CAYMAN ISLANDS LAW REVIEW

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Preface

This is the third edition of the Cayman Islands Law Review, which is intended to be published annually. The Review is edited and published by the Truman Bodden Law School with contributions from members of the local legal profession. The third edition, like the second, incorporates 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. Secondly, to provide a snapshot of leading cases which removes extraneous material and may make the decision more accessible to 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. In this vein, the third edition contains a number of articles and case commentaries which focus on a diverse range of subject matter including Brexit, dangerous dogs, murder tariffs, master-feeder funds, trusts, psychiatric injury and slavery.

This edition contains case summaries of judgments handed down by the Cayman Islands Grand Court and Court of Appeal spanning much of 2018. 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 comments should be submitted to the editor for consideration at Mitchell.Davies@gov.ky.

Mitchell Davies May 29th 2020.

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CASE NOTES:

Citation:

Case summaries appearing in this volume should be cited as (2020) (3) CILRv followed by the page number

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CIVIL PROCEDURE

Evangelina Curry v Zoltan Szucs

Order 23 r.1(1)(a) - security for costs – impecuniosity of plaintiff – relevant considerations

Cause No. G0148 of 2015

Grand Court of the Cayman Islands
Carter J (Actg.)
April 26th 2018

Legislation referred to

Grand Court Rules (1995R) O.23

Cases referred to

Caribbean Islands Development Limited (In Official Liquidation) v First Caribbean International Bank (Cayman) Limited March 7 2014, Grand Court, Smellie CJ unreported.
Keary Developments v Tarmac Construction [1995] 3 All ER 534
Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074
Nasser v United Bank of Kuwait [2001] EWCA Civ 556
Tolstoy Miloslavsky v United Kingdom [1995] ECHR 25
Al Koronky and another v Time Life Entertainment Group Ltd and another [2006] EWCA Civ 1123
Brimko Holdings Limited v Eastman Kodak Company [2004] EWHC 1343 (Ch)
Elliott v Cayman Islands Health Services Authority 2007 CILR 163

Ms. K McClymont for the Plaintiff
Mr M Wingrave for the Defendant

Facts:

The Defendant sought an order for security for costs up to the conclusion of the trial and for the costs of enforcing any order for costs on the ground that the Plaintiff was ordinarily resident outside the jurisdiction and that the Defendant was unaware of any substantial assets owned by the Plaintiff within the jurisdiction into which any costs award might be traced.

The Plaintiff claimed she was unable to afford to make a payment into Court in respect of any order for security for costs and that an order for security for costs would have the effect of stifling her claim.

Held (application for security for costs denied)

(i) It is for the Court to carry out a balancing exercise to decide, in its discretion, what is the just order to make in all the circumstances of the case.

(ii) Upon an application for security for costs, the parties should not attempt to go into the merits of the case, unless it can clearly be demonstrated one way or another that there is a high degree of probability of success or failure.

(iii) Since neither party could demonstrate a high degree or probability of success or failure, the Court would have to consider this factor as being neutral between the parties.

(iv) The onus was on the Plaintiff to satisfy the Court that they did not have the ability to provide the security and that it was therefore probable that the claim would be stifled if an order for security for costs was made.

(v) The Plaintiff, having demonstrated that she lacked the means to satisfy an order for security for costs, the Court was satisfied in the circumstances of the case that the grant of an order for security for costs would have the effect of stifling the Plaintiff's claim. Even a limited security for costs order would have a similar detrimental effect on the Plaintiff's claim.

DO'B

Idania Ebanks v Rolando Ebanks

Application for Summary Possession GCR Order 113 – purpose of GCR Order 113 proceedings – appropriateness of bringing summary possession proceedings – effect of Plaintiff being aware of the Defendant raising a triable issue, especially before filing of Originating Summons – orders that may be made in summary possession proceedings

Cause No: G29 of 2018

Grand Court of the Cayman Islands
Williams J
March 22nd 2018

Legislation referred to

Grand Court Rules (1995R) O.113
Registered Land Law (2004R) s.28

Cases referred to

Portland Management Ltd v Harte [1976] 1 All ER 225.
GLC v Jenkins [1975] 1 All ER 354
Henderson v Law (1984) 17 HLR 237
Crancour Limited v Da Silvaesa and Another, Same v Merola and Another [1986] EWCA Civ1

Mr A S McField for the Plaintiff
Mr R Dalimonthee for the Defendant

Facts:

The Plaintiff sought summary possession of a property from the Defendant, who was her brother. The Plaintiff was the registered owner of the property. The issue for the Court was whether this was an appropriate case for an application for possession to be made under the summary jurisdiction granted by Order 113 of the Grand Court Rules.

The main purpose of Order 113 is to provide a speedy and effective procedure for the owners of land to evict persons who have entered into or taken occupation of the land or remain on the land without the owner's licence or consent. Such proceedings are ordinarily only brought when there appears to be no dispute and, where the existence of a serious dispute is apparent to the Plaintiff, this procedure should not be used. Since the Defendant contended that he had an overriding right to occupy the property pursuant to s.28 Registered Land Law, and since the Plainitff was aware of this prior to issuing the Originating Summons and that the proceedings would be disputed with the Defendant, raising triable issues, the question arose as to whether the summary procedure under Order 113 was appropriate.

Held (application adjourned)

(i) Application adjourned to enable the parties to reconsider their positons in the light of the further information that had come to light since the proceedings were issued.

(ii) If the matter remained contested the use of the summary procedure rather than ordinary possession proceedings would not be appropriate.

DO'B

Fountain Medical Development Ltd v Chen

Civil Procedure – disclosure – scope of disclosure – reliance upon expert evidence

Cause No. FSD 123/2015

Grand Court
Mangatal J
January 19th 2018

Legislation referred to

Companies Law (2016 R)
Grand Court Rules (2014 R)

Cases referred to

Peruvian Guano (1882) 11 QBD 55
Qihoo Technology Co Ltd (Unreported, Mangatal J, 27 July 2017)
Qihoo Technology Co Ltd (Unreported, Court of Appeal, 9 October 2017)
In the Matter of Integra Group 2016 (1) CILR 192

Facts:

The principal proceedings related to a merger sought to be undertaken by the Petitioner Company, the effect of which was to extinguish the Respondent's shareholding, contrary to her wishes. The Petition filed by the company was filed pursuant to s. 238 of the Companies Law (2016R), for a determination of the fair value of the Respondent's shareholding.

The specific issue in the present interlocutory proceedings was the question of the determination of the scope of disclosure, pursuant to Order 24 of the Grand Court Rules. In particular, the issue to be resolved between the parties was how to determine the extent of disclosure, by reference to relevance to issues in the proceedings.

Expert reports were filed by both parties. The expert reports addressed, *inter alia*, the question of the value of the shares, and the appropriate approaches to determining that value. Arising from those expert reports was the issue of scope of disclosure required by the parties, and in particular by the Petitioner Company.

Held (order as follows)

(i) It was accepted that differing approaches in respect to valuation of shares under s.238 of the Companies Law may be equally valid. Further, the previous decisions at both first instance and in the Court of Appeal were endorsed to the effect that a valid approach to valuation would determine the scope of required disclosure.

(ii) Therefore it was accepted that, in cases such as the present, in which the parties relied heavily upon expert evidence, it is for the experts to determine the scope of relevance, by reference to the valuation methodology which they adopt. As is always the case in disclosure matters, this was subject to the proviso that it is not abusive, nor oppressive.

(iii) Where an allegation was made that there is,or is likely to be a misuse of disclosed documents, the obligation was upon the party making that allegation to present positive evidence to support it. In the absence of such positive evidence, the Court would be satisfied by an undertaking not to misuse or disclose documents.

AEW

Maso Capital Investments Limited and Blackwell Partners LLV v Sterling Macro Fund

Application for worldwide freezing injunction – s.238 Companies Law

Cause No: CICA 26/2017

Court of Appeal
Martin, Newman and Moses JAA
February 9th 2018

Legislation referred to

Companies Law (2016R) s.238

Cases referred to

Classroom Investments Inc v China Hospitals Inc and China Healthcare Inc [2015] (1) CILR 451

Mr P McGrath QC for the Appellants
Ms C Newman QC for the Respondents

Facts:

The Appellants appealed against the dismissal of their application for a worldwide freezing inunction ('freezing inunction') over the assets of the Respondents and its subsidiaries. The application had been made in the context of proceedings brought by the Appellants by way of a petition seeking a determination by the Court of the fair value of the Dissenting Shareholders' shares under s.238 Companies Law, which provides a mechanism for such a determination where shareholders have elected to dissent from a merger or consolidation of a Cayman registered company.

The financial limit which the Appellants wished to be included in the freezing inunction was the difference between (a) the figure which the Appellants' expert said was the upper limit of the range and (b) the interim payments already made by the Company to the Dissenting Shareholders.

The application for a freezing injunction was based, *inter alia*, on: (a) the contention that the Respondent had entered into post-merger transactions which had had the effect of transferring away all its valuable assets; and (b) that the Respondent intended to dispose of the proceeds of the transactions, with the result that the Respondent would be left with insufficient assets to

satisfy the judgment that the Dissenting Shareholders were likely to obtain when the fair value of their shares was determined. The Respondent claimed that it was engaging in a post-merger restructuring with a view to obtaining a listing in the People's Republic of China and that it would make a proper retention against the Dissenting Shareholders' claims.

On the application for a freezing injunction, the Judge had concluded that: (a) the Dissenting Shareholders had established a good arguable case that the fair value of their shares was above the merger price, but (b) had not established that there was a real risk of dissipation and unjustified conduct, and (c) in all the circumstances, it was not just and convenient or proportionate to grant the freezing injunction or the other relief sought by the Dissenting Shareholders.

Held (Appeal dismissed)

(i) The Judge was entitled to hold that a failure to make provision for an amount that fell within the Appellants' valuation range did not demonstrate a real risk of dissipation even though he had found that there was a good arguable case for that range.

(ii) Ordinarily a Judge will be in no position at an interlocutory stage to make an assessment of the facts beyond whether or not there is a good arguable case, but in the present case there were plain and obvious problems with the evidence of the Appellant's expert.

(iii) The risk that the fair value ultimately awarded to the Dissenting Shareholders would substantially exceed the merger price had to be fully taken into account, and the general approach had to be balanced and cautious and formulated after taking full financial and legal advice.

