the offence of aggravated burglary;

3. That the trial judge's directions to the jury relating to the effect of the Appellant's failure to answer questions put to him in his police interview were inadequate.

Ground 1 (the pre-trial publicity):

The first ground of appeal asserted that adverse pre-trial publicity had denied the Appellant the right to a fair trial. Counsel for the Appellant divided the matters complained of under this ground of appeal into three periods: a) pre and post arrest in 2011; b) following the Appellant's guilty plea to counts 5-7; and c) three weeks before the commencement of the Appellant's trial on the present indictment. In relation to all three periods, it was common ground that the

charges against the Appellant had generated a good deal of media attention both in the printed press and in the form of online and television news media coverage. It was also accepted that much of the media coverage, as well as the statements given by a senior RCIP investigating officer, were potentially prejudicial to the Appellant. Certain of the media coverage was also factually inaccurate in material respects.
Before the jury had been empanelled, counsel for the Appellant had made an application to the trial judge, Quin J, seeking that he make an order directed at the three media houses involved in circulating the adverse publicity for the immediate delivery up of all media reports relating to the Appellant. The trial judge made the requested order and all media houses concerned complied with the order within a few hours. Furthermore, the court had before it an agreed bundle of newspaper articles which the defence claimed contained material highly prejudicial to the Appellant. This material formed the basis of defence submissions made to the judge to stay the proceedings on the grounds of adverse pre-trial publicity.

Counsel for the Crown responded by noting that while some of the material posed a risk of prejudice, taking into account the length of time that had elapsed since much of the material had been published, the Appellant's right to a fair trial could be ensured by appropriate jury directions by the trial judge. Quin J, in a considered ruling, determined that, notwithstanding the adverse publicity, it would still be possible, with the assistance of counsel on both sides, for the Appellant to have a fair trial. It was in these circumstances that the matter proceeded to jury selection.

Before the jury was empanelled, Quin J had addressed all potential jurors with a caution regarding the media attention that had surrounded the case and the effect that such attention might have had on the ability of jury members to bring an independent mind to it. The trial judge concluded by inviting any potential jury members to make themselves known to him if they felt unable to comply with this essential requirement. Despite these cautions, the Appellant continued to argue that it was not possible for him to receive a fair trial in the circumstances of the case. Following the Appellant's rejection of the trial judge's invitation for him to consider the option of a trial by judge alone, the jury was empanelled. Before any evidence was given, the trial judge provided the jury with a further warning focusing upon the necessity of focusing: 'entirely on the evidence from the witness box and any exhibits or statements that are agreed between the Crown and the defence…'.

It was in these circumstances that the trial proceeded with the appellant ultimately being convicted of all three counts.

Held (rejecting the first ground of appeal)

(iv) A relevant consideration in ruling out any question of bias produced by the pre-trial publicity, as argued by the Crown, was the strength of the Crown's case: *R v Savundra* and *R v Malik*. In this regard, the DNA evidence which strongly supported the evidence of the complainant made the case for the prosecution 'so overwhelming that no jury could conceivably have returned any different verdict against the appellant.' Per *R v Savundra*.

Ground 2 (the judge's directions on aggravated burglary):

This ground of appeal asserted that the trial judge's direction on the ingredients of the offence of aggravated burglary was overly brief and 'wholly inadequate'. Counsel for the Crown accepted that Quin J's jury directions in this regard could have been more detailed, but it was argued that the conviction was safe since there was no issue on the facts as to either whether the offence had been made out or as to the intent of the Appellant (with the result that the knife that he had with him was an offensive weapon for the purposes of the offence).

Held (rejecting the second ground of appeal)

Quin J's directions might have been more expansive, particularly with respect to the ingredients of the offence of aggravated burglary and the definition of an offensive weapon. However, in light of the complainant's unchallenged evidence, according to which the offence was established, the jury would inevitably have come to the same conclusion had a fuller jury direction been given. The absence of a more comprehensive direction on these matters did not make the Appellant's conviction unsafe.

Ground 3 (the judge's directions on the effect of the Appellant's failure to answer questions put in his police interview):

When interviewed by police the Appellant did not answer any questions that were put to him, responding 'no comment' to each of them. He instead read out a short, prepared, statement denying the offences. He subsequently told the court that in adopting this approach he was following legal advice. A particular matter which the Appellant's initial silence was germane to was his subsequent attempt to rely on an alibi, which had not been raised at the time of the police interview. The Crown argued that the fact that no mention was initially made by the Appellant of any alibi was because it was false.

In relation to this matter, Quin J had directed the jury as follows:

fully alive to all of the relevant considerations arising from the authorities. The judge had accordingly not erred in refusing to stay the present proceedings on the grounds that a fair trial was not possible.

The alternative complaint within the first ground of appeal was that the judge's directions to the jury had been inadequate to cure the potential prejudice caused by the pre-trial publicity. In particular, the complaint focused upon the judge's failure to specifically warn jurors against carrying out independent internet research. Due to the absence of any 'fade factor' in relation to such material, this omission was argued to be particularly significant.

(iii) Accepting the force of the defence submission that the 'peculiar nature of internet material' (due to the absence of a 'fade factor') called for different considerations to those applicable to ordinary printed material. The question remained, however, whether, as a result of the judge's failure to address the issue of internet material specifically (which he should have done: *Abdulla Ali v The UK* and the guidance contained in the JSB Crown Court Bench Book 2010), the jury had departed from their duty to consider only the evidence presented in court and to disregard extraneous material.

The combined effect of Quin J's warnings to the jurors before and after the commencement of the trail and during the course of his summing up left the jury in no doubt that they were required to exclude all extraneous material from their consideration and to focus exclusively on the evidence given during the course of the trial in determining the question of the Appellant's guilt. It was noteworthy that before the jury had been empanelled, Quin J invited any potential juror who felt unable to 'bring an open and independent mind' to the case to speak with him. The purpose of doing so, as noted by the judge, was so that he could be 'absolutely certain that the integrity of the jury is not tarnished in anyway'.

In his summing up, Quin J having, cautioned that jurors were not to pay 'any attention to what you've read in the newspapers or what you may have heard on the radio or television' further emphasized the need for them to have regard only to: 'the evidence that has been presented to you by the Crown and by the defence…The facts and evidence presented to you in this court room are the sole items for your consideration'.

(i) Applying *Randall v R*: 'The right of a criminal Defendant to a fair trial is absolute… (It is a right to be afforded to) the guilty as well as to the innocent, for a Defendant is to be presumed innocent until proved to be otherwise in a fairly conducted trial.' To like effect, is s.7(1) of the Cayman Islands Constitution Order 2009.

(ii) On an application for a stay of proceedings on the ground that the effect of adverse pre-trial publicity has been such as to jeopardise the Defendant's right to a fair trial, it is for the trial judge to determine whether a fair trial will be possible in all the circumstances.

The test to be applied is whether the risk of prejudice is so grave that no direction by a trial judge, however careful, could cure it. In making this determination, the factors to be taken into account include: a) the length of time to have elapsed between the date of publication of the allegedly prejudicial material and the date of trial; b) the focusing effect which the trial process is likely to have on the jury: in other words, the discipline of listening to the evidence over a prolonged period and the 'drama' of the court room experience; c) the likely effect of any directions to be given by the judge. In making this determination, the trial judge is entitled to take into account his or her experience of the manner in which jurors normally perform their duties.

A fair sampling of the material before the court betrayed: 'a complete absence of editorial control on matters that plainly called for greater sensitivity and restraint on the part of the persons responsible for the publications involved.' It nevertheless fell to Quin J to determine whether by virtue of this fact, the Appellant's right to a fair trial was at risk.

Whilst accepting the defence argument that the unusually small size of the jury pool in the Cayman Islands meant that the potential reach and effect of the pre-trial material would have been greater in the present case than in larger societies, this argument was not conclusive in denying the judge the ability to neutralize the effects of the negative pre-trial publicity by way of giving appropriate jury directions.

Following a close review of the judge's ruling that a fair trial was possible notwithstanding the pre-trial existence of potentially prejudicial material, it was clear that Quin J had been

'Now you might think that an innocent man would give his response as soon as possible. You need to consider whether the case being put to the defendant was sufficiently strong to demand a response from him…But you also need to consider the defendant's reason for remaining silent. He told you that his attorney advised him that he should make no comment. The fact that a defendant has been advised to say nothing is an important consideration, but it is not necessarily an answer to the prosecution's argument. The choice as to whether to put forward an explanation as to his movements...at the time of the interview was his to make.'

Counsel for the defence argued that Quin J's comment that an innocent man might be expected to give his response as soon as possible 'ran wholly contrary to the principle that a suspect has a right to silence and is presumed innocent unless and until proven guilty'.

Counsel for the defence further objected to the judge's remarks regarding the strength of the Crown's case, on the grounds that the judge ought to have made it plain to the jury that at the stage in the investigation when the 'no comment' answers had been given by the Appellant, the strength of the case against him was quite weak. This was because at this time there was no DNA or identification evidence against the Appellant.

The Crown's response was that the defence had taken particular passages of the judge' directions out of context and when taken in their entirety they were balanced and unobjectionable. It was further asserted by the Crown that the jury would have been fully aware of the stage at which the police investigation had got to when the 'no comment' answers were given by the Appellant.

Held (rejecting the third ground of appeal)

(i) The Appellant had been properly cautioned at the time of the police interview that whilst he was not obliged to say anything, it might harm his defence should he fail to mention any fact subsequently relied upon by him in court (s.148 Police Law).

(ii) In relation to the stage that the investigation had reached when the Appellant failed to mention his (subsequent) alibi defence, the question whether any inference could be drawn from this failure, given his subsequent attempt to rely upon it, was one for the jury. Quin J's summing up on this point was consistent with the model direction set out in the relevant section of the Bench Book. Taken in their entirety, Quin J's directions were

balanced and unexceptional. His comment regarding what an innocent man might be expected to do: 'was simply an aspect of an even-handed reflection for the jury's benefit on what were the competing arguments on both sides'.

Appeal dismissed.

MD

Jude Roland Theobalds v The Queen

Appeal against conviction – appeal to Grand Court from decision of Summary Court – power to appeal conviction prior to sentencing.

Grand Court **SCA No: 0027/2015; Case No: 01672/2015**
Mettyear J (Actg)
November 2nd 2015

Legislation referred to

S. 41 (1)Penal Code (2013 R)
S.165(1) Criminal Procedure Code (2013 R)
S.166 Criminal Procedure Code (2013 R)

Mr J. Furniss for the Applicant
Mr K. Ferguson for the Crown/Respondent

Facts:

On the 19th June 2015, the Applicant was convicted, after trial in the Summary Court, of a burglary of a dwelling house and an associated offence which had taken place on the 29th December 2014.

Unusually, the Applicant sought to appeal his conviction to the Grand Court prior to being sentenced for the offences for which he was convicted. Sentencing at the Summary Court was adjourned pending the result of the appeal against conviction.

Whilst accepting that appeals against conviction are almost invariably heard after sentence has been imposed, Counsel for the Applicant argued that there were compelling reasons in this case for the appeal to be heard prior to sentence being imposed. The crux of those reasons were related to the fact that the

Applicant was at the time a client of the Drug Court and about to enter the fourth and final phase of the Drug Court programme at the time of conviction for the current burglary and related offence. The convictions resulted in the Applicant being suspended from the programme pending the outcome of this application. If things were to follow their normal course, for conviction of such a serious offence whilst in the Drug Court programme, the Applicant would likely be expelled from the Drug Court and he would then face sentence in a regular sitting of the Summary Court for the burglary and for the matter that originally put him in the Drug Court. In the circumstances, Counsel for the Applicant submitted that it would be more appropriate and fairer to resolve the question of correctness of the conviction before imposing what might be a substantial prison sentence.

In support of his argument, Counsel for the Applicant argued that the following statutory provisions gave the Court power to proceed in the way proposed: a) s.41 (1) of the Penal Code 2013 Revision which provides for discharge of an offender without punishment, or alternatively b) s.165 of the Criminal Procedure Code 2013 Revision, which provides for appeal to the Grant Court where a person is '*..dissatisfied with any judgment, sentence or order of the Summary Court.'* Counsel for the Applicant argued that the words of s.165 (set out) mean that any of those three elements can be the subject of an appeal and, as the order in which more than one element can be appealed is not specified in the provision, the court can use its inherent discretion to do what is fair.

Held (refusing the Application, and remitting the matter to the learned Magistrate)

(i) S.41 of the Penal Code 2013 Revision did not apply in this case. The provision is designed for a very particular set of circumstances which are comparatively rare. The side note makes it clear that the provision deals with '*Discharge of an offender without punishment.*' In this case the Applicant was never discharged nor was it the intention of the learned Magistrate to do so.

(ii) Whilst the wording of s.165(1) of the Criminal Procedure Code permits a dissatisfied person to appeal any of the decisions mentioned in the provision, ie: a '*judgment, sentence or order of the Summary Court'* it was not correct to assert that the order in which an appeal can take place is a matter for the inherent discretion of the court. When read in conjunction with s.166(1) of the Criminal Procedure Code, it is clear that the statute contemplates that appeals from the Summary Court should start by notice being given after sentence. It follows that it also contemplates any appeal taking place after sentence.

(iii) In the circumstances, the Grand Court had no power to entertain an appeal against conviction before sentence was passed. The matter was remitted to the learned Magistrate for sentence.

DBR

FAMILY LAW

AKS v JS
RS & HS (Proposed Interveners)

Family law – divorce – financial provision – whether the court has jurisdiction to permit a third party to intervene in ancillary relief proceedings

Grand Court **Cause No: Fam 201 of 2014**
Williams J
February 11th 2016

Legislation referred to

Family Proceedings Rules 1991
Grand Court Rules
Matrimonial and Family Proceedings Act 1984
Matrimonial Causes (Amendment) Rules 2009
Matrimonial Causes Act 1973
Matrimonial Causes Law 2005
Matrimonial Causes Rules 2003
Matrimonial Homes Property Act 1981
Rules of the Supreme Court

Cases referred to

B v B [2012] 2 CILR 24
Edna Evelyn Tebbutt v Haydn Sandy Haynes-Susan Haynes [1981] 2 All ER 238
Fisher Meredith v JH and PH (Financial Remedy: Appeal: Wasted Cost) [2012] EWHC 40 (Fam)
Goldstone v Goldstone [2011] EWCA Civ 39
Rodriquez v Ebanks and R.L. Ebanks (Intervening) [2014] 1 CILR 264
Rossi v Rossi [2007] 1 FLR 805
T v T and Others [1996] 2 FLR
TL v ML (Ancillary Relief: Claim Against Assets of Extended Family) [2006] 1 FLR 1264

Ms S Brooks for the Petitioner

Mr W DaCosta for the Respondent
Mr M Dors for the Proposed Intervenors

Facts:

The case concerned an application filed by the proposed interveners who sought permission to intervene in the ancillary relief proceedings ongoing between their son (the Respondent) and his wife (the Petitioner).
In 2008, the Petitioner and Respondent purchased a property. This property was purchased with the financial assistance of the proposed interveners, who provided the couple with a loan of $285,000 which was to be paid back at a rate of $1070 per calendar month. As at 2011, the Petitioner and Respondent had made repayments to the proposed interveners to the value of $62,597, leaving an outstanding balance of $222,403.

