

CAYMAN ISLANDS LAW REVIEW

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Preface

This is the second edition of the Cayman Islands Law Review, which is intended to be published twice a year, in summer and winter. The Review is edited and published by the Truman Bodden Law School with contributions from members of the local legal profession. The second edition has been made more user-friendly by the incorporation of a subject matter index which it is hoped readers will find useful.

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 they 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 may be covered in the Review. 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. The case summaries 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 features an article by Andrew Woodcock on the influences of John Locke on the development of the law of copyright.

This edition contains case summaries of judgments handed down by the Cayman Islands Grand Court and Court of Appeal spanning the period 28th January 2016 – 11th October 2016. Full transcripts of the cases 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 25th September 2017.

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CIVIL PROCEDURE

Appleby (Cayman) Limited v Kazuko Takada

Contract – attorney/client retainer – civil procedure – service outside the jurisdiction – Mareva injunction

Cause No: G45/2016

**Grand Court
Williams J
June 16th 2016**

Legislation referred to

Grand Court Rules (2015R) O.11
Grand Court Law (2015R) s.11

Cases referred to

Manches LLP v Kenneth William Green [2008] EWHC 917
Seaconsar Far East Bank Ltd v Bank Markazi Jomhouri Islam Iran [1993] 4 All ER 456
Third Chandris Shipping Corporation v Unimarine SA [1979] 1 QB 645
Mary Elizabeth Hakendorf v Vivian Countess of Rosenborg [2004] EWHC 2821
Ninemia Maritime Corporation v Trave Schiffartsgesellschaft mbH & Co [1984] 1 All ER 398
Chitel v Rothbart (1982) 39 OR (2d) 513

Jeremy Walton of Appleby for the Applicant

Facts:

The Plaintiff acted as the attorney on record for the Defendant in protracted divorce and ancillary relief proceedings. In accordance with the retainer agreement, the Plaintiff regularly issued invoices to the Defendant. These invoices, as at the date of application, remained unpaid. The Defendant had an outstanding debt to the Plaintiff, amounting to approximately CI\$330,000.

The Defendant had resided in New York since 2012. She had retained alternative legal representation in the Cayman Islands. That firm had applied for, and been granted, leave to withdraw as attorneys on the record, although this had not been formally completed at the date of the hearing. Despite initial negotiations with the Defendant's attorneys in the United States, there had been no communication received from those attorneys for some time prior to the present application.

The Plaintiff applied for leave to serve proceedings outside the jurisdiction, and for a Freezing Order over jointly held assets in the Cayman Islands.

Held (order as follows)

- (i) The breach of the retainer agreement amounted to a claim within the scope of O.11, r.1(1)(d). The standard to be met in order to satisfy this provision is that of a good, arguable case. The supporting affidavit, *prima facie*, satisfied this requirement, and therefore leave was granted to effect personal service on the Defendant outside the jurisdiction, pursuant to O.11.
- (ii) As to the Freezing Order, it was accepted that the Plaintiff had a good, arguable case for the recovery of the sum owing. It was also accepted that there was sufficient evidence of assets held in joint bank accounts in the Cayman Islands to establish that there were assets within the jurisdiction. Disclosure of those details in the course of the attorney-client relationship did not prevent the Plaintiff from making use of that information in the course of the Mareva application.
- (iii) While residence in a foreign jurisdiction is not enough to justify a conclusion that there is a real risk of dissipation of the assets, it is a relevant factor which may be taken into account. The court would look at the totality of the Defendant's conduct, including a failure to communicate, refusal to provide undertakings, together with the residence abroad. The court did not require positive evidence of an intention to remove assets from the jurisdiction. In the present case, there was sufficient evidence to reach the conclusion that there was a real risk of dissipation or removal of assets from the jurisdiction.

AEW

Arnage Holdings Ltd & Others v Walkers (A Firm)

Civil procedure – strike out application – dishonest abuse of process of the court

Cause No: FSD 105 of 2014

Grand Court, Financial Services Division

Smellie CJ

July 29th 2016 (released with amendments August 10 2016)

Cases referred to

Brown v Horvat Properties (Cayman Islands) Ltd and Horvat 1992-93 CILR N-5

TMSF v Wisteria Bay 2008 CILR 231

Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 (HL)

Hornal v Neuberger Products [1957] 1 QB 247 (CA)

Derry v Peek (1889) 14 App 337 (HL)

Royal Brunei Airlines v Tan [1995] 2 AC 378 (PC)

Masood v Zahoor [2010] 1 WLR 746 (CA)

Arrow Nominees v Blackledge [2001] 1 BCC 591 (CA)

AHAB v Saad Investments 2011 (2) CILR 434
Logicrose Limited v Southend United Football Club Limited, Unreported, March 5, 1998
Renova Resources Private Equity Limited v Gilbertson 2011 (2) CILR 148
Alpha Rocks Solicitors v Olade [2015] 1 WLR 4535
Briess v Woolley [1954] AC 333

Authoritative works referred to

Bowstead and Reynolds on Agency

Ms Anneliese Day QC Mr Anthony Akiwumi of Etienne Blake and Mr Richard Annette of Stuarts for the Plaintiffs (Respondents to the strike out application)

Mr Mark Simpson QC Mr Sebastian Said, Mrs Anna Snead and Ms Victoria King of Appleby for the Defendant (Applicant to the strike out application)

Facts:

This was an interlocutory application, in which the Defendant sought an order that the Plaintiffs' case be struck out for dishonest or reckless abuse of process of the court.

The proceedings concerned a dispute between companies and individuals who represented the interests of the Rabello family, a prominent family in Brazil, and the Defendant law firm which allegedly advised and represented the Plaintiffs (or at least some of them) within the Cayman Islands over the course of many years. The Plaintiffs' claim, in part, related to alleged "catastrophic" loss and damages caused by decisions of the Brazilian courts by which the effects of the bankruptcy proceedings against the Petroforte Group were extended to Securinvest Holdings SA.

Of pivotal importance to the Plaintiffs' case was confidential information which the Defendant obtained in the Cayman Islands whilst acting for the Brazilian trustee in bankruptcy of the Petroforte Group, Dr Braga. The Plaintiffs claim that by acting for Dr Braga and obtaining the confidential information (which disclosed the connection between the Rabellos and Securinvest), the Defendant acted in breach of the fiduciary, contractual and tortious duties owed to them, as clients, or former clients of the firm.

The confidential information was obtained by the Defendant on Dr Braga's instructions through the *Norwich Pharmacal* and *Bankers Trust* jurisdiction. The disclosure of the *Bankers Trust* documents was subsequently deemed improper by the Grand Court. A retrieval order was made by the Grand Court on July 25, 2011, by which Dr Braga was directed to take all possible measures to retrieve the *Bankers Trust* disclosure and have it removed from the public domain. The *Norwich Pharmacal* disclosure (which revealed Katia Rabello's status as the beneficial owner of Securinvest) was not affected by the retrieval order.

By this application, the Defendant alleged that the Plaintiffs, in the present proceedings, had contrived to conceal from the Grand Court that the *Bankers Trust* disclosure had not, in fact, been placed before the Brazilian courts, nor had it been successfully retrieved by Dr Braga, pursuant to the retrieval order. Consequently, the *Bankers Trust* disclosure was not available to, nor relied upon by, the Brazilian courts when they made their decisions to extend the Petroforte bankruptcy to

Securinvest and Katia Rabello (or to refuse appeals against those decisions).

The Defendant's allegations of dishonest abuse of process of the court included the following:

1. the Brazilian Bankruptcy Court file in Katia Rabello's case, disclosed by the Plaintiffs in the present proceedings, which had been represented as a complete copy, had been "filleted" and "manipulated" to suit the Plaintiffs' case;
2. that contrary to the Plaintiffs' representation that there had been a single file before the Brazilian Bankruptcy Court and the Appeal Court (the Tribunal de Justiça de São Paulo - "TJSP"), there had actually been a separate TJSP appeal file, which conclusively revealed that the *Bankers Trust* disclosure had not been presented to the TJSP; and
3. that the Plaintiffs had "cherry picked" the disclosure of the hard copy TJSP file in order to perpetuate their earlier misrepresentation that the *Bankers Trust* disclosure was transmitted to and relied upon by the TJSP.

The Defendant sought to argue that the dishonesty of the Plaintiffs' representatives must be attributed to the Plaintiffs, and their case struck out as a dishonest or reckless abuse of process of the court.

Held (application dismissed)

- (i) Where allegations of fraudulent litigation conduct are disputed, establishing dishonesty will require an applicant to satisfy at least one of the two specific tests established by the case law on the balance of probability:
 - a. that a misrepresentation has been made knowingly, without belief in its truth, or recklessly, careless as to whether it is true or false (*Derry v Peak*); or
 - b. failing to act as an honest person would in the circumstances (*Royal Brunei Airlines v Tan* (per Lord Nicholls at 398C).
- (ii) The court must be able to protect its process and the other parties from abuse by litigants who would seek to hide behind the egregious conduct of their lawyers acting within the scope of their authority.
- (iii) From a detailed examination of the evidence, it was apparent that the strike out application was premised upon the Defendant's particular interpretation or views taken of the Plaintiffs' case, or on the basis upon which the Plaintiffs were providing disclosure of the Brazilian court file in the proceedings. The balance of probabilities must weigh in the Plaintiff's favour on such an application, unless there was clear evidence of dishonesty, rather than the interpretation by the Defendant.
- (iv) Given the consequences of an adverse finding against the Plaintiffs on this issue, and the clear advice set out in the case law about the standard and burden of proof, the Defendant had failed to prove a dishonest intention or recklessness on the part of the Plaintiffs.

- (v) In any event, a fair trial of the issues between the parties could still be attained. That also militated in favour of allowing the Plaintiffs to have their claim heard, in full, at trial.

ASJ

Harvey River Estate Pty Ltd, Four Little Girls Pty Ltd & Ors. v Peter Clarence Foster, Arabella Louise Foster, Banksia Holdings Ltd & the Partnership of Anne Patricia Larter, Alan Jones, Miralese Pty Ltd and Leigh Johnson, Trading as “STC Sports Trading Club”

Civil Procedure – injunctive relief – Mareva injunction – Mareva injunction in support of foreign proceedings – tracing of foreign property – application for variation of injunction

Cause No: FSD175/2015

Grand Court

Mangatal J

April 28th, June 3rd and 9th 2016

Legislation referred to

Grand Court Law (2015R), s.11A

Cases referred to

Classroom Investments v China Hospitals Inc, Unreported, 15 May 2015

Johnson & Johnson & another v Stephen Medford & another, Unreported, 29 June 2015

American Cyanamid v Ethicon Ltd [1975] AC 396

Kelly & Ors v Fujigmo Ltd & Ors 2012 (2) CILR 222

Dering v Earl of Winchelsea (1787) 1 Cox 318

J Willis & Son v Willis & Anor [1986] 1 EGLD 62

Polly Peck International Plc v Nadir (No 2) [1992] 4 All ER 769

Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company, Unreported, 16 May, 2008

United Mizrahi Bank Limited v Doherty [1988] 1 WLR 35

Mr T Lowe QC and Ms J Williams, Harneys, for the Applicant

Mr K Farrow QC Appleby, for the Respondent

Facts:

The Applicants were the Plaintiffs in proceedings commenced before the Supreme Court of New South Wales, arising out of allegations of breach of contract and misleading and deceptive conduct. A total of approximately AUD\$9 million was invested in the Defendant, Sports Trading Club, by 132 investors. Each investor entered into a “Loan and Profit Share Agreement” with the Defendant. The proposal was to establish a fund for use in a sport betting programme, with the profits to be distributed proportionately amongst the investors.

The assets were never distributed, and investigations subsequently revealed that the entire programme was an elaborate scam. Of the total 132 investors, only 16 ever received any return from the fund. Proceedings were commenced before the Australian court for recovery of AUD\$11 million. Courts in both Australia and Hong Kong issued worldwide Mareva injunctions. On 2nd November 2015, the Grand Court issued a Mareva injunction over all assets held by the Defendants in the Cayman Islands, which had been traced from the original investments in Australia. The injunction was a general prohibitory Order, restraining the Defendants from dealing with any of the assets. The Plaintiffs sought to continue the original Order, and the Defendants sought to vary it to permit payment of legal fees from the frozen assets.

Held (order as follows)

- (i) This was not a case of a Mareva injunction in the ordinary course of events. It was more properly categorised as a prohibitory injunction to prevent the Defendants from making use of, or dissipating, the assets alleged to belong to the Plaintiffs. That being the case, the proper test for the grant of such an injunction was the twofold test provided in *American Cyanamid v Ethicon*:
 - 1. A serious question to be tried; and
 - 2. The balance of convenience favours the grant of the injunction.

Consequently, as the injunction is of a proprietary nature, there is nothing, in principle, which would require the court to allow the Defendants to make use of the money claimed to be the Plaintiffs' funds for purposes such as the payment of legal fees. On the application to vary the injunction to permit the use of funds for the payment of legal fees, the court required the Applicant to establish that there was no other source of funds available to the Defendants.

- (ii) On the present facts, a bare assertion by the Defendants that there was no such source of funds was insufficient to discharge the burden on them. Therefore, the application to vary the Order would be dismissed.

AEW

Leonel Bush Whittaker v McAlpine Ltd

Alleged negligence – personal injuries – damage claims - time limits

Cause No: G 0015/2014

**Grand Court
Worsley J (Actg.)
April 25th 2016**

Legislation referred to

Limitation Law (1996R) ss.39(1) and (3);

Workmen's Compensation Law (1996R) ss.17(1) and (2).

Cases referred to

Cornish v Kearley & Tonge Ltd [1983] 133 NLJ 870
Hartley v Birmingham CDC [1992] 2 All ER 213
Collins v Secretary of State for BIS [2014] EWCA Civ 717
Nugent Care Society v Wirral MBC [2009] EWCA Civ 827
W v W [2011] CILR 382

Mr D Brady for the Plaintiff
Mr J Stenning for the Defendant

Facts:

The Plaintiff suffered an accident while working on a construction site in West Bay in September 2008. He experienced significant life changing, but not life threatening, injuries. In October 2008, he completed and signed a Compensation Claim Form. In March 2009, he signed a document by which he accepted a lump sum of CI\$3,057.21. The sum was computed in accordance with the Workmen's Compensation Law. The Plaintiff continued to receive wages and the payment of medical bills until he left the Defendant's employment in October 2013.

In September 2013, the Plaintiff sought further compensation, arguing that the delay in making such a claim was not excessive in the light of the type of injuries that he had suffered. Moreover, he argued that the delay in pursuing the claim did not cause significant prejudice to the Defendant. The Plaintiff was not well educated and could not understand the nature of the documents which he had signed. It was also suggested that the Defendant may have pressured the Plaintiff to accept any deal offered.

The Defendant argued as follows:

1. there was no good reason for the delay in making the further claim;
2. there was no evidence of pressure being brought to bear upon the Plaintiff;
3. the only eye witness to the injury was untraceable;
4. the only available defence witness was not an eye witness to the incident;
5. the records of the injury were no longer available;
6. the Plaintiff failed to seek legal advice upon receiving the compensation in March 2009;
7. the claim was barred by operation of the Limitation Law.

The Plaintiff (Appellant) sought an extension of time to commence proceedings pursuant to Limitation Law s.39.

Held (order as follows)

- (i) The Plaintiff had a full working knowledge of the Workmen's Compensation Law, its claim form and the final character of the settlement document he signed. The Plaintiff was bound by the settlement and the agreed compensation.
- (ii) No extension would be granted and the final character of the settlement was confirmed with the Plaintiff not being entitled to further compensation.
- (iii) The plaintiff's actions and decisions were prompt and informed, with there being no evidence of pressure being applied by the Defendant.

LPE

SEC v Wyly and others

Evidence – proceedings in other jurisdictions – civil matters – particularity of information requested

Cause No: FSD 47/2016

**Grand Court
Quin J
April 25th 2016**

Legislation referred to

Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978;
Rules of the Grand Court of the Cayman Islands, Order 70;
Evidence (Proceedings in Other Jurisdictions) Act 1975 (UK),
Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1968

Cases referred to

Rio Tinto Zinc Corporation and Others v Westinghouse Electric Corporation [1978] AC 547
Gray 1 CPB, LLC v Gulfstream Finance et al FSD 10/2012 unreported
Voluntary Purchasing Group Incorporated v Insurco International Limited 1994-1995 CILR 84
United States v Carver et al 1982 CILR 297
Lancelot Investors Ltd 2009 CILR 7

Mr S Dickson and Mr C Levers for the Plaintiff
Mr N Dunne for Irish Trust Company (Cayman) Limited
Mr J Harris for Ms Michelle Boucher
Mr J Durston for Queensgate Bank Limited and Queensgate Trust Company Limited

Facts:

The US District Court for the Southern District of New York sent two letters of request for judicial assistance to the Chief Justice of the Cayman Islands. This request was made pursuant to Article 1 of the Hague Convention for the Taking of Evidence Abroad in Civil or Commercial Matters, and the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (EPOJ) s.1.

The US Securities and Exchange Commission commenced proceedings against the Defendants for unjust enrichment. The SEC alleged that they did not have ‘any lawful right, title or interest in certain funds, securities, real property ... personal property and ...other assets’. The proceedings were commenced pursuant to the Exchange Act, s.21(d)(5) and general equitable principles. The US court requested that the Cayman court provide certain evidence to the US Securities and Exchange Commission in support of those proceedings.

The requested evidence included testimony from Ms Michelle Boucher, who provided administrative services for Irish Trust Company (Cayman) Limited. The request also included the production of documents by the Irish Trust Company (Cayman) Limited, Queensgate Bank Limited and Queensgate Trust Company Limited. All of the companies are financial management companies and trusts, which are based in the Cayman Islands.

The Respondents made the following *ex parte* arguments:

1. they challenged the civil character of the foreign proceedings, arguing that they were of a quasi-criminal nature;
2. they objected to the lack of particularity of the documentation requested on the grounds that:
 - (a) the request was ‘conjectural and speculative’;
 - (b) no particular document was identified or identifiable;
 - (c) the action constituted a third party discovery application; and
 - (d) the action was of an investigatory character.

Held (order as follows)

- (i) The Respondents were to produce the documents requested by the foreign court.
- (ii) There was no evidence to challenge the civil character of the foreign court proceedings. The first letter of request stated unequivocally that the proceedings were of a civil character. This would suffice, following *Rio Tinto Zinc Corporation and Others v Westinghouse Electric Corporation*.
- (iii) The Respondents were required to disclose to the foreign court the files relating to the listed trusts, companies and entities mentioned in the letter of request.
- (iv) Following *Rio Tinto Zinc Corporation and Others v Westinghouse Electric Corporation*, such a request could only be refused where it was: ‘frivolous, vexatious or an abuse of the process of the court’.

- (v) In *Voluntary Purchasing Group Incorporated v Insurco International Limited*, Smellie CJ stated that ‘particular documents’ can be either ‘individual documents separately described’ or a ‘compendious description of several documents’. The current request included a ‘compendious description of several documents’, which was ‘neither unreasonable nor oppressive’, in light of the narrow client base of the Respondents.
- (vi) The identification of Miss Boucher as a witness was legitimate because, following *US v Carver et al*, she provided ‘administrative services, including record-keeping for trust management companies that served as trustees [of the disputed trusts]’.
- (vii) The court also granted leave to apply for directions as to how to implement the disclosure.

LPE

William McKeeva Bush v David Baines, Duncan Taylor and The Attorney General of the Cayman Islands

Civil Procedure – substituted Service – service of consular personnel – application to set aside Order

Cause No: G188/2015

Grand Court

Mangatal J

July 21st and 22nd, October 11th 2016

Legislation referred to

Grand Court Rules (2015R), O.10, O.11, O.65

Vienna Convention on Diplomatic Relations 1961, Arts. 22, 29 and 30

Cases Referred to

AB Junior & Madame B v MB 2013 (1) CILR 1

Masri v Consolidated Contractors International Company SAL 2010 (1) CILR 265

Al Malki v Reyes [2016] WLR 1785

Zumax Nigeria Ltd v First City Monument Bank [2016] EWCA Civ. 367

Gabato v Immigration Appeals Tribunal 2011 (1) CILR Note 6

Abela v Baadarani [2013] 1 WLR 2043

Knauf UK GmbH v British Gypsum Ltd [2002] 1 WLR 907

Habib Bank Ltd v Central Bank of Sudan [2007] 1 WLR 470

Embassy of Brazil v Castro Cerqueira [2014] 1 WLR 3718

Cable & Wireless (Cayman Islands) Ltd v Information and Communications Technology Authority 2007 CILR 273

MRG (Japan) Ltd (A Company Incorporated under the Laws of the Bahamas) v Englehard Metals Japan Limited (A Company Incorporated under the Laws of Japan) [2003] EWHC (Comm) 3418

Mr G Cox QC of Travers Thorp Alberga for the Plaintiff

Mr M Griffiths QC of the Attorney General's Chambers for the Second Defendant

Facts:

The Plaintiff issued proceedings against the three Defendants who were, at the time, acting in the capacity of Commissioner of Police, Governor of the Cayman Islands, and Attorney General of the Cayman Islands respectively. The Plaintiff alleged, *inter alia*, malicious prosecution, with an intent to damage his political career.

On 2nd March 2016, an Order was made by the Grand Court, to allow substituted service on the Second Defendant. At the time, the Second Defendant was Britain's Ambassador to Mexico. The Order provided that service could be effected by courier delivery, and email, of the Writ and supporting documents.

The Second Defendant applied to set aside the Order, on the basis of a failure by the Plaintiff to make full and frank disclosure at the time of the original application. In particular, the court was not informed of the usual process for effecting substituted service on a foreign diplomat in Mexico. The court was also not informed that the methods of service proposed were not lawful means of effecting service in Mexico, which was a requirement under the Grand Court Rules.