(iv) It was a matter well within the ambit of the Judge's discretion to determine what reliance he could place on the evidence.

DO'B

Top Jet Enterprises Limited v Sino Jet Holdings Limited and Jet Midwest Inc

Derivative action – derivative action brought in Missouri – whether the provisions of the Grand Court Rules relating to the need for leave to continue derivative actions and for representative actions apply in the case of foreign derivative actions – whether the Court can and should grant declaratory relief concerning the right of a shareholder in a Cayman company to bring a foreign derivative action

Cause No: FSD 106 of 2017

Grand Court (FSD)
Segal J
January 19th 2018

Legislation referred to

Grand Court Rules (1995R) O.11, r1(1)(c) and O.15, r.12(1) and r12A(2)

Cases referred to

Foss v Harbottle (1843) 2 Hare 461
Spokes v Grosvenor and West End Railway Terminus Hotel Co Ltd [1897] 2 QB 124
Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 BCLC 336
Prudential Assurance Co Ltd (No2) [1982] Ch 204
Renova Resources Private Equity Fund v Pallinghurst (Cayman) General Partners Lp et al (Unreported, CICA, 12 September 2017)
Smith v Croft (No.1) [1986] 1 WLR 580
Renova v Gibertson [2009] CILR 268
Fraser v Oystertec plc [2005] BIPR 389
Barrett v Duckett [1995] 1 BCLC 243
Daniels v Daniels [1978] Ch 406
Estmanco (Kilner House) Ltd v GLC [1982] 1 WLR 2
Russell v Wakefield Waterworks Co (1875) LR 20 Eq 474

Mr C McKie QC and *Mr P Smith* for the Plaintiff
No appearance for the First Defendant or Second Defendant

Facts:

Top Jet Enterprises Limited (Top Jet) was a shareholder of a Cayman Company called Sino Jet Holding Limited (Sino Jet) and owned 50% of Sino Jet's shares. The other 50% was owned by Skyblueocean Limited (Skyblueocean). Skyblueocean was said to be owned and controlled by Mr Kraus and his sister. Mr Kraus was a director of both Skyblueocean and Sino Jet. Skyblueocean had appointed three of the six directors of Sino Jet of whom Mr Kraus was one.

Sino Jet was a party to a consignment agreement entered into in December 2015 (the Consignment Agreement) with Jet Midwest, Inc (Jet Midwest), a company incorporated in the State of Kansas but with its principal place of business in Kansas City, Missouri. Top Jet asserted that: (i) Jet Midwest was in breach of the Consignment Agreement and was liable to account, and pay damages, to Sino Jet; (ii) Mr Kraus and his sister and the other directors of Sino Jet appointed by Skyblueocean, were in breach of duty because they had failed to act so as to cause Sino Jet to enforce, and would prevent Sino Jet from enforcing its rights and recovering property from Jet Midwest.

Top Jet argued that it was entitled as a matter of Cayman law to issue derivative proceedings on behalf of all Sino Jet's shareholders and in the name of Sino Jet against Jet Midwest. However, because Jet Midwest was located in Kansas City it was necessary for Top Jet to commence proceedings in State Court in Missouri, USA, in the name and on behalf of Sino Jet against Jet Midwest. In the Missouri proceedings Jet Midwest had questioned and challenged Top Jet's standing to do so. That issue was to be dealt with by the Missouri Court at trial but, before the trial, Top Jet issued a separate application to the Grand Court seeking leave to continue the Missouri proceedings, if leave was required, and a declaration under Cayman law that it was entitled to bring a claim against Jet Midwest derivatively.

Held (Top Jet had a right under Cayman law to bring and continue the Missouri proceedings derivatively on behalf of Sino Jet under the exceptions to the rule in *Foss v Harbottle*.)

(i) An application for leave to continue a derivative action, where a Defendant in a derivative action has given notice of intention to defend, pursuant to GCR O.15, r.12A, can only be made where the derivative action has been issued in Cayman. GCR O.15, r.12A has no application to a foreign derivative action.

(ii) The rules and procedural mechanisms created under GCR O.15, r.12 for protecting and involving represented plaintiffs in an action, and for allowing the shareholder initiating a derivative action to act in a representative capacity, only apply to proceedings commenced within the jurisdiction.

(iii) There was no free-standing requirement outside and independent of the Grand Court Rules to seek leave in a case of a foreign derivative action. Any challenge to standing by a Defendant in such a case needed to be brought in the foreign proceedings and disposed of by the foreign Court in accordance with its law and procedure.

(iv) A 50% shareholder may bring a derivative claim. This principle applies whenever a shareholder is not able to persuade or cause the normal organs of the company to commence proceedings in respect of a wrong done to it. The essential question was whether the company was being prevented from pursuing a claim which the company legitimately had.

(v) Assuming the asserted facts to be true, and assuming that Sino Jet had or was likely to have a good claim against Jet Midwest, the Sino Jet directors appointed by Skyblueocean appeared to be in breach of their fiduciary duty by failing to take action to protect the interests of Sino Jet and all its shareholders by enforcing its rights against Jet Midwest.

DO'B

COMPANY LAW

In the matter of Dutchess Private Equities Cayman Fund Ltd

Rectification and scope of Section 46 of the Companies Law (2016 Revision) – the distinction between a prospective claim and a right to registration by virtue of a valid transfer of legal title – the need for the Court to be satisfied of the justice of the case

FSD 185 of 2016

Grand Court
McMillan J
June 12th 2018

Legislation referred to

Companies Law (2016R) s.46

Cases referred to

Re Diamond Rock Boring Co Ltd, Ex p Shaw (1877) 2 QBD 463
Re Greater Britain Products Development Ltd (1924) 40 TLR 488
Re Heaton Steel and Iron Company, Simpson's Case (1869) LR 9 Eq 91
Re Hoicrest Ltd [2000] 1 WLR 414
Nilon Limited and another v Royal Westminster Investments S-A [2015] UKPC 2
Re Russian (Vyksounsky) Iron Works Company, Stewart's Case (1866) LR 1 Ch App 574
Re Smith & Fawcett Ltd [1942] All ER 542
Re South Kensington Hotel Company Limited, Braginton's Case (1865) 12 LT (NS) 259
Trevor v Whitworth [1887] 12 App Case 409

Mr T Lowe QC for the Plaintiff
Mr F Hughes for the Defendant

Facts:

Dutchess Private Equities Cayman Fund Ltd (the Defendant) (registered in the Cayman Islands) and Dutchess Private Equity Fund LP (Dutchess Delaware) (registered in Delaware), were "feeder funds" for an investment company called Dutchess Private Equities Fund Ltd (the Master Fund). Dutchess Capital Management was the Defendant company's investment

manager. Dutchess Advisors LLC acted as a consultant to the companies in which the Defendant company invested.

Cannonball Plus Fund (the Plaintiff) and Cannonball Fund Ltd were, among others, shareholders in the Defendant company. Together, the two Cannonball companies brought a derivative claim in the US, on behalf of the Defendant company, against three individuals associated with the Dutchess companies for alleged breaches of duty, which it was claimed resulted in significant losses for the shareholders in the Defendant company.

The Plaintiff had invested in the Defendant company through ABN Amro and, as a consequence, the shares were held by ABN Amro for the benefit of the Plaintiff. During the US proceedings the Defendants in that case argued that, as the Plaintiff was not a registered shareholder, it did not have standing to bring the US claim on behalf of the Defendant company. On 15 April 2016, the Plaintiff obtained a share transfer from ABN Amro to itself and filed it with the Defendant company's agent. A series of emails which followed suggested that the transfer was in order and no indication was given that it would be rejected. On 20 June 2016, an email indicated that the Defendant's two directors (who were also individual Defendants in the US proceedings and financially interested) had refused to register the share transfer.

The US Court found that under Cayman law only a registered shareholder has standing to bring a derivative claim, and that only the Court in the Cayman Islands could decide whether to order registration of the share transfer. As the US Court did not have jurisdiction to order rectification of the register in favour of the Plaintiff, the US proceedings were stayed to allow the Cayman Islands' Court to determine whether to order rectification of the register under s.46 Companies Law.

In the Cayman Islands' proceedings, the Court found as fact that the directors of the Defendant company had attempted to rely on an obsolete article to refuse the transfer, and had misled the US Court in doing so. The extant articles, in fact, gave no discretion to refuse to register the transfer.

Held (order as follows)

(i) The Plaintiff's name was omitted from the register of the Defendant company without sufficient, or any, cause, and the Court ordered rectification of the register in favour of the Plaintiff.

(ii) The jurisdiction of the Court under s.46 Companies Law to rectify the register is equitable in nature (see *Trevor v Whitworth*).

(iii) The principle in *Nilon Limited and another v Royal Westminster Investments S-A* (that proceedings for rectification of the register may be brought where the Applicant has right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependent on the conversion of the contract) applied in the Plaintiff's favour.