In 2011, the Petitioner and Respondent sought to purchase a further property, to which the proposed interveners offered to invest $154,000, which (this not being a loan) was to be deducted from the outstanding balance from the earlier loan. This left a balance of $68,403 which the parties left to be discussed at a later date as to repayment. The property, located in South Sound, had a garage which the proposed interveners intended to convert into a living space for their use.

The property was purchased for a sum of $630,000 with a mortgage of $485,000. The proposed interveners alleged that as at February 2013 following the completion of the conversion works on the garage which they had funded, they had invested a total sum of $376,000 plus other miscellaneous amounts. The South Sound property is valued at $975,000 of which the proposed interveners contend that the garage apartment has added a value of $313,000 or 32 per cent of the total.

The Respondent agreed with the statements of the proposed interveners regarding the financial contributions. The Petitioner, however, contended that the sums provided by the proposed interveners were gifts and that any agreements reached concerning the funds were between the Respondent and the proposed interveners. The Petitioner alleged that she offered the proposed interveners a figure between $120,000 and $250,000 to cover the expenditure incurred for the construction at the South Sound property. The Petitioner also alleged that her parents provided a figure in the region of £40,000 in 2008 to assist with the purchase of the first property.

The question before the court concerned the disputed matter as to whether the court had the necessary jurisdiction to make an order permitting third parties to intervene in ancillary relief matters. The Petitioner submitted that Grand Court Rules Order 1 Rule 2 prevents the joinder of parties and that this is supported by Rule 22 Matrimonial Causes Rules 2003 (as amended by the Matrimonial Causes (Amendment) Rules 2009) which reiterates that the exemptions in Grand Court Rules Order 1 Rule 2(4) apply to all proceedings under the Matrimonial Causes Law.

Counsel for the Petitioner also alleged that the inherent jurisdiction of the court could not be exercised where the proposed interveners still had an opportunity to bring separate proceedings relating to a determination of the alleged beneficial interest in the property.

Counsel for the proposed interveners sought to rely on *Rodriquez*, wherein the Chief Justice provided guidance as to the objective of third party joinders to ancillary relief proceedings and Grand Court Rule Order 15 Rule 6 (2), notably that:

'notwithstanding the proceedings were originally commenced as matrimonial proceedings, and entirely *in personam* as between the parties to the marriage, a separate cause of action emerged into which the intervener was allowed to intervene in the exercise of the discretionary inherent jurisdiction of the court.' Further, that the objective of allowing for third party joinders to the proceedings such as these was to 'prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action and to prevent to same or substantially the same questions and issues being tried twice with possibly different outcomes.'

The question to be addressed was whether the approach taken by the Chief Justice was correct.

Held (ruling that the court was able to rely on its inherent jurisdiction in appropriate cases to allow a third party to intervene)

(i) The Chief Justice was not suggesting that the jurisdiction to allow third party joinders to ancillary relief is given to the court pursuant to Grand Court Rule Order 15 Rule 6(2), but rather that

the inherent jurisdiction of the court is exercised for joinders to proceedings in order for the correct management of such claims.

(ii) The Court has a duty to property case manage proceedings in the most effective manner and this includes securing a just, most expeditious and less expensive determination of ancillary relief proceedings. In the absence of a provision in the Matrimonial Causes Rules 2005, the jurisdiction of the court to order a third party to intervene in ancillary relief proceedings cannot be grounded in Order 15, Rule 6(2) of the Grand Court Rules.

The Court was satisfied that it was able to exercise its inherent jurisdiction to allow a third party to intervene in proceedings if it would do justice and prevent serious hardship, difficulty or damage to the proposed intervener.

(iii) The issue of the alleged beneficial interest clearly raised issues connected to the ancillary relief proceedings and it would therefore be just and convenient to determine this issue within those proceedings rather than in separate civil proceedings.

(iv) The appropriate approach to be taken in such matters in the future would be for the dispute to be heard as a separate, preliminary issue; the parties should ensure that they consult with the listings officer for the matter to be listed at the first available mention at which time case management directions can be given.

RM

BvB

Family Law – children – application for contact

Grand Court **Cause No: Fam 180 of 2011**
Williams J
November 7th 2015

Legislation referred to

Children Law (2012R)

Mr C Fee of Samson &McGrath for the Petitioner
Mr C Allen for the Respondent
Mrs R Whittaker-Myles for the Children through their Guardian ad Litem Mrs. M. McCormac

Facts:

The case concerned a long running dispute between the parties regarding contact arrangements over vacation and school holiday periods for the two children of the relationship, C aged eight years old, and K, aged six years old.

The father of the children is resident in the Cayman Islands and the mother now resides in Florida. Both children reside with the father, with the mother having regular access during vacation periods. The ongoing dispute, which this application concerns, relates to the mother's request to have the children with her for the following periods: a) the October half term holiday; b) the Thanksgiving holiday; c) the Christmas school vacation (including leave for the children to travel to Sweden during December whilst the children are in her care).
Due to the timing of the hearing date, falling mid-way through the October school break, the mother did not seek to further pursue a) above.

The father opposed allowing the children to spend the Thankgiving period with the mother for the following reasons:

1. The children would miss two and a half days of school; and
2. Due to K having assistance with her reading, and an important lesson would be taking place on one of the days when they would otherwise be with the mother.

With respect to the Christmas vacation period, the parties had long been in dispute regarding where the children would spend this holiday, with hearings having been listed for the previous three years to determine with which parent the children would spend this time with.

Held (order as follows)

(i) Whilst the present contact arrangements would be based on the current best interests of the children, the decisions already made in 2014 regarding where the children were to spend their Christmas vacation was not irrelevant, and should have given the parties a clear indication of the approach that the court would now adopt.

The parties had repeatedly been asked to put in place long term arrangements and to attempt to reach final contact agreements. When determining disputes such as the present, the parents were reminded that the children's welfare is always the paramount consideration. The Court would use the welfare checklist to help maintain this.

(ii) The parties should for the future, negotiate long term contact arrangements, with the parties mindful of developing a pattern of the children spending alternate Christmas periods with each parent.

Should the parties seek the court's assistance in respect of the Christmas 2016 arrangements, there would need to be a good reason to depart from an order that the children would spend the greater part of the holidays with the mother (the children having remained with the father for the 2015 Christmas period and having spent Christmas 2014 with the mother).

Likewise, for the foreseeable future, unless there were good reasons to depart from the existing arrangement, half term school holidays should be spent in the care of the mother.

RM

DJ v BJ & RK

Family Law proceedings- application to vary payments order made by Grand Court-clarification of order made by the Grand Court - application for disclosure in relation to the husband's partnership

Grand Court **CAUSE NO. FAM 66 OF 2014**
Williams J
September 4th 2015

Legislation referred to

Confidential Relationships (Preservation) Law
Matrimonial Causes Law (2005 R)
Grand Court Rules, Order 62, rule 4

Case referred to

In the matter of W [2004-05] CILR 554

Mr C Fee of Samson &McGrath for the Petitioner
Mrs K Thompson for the Respondent

Facts:

The parties were married and the wife petitioned for a divorce. This case relates to a summons by the wife concerning an order of the Chief Justice made on 23rd July, 2014. The wife sought the following orders:

1. an order varying the Chief Justice's order to direct the husband to make certain payments to her directly and not to other entities or persons;

2. an order clarifying the order made by the Chief Justice as it related to arrears of payments; and

3. an order for the disclosure to the wife of further and better particulars relating to the husband's partnership.

The order of the Chief Justice had, *inter alia*, directed the husband to pay directly for toiletries, diapers, co-payments for health insurance, additional medical costs and entertainment.

The wife also applied for the husband to pay the costs of the hearing and for the preparation for the hearing.

Held (granting the application for variation; for some of the arrears; disclosure; and for costs)

The Application for Variation:

(i) In varying the order relating to the method of paying for day to day expenses, the better position is that the person whom the parties intend to be the one who will be responsible for meeting the costs of items required on a day to day basis, should pay for such items in monetary terms to the other party, rather than physically going out and purchasing them. In some cases where the party has the responsibility for buying the items, this introduces an element of control over the other party; each party should be responsible for organising their lives knowing their respective financial obligations.

(ii) In the case of treatment for therapy (occupational, speech, music and educational cognitive) it is appropriate for payments to paid by the husband when they fall due. However, the method of such payments would be varied and form part of the global maintenance order if they are unpaid.

(iii) A variation in the mechanisms of the order for payment restricts the husband's obligation to the separate specific payments ordered by the court thereby placing the responsibility on the wife to meet the heads of need for the child.

The Application for Arrears:

(i) The husband owed $5,559 in arrears in respect of certain matters but, in respect of the arrears which arose under the order made by the Chief Justice, the applicant would be required to apply to the Chief Justice for a clarification of this part of the order as the

court did not believe it was proper to amend the order of the Chief Justice to change the amount of the arrears.

(ii) The husband's contention that he made payments towards clothes, education, toys, toiletries and diapers required an affidavit with supporting documentation to absolve him from an obligation to pay the arrears claimed. Without such documentation, the standard of proof to be applied is on a balance of probabilities.

The Application for Disclosure:

(i) The request for disclosure of particulars relating to the husband's partnership was proportionate, relevant and appropriate.

(ii) In making the order for disclosure, regard should be had to the Confidential Relationships (Preservation) Law and, whilst the firm could have opposed the application for disclosure, they had not done so.

The Application for Costs:

The powers of the court to make orders arise under s. 21 of the Matrimonial Causes Law (2005 Revision) which must be read in conjunction with GCR Order 62 rule 4. The governing rule is that costs will follow the event and, in this case, the wife was the successful party save for minor matters. The court had a wide discretion as to an order for costs and, in the circumstances of this case, the husband would be required to pay 50 per cent of the wife's costs.

CAN

DJ v BJ & RK

Family Law proceedings - application for leave to appeal Grand Court judge's costs made prior to divorce decree; jurisdiction of the Grand Court to make

costs orders in matrimonial proceedings before petition is proved - test to be applied by the Court when considering applications for leave to appeal

Grand Court **CAUSE NO. FAM 66 OF 2014**
Williams J
October 30th 2015

Legislation referred to

Matrimonial Causes Law (2005 R)
Matrimonial Causes Rules (2005 R)
Grand Court Rules,
Supreme Court Act 1981
Judicature Law (2013 R)

Cases referred to

KSO v MJO & Ors [2008] EWHC 3031(Fam)
Telesystem International Wireless Inc and another v CDC/ Opportunity Equity Partners LP & three others [2001] CILR Note 21
Maria-Costatanza Lindsay Fear v Richard David Fear D129/ 2005
Swain v Hillam, the Times 4 November 1999 EWCA (Civil Division)
Practice Direction (Court of Appeal, Civil Division: Leave to Appeal and Skeleton Arguments) 23 November 1998 TLR
Roy Michael McTaggart v Mary Elizabeth McTaggart [2015] (1) CILR 123 (CICA)
Darrell Hines v Esther Hassett D11 of 2006
B v B 2014 (2) CILR 234
Piglowska v Piglowski [1999] 2 FLR 763

Mr D McGrath for the Petitioner
Mrs K Thompson for the Respondent

Facts:

The parties were married on 17th February, 2012 and a male child of the marriage was born on 4th July, 2012. The wife petitioned for divorce on 15th April, 2014. On 30th April, 2014 the husband filed his answer and cross-petition. Up to the time of this case, the matter had come before the court on six occasions.

This case concerned an application by the husband for leave to appeal an order made by the Grand Court in proceedings in September 2015 in which the judge, after considering an application by the wife to vary an earlier order made by the Chief Justice, awarded costs to the wife. The court had, prior to the making of the order in a related hearing in November 2014, expressed disquiet with the nature and the number of applications being made and the fact that the divorce remained a contested one. Due to the concern about escalating costs, the judge in November 2014 had ordered that for any hearing listed for 30 minutes or more, both parties were to provide the court with a schedule setting out their costs and fees to date. The intention was that the schedules would, at each stage of the hearing, inform the parties about the escalating level of the costs.

The husband nevertheless at the hearing in September 2015 failed to provide an affidavit required in the proceedings and this resulted in him giving detailed oral evidence in chief which hindered the narrowing of the issues prior to the hearing. The court found that the wife was the successful party in the proceedings and the husband was ordered to pay 50 *per cent* of the wife's costs of preparation for an attendance at that hearing.

The husband applied to the Grand Court for leave to appeal the order on the ground that the court had no jurisdiction to make an order for costs on an interlocutory basis prior to the grant of a decree of dissolution. It was contended that in matrimonial law proceedings, orders for costs can only be made pursuant to s.21(e) of the Matrimonial Causes Law, that no such power is contained in s.20 of the Law and that therefore no costs order could be made prior to the proving of a petition or cross-petition.

Held (dismissing the application for leave to appeal)

(i) The test to be applied when considering an application for leave to appeal is 'does the appeal have a real prospect of success?' The real prospect of success test means the prospect must be realistic rather than fanciful. *Telesystem International Wireless Inc and another v CDC/ Opportunity Equity Partners LP and three others; Maria Costatanza Lindsay Fear v Richard David Fear; Swan v Hillam.*

(ii) Leave to appeal may also be granted in exceptional circumstances even though a case has no real prospect of success, when the point at issue raises a question of public interest that should be examined by the Court of Appeal. Although the point being argued is a novel one, this principle does not apply to the present case, especially as the cost of the appeal would far exceed what is at stake.

(iii) The Grand Court Rules ordinarily do not apply to any proceedings which are governed by the Matrimonial Causes Rules. However, GCR Order 1 r.2 (4) provides that Order 62 of the GCR is an exception and therefore applies. Although s. 20 does not mention costs, there is no clause in the Law that displaces any general power the Grand Court has to award costs at any stage of any proceedings. *Roy Michael McTaggart v Mary Elizabeth McTaggart*.

The Grand Court's discretion as to costs is a statutory discretion conferred by the Judicature Law and remains a broad one in matrimonial proceedings. Order 62 r. 1 (2) provides that the discretion under s. 24 of the Judicature Law shall be exercised subject to and in accordance with Order 62. It is clear under Order 62 r. 3 that proceedings for which costs orders can be made include interlocutory proceedings.