Held (application dismissed)

- (i) There had been a material non-disclosure of the criteria for service of initiating proceedings upon a diplomat, and of the criteria for effecting personal service generally in Mexico. However, it was noted that there were various mechanisms by which the Plaintiff could have served the process, with the leave of the court. Further, the very fact of the application to set aside was indicative that the Second Defendant was aware of the commencement of proceedings, which was the primary purpose of effecting personal service.
- (ii) The Second Defendant's application to set aside the Order for substituted service would therefore be dismissed. However, the Plaintiff's non-disclosure would not be without penalty. Accordingly, no order as to costs would be made, despite the dismissal of the Second Defendant's application.

AEW

Michael Witter v Cox Lumber Limited

Civil Procedure – application to set aside default judgment – delay in applying to set aside default judgment

Cause No: G 104/2015

Grand Court

Malcolm J (Actg.)

February 23rd 2016

Cases referred to

Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc [1986] 2 Lloyd's Report 221

Evans v Bartlam [1937] AC 473

Mr C Allen for the Appellant

Mr A Davies for the Respondent

Facts:

The proceedings concerned a dispute between the Appellant and the Respondent in respect of the sale in 2009 of building supplies. The Appellant argued he was unaware, and had not authorised, the purchase. The Appellant sought leave to appeal against the decision of the Summary Court on 12th June 2014 by which the Acting Magistrate refused to set aside a default judgment, entered on 18th October 2013.

The parties agreed to certain facts, and these included the fact that the Appellant had signed a Promissory Note on 20th May 2011, in which he promised to pay a principal amount plus interest in monthly installments. The Appellant made two payments in June and July 2011, but no further payments thereafter. The Respondent filed suit in the Summary Court on 29th July 2013, and on 18th October 2013 a default judgment was entered against the Appellant.

On 11th April 2014, the Appellant filed a Summons to set aside the default judgment on the basis that he had a good defence. The application was supported by an affidavit exhibiting an undated letter of a third party, which alleged that certain building materials had been placed on the Appellant's account without the Appellant's knowledge.

Prior to the hearing of the Summons on 11th June 2014, on 10th June 2014 the Respondent served an affidavit sworn by the same third party, swearing that the Appellant had authorised him to purchase the materials on the company's account. The third party's affidavit did not address the letter filed by the Appellant containing contrary assertions which purported to have been signed by the third party.

The Appellant raised three grounds of Appeal:

1. the learned Acting Magistrate failed to properly consider the tests to be applied in setting aside a default judgment;
2. she placed too much emphasis on the delay in applying to set aside the judgment, rather than whether there was an arguable case for the defence; and
3. that there was a triable issue.

The learned judge found sufficient substance in the grounds and granted leave to appeal.

Held (appeal dismissed)

- (i) The test to set aside a default judgment is that the arguable defence must carry some degree of conviction (*Alpine Bulk Transport Co Inc v Saudi Eagle Shipping*).
- (ii) Delay, *per se*, cannot be a reason for refusing to set aside a judgment when there is an arguable defence.
- (iii) On the facts, whilst the Appellant argued that the promissory note had only been conditional upon him receiving supporting paperwork, the fact that he had made payments without asking the Respondent for the missing documentation meant that the defence did not meet the test of “carrying some degree of conviction”.

NCE

COMPANY LAW

In the Matter of Herald Fund SPC (in official liquidation)

Pearson v Primeo Fund (in official liquidation)

Company Law – status of unpaid redeeming shareholder – priority of redemption claims – interpretation of the Companies Law (2013 Revision) s.37(7)(a) – meaning of redemption

Cause No: CICA No 17/2015

Court of Appeal

Martin, Field and Morrison JJA

April 18th and 19th 2016

Legislation referred to

Companies Law (2013R) s.37 (7)(a)

Companies Law (2013R) s.37A

Companies Law (2013R) 49(g)

Companies Law (2013R) s.139(1)

Companies Law (2013R) s.140(1)

Insolvency Act 2003 s.197 (BVI)

Companies Act 1981 Ss.59(4)-(6) (England)

Companies Act 2006 s.735 (England)

Cases referred to

Culross Global SPC Limited v Strategic Turnaround Partnership Limited 2000 (2) CILR 364

Trevor v Whitworth [1878] LR 12 App Cas 609

In the Matter of Belmont Asset Based Lending Limited 2011 (2) CILR 316

Somers Dublin Ltd A/C KCBS et al v Monarch Pointe Fund Limited [2013] ECSC JO 311-10

Re Founding Partners Global Partners Limited (in Liquidation) Unreported September 21 2010

Western Union International Limited v Reserve International Liquidity Fund Limited [2010] ECSJ No 26

*In re Dynamics Corp*n [1976] 1 WLR 757

Rt Hon Lord Goldsmith QC and Mr F Tregear QC instructed by Mr M Goucke and Mr C Keefe for the Appellant

Michael Pearson (in his capacity as Additional Liquidator of Herald Fund SPC)

Mr M Crystal QC and Mr T Smith QC instructed by Mr P Hayden, Mr R Cecere and Mr C Levers for the Respondent Primeo Fund (in official liquidation)

Facts:

Herald Fund SPC ("Herald") was incorporated as an exempted segregated portfolio company under the Companies Law (2003R) and was subsequently registered as a mutual fund under the Mutual Funds Law (2003R). From its inception, Herald invested all, or substantially all,

of its assets in Bernard L Madoff Investment Securities LLC ("BLMIS"), which was run by Mr Bernard Madoff.

Shareholders in Herald received participating non-voting shares in exchange for monies they invested in Herald. Each share carried with it the right of redemption for a sum based upon Herald's net asset value, as calculated on a specific day, in accordance with the valuation principles provided for in Herald's constitutional documents. Upon the redemption of the shares, the shareholder would cease to be entitled to any rights in respect of those shares, and the shares themselves would be removed from the register.

Prior to 1st December 2008, redemption requests (the "Redemption Requests") were received from Herald shareholders (the "Redeemers"), each of whom was holding Participating Non-Voting Shares in Herald (the "Shares"). These requests were made to Herald's administrator, HSBC Securities Services (Luxembourg) SA. The relevant Redemption Day for these Redemption Requests was 1st December 2008. It was common ground between the parties that, in accordance with the Articles, the Shares were redeemed on 1st December 2008 and removed from Herald's share register. Redemption proceeds were not paid at that time as Herald's constitutional documents provided only that the Redeemers were to be paid as soon as reasonably practicable, which was usually within 20 business days.

On 11th December 2008, prior to payment of the redemption proceeds, Bernard Madoff confessed that BLMIS was a fraud. On 12th December 2008, Herald's board of directors resolved to suspend calculation of Herald's net asset value, together with the issue, redemption and conversion of its shares, with immediate effect. Subsequently, on 24th December 2008, Herald's board of directors further resolved to suspend the payment of redemption proceeds in respect of the Redemption Requests with the result that the Redeemers were not paid their redemption proceeds.

In the course of Herald's liquidation, the Respondent (being a member of the Redeemers) claimed that:

1. as its shares were redeemed, it was entitled to claim in Herald's liquidation as a creditor in respect of its unpaid redemption proceeds; and,
2. its claim for unpaid redemption proceeds would rank *pari passu* with Herald's other third party, unsecured creditors and in preference to any claims that Herald's shareholders may have had in the liquidation, in their capacity as shareholders.

The Appellant disputed these claims. It was argued that the claims of the Redeemers for unpaid redemption proceeds were subject to the Companies Law s.37(7)(a) which provides that, where a company is being wound up and, at the commencement of the winding up, any of its shares which "*are or are liable to be redeemed have not been redeemed*", the terms of the redemption may be enforced against the company. However, the terms of the redemption could not be enforced if, *inter alia*, they provided that the redemption was to take place at a date later than the date of the commencement of the winding up (the "Proviso").

The Appellant contended that the Redeemers were not entitled to claim in Herald's liquidation for the unpaid redemption proceeds as:

1. redemption in the context of s 37(7)(a) was something different from redemption under the Articles;
2. for the purpose of s.37(7)(a), redemption meant a process that was only completed at the time of payment of the redemption proceeds;
3. as the redemption proceeds had not been paid, the Redeemers' shares, including those of the Respondent, were not redeemed, and were therefore caught by s. 37(7)(a); and
4. as a result of the suspension, the redemption proceeds were not due before the commencement of Herald's winding up, and the Proviso therefore applied.

At first instance, the Grand Court found that:

1. as was agreed by the Appellant, the Redeemers' shares had been redeemed in accordance with the Articles before the commencement of Herald's winding up (notwithstanding the fact that the redemption proceeds had not been paid);
2. s.37(7)(a) applied only where the shares in question were liable to be redeemed but had not been redeemed in accordance with a company's articles; and
3. as a result, the Redeemers' claims were not caught by s.37(7)(a).

Held (dismissing the appeal)

- (i) Section 37(7)(a) did not apply where, at the commencement of the winding up, the redeemable shares in question had been redeemed in accordance with a company's Articles of Association, notwithstanding that the redemption proceeds were yet to be received. The words "have not been redeemed" in the section mean "have not been redeemed in accordance with the Articles".
- (ii) This interpretation was consistent, not only with the legislative origins of s. 37(7)(a), but also the reasonable expectation of an investor in a fund with articles such as Herald's. Such an investor would expect that, having served a valid redemption request, he would be redeemed on the Redemption Day and have a corresponding claim for redemption proceeds as a consequence.
- (iii) Section 37(7)(a) would apply where, at the commencement of the winding up, a holder of redeemable shares had an accrued and enforceable right for the redemption of his shares under the Articles of Association, but there had been no redemption because some further step required by the articles had not been completed.
- (iv) Section 37(7)(a) was enacted because, in the absence of such a provision, a claim in liquidation for redemption proceeds could not be made by a shareholder who had not been paid in accordance with the articles of association as:

- (v) (a) the Companies Law (2013R) s.99 prohibited a change in status of a stakeholder in the company once a winding up order had been made; and

(b) a counterparty would not ordinarily be permitted to enforce a contract against a company in liquidation which required the company to pay out money in order to acquire property.
- (vi) The concern that this interpretation could lead to a run on funds, with investors lodging redemption requests at "the first sign of trouble", was unwarranted. It was open to investment funds to include provisions in their articles of association to protect against such a risk.
- (vii) Accordingly, the Redeemers, as unpaid former shareholders whose shares were redeemed pursuant to a company's articles before the commencement of the winding up, were considered creditors with provable claims in Herald's liquidation for the redemption proceeds.
- (viii) These claims would, however, be caught by Companies Law (2013R) s.49(g) with the result that they would rank in priority behind the claims of ordinary creditors, but ahead of the entitlement of those shareholders who had not been redeemed.

CAL

In The Matter of the Companies Law (2013 Revision)

and

In The Matter of Section 30 (11) (b) of the Mutual Funds Law (2015 Revision)

and

In the Matter of Brighton SPC (In Controllershship)

Cayman Islands mutual fund registered with CIMA – controllershship – winding up petition by CIMA under the Mutual Funds Law (2013R)

Cause No: 144 of 2015 (AJJ)

Grand Court

Andrew Jones J

May 21st 2016

Legislation referred to

Mutual Funds Law (2013R), (2015R) ss.4(3), 29(3) and 30
Companies Law (2013R)

Mr G Johnson-Goring for the Cayman Islands Monetary Authority for the Applicant
Mr K Farrow QC of HSM Chambers for Belvedere Life Limited for the Respondent

Mr J Walton of Appleby (Cayman) Ltd for the Messrs S Conway and D Walker of PwC Corporate Finance and Recovery (Cayman) Limited in their capacity as Controllers of Brighton SPC
Brighton SPC was not represented

Facts:

This judgment arose from a request to the Grand Court to give full written reasons for a winding up order granted on 6th October 2015, in respect of Brighton SPC (“the Fund”).

The Fund was incorporated in the Cayman Islands on 15th May 2014 as a segregated portfolio company. It was registered with the Cayman Islands Monetary Authority (“CIMA”) on 27th June 2014, pursuant to the Mutual Funds Law (2013R) s.4(3), as a mutual fund. The business of the Fund did not commence until November 2014. The Fund came to CIMA’s attention on 17th March 2015, when CIMA was notified by the independent directors that they had resolved to suspend subscriptions, and thereafter resigned as a result of allegations of fraud made against the Fund and its promoters in the well-known publication called Offshore Alert. The article asserted that the Fund was part of a huge criminal enterprise operated through a group of companies based in Mauritius, namely, the Belvedere Management Group (“Belvedere”), and was controlled by three individuals. The article in Offshore Alert stated that the Fund “appears to be a crude Ponzi scheme”.

The Fund had set up a large number of segregated portfolios in Cayman, the majority of which were unfunded. A large number of the portfolios contained the prefix “CWN” in their respective portfolio names. The Offshore Alert article further claimed that Belvedere’s London office, CWM FX, was the subject of criminal investigation by the City of London Police, and that the Financial Services Commission of Mauritius had taken regulatory action against Belvedere. CIMA subsequently ascertained that the Fund’s administrator and investment manager had resigned.

Following correspondence with the Fund’s attorneys, CIMA held significant concerns about the Fund, and appointed two examiners to further assess the Fund’s operations. Pursuant to its powers under the Mutual Funds Law s.29(3) CIMA authorised PWC Corporate Finance & Recovery (Cayman) Limited (“PWC”) to perform a forensic examination on the Fund which PWC delivered on 21st May 21, 2015. PWC reported that:

1. the Fund established a large number of segregated portfolios designated with the prefix CWM, which were intended to act as vehicles for investments related to CWN FX. CWN FX ceased carrying on its own business following the action taken by the City of London Police;
2. its investigation should focus on the unfunded portfolios, in particular those called the Kijani Funds;
3. the Kijani Funds were said to have transferred into the Fund, from Four Elements PCC, a fund which was incorporated under the laws of Mauritius;
4. Four Elements PCC was the subject of regulatory action in Mauritius, whereby it was prohibited from taking on new business;

5. the Kijani Funds, by offering documents and marketing materials, gave an impression of highly liquid funds; and
6. the Kijani Funds' sole asset was a loan receivable from a wholly owned subsidiary.

On 1st June 2015 CIMA appointed David Walker and Simon Conway of PWC as controllers ("the Controllers") of the Fund. The Controllers were granted all such powers necessary under the Mutual Funds Law s.30(7). Subsequently, the Controllers issued two reports dated 26th June and 3rd August 2015.

On 3rd August 2015 CIMA resolved to present a winding up petition against the Fund and cancelled its registration under the Mutual Funds Law. The petition was opposed by the Applicant and the Fund was not represented.

Held (winding up Petition granted on 6th October 2015)

- (i) CIMA had established its case under the Mutual Funds Law Ss.30(1)(a) and (b);
- (ii) the business of the Fund and its portfolios were being carried on in a manner prejudicial to the investors;
- (iii) the Kijani Funds were unable to pay redemption requests in the amount of US\$12 million and the Fund immediately resolved to suspend redemptions. The suggestion that the Kijani Funds had an ability to pay the redemptions lacked credibility;
- (iv) the Fund and its portfolios no longer had any effective management;
- (v) it was unnecessary to consider whether CIMA had made out its case under s.30(1)(d).

RLM

In the Matter of the Washington Special Opportunity Fund, Inc

Company Law – winding up – just and equitable ground – loss of substratum – reasonable expectations of shareholders based on constitutional documents - oppression – lack of probity and loss of confidence –need for an investigation

Cause No: 151 of 2015

**Grand Court
Mangatal J
February 26th 2016**

Legislation referred to

Companies Law (2013R) s.92(e)
Companies Law (2013R) s.95
Companies Law (2013R) s.115(1)
Companies Winding Up Rules (2008R) O.3 r.3
Companies Winding Up Rules (2008R) O.3 r.11(h)

Cases referred to

Camulos Partners Offshore Limited v Kathrein and Company 2010 (1) CILR 303
Banco Economico S.A. v Allied Leasing and Finance Corporation 1998 CILR 92
Carl Clappison and Beric Evans v the Proprietor Strata Plan No 381, Unreported, May 4, 2015
Belmont Asset Based Lending Limited 2010 (1) CILR 83
Re Freerider 2010 (1) CILR 486
Re Freerider 2011 (2) CILR 103
In re Wyser-Pratte Eurovalue Fund Ltd 2010 (2) CILR 194
In re Heriot African Trade Finance Fund Ltd 2011 (1) CILR 1
ABC Company (SPC) v J & Company Ltd 2012 (1) CILR 300
Re Harbinger Class PE Holdings (Cayman) Ltd, Unreported, November 10, 2016
Re Suburban Hotel Company (1867) LR 2 Ch App 737 (CA)
Re Diamond Fuel Company (1879) 13 Ch D
Re Haven Gold Mining Company (1882) 20 Ch D 151
Re German Date Coffee Company (1882) 20 Ch D 169
Re Baku Consolidated Oilfields Ltd [1944] 1 All ER 24
Re Kitson & Co Ltd [1946] 1 All ER 435
Citco Global Custody NV v Y2 K Finance Inc., Unreported, September 16, 2007
Aris Multi-Strategy Lending Fund Ltd v Quantek Opportunity Fund, Unreported, December 15, 2010
Elder v Elder and Watson Ltd [1952] SC 49
Re Kong Thai Saw Mills [1978] 2 MU 227
Loch v John Blackwood Ltd [1924] AC 783
RCB v Thai Asia Fund Ltd [1996] 1 CILR 9
Re Fortune Nest Corporation, Unreported, 5 February, 2013
Re Parmalat Capital Fin Ltd [2006] CILR 171
Re GFN Corporation Ltd [2009] 2009 CILR 135
ICP Strategic Credit Income Fund Ltd, Unreported, August 10, 2010

Mr M Goucke and Ms A Shibli for the Petitioner
Mr S Atherton QC instructed by Mr T Heaven-Wren for the Respondent Company

Facts:

The Washington Special Opportunity Fund, Inc (the "Fund") was incorporated as an exempted limited company. Pursuant to its Amended and Restated Private Offering Memorandum, dated February 2007, the investment objectives of the Fund were to achieve

above-average returns by investing primarily in portfolios of financial, real estate and/or operating assets and/or loans and fixed-income securities secured by the same.

In 2008, the Fund received a large number of redemption requests which, in the Fund directors' view, required them to take action. Accordingly, the Fund's directors resolved, *inter alia*, to compulsorily redeem all shareholders, and convert some of their interests into new Class-R shares which would be redeemed on a "slow pay" basis as and when assets were liquidated. This action required an amendment to the Fund's Articles of Association (the "Articles") in order to be permissible.

The Articles were duly amended by way of special resolution on 30th July 2008. It was common ground that all shareholders (including the Petitioner) consented to the proposed amendments to the Articles in order to effect the "slow pay" proposal. It was also common ground that the amendment was valid and binding.

On 30th December 2013, the Fund sent out correspondence to its investors stating that the Fund's wind down might be completed by 30th June 2016. On 1st June 2015, the Fund further reported that it had no debt, illiquid assets valued at US\$15.5m and approximately US\$10m in cash, which it proposed to withhold for protective advances in respect of three of its assets. On 4th September 2015, the Fund informed investors that it had realised only a few small investments, which were worth less than US\$1m.

The Petitioner presented its petition, dated 18th September 2015, on the just and equitable basis. The Petition was supported by a number of shareholders, totaling about 53% of the Class-R Shares (the "Investor Group") and alleged that:

1. the Fund was being conducted in a way which was oppressive and disregarded the rights and interests of the shareholders;
2. relying on the dicta in *Re Belmont Asset Based Lending Limited*, the Fund had lost its substratum. It alleged that, due to the fact that the Fund was in "soft wind down", it had become impracticable to carry on its investment business in accordance with the reasonable expectations of the shareholders who were entitled to have that process run by qualified insolvency practitioners;
3. the Investor Group had justifiably lost confidence in the Fund's management which had abused its power and authority to further its own interests; and
4. there was a clear need for an independent investigation.

In reply, the Fund contended that it, and those responsible for its management, acted at all times within the proper ambit of the constitutional and commercial documents that governed the operation of the Fund, by reference to their obligations of good faith and in the best interests of the Fund (as represented by the interests of investors) and that the allegations concerning oppression, loss of confidence and the need for an independent investigation were misconceived.

The Fund also submitted that, with respect to the loss of substratum ground this, too, was misconceived. It argued that the proper test to be applied was not the impracticability test urged by the Petitioner, but rather whether the business of the company had become impossible. Further, and in any event, as the shareholders had all agreed to the amendments to the Articles which permitted the Fund's management to do so, it could not be said that a "soft wind down" was outside their reasonable expectations.

Held (dismissing the Petition)

- (i) There was no need to determine which was the correct test for loss of substratum. On either test, the Petitioner had failed to prove its case.

The valid amendment to the Fund's Articles, which provided the Fund's management with the power to undertake a "soft wind down", had been approved by all shareholders. In determining the reasonable expectations of the Fund's shareholders, it was necessary to have regard to the Fund's constitutional documents. As the shareholders consented to the amendment to the Articles, it must be accepted that the shareholders were aware that the directors should be able to exercise their power to initiate a "soft wind down". It was therefore not open to the Petitioner to contend that a *bona fide* use of that power was outside the shareholders' reasonable expectations.

- (ii) A number of the issues raised by the Petitioner were based upon old matters (some going as far back as 2008). Absent good reason, it was not the function of the court to deal with old claims, particularly where the Petitioner had previously made no complaint in respect of these matters. Instead, the question of whether it was just and equitable to wind up a company must be decided in light of circumstances which exist at the time of the hearing. Accordingly, where the Petitioner had merely engaged in a substantial regurgitation of stale claims and past ills, it would not be just and equitable to wind up the Fund based upon those complaints.
- (iii) In any event, even if good reason did exist for examining the Petitioner's antiquated claims, it had failed to make out any grounds for the Fund's winding up.