KL

In the Matter of Shanda Games Limited

Section 38 Companies law (2013 Revision) - determination of fair value of the shares of shareholders dissenting from a statutory merger - whether a minority discount is to be applied - the approach to be adopted by the Court in determining fair value

CICA 12 of 2017 (Cause FSD 14 of 2016 (NSJ)

Court of Appeal
Goldring P, Martin and Morrison, JJA
March 9th 2018

Legislation referred to

Cayman Islands Companies Law (2013R) Ss 86, 87,88, 95, 238
Court of Appeal Law (2011R) s.6
Court of Appeal Rules (2014R) Rule 12
Judgment Debts (Rates of Interest) Rules 2012
Judicature Law (2013R) s.34
Companies Act 1981 s.103 (Bermuda)
Business Companies Act 2004 s.179 (BVI)
Business Corporations Act s.190 (Canada)
General Incorporations Law s.262 (Delaware)
Companies Act 2006 Ss155, 899, 900, 986, 994, 996 (E & W)
Companies Act 1948 s.209 (repealed) (E & W)
Companies Act 1929 s.155 (repealed) (E & W)

Cases referred to

Addbins Ltd, Re [2015] EWHC 3161
Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd [1987] 2 ALL ER 923
Bell v Kirby Lumber Corp, Del. Supr., 413 A.2d 137 (1980)
Bird Precision Bellows Ltd, Re [1985] 1 BCLC 493
Blue Index Ltd, Re [2014] EWHC 2680
Cavalier Oil Corp v Harnett 1988 WL 15816, 564 A.2d 1137 (1989)
Cede & Co., Inc v Medpoint Healthcare, Inc 2004 Del. Ch, Lexis 124
CVC/Opportunity Equity Partners Ltd v Demarco Almeida [2002] 2 BCLC 108
Dell Inc, Re Appraisal of 2016 WL 3186538
DFC Global Corp, In re Appraisal of (2016) WL 3753123 Del. Ch.
Golar LNG Ltd v World Nordic SE [2011] Bda L R 9
Grierson, Oldham & Adams Ltd, Re [1968] Ch 17
Integra Group, Re [2016] 1 CILR 192
Irvine v Irvine (No 2) [2007] 1 BCLC 445
Jermyn Street Turkish Baths Ltd, Re [1971] 1 WLR 1042
Kummen v Kummen-Shipman Ltd (1983) 19 Man R (2^{nd}) 92
Ladd v Marshall [1954] 3 All ER 745
Linton Park plc, Re [2005] EWHC 3545
Merion Capital LP v 3M Cogent, Inc 2013 WL 3793896
O'Neill v Phillips [1999] 2 BCLC 1, [1999] 1 WLR 1092
Olive Group Capital Limited v Mayhew [2016] ECSCJ No 167
Strahan v Wilcock [2006] ECA Civ 13; [2006] BCC 320
Syers v Syers (1876) 1 App Cas 174
Tate & Lyle Food and Distribution Ltd v Greater London Council [1981] 2 All ER 716
The Orchard Enterprises Inc, Re Appraisal of 2012 WL 2923305
Tri-Continental Corp. Battye, Del. Supr., 74 A.2d71, 72 (1950)
Virdi v Abbey Leisure Ltd, re Abbey Leisure Ltd [1990] BCLC 342

<u>Authoratitive works referred to</u>

Heaver-Wren, T., & Jackson, A., Dissenting Shareholders' Appraisal Right in Cayman Islands Mergers and Consolidations
Hunter, C., QC, & Pearce, C., Fair Value – A common issue with surprisingly sparse Canadian authority, Canadian Annual Review of Civil Litigation (2011)

Ms Madeleine Heal, Mr Paul Madden, Mr James Elliott and Mr Philip Jones QC for the Appellant
Mr Robert Levy QC, Mr Mac Imrie and Ms Gemma Freeman for the Respondent

Background:

In November 2015, with the approval of 99.3% of its shareholders at EGM, the Appellant, Shanda Games Limited (Shanda) merged with Capitalcorp Limited. Some shareholders, the Respondents in this appeal, dissented from the merger (the Dissenting Shareholders).

Prior to the draft judgment being circulated, Shanda sought leave to introduce additional expert evidence. Permission was refused. Shanda appealed (i) against refusal of leave to introduce new expert evidence. Following delivery of the judgment, Shanda appealed against (ii) the refusal to apply a minority discount to the shares of the Dissenting Shareholders; and (iii) against the rate of interest.

The Dissenting Shareholders appealed against three aspects of the methodology adopted to determine fair value being: (iv) the beta component – a discount rate to be applied in the discounted cash flow analysis; (v) the measure of market capitalisation to be used to apply a Small Stock Risk Premium (SSRP); (vi) the growth rate during the terminal period.

(1) Leave to re-open the case and to introduce additional expert evidence

Facts:

At trial, Shanda engaged an expert witness, Professor J, on the issue of valuation of the shares. The Dissenting Shareholders engaged a Mr. I as their expert. After the trial, Shanda engaged a new expert, Mr. d'A, to review Professor J's and Mr. I's evidence. Mr. d'A concluded that Professor J's evidence was so inadequate the Court had been misled at trial. Shanda applied for leave to re-open the case and introduce new evidence from Mr. d'A. Leave was refused, and Shanda appealed.

Held (dismissing the appeal)

The judge had taken into account the relevant considerations including the *Ladd v Marshall* factors, "the reasons for the application, the conduct of the parties, the delay between the conclusion of the trial and the making of the application, the prejudice to the Applicant as a result of not allowing the new evidence to be admitted and the trial re-opened, the prejudice to the other party of being deprived of the judgment or the further costs and delays of having to deal with the new evidence and a new hearing and the need to secure the '*just, most expeditious and least expensive determination of every cause or matter on its merits. The need for justice to other litigants and a fair allocation of the Court's resources must be taken into account*'." *(See paragraph 2.2 of the Preamble to the Grand Court Rules).*

(2) The refusal to apply a minority discount to the shares of the Dissenting Shareholders

Facts:

The Dissenting Shareholders owned 1.64% of Shanda's issued share capital. At trial Shanda argued that a minority discount should be applied. Professor J and Mr. I, the expert witnesses, agreed that if a discount were to apply, it should be 23%. The trial judge held that no minority discount should be applied. Shanda appealed.

Held (allowing the appeal)

A minority discount should be applied. In the Cayman Islands there are "*three mechanisms contained in the Companies Law by which the shares of dissentients may be acquired: by squeeze-out with a 90% majority, by scheme of arrangement with a 75% majority, and under s.238 with a two-thirds majority*". The English approach to squeeze out and scheme of arrangement applied in the Cayman Islands. It was "*unlikely in the extreme that the simplified merger and consolidation regime introduced as Part XVI of the Companies Law was intended to depart from that approach".*

"S.*238 requires fair value to be attributed to what the dissentient shareholder possesses. If what he possesses is a minority shareholding it is to be valued as such. If he holds shares to which particular rights or liabilities attach, the shares are to be valued as subject to those rights or liabilities.*"

(3) The rate of interest

Facts:

The rate of interest awarded at trial was the mid-point between (a) the rate at which the trial judge decided that Shanda could have borrowed the sum necessary to pay "fair value" to the Dissenting Shareholders for their shares and (b) the rate which the Dissenting Shareholders, were they "prudent investors", could have obtained had they invested that sum. Shanda appealed.

Held (dismissing the appeal)

Unlike an award of interest in relation to damages where the aim is to put the Plaintiff back in the position he would have been in had his right not been infringed, the aim of a s.238 award is to ensure that the dissentient shareholder receives fair value for what he is obliged by statute to give up. The focus should therefore be on the entirety of the circumstances: "*both the disadvantage to the dissentient and the advantage to the company should be taken into account*" and adopting the mid-point is a logical approach. Where the evidence supports no other conclusion, the judgment rate may be relied on as a fall-back position.

(4) The beta component – a discount rate to be applied in the discounted cash flow analysis

Facts:

The experts agreed that discounted cash flow (DCF) analysis was the valuation model to be applied to Shanda's business in order to determine fair value for the Dissenting Shareholders' shares. Essentially, "*the exercise is designed to identify how much it would have cost at the valuation date to buy an investment with a rate of return and a risk profile equivalent to that of the company's business*." Part of the DCF analysis involves measuring the risk of a particular investment (here Shanda's business) against the systematic risk of the whole market. This measure is known as the beta component. At trial, the experts took different approaches to calculating the beta component and consequently reached different values. The judge found that each of the approaches had merit, but that "*the estimates of both were nevertheless subject to risks and problems*" and consequently he applied an average of Professor J's and Mr I's beta component. The Dissenting Shareholders appealed, arguing that the beta component should have been determined either by blending the company's beta (from Professor J's evidence) with that derived from a peer group (from Mr I's evidence), or alternatively, rather than averaging the beta components of the experts, the judge should have taken an average of the ultimate share value calculated by the experts.

Held (dismissing the appeal)

In the circumstances, it was appropriate to determine the beta component by balancing the proposals put forward by the two experts. The "blending method" was rejected as it would "*have meant that one component of the calculation was treated as determinative of the entire beta*" and "*some other method of resolving the overall difference between the experts would be preferable*". The beta component was one element in the analysis and to "*average the outcome of the entire analysis to reflect an inability to resolve differences affecting one element of it lacks logic*." The Court held that "*in the absence of a more nuanced solution to the dilemma the most appropriate method of resolution was by averaging the two figures*".

(5) The measure of market capitalisation to which to apply a Small Stock Risk Premium (SSRP)

Facts:

Investment in smaller companies is generally perceived to be associated with higher risk. The SSRP is applied to the investment to reflect this risk and is calculated by reference to the Duff & Phelps tables. Professor J and Mr I agreed that the tables should be used, but disagreed as to how to apply them. The trial judge preferred Professor J's approach. The shareholders appealed.

Held (dismissing the appeal)

It was circular to use the ultimate result of the DCF analysis to determine one of the factors in the analysis. It was appropriate to approach the DCF analysis on a step by step basis, and to resolve disputes at each step: "*the way in which the Duff & Phelps tables were compiled meant that the market capitalisation was the appropriate measure of Shanda's size and that the unaffected share price was sufficiently reliable to be used for the purpose of ascertaining the SSRP*."

(6) The growth rate during the terminal period

Facts:

A three-stage estimation of future cash flows was adopted as part of the DCF analysis. The trial judge adopted Mr I's basic methodology, but reduced Mr I's proposed transitional period from 10 years to 5 years. A growth rate was then applied to the investment for the terminal period. The shareholders appealed, arguing that the evidence in relation to the growth rate in the terminal period had not been properly applied.

Held (dismissing the appeal)

The judge was entitled to reach the conclusion he did based on the evidence before him. Although the evidence as to the terminal growth rate was based on a transitional period of 10 years, it did not suggest a different rate where the transitional period was shorter.

KL

In the matter of Zhaopin Limited

Summons for Directions – s.238 of the Companies Law petition – terms of non-disclosure agreement – whether individuals accessing confidential information supplied by the Company to dissenters should sign non-disclosure as a pre-condition of access to disclosed material

Cause No FSD 260 of 2017

Grand Court
Kawaley J
June 21st 2018

Legislation referred to

Cayman Islands Companies Law (2016R) s.238
Grand Court Rules (1995R) O.1.2

Cases referred to

Khongzong Corporation 2018(2) CILR N2
Mindray Medical International Limited (2016)
Nord Anglia Education Inc 2018 (2) CILR 148
Quihoo 360 Technology Co. Ltd (2016)
Trina Solar Limited 2017 (2) CILR 12

Ms C Moran and *Mr M Sweetman* for the Company
Mr R Levy QC and *Ms Jennifer Mauhgan* for the Dissenters
Facts:

Following the presentation of a petition and Summons for Directions to the Court, a Directions Order was agreed, save for the narrow question of a single contentious clause in the Non-Disclosure Agreement (NDA). The issue before the Court was the scope and extent of the

confidentiality obligations in the NDA. The Company sought to require each adviser to expressly agree in writing to comply with the NDA and to require a copy of that agreement to be given to the Company before granting access to the data room.