CAN

DJ v SJ

Family Law – divorce – maintenance pending suit for spouse – principles to be applied

Grand Court **Cause No: Fam 105 of 2015**
Williams J
December 31st 2015

Legislation referred to

Matrimonial Causes Law (2005 R)

Cases referred to

Campbell v Campbell [1995] 1 FLR 828 CA
T v T (Financial Provision) [1990] FCR 169
TL v ML [2005] EWHC 2860 (Fam)

Mr P Ebanks for the Petitioner
Ms S Bush for the Respondent

Facts:

The parties were married in 2008. There were no children of the marriage. The proceedings for divorce were initiated by the Respondent by way of petition to the court dated 1st June 2015. The husband is a Caymanian national. The Petitioner is a Jamaican national. The Petitioner's Residency and Employment Rights Certificate expired on the 15th July 2015, and the Petitioner was informed that this would not be renewed due to the status of the parties' marriage being: '*unstable'* and '*not in tact'*, according to the Caymanian Status and Permanent Residency Board. The Petitioner was therefore unemployed and unable to accept employment due to her inability to gain a work permit as she continued to be married to the Respondent. This status has left the Petitioner without the ability to be gainfully employed in the Cayman Islands. The urgent hearing request for interim relief arose therefore as the Petitioner had had no income since November 2015 and had debts in the form of a credit card and outstanding loan repayments.
Held (order as follows)

(i) The court had an obligation to ensure that the Petitioner has sufficient income to meet her day to day needs prior to a contested financial provision hearing, and was therefore entitled to make interim spousal orders even if, at the final hearing, there might be an issue as to whether there was a need for ongoing spousal maintenance.

(ii) In accordance with s.19 Matrimonial Causes Law 2005, the court would consider the responsibilities, needs, financial and

other resources and the actual and potential earning powers and the deserts of the parties.

(iii) Relying on *T v T*, *Campbell v Campbell* and *TL v ML*, any interim order must be fair to both parties and designed to last until the final ancillary relief hearing, or approval of a submitted consent order.

(iv) Given the wife's circumstances, the husband had an obligation to arrange his financial affairs to enable his wife's basic day to day needs to be met in the interim.

(v) Any order made in the interim of ancillary relief proceedings would not be indication of the final level of periodical payments, or indeed whether any final order for such payments was appropriate.

RM

KCP v JB

Children Law proceedings - application to terminate appointment of guardian ad litem; application for recusal of judge

Grand Court **CAUSE NO. FAM 245 OF 2010**
Williams J
August 12th 2015

Legislation referred to

Constitution Order 2009
Grand Court Rules
Practice Circular No. 1, 2014
Anti-Corruption Law, 2008
Civil Servants Code of Conduct
Children Law (2012 R)
Guardian Ad Litem (Panel) Regulations, 2012
ECHR, Article 6
Standards in Public Life Law, 2013 (Guidelines for 2015)

Cases referred to

Re F (Shared Residence Order) [2003] EWCA Civ 592, [2003] 2 FLR 397
Magill v Porter [2001] UKHL 67, [2002] 2 AC 357
Ansar v Lloyds TSB Bank plc (2006) EWCA Civ 1462
TF v RF & DF & NMF [2007] EWHC 2543 (Fam)
Oxfordshire County Council v P [1995] 1 FLR

Mr C Fee of Samson &McGrath for the Applicant
The Respondent in person
Mrs C McCormac Guardian ad Litem
Mrs R Myles representing the child

Facts:

The parties met in December 2007 and began a relationship around April 2008, the mother ('the Applicant') was aged 20 and the father ('the Respondent') was aged 28. A child, J, was born to the parties in December 2009. The parties never married. In November, 2012 the court granted an order permitting the Applicant to remove J from the jurisdiction to enable her to attend college in Tallahassee. A contact order was also made concerning the Respondent's contact with J.

Acrimonious litigation commenced after the orders were made, and the Respondent made several allegations relating, among other things, to conflicts of interest of the judge and the staff of the court and alleged breaches of his human rights. After his criticism of the social worker who was assigned to the case, a *Guardian ad litem* was appointed by the court after consultation with, and with the approval of, the parties. The Respondent eventually also made several allegations against the Guardian. This case concerns two interlocutory applications made by the Respondent which the Court required to be considered before its hearing of other summonses in the case filed by both parties. The first was an application for an adjournment of an application by the Respondent that the judge in the case recuse himself from further hearing the case. The second application was for the termination of the appointment of the *Guardian ad litem* in the case.

Recusal application:

During the time when the Applicant had been given leave by the Court to reside outside of the Islands there were a number of hearings dealing primarily with issues of contact between J and the Respondent. Tensions between the parties were exacerbated when the Applicant was granted an expedited summons to extend leave to remove J for a longer period, as the Applicant required time to conclude her studies. After the expedited hearing, the Respondent became very critical and made several allegations about the conduct of the judge, the court staff and other persons connected with his case, including his attorney-at-law. His application for legal aid was declined on four occasions and he alleged special treatment of the mother with respect to her successful grant of legal aid. He submitted complaints to the Judicial Services Commission, the Premier, the Leader of the Opposition, the Governor, the Human Rights Commission, the Caymanian Bar Association and other persons. In making an application for the recusal of the judge and all of the court staff he alleged, *inter alia*, that the judge had refused to admit evidence in the case, was disrespectful towards him, had discriminated against him and had preconceived notions about the Respondent's finances.

The Respondent applied for an adjournment of his application for the judge's recusal in order to hear another summons relating to the case.

Application to terminate the appointment of the Guardian ad litem:

After the Respondent had, in earlier proceedings in 2012, complained that the then expert in the case was incompetent and not impartial, the Court had ordered the appointment of a *Guardian ad litem* to which both parties agreed. The *Guardian ad litem*, who had acted in a number of matters in the Summary Court and the Grand Court, was married to the Court Administrator, but had been selected by a panel of guardians in accordance with Guardian Ad litem (Panel) Regulations. The Respondent sought her termination as Guardian after arguing, *inter alia*, that the Guardian was biased, had a conflict of interest in light of her marriage, and had been dilatory in conducting enquiries.

Held (order as follows)

(i) In accordance with the Overriding Objective set out in the preamble to the Grand Court Rules, the Court is required to actively case manage all cases before it and deal with every matter in a 'just, expeditious and economical way'; the Court should ensure that the 'normal advancement of the proceedings is facilitated rather than delayed'. The many applications made

by the Respondent were noted and the lengthy delays in dealing with the case, and it was determined that this was not a case in which an adjournment would be appropriate and consistent with the Overriding Objective. There were no grounds for an adjournment.

(ii) There were no sufficient grounds for the judge to recuse himself. The Court was guided by the principles for the consideration of an application of recusal set out in *TF v RF & DF & NMF* by Sumner J. Accordingly, the Court had to consider the application for recusal seriously even if such allegations were wild and extravagant. Justice must be seen to be done but that does not mean that judges should too readily accept suggestions of appearance of bias. The test was that, having considered all of the circumstances bearing on the allegation that the judge could be biased, whether those circumstances would lead a fair minded and informed observer, adopting a balanced approach, to conclude that there was a real possibility that the tribunal was biased.

An application for the termination of the appointment of a Guardian is 'an unusual application, not lightly to be granted' and should only be made in 'exceptional circumstances'. The Guardian had carried out her duty to safeguard the interest of J and the criticisms of her were without merit. *Oxfordshire County Council v P.* The application for termination was denied.

CAN

KN v MN

Family Law – children – findings of fact – leave to appeal

Court of Appeal **CICA No: 14 of 2015; Fam 123 of 2014**
Chadwick, P, Rix and Field, JAA
December 9th 2015

Legislation referred to

Children Law (2012 R)

Case referred to

Ms D Owen for the Appellant
Mrs K Thompson for the Respondent

Facts:

The appeal concerned a determination of the future long-term welfare of a three year old child, then residing with the mother, who lived in the Cayman Islands. The contact arrangements made in respect of the father, who at the time also lived in the Cayman Islands, were also before the Court.

Williams J, at an earlier hearing, had ordered a fact-finding hearing in order to determine the truth regarding allegations made against the father of physical abuse towards the child. The fact-finding hearing took place in April 2015, with Mangatal J handing down her findings on the 16th June 2015. Mangatal J found that of the allegations made by the mother, two were proven and a number of other allegations unproven.

The father was granted leave to appeal against her findings by Mangatal J with the father filing notice on the 29th June 2015, and thereafter, on the 7th July 2015, filing a memorandum and grounds for appeal.

The Court's autumnal session commenced on the 2nd November 2015. Shortly before this, Counsel for the father wrote to the Registrar of the Court of Appeal, requesting that the appeal be listed during the upcoming session, noting that it had not been listed on the published list of appeals to be heard. Prior to this, there was little to no communication between the Court and Counsel for the father.

The Registrar responded that the appeal could be heard on the 13th November 2015, but that in order to enable to appeal to be heard on said date, it would be necessary for all documentation to be filed with the Court no later than the 10th November 2015.

The required documents, consisting of a detailed bundle of materials that had been before Mangatal J, a comprehensive skeleton argument and the judgment of Mangatal J were not filed with the Court until the 19th November 2015. At the

same time, this bundle was sent to Counsel for the mother. The Court directed the matter to be heard for a mention on 20th November 2015.

A practical problem identified by the Court was that the father's work permit was due to expire in February 2016, with the mother's due to expire in November 2016. This change in circumstances was a matter for consideration by the Court, notably as to what were the suitable contact arrangements (supervised or unsupervised) to put in place between the father and child during the period of time that he was off Island. In order to make such a determination, the Court needed to take account: a) of the findings of Mangatal J; b) that Mangatal J had granted an appeal relating to her findings; and c) that circumstances had arisen which had made it impossible for the Court to hear and determine the appeal against those findings of fact in the current session.

Held (order as follows)

(i) It was noted that one of the problems that the Court of Appeal faced when hearing the appeal was the absence of a transcript of the evidence presented at Mangatal's April 2015 hearing.

If appeals from judges in the lower courts conducting fact-finding hearings was to become common place, serious consideration would need to be given for a the use of a stenographer, as in a criminal trial, because without such a transcript, the Court of Appeal was at a disadvantage in determining those matters.

(ii) The Family Court should be slow to give leave to appeal in fact-finding hearings against their own findings. Leave to appeal should be granted only if a point of principle existed which needed to be determined by the Court of Appeal. It should be a matter for the Court of Appeal to determine if leave to appeal should be granted against findings of fact.

Fact-finding hearings are intended to achieve finality in relation to facts upon which decisions as to the child's welfare are based. This objective would be seriously undermined if leave to appeal findings of fact were to be granted as a matter of course.

(iii) Judges were to be reminded that litigating points of principle is an expensive undertaking and should not be regarded as being 'par for the course'. Granting leave in fact-finding hearings was not easily reconciled with the need for finality without undue expense and delay.

RM

KQ v PQ

Family Law – joint physical custody – the paramountcy principle – principles to be applied

Grand Court **Cause No: Fam 39 of 2015**
McMillan J (Actg)
December 16th 2015

Legislation referred to

Children Law (2012 R)

Case referred to

MW v FW Cause No. Fam 0004 of 2013

Ms S Brooks for the Petitioner
Ms L McDonough for the Respondent

Facts:

The parties were married in Canada in 2002, and have resided in the Cayman Islands for nine years. There are two children of the marriage, aged 11 and 9 years old respectively.

The case concerned the making of a final order relating to the living arrangements of the children consequent upon the parties' ongoing divorce proceedings.

Pursuant to the report of a welfare officer, the recommendation for the Court to consider was that of joint physical custody (shared residence) on an alternative weekly basis. This was supported by the children's mother (the Respondent) but was strongly opposed by their father (the Petitioner) who sought sole responsibility for the residence of the children, with the Respondent having overnight access every second weekend.

It was agreed by both parties that they should each have a significant role in their children's lives. However, the Petitioner raised concerns about the Respondents' history of recurring alcoholism and the adverse affects this might pose in terms of the welfare of the children. The Respondent countered that she had been free of alcohol for some time, with a recent report submitted to the welfare officer speaking of the mother having had seven months' of sobriety. It was therefore argued that if a joint residence order were to be made, the Respondent would be capable of providing the care required for the children.

Held (order as follows)

> The welfare of the children is the court's paramount consideration in determining contested residency disputes. In accordance with the recommendation of the welfare officer, a joint residence order would be made in relation to the children who would reside with each parent for alternate weeks. This order was clearly in the best interests of both the children and the parties as it recognised both parents as equals in the lives of their children, with neither parent deemed a 'visitor'.

RM

PC v JC

Family law – children – application for leave to permanently remove children from the jurisdiction – no need for detailed classification of the type of relocation case – each child's welfare to be considered paramount

Grand Court **Cause No: Fam 18 of 2014; L/A 0356 of 2013**
Mangatal J
February 15th 2016

Legislation referred to

Cases referred to

B v B [2013] 1 CILR
Payne v Payne [2001] EWCA Civ 166
Re Y (Leave to Remove from Jurisdiction) [2004] 2 FLR 330
Re F (Child International Relocation) [2012] EWCA 1364
K v K (Relocation: Shared Care Arrangement) [2011] EWCA Civ 793

Mr D Holland for the Petitioner
Ms S Dobbyn for the Respondent

Facts:

The case concerned the application of the mother (the Petitioner) to relocate with the two children of the marriage to the United Kingdom. The Petitioner sought to have the children reside with her during school term times and to reside with their father (the Respondent) during the school vacation periods.
The application was strongly opposed by the Respondent.

The parties to the marriage were both born and raised in England. The parties met in England and married in 2005 before relocating to the Cayman Islands in December 2005. There are two children of the marriage, M, born 7th March 2007 and R, born 8th January 2010. The parties separated in 2013.

The parties initially agreed to a four day rolling shared residency between November 2013 and March 2014. However, the Petitioner's employment was terminated in December 2013, at which point the parties' discussions turned to the future and the plans for the continued shared custody of the children.

A point of dispute related to an agreement, alleged by the Petitioner to have occurred in early 2014, by which the children would relocate to England with her. The Respondent argued that no such firm agreement had been made. In January 2014, the Petitioner travelled to England to attend job interviews and to begin to assess the suitability of schools for the children, on the basis of the alleged agreement that she maintained the parties had reached.

Both parties agreed that a shared residence order should be put in place regarding both children. The decision for the Court was whether to allow the relocation application, or to maintain the *status quo* with the children remaining with their father during term time and spending vacation periods with the mother in the United Kingdom.

On the 9th July 2014, Henderson J set out an order as follows, based on the circumstances as they then existed. Henderson J acknowledged that the order was temporary, as the application with at this stage 'premature'.

1. By consent, there would be a shared residence order.

2. The children were to reside with the father during the school term until further order.

3. The mother would be entitled, at her discretion, to have the children reside with her during the school vacation period.

4. The children were not to be removed from the Cayman Islands except that the mother could, at her discretion, remove them to the United Kingdom for the summer vacation period.

5. The father would be at liberty to apply for a permanent order after he had obtained permanent residency.

6. The mother would be at liberty to apply for a permanent order after she had been in full time permanent employment for at least six months and had obtained suitable accommodation for the children.

Welfare reports recommended that the *status quo* should be maintained. Although little weight was placed on these reports as they did not discuss all specific issues relating to removal from the jurisdiction, Henderson J noted that they provided useful factual observations and opinions on various relevant matters.

The Petitioner opposed these recommendations.