With respect to the ground of loss of confidence, in order for a company, that is not a quasi-partnership, to be wound up on the basis that there is a loss of confidence in its management, a lack of probity on the part of that management would need to be proven. The Petitioner had failed to make out a proper basis for a case that the Fund's management acted with a lack of probity and had also failed to demonstrate that there was a mismanagement of the Fund's business.

The actions taken by the Fund, and the answers provided by it in response to the Petitioner's allegations, were objectively justifiable and based upon commercially defensible reasons which had been communicated to its shareholders, including the Petitioner. Although the Petitioner and the

Investor Group might hold a contrary view, the subjective belief of the Petitioner was not sufficient.

With respect to the ground of oppression, the Fund's proposal to permit investors to redeem their shares at a discount was made in order to explore the possibility of providing liquidity to those investors who required it more than others. The letter making the proposal expressly stated that, even though the Fund's management thought that this proposal was fair to all shareholders, it was not mandatory and shareholders should not have felt compelled to redeem. Further, upon learning that the Investor Group strongly opposed this proposal, the Fund decided not to pursue it. Accordingly, it could not properly be said that the Fund's actions were oppressive, as they did not constitute a visible departure from standards of fair dealing and the conditions of fair play which a shareholder is entitled to expect.

- (iv) Further, the behaviour of the Petitioner with respect to the motivation and timing of the Petition had given rise to a sense of judicial unease and disquiet. In particular, the Petitioner had failed to inform the court that its investment manager, Pentagon Capital Management LLC (in administration) ("Pentagon"), and Pentagon's Chief Executive Officer, had been found liable in the court of the US Southern District of New York for engaging in securities fraud and Pentagon had been placed in administration as a result of the judgment obtained in relation thereto.

The jurisdiction to wind up a company on the just and equitable ground was an equitable one and required a petitioner to come to court with clean hands. While the application of this principle was usually in relation to the matters which formed the subject matter of the complaint, it was open to the court to have reference to other matters when having regard to all the circumstances of the case. Accordingly, although the Petitioner's failure to inform the court of the findings of securities fraud made against Pentagon did not relate to complaints which formed the basis of the Petition, it did impact upon the Petitioner's credibility as well as upon the overarching equitable considerations in issue.

- (v) Where grounds for winding up had not been made out, the issue of support amongst the stakeholder base was irrelevant. Accordingly, it was not open to the court to make a winding up order, even though a majority of the investors in the Fund supported the Fund being wound up.

CAL

CONFIDENTIALITY

United States of America v Verna Cheryl Womack

Foreign criminal tax proceedings – confidential information obtained on professional activity – disclosure to foreign authorities – notice of proceedings to the person affected – live testimony

FSD Cause No: 196 of 2015 ASCJ

FSD Cause No: 197 of 2015 ASCJ

FSD Cause No: 198 of 2015 ASCJ

FSD Cause No: 199 of 2015 ASCJ

Grand Court

Smellie CJ

23rd - 24th February 2016 and 8th April 2016

Legislation referred to

Confidential Relationships (Preservation) Law, s.2, s.3, s.4, s.5

Cayman Islands Tax Information Authority Law Ss.3(3), 8 17(1)

Tax Information Exchange Agreement with the United States Arts.1(m), 2, 5.3 and 10

Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978

Cayman Islands Constitutional Bill of Rights, s.7(1)

Mutual Legal Assistance (United States of America) Treaty, s.4.

Penal Code (2013R) s.41,

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

Cases referred to

Re the State of Norway's Applications (Nos1&2) [1990] 1 AC 723 HL

Bertoli v Malone [1990-1] CILR 58

H [1996] CILR 237

Mr J A Smith for the Plaintiff

Mr R Lindley and Ms S Tibbetts for the first to third Defendants

Mr Huskisson and Ms Richter for the Respondent

Facts:

Verna Cheryl Womack ("VCW") is a US national whom the US tax authorities alleged sought to conceal some of her income from the IRS by opening a series of bank accounts and organising nominee companies and trusts in the Cayman Islands. The four applicants, captive insurance management specialists, provided professional fiduciary services through a professional services firm in the Cayman Islands, Willis Cayman Ltd, and acquired confidential information in the course of their professional relationship.

The US District Court for the Western District of Missouri had initiated criminal proceedings against VCW. In the course of these proceedings, it requested live testimony from the four applicants.

Two of the applicants reside in the Cayman Islands and had previously disclosed confidential documents involving VCW. One of the applicants resides in the US and had been served with a subpoena. Another applicant resides in Ireland.

The four applicants were willing to cooperate with the investigation. As they did not have VCW's consent, they requested permission from the Grand Court of the Cayman Islands to do so.

The court identified two questions to be determined: First, the extent to which tax-related confidential information obtained in exercise of professional activity could be disclosed through live testimony to foreign tax authorities in the course of foreign criminal tax proceedings. Second, the extent, if any, of the notification rights of the Respondent.

Held (order as follows)

Disclosure of confidential tax information:

- (i) Pursuant to CR(P) L, Ss. 2-5 the four applicants could only divulge any confidential information about VCW with VCW's consent or following the court's directions, regardless of their current residence.
- (ii) Whilst the four applicants had applied under CR(P) L, s.4 only the Tax Information Authority Law ("TIAL") allowed for the divulgence of confidential information in aid of foreign criminal tax proceedings.
- (iii) Whilst TIAL was an agreement regulating giving of such evidence to foreign authorities, it did not entertain an unbridled and automatic grant of requests.
- (iv) Applications under TIAL s. 8(1) required that the judge be in a position to review the information request itself and the terms of the questions upon which the witness(es) would be examined. The judge could then consider the impact and importance of the evidence to be marshalled and whether notice should be given to those affected and whether those affected should be allowed to participate and, if so, to what extent.
- (v) The applicants would be directed to await a TIAL request from the foreign court to which they might be called upon to respond.

Live testimony to foreign tax authorities:

- (i) TIAL requests for live testimony gave significant powers to the judge in carrying out the live testimony. In exercising such powers, the principle of fairness, as set in the Cayman Islands Constitution, s. 7(1), had to be observed.

- (ii) TIAL could serve an equivalent function in the Cayman Islands to that of the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters in the UK.
- (iii) It was to be noted that CR(P) L s.4 did not afford the same safeguards as TIAL s.8. If the applicants' request made on grounds set out in the CR(P) L were to be accepted, the Respondent would have no possibility to protect her rights in front of the US court.
- (iv) Article 2 of the Tax Information Exchange Agreement with the United States ("the Treaty"), created a dichotomy of enforcement arrangements between the information itself and those in possession of it. TIAL's authority rested on the information itself and who was in possession of it and its applicability did not depend upon where the applicants happened to reside.
- (v) If a request were sent by the United States under Article 2 of the Treaty, the applicants residing in the Cayman Islands could be directed to testify in terms set out by the court and regulated by TIAL. However, the applicants would not be allowed to testify directly before the United States court pursuant to the provisions of CR(P) L.
- (vi) Should the foreign authority wish to obtain live testimony from the Applicants, the authority would therefore be required to submit a TIAL request in proper form. This would ensure compliance with the law, as well as protecting the Respondent's interests.

Whether Respondent had a right to be notified:

- (i) The CR(P)L did not give the judge the discretionary power to direct notice of the proceedings to the Respondent.
- (ii) The powers that TIAL conferred upon the judge included the discretionary power to notify the Respondent about the judgment. This would provide the Respondent with an opportunity to hear, observe and cross-examine the live testimony. This would ensure that the extent of the disclosure did not exceed what is permitted by law, in order that all relevant interests could be adequately defended before the foreign tax authorities
- (iii) Two *ex tempore* rulings by Williams J of 5th June 2014 and 18th November 2015 dealing with the disclosure, pursuant to TIAL, of documentary information by VCW, determined that no notice had to be given. However, these rulings involved the release of documentation and were not applicable to the current matter of giving live testimony.
- (iv) In exercise of her TIAL powers, the judge had decided to provide notice of the judgment and of the extent of the information that would be submitted to the

foreign tax authorities. If such notice was to be restricted, the Applicant party (the United States) would be required to show that doing so would prejudice the criminal tax investigation, expose potential witnesses to interference or risk evidence tampering.

LPE

CONTRACT

Vista del Mar Developments Ltd v Janet Francis and Dwight Clarke

Contract – sale of land – specific performance – agreement by purchasers to commence and complete construction within a specific time – deed of variation – vendor’s option to re-purchase - whether discretionary bars to remedy specific performance

Cause No: G 247 of 2014

**Grand Court
Mangatal J
September 20th 2016**

*Mr M Imrie and Ms G Freeman for the Plaintiff
Mr H Robertson for the Defendants*

Facts:

V is a company, whose business was land development. V entered into a contract of sale with D, whereby V agreed to sell, and D agreed to purchase, a parcel of land. A clause in the agreement required D to commence construction on the land within 18 months of completion, or complete such construction by the third anniversary of completion. If this was not done, provision was made for the property to be sold back to V, on V issuing written notice to D. The sale price in such a case was the price D paid for it, plus any value that the construction added to the land.

In April 2011, V and D entered into a written deed of variation, as D had required an extension of time. The new clause was substantially similar to the old clause, but the dates were different and favoured D.

D failed to comply with the terms in the deed of variation. V argued that D was in breach of the deed of variation and V sent a notice to D exercising the right to purchase the property.

Several issues arose for determination in the case, namely:

1. whether D, by the terms of the agreement for sale, was under an obligation to commence construction under the terms of the deed of variation;
2. whether the agreement, as varied, created a valid and enforceable option to purchase in favour of V;
3. whether the option had been exercised correctly;
4. whether the enforcement of any obligation on the part of D to resell the property to V imposed a detriment on D, which was out of proportion to any legitimate commercial or other interest that V might have in enforcing the provision;

5. whether damages would provide adequate benefit to V, in lieu of specific performance;
6. whether certain equitable maxims, such as “he who comes to equity must come with clean hands”, and “delay defeats equity”, applied to the facts of the case.

Held (order as follows)

- (i) The failure of performance of the obligation on D to commence and complete construction as required by the agreement for sale, as varied by the deed of variation, amounted to a breach of contract.
- (ii) There was a valuable and enforceable option to purchase, in V’s favour, consideration for which was the deed itself.
- (iii) On the facts of the case the option had been correctly exercised by V.
- (iv) The obligation to sell the property back to V was a primary conditional obligation. D would receive back what they had paid for the property. D’s ‘losses’, such as they were, amounted to the money spent as a precursor to commencing construction on the land. The purpose of the condition in the agreement was not punitive, and, moreover, all the parties in the case were experienced in commercial matters.
- (v) Damages would not be an adequate remedy on the facts.
- (vi) There was no evidence to suggest that there had been an unreasonable delay on the part of V, nor had it acted in any way which would cause the court to conclude that it had not acted with clean hands.

MT

CRIMINAL LAW

In the Matter of the Roumania Order in Council dated 30 April 1894, SR No. 119

and

In the Matter of the Extradition Act 1989

and

In the Matter of a request for the extradition of Tanjala f/n Mihai

and

In the Matter of an application for a writ of Habeas Corpus by Mihai Tanjala

Extradition - Extradition Act - Extradition Treaty and Extradition Order in Council - application for writ of habeas corpus

Cause No: 06596/2015

**Grand Court
Swift J (Actg.)
June 3rd 2016**

Legislation referred to

Grand Court Rules (1995R) O.54

Extradition Act 1989, s.26, Schedule 1 paras.1 (2)(b), 2, 4 (2), 4(3), 5 (4), 6, 7(2), 7(3), 8 (1), 12, 20 (UK)

Order in Council 30 April 1894 SR No 119, Articles VIII, X, XII, XVII (UK)

Extradition Act 1870, ss.2, 9, 10 (UK)

Extradition Act 2003 (UK)

Extradition Act 2003 (Commencement and Savings) Order 2003 (UK)

Police and Criminal Evidence Act, 1984 s.73 (1) (UK)

Treaty between the United Kingdom of Great Britain and Roumania for the Mutual Surrender of Fugitive Criminals, March 21, 1893, Arts II, X

Treaty between the United Kingdom and Greece for the Mutual Surrender of Fugitive Criminals Athens, September 24 1910 Art 7

Article 10 (a) of Law 78/2000 Roumania

Penal Code (1995R) s. 229 (now Penal Code (2013R) s. 241)

Convention for the Protection of Human Rights and Fundamental Freedoms, Art 6

Cases referred to

Re Evans [1994] 1 WLR 1006

R v Governor of HM Prison ex parte Franco Barone [1997] QBD Transcript CO/2734/1996

Re Kiriakos [1996] EWHC Admin 205

R v Governor of HM Prison and Government of the Republic of France, ex parte, Delli Transcript CO/ 3968/98

In Re Guisto (FC) application for a writ of Habeas Corpus [2003] UKHL 19

Royal Government of Greece v Governor of Brixton Prison and Another [1971] AC 250

R v Chief Metropolitan Magistrate, ex parte Government of Denmark (Re Nielsen) [1984] 1 AC 606

R v Governor of Pentonville, ex parte, P. Budlong [1980] 1 WLR 1110

Johannes Deuss v the Attorney General for Bermuda [2009] UKPC 38
Schtraks v Government of Israel [1964] AC 556
In Re Arton [1896] QB 108
Roman Orechovsky v the Government of Slovakia [2003] EWHC 2758
R v Governor of Pentonville Prison ex parte Fernandez [1971] 1 WLR 987
Antonov and Baranauskas v Prosecutor General's Office Lithuania [2015] EWHC 1243
European Commission decision 2015/1470 (*Micula v Roumania*)
Symeou v Greece [2009] EWHC 897
Sobezk v Poland [2011] EWHC 284

Authoritative works referred to

2012 and 2015 US Country Report on Human Rights in Roumania

Mr M Tanjala Applicant in person

Ms A Fosuhene amicus curiae

Ms C Richards for the Respondent

Facts:

The Applicant had been convicted in Roumania of the offence of corruption in 2011. He had been found guilty by the Court of Appeal in Roumania of an offence in contravention of Article 10 of Law no. 78/2000. It had been held by the court that the Applicant, while he had been the sole administrator of a state owned company, had sold immovable property, belonging to the company, to his wife's company at a reduced value of 660,000,000 lei, which was then sold by that company to his wife, and then resold by his wife at 15,964,290,000 lei. He personally derived a benefit from this. He had been acquitted by the court of first instance, but was convicted after an appeal by the prosecutor. The Court of Appeal provided a detailed judgment in which it held that the Applicant knew the true market value of the real estate when he sold it to his spouse at an under value, and that the sale was deliberate.

A sentence of five years imprisonment was imposed, and a warrant for his arrest was issued. The warrant could not be enforced because the Applicant had absconded. He was arrested in the Cayman Islands in October 2015 under an international arrest warrant seeking his arrest on behalf of the Roumanian authorities. He claimed immigration rights in the Cayman Islands. The Applicant had arrived in the Cayman Islands after being in the US, Bahamas and Cuba. He spent a month in the Islands and travelled to Jamaica. The Jamaican authorities had returned the Applicant to Grand Cayman.

On 29th October 2015 the Chief Magistrate issued a provisional warrant for the Applicant's arrest which was executed on the same day. After some delay, on 16th December 2015 Her Excellency the Governor issued an Authority to Proceed to the Chief Magistrate, and the extradition hearing took place. A warrant of committal was thereafter issued by the Chief Magistrate. Extradition from the Cayman Islands to Roumania is governed by Order in Council of April 30, 1894 and Schedule 1 to the UK Extradition Act 1989. The Order in Council was made pursuant to the UK Extradition Act 1870. The Order in Council sets out the terms of the Treaty with the UK which was concluded with Roumania on March 21, 1893.

This case concerned an application for release by the Applicant from the relevant warrant of committal on the following four main grounds:

1. the offence of corruption of which he was convicted in Roumania does not exist, is incorrectly classified by the court as fraud by a bailee and is not an extradition crime;
2. his conviction in Roumania was unjust, was committed by someone else and he is innocent;
3. his conviction was obtained for political reasons, and he will be subject to political persecution if he is returned to Roumania; and
4. there was an administrative error in the spelling of his name in one of the documents transmitted by the Roumanian Authorities which required correction.

Among other evidence provided by the Applicant, there were affidavits from other Roumanians, from his defence attorney in Roumania and from a former attorney who had represented him in a prior asylum case in the USA, which were submitted in support of the contention that the applicant's conviction had been a political one.

Held (application dismissed)

The conviction and being at large

- (i) The court in dealing with a conviction case (as opposed to an accusation case) in an extradition proceeding must be satisfied of three main elements:
 - (a) that the offence in respect of which extradition is sought is an extradition crime;
 - (b) that the person whose extradition is sought has been convicted of that offence; and
 - (c) that the person appears to be unlawfully at large (*R v Governor of HM Prison, ex parte, Franco Barone*).
- (ii) The certified and stamped judgments supplied by the Roumanian authorities with authenticated translations were, for the purposes of Articles X and XII of the Order in Council, proper records of the Applicant's conviction, and of the route the case took through the Roumanian courts which terminated the Applicant's conviction in the Court of Appeal.
- (iii) The issue of a warrant of arrest in Roumania for the Applicant to secure his attendance for the service of his sentence was sufficient evidence that the Applicant was unlawfully at large.

- (iv) Article II of the Treaty between Roumania and the United Kingdom, as extended to the Cayman Islands by Article XVII of the Order in Council, lists 31 specific offences as extradition crimes including fraud by a bailee, banker, agent, factor, trustee or director, or member or public officer of any company, made criminal by any law for the time being in force. Extradition is also to be granted for “participation in any of the crimes listed in Article II provided such participation was punishable by the laws of both Contracting parties”. The conduct of the Applicant, for which he was convicted, fell within an offence listed in Article II, and such conduct also plainly fell within the general category of theft and conspiracy to defraud as provided under the Penal Code (2013R) s.241.
- (v) The court would not enquire into the propriety of the Roumanian conviction. It is well established by authorities such as *Royal Government of Greece v Governor of Brixton Prisons and Another* that it is not for the court to inquire into evidential proof leading to the conviction, nor into the possibility of new evidence or of relevant facts. Neither should the court entertain allegations of bad faith on the part of the requesting state in cases where the offence has not been shown to be of a political character. Once the conviction is properly established, the court in the requested state should not seek to go behind the fact of the conviction. This applies not only to allegations of unfairness in the trial process but also to allegations of an improper non-political motive for proceeding with a prosecution.

Conviction of political character

There was no evidence to support the submission of a politically motivated prosecution. The Applicant’s evidence and his written submissions that the conviction was politically motivated amounted to no more than a belief on his part that the motivation behind his prosecution was political. Indeed, he had been out on bail throughout the legal proceedings, and had been acquitted at first instance on what appeared to be a technical ground. Moreover, the ruling of the Court of Appeal was very detailed and did not appear on the face of the ruling to have been politically motivated.

Administrative errors

This was an issue without merit, as there are invariably mis-spellings in documents.

CAN

CRIMINAL LAW – Sentencing

The Queen v Robert Neil Aspinall

Sentencing – money laundering - Proceeds of Crime Law (2014R) s.133; s.144(4); s.141(1)(b) - Cayman Islands Sentencing Guidelines

Ind. No. 0069/2016

**Grand Court
Owen J
July 29th 2016**

Authorities

R v GH [2015] 1 WLR 2126

Ms Toyin Salako for the Crown
Mr James Austin-Smith for the Defendant

The Queen v Michelle Bouchard

Ind. No. 0005/2014

**Grand Court
Worsley J (Actg)**

April 21st 2016

Mr Simon Russell Flint QC & Ms Toyin Salako for the Crown
Mr Peter Carter QC with Ms Lee Halliday-Davis of Stenning & Associates for the Defendant

Facts:

The Queen v Robert Neil Aspinall

Aspinall was the Financial Advisory Director of Deloitte Cayman. In this role, over a period of ten months, he breached his position of trust and fiduciary duty by misappropriating a total of USD\$495,414.20 from two connected funds. Aspinall achieved this by forming a fictitious company in the BVI and through creation of an associated account with HSBC Cayman; both of these had similar names to a legitimate company associated with the voluntary liquidations of the funds.

Aspinall was sentenced to a total of three and a half years in prison with respect to two counts of theft, two counts of forgery, and two counts of converting criminal property (contrary to the Proceeds of Crime Law (2014R) Part V, s.133(1)(c)).

The Queen v Michelle Bouchard

Bouchard, while in a relationship with the victim, an elderly and vulnerable man, stole in excess of USD\$2,000,000. In the course of her conduct, Bouchard had transferred USD\$1,000,000 out of the jurisdiction and had attempted to transfer more. Bouchard was convicted of 14 counts of theft, one count of forgery, one count of obtaining property by deception, three counts of transferring criminal property and six counts of attempting to transfer criminal property (contrary to the Proceeds of Crime Law (2014R) Part V, s.133 (1)(d)) and was sentenced to a total of 12 years imprisonment.

Comment:

Each of the above cases include offences of money laundering. In *Aspinall*, two counts of converting criminal property (contrary to the Proceeds of Crime Law (2014R) Part V s.133(1)(c)), and in *Bouchard*, three counts of transferring criminal property and six counts of attempting to transfer criminal property (contrary to the Proceeds of Crime Law (2014R) Part V s.133 (1)(d)).

Both cases are factually similar with respect to the money laundering aspect, as both cases were examples of self-laundering. That is, that the defendants in both cases, by various methods, were seeking to sequester money which related to predicate offences they themselves had committed, as opposed to activities aimed at sequestering money relating to a predicate offence committed by a third party.