Held (order as follows)

(i) The Company's proposal would represent a departure from the past practice of relying on Dissenters to enforce confidentiality obligations;

(ii) It would be legally problematic to require everyone gaining access to the data room to sign the NDA;

(iii) The Company's proposal was likely to add costs and delay to the discovery and inspection process without any significant corresponding benefit for the Company in terms of practical confidentiality protections;

(iv) Referencing the decision in *Nord Anglia*, there may be exceptional circumstances where special safeguards might be justified, for example in relation to highly sensitive documents. The evidence presented did not justify such special protections in the instant case.

KL

In the matter of Zhaopin Limited

The jurisdiction to award interim payments in fair value proceedings under s.238 of the Companies Law – consideration as to what may ultimately constitute success in fair value proceedings – irrelevance of commercial purpose on the part of the purchasing shareholder – application of appropriate minority discount in the context of an interlocutory hearing

Cause No FSD 260 of 2017

Grand Court
McMillan J
June 22nd 2018

Legislation referred to

Cayman Islands Companies Law (2016R) s.238
Cayman Islands Grand Court Law s.20

Cayman Islands Grand Court Rules (1995R) O.29, R.10 and 12

Cases referred to

In the matter of Quihoo 360 Technology Co. Ltd, January 26 2017, Grand Court,
In the matter of Qunar Cayman Islands Limited, August 8 2017, Grand Court,
In the matter of Shanda Games Limited, March 9 2018, Court of Appeal
Deutsche Bank AG and others v Unitech Global Ltd [2016] IWLR 3598
Test Claimants in the FFI Group Litigation v Revenue and Customs Commissioners (formerly Inland Revenue Commissioners) (No 2) [2012] IWLR 2375

Mr R Levy QC for the Applicant
Mr R Boulton QC for the Company

Facts:

Zhaopin Limited (ZL) is a private company (previously listed on the New York Stock Exchange) which provides online job search and recruitment services in the People's Republic of China. In 2017, an extraordinary general meeting of ZL approved its merger with another company. As part of the merger process, ZL offered relevant shareholders a payment of US$8.16 per ordinary share (the "Merger Consideration"). The "Maso Dissenters", being Maso Capital Investments Limited, Blackwell Partners LLC and Star V Partners LLC, did not agree that the amount offered by ZL represented the fair value of their shares and dissented from the merger. In these proceedings, the Maso Dissenters sought an interim payment equal to the Merger Consideration.

In rejecting the Company's arguments that:

i. To obtain an Order for interim payment the Applicants must show that "they are more likely than not to obtain significantly more than the Merger Consideration" (para 38-39);
ii. "The Applicants are not suffering hardship by 'being kept out of their money' or indeed being prevented from using their money by the Company" (para 46);
iii. The Company would suffer hardship and prejudice if the relief sought were granted (para 47);

the Court noted that it does not have jurisdiction to "withhold interlocutory relief on a basis that neither the Grand Court Rules nor the [Companies] Law itself has ever intended" (para 48).

Held (order as follows)

In the absence of expert evidence as to the issue of "fair value", the Merger Consideration was the relevant basis for valuation. Applying *Shanda Games Limited*, the Merger Consideration should be subject to a discount. In the instant case, but without expounding its reasons, the Court found a 15% discount to be "both just and measured". The Court made no distinction between dissenting shareholders who purchased shares for one commercial purpose as distinct from another.

KL

CONTRACT LAW

Constantino Anggaway and Analyn Febrero Aydoc v Lorimar Development Limited

Construction contract – breach – liability for defects - causation

Cause No: 101 of 2015

Grand Court
Carter J (Actg.)
May 17th 2018

Legislation referred to

Evidence Law (2018R) Ss.42, 44
Limitation Law (1996R)

Cases referred to

Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428

Mr Pramod Joshi for the Plaintiff
Mr John Meghoo for the Defendant

Facts:

The Plaintiffs ("P") purchased and later took possession of a residential property in April 2012. A number of issues relating to the construction of the property were reported to the developer and addressed. However, in May 2014 tiles began "popping off" a number of the walls in the property. P informed the Defendant ("D") in June 2014 and D instructed an agent to inspect the defects on 24th June 2014. D's agent concluded that the entire house would need to be retiled and contacted D. P refused this proposal, and further *ex gratia* assistance offered by D. The first Plaintiff claimed that the second Plaintiff attended hospital on approximately 12th July 2014 suffering with sinusitis and chest pains and alleged that these were connected to the dust nuisance at the property. P informed D of these matters before issuing proceedings in September 2014. P claimed the costs of replacing the tiles, materials, filing fee, accommodation during the period the work would be done, general damages and legal fees.

D filed a defence and counter claim on 3rd July 2015.On the date of the trial, the D attempted to introduce two witness statements which had been filed out of the time directed by McMillan J at the Directions hearing on 27th October 2015. The Court ordered that these witness

statements could not be relied upon at trial; the effect of this was that D could not pursue its counterclaim as it had adduced no evidence.

The Court noted that the purpose of s.42 Evidence Law (2018R) was to permit one spouse to give evidence against the other; but that the same section did not permit the Court to take one spouse's evidence on matters that the other spouse has knowledge of, when the second spouse is unable to attend Court.

The matter of a "waiver" to be found in the contract for sale was also considered, which purported to declare that P had received independent legal advice, and that P waived any "right of action" which arose out of the performance of the contract between P and D. P claimed that the waiver was "rambling and nonsensical", while D contended that the waiver "operates to vest responsibility to the Plaintiffs entirely".

In summing up, Carter J stated that the essence of this claim was whether P could claim that D had not constructed the house in a "proper and workmanlike manner" due to the defects outlined. Carter J stated that despite P failing to adduce evidence beyond the Particulars of Claim, the trial proceeded on the basis of a claim for breach of contract. Carter J outlined that the Court would need to be satisfied of both factual causation and legal causation in order to find in favour of P.

Held (finding in favour of D)

(i) The Plaintiffs' claim was dismissed for failure to prove causation and damage to the required standard.

(ii) The Defendant's counterclaim was dismissed.

(iii) In considering its order regarding the Defendant's counterclaim, the Court noted that the Plaintiffs had never filed a defence to the counterclaim and therefore, while the counterclaim would be dismissed, the Court made no order for costs in relation to it.

(iv) Costs to be awarded to the Defendant to be assessed if not agreed.

Comment

This case suggests a failure to manage, and plead in the alternative, matters relating to tort law, contract law, and the law of property. The claim was one relating to alleged latent defects in the construction of new property. Following just two years of general use in a residential setting, the tiles became unsecure *en masse*. This position seems to be confirmed by D's agent

who inspected the property, but who, regrettably, was not called to give evidence. There was little evidence produced by either party to the claim and, to that end, the matter could arguably have been dealt with by a simple finding that P had failed to prove their case. The most prominent rule of evidence is that a point in issue must be proved by the party who asserts it (*ei incumbit probatio qui dicit, non qui negat* and the sister maxim *affirmati non neganti incumbit probatio*). It is incumbent upon P to adduce evidence to satisfy the evidential burden of proof prior to the matter proceeding for consideration by a judge. If, on the face of it, there is no evidence adduced by the party claiming redress, then surely there is no matter to try.

The judgment in this case arguably fails to distinguish adequately between matters of causation in tort, causation in contract law and the burden of proof. This results in the borrowing of legal terms of art and their application in inappropriate contexts. In deference to the learned judge, it may well be that P's particulars of claim were not drafted in the alternative, thereby presenting difficulties in disentangling principles of contract and tort law. It is possible to provide remedies for claims in contract and tort in the same hearing; where a Defendant has a liability in contract, it is possible – for example in contributory negligence in England and Wales – for a concurrent liability in tort to be dealt with at the contractual claim hearing (*Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 (CA) and the Law Reform (Contributory Negligence) Act 1945). However, causation in tortious matters (as indicated by Carter J's judgment) is rather different from causation in contractual matters, which has its own body of legal authority. The differentiation between these nuanced areas of causation is crucial. Causation in tort law has an extensive body of authority which is often very reactive to the specific circumstances that exist in a case. Constraints of space prevent even a summary of causation in tort in a case comment; however, terms such as the "but for test", factual causation, legal causation and *novus actus interveniens* are likely to be familiar to many. Causation in contract law often adopts the "common sense approach" with the term "caused" being given a wide ambit in many circumstances (*Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22).

One matter of particular concern in this case related to that of the waiver. Despite the very important legal contention over the validity of the waiver and its potential to assist either P or D's argument, no authority was produced dealing with this crucial matter. With respect to Carter J, it is unclear from the judgment whether the waiver was considered an unfair contractual term, whether it was held contrary to public policy to exclude all liability on the part of the developer, or whether it amounted to an attempt to set aside access to justice more generally. With none of these issues being given the Court's attention, there was a consequent absence of any declaration on these pertinent matters. It is noteworthy that D is a developer and, as such, has likely used such a waiver on other developments they may have been engaged in. A declaration on the legal validity of the waiver may therefore have been of interest to a wider audience than simply the two parties to this case.

The final matter to consider is that of the applicable limitation period. The judgment focuses on the Limitation Law (1996R) rather than on any of the jurisprudence developed around limitation rules and there is no reference to the point at which the limitation period starts. This is an area of law replete with authority to consider. Matters such as the date from which the cause of action arises, the control mechanisms which give certainty to developers and provide legal redress to purchasers who are potentially out of warranty, and specific latent defect limitation periods are all the subject matter of decisions in this area, none of which found their way into the learned judge's judgment. It may well be that such authorities were not sufficiently argued by counsel for P and D. Notwithstanding this, the lack of attention in the judgment to principles of limitation is regrettable.