Since the 2014 order, the Petitioner had relocated to the United Kingdom where she had taken up employment. During this time, the Respondent had applied for Permanent Residency and had begun to cohabit with his new partner.

Held (order as follows)

(i) The Court should not dwell upon determining whether the case was one of primary carer (*Payne v Payne*), shared parenting (*K v K (Relocation: Shared Care Arrangement*) or otherwise in determining the outcome of a relocation application.

(ii) The Court should not focus on the parents' wishes or positions, save to the extent that it was necessary to consider what, if any, impact this would have on serving the best interests of the children.

Applying the leading authority of *B v B*, the Court reiterated that in relocation cases, the paramount consideration is always the childrens' welfare. Each case should be determined by having regard to the welfare checklist and, where relevant, earlier jurisprudence to provide suitable guidance.

RM

RE v CD

Family law – financial provision – ancillary relief – whether the Court has power to order periodical payments for school fees – what is meant by the courts' s.19 duty to have first regard to the best interests of the child – what constitutes a matrimonial asset – effect of contributions by parties towards purchase of matrimonial home – US income tax as a marital debt – suitability of Mesher Orders

Grand Court **Cause No: Fam 119 of 2012**
Williams J
February 18th 2016

Legislation referred to

Children Law (2012 R)
Married Woman's Property Act 1870
Matrimonial Causes Act 1973
Matrimonial Causes Law (2005)

Cases referred to

AT v JT [2012] Fam 34
B v B (Mesher Order) [2003] 2 FLR 28
C v C [2007-8] GLR Note 1
Charman v Charman (No.4) [2007] 1 FLR 1246
Doak v Doak & Riley [2002] CILR 224
Dorney Kingdom v Dorney-Kingdom [2000] 2 FLR 285
Ebanks v Zelaya Ebanks CICA 23/2012, 2014 (1) CILR Note 1
Hoddinott v Hoddinott [1948] 2 KB 406
Jones v Maynard [1951] Ch 572
K v K (Financial Relief: Management of Difficult Cases) [2005] 2 FLR 1137
L v L (School Fees: Maintenance Enforcement) [1997] 2 FLR 252
McTaggart v McTaggart [2011] 2 CILR 366
Mesher v Mesher & Hall [1980] 1 All ER 126
Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618
Practice Direction Periodical Payments – Ancillary Relief: Payment of School Fees [1983] 3 FLR 513
Practice Direction Periodical Payments – Ancillary Relief: Payment of School Fees [1987] 2 FLR 255
Re Bishop [1965] Ch 450
Richards v Dove [1974] 1 All ER 888
Suter v Suter & Jones [1987] Fam 111 CA
Tattersall v Tattersall [2013] EWCA 772
Valerie Ayala Gordon v Jeffrey Raymond Watler CICA (Civil) 13/2014
W v W [2009] CILR 225
White v White [2001] 1 AC 596
Wight v Wight [2006] CILR 1
Wood v Wood [2009] CILR 255

Authoritative works referred to

Hansard, HL Vol 359
Jackson's Matrimonial Finance 9th Edition
Precedents for Consent Orders 5th Edition, Solicitors FLA
Rayden and Jackson on Divorce and Family Matters 15th Edition

Mr C Fee of Samson & McGrath for the Petitioner
Mr G Hampson for the Respondent

Facts:

This case concerned an application for ancillary relief made by the Petioner wife, who is a Caymanian national, against the Respondent husband, an American citizen, who has Caymanian Status. The wife did not file a summons for ancillary relief, but her cross-petition contained the relief sought.

The parties were aged 52 and 53 respectively and were married in 2000. The husband has two adult children from an earlier marriage. There were three children of the marriage between the Petitioner and the Respondent, aged 15, 13 and 11. The husband did not have any contact with the children of the marriage and had made no applications regarding their care pursuant to s.10 of the Children Law 2012.

Several issues of contention arose relating to:

1. responsibility for payment of the children's school fees and whether the Matrimonial Causes Law 2005 permitted the court to order payment of educational costs within an order for periodical payments;

2. the meaning of 'first consideration' of children and how this affects the division of assets and appropriate orders for ancillary relief proceedings;

3. the determination of what are relevant matrimonial assets and consideration of what is meant by a matrimonial debt/liability;

4. the suitability of *Mesher* Orders.

School Fees:

Counsel for the husband submitted that s.21 of the Matrimonial Causes Law 2005 did not permit the court power to order a party to ancillary relief proceedings to pay school fees in the absence of consent.

S.21 of the Matrimonial Causes Law 2005 gives the court power to order payment of school fees, which are regarded as being a form of periodical payment. Whilst there is no provision within the Matrimonial Causes Law 2005

which requires the parties to consider the manner of the child's education, as is the case in the Matrimonial Causes Act 1973 and the Matrimonial and Family Proceedings Act 1984 (both English legislation), the courts are able to give consideration to this when paying regard to the requirement that the children are to be the court's first consideration when executing their duties pursuant to Ss.19 and s.21 of the Matrimonial Causes Law 2005.

Ss.21 and s.19 of the Matrimonial Causes Law gives the court a wide discretion concerning financial provision orders. The Courts, when deciding whether to exercise their powers and, if so, in what manner, have traditionally looked to guidance from the s.25(2) factors found within the Matrimonial Causes Act 1973. This enabled the Court to determine what is fair for the parties in all the circumstances.

Matrimonial Assets:

The primary asset of the parties was the former matrimonial home, which was held in both parties' names, jointly. The husband contended that the parties were entitled to an equal share in the division of the property, which was mortgage free. The wife sought an outright transfer of the property into her sole name, with no provision for any payment to the husband.

The husband had taken a 'draw-down' sum from his pension fund in order to pay off the existing mortgage on the matrimonial home. The husband contended that there was a trigger point for repayment to the pension fund on transfer of legal ownership i.e. a sale to a third party or on the outright transfer of ownership to the wife. The husband contended that if the property was transferred to the wife, the result would be a requirement for him to pay back 10 *per cent* of the market transfer value in accordance with s.52C (9) of the National Pensions Law 2012.

The wife contended that s. 52C (9) would not trigger a repayment as in the case of an outright transfer as the legislation did not equate a transfer with a sale. The wife sought to rely on s.55(2) of the Law which states that the provision within s.55(1) (rendersing a transaction void if it purports to convey, assign, charge, anticipate or give as security) did not apply to a transfer required by a court order relating to the transfer of assets on divorce.

The husband further contended that the wife was in possession of jewellery of significant value, a claim which was contested by the wife and supported in evidence by her parents. The wife claimed that the jewellery was of a significantly lower value than claimed by the husband, and that the items in question were gifts from her mother which had been returned as they had been identified as family heirlooms to be kept within the family. The husband had also listed the wife's wedding ring when seeking disclosure of assets.

Mesher Orders:

The court considered the practical problems associated with the use of *Mesher* Orders and relied upon the guidance of Thorpe LJ in *Dorney Kingdom v Dorney-Kingdom*, where it was noted that it was necessary to find a clear justification for why a *Mesher* Order should not be utilized. It was further noted that when considering whether there should be a *Mesher* Order and the percentage shares to be allocated upon sale, the Court should have regard to the wife's housing needs at the time of the sale and compensation to her for having to draw on her own resources to maintain the property until that date. It was noted that the property in question in this case had no mortgage, and the wife would not be paying occupational rent.

It was further noted that one of the advantages of the *Mesher* Order is that the obligation to regard the children of the marriage as the first consideration in ancillary relief proceedings is inherent within such an Order.

Matrimonial Debts/Liabilities:

A question for the court to determine was whether a US tax liability of a party to the marriage would be considered a marital debt for the purposes of determining the parties' assets and liabilities in ancillary relief proceedings. The husband contended that he had accrued a significant US tax liability, and that this should be treated as a matrimonial debt. This debt had resulted from short or non-payments by the husband between the years 2006-2012. The wife contended that

the debt had resulted from the husband's failure to file his tax returns in a responsible manner. The court stated that:

'*as a general rule, for a US citizen, income tax is a necessary expense incurred in the process of earning marital income. Therefore, to the extent that income tax is based upon marital income, tax liability should generally be treated as a marital debt. This does not depend on whether the taxes are paid in a timely fashion. A debt incurred for a marital purpose benefits the marital estate and should be paid from the marital estate.'*

Held (order as follows)

(i) *Education Costs:*

English jurisprudence confirmed that the appropriate approach when considering children in ancillary relief proceedings was to have regard to their best interests as a first consideration, but this was not to state that children were to be regarded as the paramount consideration. Neither did S.19 of the Matrimonial Causes Law 2005 make the interests of children paramount. Accordingly, it would not be the correct approach to have regard only to the best interests of the child when making financial orders, without giving consideration to the other s.19 factors.

On the facts, the husband was to be responsible for the payment of all school fees until the relevant child completed full time education. The parties were to agree and share additional educational expenses. As the school fees formed part of the periodical payments, the level of child maintenance would be low and would expire when the relevant child reaches the age of 18, or completed full time education, up to the age of 21.

(ii) *Matrimonial Assets and Mesher Orders:*

The court agreed that if a party received a payment following the sale of the property in question, pension fund withdrawals should be replenished from the sale. However, s.52(c) (9) of the National Pension Law 2012 made no reference to the issue of property transfers upon divorce. As such, the court was unable to drawn a firm conclusion on this issue. However, the court opined that if the repayment requirement did apply to such transfers, it would be for the husband to make any such repayment as he would be the sole beneficiary of the increase in his pension fund. The husband's draw-down contribution to the home was to be equated with that of the wife's contributions to the initial purchase and renovations of the property; the draw-down had not given rise to an increased interest in the value of the home.

The former matrimonial home was to be held on trust for the parties as beneficial tenants in common until the youngest child attained the age of 18, at which point the trigger for sale would occur. As the property was free of mortgage, the wife was to be responsible for maintenance and decoration of the home, as well the cost of insuring the home until the sale was completed. These contributions, coupled with the fact that the wife lacked the same capacity to raise capital as the husband, made it just and fair to award the wife 55 per cent and the husband 45 per cent from the proceeds from the sale.

Bank accounts, pensions, vehicles and contents of the former matrimonial home were also to be regarded as matrimonial assets to be included in the calculations undertaken when dividing the assets. However, these may be offset to accommodate disparities when dealing with the final division of the parties' assets and retained by the individuals.

In relation to the inherited or gifted family heirlooms, unless it was shown that, on a balance of probabilities, the items in question had a substantial and realizable financial value, such items are generally to be omitted from the calculations when matrimonial assets are being divided. Regarding the wife's wedding ring, the principle to be applied was that unless it was demonstrated that it was expressly intended for the jewellery in question to be returned to the giver, jewellery is for the recipient to keep in the event of the relationship breakdown.

(iii) *Matrimonial Debts/Liabilites:*

A debt incurred for a marital purpose which benefitted the marriage estate was to be paid from the parties' joint assets. Whilst being satisfied that a portion of the marital income had been redirected by the husband from the payment of income tax for the benefit of the family, it was found that due to him being solely responsible for the unilateral late filings and due to his continued financial mismanagement, the debts which had accrued as a result were non marital debts

RM

CMS v RGS

Divorce – contested divorce – unreasonable behaviour test – Matrimonial Causes Law (2005 R) – civil standard of proof

Grand Court **Cause No: FAM 177/13**
Williams J
August 10th 2015

Legislation referred to

Matrimonial Causes Law (2005 R)

Cases referred to

Grenfell v Grenfell [1978] 1 All ER 561
Gollins v Gollins [1964] AC 644
Livingstone-Stallard v Livingstone-Stallard [1974] Fam 47
Katz v Katz [1972] 1 WLR 955
A v A (19/2009)
F v F (2003-4) GLR Note 29

Ms V Allen for the Petitioner
Respondent in person

Facts:

The Petitioner wife and the Respondent husband, both United States nationals, married in the Cayman Islands on 26th March 2010. They had one son, P, on 16th March 2012 and lived together until July 2013. The couple attempted

marriage counselling which broke down in June 2013 due to the husband seeking to control the sessions. On 26th August 2013 the wife filed a Petition for Dissolution of the Marriage on the ground of the husband's unreasonable behaviour under s.10(1)(b) of the Matrimonial Causes Law (2005 Revision). The husband defended the Petition, denying that the marriage had broken down irretrievably. He contended that the wife was making such allegations only because her lawyer and third parties were influencing her.

The wife alleged that the husband's unreasonable behaviour included; unlawful retention of P in Florida; his controlling and overbearing behaviour concerning the raising of P, including not allowing her to take P out of the apartment complex unaccompanied and restricting the time that she spent with P; questioning her capacity to care for P in an insulting manner; control of the wife's movements; and exerting improper emotional pressure. The husband alleged concerns about the wife's mental health and her ability to care for P as well as accusing the wife of multiple affairs. Despite continuously alleging to the court that the marriage was 'salvageable', he sought to include a Cross-Petition on 14th April 2015, which was denied.

The wife suffered from depression and at different stages had to take medication. The marital issues and numerous legal proceedings involving the breakdown of the relationship and care of P had exacerbated her mental condition.

Contested divorces and unreasonable behaviour

S. 10(1)(b) of the Matrimonial Causes Law provides that irretrievable breakdown of the marriage may be proved by satisfying the Court that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

There is little Cayman Islands' case law to determine the approach to be taken when dealing with a contested divorce petition, particularly in relation to behaviour. Therefore the present judgment included a detailed review of case law from other jurisdictions.

In *Livingstone-Stallard v Livingstone-Stallard* the test to establish the behaviour ground under English law was formulated as,

'*would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him*'.

It was added that the Court was also required to consider the effect of the Respondent's behaviour on the Petitioner. This involved taking into account the

whole of the circumstances, the characters, the personality and disposition of the parties.

In *Katz v Katz* it was held that it was the effect or reasonably apprehended effect of the Respondent's behaviour that has to be considered. The question was to ask whether there existed behaviour of such gravity that caused the Court to come to the conclusion that the Petitioner cannot reasonably be expected to live with the Respondent.

While making it clear that the Cayman Island's court was not bound by the decisions of the Royal Court of Guernsey, Williams J referred to the summary of principles in *F v F* which, having affirmed the approach taken in *Katz* added that:

'*the burden of proof is on the person alleging that the other spouse has behaved in such a way that he or she cannot reasonably be expected to live with the Respondent. It is for the person making the allegation to prove the behaviour by the other party and that he or she cannot reasonably be expected to live with the Respondent, and, unless he or she satisfies the court of both these matters, the court will not hold that the marriage has broken down irretrievably. Divorce is a civil matter, and the allegations must be proved by a preponderance of probabilities.*'

Held (granting the Petition)

(i) The factual issues of bearing in the contested petition including the husband's conduct and the effect of it on the wife were to be considered. The husband's state of mind was also to be considered and it was noted that that in certain circumstances conduct that may be viewed as trivial may amount to sufficient behaviour for the purposes of s.10(1)(b) of the Law if it was found to have been continued with callous disregard of its effect, where the sensitivity of the wife was known. The wife's depression was to be taken into account when assessing whether she could reasonably be expected to live with the husband.