The approach in sentencing, however, was markedly different between the two cases. In *Aspinall*, Owen J considered the money laundering aspects of the charges to be ‘...frankly unnecessary as a means of reflecting the proper basis for sentence.’ (para. 36). In so doing, he was guided by the U.K. Supreme Court decision of *R v GH*. Owen J quoted two paragraphs from the case, the import of which is illustrated by Lord Toulson JSC’s statement that, ‘The courts should be willing to use their powers to discourage inappropriate use of the provisions...to prosecute conduct which is sufficiently covered by substantive offences.’ (para. 49) In Owen J’s view:

“All thieves tend to spend the proceeds of their theft if they can before they are apprehended. Alleging that they are also money launderers because they manage to spend some or all of the proceeds of their predicate crime generally adds nothing to the gravity of their conduct.” (Para. 37)

As a result, *Aspinall* received no sentence for the money laundering aspects of his offending. In contradistinction, Worsley J, in *Bouchard*, sentenced Bouchard, in respect to the money laundering aspects of her offending, to a concurrent total of four years, but to run consecutively with the non-money laundering offences.

Both cases must be viewed in light of the general sentencing principle of totality. This principle is detailed in Part 5 of the Cayman Islands Sentencing Guidelines (Oct 2015) which states:

“The Court, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and at the same time, is a

sentence which is just and proportionate. This is so whether the sentences are concurrent or consecutive. Thus, concurrent sentences will ordinarily be longer than a single sentence for a single offence. It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.”

The Sentencing Guidelines then go on to quote s.4 of The Alternative Sentencing Law 2008 which states: “A court shall, in imposing a punishment under this Law, take into account the following principles...(e) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh...”.

Therefore, *Aspinall* and *Bouchard* evidence a disjuncture in the approach of the courts to sentencing in relation to money laundering offences where the defendant is laundering proceeds from a predicate offence they themselves have committed. It might be argued that the inclusion of such charges in effect overload the indictment and add nothing to the blameworthiness of the defendant (*Aspinall*), or that they manifest a distinct and additional form of criminal blameworthiness and thus culpability (*Bouchard*). Certainly s.144(4) of the Proceeds of Crime Law which states that “[i]t is immaterial who carried out the criminal conduct...” technically does not in any way preclude charges of money laundering in circumstances of self-laundering (as is the case in the U.K.). It might also be argued that the Proceeds of Crime Law can be seen as an essential tool in fostering confidence in the financial industry of the Cayman Islands and thus money laundering activities, irrespective of the genesis of the predicate offence, should be endowed with separate and additional blameworthiness and thus culpability.

However, it should be noted that Part Two of the Cayman Islands Sentencing Guidelines includes the incorporation into the sentencing consideration the harm caused by the defendant’s offending as it impacts the community and states that, ‘This may be particularly relevant where the offence has a potential impact on the tourist or financial industries of the Islands...’. Therefore, it is argued, that it may well be better from a prosecutorial perspective to reserve charges of money laundering for money laundering related to proceeds from third party predicate offences or for self-laundering cases where the money laundering has aspects sufficiently distinct from the predicate offences. In the absence of these factors, any additional financial industry reputational harm caused by self-laundering can then be considered in sentencing as part of the predicate offences under the community harm element, ensuring a fair, just and proportionate sentence in light of these issues. Where this does not occur, it will lie with the judiciary to consider the effect of the totality principle when considering if self-laundering money laundering offences should attract separate sentencing consideration or not and, where they do, whether such sentences should be consecutively or concurrently applied.

In any event, consistency would be best served by legislative clarification of the circumstances which would constitute appropriate inclusion of money laundering charges in such circumstances.

R v Otis Melbourne Myles

Sentencing – burglary – application of Sentencing Guidelines–offence committed prior to the commencement of the Sentencing Guidelines 2015

Case Nos: #00387/14 #03746/15 #03745/15

**Grand Court
Malcolm J (Actg.)
March 23rd 2016**

Legislation referred to

Criminal Procedure Code (2014R) s.7(2)(a)

Cases referred to

R v Chunxia Bao [2008] 2 Cr. App. R (S) 10
R v Boakye and others [2013] 1 Cr App. R (S) 2

Mr P Moran (Deputy DPP) for the Crown
Ms Carver for the Defendant

Facts:

The defendant was convicted on three separate indictments after contested trials (Case numbers: #00387/14 #03746/15 #03745/15). He was committed to the Grand Court for sentence in relation to all matters pursuant to the Criminal Procedure Code (2014R) s.7(2)(a).

Case #00387/14 was a burglary of a dwelling house on 23rd December 2013, committed whilst the occupants were off island. The house had been ransacked and the safe, containing important documents and jewellery worth between US\$125,000 and US\$150,000, had been taken. Other expensive items had been found abandoned nearby, possibly due to the offender being disturbed.

Case # 3746/15 was a burglary of a commercial premises committed by the defendant on 24th May, 2015 whilst he was on conditional bail. The intruder was disturbed and no property appeared to have been taken, but CCTV and forensic evidence linked the Defendant to the offence.

Case #3745 was a night-time burglary of a school, also committed whilst the Defendant was on conditional bail and in breach of his curfew. Cabinets and drawers had been opened and paperwork had been strewn on the floor, but no property appeared to have been taken. CCTV and forensic evidence linked the Defendant to the offence.

The Defendant, who was 29 years old at the date of the sentencing hearing, had eight previous convictions for burglary and five previous convictions for handling stolen goods.

At the sentencing hearing, Defence Counsel argued that:

1. As all three offences were committed prior to the introduction of the 2015 Sentencing Guidelines, and all three convictions for the offences also pre-dated the introduction of the 2015 Sentencing Guidelines, the court ought not to have regard to the 2015 Guidelines.
2. The court ought not to regard prevalence as an aggravating circumstance as had been submitted by the Crown.

Held (convicting the Defendant, and sentencing him to six years and nine months imprisonment for the first offence, nine months imprisonment for the second offence, and 12 months imprisonment for the third offence)

- (i) A sentencing judge can have regard to the 2015 Cayman Islands Sentencing Guidelines even when the offences occurred before the Guidelines were issued. The purpose of the Guidelines is to ensure a certain consistency in sentencing. As long as the maximum sentence in force at the time of the offence is not exceeded, it is permissible to, and indeed a judge should, have regard to the current sentencing guidelines. (Applying *R v Chunxia Bao*).
- (ii) The only evidence as to prevalence was a comparison of crimes in 2014 and 2015. There were 699 burglaries in 2014 and 656 burglaries in 2015 – a 6% reduction. In the circumstances, and on the facts of this case alone, prevalence would not be taken as an aggravating factor.
- (iii) All three sentences should be consecutive but, with an eye on totality, the 12 months sentence would run concurrently with the nine month sentence of imprisonment, making a total sentence of seven years and six months imprisonment.
- (iv) [*Obiter*] Dwelling house burglaries are serious offences and merit a severe sentence when committed even by persons of good character.

DBR

FAMILY LAW

CE v BE

Family – decree of nullity – non-consummation - duress – void and voidable marriages – non-applicability of doctrine of approbation to void marriage – applicability of doctrine of approbation to voidable marriages in the Cayman Islands – requirement of wilful refusal of the Respondent for non-consummation

Cause no: FAM 287 of 2012

Grand Court

Williams J

March 7th 2016

Legislation referred to

Matrimonial Causes Law (2005R), ss.8(1)(c) and 8(3)

Nullity of Marriage Act 1971 s.1(a)

Matrimonial Causes Act 1973 ss.12(1)(c), 13

Cases referred to

Buckland v Buckland [1967] 2 All ER 300

D v D (Nullity: Statutory Bar) [1979] 70 Fam Law

H v H [1953] 3 WLR 849

Hirani v Hirani (1982)

P v R (Forced Marriage: Annulment: Procedure) [2003] 1 FLR 661

Pao On v Lau Yiu Long [1980] AC 614

NS v MI [2006] EWHC 1646

Scott v Sebright (1986) 12 PD 31

Sheldon v Sheldon (1964) Times, July 8

The Siboen and the Sibotre [1976] 1 Lloyd's Rep 293

Silver v Silver [1955] 1 WLR 728

Singh v Kaur 11 Fam Law 152

Singh v Singh [1971] 2 All ER 828

Szechter v Szechter [1971] 2 WLR 170

Vervaeke (formerly Messina) v Smith and Others (1983) 1 AC 45

Authoritative works referred to

Rayden on Divorce 10th edition 1967

D Tolstoy Void and Voidable Marriages, (1964) 27 MLR 385

Mr E Gomez for the Petitioner

Mr D Murray for the Respondent

Facts:

This case involved a petition by CE, the husband (a Caymanian National), who asserted that his

marriage to the (Jamaican) Respondent, entered into on 20th December 1995, be declared null and void, pursuant to the Matrimonial Causes Law, s.8(1)(c). This application was made following several other applications in relation to the parties, most notably a petition for divorce filed earlier by BE, the wife, and a dispute over financial relief and title to the former matrimonial home.

The basis of the nullity petition was duress. CE contended that the parties did not have a husband and wife relationship, because he (the Petitioner) was a homosexual. Instead, the marriage was one of convenience to secure a better life for his infant child, who was born prior to the marriage and, it was contended, would not be allowed to remain in the jurisdiction without the Caymanian father's marriage to the Jamaican mother. CE pleaded that no intercourse had taken place between the parties save for the conception of their child, which he only did for fear of her telling people that he was a homosexual. BE pleaded that marital intercourse had taken place and that CE had married, not under duress, but of his own free will and personal choice. It was noted that there was a financial motivation to presenting the nullity petition, namely to preserve the asset of the former matrimonial home.

Ground 1 (non-consummation):

Williams J addressed the issue of non-consummation under s.8(3)(c) which provides:

'A decree of nullity may be pronounced by the court in respect of any marriage or purported marriage on the ground that.... the marriage has not been consummated by reason of wilful refusal of the respondent to consummate the marriage.'

Williams J was satisfied that on the balance of probabilities, the parties did have sexual intercourse following the marriage ceremony but, even if that was wrong, that the petition could not be granted on that basis because the reason for the non-consummation was due to the Petitioner's wilful refusal rather than the Respondent's.

Ground 2 (duress):

Since there was no Cayman Islands precedent on this point, Williams J then took the opportunity to conduct a full review of the law of nullity through duress. He first clarified the distinction between a void and voidable marriage. The former being a marriage in which there was such an impediment at the time of the ceremony, that the marriage would be viewed by the court as never having taken place, and would be so treated even without any decree of annulment. On the other hand, a voidable marriage was one which the courts would view as subsisting until a decree of annulment has been pronounced by a court of competent jurisdiction which could only be done at the instigation of one of the parties during their lifetime. The doctrine of approbation could preclude a petitioner from disputing the validity of a voidable marriage but not a void one.

Before conducting a review of the relevant case law on consent and duress, Williams J highlighted a significant difference between the relevant legislation in the Cayman Islands, and England and Wales. In the Cayman Islands, if a party is induced to go through a ceremony of marriage by duress, the marriage may be declared void by reason of duress, fraud or incapacity of the mind, *per* s.8(1)(c). Whilst, under the common law of England and Wales, a lack of consent due to duress would render the marriage void prior to 1971, statutory provisions now contained within the Matrimonial Causes Act 1973, rendered such a marriage voidable and not void. Importantly,

Williams J noted that this appeared to cause a distinction between the cases from England and Wales. The pre-1971 cases mostly favoured an objective approach, whereas in more recent times the courts had applied a subjective approach. His Honour opined that one explanation for this apparent change in approach was that a stricter test was considered desirable when the consequence was a void marriage, with no time bar applying.

Following a review of the post 1971 case law, Williams J noted that, on the whole, the courts in England and Wales demonstrated a preference for the subjective approach to be applied in determining whether consent was valid. Notwithstanding that a marriage in the Cayman Islands would be void (and not voidable) for duress and that the facts in this particular instance did not relate to a forced marriage, his Honour was satisfied that the preferable approach to be applied in the Cayman Islands should likewise be the subjective approach, both as a matter of precedent and policy.

Accordingly, the approach of the Cayman courts should be that the Petitioner need not show threats of a specific type, but rather was required to demonstrate whether the threats, pressure, and other relevant factors were such that they destroyed the concept of true consent, and eroded the will of the individual. At the same time, it was noted that the court should recognise the importance of the institution of marriage.

Held (dimissing the petition for nullity)

Applying the subjective test:

- (i) there was a conflict of evidence as to the circumstances leading up to and after the ceremony. However the credibility of BE's evidence was to be preferred, and examples of CE's questionable reliability were noted.
- (ii) CE recognised that one of the benefits of marriage would be the regularisation of his child's immigration status. It was CE's suggestion that the parties should marry, and it was clear that CE's decision to marry was not rushed. He was able to think lucidly about the consequences of the marriage, as he required BE to write out an agreement designed to preserve his premarital assets. The same agreement also mentioned a marriage "due to love", and that the assets which accrued after the marriage would be dealt with according to the law. His evidence that the marriage was loveless and lacking intimacy was unreliable.
- (iii) In applying the subjective test, it was necessary to continue to recognise the importance of the institution of marriage. A marriage did not become void simply because a party entered into it with the ulterior motive of circumventing immigration requirements. For a decree of nullity to be granted, there must exist coercion or duress that overbore the will of the individual. CE was a person of sound mind and full age who entered into a marriage in the presence of witnesses. On the balance of probabilities, the Petitioner had not presented evidence that his will had been overcome to the extent that his express consent was not real consent. The duress had to be present at the time of the marriage, with conduct prior to the marriage also of potential relevance.

- (iv) On the facts stated, the court was not satisfied that CE's consent had become vitiated by virtue of duress when he married BE. Although CE may have been concerned about immigration issues, his evidence was insufficient to establish that when CE married BE, he was under such a level of oppression that his consent was not his own.
- (v) The petition for decree of nullity was dismissed.

LJ

Department of Children and Family Services v DE, NE & H,T, J

Family – care order - unopposed care order – duty of the court to investigate the facts prior to making an unopposed care order – application to remove a child from the Cayman Islands to attend a residential treatment facility in Florida

Cause no: FAM 237 of 2010

Grand Court – Family Division
Williams.J
March 7th 2016

Legislation referred to

Children Law (2012R) ss.3, 33 & 35

Cases referred to

DCFS v SH & WH Cause No. FAM 88 of 2013
Re G (A minor) (Care proceedings) [1994] 2 FLR 69

Ms T Williams for the Applicant
Mr D Altneu and Mrs K Thompson for the Respondents

Facts:

This case followed earlier care proceedings in 2015, and concerned an unopposed care order made by the DCFS in relation to a female 12 year old child, T, in order that she could be sent to rehabilitative psychiatric treatment facility in Florida. No such facility was available in the Cayman Islands.

Held (finding for the Applicant)

Whilst the application for the care order was unopposed by the mother, father and *guardian ad litem*, Williams J made clear that the court's role was not merely a "rubber stamping exercise". Following *DCFS v SH & WH*, the court has an overriding duty, even if an agreement is reached, to investigate the material placed before it before making a care order under the Children Law (2012R) s.33.

- (i) Given an earlier judgment to award an interim care order, plus subsequent additional

factors of deterioration of the behaviour of T and psychiatric evidence, Williams J was satisfied that the threshold criteria as stated in *DCFS v SH & WH*, were met and that there was an actual likelihood of significant harm to T. Moreover, the welfare checklist was satisfied and it was in the child's best interests to promptly attend the therapeutic facility in Florida.

- (ii) Contact should be promoted between the child and her parents and siblings, as set out in the care plan.

LJ

Faulkner v Damer

Family Law - financial relief - jurisdiction – interim provision - interim lump sum - costs

Cause No: FAM 60/2016

**Grand Court
Family Division
Williams J
June 1st 2015**

Legislation referred to

Matrimonial Causes Law (2005R), ss.19, 20
Matrimonial Causes Rules (2005R)
Matrimonial Causes Act 1973, s. 23(1)(c), (3)(a)
England and Wales RSC, O.29, r.2
Grand Court Rules, O.1, r 2; Order 29 r. 2, O.62 r.4 (1) and 4(3)

Cases Referred to

Wicks v Wicks [1998] 1 FLR 470
Barry v Barry [1992] 2 FLR 233
Tee v Tee and Hillman [1999] 2 FLR 613
CMS v RGS Fam 177/2013
Roy Michael McTaggart v Mary Elizabeth McTaggart CICA 14 of 2010
DJ v BJ & RK Fam 66/2014

Authoritative works referred to

Peter Duckworth Duckworth's Matrimonial Property and Finance, para B123

Mr D McGrath for the Petitioner
Ms L McDonagh for the Respondent

Facts:

The parties were married on 1st February 2012 in England and there were two children of the marriage, aged five and ten respectively. Subsequent to the marriage, the parties moved to the Cayman Islands to live. On 29th March 2016 the Petitioner filed for a divorce, which was not contested. The petition was proved on 19th April 2016.

The Respondent moved back to England and was facing health and employment issues. He filed a summons, which was amended on 12th May 2016. Under the amended summons the Respondent applied for an order for maintenance, pending suit for spousal and child maintenance for the amount of US\$8000 per month; for an order for a lump sum payment of US\$30,000 for interim legal costs; for an order for an unspecified interim lump sum payment to meet his relocation costs; and for an order requiring the Petitioner to pay or to transfer to the parties' joint bank account the sum of US\$62,500. The Respondent had also applied for leave to remove the children permanently to the United Kingdom.

The Petitioner had previously offered to make a capital payment to the Respondent of around US\$50,000 which she believed to be his interest in the matrimonial assets. This offer was refused by the Respondent.

The following applications were made:

1. an application by the Respondent for an interim lump sum payment to meet his relocation costs to England; and
2. an application by the Petitioner that the Respondent pay the Petitioner's costs for the hearing of this part of the summons.

In her application for costs, the Petitioner contended that the Respondent should have realised from the outset that the application for an interim lump sum payment was flawed as the court had no jurisdiction to make interim lump sum orders in matrimonial proceedings brought under the Matrimonial Causes Law (2005R).

Held (order as follows)

Application for the interim lump sum payment (application dismissed)

- (i) The preliminary issue was whether the court had jurisdiction to make an interim lump sum payment in proceedings governed by the Matrimonial Causes Law (2005R) ("the Law").

Section 20 of the Law sets out the orders which the court can make pending suit, and the section contains no provision for the making of a lump sum order. Even if there was a need in some cases to make interim capital provisions, the inherent jurisdiction of the court did not confer a general residual discretion to make any order necessary to ensure that justice be done between the parties. Claims arising from the breakdown of a marriage should

only be brought in the context of the empowering Law and in the Cayman Islands the Law does not confer such a power.

- (ii) Held, *obiter*, that interim orders in relation to school fees and costs allowance are not lump sum orders, but are periodical payment orders.

Application for costs (application granted)

- (i) Pursuant to GCR, O.62 r.4 the court has a wide discretion concerning the making of costs orders in matrimonial proceedings and this rule has effect unless otherwise provided by any law.
- (ii) In accordance with Cayman Islands precedents such as *CMS v RGS* and *McTaggart v McTaggart*, if the court sees fit to make an order as to costs in any matrimonial proceedings, the court shall order costs to follow the event, except where it appears to the court that, in the circumstances of the case, some other order should be made as to the whole or any part of the costs.
- (iii) There was nothing in the submission as to costs before the court, or from the circumstances of the case, that would lead the court to depart from the normal course, i.e., that costs follow the event. It should have been evident to the Respondent that the application for an interim lump sum payment would fail as the court had no jurisdiction to make the order sought. Accordingly, having regard to the applicable precedents and GCR, O.62 r.4, the Respondent was ordered to pay the Petitioner's costs incurred in preparation and for the hearing of the summons.

CAN

SD v GD

Family law – application to vary ancillary relief order – periodical payments for children – education and medical expenses for children – court's duty when approving consent order

Cause No: Fam 44 of 2015

Grand Court
Williams J
10th March 2016

Legislation referred to

Matrimonial Causes Law 2005

Mr A Walters for the Petitioner
Mr D Holland for the Respondent

Facts:

The parties married in the Cayman Islands in May 1994. They went on to have two children, C, who is now aged 18, and L, who is now aged 14.

SD, the Petitioner wife, filed for divorce on 2nd March 2005, with an order proving the petition made on 12th April 2005. The Decree of Dissolution of Marriage was certified on 21st October 2005. The matters relating to ancillary relief were settled by way of a consent order on 21st October 2005.

The Order required GD, the Respondent husband, to pay SD the sum of \$3500 per month, by means of a standing order on the last working day of each calendar month. This payment was to continue until C and L attained the age of 18, or until they completed tertiary education. Moreover, it provided that there would be no future requests by SD to increase this payment amount beyond the agreed figure of \$3500. The consent order also provided that SD and GD would equally bear the costs for all education and medical related expenses until C and L attained the age of 18, or until they completed tertiary education.

A joint custody, care and control order was also made on 21st October 2005, although it was noted that, since the divorce, the mother had undertaken the role of primary physical carer of the children. The eldest child, C, was now in full time education in the United States, and the youngest child, L, continued to attend private school in Grand Cayman.

The current proceedings related to a variation of the original consent order, pursuant to the court's jurisdiction to do so, further to Matrimonial Causes Law 2005 s.23,.

In her summons, dated 24th December 2014, the Petitioner sought payment of outstanding sums owed relating to payments made for the children, pursuant to the consent order of 2005 and, reinstatement of continuing payments by standing order.

The Respondent, in his summons filed March 4, 2015, sought the following:

1. a reduction in the amount of child maintenance in relation to the eldest child, C, who was now studying full time overseas;
2. a variation of the order from 2005, specifically that part which concerned non-urgent medical treatment;
3. that the parties agree in advance of such medical treatment;
4. that SD provide copies of all relevant receipts and documentation on a monthly basis;
5. that the court make an order relating to the children's medical expenses as well as relevant maintenance orders expressed to last until the respective child turned 18, or completed full time tertiary education, until the age of 21.

Held (order as follows)

- (i) The change of circumstances of the children and the parties since the making of the original order was noted. It was the duty of the court to carefully consider the content of a draft consent order negotiated by the parties, and for the court to be satisfied that the varied order is appropriate before approval is granted.
- (ii) The variation of an original order, which was made pursuant to the Matrimonial Causes Law, s.19, was more than '*simply a rubber stamping exercise*'. In considering whether to grant any such variation, the matters to be taken into consideration included the following: the best interests of the children, and the responsibilities, needs, financial and other resources of the parents as well as their actual and potential earning power.