This comment has hitherto largely focused on the judgment itself and the management of the case, as opposed to the substance of P's claim. Given the lack of evidence adduced, it is difficult to comment on the merits *per se*, although, in principle, the area of latent defects and construction contracts is one which can produce a considerable number of discussion points. A combination of the issues arising in this case, however, meant that the discussion is more appropriately directed at the matters outlined above.

MJ

COMMERCIAL LAW

Banco Internacional de Costa Rica, S.A. v Banana International Corporation; Banacol de Costa Rica, S.A. and Banacol Corporation

Confidentiality v disclosure – ex parte summons – freezing injunction – disclosure orders

FSD Cause No. 22 of 2017

Grand Court (FSD)
Kawaley J
August 7th 2018

Legislation referred to

Grand Court Law, s. 11; GCR Order 11 r.1(1)(m), Order 18 r.19; Order 29 r.1, Order 38 r.19
Evidence Law (2011R)
Evidence Law (2018R)
Senior Courts Act 1981 s.8 (UK)
Bankers Book Evidence Act 1879 s.37(UK)
Confidential Information Disclosure Law 2016, s.4
Confidential Relationships (Preservation) Law 1976, s.3A

Cases referred to

Walker International Holdings Limited and another v Olearius Limited and others [2003] CILR 457
T.S.B. Private Bank Intnl. S.A. v Chabra [1992] 1 WLR 231
Nomihold Securities Inc v Mobile Telesystems Finance SA [2011] EWHC 337 (Comm)
VB Football Assets v Blackpool Football Club (Properties) Ltd and others [2018] EWHC 1232 Ch (23 May 2018)
Classroom Investments Incorporated v China Hospitals Incorporated and China Healthcare Incorporated [2015] 1 CILR 451
JP Morgan Multi-Strategy Fund LP v Macro Fund Ltd [2002] CILR 569
Bank of Nova Scotia v Emerald Seas Ltd [1984-85] CILR 180
Meridian Trust Company Limited and another v Batista Da Silva and others [2017] 1 CILR 370
Arnott v Hayes (1887) 36 Ch D 731
Douglas v Pindling [1996] AC 690 (PC)

South Staffordshire Tramways Company v Ebbsmith [1895] 2 QB 669
Ferrostaal AG v Jones and others [1984-85] CILR 143

Ms K McClymont & *Ms S Bowler* for the Plaintiff

Facts:

The case concerned a post-judgment *ex parte* application for a post-judgment freezing injunction and a bankers' books inspection.

The Plaintiff lent monies to the first Defendant, with repayment agreed via payment of the proceeds of fruit sales into an escrow account established in New York. In early 2014, the first Defendant notified the Plaintiff that it was no longer going to adhere to the agreed repayments. In response, the Plaintiff commenced proceedings in New York.

In September 2015, the New York State Court issued a money judgment obtained against the Defendants. It was ascertained: i) that the first Defendant paid substantial sums into a Cayman Islands account which should have been deposited in the escrow account in New York; and ii) that the Defendants were non-cooperating judgment debtors.

In October 2017, the Plaintiff issued a writ of summons and statement of claim seeking to enforce the 2015 judgment and filed an *ex parte* summons in Grand Cayman. This was granted in November 2017. In January 2018, the Defendants applied to set aside that *ex part*e order, but this was dismissed.

In May 2018, the Plaintiff entered judgment in default for principal and interest totalling in excess of US$24 million.

The current application sought freezing and disclosure orders to enable the Plaintiff to enforce the outcome of the New York proceedings.

Held (granting the applications)

On the injunction for the post-judgment worldwide freezing order (application granted):

(i) Post-judgment freezing orders can be sought and granted. Weaker evidential standards than those applied in pre-judgment may apply in demonstrating risk of asset dissipation. The order was granted on the ground that if prior notice was given, there was a risk that the Defendants would engage in activities outside the usual course of business to undermine the efficacy of the relief

sought. Evidence of a real risk of the judgment remaining unsatisfied if the Defendant was prevented from dealing with his assets within Cayman was not needed.

(ii) The three Defendants were considered jointly and severally liable due to their close commercial and corporate ties, mainly being part of the same group of companies managed by the same Secretary General and President.

On the disclosure order (application granted):

(i) The practice of granting Mareva injunctions must remain flexible over time. The injunction was granted on the grounds that the Defendants' assets were located in Cayman and that valuable information on their origin might be obtained within the jurisdiction. The usual requirement that the Cayman Islands should be the Defendants' home jurisdiction did not apply.

(ii) An application under Evidence Law (2018 Revision) could be made post-judgment. The Law codifies the common law practice: it focuses on enabling evidence to be given at the trial, if necessary being flexible in interpreting its provisions.

(iii) Three requirements must be satisfied in order for an *ex parte* application for examination of bankers' books to be allowed: (i) the bankers' books sought must be relevant; (ii) the bankers' books need to contain information impossible to be otherwise obtained from the other party; and (iii) there must be good grounds for seeking an order *ex parte*.

(iv) The Court has a duty to manage civil litigation in an efficient manner, seeking transparency consistent with the existing confidentiality legislation in Cayman. The Court would give flexibility to the bank as to how best to balance confidentiality and disclosure, with the option of seeking further directions from the Court if necessary.

LPE

CRIMINAL - EVIDENCE

Michael Fernando Jefferson v The Queen

Firearms Law 2008 – definition of a firearm – confession evidence – judicial summing up – good character definition

Crim App No: 27 of 2017

Court of Appeal
Goldring P, Field and Morrison JAA
September 14th 2018

Legislation referred to

Firearms Law (2008R) Ss2 (11), 15(1) and 39(2) (b)
Firearms Act 1968 Ss1 (1)(b), 57(1) and 57(4) (UK)
Firearms Act 1982 Ss1 (5), 1(6) and 2(1) (UK)
Evidence Law (2011R) Ss23 and 40
Police Standing Order C3
Police Law (2017R) s.6
Judges Rules II, III (b), IV (a)
Police and Criminal Evidence Act 1984 s.66 (UK)
Court of Appeal Law (2011R) s.9(2)

Cases referred to

Grace v Director of Public Prosecutions (2009) 153 JP 491
R v Bewley [2012] 2 Cr App R 27
R v Heddell [2016] EWCA Crim 443
R v Manderson 2013 (1) CILR Note 1
Peart v The Queen [2006] UKPC 5
R v Delaney (1989) 88 Cr App R 338
R v Keenan [1990] 2 QB 54
R v Nelson [1997] Crim LR 234
R v Richardson (1994) 98 Cr App R 174
R v Puddick (1865) 4 F&F 497
R v Hunter (Nigel) [2015] 1 WLR 5367
Reid v R [1980] AC 343 (on appeal from Jamaica)

Mr P Rule for the Appellant
Mrs N Petit for the Respondent

Facts:

The Appellant was convicted by a jury of possession of an unlicensed firearm and ammunition, contrary to the Firearms Law (2008R) and sentenced to ten years' imprisonment on September 18th 2017.

The police carried out a search of the Appellant's house on June 11th 2015 and found a 0.38 semi-automatic pistol and two rounds of ammunition. During the search, an inculpatory statement (an alleged confession) was made by the Appellant whilst under caution outside his property. This statement was not noted by the police officer in his notebook at the time it was made. The officer later updated his notebook at the police station but omitted to record the alleged confession. Later that same night, the police officer recalled the alleged confession. He informed two of the officers who had taken part in the search of the Appellant's house about it the following morning, so that they could put it to the Appellant when he was being interviewed. The Appellant made no comment when asked to explain what he meant by the statement he allegedly made.

The grounds of appeal were as follows:

i. That the weapon seized from the Appellant's residence was not a firearm within the meaning of the Act;

ii. That the Judge wrongfully admitted a confession allegedly made by the Appellant to the police;

iii. That the Judge's summing up lacked impartiality and unfairly undermined the defence;

iv. That the Judge failed to give the Appellant the benefit of a positive good character direction as regards his propensity to commit the offences for which he was charged.

Held (appeal allowed and retrial ordered)

(i) Rejecting Ground 1, it was noted that expert evidence was led to the effect that, with the insertion of a missing firing pin, the pistol was in fact a firearm capable of operating as a lethal barrelled weapon. The Trial Judge had correctly rejected the defence submission that the gun was inoperable; it was a question of fact for the jury and the jury was entitled to find that the gun was a firearm within the statutory definition if it could be adapted without specialist equipment or skill.

(ii) Allowing Ground 2, the Trial Judge had mistakenly focused principally on the voluntariness of the alleged confession. There had been significant breaches of the Judges' Rules which were designed to "safeguard against the police inaccurately recording or inventing the words used in questioning a detained person" as per the comparable Code in *Keenan*.

The alleged confession was a significant item in the Crown's evidence and the potential for prejudice was plainly inestimable in the circumstances, therefore it was unfair to the Appellant and dangerous to admit the alleged confession into evidence.

(iii) Rejecting Ground 3, there was no basis for the Court to interfere with the Trial Judge's exercise of his discretion in regard to the matters complained of. These were that:

a. The Trial Judge's general comment on how to assess witness evidence was so close to his summary of a Crown witness that it had the effect of unfairly bolstering the prosecution's evidence;
b. The Trial Judge's comments on the role of prosecution and defence counsel differed to the extent that it bolstered the case for the prosecution and undermined the independence or the quality of the defence;
c. the Trial Judge did not separate the point which the Standard Direction seeks to make in respect of witnesses from his more general directions on inconsistencies, bias, demeanour and the like; and
d. the structure of the Trial Judge's summing-up with a detailed direction on how to approach credibility immediately before his review of the defence, would have given the jury the impression that he favoured the case for the prosecution.

(iv) Allowing Ground 4, it was noted that the Appellant had given evidence that he had no previous convictions and that four defence witnesses testified to his

good character. The Appellant's counsel failed to raise the question of good character and neither had the Trial Judge given such a direction, although the Trial Judge did refer to character evidence during the summing up.

Following the five member Court of Appeal judgment in *Hunter*, the Trial Judge had a discretion whether to give a good character direction, taking into account considerations of fairness to the Appellant in all the circumstances. The quality of the character evidence given in support of the Appellant at trial was impressive, however, and strongly suggested that the Trial Judge should have given him the benefit of a good character direction, modified in whatever way necessary to take into account the Appellant's circumstances.