(ii) The husband's continuous stream of criticism of the wife (including referring to her as 'psychotic'), and serious allegations made both against her and numerous professionals, gave great insight into the husband's personality. He was of the view that his approach was always the right one and that if any person or professional held a different view, it merited a formal complaint against them. This, and other controlling behaviour by the husband, formed part of a course of conduct that clearly

detrimentally affected the wife. These factors coupled with the husband having wrongfully retained P in Florida, knowing of the detrimental impact this would have on the welfare of the wife, amounted to behaviour for the purposes of s.10(1)(b) of the Law. Therefore, the wife had demonstrated on the balance of probabilities that she could not reasonably be expected to live with the husband. The gravity of the behaviour was such that it would be unreasonable to expect the wife to continue to endure it and remain married.

(iii) The divorce was granted and each party afforded the opportunity to file submissions as to costs within 21 days of Judgment.

LJ

LN v MN

Divorce – ancillary relief – financial provision – lump sum order – insufficient assets – effect of poor health of party and costs of care on the division of assets

Grand Court **Cause No: FAM 158/14**
Williams J
October 26th 2015

Legislation referred to

Matrimonial Causes Law (2005 R)
Matrimonial Causes Act 1973

Cases referred to

Valerie Ayala Gordon v Jefferson Raymond Watler CICA (Civil) 13/2014
McTaggart v McTaggart [2011] 2 CILR 366
Miller v Miller [2006] UKHL 24
W v W [2009] CILR 225
AT v JT (2012) Fam 34

Mr G Dilliway-Parry for the Petitioner
Mr C Fee for the Respondent

Facts:

This case involved a petition for ancillary relief by the Petitioner, LN, aged 58, a Philippine national and naturalised Caymanian, against her 86 year old British husband, MN, also a naturalised Caymanian. On 15th August 2014 the wife filed a Petition for Dissolution of the Marriage. She did not file a Summons for ancillary relief but her Amended Petition dated 18th June 2015 contained the relief sought.

The parties met in the Philippines in 1982 and cohabited together from December 1987 when the Petitioner moved to the Cayman Islands. They married on 30th April 1994. Ten days prior to the marriage, the Respondent provided the Petitioner with a letter/agreement which set out his financial position and his proposals for what should happen if they divorced. Whilst it was accepted by counsel that this was not a binding pre-nuptial agreement, the document evidenced the financial assets of MN at the time of the marriage and illustrated that the majority of assets being brought to the marriage were contributed by him. The parties separated in May 2014, after a twenty year marriage. There were no children of the marriage, although MN had a son from a previous relationship, who had power of attorney to deal with his assets on his behalf.

The Respondent had a history of poor health commencing around 1998. He suffered a heart attack in February 2014 and required extensive treatment in Jamaica. Since his return to Cayman, he had required costly 24-hour care.

Principles to be applied in ancillary relief proceedings:

The Law pertaining to the making of periodical payment orders and to the division of matrimonial assets is found in s.19 of the Matrimonial Causes Law which provides:

'In dealing with all ancillary matters arising under this Law the court shall have regard first of all to the best interests of any children to the marriage and thereafter to the responsibilities and financial and other resources, actual and potential earning power and deserts of the parties.'

S.19 must be read in conjunction with s.21 of the Law dealing with the orders which are available, for example lump sum orders, disposition of property orders or periodical payments. Ss 19 and 21 of the Law give the Court a wide discretion when it comes to financial provision and any awards made to the parties.

The Courts in the Cayman Islands, in deciding whether to exercise their powers under s.21, and if so, in what manner have traditionally had regard not only to the matters set out in s.19, but also the relevant factors of s.25(1) of the Matrimonial Causes Act 1973 of England & Wales. The factors to be considered thereunder include: the income and earning capacity of the parties, the property and financial resources of the parties; the financial needs and obligations of the

parties; the standard of living enjoyed by the parties before the breakdown of the marriage; the age of the parties; the duration of the marriage; physical or mental disability of the parties; contributions made by the parties to the welfare of the family and the conduct of the parties.

In *Valerie Ayala Gordon v Jefferson Raymond Watler* the Court reiterated the principles set out in *McTaggart v McTaggart namely* that the approach to be taken when considering the case law emanating from England and Wales is that such authorities are of assistance provided the principle is applied that each case must be decided on its own facts. Indeed, extensive citation of such authority could 'confuse rather than illuminate.'

With this *caveat* in mind, it was not necessary to look beyond the decision of the House of Lords in *Miller v Miller* which identified three relevant principles to be applied (absent any question of the best interests of children arising) namely: need, compensation and sharing. The ultimate objective for the Court was to give each party an equal start to independent living. Whilst poor health on the part of one spouse may create a need for greater capital, the court was still to perform a balancing exercise.

In *W v W* the President had stated:

'*On the basis of the new approach to the institution of marriage and the fact that it is a union of partners… Each therefore would be entitled to equal share of the assets acquired in the marriage, unless there is good reason to depart from that principle."*

The President then considered the issue of property brought into the marriage by one party in particular which was to be taken into account. In this respect it was stated, however:

'in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the Claimant's financial needs cannot be met without recourse to this property.'

In summary, the principles as set out therefore emphasise that the Court is charged with dividing the assets in a fair and equitable manner, whilst attempting to achieve a clean break.

Held (order as follows)

(i) This was a difficult case, especially due to the husband's age and his significant full time care costs associated with his severe ill health, coupled with the wife's age and lack of employment history. The difficulty was compounded by the limited value of

the total assets which, even if it were appropriate to split equally between the parties, would not be sufficient to provide for their long term, or possibly even medium term needs. The total remaining matrimonial assets at the time of the hearing totaled $101,466. The wife submitted that an additional $169,940 held in the husband's company's accounts should also be classified as matrimonial property.

(ii) Whilst the wife had relocated to the Cayman Islands and the marriage was of long duration, there were no children to the marriage and the wife had made no financial contribution to it. Given that there was no order which would satisfy both parties' long term needs on the assets available, the matrimonial assets should be split in 50 per cent shares and a lump sum payment awarded to the wife, thereby achieving a clean break with no order for spousal maintenance.

(iii) The company assets should not be classed as matrimonial property since there had been no merging of non-matrimonial assets with the already acquired assets having remained separate throughout the entire marriage. Therefore these were to be retained by the husband.

LJ

IMMIGRATION LAW

In The Matter of Section 17(2) of the Immigration Law (2013R)

And

In The Matter of an Application for Permanent Residence and Employment Rights by Michelle Jean Hutchinson -Green

And

In The Matter of an Application for Permanent Residence and Employment Rights by Alisha Myriah Racz

Permanent residence and employment rights – appeal against refusal of permanent residence and employment rights – duty of Immigration Appeals Tribunal to observe the rules of natural justice and the duty of full and frank disclosure – duty of heightened scrutiny of the Court when considering such issues – whether Tribunal acted in breach of the principle of doubtful penalization – tribunal directed to rehear the matter – whether tribunal required to apply the current law or the law at the time of the application.

Grand Court **Cause Nos: G0386 and G0387/ 2013**
Smellie CJ
August 28th 2015

Legislation referred to

Cayman Islands Constitution Order 2009 S.19(1)
Immigration Law (2013 R)

Cases referred to

Associated Provincial Picture Houses Ltd. V Wednesbury Corporation [1948] 2 All ER 680
R v Ministry of Defence Ex parte Smith [1996] QB 517
Axis Intl. v Civil Aviation Authority (2014) (1) CILR 12
R v Secretary of State, ex p. Doody [1993] 1 All ER 151
Lloyd v McMahon [1987] 1 All ER 1118
Wiseman v Borneman [1969] 3 All ER 275
Ford v Immigration Appeal Tribunal [2007] CILR 258
R v Z [2005] 3 All ER 95

Mr R McMillan for the Applicants in both causes
Mrs S Bothwell for the Respondents in both causes

Facts – Cause No. G0386:

In Cause 0386 of 2013, the Applicant appealed against a decision of the Immigration Appeals Tribunal (the 'IAT") to refuse the Applicant's application for permanent residence and employment rights ('PR').

The Applicant was a citizen of Jamaica who has resided in the Cayman Islands since 1996. The Applicant first applied for PR on 7th November 2006. The Board considered her application on 1st May 2009 under the 2007 Revision of the Immigration Law and Regulations and awarded her 81 points, when an award of a minimum 100 points was required for a grant. Upon rehearing, some four and a half years later, the IAT, in its decision of 17th October 2013, awarded her 92 points. However, despite the overall award being higher, the IAT reduced the number of points awarded to her on three crucial factors, namely, 'Occupation', 'Skills and Funds' and 'Salary'. The resultant reduction in these three factors by 9 points meant that the applicant's award of 92 points would otherwise have satisfied the minimum of 100 points required.

The applicant complained about the irrationality of the application of the award, failure to notify and procedural fairness. The Applicant claimed that the 'logistical materials' used to determine her case were a later version of the Law and Employment Relations database (as at 2013) and a points calculation chart, created subsequent to the original hearing, causing prejudice and detriment to her. The IAT asserted that in accordance with the Immigration Law, the matter was considered afresh in 2013 against the Law in place at the time, and that the Tribunal had the discretion to adjust the points awarded.

The following were the three distinct grounds to the appeal which asserted:

1. alleged breaches of the rules of natural justice in the IAT's determination to reduce the points awarded by the Board on the three crucial factors without first giving the applicant notice of that intention and an opportunity to respond;

2. irrationality of the award of points in the face of and contrary to the objective evidence showing that the applicant had enhanced her occupational position, increased her skills by way of further training and education and increased her funds and salary;

3. the IAT's reliance upon later versions of the logistical materials (only some of which were authorized and promulgated under the regulations) which had been to the detriment of the Applicant

and were all in breach of the principles of doubtful penalization and retrospectivity.

Held (order as follows)

(i) *Heightened scrutiny and the Court's duty of protective oversight; irrationality:*

The Court's ability to scrutinize administrative decisions was now enshrined in the Constitution Order 2009 s.19(1), which provided that all decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair. This was in addition to a long history of English case law decisions, such as *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* and the even more stringent 'heightened scrutiny test' expounded in *R v Ministry of Defence Ex parte Smith*.

This approach was confirmed by the Cayman Islands Grand Court in *Axis Intl. v Civil Aviation Authority* which determined that, in adjudicating decision making in a human rights context, the Court should not necessarily be looking for an extreme degree of unreasonableness, capriciousness or absurdity, something less would suffice. This was especially so where the decision-maker had failed in its duty to make full and frank disclosure to the Court. In such cases, the margin of appreciation which would otherwise have been accorded to the IAT's decision making process was eroded to the point where the evidential burden shifted onto the IAT to establish the reasonableness of the decision. On the facts of the present Appeal, the IAT had failed to fulfil this duty in relation to the logistical materials upon which it based its decision. It should have disclosed the versions of the material that it had relied upon and the manner in which it made its decision; without having done so, it was impossible for the Court to adjudicate whether the decision was reasonable. It followed that in the absence of a rational explanation for it, the decision to reduce the points in the above-detailed categories was irrational.

(ii) *Natural Justice:*

Modern case law emanating from both the local and international courts, provided a clear guide to the application of

the rules of natural justice. These rules required that an affected party be given an opportunity to make representations and to be informed of the relevant information known to the decision maker before an adverse conclusion contrary to that party's interest is arrived at by the decision maker. On the present facts, in relying upon the logistical materials without affording the Applicant the opportunity of responding to its intended application of them to her detriment, the IAT had clearly failed to satisfy the requirements of procedural fairness imposed by the principles of natural justice.

(iii) *The Principles against doubtful penalization, retrospectivity and ultra vires*

A comparison of the state of the Law as it stood at the time of the Applicant's applications and the Law as it stood now was undertaken by the Court. The unconscionably long delay of some seven years from the application in November 2006 to the refusal by the IAT in October 2013 was noted. This fact was important because during the period of delay, the Law, Regulations and logistical materials changed and this might have operated to the detriment of the Applicant, diminishing her prospects of success.

The principle against doubtful penalization, namely, that a person should not be penalized except by application of clearly stated law and should not be put in peril on account of ambiguity, was an enshrined principle of statutory interpretation. It was therefore concluded that the retrospective application of the Board's points calculation chart to the detriment of the Applicant was impermissible. The same would hold true in the use of any other logistical materials even if lawfully authorized, but which changed between the time of the Application and the time of the decision making so as to operate to the detriment of the Applicant. The Court noted:

'The sum effect and the conclusion to which I am compelled therefore, is that the application of the current Points System could operate and rebound to the detriment of the Applicant when compared to the 2004-2010 Points System in ways not clearly contemplated and permitted by the Legislature. For that reason, the principles against doubtful penalization and retrospectivity of the Law, are also engaged and require that I direct that the rehearing of the Applicant's application by the IAT takes place pursuant to the Law and regulations as they

stood at the time the application was taken by the Board… pursuant to the version that was applicable at the time of the Board's hearing of the application.'

These conclusions were summarized as follows:

a) The IAT had regrettably impeded the course of justice in its reliance upon the logistical materials without first having afforded the Applicant the opportunity to speak to that material.

b) The IAT had also regrettably failed to disclose to the Applicant and to the Court, the extent and manner of its reliance upon the logistical materials such that the Court had been unable objectively to assess the reasonableness of that reliance.

c) The IAT would therefore not be accorded the usual margin of appreciation for its decision; in failing to meet its duty of disclosure it had also failed to discharge the evidential burden which rests upon it to overcome the *prima facie* irrationality of its decision.

d) In failing to disclose to the Applicant the logistical materials upon which it intended to rely, including the Board's points calculation chart which had hitherto never been published, the IAT had also acted in breach of the well-established principles of natural justice in a manner in contradictory to the guidance given by the Grand Court in the *Ford* case.

e) The Board's points calculation chart which was never promulgated under the Law or Regulations, was unauthorized and its application by the IAT to the Applicant's case was therefore *ultra vires*, void and of no effect.

f) In requiring that the IAT re-heard the Applicant's appeal, it was also directed that in order not to fall foul of the principle against doubtful penalization, it did so by having regard to the Law and Regulations that were in place at the time of the hearing before the Board and before the IAT. The IAT was required to apply the same Employment database and Employment report, as appropriate, that the Board had previously applied. The points for 'Funds and Salary' were to be awarded solely on the merits and not on account of any unauthorized policy document. The IAT was further directed to disclose to the Applicant any material upon which it intended to rely.

g) For these reasons, the decision of the IAT was set aside for substantial wrong and miscarriage of justice as required by Order 55 r 7(7) of the Grand Court rules and the IAT was directed to rehear the Applicant's application for PR in accordance with the Law.

Facts – Cause No. G0387:

The Applicant in this case was a Canadian citizen who had resided in Cayman since January 25th 1999. She too appealed under s.17(2) of the Immigration Law (2013) from a decision of the IAT dated October 15th 2013 in which, upon rehearing of her application for PR under which the Board had awarded her 87 points, the IAT awarded her 95 points, 5 less than the 100 required. Whilst the overall total points awarded to her was higher, particular categories of points had received reductions in a similar way to the applicant in Cause No. G0386. The two appeals were therefore considered together.