RM

IMMIGRATION LAW

Appleby (Cayman) Limited v Chief Immigration Officer

Immigration – decision to grant work permits

Cause No: G0046/2016

**Grand Court
Panton J
June 14th 2016**

Legislation referred to

Immigration Law (2015R), Ss.44, 50, and s.53

Mr A Bolton of Appleby for the Applicant

Facts:

The case concerned an application for leave to apply for judicial review of two decisions made by the Chief Immigration Officer (“CIO”) to grant temporary work permits. The Applicant is a firm of attorneys-at-law. Two attorneys who had worked for the Applicant resigned simultaneously, to take up employment with another law firm in the Cayman Islands. The Applicant was of the opinion that both attorneys were “in breach of their duties of good faith and loyalty”. In August 2015 the Applicant wrote to the Business Staffing Plan Board in relation to the granting of new work permits for the attorneys. The Applicant requested that the Board refuse to grant each of the attorneys a permit to work for the other firm, pursuant to the Immigration Law 2015 s. 50.

Correspondence passed between the CIO and the Applicant in relation to the work permits before the Applicant was informed that there would be no revocation of the permits. The Applicant thereafter applied to the court seeking leave to apply for judicial review of the decision of the CIO. The Applicant claimed that the CIO was in breach of s.50 Immigration Law, that there was no right to appeal thereunder and that there existed a prospect of success if the Applicant were to be granted leave to apply for judicial review.

Held (refusing the application)

- (i) Immigration Law s.50 states that, during the currency of a work permit, the holder of that permit may not change his employer unless the board or the CIO believes that there are special circumstances. S.2 defines “special circumstances” as including a situation where;
 - a) The position has become redundant;
 - b) The worker is being victimised by the employer or by other employees of that employer;

- c) The employer has changed due to corporate action such as merger or amalgamation; or
- d) The worker has been given written consent by his present employer.

The word “including” in the definition was very important. It indicated that the s.50 list is inexhaustive, and that the CIO has clearly been given a discretion by the legislature.

- (ii) Section 53 of the Law contained other provisions in respect of the grant of temporary work permits, and requires the CIO to have regard to the criteria in s.44(2)(a), (3) and (4) of the Law.
- (iii) Based on the facts in the affidavit in support of the application, there was no evidence that the CIO had erred. No leave would be granted for a challenge to the exercise of the CIO’s discretion afforded to him by law.
- (iv) Recital of the record of Hansard was unhelpful in this situation. The wording of the legislation was clear and not in need of such aid. Legislators the world over have from time to time said one thing, yet legislated another. Where the language of the statute is clear, the words are to be given their natural meaning. If the legislature wished to avoid situations such as the instant one from arising, it must state in clear language that the CIO has no discretion and list exhaustively the circumstances that the CIO should consider.
- (v) If attorneys ‘A’ and ‘B’ had breached their contracts with the Applicant, the remedy for the applicant to pursue rested in breach of contract. The application seemed to be an attempt, albeit unintentional, to involve the CIO in unnecessary and unwarranted litigation.

RLM

INSOLVENCY

In the Matter of Ardent Harmony Fund Inc (In Official Liquidation)

Insolvency – anti-suit injunction – proper jurisdiction for liquidation

Cause No: FSD 54 of 2016 (ASCJ)

Smellie CJ
Grand Court
May 26th 2016

Legislation referred to

Companies Law (2013R) s.97(1)
Companies Law (2013R) s.124
Company Winding Up Rules, O.15, r.5(1)
Grand Court Rules O.1 r.1(1)(ff)
Grand Court Rules O.62, r.4(11)

Cases referred to

Ayerst (Inspector of Taxes) v CK Construction Ltd [1976] AC 167
Bloom v Harms Offshore AHT Taurus GmbH & Co KG [2009] EWCA Civ 632, [2010] Ch 187, [2010] 2 WLR 349
Bushby v Munday (1821) 5 Madd 297
In Carron Iron Company Proprietors v Maclaren (1855) 5 HLC 415
Singularis Holdings Ltd v PriceWaterhouseCoopers [2014] UKPC 36
Wight, Pilling and MacKey v Eckhardt Marine GmbH [2003] CILR 211
Stichting shell Pensioenfonds v Krys and another [2014] UKPC 41

Authoritative works referred to

Dicey Morris & Collins, the Conflict of Laws (15th ed)
Sheldon on Cross Border Insolvency (4th ed)

Ms R Reynolds and Mr W Jones for the Applicant

Facts:

International Tropical Timber Organisation (“ITTO”), was a member of and the single largest creditor of the Ardent Harmony Fund Inc (In Official Liquidation) (the “Fund”). It had sought a receivership order and the appointment of a trustee in bankruptcy over this Fund in proceedings brought in Barbados (the “Barbados Proceedings”).

The Fund operated as an open-ended investment fund until voluntary liquidators (the “JOLs”) were appointed by special resolution on 26th April 2016. On 27th April 2016 all creditors were put on notice that an application would be filed due to an inability of the directors to provide a declaration of solvency. On 10th May 2016 an order was made that the liquidation continue under the supervision of the court.

From the commencement of their appointment, the JOLs worked with the Fund's service providers and other third parties to gather in the assets of the Fund. Proceedings were issued in the US against Bruin Fund LLC (the "US Proceedings") with which the majority of the Fund's assets were invested. The JOLs found no assets or debtors in Barbados, other than the Fund's bank accounts over which the JOLs took control and transferred the full balances to accounts opened in the Cayman Islands.

The JOLs notified ITTO of the steps being taken to realise assets, including the US Proceedings. ITTO, in turn, on 19th May 2016, submitted its Proof of Debt whereby, the JOLs argued, it must be deemed to have submitted to the jurisdiction of the court in the liquidation of the Fund.

Without notice to the JOLs, ITTO commenced the Barbados Proceedings on 13th May 2016 although no service was effected on the Fund in the Cayman Islands. Having learned of the proceedings, the JOLs instructed Barbados counsel to act on behalf of the Fund, and at a hearing there on 20th May 2016, ITTO's application was adjourned until 27th May 2016.

Relying on Barbados counsel's legal opinion, the JOLs argued that at the hearing in Barbados a receiver might be appointed by the Barbados court over the assets of the Fund. Such appointment would, however, conflict with the role of the JOLs.

The JOLs sought an anti-suit injunction restraining ITTO from continuing the Barbados Proceedings arguing, *inter alia*, that:

1. the Fund was already under the control of the Cayman Islands court;
2. there were no assets, debtors or other relevant connection with Barbados; and
3. an appointment of a Trustee in Bankruptcy in Barbados would result in conflicting bankruptcy regimes and orders being made in two different jurisdictions, which would increase the costs to the Fund's estate. This had the potential to undermine the US Proceedings. Moreover, there would be a conflict of interest as ITTO sought to appoint a receiver of the auditor who had acted for the Fund and against whom a claim might lie.

If the order for the anti-suit injunction were granted, the JOLs further sought leave to serve the injunction outside of the jurisdiction, such service to be effected on ITTO *via* its Barbados attorneys.

Held (order granted)

- (i) There is a strong public interest in the ability of a court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis (*Singularis Holdings Ltd v PriceWaterhouseCoopers*).
- (ii) The court has jurisdiction to grant an anti-suit injunction in a case where foreign proceedings are calculated to give the litigant prior access and it is satisfied that it has personal jurisdiction over the party to be restrained (*Bushby v Munday*).

- (iii) An anti-injunction can be granted against a foreign litigant even where it purports to sue before the courts of its own country and simply because there may be difficulty in enforcing it against the foreign litigant does not mean that the anti-suit order should not be granted (*Stichting shell Pensioenfond v Krys and another*).
- (iv) ITTO was a shareholder of the Fund, as well as having submitted a Proof of Debt in the Cayman liquidation, and thus the court had personal jurisdiction over ITTO.
- (v) The order for substituted service outside the jurisdiction was justified in all the circumstances of the case.
- (vi) In light of ITTO's unilateral decision to issue the Barbados Proceedings without serving notice upon the JOLs; the lack of any apparent proper basis for doing so; and the refusal to dismiss or withdraw the Barbados Petition once the lack of utility of the Barbados Proceedings was brought to its attention, the JOLs were granted costs on the indemnity basis.

NCE

In the matter of Madison Niche Assets Fund Ltd (In Liquidation) ("MNAF")

In the matter of Madison Niche Opportunities Fund Ltd (In Liquidation) ("MNOF")

Cayman Islands investment fund in liquidation - claim before the Delaware court seeking damages for breach of service agreement - application to the Grand Court for leave to allow Delaware action in continuance pursuant to Cayman Islands Companies Law (2013 Revision) s. 97(1) – appropriate forum - applicable principles.

Cause No: FSD 0035 of 2015 (ASCJ)
FSD 0036 of
2015 (ASCJ)

Grand Court
Smellie CJ
April 25th 2016

Legislation referred to

Companies Law (2013R) s. 97(1)
United States Bankruptcy Code

Cases referred to

Ahmad Hamad Algosaibi and Brothers Company v SAAD Investments Company Limited and Forty-Two Others [2010] (1) CILR 553
In re Aro Co. Ltd [1989] Ch 196
Re Bank of Credit and Commerce Int'l S.A (No 4) [1994] 1 BCLC

Mr F Hughes of Conyers Dill & Pearman for the Applicant.

Mr B Gowrie of Walkers for the Joint Official Liquidators of MNAF and MNOF.

Facts:

This case concerned an application pursuant to the Companies Law (2013R) s.97(1) for leave to continue a Delaware action against two exempted Cayman Islands companies, MNAF and MNOF, both in liquidation. The case was noted by the Grand Court as an unusual instance of cross-border insolvency cooperation. The applicant, TMC Consulting Services LLC (“TMC”), was a Delaware LLC which had an ongoing action in Delaware against MNAF and MNOF. TMC commenced proceedings in the Delaware courts, claiming approximately US\$2.1m in damages for breach of a Consulting Agreement entered into in October 2014 with the MNAF and MNOF. The Consulting Agreement was entered into after MNAF and MNOF were placed into voluntary liquidation, but before the Liquidators’ appointment was continued by way of supervision by the Grand Court. The Consulting Agreement was governed by the laws of Delaware, and designated Delaware as the exclusive forum for the resolution of disputes relating to it. While it was accepted that the Delaware action was properly instituted in Delaware, the continuation of the action required the leave of the Grand Court, since MNAF and MNOF were being wound up under Cayman Islands law.

In January 2016, the Liquidators petitioned the United States Bankruptcy Court for Delaware, seeking to obtain recognition of the Cayman Islands liquidation proceedings as *foreign main proceedings* pursuant to Chapter 15 of the United States Bankruptcy Code. TMC initially objected to the Liquidators’ application to obtain Chapter 15 recognition on the basis that an ordinary and usual consequence of recognition is that a stay is imposed upon any proceedings against the bankrupt. However, TMC withdrew its objection following an agreement with the Liquidators that the recognition order granted by the U.S. Bankruptcy Court for Delaware would include the express *caveat* that the TMC litigation, as foreign main proceedings, would not be stayed. A number of provisions were contained in the recognition order to cover the agreement, including an injunction prohibiting the Liquidators from resisting any application by TMC to the Grand Court to lift the stay under s.97(1).

TMC applied to the Grand Court for leave to pursue the Delaware proceedings against MNOF and MNAF. The Grand Court referred to *Ahmad Hamad Algosabi and Brothers Company v SAAD Investments Company Limited and Forty Others* (the “SAAD Judgment”) as the leading authority on the Companies Law s.97(1), and its English equivalent, the Insolvency Act 1986 s.130(2). It was established in the SAAD judgment that on an application under this provision, the court has a free hand to do what is right and fair, according to the circumstances of each case.

The Grand Court further noted the comments of Jonathan Parker J in *Re Bank of Credit and Commerce Int’l SA (No 4)*. It was stated that in cases where there are competing claims to the assets, the essential question that a court must determine, on applications to grant leave under s.97(1), was whether the dispute was one which could be appropriately determined within the winding up process, or whether it was more appropriately determined in separate proceedings.

It was set out in *Stichting Shell Pensioenfond v Krys and Another*, as a settled principle, that claims against a company were ordinarily required to be resolved in the context of the winding up process. However, the Grand Court noted that there may be circumstances where it is appropriate to allow proceedings to take place outside of that process. The Grand Court stated that the essential question to ask was whether it was more appropriate to allow the Delaware litigation to run its course, or whether TMC should be required to establish its claim exclusively in the winding up process. The Grand Court concluded that TMC's claim could not be resolved within the winding up process itself until it was established outside of that process and therefore the claim would need to be determined by way of separate litigation in either Delaware or Cayman. The question thus became which was the more appropriate forum for determining TMC's claim.

Held (application granted)

The Grand Court concluded that the overwhelming answer was that Delaware was the most appropriate jurisdiction in which the claim should proceed.

The court set out the following reasons for permitting the TMC litigation to proceed in Delaware:

- (i) The fact that the companies and the Liquidators agreed to the recognition order permitting the TMC Litigation to continue in Delaware. This was a sufficient reason in, and of itself, to grant the order.
- (ii) The Consulting Agreement which was the subject matter of the dispute, was governed by the laws of Delaware since it contained a clause which said that that was the exclusive venue for the resolution of disputes.
- (iii) The TMC Litigation involved claims against various entities other than the companies which were the focus of this dispute. If TMC were not permitted to proceed with the TMC Litigation, but were forced to litigate in the Grand Court, then near identical litigation would be taking place against those other entities in Delaware. Thus there would be different parties engaged in what was essentially the same dispute in different jurisdictions, resulting in significant duplication and an increase in costs.
- (iv) To determine the TMC Litigation in Delaware would be more convenient for the witnesses, ensuring that no costs were wasted by either the liquidators or TMC.

RLM

In the Matter of Weaving Macro Fixed Income Fund Limited (In Liquidation)

David Walker and Simon Conway (as Joint Official Liquidators) v Citco Global Custody N.V.

Insolvency – leave to amend summons – leave to substitute a new defendant – validity of a writ for service

Cause No: FSD 167 of 2014 (NRLC)

**Grand Court
Clifford J
May 2nd 2016**

Legislation referred to

Companies Law (2013R) s .145
Grand Court Rules O.6 r. 8(2) and (3)
Grand Court Rules O.11 r.1(1)
Grand Court Rules O.12 r.8(1)(a)
Grand Court Rules O.20 r.5
Grand Court Rules O.29 r.5
Hong Kong Rules O.6 r.8
Landlord and Tenant Act 1954 (UK)
RSC O.6 r.8 (UK)
RSC O.20 r.5 (UK)

Cases referred to

Evans Ltd v Charrington & Co Ltd [1983] 1 QB 810
Jones v Jones [1970] 2 QB 576
Mitchell v Harris Engineering Company [1967] 2 QB 703
Owners of Sardinia Suicis v Owners of Al Tawwab [1991] 1 Lloyd's Rep 201
Paybi v Armstel Shipping Corporation [1992] 3 All ER 329
Rodriguez v Parker [1967] 1 QB 116
Whittam v WJ Daniel & Co Ltd [1962] 1 QB 271
Yau Ngai and Others v Yau Tak and Others HCA 1309/2007, Unreported, January 9, 2009

Authoritative works referred to

The Supreme Court Practice 1999 Vol. 1

Mr J Golaszewski and Mr D Olarou for the Plaintiffs
Mr J Walton and Mr A Jackson for the Defendant

Facts:

The application before the court was one of a series of claims pursuant to Companies Law s. 145 (the “Preference Proceedings”) brought by the Joint Official Liquidators (the “JOLs”) of

the Weaving Macro Fixed Income Fund Limited (In Liquidation) (the “Fund”). In the Preference Proceedings, the JOLs sought the return of sums of money paid by the Fund to a number of redeeming investors in the months immediately prior to the commencement of the Fund’s liquidation.

The Writ of Summons (the “writ”) in this instance was issued on 31st December 2014 in circumstances where it was later discovered that both the name and address for service of the Defendant were incorrect. On 2nd June 2015, pursuant to GCR, O.11 r.1(1) the court granted the Plaintiffs leave to serve the writ out of the jurisdiction and it was then served on 25th June 2015 before it was due to expire on 30th June 2015.

On or about 21st July 2015, the JOLs discovered that both the name of the Defendant and the address for service were incorrect and, pursuant to GCR, O.20 r.5, they issued a Summons on 21st August 2015 seeking leave to amend the writ in order to substitute the correct Defendant and its address.

At an *ex parte* hearing on 13th October 2015, the learned judge found the mistake which was sought to be corrected was a genuine mistake and was not misleading, and therefore exercised the discretion under GCR, O.20 r.5 to grant leave to amend the writ (the “October Order”) notwithstanding that the relevant period of limitation had expired. Leave was also granted pursuant to GCR, O.11 r.1(1)(ff) to serve the writ, as amended, out of the jurisdiction. The time for acknowledging service of the writ by the new Defendant was ordered to be 28 days after the date of service. Although express provision was made in the October Order which gave leave to the Defendant to apply to the court, no challenge to the Order was made.

The amended writ was re-issued on 23rd October 2015 and contained the standard note that it could not be served later than 4 calendar months (or in the case of leave for service out of the jurisdiction, 6 months) from the date of issue, unless renewed by order of the court. The amended writ was served on the Defendant on 16th December 2015.

By Summons dated 29th January 2016, the Defendant applied for an order (the “Defendant Summons”) that the service of the writ upon it be set aside on the ground that the writ was invalid as at the date of service, since it had not been renewed at any time between 30th June 2015 and 16th December 2015.

The Parties’ Positions

The Supreme Court Practice 1999 Vol 1, paragraph 6/8/5 provides that a Defendant can only validly be served with a writ of summons while the writ remains valid. If the writ is invalid when served, the Defendant is entitled to apply to the court, within the time limited for service of its defence, for an order setting aside the writ under GCR, O.12,r.8(1)(a). In circumstances where the Defendant is incorrectly identified, leave to amend the writ, and to substitute a new Defendant could be sought pursuant to GCR, O.20, r.5(3).

The Defendant submitted that there was nothing in the sub-rules of Order 20 which suggests that an amendment made pursuant to Order 20 had the effect of revalidating a writ for service. The Defendant argued that even where a Plaintiff was given leave to make corrective amendments to his writ outside of the applicable limitation period, and after the writ had expired, it was still necessary for the Plaintiff to obtain an order expressly extending the

validity of the writ for service (*Rodriguez v Parker; Evans Ltd v Charrington & Co Ltd*). As there was no such express extension in the present case, it was argued that there had been no due service on the Defendant and that such service should therefore be set aside.

The Plaintiffs argued that, although the period during which an original writ is valid runs from the date of issue, the period of validity of a writ which has been amended under GCR O.20, r.5(3) runs from the date of its re-issue for the purpose of serving it on the party who is substituted by operation of that rule (Supreme Court Practice 1999 Vol. 1, paragraph 6/8/5; *Jones v Jones; Payabi v Armstel Shipping Corporation*).

Held (Defendant's summons dismissed)

- (i) Where a writ is amended under GCR, O.20, r.5(3) with the effect that one legal entity is substituted for another as a Defendant, the provisions of GCR, O.6, r. 8(1) which regulate the validity of a writ for service, must be construed as requiring service on that Defendant within the appropriate period from the date of the amendment by which such party is added (*Payabi*).
- (ii) The effect of the October Order was to make the amended writ valid for service on the substituted Defendant for a period of 6 months from the date of its reissue. The writ was reissued on 23rd October 2015, served on 16th December 2015 and was, accordingly, validly served with the required time.

NCE

In The Matter of the Companies Law (2013 Revision)

and

In The Matter of Watler Holdings Limited (In Official Liquidation)

and

In the Matter of Frank Sound Estate Limited (In Official Liquidation)

and

In the Matter of Red Bay Estates Ltd (In Official Liquidation)

Company law – company incorporated with intention to be used as corporate vehicle for distribution of family estate property to sole shareholders, three siblings – Winding Up Petition on just and equitable basis

Cause No: FSD 0092/2010-IMJ

Grand Court

Mangatal J

January 28th 2016

Legislation referred to

Cases referred to

Re DD Growth Premium 2X Fund (In Official Liquidation) 2015 (2) CILR 361

In the Matter of Trident Microsystems (Far East) Ltd 2012 (1) CILR 424

In Re Belmont Asset Based Lending Ltd (in Liquidation) 2010 (1) CILR 84

Authoritative works referred to

French Applications to Wind Up Companies 2nd edition

Mr F Moeran QC for the Joint Official Liquidators

Mr A De la Rosa and Ms M Embury for Mr Selkirk Watler III

Mr M Alberga and Ms D Owen for Ms Shannon Panton and Ms Lynette Watler

Facts:

Background

This matter was noted as having a long and convoluted history. In 2007 a winding up order by the court was presented in respect of Watler Holdings Limited (“the Company”) and two subsidiary companies namely Frank Sound Estates Limited (“FSE”) and Red Bay Estates Limited (“RBE”). This winding up order had been made with the consent of three shareholders, who were siblings. It was presented on a just and equitable basis, due to a falling out between the shareholders. FSE and RBE both owned land on Grand Cayman.

FSE and RBE were ultimately owned by Selkirk Watler (Senior), until he died in 1989, at which time FSE and RBE fell to his estate to be administered under his will, which was executed in 1982. Mr Watler’s wife, Mrs Watler, was initially appointed as executrix. However, she was replaced in 1992 by Jeffrey Parker, who was independent of the beneficiaries. The beneficiaries of the will were Mrs Watler, and her three children Shannon Panton (“SP”), Lynette Watler (“LW”) and Robert Selkirk Watler III (“RSW”).

In 1983 the three children signed a deed of family arrangement, which issued the share capital in FSE and RBE to SP, LW and RSW. The Company was incorporated in 1983 with its shares being divided equally between SP, LW and RSW. At some time prior to 2007, SP, LW and RSW transferred their shares in FSE and RBE to the Company.