Following *Reid v R*, a new trial was ordered on the basis of the successful grounds of appeal arising from errors by the trial judge rather than any deficiencies in the evidence.

MCB

Paul Anthony Hume Ebanks v The Queen

Evidence – refusal to issue witness summons-admission of contested witness statements-dock identification warning-dismissal of juror

Crim App No. 29 of 2016; IND 39/2015

Court of Appeal
Goldring, P, Martin Field JJA
April 19th 2018

Legislation referred to

Criminal Procedure Code (2014R) s.43
Evidence Law (2011R) Ss33(1), (6)
Criminal Justice Act 2003 s.240A
Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.109

Cases referred to

R v Tido [2012] 1 WLR 115

R v Douglas (2016) (1) CILR N.13

Mr A Davies for the Applicant
Ms T Solako for the Respondent

Facts:

On November 8th 2016, following a trial before Acting Justice Wood, the Applicant had been convicted of 26 counts of obtaining property by deception and one count of theft. He was subsequently sentenced to a total of 14 years' imprisonment, reduced to 12 years and 9 months after deduction for time spent on electronic monitoring. In the present proceedings, the Applicant sought leave to appeal against conviction and sentence.

Previous convictions:

Before the jury were admissions of previous convictions for some 53 like offences dating back to 2004 and for which the Applicant had been convicted during the period 2006-2009. As with the present facts, the prior offences consisted of the Applicant having received payment from third parties obtained on the pretext that it would be used to legitimately obtain permanent residency or status grants for them.

The Applicant's previous *modus operandi* formed the basis of each of the present convictions, with the Applicant allegedly representing (either personally or through agents) that, by dint of his connections with politicians and senior government employees, he was able to take advantage of what he alleged to be a *bona fide* arrangement whereby (for a fee) he would arrange residency or status grants for them.

The senior politicians named by the Applicant included the then Premier, McKeeva Bush, who was in Office during the period of some, but not all of the offending. In the course of investigating counts 1-18, The Financial Crime Unit of the RCIP approached Mr. Bush for a statement. Through his lawyer, he twice refused to do so. The Deputy Chief Officer of the Office of the Premier had, however, provided a written statement categorically denying any involvement of the Office of the Premier in the Applicant's dishonest scheme.

It was accordingly the Crown's case that as a result of the Applicant's scheme, perpetuated over a period of 30 months, he dishonestly obtained some C.I.$164,700 from his victims (being both friends and strangers).

The primary responses of the defence to the present charges were:

i) that the Applicant genuinely believed that he was part of a genuine government approved scheme whereby residency and status could be obtained. He had consequently received the money in good faith; and

ii) that numerous complainants had conspired against him in stating falsely that they had given him money, when they had not.

The first of the above pleas (also argued unsuccessfully in his previous trials) had been summed up by the Applicant in alleging that he had: "taken the rap for Mr. McKeeva Bush".

The Trial

During the trial and in the face of objections by then defence counsel, the prosecution sought to have a witness summons served on Mr. Bush pursuant to s.43 Criminal Procedure Code 2014, arguing that his evidence was "essential to the just outcome of the case". Defence counsel objected to this proposed course of action, arguing that it was made too late. Whilst characterizing the stance taken by Mr. Bush as being "wholly improper", the Trial Judge ruled that Mr. Bush's evidence was not essential to a just outcome of the case and that to issue a witness summons during the trial risked delaying or even derailing it. The application was therefore refused.

The Applicant had appointed new counsel (Mr. Davies) to represent him in the appeal and his position differed from that of his predecessor. Mr. Davies' position was that, as maintained by the prosecution, Mr. Bush's evidence was important to the just outcome of the case. Mr. Davies further noted that the Applicant's position was that it had been his wish throughout that Mr. Bush be called to give evidence and that in arguing otherwise, his original counsel had not been acting in accordance with the Applicant's instructions.

The Trial Judge had allowed witness statements of six complainants, absent from the Cayman Islands, to be read by the Prosecution to the Court. Counsel for the Applicant had objected to the admission of this evidence due to his inability to cross examine the witnesses. On each occasion, before admitting such evidence over the course of several days, the Judge had warned the jury of the dangers of relying upon evidence which had not been agreed by the defence and which counsel had not had the opportunity to test by cross examination. Counsel for the defence argued that the warnings given had been inadequate and that the convictions on the counts to which the witness statements related were consequently unsafe.

In relation to Count 28, which alleged that the Applicant had obtained $26,000 by deception from MM, an issue of "dock identification" by MM had arisen. This arose when, in response to the prosecution's question as to whether she had met the Applicant on any other occasion, MM stated; "No, that's the only time I saw him. Until today". The defence case was that MM had not handed money directly to the Applicant, but rather to an agent acting for him and that therefore her "dock identification" (in any event, not generally admissible: *Tido v The Queen* [2012]) was unreliable and should have been addressed by an immediate warning being given by the Judge. Instead, and apparently contrary to the Applicant's wishes, the Judge had subsequently warned the jury of the need to disregard the witnesses' identification of the Applicant.

A further issue arising during the trial concerned the dismissal of Juror number 4 who had been dismissed after it had transpired that she knew two of the witnesses. When this came to light, the judge had separated Juror number 4 from the other jurors and asked her to confirm whether this was the case. When she had done so, the Judge had immediately discharged her from the jury and sought and received her assurance that she had not discussed her knowledge of the witnesses with other members of the jury. Counsel for the Applicant asserted that because Juror number 4 had not disclosed her knowledge of any of the witnesses when given the opportunity to do so at the outset of the trial, her credibility was in doubt. The assurances that she gave to the Judge should not therefore be accepted at face value. In the words of counsel for the defence there existed: "A palpable risk that she might have influenced other jurors although she denied it."

Accordingly, the following main Grounds of Appeal against conviction were relied upon in the present application for leave to appeal:

1. The refusal of the Judge to issue a witness summons for Mr. McKeeva Bush;

2. That the written witness statements of six absent witnesses should be regarded as hearsay evidence;

3. In relation to Count 28, it was argued that an identification warning given by the Trial Judge regarding the "dock identification" of the Applicant by the witness had been given contrary to the Applicant's wishes. It was further alleged that the warning had the effect of exaggerating what had happened and was not in accordance with guidelines given in *Tido v The Queen* [2012];

4. That the dismissal of juror number 4, whom it transpired during the trial knew two of the witnesses, meant that the convictions were unsafe due to the risk of her influencing other jurors.

Held (dismissing the application)

(i) The assertion that original counsel had acted in breach of the specific instructions of his client was "incredible". The central issue, however, was whether the safety of the convictions was affected by the absence of Mr. Bush's evidence, which it was not. As recognized by original counsel, any evidence given by Mr. Bush would have "severely prejudiced" the Applicant's case. It could not conceivably have assisted it. The safety of the Applicant's convictions was therefore not affected by the absence of this evidence.

(ii) This was not a case dependent upon the absent witnesses' evidence. The witnesses in question had paid money to agents acting (innocently) for the Applicant. The agents were available to be cross-examined. Moreover, there were many other witnesses in a similar position to the absent

witnesses who were available to be called, but whose statements were read by agreement. Whilst the warnings given by the Judge might have been "more fulsome and clearer" (perhaps because "to some extent" the Judge regarded the relevant evidence to be "peripheral"), the limitations of the warnings did not affect the safety of the convictions.

(iii) In relation to count 28 the real issue was not whether the witness could identify the Applicant, but whether she was being truthful in the reasons she gave for handing over the money, which the Applicant disputed. Moreover, whilst the Judge's identification warning was not as well expressed as such a warning should have been, importantly it had made it plain to the jury that they should ignore the witnesses' purported identification.

(iv) In respect of the issues surrounding the dismissal of Juror Number 4: "[the] matter was dealt with impeccably by the Judge. There is no sensible basis for suggesting that this juror in some way influenced her colleagues against this Applicant.. in any way at all."

The Applicant also sought leave to appeal against his sentence, arguing that the total term of 14 years' imprisonment was manifestly excessive, given that the maximum sentence for the obtaining offence is 10 years' imprisonment. In support of this contention defence counsel cited two Grand Court decisions, *R v Douglas* and *R v Hamilton (2016)* where Quin J had handed down much shorter sentences.

Held (dismissing the application)

(i) In the Court's view it was: "difficult to conceive of a more serious example of offending of this type… He deliberately played (sic) upon what he knew was the desperate wish of people, mostly of moderate means, to obtain Residence or Status". The Applicant's record of offending had rightly been described by the trial Judge as being "simply appalling" and was characterized by his lack of remorse and a tendency to reoffend immediately upon release from prison. A further aggravating feature of the offences was that they involved an: "attack on the integrity of the immigration laws and procedures, and the subsequent tarnishing of the reputation and the image of the Cayman Islands".

(ii) The facts of the present case were of a quite different order to the decisions of Quin J cited by defence counsel and the Judge had been quite entitled to impose an overall sentence of 14 years' imprisonment.

(iii) In light of the aggravating features of the case, there existed no arguable grounds to appeal the overall sentence of 14 years' imprisonment.

(iv) The period of set off to be allowed as a discount for the time spent by the Applicant whilst subject to electronic monitoring ("the curfew") was to be considered at a later sitting of the Court.

Editor's note: at a hearing of the Court convened on 6th September 2018, the Court considered the appropriate discount to be applied to the Applicant to reflect the period he had spent on curfew. In so doing, the Court referenced new sentencing guidelines relating to time spent in custody issued by the Chief Justice in October 2015. In application of these guidelines and also by reference to the principles applicable in England and Wales, it was found that the Judge could have reduced the allowable set off days from 1099 days to 637 to reflect the Applicant's non-compliance rate of 42% (according to figures provided by the Electronic Monitoring Service). The Trial Judge had apparently decided not to do so, thereby arriving at a generous set off period of 1 year and 3 months. The present Court ruled that it was not open to it to decrease the set off period and to thereby increase the sentence. There was, however, no basis at all for giving the Applicant more credit than the Judge had done and the sentence would therefore stand.

The Court also noted its concern that trial judges should clearly explain how they arrived at their calculations of sentence, reflecting the time that the Defendant had spent on remand, together with any restrictions imposed on his liberty.