Held (allowing the appeal)

This appeal was also allowed and the matter referred back to the IAT for rehearing, consistent with the directions given in Cause No. G0386.

LJ

Contributor's and Editor's note:

The Immigration Appeals Tribunal reheard these applications in June 2016. Both applications were granted on July 12th 2016.

It is not difficult to see why this case has had potentially wide-reaching implications upon Cayman Islands immigration law. The principles of natural justice, judicial review, doubtful penalization and retrospectivity detailed in these co-joined appeals resulted in a Governmental review and analysis of the immigration system and how to deal with appeals of this nature. This review, completed by Attorney David Ritch, was presented to Government earlier this year and has not yet been released to the public but, at the time of writing, was the subject of an ongoing Freedom of Information request by the Cayman Compass (Brent Fuller '*Bureaucracy stalls request for immigration report*' (28th August 2016)).
A law which is constantly under reform and a system of administration which receives criticism from all sides of the immigration argument, combined with the lengthy delays in the application process, runs the risk of further claims of breaches of administrative law and human rights. The review is likely to result in further delays in the processing of PR applications. In the interim, awards of

PR may need to be made in order not to face claims of the arbitrary penalization of applicants under a system in transition.

INSOLVENCY

In re PAC Ltd (in Official Liquidation)

Insolvency – application for sanction of settlement agreement – interests of creditors

Grand Court **Cause No: FSD 71/12**
Foster J
December 11th 2015

Cases referred to

Re Edennote Ltd (No. 2) [1997] 2 BCLC 89
Re Greenhaven Motors Ltd (in liquidation) [1999] BCLC 635
Re High Risk Opportunities Hub Fund Limited (in liquidation) (CICA, 24th June 2004, unrep.)
Trident Microsystems (Far East) Limited [2012] 1 CILR 424
DD Growth Premium 2X Fund [2013] 2 CILR 361
Re ICP Strategic Credit Income Fund Limited [2014] 1 CILR 314

Mr M Goucke and Mr P Kendall for the Official JOLs
Mr P McMaster QC and Mr J Snead for the Liquidation Committee
Mr I Croxford QC and Mr D Butler for two of the Rotana Companies

Facts:

The case concerned an application by the Joint Official Liquidators ('JOLs) of PAC for sanction of a settlement agreement, by which the JOLs proposed to settle strong claims which PAC had against the Rotana Companies for just over US$44m on terms which included a cash payment to the JOLs of US$2.5m, coupled with the waiver of a claim for US$19m which one of the Rotana Companies had asserted against PAC, and an agreement that the Rotana Companies would finance and exclusively assume the conduct and control of a US$17.9m claim which PAC had against a third party.

The circumstances which precipitated the JOLs' entry into that settlement agreement were as follows: PAC went into Court-supervised liquidation in May 2012. In the three years which followed, the JOLs were unable to make any recoveries for the estate. Whilst PAC had tangible assets in Lebanon, those assets were being held unlawfully by LBCI, the Lebanese entity to which PAC primarily provided its services, and the Lebanese proceedings which the JOLs had initiated to recover those assets had been continually thwarted by LBCI and had failed to produce any recoveries. PAC also had the above-mentioned claims

against the Rotana Companies and a receivable of US$17.49m due to it from LBCI, but the JOLs lacked the finances needed to pursue those claims and were unable to find funding to do so. One consequence of the failure in recoveries was that the JOLs had not been remunerated for their services throughout the liquidation and had largely been advancing the costs of the liquidation themselves. Their fees and disbursements, including legal expenses, totalled some US$2.32m. The other consequence was that the JOLs had been unable to pay any dividends to the creditors of PAC, including various trade creditors and a multitude of former employees whose claims together totalled US$31.6m.

The JOLs' principal reason for seeking to compromise the claims against the Rotana Companies was the lack of available funding to pursue the litigation of those claims. The evidence was clear that the JOLs considered that the claims against the Rotana Companies had strong prospects of success. The Liquidation Committee opposed the sanction application on the basis that the payment of US$2.5m which was to be made under the settlement agreement would be enough to settle the JOLs' expenses, but would provide virtually no return for the creditors. Further, that, if the settlement were sanctioned by the Court and took effect, it would be highly prejudicial to the creditors' prospects of making any recovery from the Rotana Companies in separate Lebanese proceedings because its terms would provide the Rotana Companies with a defence to their claims.

By the time that the JOLs' sanction application was heard, a group of the principal creditors of PAC had obtained an agreement for bank financing of up to US$1m to enable the JOLs to pursue the claims against the Rotana Companies in Lebanon, which they contended was sufficient to enable the JOLs to pursue the claims in that jurisdiction.

Held (refusing to sanction the settlement agreement)

(i) It was noted that the principal authority establishing the appropriate approach to be taken by the Court when considering an application for sanction of a compromise by liquidators was the judgment of the English Court of Appeal in *Greenhaven Motors*, which had been cited with approval and relied upon by the Cayman Islands Grand Court and Court of Appeal; *Greenhaven Motors* itself applied the earlier judgment of the English High Court in *Re Edennote Ltd (No. 2)*. That approach was as follows:

1. In an ordinary case, the Court would attach considerable weight to the liquidators' views, unless the evidence revealed substantial reasons why it should not do so;

2. In deciding whether or not to sanction the proposed compromise, the Court must consider those who had a real interest in the assets of the company and whether their interests were best served by permitting the company to enter into the proposed compromise or by not permitting it to do so;

3. The Court would not give weight to the wishes of those who were unaffected whichever way the decision went, but would give considerable weight to the interests of those affected, as they, if uninfluenced by extraneous considerations, were likely to be good judges of where their own best interests lay;

4. It was ultimately for the Court to decide whether or not to sanction the compromise before it. The Court was not required to decide whether the compromise was the best that could be obtained in the circumstances, or whether it could be improved if it did not contain all the terms that it did.

(ii) Despite attaching considerable weight to the views of the JOLs, the Court noted that circumstances had materially changed since the settlement agreement was negotiated. The Court found, in those circumstances, that the creditors were the best judges of where their own interests would lie. Given the creditors' strong opposition to the settlement agreement being sanctioned, and their expressed belief that the litigation they proposed to fund would produce a better return for them, the Court concluded that their interests were best served by refusing to sanction the settlement agreement.

ASJ

In the Matter of the SPhinX Group of Companies – Deutsche Bank AG London and others v Kenneth Krys (as Official Liquidator of the SPhinX Group)

Insolvency – stay of liquidation proceedings – scope of arbitration clauses

Cayman Islands Court of Appeal **CICA No 6 of 2015**
Mottley, Field and Morrison, JJA
2nd February 2016

Cases referred to

In re Vocam Europe Ltd [1998] BCC 396
Exeter City Association Football Club Ltd v Football Conference Ltd & Another [2004] 1 WLR 2910
Fulham Football Club (1987) Ltd v Richards [2012] Ch 333
Lombard North Central Plc v GATX Corpn [2013] Bus. L. R. 68
In Re Danka Business Systems Plc [2013] 2 WLR 1398
AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamengorsk HydroPower Plan JSC [2013] UKSC 35
Flint Ink NZ Ltd v Hutamaki Australia Pty [2014] VSCA 166
Assaubayev v Michael Wilson Partners Ltd [2014] EWCA Civ 1491
Salford Estates (No:2) Ltd v Altomart Ltd [2014] EWCA Civ 1575
Re Cybernaut Growth Fund LP [2014] 2 CILR 413

Mr M Phillips QC instructed by Ms A. Dunsby for Deutsche Bank AG London, Refco Public Commodity Pool LP and hfc Limited
Mr G Halkerston instructed by Mr C. Young for Kenneth Krys (as official liquidator of the SPhinX Group of Companies), Kris Beighton and Richard Heis (as Scheme Supervisors of the SPhinX Group), Beus Gilbert PLLC and Brown Rudnick LLP

Facts:

The SPhinX Group of Companies ('Sphinx') consisted of 22 companies incorporated in the Cayman Islands, which operated as open ended investment companies. Its service providers included DPM LLC as administrators, Deutsche Bank as custodians and Refco Group LLC ('Refco') as its prime broker.

In 2005, it was discovered that Refco was a victim of a 'massive' fraud perpetrated by its management which resulted in SPhinX suffering losses of approximately US$260million. Due to these losses, SPhinX was unable to satisfy redemption requests submitted by investors with cash. Accordingly, on 30th June 2006, SPhinX was placed into voluntary liquidation, which was subsequently brought under Court supervision.

In June 2007, the joint official liquidators of SPhinX (the 'JOLs') engaged the services of Beus Gilbert PLLC ('BG') as their US attorneys. In turn, BG

retained the services of Brown Rudnick LLP (‘BR’) as their New York agents. Pursuant to the terms of their agreement (‘the Agreement’), BG was to be remunerated on a contingency fee basis. Section 2.2 of the Agreement provided:

‘*If, for any reason, the parties to this Agreement are unable to reach agreement on the legal fees and expenses owed by Client to Counsel within thirty (30) days of the date of compromise or settlement of the Matter, or any portion of the Matter, or within thirty (30) days of any verdict of final judgment should the Matter proceed through trial, then in such event either party may submit written notice to the other specifying that the issue of legal fees and expenses shall be submitted to arbitration in the manner described in this section 2.2…*’

On the advice of BG, the JOLs issued 2 sets of proceedings, in New York and New Jersey, against a number of Defendants, including Deutsche Bank (‘DB’). Those proceedings were ultimately dismissed but were not considered to be finally determined due to the possibility of appeals.

Subsequent to the dismissal of those US claims, DB and another of SPhinX's principal investors proposed a scheme of arrangement (‘the Scheme’) under which the assets of all 22 companies within the group would be pooled and from which the assets of any of the SPhinX creditors would be paid. Pursuant to the terms of the Scheme, DB (among other parties) would receive a release of any liabilities owed by it to SphinX.

On 22nd September 2011, BG informed the JOLs that, if the Scheme was approved, they would seek compensation from the JOLs for the work done to date by means of a *quantum meruit* claim. The Grand Court considered that, prior to the sanction of the Scheme, it was necessary to determine the potential liability to BG (if any) as a result of their threatened claim. In July 2013, the Grand Court concluded that BG was not entitled to be compensated on a *quantum meruit* basis and no reserve was required to be held, save in respect of the costs of defending BG's potential claim.

Latterly, there was concern on the part of the JOLs that BG might bring a claim for compensation on some other basis. It was agreed that a further US$50million would be added to the Scheme's general reserve. The Scheme was sanctioned by the Grand Court and came into effect on 22 November 2013.

On 20 December 2013, the members of the SPhinX liquidation committee (‘the LC’) issued a summons seeking, *inter alia*, the release of the US$50million from the General Reserve so that it could be distributed. This summons was withdrawn as part of a compromise between the LC and the JOLs. This compromise also resulted in an amendment to the Scheme whereby most of the functions of the JOLs were transferred to separate insolvency practitioners as Scheme Supervisors.

On 10th June 2014, the day on which the Scheme was amended, BG wrote to the Scheme Supervisors quantifying their claim as US$242,874,849 or

US$36,753,163 in the alternative. BG and the Scheme Supervisors attempted negotiations which proved unsuccessful and, on 23rd October 2014, the LC (which had been renamed as the Scheme Committee pursuant to the amendment to the Scheme) issued a second summons again seeking the release of US$50million from the General Reserve (the 'Second Release Summons').

On 1st December 2014, the JOLs issued a summons seeking a stay of the Second Release Summons ('the Stay Summons') relying on s. 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) ('the Law'), which provides that if any party to an arbitration agreement commences legal proceedings in any Court against the other party to that agreement, the party against whom such proceedings are issued may apply to Court for a stay of those proceedings and, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, the Court shall make such an order.

Grand Court's Findings:

The Grand Court held that all the conditions of s. 4 of the Law were satisfied with the result that it was bound to grant a stay. In so doing, the Judge rejected the submissions of the Scheme Committee that the issues raised by the Second Release Summons were non-arbitrable as they involved the exercise of the JOLs powers as officers of the Court which had the effect of regulating class rights of members (applying the decisions of the English High Court in *Exeter City Association Football Club Ltd v Football Conference Ltd & Another* and of the Grand Court in *Re Cybernaut Growth Fund LP*).

The Judge considered that the submission was flawed for two reasons. First, the US$50million in the General Reserve was entirely dependent upon BG's entitlement to remuneration under the Agreement and section 2.2 of the Agreement provided that this issue was to be submitted to arbitration. Second, the recent authorities of *Fulham Football Club (1987) v Richards*, *Assaubayev v Michael Wilson Partners Ltd* and *Salford Estates (No 2) v Altomart Ltd* ran counter to the decision in *Exeter City* which was expressly disapproved of by the English High Court in *Fulham Football Club*.

The Judge stated:

'…it is no bar to a stay in order that a contractual obligation may take place that the same issue may arise in associated legal proceedings. What is not permitted is the reference to arbitration of a matter which is within the exclusive jurisdiction of the court. A matter of public interest cannot be delegated to a private contractual process. These three cases appear to me to confirm that the Second Release Summons is wholly dependent and consequential on whether SPhinX is liable for the fees claimed by BG in the three matters specifically

referred to in the summons. As such, there is no reason why the arbitration

should not proceed. Indeed I would go further. There is every reason to stay this summons so that it may not be used to by-pass the agreed resolution processes.'

The Scheme Committee appealed.

The Scheme Committee argued that the Judge had erred in incorrectly characterizing the nature of the Second Release Summons. The Scheme Committee contended that the fixing of a reserve did not require the JOLs to form a view as to whether BG's claim was legally due and owing but simply as to whether they were fanciful and, if not, at what level the reserve should be fixed. Therefore, the question on the Second Release Summons was not whether BG was entitled to the sums it was claiming. Instead, the only issue to be determined was whether a reserve of US$50million was required to ensure that BG would be paid if one day it was subsequently found that a sum was due to them (applying *Re Danka Business Systems plc*). Accordingly, the Second Release Summons could not be said to be in respect of a 'matter agreed to be referred' within the meaning of s. 4 of the Law.

In this respect, the Scheme Committee sought to distinguish the decisions of *Fulham Football Club*, *Assaubayev* and *Salford Estates* submitting that, in each of those decisions, the dispute was the subject matter of other proceedings and required determination as a first step in those proceedings. In the present case, it was contended that the issue relating to the Second Release Summons was different as it was concerned only with the question of a reserve and was not concerned with determining the validity of BG's claim.

The Scheme Committee further contended that the fixing of a reserve was a statutory duty of the JOLs, undertaken under the supervision of the Court. It was therefore not arbitrable by its very nature. It was argued that, if the decision of the Judge was correct, it would have far reaching, and potentially dangerous, consequences as it would impact upon the duty of liquidators to make provision for expenses of liquidations which are anticipated but not yet incurred in calculating and distributing any dividend.