Winding Up Petition

In 2007, SP presented a winding up petition, which was granted in 2008, whereby the Company was placed under court supervision. Under the court order, joint official liquidators (the “Liquidators”) were granted powers to appoint themselves as director to the subsidiaries, FSE and RBE, and/or place them into voluntary liquidation, and agree a scheme of arrangement to distribute the assets of the Company. The terms of the 2008 order were found to be important to the resolution of the case. A salient extract of the Order read as follows:

- “5. *The Official Liquidator is directed to prepare a scheme of liquidation whereby the assets of the Company and its subsidiaries be distributed amongst its shareholders in specie in equal shares by value, for which purpose he is directed to instruct a licensed land surveyor to prepare a plan for the distribution of the land. Such scheme of liquidation shall be submitted to the shareholders within 90 days and, in the event that such scheme of liquidation is not unanimously agreed upon within 30 days thereafter, the official liquidator shall apply to the Court for **further directions**.*”

In July 2009, the Liquidators made an *ex parte* application for a pooling order, which was granted by Foster J. Terms of the order which were argued to be relevant read as follows:

- “1.*the assets of the Companies being administered respectively by the Official Liquidator be treated as being and be pooled, for the purpose of the payment of costs, expenses, claims and distributions arising out of or relating to the Companies.....*
2. *All funds, property and assets held by the Companies will be realized and pooled in one liquidation estate account (the “General Pool”) which will be invested by the Official Liquidator as appropriate.*”

Notwithstanding the above order, it was noted by counsel that the Company’s Liquidators attempted for six years to create a scheme of arrangement whereby the property could be distributed *in specie* to the shareholders. Counsel opined that it had proved incapable of receiving unanimous support of the shareholders.

The 2011 Scheme

The first scheme was agreed by SP and LW, but RSW objected to it. In essence, RSW took the view that the 2011 scheme allocated him land which was significantly lower in value than that allotted to SP and LW.

The Construction Order

As a consequence of there being no unanimous agreement by the shareholders, the Liquidators then applied to the court for directions. In October 2012 Henderson J made an order that the parties file skeleton arguments on “the Construction Issue” as follows:

“Is it the intention of the Honorable Justice Foster’s order (“Order”) dated 28 November 2008 that the valuer should value the land and property owned by the Company on an ‘as is’ basis on the assumption that its use will be nothing other than residential, or is it the intention of the Order that the valuer will proceed to this land and property on the basis of “highest and best use”?”

Foster J’s Order - March 2013

There followed a contested argument on the Construction Issue. Foster J made certain orders clarifying the interpretation of the word “value” in paragraph 5 of the 2008 order: “... *means the market value of the land to be distributed **in specie** to the three shareholders....*”. Foster J

further explicitly specified that such value be measured in accordance with internationally recognised valuation standards.

The 2014 Scheme

The Liquidators produced a revised scheme of arrangement, based on the 2014 valuations, as directed by Foster J's order in March 2013. SP and LW agreed to the 2014 Scheme but RSW did not. Once again, unable to secure unanimous agreement, the Liquidators applied to the court for directions. RSW did not file evidence or submissions in advance of the hearing for the 2014 Scheme in June 2015. Mangatal J ordered that, unless RSW file evidence outlining his grievances by 25th June 2015, the 2014 Scheme would be granted. RSW served affidavit evidence on that date.

One of the matters raised by RSW was that the valuations carried out did not properly comply with the March 2013 order. The key point being that the valuations ignored all, or substantially all, development potential to certain properties.

The Liquidators claimed that, since the last hearing and the filing of RSW's evidence in June 2015, the picture had changed. Counsel for the Liquidators, SP and LW all argued that what they were really seeking was not so much a variation of the November 2008 order as an augmentation of that order or, rather, that they were seeking further directions from the court, which they contended paragraph 5 of the November 2008 order permitted.

The Liquidators' Case

There was a small amount of land held by FSE which was sold early in the liquidation to meet creditor claims. It transpired that the sale proceeds were not sufficient to meet all creditors' claims. At the time, the shareholders were in agreement that the property was not to be sold. Accordingly, it was asserted that the only feasible way to fund the liquidation claims without selling property was for the shareholders to provide the funding. The shareholders accordingly contributed \$600,000 in 2010. In early 2014, the Liquidators required further funds.

There followed an injection of additional funds into the Company, after which, following the submission by RSW of additional evidence on 25th June 2015, the Liquidators required additional funding. The result was that RSW agreed to contribute his share of the funds required but LW and SP indicated that they no longer desired a distribution *in specie* but rather wanted the properties to be sold and the proceeds distributed.

The Liquidators advised RSW of the new desire of LW and SP to receive the proceeds of the properties by way of cash distributions. RSW responded with an alternative proposal. The Liquidators dealt with RSW's new proposal by way of affidavit to the court. It was the Liquidators' position that, considering the fact that a majority of shareholders wanted the properties to be sold, and that a sale of the properties would avoid further costly delays, the only option available was to sell the properties and distribute the proceeds. Doing so would maximize the return to shareholders.

Mangatal J noted that the sale of the land on the open market would allow any of the shareholders to bid on the properties.

The role of Liquidators was discussed in detail by Mangatal J, in particular, their role as officers of the court and how legislation is typically designed to allow smooth and fast decisions to be made for shareholders in realising assets for their benefit. Her Honour also considered the work of Derek French in “*Applications to Wind Up Companies*”.

The RSW Alternative Proposal

The Liquidators and Mangatal J agreed that RSW’s alternative proposal was voluminous and complex. The Liquidators opined that the proposal was largely for a distribution *in specie* and included a funding proposal that the Liquidators viewed as conditional and unworkable. The merits and substance of RSW’s alternative proposal were considered further by Mangatal J who ultimately agreed with counsel for the Liquidators in concluding that elements of the RSW alternative proposal were unworkable.

Nature of the November 2008 Order

The case was unusual because it took several twists and turns and had been in existence since 2008 when the Liquidators were originally appointed. The case was further complicated by the fact that an order in 2013 needed to be issued to determine the meaning of the 2008 order.

Held (Application granted)

- (i) The law was clear and that the opinion of the Liquidators was to be given considerable weight.
- (ii) The only matter which the three shareholders had ever agreed on was that they did not want the land to be sold. This mutual agreement had changed recently when LW and SP stated their desire to receive distributions in cash rather than fund the liquidation. In this circumstance, there was no option other than to sell the land.
- (iii) In all of the circumstances, it was clear that there was no realistic alternative to sale of the properties. The choice was to pursue the option put forward by the Liquidators or to have the entire process delayed yet again, with no concrete plan of action, which ultimately would amount to no action at all.
- (iv) It did not matter significantly whether the relief was considered as a variation of the November 2008 order or as further direction under it, as both approaches could be justified, although the description “further directions” was perhaps most apt.
- (v) Relief was granted to the Liquidators as set out in the modified draft order provided.

RLM

JUDICIAL REVIEW

Dwene Ebanks v The Department of the Environment (First Respondent) & The National Conservation Council (Second Respondent)

Judicial review – illegality – irrationality – failure to provide prior consultation – fettering of decision by inappropriate considerations – considerations of detriment to good administration

Cause No: G130 of 2016

Grand Court
Mangatal J

1 August 2016

Legislation referred to

Cayman Islands Constitutional Order 2009
National Conservation Law (2013R)

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
R (Mwanza) v Greenwich London Borough Council [2010] EWHC 1462
R (Downs) v Secretary of State of Environment, Food and Rural Affairs [2009] EWCA Civ 664
R (Mabanoff) v Secretary of State for Energy and Climate Change [2009] EWCA Civ 224
R (Campaign to End All Animal Experiments) v Secretary of State for the Home Department [2008] EWCA Civ 417
R v Hampshire County Council, ex parte W [1994] ELR 460
R (Assisted Reproduction and Gynecology Centre) v Human Fertilisation and Embryology Authority [2002] EWCA Civ 20
Begum v Tower Hamlets London Borough Council [2003] UKHL 5

Authoritative works referred to

Judicial Review, 6th Edition, Fordham

Mr S Tromans QC, Ms D J Rhee and Mr K Cox for the Applicant
Ms J Wilson, Solicitor General and Mr K Hemans for the Respondents

Facts:

Background

In 2009, the Cayman Islands became the first country in the world to release Genetically Modified Mosquitoes (“GMMs”). This was part of a trial undertaken by the Mosquito

Research and Control Unit (“MRCU”). The release of the GMMs would take place in three stages. The first batch was released in 2009, and the purpose of this release was to determine whether the genetically modified male mosquitoes would mate with ‘normal’ females, who would go on to produce eggs, which would hatch, but the larvae would die before adulthood. The second release of some 3.3 million mosquitoes occurred in 2010, and its object was to determine if the genetically modified male mosquitoes would suppress the wild mosquito population. The third release, which is the subject of the challenge, had the same objective as the first two releases, albeit in a different location on the Island, namely, West Bay, and with a much larger number of 22 million GMMs being released.

The Application

The Applicant instituted proceedings for judicial review of the decision of the Department of the Environment (“DOE”) acting on behalf of the National Conservation Council (“NCC”) to undertake the third generation release in West Bay. He argued the decision was illegal, irrational and tainted by procedural impropriety, and that this could be demonstrated by the following:

1. The failure to carry out an independent risk assessment of the consequences of the proposed release;
2. A flawed reliance on a risk assessment carried out in October 2009;
3. The failure to carry out a public consultation;
4. A predisposition for taking into account an immaterial consideration, which fettered the
5. Exercise of discretion; and
6. Irrationality.

The Respondents argued that the grounds for challenge lacked the support of any cogent evidence, and were misconceived.

The court’s role in judicial review

The court’s role in actions for judicial review is supervisory, and thus it was not concerned with the merits or otherwise of the project in this case. Rather, the concern of the court was whether the NCC, in arriving at the Contested Decision (“decision”), acted within the scope of its powers, took all relevant considerations into account, and balanced the appropriate considerations. Nevertheless, the court made it clear that, while it was not concerned with the merits of a decision, but rather with its lawfulness and the procedural propriety of the decision, in certain areas, such as those of public health and environmental matters, the court must, in examining the process carried out by the public bodies entrusted with these tasks, examine the rationality of the decision against the backdrop of the law in the area. The court is interested in ensuring that citizens are informed before and after the fact and are consulted within reasonable bounds, prior to the implementation of decisions that may have a direct effect on their lives.

The illegality and irrationality tests, which the court applies to determine whether a decision has been made illegally or irrationally, are well known. The former can be traced to Lord Diplock in *GCHQ*, in which he said that a decision-maker must correctly understand the law that regulated his decision-making power, and give effect to it. The latter can be traced back to the seminal judgment of Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, where he stated:

“In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that it ought not to or disregarded matters that ought to be

taken into account. [It] cannot...override a decision of such an authority ...[It is] concerned to see whether it has contravened the law by acting in excess of its powers.”

Nevertheless, it is important to note that the test for unreasonableness is “flexible and contextual”, as Fordham explained in Judicial Review Handbook. He stated:

“Public authorities have important roles and functions and there must necessarily be questions which it is for them to decide, and not for judges to second-guess. Judicial vigilance is needed under the rule of law, but judicial restraint is as necessary under the separation of powers. In considering whether a public body has abused its powers, courts must not abuse theirs.”

The failure to carry out an independent risk assessment of the consequences of the proposed release

The Applicant conceded that there was no *express* legal requirement that the NCC, pursuant to any provision under the National Conservation Law 2013 (“NCL”), conduct an independent risk assessment in respect of any proposed introduction of an alien or genetically altered species. He also conceded that any such risk assessment could be conducted by the exporter of the genetically modified organisms. However, he argued that such an obligation may be *inferred* from the NCL framework and, in particular, s.3(9) and s.3(12)(h). The former states that it is the responsibility of the NCC to promote biological diversity of natural resources, and the latter that the NCC has the power to develop procedures for regulating and controlling the import, introduction and release of genetically modified organisms. Moreover, s.5(2) gives the Director of the DOE power to develop and establish criteria to determine whether proposals for the introduction of genetically altered species may cause harm to the Island’s natural resources and, further, the procedures for regulating and controlling said introduced organisms.

Fettering the exercise of a discretion

This ground was based on the assertions:

- (i) that a partnership agreement was signed between the MRCU and Oxitec (who supplied the GMMs), prior to the submission of MRCU’s application to the NCC; and
- (ii) that there was a vested interest by the Mosquito Research and Control Unit in its partnership with Oxitec.

Dr Petrie, the Director of the MCRU, vehemently refuted the second ground stating:

“The interest of the Unit in partnering with Oxitec is purely scientific for the purpose of improving mosquito suppression in the Cayman Islands. I and other personnel within the Unit carried out extensive background research into the efficacy of the Oxitec Technology as a suppression strategy and also the risks relating to human health. While the Unit collaborates on a scientific basis with Oxitec, it remains independent and would not engage with Oxitec if there was any compelling scientific evidence that the technique posed a risk to human health or the environment of the Cayman Islands.”

The failure to carry out a public consultation

The Applicant asserted that the NCC failed to carry out a public consultation prior to making its decision. In response, the evidence was that, in keeping with the NCC’s usual practice, notice of the general meeting (held on 18th May 2016) was given in the local media, and

published on the MRCU's website, along with copies of relevant supporting materials being published on the DOE's website in advance of this meeting.

The affidavit of Dr Petrie also referred to a range of outreach efforts, such as press releases and door to door information campaigns which were a condition of the MRCU being granted the approval.

Held (finding for the Respondents)

- (i) The Respondents' evidence demonstrated that both NCC and the DOE took the potential risks of the project into account. Both conducted research efforts, which included a review of reports by regulatory organisations, such as the FDA and WHO.
- (ii) There was no proper basis to conclude that the NCC or the DOE misunderstood or failed to carry out their functions properly.
- (iii) There had not been a failure to consult prior to the decision by the NCC; the meetings to which the "challenged decision" related were held in public, with advance notice of such. This amounted to: "quite intense public outreach in West Bay."
- (iv) There was no sound basis for the Applicant to suggest that the NCC gave undue weight to, nor indeed considered, the partnership agreement. Indeed, the partnership agreement specifically included a provision that the Oxitec contract was "subject to appropriate approvals of funding."
- (v) There was no evidence to demonstrate that the NCC acted irrationally or unreasonably in arriving at the decision they reached.
- (vi) The Applicant had failed to establish the grounds set out in his application, and the relief sought by way of judicial review was refused.
- (vii) It would be detrimental to good administration as well as being disproportionate for the decision of the NCC of May 18, 2016, (for the release of the GMMs), or that of the Department of Agriculture's (to grant the import licence) to be prohibited and quashed.
- (viii) It was not for the court to interfere with this type of decision making unless it was flawed or procedurally unfair.

RM

TRUSTS

In the Matter of Caledonian Securities Limited (in official liquidation)

Winding up of a corporate trustee – whether liquidators assume the role of trustee or act as agents of the corporate trustee – whether liquidators may charge their fees and expenses to the assets held in trust or whether obliged to recover them only from assets of the liquidation estate of the corporate trustee – if recoverable from the trust assets then by what apportionment and in what quantum

Cause No: FSD 26/15

Grand Court
Smellie CJ
May 5th 2016

Legislation referred to

Insolvency Act 1986 (UK), s.115
Companies Law (2013R), s.109(1)

Cases referred to

In re Berkeley Applegate (Investment Consultants) Ltd (in liquidation) [1989] 1 Ch 32
AHAB v SICL et al 2010 (1) CILR 553
In re Marine Mansions Co LR 5 Eq 601
Scott v Nesbitt 14 Ves Jun 438
Phipps v Boardman [1964] 1 WLR 993
In re Duke of Norfolk Settlement Trust [1982] Ch 61
In re Downshire Settled Estates [1953] Ch 218
In re Berkeley Applegate (Investment Consultants) Ltd (No 3) [1989] 5 BCC 803
Ayerst v C.K. Construction Ltd. [1976] AC 167
Wight, Pilling and Mackey v Eckhardt Marine EmbH 2003 CILR 211
Lehman Brothers v CRC Credit Fund [2012] Bus LR 667
Re GB Nathan & Co P & Y Ltd (in liquidation) (1999) 23 NSWLR
Allenfield Property Insurance Services Ltd et al v Aviva Ins Ltd et al [2015] EWHC 3721
The Winston [1982] AC 939
Re Mirror Group [1988] BCC 324
Re SphinX 2012 (2) CILR Note 11

Mr R Levy QC instructed by Mr R Bell and Mr N Hanna for the Joint Official Liquidators of Cayman Securities Limited
Mr T Lowe QC instructed by Ms G King for Global Asset Allocation Fund Saad Investments Finance Company (No 5) Ltd and Bristol Investment Fund Limited
Mr D Harby for Nova Holding Group Limited
Ms J Hale for the Liquidation Committee of Caledonian Bank Ltd (in liquidation)

Facts:

Caledonian Securities Limited ("CSL") was a company incorporated in the Cayman Islands which held a full Securities Investment Business Licence. Its business was the provision of fiduciary custody and brokerage services to its customers. Caledonian Bank Limited ("CBL") was also a company incorporated in the Cayman Islands and it held a "Category A" Banking Licence. At all material times, CBL acted as sub-custodian with respect to some of the assets under CSL's custody, which comprised cash and securities to the sum of approximately US\$573million.

On 10th February 2015, Ms C Loebell and Mr K Hutchison of Ernst & Young were appointed as controllers of CSL and CBL. CSL and CBL were ultimately wound up on 23rd February 2015, upon a petition presented by the Cayman Islands Monetary Authority. Ms Loebell and Mr Hutchison were appointed as joint official liquidators (the "JOLs") of CSL and CBL.

Certain assets held by CSL and CBL were held on trust for their customers, and therefore could not be considered to be part of the companies' general assets. The JOLs applied to the Court for directions as to how to treat those trust assets. On 24th June, 2015, the Grand Court ordered that the JOLs were authorised to deal with the trust assets in accordance with the instructions of the customers who were beneficially entitled, subject to the establishment of a reserve account equal to one per cent of each customer's trust assets.

The JOLs, pursuant to this order, undertook a significant amount of work in returning the trust assets to customers and, in doing so, incurred a significant quantum of fees and expenses. The JOLs applied to the Grand Court for permission to recover those fees and expenses from the reserve account, with each customer bearing a proportionate share of the total fees and expenses incurred, by reference to the total value of the customer assets.

Global Asset Allocation Fund, Saad Investments Finance Company (No5) Ltd, Bristol Investment Fund Limited and Nova Holding Group Limited (the "Objectors") opposed the JOLs' application on the basis that the trust assets did not belong to the liquidation estates of either CSL or CBL, and the JOLs therefore had no right of recourse to them generally to meet their fees and expenses. The Objectors did accept, however, that the JOLs were entitled to withhold some monies from the reserve account, but only so much as was referable to the actual cost of returning the trust assets to the customers. They further argued that each customer should only bear the costs associated with the return of its trust assets, and should not be made to subsidise the costs associated with other customer accounts.

Held (granting the application)

- (i) The trust assets were held on behalf of customers by CSL and CBL, and did not belong to the respective liquidation estates. The JOLs therefore had no direct legal entitlement to recover their fees and expenses *qua* liquidators from those assets.
- (ii) However, the court retained an inherent equitable jurisdiction to direct that fees and expenses be paid from trust property held by a company in liquidation, where such fees and expenses were reasonably incurred by the

liquidator in returning the trust property to those entitled to it (*In re Berkeley Applegate Investment Consultants Ltd (in liquidation)*).

- (iii) On the facts, the work done by the JOLs was both necessarily required for and was to the benefit of all customers who had assets being held on trust by CSL and CBL. This was the case even if that benefit did not involve an increase in the respective value of the underlying trust assets. On that basis, the court was prepared to exercise its discretion to permit the JOLs to recover from the reserve account those fees and expenses incurred in dealing with the trust assets.
- (iv) A liquidator who is allowed to recover his costs under this jurisdiction would not be required to follow the same strict accounting principles as would be expected of a trustee.
- (v) The method of apportionment proposed by the JOLs which required each customer to bear a proportionate share of the total fees and expenses incurred by reference to the total value of the customer assets, was reasonable. Customers who sought the assistance of the equitable jurisdiction of the court (in asking it to recognise the existence of its beneficial interest in the trust assets) must 'do equity' by contributing a fair share of the overall costs.
- (vi) Further, the task of allocating specific costs to each customer would be impractical and would be imperfect. Further, the costs of employing this methodology would be enormous, and the JOLs would be at risk of not being able to recover those costs.
- (vii) However, in claiming their costs, the JOLs were required to demonstrate that the fees and expenses incurred were reasonably incurred, as well as being proportionate to the ends to be achieved. In assessing the costs on this basis, the court would take into account a number of factors, including: (a) the amount of time worked; (b) the complexity of the case; (c) any exceptional responsibilities required; (d) the effectiveness of the liquidators' operation; and (e) the value and nature of the property involved relative to the expense of the work undertaken.
- (viii) Despite a suggestion made by the Objectors to the contrary, an independent assessor of the JOLs' costs would not be appointed. Instead, the JOLs would be directed to provide records and other relevant information to the Objectors and the Liquidation Committee of CBL. If an agreement could not be reached in respect of these expenses, the matter would be returned for determination by the court.

CAL

ARTICLES

THE IDEAS/EXPRESSION DICHOTOMY IN COPYRIGHT AS A REFLECTION OF THE LOCKEAN LABOUR PRINCIPLE

Introduction

John Locke's most important – or at least best known – contribution to Western thought has been in the field of political theory. As a consequence of his attacks on absolutism, Locke has been labelled by some as the father of modern Liberalism. However, Locke's labour theory, as set out in Chapter V of his *Second Treatise* has had important implications not only for political theorists, but also for lawyers, especially in the field of intellectual property. Although the modern approach to intellectual property protection has become more sophisticated than the original property formulation set forth by Locke, it will be demonstrated that his contribution to the recognition and protection of intellectual property rights is undeniable.