MD

CRIMINAL LAW – SENTENCING

R v Rueben Hesmer Hydes

Sentencing – firearms – exceptional circumstances

Indictment No: 32 of 2017

Grand Court of the Cayman Islands
Carter J
June 29th 2018

Legislation referred to

Firearms Law (2008R) Ss2(11), 15(1), 15(2), 29, 39
Firearms Law (2006R) s.38A
Criminal Procedure Code (2014R) s.88A(1)

Cases referred to

R v Avis [1998] 1 Cr App R 420
R v Rehman & Wood [2006] 1 Cr App R (S) 77
Parsons v Attorney General 2012 (1) CILR 388
Chavarria-Atily v R 2009 CILR 118
Bodden Cordero v R 2014 (SCA 11 of 2014)

Mr S Wainwright for the Crown
Mr N Dixey for the Defendant

Facts:

The Defendant was convicted on two counts, firstly the possession of an unlicenced firearm and secondly possession of ammunition, both contrary to s.15(1) of the Firearms Law (2008R).

The statutory minimum sentence for such offences is ten years, as per s.39 of the Law, unless the Court can identify exceptional circumstances for not applying it.

The Crown submitted that there were no exceptional circumstances.

The Defence submissions focused on three aspects of the general guidance given on possession of firearms by the English Court of Appeal in *Avis*: no use of the firearm was made, there was no evidence of any criminal intent to use it and that there were no recent, relevant previous convictions. These submissions were accepted by the judge.

The Defence further submitted a psychiatric report concluding that there existed mild to moderate depressive disorder with moderate anxiety disorder with panic. It also submitted a psychological report suggesting a prominent generalized anxiety disorder, but the author was not able to comment on the long-term effects of incarceration.

The social enquiry report noted that the Defendant continued to deny the offence and he was at a very high risk level of re-offending.

Held (order as follows)

The Defendant's case did not present exceptional circumstances, stemming from either one particular factor or in the round, which would justify a reduction in sentence below the minimum mandatory term of ten years for count 1. A term of five years was imposed for count 2 to run concurrently.

MCB

INSOLVENCY

CTRIP INVESTMENT HOLDINGS LTD V EHI CAR SERVICES LIMITED

Application to strike out - just and equitable ground - contributory winding up petition - abuse of process - unsustainable allegations of misconduct - alternative remedies - collateral purpose - merger agreement attempt by Petitioner to compel company to consider alternative merger bid

Cause No: FSD 63 of 2018

Grand Court FSD
Kawaley J
June 29th 2018

Legislation referred to

Companies Law (2018R) s.95(3)
Companies Law (2016 R) s.238
Grand Court Rules Order 1 r.2.2
Grand Court Rules Order 18 r.19

Cases referred to

Loch v John Blackwood [1974] AC 783
Re The Washington Special Opportunity Fund FSD 151 of 2015
Howard Smith Limited v Ampol Limited [1974] AC 821
Eclairs Group Ltd v JKX Oil and Gas Plc [2015] UKPC 71
Awa Ltd v Daniels [1992] 7 ACSR 759

Authoritative works referred to

Derek French, Applications to Wind up Companies 3rd Edition, 2015

Mr Tom Lowe QC, Mr Nicolas Hoffman and Mr Conal Keane for the Petitioner
Mr Stephen Atherton QC, Mr Jan Golaszewski and Mr Denis Olaru for the Respondent Company

Facts:

The application arose from the presentation of a winding up petition on the just and equitable ground. The Petitioner did not seek to wind up the Respondent company but to obtain alternative relief under s.93(5) Companies Law (2018R). The Petitioner was a supporter of a rival merger bid made by the Ocean Link Consortium shortly before the Respondent company

consummated a merger agreement with a consortium which included the Respondent company's Chairman.

The winding up petition sought the following relief, namely:-

1. Declarations that the Board meetings held and the resolutions passed on April 6th and 10th 2018 were void.

2. The appointment of a person by the Court to solicit the highest possible bids to take over the company.

3. An injunction restraining the Board from issuing any further shares prior to the Extraordinary General Meeting (EGM).

Held (order as follows)

(i) Far from advancing a class remedy, the Petitioner was seeking to advance its own commercial interests and maintain its investment in the company. This had been conceded in submissions by Counsel.

(ii) The attack on the Board's decision to enter a merger agreement was hopeless. The Petitioner was not complaining of a loss of trust and confidence in the management of the Respondent company and had more suitable alternative remedies available to it other than a just and equitable winding up of the Respondent company. Those alternative remedies included:-

1. Blocking the approval of the merger agreement at the EGM; and

2. Exercising statutory dissenting shareholder rights under s.238 Companies Law (2016R)

AJP

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION) AND IN THE MATTER OF CHINA HOSPITALS INC AND IN THE MATTER OF CHINA HEALTHCARE INC

Winding up petition based on final arbitration award pending appeal by parties interested in whether petition debt is disputed - duty of the Court to support reliance on foreign award - foreign arbitral awards enforcement law - whether petition should be dismissed or adjourned - whether appointment of joint provisional liquidators should be discharged or varied

Cause No: FSD 119 and 120 of 2018

Grand Court of the Cayman Islands Financial Services Division
Kawaley J
October 3rd 2018

Legislation referred to

Foreign Arbitral Awards Enforcement Law (1997R)
The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Companies Law (2018R) s.95(1)(B)

Cases referred to

Mobikon Sdn Bhd v Inmiss Communications Sdn Bdn [2007] 3 MLJ 316
Regarding Amalgamated Properties of Rhodesia [1917] 2 Ch 115
HM Revenue and Customs v Rochdale Drinks Distributors Ltd [2011] EWCA Civ 1116
Cowan v Scottish Publishing Company Co [1892] 19 R 437
Richbell Strategic Holdings Ltd [1997] 1 BCL 429
Pacific Holdings Ltd v China Pacific Holdings Ltd (in liquidation) N0.1) [2012] 4 HKLRD 1
Corporacion Transnacional de Inversiones Sa de CV v STET International SpA [1999] 45 OR (3d) 183
Cukurova Holding v Sonera Holding [2014] UKPC 15
Parsons & Whittmore Overseas Co inc v Societe Generale F 2d 969 (1974)
IPCO(Nigeria) v Nigerian National Petroleum [2005] 2 Lloy's Rep 326
Re Claybridge Shipping Co SA [1981] Com LR 107
In the Matter of Sphinx Group of Companies CICA 5 of 2015
Re Parmalat [2008] UKPC 23

Authoritative works referred to
Derek French, Applications to Wind up Companies 3rd Edition, 2015

Mr Tom Lowe QC and Mr Basedo for the Petitioner
Mr Louis Mooney and Ms Christina Kish for the companies

Facts:

On the 15th June 2018 the Petitioner obtained a final award against each of the companies in arbitration proceedings held in Hong Kong under the law of Hong Kong with the final award amounting to US $231,805,125.09. A petition was presented to this Court on 29th June 2018 for the companies' winding up on a just and equitable basis.

Following an *ex parte* hearing on 3rd July 2018, Macmillan J appointed Borrelli Walsh as Joint Provisional Liquidators ("JPL's") of the company. By a Consent Order dated 09th August 2018, the JPL's appointment was continued until the hearing of this matter on 13th July 2018.

At the hearing, the Petitioners sought winding up orders and to discharge the JPL appointments on the grounds that the debt was disputed. In the alternative, the company sought an adjournment of the petitions pending an appeal of the final award in Hong Kong and a variation of the JPL Orders to permit the directors to instruct the companies to join the appeal against the final award and to contest the Costs Orders made in certain earlier winding up proceedings in favour of the Petitioner.

Held (winding up orders to be granted against the companies, and refusing the adjournment application)

(i) There was no need to formally determine the balance of relief sought by the companies.

(ii) There was no arguable or serious breakdown of the arbitration process.

(iii) There was an insubstantial dispute relied upon; the Court was satisfied that the companies had failed to demonstrate that the Petition Debt was disputed on substantial grounds.

(iv) The Petitioner was *prima facie* entitled to immediate winding up orders in each case on the grounds of insolvency.

AJP

INSURANCE

Toby v Allianz Global Risks US Insurance Company

Insurance – aviation insurance – confiscation of Aircraft in Brazil by revenue authorities – avoidance – misrepresentation – non-disclosure – Brazilian law – whether unlawful use of temporary admission regime – whether confiscation of Aircraft unlawful – illegality – law compliance condition – whether all reasonable efforts made by insured to comply with law – "any other financial cause" exclusion – whether loss within policy period –claims procedure condition – loss payee clause

Cause No: FSD 152 of 2013

Grand Court of the Cayman Islands Financial Services Division
Mangatal J
August 29th 2018

Legislation referred to

Chicago Convention, Arts. 17, 18
Convention on International Civil Aviation
Criminal Code, Art 304 (Brazil)
Customs and Excise Act 1952
Decree 6,759/09, Art 363 (Brazil)
Decree 37/1966, Arts 75, 105 (Brazil)
Decree 97,464/1989, Art 2 (Brazil)
Decree 1455/76, Art 23 (Brazil)
Marine Insurance Act 1906, Ss17-21 (E &W)
National Service Act 1948, s.34(4) (E & W)
National Tax Code, Arts 116, 149 (Brazil)
Normative Instruction 285/2003, Annex V, Arts 1, 2, 4, 5, 6 (Brazil)
Practice Direction 1/2004
The (West Indies) Insurance Act 1959, Ss22-26

Cases referred to

Aspen v Peckel Ltd [2009] 2 All ER (Comm) 873
Banks v The Insurance Company of the West Indies (Cayman) Limited 2016 (2) CILR 442
Brit UW Ltd v F & B Trenchless Solutions Ltd [2015] EWHC 2237 (Comm)
Brotherton and ors v Aseguradora Colsegura SA and onor [2003] EWCA Civ 705
Coxe v Employers Liability Association Corp Ltd [1916] 2 KB 629
Denso Manufacturing UK Ltd v Great Lakes [2017] EWHC 391 (Comm)
Euro-Diam v Bathurst [1990] QB 1
Flack v Kodak [1981] 1 WLR 310C
Geismar v Sun Alliance and London Insurance Ltd [1978] 1 QB 383

HLB Kidsons [2009] 2 All ER 81
IFE Fund SA v Goldman Sachs International [2006] 2 CLC 1043
Involnert v Aprilgrange [2015] EWHC 2225
Interlocutory Appeal No. 0026190-44.2014.4.01.0000/DF (Brazil)
Kausar v Eagle Star [2000] Lloyd's Rep IR 154
Milton Cardoso dos Santos Filho el al vs. Uniao Federal (3rd Federal Regional Court, Brazil)
Moore Large & Co Ltd v Hermes Credit & Guarantee plc [2003] Lloyd's Rep IR 315
Patel v Mirza [2016] UKSC 42
The Wondrous [1992] 2 Lloyd's Rep 566
The Aliza Glacial [2002] 2 Lloyd's Rep 421
Zurich v Maccaferri [2016] EWCA 1302

Authoritative works referred to

Arnould's Law of Marine Insurance and Average (17th Ed)
MacGillivray on Insurance Law (12th Ed)
MacGillivray on Insurance Law (13th Ed)
Stroud's Judicial Dictionary of Words and Phrases (7th Ed)

Mr T Weitzman QC instructed by *Mr M Kish*, *Ms A Brown* and *Mr D Vekaria* for the Plaintiff
Mr B Elkington QC instructed by *Mr R Annette* and *Ms F Sbaiti* for the Defendant

Facts:

The application before the Court was an insurance claim relating to a Cessna Aircraft leased by the Plaintiff (the "Aircraft"), insured by the Defendant, and subsequently confiscated by the Brazilian authorities.