Held (appeal dismissed)

(i) In dismissing the appeal, it was held that the substance of the Second Release Summons made it plain that the issue of the appropriate level of reserve (if any) was entirely dependent upon whether or not BG was entitled to remuneration. Where this question was subject to the arbitration clause in section 2.2 of the Agreement, s. 4 of the Law required that a stay be ordered.

(ii) In assessing whether the legal proceedings commenced included referred matters within the meaning of s.4 of the Law, the proper approach to adopt was that set out in the English High Court decision of *Lombard North Central plc v GATC Corpn*:

"*…the court should consider what questions will foreseeably arise for determination in the proceedings and whether they include referred matters*…"

(iii) While the task of a liquidator in setting a reserve involved forming a view as to whether or not the claims were fanciful, doing so would involve a determination that BG's claims were not legally valid under New York law. As accepted by the Scheme Claimants, any hearing of the Second Release Summons would necessarily include a debate as to the relative merits of BG's claim.

(iv) Further, it was obvious that BG's claim was disputed by the JOLs and/or the Scheme Supervisors and that that dispute fell within the scope of section 2.2 of the Agreement. It did not matter that the arbitration proceedings had not yet been commenced as that fact would not act as a bar to the exercise of the jurisdiction under s.4 of the Law to grant a stay (applying the English Supreme Court decision of *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant*).

(v) The Second Release Summons foreseeably engaged issues which were within the scope of section 2.2 of the Agreement as the question of whether BG's claims were fanciful so that the US$50million reserve could be released depended entirely on whether those claims were bad in law. In those circumstances, the Judge was correct to conclude that the Second Release Summons was 'a matter to be referred' within the meaning of s.4 of the Law.

(vi) A grant of a stay would not have the effect of delegating to the arbitral tribunal the function of determining whether a reserve should be maintained or released. It would only serve to recognize BG's private contractual right, pursuant to s.4 of the Law, to have the dispute regarding fees determined by arbitration as agreed by the parties. Absent such an order, the JOLs/Scheme Supervisors would be allowed to escape from this contractual obligation.

(vii) Although it was recognised that a stay may have the effect of delaying the progress of the liquidation, and potentially add expense to its administration, this was not a proper reason for failing to protect the contractual right to arbitration as required by s. 4 of the Law.

(viii) While there was some question as to the correctness of the decision of the Grand Court in *Re Cybernaut*, it was not necessary to overrule that decision in order to determine the issues on the present appeal.

CAL

PROBATE

In the Matter of the Estate of Layman Hopkin Ebanks (Deceased)

Contentious probate - removal of administrator and appointment of replacement - accounting

Grand Court **Cause No: P 4 of 1999**
Mangatal J
September 21st 2015

Authoritative works referred to

Tristan & Coote's Probate Practice, 26th edition

Mr L Aolfi for the Petitioner
Mr D Dinner for the First Respondent
Mrs J Green In Person (Second Respondent)

Facts:

Mr Ebanks ('the deceased') died on 2nd March 1992. He was married to Vera and had three children, the Petitioner, R, and the Respondents (M and J). V was granted Letters of Administration, but died on 23rd October 1998, without having completed the Administration of the deceased's estate. She did, however, have Parcel 277 transferred into her name. M was granted Letters of Administration *de Bonis Non* on 15th April 1999. At some point, Parcel 277 was transferred to J, and J subsequently transferred that land into the joint names of herself and her husband. On 16th July 2014, the Petitioner, who is currently an inmate at Northwood Prison, filed a summons seeking the following:

(a) The removal of M as administrator.
(b) An order compelling M to execute a transfer of Parcel 277 into R's name.
(c) An inventory of the estate of the deceased.
(d) An account of the monies received and expenses paid from the estate since M was appointed as executor.
(e) The appointment of the Petitioner as administrator in place of M.

Williams J, at an earlier hearing, made a number of orders relating to (d) above, including that M was required to provide a full account of the following expenses she had incurred: 1) medical expenses incurred in relation to the treatment of the deceased; 2) charges incurred on Parcel 277 and repayment of those charges; and 3) all expenditure incurred on Parcel 277. M was also required to provide an account showing the rental income received from the

property. In relation to (e) above, Williams J noted that the nature of the Office of Administrator is such that a person serving a prison sentence for a serious offence is not a suitable person for such an appointment – *Tristan & Coote's* Probate Practice, 26th edition.

Mangatal J in the present hearing formed the view that J should be added as a party. The parties then entered into a number of agreements in which J agreed to make no further claim in the estate of the deceased; The Petitioner and M agreed to make no further claim against Parcel 276 and J and M did not object to the Petitioner being appointed as an Administrator. The parties further agreed that M should be removed as Administrator and the Petitioner appointed in her place. It was further agreed that all charges against Parcel 277 be removed by M, to whom the property would be transferred, and a new charge made in favour of M against the property.

The remaining issue was the extent to which there should be a new charge against the property to protect M, as creditor of the estate, for expenditure incurred for the deceased's medical treatment. M's evidence had been inconsistent in this respect. She also claimed money in respect to renovation of the property, but the amount spent was unclear. She transferred Parcel 277 into her own name and that of her husband and raised a new charge to secure a mortgage for her personal home.

Held (order as follows)

> M had mingled estate business with her own. She never expected to be held to account by the Petitioner because of his personal situation: moreover she had not rendered a true and proper account of the rental income, and there was evidence, replete with examples, that suggested the rental income was greater than M had indicated.

MT

In The Matter of the Estate of John Samuel Hinds (Deceased) and the Estate of Esther Rosalind Hinds (Deceased)

Intestacy - rights of beneficiaries – common intention constructive trust – limitation – laches - acquiescence

Court of Appeal **Cause No: 5 of 2015**
Chadwick P, Martin and Moses, JAA
November 4th, 5th, 6th and 20th 2015

Legislation referred to

Limitation Law (1996 R)
Trusts Law (1967 R)

Cases referred to

Commissioner of Stamp Duties (Queensland) v Livingston [1965] AC 694
Re Ponder [1921] 2 Ch 59
Jones v Kernott [2011] UKSC 53
Frawley v Neill [2000] CP Rep 20
Fisher v Brooker [2009] 1 WLR 1764

Robert Ham QC and Rupert Coe for the Appellant.
Tom Roscoe and George Giglioli for the First Respondent
Clare Stanley QC and Robert Jones for the Second to Sixth Respondents.

Facts:

Hinds ('the deceased') died intestate on 4th April 1978 domiciled in Louisiana. He was survived by his widow, Esther ('E'), and her son, Phillip ('P'). In May 1978, E took out a Grant of Letters of Administration in Louisiana, and in 1980 the Grant was resealed in the Cayman Islands. E was accordingly the sole Administrator of the deceased's estate in the Cayman Islands. Under the Succession Law 1975, the persons entitled to share in the deceased's estate were E (who was entitled to a commission as Personal Representative, the personal chattels, a statutory legacy of a sum equivalent to 10 per cent of the net value of the estate and a life interest in half the residuary estate), and P (who was entitled to the other half share of the residuary estate, and on E's death to the capital of the share which had been subject to her life interest).

E died in Grand Cayman on 11th July 2010, and Letters of Administration of her estate were granted to C, one of her sons of her previous marriage. T and J are her other sons by this marriage. In E's capacity as the deceased's Personal Representative, E had held the legal title to certain parcels of land on Grand Cayman –namely Parcels 1, 63, 172, 175, 191, and 222 - and a one-quarter interest as tenant in common in a further parcel known as Parcel 81.

Parcel 1 had been transferred to the deceased by B by deed of gift dated 12th September 1969. At that stage, the parcel was undeveloped. Some days earlier, however, on an unspecified date in August 1969, the deceased entered into a contract for the building of a house. This agreement recited that the deceased, together with E, his wife, were seised of an estate in fee simple in possession of Parcel 1. After the deceased's death, E, in June 1979, by a deposition in the District Court of the United States, Houston Division, asserted that B had given both her and the deceased Parcel 1 and that they had built the house as a retirement home. E had further averred that when they had it built, both their names were on the papers and that the cost of building the Cayman house had

been partly met from money which she held on behalf of the her three sons (C, T and J) who had received it following the death of their father. E also stated that once the building was complete, it had been let and the rent paid into a joint account in the names of E and the deceased. It appeared also that a further part of the building cost was obtained by mortgage, and it was a condition of the mortgage that it was: 'to be in your joint names if the property is so registered but in any event [E] is to be joined in as party to the mortgage.'

E had transferred Parcel 63 to the sons of her first marriage during her lifetime and sold Parcel 191 in February 2005, and transferred the proceeds of sale to C and his wife, S, who, in turn, transferred the property to Norahs Kcotsob Ltd, a company owned and controlled by C's wife. E had retained Parcels 172, 175, 222 and the share of Parcel 81.

A number of issues arose flowing from the foregoing events:

1. *Whether P (E's son) had standing to bring an action*

P argued that the retained Parcels, Parcel 1, Parcel 63 and the proceeds of sale of Parcel 191 were still, at E's death, assets of the deceased's estate (of which P was now the sole beneficiary). The Respondents in this case were C, L, T, S and Norahs Kcotsob Ltd, all of whom argued that the retained Parcels, Parcel 1 and Parcel 63 were vested indefeasibly in C, L and T, and that S and the Norahs Kcotsob Ltd were entitled to the proceeds of sale of Parcel 191.

In the Grand Court proceedings, Foster J, had dismissed P's claims. Foster J ruled that P's claims were to a beneficial proprietary interest in all of the parcels; but that P, as a person interested in an intestate estate that had not been fully administered, had no proprietary rights. The estate had not been fully administered because, under the terms of the Succession Law, an intestate estate was to be held on trust for sale, and with the exception of Parcel 191, none of the assets had yet been sold. A person interested in an unadministered estate had a right, enforceable in an administration action, to insist upon proper administration of the estate, but that was not what P was claiming. His claim was based on the premise that, as beneficiary of the deceased's estate, he had a beneficial proprietary interest in the specific parcels of land comprised in that estate. Insofar as P was claiming that assets had been misappropriated by E and treated as her own, he was asserting a claim that could properly only be made by the deceased's Personal Representative or someone acting in that Representative's name. Importantly, P had not been seeking to bring a derivative action in the name of the deceased's Administrator. Moreover, the Administrator would be a necessary party to any such claim, and since E's death, there was no Administrator.

In the Privy Council in *Commissioner of Stamp Duties (Queensland) v Livingston* it was stated:

‘When Mrs Coulson died she had the interest of a residuary legatee in the testator's unadministered estate. The nature of that interest has been conclusively defined by decisions of long-established authority, and its definition no doubt depends upon the peculiar status which the law accorded to an executor for the purpose of carrying out his duties of administration. There were special rules which long prevailed about the devolution of freehold land and its liability for the debts of a deceased, but subject to the working of these rules whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and these duties would be enforced upon him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate. Certainly, therefore, he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee. ‘An executor’ said Kay J in In Re Marsden, ‘is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office. He is a trustee in this sense.

It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in the due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed "duties in respect of the assets" as trusts. What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in the property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realisation are very far from being interchangeable terms.

At the date of Mrs Coulson's death, therefore, there was no trust fund consisting of Mr Livingstone's residuary estate in which she could be said to have any beneficial interest, because no trust had as yet come into existence to affect the assets of his estate.'

Held (ruling that P had no standing to bring a claim)

> Accordingly a person interested in a deceased's residuary estate has no interest in any specific asset until, at the earliest, Administration of the estate is complete. Foster J in the Grand Court was therefore correct to hold that P had no proprietary interest in any asset of the estate until Administration was complete.
>
> The judge was wrong, however, to hold that Administration could not be complete until all the assets had been sold. The ordinary rule in England and Wales was that administration is complete when all debts and expenses have been discharged and the residue has been ascertained, and *at that point* the Personal Representative becomes a trustee in the true sense of the assets for those entitled to them: *Re Ponder*. It is not necessary that all the assets should be sold if the debts and expenses can be met and the residue ascertained without doing so. The statutory framework in the Cayman Islands was not significantly different from that of England and Wales, and such a rule should apply in the Cayman Islands. The trust for sale imposed by s.31 of the Succession Law is an administrative tool designed to enable an Administrator to deal with the estate efficiently; but it is subject to a power to postpone sale by virtue of s.14 of the Trusts Law 1967. It is not to be regarded as requiring a sale where the circumstances of the estate do not require one and the beneficiaries wish to take assets *in specie*.
>
> P's claim therefore failed on the ground that he had no standing to bring it.

2. The claim with respect to Parcel 1

The Respondents argued that the deceased held Parcel 1 subject to a common intention constructive trust under which he and E were joint tenants in equity, with the consequence that on the deceased's death the equitable interest in Parcel 1 devolved to E by survivorship, and thus did not become an asset of his estate. Foster J in the Grand Court had upheld the Respondents' contention.

In the United Kingdom Supreme Court decision *Jones v Kernott* it had been stated:

'The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their

common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above.'

Paragraphs 51(3) - (5) stated:

'(3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (per Lord Diplock in Gissing v Gissing). Examples of the sort of evidence which might be relevant to drawing such inferences are given in Stack v Dowden, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": per Chadwick LJ in Oxley v Hiscock. In our judgment, "the whole course of dealing ... in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant in ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).'

Held (finding a common intention constructive trust to exist)

(i) In order to establish a common intention constructive trust, a two-stage test must be satisfied. First, it must be shown that there was a common intention that both parties should have a beneficial interest in the property. That is a question of fact. It is only once the first test is satisfied and a common intention is established that the second stage arises. It is only at this stage that, if it is not clear what beneficial shares were intended, the Court will determine what share it would be fair for each party to have in the light of their whole dealings with regard to the property.

(ii) The evidence in this case clearly pointed to the existence of a common intention that E should have a beneficial interest in Parcel 1. It also pointed to the fact that E acted upon that common intention by undertaking liability on the mortgage and contributing to the building cost from funds she held for the three brothers. The recital in the building contract alone compels that conclusion; but the whole of the history of H's and E's conduct in relation to the property up to his death demonstrated an expectation that it was to be their joint retirement home.

3. Limitation and the claim with respect to Parcel 63.

Parcel 63 had been transferred by E to her three sons from her first marriage, C, T and J on 26th February 1999. The property was an asset of the deceased's estate, and the three brothers were therefore not entitled to any interest in that estate. The transfer to them was accordingly a breach of trust by E. Immediately after the transfer, E, in her capacity as Personal Representative of the deceased, had a right (and an obligation) to reclaim it for the benefit of his estate. That right accordingly accrued immediately after the transfer. Any claim by her to enforce the right would have been a claim to recover land, and s. 19 of the Limitation Law (1996 R) would have applied to it. [It would also have been a claim to recover trust property, but s.27(3) expressly applies only where no other period of limitation is prescribed.]