One of the cornerstones of intellectual property protection is the requirement of originality. Protection is only available if the work is the embodiment of the skill and labour of the author.¹ This is commonly referred to as the ideas/expression dichotomy: no rights subsist in a mere idea. It is the expression of the idea in a material form which attracts the protection of the law. The dichotomy, and the early treatment of it by the English courts, can be clearly traced to the labour theory articulated in the *Second Treatise*. Despite the purely theoretical nature of his work, it is interesting to note that Australian, United Kingdom and United States courts have applied the Lockean labour principles in practice, only occasionally directly acknowledging Locke's contribution.

Copyright has been described as an exclusive right to exploit the copyright work, through such means as reproduction, performance and adaptation.² This right is based upon an entitlement to a limited monopoly in a work produced by the author. The monopoly right enables the author to prevent the unauthorised reproduction of his or her work, except in limited circumstances.³ However, this right is predicated upon it being established that there is a work in which copyright subsists. It must first be shown that the work is entitled to legislative protection, and therefore allows the author to take advantage of the limited monopoly granted by legislation in Australia and the United Kingdom.⁴

History of Authors' Protections

Originally, English copyright law did not seek to protect the rights of the author. It was originally designed as a mechanism to secure censorship within England. Shortly after the Restoration in 1660, Charles II encouraged Parliament to enact the Licensing of the Press Act, 1662. The long title of the Act was: "An Act for preventing the frequent abuses in printing seditious, treasonable and unlicensed books and pamphlets and for regulating of printing and printing presses".

This theme of censorship was made clear in the recital, which stated that "many evil disposed persons have been encouraged to print and sell heretical, schismatical, blasphemous,

¹ Note, for example, the traditional cases in this area, such as *Walter v Lane, University of London Press v University Tutorial Press*, and *William Hill (Football) v Ladbrooke (Football)*, which will be discussed in more detail below.

² See, for example, ss. 1(1) and 16 of Copyright, Designs and Patent Act 1988 ("CDPA"), and s. 31 *Copyright Act 1968* ("CA") (Aust.).

³ S. 16 CDPA and s. 31 CA.

⁴ See for example sections 13 and 31 of the *Copyright Act 1968* and s. 2 CDPA

sedition and treasonable books, pamphlets and papers...”⁵ The Act goes on to secure the position of the Stationers’ Guild, by providing that no person is to print any book unless it is first registered with the Stationers’ Company of London.⁶ By this means, the Stationers’ Company was given the exclusive economic right of publication, in return for which, loyalty to the Crown was assured.

The Act went further than merely prohibiting the publication of unregistered material. It sought to limit the number of printing presses in the country,⁷ and sought to restrict the importation of books only to those which had already been approved by the Crown,⁸ or those which had previously not been prohibited.⁹

Thus, the legislature initially granted monopoly rights to the publishers, rather than the authors. This was not founded upon a reasoned basis to protect a particular proprietary right. It was to further a primarily political agenda. The labour of the author was therefore somewhat irrelevant to the entire process. However, it should be noted that the legislature did not seek to vest the rights in the Stationers’ Company on the basis of any proprietary interest. It was simply on the basis of status as printers. It was not until some 50 years later that the issue of intangible property rights came to be considered.

The first piece of legislation passed for the protection of the author’s interests was the *Statute of Anne*, in 1709. The formal title of this Act was “An act for the encouragement of learning, by vesting the copies of printed books in the authors....” This Act granted the author copyright in an original work, albeit to a very limited degree. The author was given the exclusive right to “print, publish and vend”¹⁰ the work. This is said to have been the creation of a “public domain” for copyright. The term of the right granted by this legislation was fourteen years, although it was renewable for a further period of fourteen years. Authors were therefore given a financial incentive to engage in creative activity, while the creative common was also protected.

The importance of this legislation is that it represents the turning point in copyright from being a publisher’s right to being an author’s right. The Act can be seen as an important recognition of the point propounded by Locke that the person who contributes his labour ought to be entitled to ownership of the proceeds of that labour.¹¹ The question then becomes: what is the threshold which the author must pass in order to be able to claim the monopoly, and thereby prevent others from making use of the work?

It was not simply a matter of securing the passage of legislation which was needed to change the attitude of courts, authors and publishers. The law struggled for many years following the passage of the Act, especially with an articulation of the concept of intangible property. Blackstone, in his *Commentaries*, fifty years after the passage of the Act, observed:

*There is still another species of property, which, being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy is supposed by Mr Locke, and many others, to be founded on the personal labour of the ‘occupant’.*¹²

⁵ Recital, Licensing of the Press Act 1662.

⁶ S. II.

⁷ S. XI.

⁸ S. IV.

⁹ S. XIX.

¹⁰ S. I.

¹¹ *Second Treatise*, II, 27.

¹² Blackstone, *Commentaries*, p. 405.

Blackstone goes on to reinforce the concept of the ideas/expression dichotomy, when he refers to the original part of a work as being “the sentiment and the language”.¹³ He goes on to observe that the concept of intangible property causes some difficulty conceptually. Roman law vested rights not in the creator of a literary work, but in the owner of the paper on which a work is written.¹⁴

In the early years after the passage of the Act, there were numerous cases in which, as a matter of course, the courts granted injunctions to restrain the publication of copied works.¹⁵ It would appear that some doubt began to creep in regarding the independent existence of copyright, in the decision of Lord Mansfield in *Tonsor v Collins*.¹⁶ His Lordship noted that an injunction is only available to protect a property right. His Lordship did not decide that there was a property right, but sent the matter back to Equity for a determination.

Testing the Legislation

The first time the legislation was tested in any meaningful way was in *Millar v Taylor*.¹⁷ In that case, the majority of the Court of Appeal held that there was a common law entitlement to copyright, and that right was independent of the rights prescribed by the *Statute of Anne*. The issue before the court was whether the common law vested an exclusive right of copying in an author, independently of the statute. The matter came before the court in circumstances in which there was copying of an original work after the expiration of the statutory period of protection. The author alleged that the common law gave an exclusive right to the product of his labour, independently of the statute.

This case was decided during a period in which natural law still prevailed in English legal theory. It is not surprising, then, that the judgments were dominated by natural law reasoning. In light of these factors, there is perhaps little surprise that two members of the majority – Chief Justice Mansfield and Justice Aston – directly cited natural law in reaching a decision on a matter of personal property.

In giving his opinion on this issue, Justice Willes provided a detailed historical approach to the issue. As to the protections offered to the author, His Honour adopted the approach which is most in line with the contemporary rationale for intellectual property protection:

*It is wise, in any state, to encourage letters and the painful researches of learned men. The easiest and most equal way of doing it is by securing to them the property of their own works.*¹⁸

In applying this reasoning, His Honour expressly rejected reliance upon ‘metaphysical’ arguments and concluded that there is in fact a common law right to copyright protection, independent of the statute. However, his reasoning was quite separate and distinct from that of his brother judges in arriving at this conclusion.¹⁹

¹³ *Ibid.*, p. 406.

¹⁴ *Ibid.*, pp. 406-407.

¹⁵ See, for example, *Burnett v Chetwood* (1721) 35 ER 1008, *Gyles v Wilcox* (1741) 26 ER 489, and *Pope v Curl* (1741) 26 ER 608.

¹⁶ (1761) 96 ER 169.

¹⁷ (1769) 98 ER 201.

¹⁸ Page 218.

¹⁹ Page 218.

In modern terminology, this could be said to constitute a public policy determination of the case. It is of social benefit to ensure that there is material reward for the author who expend creative effort, and therefore enrich the commons.

In contrast, Justice Aston adopted a much more obviously Lockean approach to the right to own property, and found that, once the author invests time and labour into the production of a work, there is a natural right to the fruits of that labour.²⁰ Reflecting an obvious and direct influence from Locke, Aston notes that if one applies one's labour to an undertaking, the 'effect or produce of the labour' belongs to the labourer.²¹ Although His Honour does express misgivings about the definition of property at the time being adequate to the purpose of applying it to intellectual property law, he does nevertheless expressly cite Locke's 'enough and as good' proviso for the accumulation of wealth.²² The misgivings were, however, justified, given the state of the law in 1769, which, outside the courts of Equity, was not equipped to deal effectively with intangible property.

Justice Yates continued the natural law theme to the case when he observed that "...the law of England, with respect to all personal property, had its grand foundation in natural law."²³ Nevertheless, His Honour resolved those difficulties very effectively, and in a manner which, like that of Justice Willes, is also most consistent with a contemporary approach to the formulation of intellectual property rights. Justice Yates noted the limits of property rights, and that no right can be created in a mere idea. This is a product of the distinction between tangible and intangible property. Given the infancy of the concept of intangible property within the common law at the time, it was necessary to formulate a mechanism by which intangible rights could be protected.

Within the intellectual property context, this problem is overcome by the concept of "occupancy". Occupation of tangible property is a straightforward proposition. It is achieved by "tak[ing] the thing out of the common".²⁴ However, occupation of an idea is achieved by the "invention and labour" of reducing an idea to a substantive form.²⁵ This, naturally, accords very effectively with the modern requirement of expression of an idea to obtain protection for an author.²⁶ Only three years earlier, Blackstone had sought to justify intellectual property on the basis of occupation.²⁷ Despite accepting these propositions, which ought to justify an independent copyright under the common law, Justice Yates still found that there was no copyright independently of the statute.²⁸

Like Justice Willes' judgment, Justice Yates' dissent is more consistent with the contemporary approach to the subsistence of copyright. Justice Yates commenced with the idea that there is a right of all humanity to share in the benefit of all persons' ideas, and that this is the best means to ensure that humanity advances and improves. There ought to be protection for intellectual endeavour, as far as Yates is concerned, but that protection should not be unlimited. This means that there must be a mechanism in place by which a limit is placed upon the entitlement of the author to protection.

According to Yates, this mechanism is to be found in the terms of the legislative scheme. He suggested that, to recognise a common law entitlement to copyright is essentially

²⁰ *Millar v Taylor* [1769] 98 ER 201 at 220-221.

²¹ At page 220.

²² Also at page 220, citing Locke, II, 25 & 26.

²³ At page 229.

²⁴ Page 230.

²⁵ Page 230.

²⁶ See, for example, *Victoria Park Racing and Benchley*.

²⁷ Blackstone, *Commentaries*, vol. 2, 405.

²⁸ Page 250.

to suggest that there may be a perpetual entitlement to copyright in ideas, because it ensures that an author may be entitled to refrain from ever releasing a work, which may result in that idea never becoming part of the commons.²⁹ The compromise, according to Yates, is to provide a period of protection for the work of an author, at the end of which the work and ideas belong to the community at large.³⁰ This proposition that there is no protection for ideas per se, and that there ought to be a balance between the protection of the individual, and the benefit to the community, are both entirely consistent with contemporary views on copyright.³¹ Although this ostensibly reflects a move away from Locke's theory of property, it may be said to reinforce the labour aspect of the theory, which requires the incorporation of mental effort on the part of the individual in order to obtain ownership, and – in intellectual property terms – presumes ideas to be part of the common.

However, the promotion of authors' rights beyond the context of the statute was relatively shortlived, as *Millar v Taylor* was reversed by the House of Lords in its decision in *Donaldson v Beckett*³². The House of Lords was asked to revisit the questions raised in the *Millar* case. The House rejected the position adopted in *Millar*, and found that there is no common law right of copyright, independent of the rights created by statute. The basis for reaching this conclusion was essentially the same as the dissent of Justice Yates in *Millar*. The point made by the House was that there should be no right to lock ideas and learning perpetually.³³ The corollary of this is that it is necessary to look to the criteria set by the legislation in order to determine whether copyright subsists, and the extent to which the work will be protected.³⁴ Once again, this reasoning is consistent with the contemporary justification for copyright, which is the balance between the right of the author to expect protection, and the right of the community to expect access to the works of science and scholars, which may be beneficial to society as a whole.³⁵

As noted in respect to Justice Yates' dissent, there is no reason for this to be seen as a rejection of Locke's theory in its practical application. In fact, the contrary is the case. Locke argues that the individual is only entitled to that part of the commons with which he actually mixes his labour.³⁶ Given that the subject for consideration is intangible property, the commons in this context must be considered to be readily obtainable ideas and knowledge. It is only through the addition of the intellectual labour in developing and embodying an idea that property will vest, according to the House of Lords.³⁷ In the same way, Locke's theory only contemplates a limited right being acquired by a labourer on the commons.

Arguably, it is in the realm of intangible property that Locke's labour theory can be most effectively applied without falling foul of Aristotle's theory of justice.³⁸ In the tangible world, there is the overriding problem of scarcity of resources. This does not apply in the intangible world of ideas. Therefore, Locke's labour theory is perhaps better suited to

²⁹ *Millar v Taylor*, supra, 235.

³⁰ *Millar v Taylor*, supra, 236.

³¹ See, for example, the European Court of Justice in *Infopak International A/S v Danske Dagblades Forening* [2009] ECR I-6569, and the United States Supreme Court in *Feist Publications v Rural Telephone Service Co. Inc.* 499 US 340 (1991).

³² (1774) 98 ER 257.

³³ *Donaldson v Beckett*, supra, 262.

³⁴ *Donaldson v Beckett*, supra, 262.

³⁵ It will be recalled that the *Statute of Anne* is stated to be "An Act for the Encouragement of Learning, by Vesting the Copies of printed Books in the Authors or Purchasers of such Copies."

³⁶ *Second Treatise*, II, 25 & 27.

³⁷ At page 262.

³⁸ Taking more than one's fair share; *Ethics* 1130a28ff.

intangible property, albeit that this is a development which Locke would probably not have anticipated.

The Labour Theory at Work Before the Modern Courts

The proposition that there must be an expression of an idea in order to obtain protection is one which has been enshrined in both Australian and British law. It is very effectively illustrated by the decision of the High Court of Australia in the case of *Victoria Park Racing and Recreational Grounds Co Ltd v Taylor*.³⁹ In this case, the plaintiff, Victoria Park Racing and Recreational Grounds operated a racecourse, and charged a fee for entry. The defendant set up a viewing tower on a neighbouring property, and broadcast the results of horse races staged by the plaintiff, which included reading the results of the races, as displayed on certain boards at the field. As a consequence, attendance at the plaintiff's racecourse declined, resulting in a loss of revenue. The plaintiff brought proceedings for, *inter alia*, infringement of copyright in the results boards displayed by the plaintiff.

In rejecting this claim, Chief Justice Latham made the following observation:

*The law of copyright does not operate to give any person an exclusive right to state or to describe particular facts. A person cannot by first announcing that a man fell off a bus or that a particular horse won a race prevent other people from stating those facts.... What the law of copyright protects is some originality in the expression of thought.*⁴⁰

This same point was voiced by Justice Dixon, who concluded that there need not be any "new or inventive ideas" on the part of the author. All that is necessary is that "it must originate with the author and be more than a copy of other material".⁴¹ The final member of the majority, Justice McTiernan, agreed that the mere dissemination of information cannot amount to an infringement of copyright, because there can be no copyright in information alone.⁴² There was no originality in the betting boards, and no thought or effort had been expended in producing those boards. Those boards were a statement of information only. Therefore, the High Court had no difficulty in rejecting the proposition that there had been copyright which had been infringed by the actions of the defendant.

This case illustrates the fact that there are essentially two criteria which must be satisfied in order for a protectable copyright to subsist; there must be some form of originality, and the work must be reduced to a material form.⁴³ Each of these criteria requires some degree of labour on the part of the author. Once these two criteria are met, it can be said that there is a work capable of being protected by copyright. Consequently, a right of property has been created. However, in respect to the former criterion, it is necessary to remember that, as observed by Justices Latham and Dixon, it is the form which must be original, not the idea. In Lockean terms, this means that the author is entitled to make use of the common, being ideas and information in the public forum, but the labour of reduction to a tangible form is what creates the proprietary right.

On the question of originality, the starting point, and most oft-quoted decision is that of Justice Peterson in the case of *University of London Press Ltd v University Tutorial Press Ltd*.⁴⁴ This was a case in which there was a question of copyright protection for university

³⁹ (1937) 58 CLR 479. This is also enshrined in s. 3(2) CDPA.

⁴⁰ *Victoria Park Racing and Recreational Grounds Co Ltd v Taylor*, supra, 498.

⁴¹ *Victoria Park Racing and Recreational Grounds Co Ltd v Taylor*, supra, 511.

⁴² *Victoria Park Racing and Recreational Grounds Co Ltd v Taylor*, supra, 526-527.

⁴³ In this respect, see s. 3 CDPA and s. 10(1) CA.

⁴⁴ [1916] 2 Ch 601.

exam papers. Justice Peterson observed that: “The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought.”⁴⁵ All that is required is that the work is not copied from another, and that it actually originates with the author. If those requirements are satisfied, then there can be said to be sufficient originality to attract copyright protection. This does, however, accord with the idea that some labour or effort must be applied by the author.

Justice Peterson revisited the reasoning of the ‘commons’ when he observed that authors must be entitled to draw upon the collection of human knowledge in order to produce their works. To insist that they produce something novel, without reliance upon the sum of human knowledge would be to have the effect that only the most creative and original of authors should be entitled to copyright protection.⁴⁶ Clearly, this is neither practically realistic nor the intention underlying copyright legislation. Therefore, in the circumstances, the exam papers were found to be copyrightable, and the copying of them amounted to an infringement.

However, it is then important to consider the question of whether, and if so, to what extent, an author is entitled to protection where the compilation work infringes the copyright of other persons’ work. That is, a compilation incorporates the original work of another, without the consent of the other author. This could be said to the operation of the “as much and as good” proviso, to be found in the *Second Treatise*.⁴⁷ That is, one must not take any more from the common than one needs, and one must leave enough and as good for others to take.

The basic position under Anglo-Australian law is that there is nothing to prevent a copyright infringer from obtaining copyright protection in respect to a work which is an infringement of another’s work. That is, of course, provided that the work is not simply a direct copy of the original. The criteria of originality plus skill and labour must be satisfied. If the two are satisfied, then even if the result is a work which can be said to be a substantial reproduction of another work, then the infringing work is entitled to copyright protection, against all but the original author.

This accords with the view expressed by Justice Peterson in *University of London Press Ltd*, that when the criteria of the relevant copyright legislation have been satisfied, proprietary rights vest in the author.⁴⁸ It should, however, be borne in mind that this exact question was not before Justice Peterson for consideration, and therefore this conclusion may not have been intended by His Honour. It is, nevertheless, consistent with the decision in *Wood v Boosey*,⁴⁹ an early case in which the author of an arrangement of an opera – which infringed the copyright in the original operatic work – was held to be entitled to copyright protection. The adaptation amounted to a ‘literary work’ in its own right. Naturally, this right was enforceable against all but the original author.

Finally, on the issue of the point at which copyright can be said to subsist, assistance may be derived from a comparative consideration of the law of the United States. The starting point for the consideration of this question is section 102(a) of the 1976 *Copyright Act*. This provides that copyright subsists in any “original work of authorship”. The second, and perhaps more important element is in section 102(a)(2), which provides that it must be “fixed in any tangible medium of expression, now known or later developed, from which they

⁴⁵ *Ibid.*, p. 609.

⁴⁶ *Ibid.*

⁴⁷ *Second Treatise*, II. 32.

⁴⁸ *University of London Press Ltd v University Tutorial Press Ltd*, *supra*, 609.

⁴⁹ (1866) LR 2 QB 340.

can be perceived, reproduced or otherwise communicated...". Clearly, then, there are two elements for copyright to subsist under the United States legislation; there must be originality, and there must be tangible expression.

The Anglo-Australian position on this issue is in direct contrast with the position to be found in the United States. Under the 1976 *Copyright Act*, where a derivation or compilation makes unlawful use of the copyright work of another, there is no protection available for that new work of authorship.⁵⁰ This is an important distinction, in that it ensures that there is no uncertainty in relation to such matters, and any work which is unlawfully derived has no protection. Even if it is established that there is sufficient originality, demonstrated by the skill, judgment and labour applied to the work, it is nevertheless necessary to ensure that the work amounts to a sufficiently original expression to obtain protection.

In *Donoghue v Allied Newspapers*⁵¹ the plaintiff, a well known jockey, told his life story to a journalist. The journalist wrote a story on the basis of his interview with the plaintiff. The question subsequently arose as to who was the copyright owner in the story. It was held that ownership of the copyright vested in the journalist. Justice Farwell observed:

*If the idea, however original, is nothing more than an idea, and is not put into any form of words, or any form of expression such as a picture, then there is no such thing as copyright at all. It is not until it is (if I may put it that way) reduced into writing or into some tangible form that there is any copyright, and the copyright exists in the particular form of language in which... the information or the idea is conveyed...*⁵²

On the basis of these views expressed by His Honour, the conclusion was that the plaintiff had the 'idea', in this case his life story. However, that was merely an idea in the abstract until such time as the journalist put it into a tangible form.⁵³ Therefore, the copyright in the story vested in the journalist.

The Full Federal Court decision of *Zeccola v Universal City Studios Inc*⁵⁴ addressed a similar point, albeit from a slightly different perspective. In this case, the plaintiff was the copyright owner of a well known and successful novel and series of movies, *Jaws*. The defendant (the appellant in the Full Court), sought to release a movie which bore substantial similarity to the characters and circumstances in the plaintiff's work. The defendant's work was, in essence, the story of a great white shark which terrorised an Italian seaside village. The defendant argued that there was insufficient similarity between the two works, and as there is no copyright in an idea, there could be no infringement.⁵⁵ Ultimately, this argument was rejected, on the basis that the work ought to be taken as a whole, and the overall impression of the work should be taken into consideration by the court.⁵⁶ In doing so, it must be acknowledged that some similarity in characters, setting and incidents is unavoidable, given the natural limits of human experience. However, where there is such a substantial reproduction of these factors that the overall impression of the work is that it is a reproduction

⁵⁰ See section 103(a).

⁵¹ [1938] 1 Ch 106.

⁵² *Donoghue v Allied Newspapers*, supra, 110.

⁵³ *Donoghue v Allied Newspapers*, supra, 110.

⁵⁴ (1982) 46 ALR 189.

⁵⁵ For a summary of the facts and arguments in the case, see the joint judgment of Justices Lockhart and Fitzgerald at pages 191-192.

⁵⁶ *Ibid.*, p. 193.

of the original, then it will be said to have infringed the original.⁵⁷ This was an appeal from a first instance decision to grant an interlocutory injunction. The primary issue to be determined in this context was thus whether the trial judge had applied the correct test in deciding whether to grant the injunction, and the substantive question of copyright protection was an ancillary issue.

In respect to the former requirement, the principles under the United States legislation are essentially the same as those set out in Anglo-Australian law. Oliver Wendell Holmes of the United States Supreme Court made the point that the originality simply has to be in respect to the manner in which the work is expressed.⁵⁸ This approach was more recently endorsed by Justice O'Connor in *Feist Publications Inc v Rural Telephone Service Co.*⁵⁹. In that case, Her Honour held that when looking at the issue of originality for the purposes of copyright, the threshold of creativity is extremely low, and if there is any level of creativity, the requirement will be satisfied. However, where there is an absence of that necessary narrow level of creativity, then there is no copyright protection available to the author of the work.⁶⁰ Her Honour did, however, endorse the view of Justice Holmes, which was to the effect that this category of case is necessarily a limited one.⁶¹ This distinction between "originality" and "novelty or invention" is one which has long been maintained by the Supreme Court.⁶²

The second limb which must be established is that there must be some degree of 'fixation', in order for the work to be protectable by copyright.⁶³ This is directly analogous to the requirement in Anglo-Australian law that there must be an expression of the idea, rather than an idea alone. Again, this is enshrined in the legislation, in section 102(b) of the 1976 Act, which provides an exclusion from the operation of the Act for "any idea, procedure, process, system, method of operation, concept, principle, or discovery...". Essentially, the effect of this provision is that it ensures that mere ideas are not capable of being the subject of copyright protection.⁶⁴ Note that this also has the effect of taking other matters, such as patentable inventions, out of the purview of the copyright legislation. These are, however, dealt with by separate legislation.

It has been suggested⁶⁵ that the inclusion of section 102(b) into the 1976 Act came about as a result of the decision in *Mazer v Stein*, in which the idea-expression dichotomy was reaffirmed by the Supreme Court. In that case, the Court made the observation that

*Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea – not the idea itself.*⁶⁶

Essentially, it does not matter what form a work is reduced to, provided it satisfies the criteria set out in section 102(b) – primarily that there be fixation in a tangible form. In this case, there will be satisfaction of the second requirement, and the work may be copyrighted.

⁵⁷ *Ibid.*

⁵⁸ See the leading case of *Bleistein v Donaldson Lithographing Co.* 188 US 329 (1903).

⁵⁹ 499 US 340 (1991).

⁶⁰ *Feist Publications Inc v Rural Telephone Service Co.*, supra, 359.

⁶¹ *Feist Publications Inc v Rural Telephone Service Co.*, supra, 359.

⁶² See also the case of *Mazer v Stein* 347 US 201 (1954) at page 218, in which this distinction was made.

⁶³ Harry Henn, *Copyright Law: A Practitioner's Guide*, Practising Law Institute, 1988, p. 50.

⁶⁴ *Ibid.*

⁶⁵ Melville B Nimmer, David Nimmer, *Nimmer on Copyright*, New York: M. Bender, 1980-, p. 2-36.2.

⁶⁶ *Mazer v Stein*, supra, 217.

However, in the case of *White-Smith Publishing Co v Apollo*⁶⁷ a music roll for a pianola was held not to be sufficient fixation of a musical composition to be capable of legal protection. This decision has subsequently been the subject of substantial criticism as being artificial and producing a harsh and unfair result.⁶⁸ Whether or not *White-Smith Publishing Co.* is a correct application of the law, the point remains that, as with Anglo-Australian copyright law, in order for copyright to be found in a particular work, there must be an expression of an idea, and not merely an idea in the abstract.

Locke in Copyright Law

These decisions reveal that modern copyright law bears many of the hallmarks of Lockean property theory. The essential feature of labour being mixed with the common to give rise to a proprietary right is present.⁶⁹ However, to say that this in and of itself establishes that Locke has been influential in the development of intellectual property law is potentially fatal *a priori* reasoning. It is necessary to look for some evidence of the direct – or even indirect – influence of Locke of the development of the law relating to intellectual property development.

It can certainly be said that near contemporaries of Locke applied Lockean reasoning to allow the creation of a proprietary right, in circumstances in which such a right had previously not existed, or at least not been recognized.⁷⁰ This reason was an almost verbatim account of the acquisition of property rights, as espoused by Locke. Further, this theory of intellectual property rights has developed and evolved since its inception in the mid-eighteenth century. Generally, modern courts have failed to concede the debt owed to Locke in terms of the contemporary formulation of copyright law, although it is interesting to note that in a decision of the United States Supreme Court, there was a direct acknowledgement of Locke on the question of whether trade secrets constituted property.⁷¹ Nevertheless, despite these rare direct acknowledgements of Locke, it can be said that the continued reliance upon the basic propositions espoused in his chapter on property reflects the important place which he continues to hold in modern intellectual property law.

Consequently, it can be seen that, in practical terms, the position adopted by Locke in respect to the acquisition of property rights has not only been accommodated in modern copyright law, but has in fact been embodied in it, in the form of the requirement of some form of expression of an idea in order for rights in copyright to be created. The labour theory is at the very heart of copyright law in both the Anglo-Australian legal system, as well as that of the United States. Reduction to a material form requires some action, skill and judgement on the part of the author, and therefore amounts to a mixing of the author's labour with the commons, being knowledge which is held by the world at large. Contrary to the views of Justice Yates, these fundamental requirements for the acquisition of proprietary rights generally, are clearly transposable to the acquisition of rights in intangible property. Although these principles are now so well established that modern courts fail to see the need to attribute them to Locke, it is clear where the ideas are derived from, and to whom modern lawyers ought to be grateful for provision of a clear and simple test for the acquisition of proprietary rights.

Scholarly Discourse on Locke

⁶⁷ 209 US 1 (1908).

⁶⁸ William F Patry, *Copyright Law and Practice*, vol. 1, Washington DC: The Bureau of National Affairs, 1994, p. 168.

⁶⁹ As prescribed by *Second Treatise*, II, 27.

⁷⁰ For example, Justice Aston in *Millar v Taylor*, supra and Blackstone in his *Commentaries*.

⁷¹ *Ruckelshaus v Monsanto Co* 467 US 986 (1984)

The discussion of the status and development of copyright law is informative from the point of view of considering the question of whether Locke's theory of property has influenced the development of copyright law. As has already been demonstrated, the modern law of copyright would appear to encompass the key features of Locke's theory of property, even though it would appear that this adoption of Locke's theory does not actually acknowledge the contribution which has been made by Locke. However, the issue perhaps becomes much clearer in the context of contemporary scholarly discourse on the issue of the extent to which Locke informs current thinking on the formation of copyright. This is because it is in this context that the question of Locke's contribution is expressly addressed. Although it is argued that the law in Australia, the United Kingdom and the United States has in fact adopted the Lockean formulation of property rights in respect to copyright, this is something which can only be extrapolated from a review of the current principles, in the context of a consideration of the theory itself. The same is not true of contemporary scholarly discussion of the issue, in that the contribution of Locke is expressly raised and debated.

Objectively, an argument can be made that the labour principle is present in modern copyright law, albeit in a slightly different form. However, it will be demonstrated that scholars are divided as to the actual extent to which Locke's theory directly influenced the formulation of copyright law, given that the courts rarely expressly acknowledge his contribution.

From the outset, this issue ought to be considered in the context of modern approaches to natural law. Specifically, the natural law considered in this framework is a form of natural law directly applicable to intellectual property law. Further, it is necessary to give some consideration to the question of the labourer's right under modern copyright law. This aspect of the labour theory, as espoused in Locke, is of some importance to modern scholars. A third matter to consider is directly drawn from this. That is, the author's right. It is important to give some thought to the issue of whether, and if so, to what extent, the author's right under modern copyright law is in fact analogous to the labourer's right under the Lockean theory of property. Finally, some alternative viewpoints on the issue ought also to be considered. This is both in the question of whether in fact Locke has influenced the development of modern copyright law to any extent or at all, and also the question of any limitations which may be placed upon the Lockean approach in the contemporary context.

Locke's views as a natural lawyer have been taken by modern scholars to provide more than merely a framework for the justification of copyright law in the modern context. In particular, his arguments in respect to property, when taken with the totality of his position as a natural lawyer have led to the suggestion that Locke was one of the founders of modern liberalism. His attack, in the *Two Treatises*, on Sir Robert Filmer led to a revised approach in natural law to the relationship between the citizen and state, specifically focusing more on rights than on obligations.

Gordon focuses on the "enough and as good" proviso⁷² as the basis for her argument on this issue. She looks at the conflict between the natural right of the labourer to benefit from his or her labour, and obtain the property so derived,⁷³ as opposed to the right of the community to obtain the benefit of the common. Gordon argues that the "enough and as good" proviso resolves this dispute.⁷⁴ Importantly, Gordon points out that Locke's own

⁷² As set out in *Second Treatise*, II, 27.

⁷³ Wendy J Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property", 102 *Yale Law Journal*, p. 1533 at 1545

⁷⁴ *Ibid.*

resolution is contained in the “enough and as good” proviso itself.⁷⁵ Locke observes that if enough and as good proviso is met, then the net consequence of the act of taking by the individual is the same as if there had been no taking at all.⁷⁶

The flaw inherent in the “enough and as good” proviso is the follow-up, being the introduction of money. This effectively renders the proviso redundant. However, the proviso can be side-stepped in respect to intellectual property. It is for this reason that Chapter V can be said to be best suited for application to the acquisition of tangible property.

With the greatest of respect to Professor Gordon, it seems that the analysis put forward ignores essential historical context. In particular, Locke was writing at a time at which there was substantial tension between absolutism and the democratic drive of Parliament. Locke was very much an apologist for the liberal democratic school, in particular the landed middle class.

Locke’s theory of property, therefore, had a very significant political element to it, which was the preservation of individual property rights from state interference. His *Second Treatise* makes repeated reference to the dangers of absolutism, and the fact that the citizen must be free from the arbitrary exercise of state power.⁷⁷

The right to hold property which is derived from the application of the Lockean principles is governed by the Natural Lawyer’s enjoiner to do no harm to others, but is of course, limited by the equally powerful “enough and as good” proviso. The conclusion which is adopted by Gordon in her work is that the consequence of this application of Lockean principles to modern intellectual property law is that there ought to be a narrowing of interpretation by modern courts in respect to the availability of remedies for authors. Perhaps most relevant is the suggestion that “derivative authors”, or those who use the work of others as the basis for their own creative output, should not gain the protection of the law.⁷⁸

This point has been supported by the argument that the very nature of copyright law is such that the mixing of labour with the common ought not give the individual creator absolute control over the consequential product.⁷⁹ It simply grants certain exclusive rights for a defined period. Locke himself observes that Man’s entitlement to own property must always be subject to the laws of civil society.⁸⁰ However, once those property rights are created, the state has an obligation to protect them.⁸¹ This is a reflection of the fact that Locke’s property theory was principally motivated by his views on the relationship between citizen and state.

When considering the application of Locke’s property principles to modern copyright law, it is important to bear in mind that there is, by necessity, a much greater degree of complexity involved in modern intellectual property law. In particular, the question must be asked to whether there ought to be an absolute right of control granted to a derivative author.⁸² Therefore, according to Friedman, to attempt to take the argument that Locke’s property theory grants an author a degree of absolute control, without any risk of government interference is “arguably a distortion of Locke’s own perspective”.⁸³

⁷⁵ *Ibid.*, p. 1563

⁷⁶ *Second Treatise*, II, 33.

⁷⁷ See, for example, *Second Treatise*, II, 2 and 138-139.

⁷⁸ See Barbara Friedman, “From Deontology to Dialogue: The Cultural Consequences of Copyright”,

13 *Cardozo Arts and Entertainment Law Journal*, 161.

⁷⁹ *Ibid.*, p. 162

⁸⁰ *Second Treatise*, II, 27.

⁸¹ Locke, II, 2.

⁸² Friedman, *op. cit.*, p. 162.

⁸³ *Ibid.*, p. 161.

Therefore, what can be seen from this juxtaposition is that the natural law approach of Locke certainly maintains a degree of relevance to the modern theory of copyright law. In fact, it can be said to go further than that, and be said to continue to be used as a source of justification for the law of copyright.

Limitations on Property Rights

However, awareness must nevertheless be maintained of a dual limitation in the operation of the property theory, both of which are found in Locke's own words. The first is the "enough and as good" proviso, which Gordon justifiably argues holds as being a significant limitation on the extent to which the property theory ought to grant rights to the author.⁸⁴ The second is the proposition that property ought only be held subject to the limitations placed by law and society. Therefore, in an increasingly complex legal system, it is not unfair to say that perhaps the property principles are starting to fade somewhat in relevance, particularly given that they were not formulated with intangible property in mind.

The second important point to consider in relation to a modern discussion of Locke's property theory is the question of the labourer's rights. A useful starting point on this issue is to identify what is actually meant by the concept of "labourer" in the context of intellectual property law. We are dealing with the question of intangibles, and therefore the physical effort of an individual is not the subject of discussion. It must necessarily be something more nebulous. The answer is provided by Becker, when he speaks at some length of the "mental element" of labour in intellectual property law.⁸⁵ In addressing this point of the mental element, Becker both builds upon and responds to certain limitations in the Lockean approach to property.

Identification of this "mental element" is an important development or clarification of the points made by Gordon, in that it identifies the nature of the labour which is being applied by an author in order to obtain the proprietary interest in the product of mixing of labour with the common.⁸⁶ Becker effectively adopts the general common law approach to creativity in copyright law, and substitutes the concept of mental labour for the concept of creativity. It is this creative step – or the application of the mind of the author to the particular work at hand, to produce something new – which amounts to mental labour in Becker's view.⁸⁷ Naturally, in these circumstances, the common must be seen as the vast body of ideas in the public forum. Therefore, Becker justifies the idea of mental labour as the basis of property ownership or acquisition in the Lockean model.

It may be said that in fact Becker takes this proposition too far, to the point that he suggests that any action, no matter how menial, can be the product of intellectual labour.⁸⁸ This is based around the idea that any form of human activity requires the human mind to operate. With respect, this is not entirely consistent with the idea espoused by Locke himself, who spoke of using the "work of his hands" to produce something new.⁸⁹ Naturally, this phrase did not contemplate mental labour. However, if it is to be so applied, then it must necessarily be read as something more than the mere use of the mind, but in fact employing the mind to produce a result. It must be accepted that Locke's views regarding the ownership

⁸⁴ Gordon, *op. cit.*, p. 1546

⁸⁵ Lawrence C Becker, "Deserving to Own Intellectual Property", 68 *Chicago-Kent Law Review*, p. 615.

⁸⁶ *Ibid.*, p. 613.

⁸⁷ *Ibid.*, p. 614.

⁸⁸ *Ibid.*

⁸⁹ *Second Treatise*, II, 27

of one's labour can be applied to intangible property, even though it was not contemplated at the time of writing.

Nevertheless, the point is well made that perhaps the restriction placed upon the property in which a mental labourer may gain benefit is too limited. This makes room for the derivative author to gain a benefit from the further development of the work of others. It has been noted earlier that the courts have recognised copyright in authors who assemble collections of others' work.⁹⁰ This is clearly accommodated by the idea that any form of creative conduct may amount to mental labour, even where it amounts to the development of existing ideas.⁹¹

The corollary of this observation is the impact that this more broad interpretation of the idea of "labour" will have upon the "enough and as good" principle. In nature, there is a fundamental "scarcity" of all resources,⁹² although Locke seems to presume unlimited resources in the state of nature. There must be a limit on the availability of such resources, which is the purpose of the imposition of the "enough and as good" principle. More conservative scholars have taken the view that this can and should be applied to intellectual property law, such that only 'truly' original work ought to gain the protection of copyright law.⁹³ However, when one considers the larger interpretation of mental labour, it can be concluded that each time a new work is created, that new work becomes both the property of the individual who created it, as well as part of the common. It is available for others to apply their labour to it, provided that the later authors or labourers do not in fact infringe the property rights contained in the work. In this sense, then, the common is constantly growing, and the problem of scarcity can never apply to it.

Locke's theory, as it relates to intangibles, is not without problems. The fundamental requirement of Locke is that there is a mixing of labour with the common.⁹⁴ It is on this common that the individual will labour, and from the fruits of that labour that the individual will enjoy his subsistence.⁹⁵ The most important aspect of this is the fact that God gave Man the common, in order to sustain him, and for Man to do with as he pleases.⁹⁶ The point is therefore that the common is something created by God, for the benefit of Man.

The corollary of the fact that the common is bequeathed by God to Man is that there is thereby imposed a duty upon man to ensure the "enough and as good" proviso is maintained. That is, Man owes a duty to God to refrain from taking any more than he reasonably needs, or can reasonably use. Failure to comply with this enjoinder amounts to a breach of one's duty to God.

However, it is when one applies the theory to the concept of intangibles – particularly intellectual property – that the difficulties arise. The concept of the common in intellectual property can be seen as the body of collected human knowledge or ideas. The common in these circumstances cannot have been created by God. It must necessarily have been created by man, through his thought and his ideas.⁹⁷ Thus, the question must necessarily be posed: if man owes no duty to his God for granting the common, then does the "enough and as good"

⁹⁰ See for example, *Ladbroke* in the United Kingdom, *Kalamazoo* in Australia, and taking the point even further, *Feist* in the United States.

⁹¹ See Becker, *op. cit.*, p. 615.

⁹² *Ibid.*

⁹³ Gordon, "A Property Right in Self-Expression", p. 1606.

⁹⁴ *Second Treatise*, II, 34.

⁹⁵ *Second Treatise*, II, 32.

⁹⁶ *Second Treatise*, II, 34.

⁹⁷ Benjamin D Damstedt, "Limiting Locke: A Natural Law Justification for the Fair Use Doctrine", 112 *Yale Law Journal*, 1191.

proviso apply to taking advantage of the common? If the answer is no, then there can in fact be no protection available for intangibles in this context, because the legal duty is derived from the duty to God.

However, in answering this question it is perhaps useful to return to the basic natural law principle referred to above, that there is a duty on the individual member of civil society to do no harm to other members of that society.⁹⁸ It is only by recourse to this broader aspect of Locke's work that the difficulty can be resolved, and it can be seen that there is a broader duty on the individual in the community, but this is derived from general principles, rather than the principles set out in chapter 5 of the *Second Treatise*.

Nevertheless, this very weakness has been said to be something which is of use to liberal scholars in the intellectual property sphere, in arguing in favour of a fair use doctrine in intellectual property.⁹⁹ Fair use is a form of restriction on the monopoly right gained in the copyright material, such that individuals are entitled to use the work for specified purposes. The most important feature of the concept is that it is a restriction on the absolute monopoly right which is otherwise available to the copyright owner upon the creation of a work.

The weakness lies in the fundamental difference between tangible and intangible property.¹⁰⁰ Essential to this fundamental difference is the fact that the prohibition on waste cannot apply to intangible property. That is, by its very nature, intangible property is property which is capable of being stored without likely destruction.¹⁰¹ Therefore, there is again little or no restriction on the right of individuals as to the extent to which they may acquire such property. However, note the generic enjoinder on government that it should act in a manner consistent with "the public good".¹⁰²

The argument therefore runs that the property theory of Locke must be read with the balance of his work on civil government.¹⁰³ This includes the requirement of intervention of government in certain circumstances, not to acquire the property of others, but to permit members of the community to make use of that property, where it serves the public good.¹⁰⁴ With respect, this argument is somewhat inconsistent with the general political gravamen of the work, which is directed towards a limitation upon the power of the sovereign to interfere with the property rights of the individual.

What this discussion of these two key issues in Lockean property theory as it relates to copyright law illustrates is the potential weakness contained in the Lockean theory, when one attempts to apply it to a modern legal construct which did not exist at the time at which it was in fact originally drawn. This is not to say that courts and scholars have refrained from doing so. However, it does demonstrate that there is a fundamental difference between tangibles and intangibles, which must necessarily flow on to the manner in which Locke is interpreted in the context of intangibles.

Conclusion

Locke's theory of property, in its simplest form, is a theory which has shown itself to be amenable to application to any form of property. As has already been demonstrated, this has been accepted from the very outset of legal history insofar as copyright is concerned, and has been subsequently followed and developed by courts in the United Kingdom, Australia

⁹⁸ Gordon, "A Property Right in Self-Expression", p. 1543.

⁹⁹ Damstedt, *op. cit.*, p. 1197.

¹⁰⁰ *Ibid.*, p. 1207.

¹⁰¹ *Ibid.*

¹⁰² *Second Treatise*, II, 3.

¹⁰³ Damstedt, *op. cit.*, p. 1207.

¹⁰⁴ *Ibid.*

and the United States. It has also been shown that Locke's work has been expressly acknowledged on various occasions as the source of certain aspects of copyright law. For the rest, it has been demonstrated that copyright theory as it is presently formulated, is a clear statement of the principles set out by Locke in chapter 5 of *The Second Treatise*.

However, as set out above, the fundamental weakness which can be seen is the developing complexity of the law and ideas related to the law of copyright. This opens the principles espoused by Locke to a wide range of differing interpretations, and therefore, there is a significant question of potential ambiguity. Consequently, it may be reasonable to suggest that John Locke's theory of property has substantially informed contemporary copyright law, but has not, and could not have been, the sole developmental factor in bringing it to its present form.

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