S.19(1) provides as follows:

'An action shall not be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'

Thus, E had twelve years from the date of the transfer in which to bring the claim. She died before that period expired, without having brought a claim in her lifetime. No substitute Personal Representative of the deceased was appointed before the twelve year period expired on 25th February 2011 without a claim having been brought. The *prima facie* consequence of this was that the estate's title to the land was extinguished on that date by virtue of s.23 Limitation Law, which so far as relevant, provides that, subject to s.24 : 'at the expiration of the period prescribed by this Law for any person to bring an action to recover land ... the title of that person to the land shall be extinguished'.*Prima facie*, therefore, the estate's title to Parcel 63 had been extinguished, and the three sons had an unassailable right to it.

As s. 23 makes clear, however, that position is capable of being affected by the provisions of s.24 of the Limitation Law. Subsections (3) and (4) of that section are in the following terms:

'(3) Where any land is held upon trust (including a trust for sale) and the period prescribed by this Law has expired for the bringing of an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Law; but if and when every such right of action has been so barred the interest of the trustees shall be extinguished.

(4) Where any land is held upon trust (including a trust for sale), an action to recover the land may be brought by the trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Law, notwithstanding that the right of action of the trustees would, apart from this provision, have been barred by this Law.'

Moreover, the definitions of trust and trustee are extended by virtue of the incorporation of the Trust Law definitional provisions to include the duties incident to the office of a Personal Representative and that office itself.

The only persons who may be said to have been entitled to beneficial interests in the land adverse to the three sons were E and P. If E had a right of action by virtue of her beneficial interest, it would have accrued at the same time as her right as Personal Representative to reclaim the land and would have become time barred twelve years after the transfer.

Held (affirming the title of the three sons)

> P's right to recover Parcel 63 as beneficiary of the estate had been extinguished, whether or not the estate had been fully administered. Under the Succession Law, E held the whole of the estate of the deceased (apart from personal chattels and commission) on trust for sale. In particular, she held Parcel 63 on trust for sale. Construing the Limitation Law consistently with the Succession Law, it was clear that the former law was not concerned with whether or not an estate has been fully administered: it recognised that the interests of a beneficiary may lie behind the statutory trust for sale. It cannot have been intended that accrual of a cause of action for the purposes of determining when the action is barred could depend upon some external event such as whether or not an Administrator had completed Administration. Some indication that this was the policy of the Limitation Law could be derived from s.31, which provides as follows:
>
> 'For the purposes of this Law relating to an action for the recovery of land, an administrator of the estate of a deceased person shall be treated as claiming as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.'

Accordingly, delay in obtaining a grant did not prevent time from running. Whatever the state of administration of the estate, P's interest in the estate, and in Parcel 63, was to be treated for the purposes of the Limitation Law as being an interest in the proceeds of its sale; and by virtue of s.24(1), his right to recover Parcel 63 was treated as accruing as though it were an interest in land.

P's interest under the statutory trusts was an interest in possession of one half and an interest in remainder in respect of the other half. Therefore s. 19(4) became relevant. It is in the following terms:

'Where any person is entitled to any interest in land in possession and, while so entitled, is also entitled to any future interest in that land, and his right to recover the interest in possession is barred under this Law, no action shall be brought by that person or by any person claiming through him, in respect of the future interest, unless in the meantime possession of the land has been recovered by a person entitled to an intermediate interest.'

P was to be treated as having acquired a cause of action in relation to Parcel 63 on the date on which that parcel was transferred to the three brothers. On that date, he had in equity both an interest in possession and a future interest in the parcel: the equitable interest in possession was to be treated for the purpose of determining when a cause of action accrued to P as being an interest in land (s. 24(1)), and the equitable future interest was to be disregarded (s.19 (4)). More than 12 years having elapsed since the transfer, the titles both of the estate and of P had been extinguished; and the title of the three sons was now unassailable.

4. Limitation and the claim with respect to the proceeds of sale of Parcel 191

As E held Parcel 191 as an asset of the deceased's estate prior to its sale, she held the proceeds of sale on the trusts affecting that estate. Consequently, such proceeds were not hers to give away. In doing so she therefore committed a breach of trust. As neither C, S, nor the Company had given any consideration for the gift, *prima facie* it appeared therefore that they would be vulnerable to a claim by the estate or by P, that they should return the proceeds. (At first instance, however, P's claim had been defeated on the grounds that it was barred by statute or by laches.)

When the breach of trust ocurred, a cause of action accrued on that date to E as Personal Representative of the deceased, but she brought no claim in respect of it. There is currently no substitute Personal Representative to pursue any action

still capable of being brought. Moreover, P's claim was not brought until 17 June 2011, more than six years after the transfer to C and S.

S. 27(3) of the Limitation Law provides:

'*Subject to subsections (1) and (2), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which another period of limitation is prescribed by any other provision of this Law, shall not be brought after the expiration of six years from the date on which the right of action accrued. For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.'*

Held (P's claim was not statute barred)

> In order for s.27(3) to apply to bar the claim, more than six years must have elapsed since a right of action accrued to P. Even if it be assumed that E had completed Administration of the deceased's estate by the time of the transfer, so that P could be said to have had a proprietary interest in the proceeds of sale and able to maintain an action in respect of them in his own right, his interest was in part a future one.
>
> Unless it could be said that E had impliedly assented to the vesting in P of the entirety of the estate's cause of action in respect of the proceeds of sale in part satisfaction of his absolute interest in half the residuary estate (which is clearly not what happened), P had no more than a half interest in possession. It did not make sense to say that there accrued to him on the date of the transfer half a cause of action, or a cause of action in respect of half of the proceeds. S.27 contained no provision disregarding a future interest for the purposes of determining when a course of action accrued if an interest in possession is held at the same time. Instead, the concluding words of s.27(3) provide that a right of action is not to be treated as having accrued until a future interest falls into possession. No cause of action therefore accrued to P until E's death. Accordingly, P's claim to the proceeds of sale would not be statute barred.

5. *Acquiescence and laches and the claim with respect to the proceeds of sale of Parcel 191and the Retained Parcels*

The Retained Parcels.

The Retained Parcels were, by definition, still in E's possession at her death. She had done nothing with them that was inconsistent with her duties as the deceased's Personal Representative or inconsistent with P's present or future entitlement. No cause of action ever arose in respect of the Retained Parcels

before E's death, and in the absence of an accrued cause of action no limitation period could have started to run.

Acquiescence and laches

The modern approach is to treat acquiescence, laches and equitable estoppel as labels describing broadly the same concept. In *Frawley v Neill* Aldous LJ stated :

'In my view, the more modern approach should not require an enquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The enquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach.'

Acquiescence and laches both come into play only when a right has been infringed, since otherwise there is nothing in which to acquiesce and no right capable of being lost by delay. But E did nothing during her lifetime in relation to the Retained Parcels that amounted to an infringement of P's rights.

In *Fisher v Brooker* the House of Lords stated that detrimental reliance was usually an essential ingredient of laches. The most that the Trial Judge had stated in this regard was that P allowed E and the three brothers :'to reasonably assume that he was going along with what was happening'. There was no finding of any detrimental reliance by either E or the three brothers in relation to the Retained Parcels.

Held (order as follows)

(i) In the circumstances, P had not lost his rights in relation to the Retained Parcels by acquiescence or laches.

(ii) In relation to the proceeds of sale of Parcel 191, P's claim whilst not time-barred was barred by acquiescence. A substantial part of the proceeds of sale was used to fund a cruise to Alaska for the whole extended family, meaning E, P and the three brothers and their wives, and E's grandchildren. By participating in the cruise, P impliedly represented that he had no objection to the proceeds of sale being used to fund it; would now be unconscionable for P to insist on his strict rights.

MT

TORT

Donette Thompson v The Cayman Islands Health Services Authority & Dr. Gilbertha Alexander

Negligence - blanket immunity under s.12 Health Services Authority Law 2004 – compatibility with Bill of Rights, Freedoms, and Responsibilities, Cayman Islands Constitution Order 2009 – retrospective effect of the Bill of Rights

Grand Court **Cause No: 190/13**
Williams J
February 19th 2016

Legislation referred to

Health Services Authority Law (2004 R)
The Cayman Constitution Order 2009

Cases referred to

Charles McCoy v Cayman Islands Health Services Authority & Dr Jha Cause no.G2/13
Elliott v Cayman Islands Health Services Authority [2007] CILR 163
In The Matter of Nairne [2013] 1 CILR 345

Mr J Jones for the Plaintiff
Mr P Bowen for the 1st & 2nd Defendants

Facts:

P was born at George Town Hospital on 9th July 2005. The hospital was maintained and operated by the 1st Defendant, which was responsible for the general management of the hospital, including nursery and midwifery. The 2nd Defendant, an employee of the 1st Defendants, was the attending consultant obstetrician at P's birth.

P suffers from spastic quadriplegia, hypoxic ischemic encephalopathy, seizures, microcephaly, cortical blindness, bilateral brachial plexus injury and global development delay.

P sued based on the claim that the 1st and 2nd Defendant's owed a 'duty of care to provide reasonably competent medical care' and that they were in breach of this duty as a result of the negligent management of the mother's labour and the delivery of P by the 1st Defendant's clinicians, midwives and the 2nd Defendant.

It was claimed that the 1st Defendant was either vicariously liable for these negligent acts, or directly liable under a non-delegable duty of care.

It was claimed that the bilateral brachial plexus injury was caused by the 2nd Defendant's negligent performance of a caesarian section performed on the P's mother, for which he was personally liable.

The 1st Defendant denied that its servants or agents were negligent, and that, by reason of s.12 of the Health Services Authority Law 2004, they did not owe a duty of care to P. The second Defendant also denied being negligent, and that, as a result of s.12, he did not owe a duty of care.

S.12 provides:

'Neither the Authority, nor any director or employee of the Authority, shall be liable in damages for anything done or omitted in the discharge of their respective functions or duties unless it is shown that the act or omission was in bad faith.'

It was accepted that bad faith, which involves improper motives and does not include negligence, did not arise on the facts of the case. P's mother denied knowledge of the immunity.

The P claimed that s.12 was inconsistent with a number of sections of the law, particularly Ss 3(3), 12A and 32(2) of the Health Services Authority Law 2004 and that s.12 should be read narrowly, with immunity limited in scope to the setting up and general administration and running of the Authority, and not in relation to medical decisions and treatment.

Further, that should the court conclude that there existed such an immunity, including consideration of s.25 of the Bill of Rights, that the P would seek a declaration of incompatibility pursuant to s.23 of the Cayman Islands Constitution Order, as such an immunity, it was contended, would be in breach of sections 2 (right to life), 3 (right not to be subject to inhumane or degrading treatment), 7 (right to a fair trial), and 17 (Protection of Children) of Part 1, Bill of Rights, Freedoms and Responsibilities, of the Cayman Constitution Order 2009.

S.25 provides:

'In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part.'

S.23 provides:

'If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility.'

Throughout the trial procedures the Attorney General considered whether to intervene in the case and be joined in this matter, but eventually did not do so.

Held (order as follows)

(i) S.12 clearly and unambiguously applied to all employees, and was not limited to directors. Further, the legislative history clearly indicated an intention to extend the immunity provided by s.12 beyond the Health Services Authority Law itself, to include the discharge of common law duties. S.12 did not give rise to inconsistency or absurdity and was therefore to be interpreted literally. Therefore, s.12 granted immunity to the Authority, its Board and its employees from civil liability, so long as the actions or admissions were not in bad faith.

(ii) S.25 of the Bill of Rights only applied where the compatibility of the primary or secondary legislation with the Bill of Rights was unclear or ambiguous. Thus, it was not applicable given that s.12 of the Health Services Authority Law 2004 was clear and unambiguous.

(iii) Given the fundamental role the Attorney General played in determining the appropriate wording of s.12, the absence and lack of input from the Attorney General adversely impinged on the Court's ability to make a fully informed decision and proper determination of the issues regarding the question of incompatibility with the Bill of Rights under s.23, and the question of its potential retroactive effect. P's application for a declaration of incompatibility would therefore be adjourned to enable the Attorney General's Chambers to make representations.

The parties were directed to provide the Attorney General with materials submitted to the Court which the Attorney General had not been provided with previously, in addition to a copy of the judgment.

The parties, in consultation with the Attorney General's Chambers, were to arrange a mention date to enable the Judge to make any necessary case management directions to progress the application for a declaration of incompatibility.

MCR

TRUSTS

IN THE MATTER of the Y Trust No 1

Deeds of settlement - identity of protector names in deed doubtful- rectification of deed- retirement of trustees

Grand Court **Cause No : FSD 49 of 2015 (ASCJ)**
Smellie CJ
November 19th and 20th 2015

Case referred to

Megerisi v Protec Trust Management Establishment [2012] (2) CILR 355

Authoritative works referred to

Snell's Equity

Mr F Hinks and Mr S Hurry for the Plaintiffs
Mr C McKie QC and Mr C La-Roda Thomas for the First Defendant
Ms R Reynolds for the Second Defendant
Mrs S Warnock-Smith QC and Mr R Lindley for the Third Defendant
Sixth Defendant not appearing

Facts:

A settlement was constituted by a deed in December 1982. Y was the Settlor and Protector. FDS was the controlling mind of Y. F was appointed as Protector in place of Y, but the appointment was invalid as the trustees' power to appoint a Protector only arose if there had not been a Protector in place for one month. Thus it was argued that a mistake had been made requiring rectification and showing F as Protector. Moreover, the consent of the Protector had been required to the retirement of two trustees, and thus there was a question as to whether the trustees had retired, and whether the subsequent acts of trust administration for the past 31 years had been valid.

Three issues arose for discussion in the case, namely:

1. Whether F was intended to be the Protector of the settlement from the moment of constitution, so that the settlement should be rectified to reflect this.

2. Whether F's consent to the Deed of Retirement was obtained.

3. Whether there had been undue delay by the trustees in bringing this action.

Held (order as follows)

(i) On the evidence, the Court was satisfied that F should be the Protector of the trust.

(ii) There was a strong indication that F's consent to the retirement by the trustees was not regarded as necessary.

(iii) Since rectification was a discretionary remedy, laches and delay needed to be considered. An accurate summary of the principles was to be found in Snell's Equity, 33rd edition at para 5- 011:

'Mere delay… delay is not sufficent of itself to bar the claim. There must be something that renders it inequitable to grant relief. See Weld v Petre 1929 1 Ch 33 – a case in which 26 years delay was not itself sufficient to disentitle a mortgagor from redeeming his shares which he had pledged to secure a loan which he had repaid, there being no prejudice to the Mortgagee.'

In this case where rectification was being sought in the interests of all parties interested in the trust, including the beneficiaries, it was plainly not inequitable to grant the relief, concerns about delay and laches nothwithstanding.

Nevertheless,it was necessary to discuss whether rectification was the appropriate remedy in this case. Rectification was available where a document failed to give effect to the intention of its maker, and if the document were rectified it would give effect to the intention of the maker. But convincing proof that the document did not reflect the true intention of the parties was required before rectificarion coulds be granted: *Megerisi v Protec Trust Management Establishment*. That proof was established in relation to the Deed of Settlement, but not in relation to the Deed of Retirement.

MT