The terms of a finance lease agreement dated 18th March 2008 provided, *inter alia*, that (1) the Aircraft was to be registered in the Cayman Islands; (2) the Aircraft was to be primarily based at a Brazilian international airport; (3) the Plaintiff would use the Aircraft for general corporate business and (4) the Aircraft would be insured.

The Plaintiff, a Cayman Islands limited liability company, insured the Aircraft from 6th May 2008 pursuant to a series of annual policies. The policy that was in effect at the time of the confiscation was issued by the Defendant on 10th August 2012 (the "Policy") and provided cover from 6th May 2012 to 6th May 2013.

Brazil operates a temporary admission regime (the "TAR") permitting foreign Aircraft to enter and remain in Brazil for a specified period and not pay certain customs and import duties subject, *inter alia*, to obtaining a Temporary Entry and Admission Permit ("TEAT") from the Brazilian Federal Revenue Service ("FRS") prior to each flight entering the country. The Aircraft flew into and out of Brazil regularly during the period 2008 – 2012, having obtained the appropriate TEAT prior to entry each time.

On 19th June 2012, the FRS issued a TEAT to the Plaintiff in respect of the Aircraft which then flew from the US to Brazil. On 20th June 2012, one of the pilots of the Aircraft was served with a notification of seizure of the Aircraft by the FRS. The Aircraft was seized pursuant to a coordinated enforcement exercise, known as "Operation Forced Landing", a step taken by the Brazilian authorities to put a stop to what it saw as the illegitimate use of the TAR by Brazilian residents attempting to avoid import duties on Aircraft.

During the course of the FRS investigation, the Plaintiff dealt with numerous information requests from the FRS. In the interim, on 29th August 2012, the Plaintiff wrote to the Defendant and informed them of the seizure of the Aircraft, indicating that at the time, it was believed that the Aircraft would be returned in relatively short order once the investigation was completed.

On 29th January 2013, the FRS concluded its investigation and issued a Notice of Tax Assessment (the "Notice of Assessment") to the Plaintiff, stating that it had breached Brazilian customs law and the appropriate penalty was confiscation of the Aircraft. The Plaintiff's challenge of the Notice of Assessment was ultimately denied on 24th September 2013, prompting the Plaintiff to commence civil proceedings against the FRS which were ultimately dismissed by Brazilian Courts in 2017.

On 26th February 2013, the Plaintiff forwarded the Notice of Assessment to the Defendant and gave formal notice of a claim under the Policy in respect of the loss of the Aircraft. On 22nd April 2013, the Defendant responded denying cover and relying on certain exclusions to the Policy which it claimed precluded recovery by the Plaintiff. On 5th December 2013, the Plaintiff commenced proceedings in the Grand Court.

The draft judgment in the proceedings was circulated to the parties on 1st August 2018 and on 21st August 2018 the parties indicated that they had entered into advance settlement negotiations and requested that the Court not hand down or publish the judgment. The Court exercised its discretion to dismiss that application and decided that it was in the public interest to publish the judgment.

The Parties' Positions

The Plaintiff claimed that the Defendant failed and refused to perform its obligation to pay its valid claim under the Policy in respect of the total loss of the Aircraft on 15th January 2013.

The Defendant denied the claim and argued: (i) that the Policy had been avoided based on numerous misrepresentations and non-disclosures made by the Defendant relating to (a) the nature and business of the Plaintiff; (b) the length of time for which the Plaintiff had been incorporated; (c) the ownership of the Plaintiff; (d) the operation of the Aircraft; (e) the use of the Aircraft within Brazil; and (f) failure to disclose that the intended use of the Aircraft would involve breaches of Brazilian customs law.

The Defendant further argued, *inter alia*, that the claim should be barred as: (ii) the Plaintiff failed to pay customs duty on the Aircraft applicable under Brazilian law resulting in the confiscation of the Aircraft by application of the doctrine of illegality; (iii) the Aircraft was not

lost during the period of the Policy, but rather on 24th September 2013 when the FRS upheld the decision to confiscate, and thus the loss was not within the Policy period; (iv) the Plaintiff breached the Law Compliance Condition and Due Diligence Condition of the Policy by failing to use all reasonable efforts to ensure that it complied with the laws of Brazil; (v) the Plaintiff used the Aircraft illegally in that it was imported into and based in Brazil without the appropriate import duty having been paid in breach of the Illegal Use Exclusion of the Policy; (vi) the Aircraft was not confiscated by the Brazilian authorities within the meaning of "confiscation" under the terms of the Policy; (vii) the Plaintiff's failure to pay Brazilian taxes and/or customs duty through the unlawful use of the TAR regime was a financial cause of the loss of the Aircraft and was thus excluded under the terms of the Policy; and (viii) the Plaintiff failed to give proper notice of an event likely to give rise to a claim under the Policy. Finally, the Defendant argued that; (ix) even if the Court were to find for the Plaintiff, it was not entitled to recover any damages because it would not be in breach of any obligation to the Plaintiff and instead to the owner of the Aircraft pursuant to the Loss Payee Clause of the Policy.

Held (judgment for the Defendant)

(i) The Defendant was not entitled to avoid the Policy on the grounds of misrepresentation or non-disclosure because, while certain information provided by the Plaintiff was factually incorrect, it was not materially incorrect, and the Defendant was not induced by the statements or the non-disclosures to enter into the Policy (*Involnert v Aprilgrange*).

(ii) As (1) the relevant question was whether the Plaintiff's right to indemnity under the Policy should be enforced and not whether the Brazilian import duties should be enforced; and (2) there was public policy interest in holding parties to their bargains; and (3) the prohibition on the provision of an indemnity in respect of punishment of a crime was outweighed by the public interest in enforcing contractual obligations, the doctrine of illegality did not apply so as to defeat the Plaintiff's claim (*Patel v Mirza*).

(iii) The Aircraft was lost pursuant to the Notice of Assessment dated 15th January 2013 and thus the loss fell within the Policy period.

(iv) The Plaintiff breached the Law Compliance Condition of the Policy as it did not genuinely believe that it was complying with Brazilian law that import tax was not properly due or alternatively was reckless in its approach to compliance with said law. The Due Diligence Condition was not applicable.

(v) As the Brazilian FRS's complaint related not to the purpose of the use of the Aircraft, but to the utilization of the TAR while the Aircraft was in Brazil, the Illegal Use Exclusion did not apply.

(vi) The Policy provided coverage in respect of the confiscation of the Aircraft irrespective of whether that confiscation was lawful or unlawful and irrespective of whether that confiscation was the result of unlawful conduct on the part of the insured.

(vii) The Plaintiff's failure to pay the appropriate import duty was either the sole proximate cause, or one of the proximate causes of the loss of the Aircraft and the loss of the Aircraft was excluded pursuant to the "Any other Financial Cause" Clause Exclusion.

(viii) The Plaintiff failed to give immediate notice of the claim as required under the Policy and the Defendant was not estopped from relying on that condition (*Denso Manufacturing UK Ltd v Great Lakes).*

(ix) Pursuant to the terms of the Policy, in the event of a total loss of the Aircraft, the Defendant was obliged to pay the owner of the Aircraft and not the Plaintiff.

NE

LAND LAW

Marivel Ebanks-Yates v Mireya Odalys Ebanks

Land law – joint proprietorship – registered land law does not prevent order being made for the sale of entire property – preliminary jurisdiction

Cause No: G214/2014

Grand Court
Williams J
May 31st 2018

Legislation referred to

Judicature Law (1995R)
Judicature Law (2017R) s.42
Law of Property Act 1925
Matrimonial Causes Law (2005R) s.21
Partition Act 1868
Partition Law (1997R) s.4
Registered Land Act (Antigua and Barbuda) s.161
Registered Land Law (2018R) Ss2, 3, 37(1), 100, 100(a), 102, 103, 164

Cases referred to

Eunice Edwards v Keith Edwards and Njardas AS Civil Appeal No.15 of 2005 (Eastern Caribbean Court of Appeal)
Mums Incorporated and Thiam-Hong Tan v Cayman Capital Trust Company, B.V. Randall and E.G. Randall [2000] CILR 131 (CA)
Paradise Manor Ltd v Bank of Nova Scotia [1984-198] CILR437
Pun Jong Sau & Ors v Poon Wing Kong & Ors [1977-1979] HKC 210
Webb (DL) v Webb (OB) and Webb (M) and *Cowcatcher Collection Limited v Hawkes (R.) and Hawkes (B)* 1997 CILR 26

Authoritative works referred to

Cooper Conveyancing Law and Practice in the Cayman Islands (3rd Ed)
Cooper 'Partition of Land in the Commonwealth Caribbean' (2010) 36 Common Law World Law Review 283

Mr Laurence Aiolfi of Priestleys for the Plaintiff
Mr H Phillip Ebanks of Premier Group Solutions for the Defendant

Facts:

The Plaintiff ("P") was a joint proprietor of a registered property with the Defendant ("D"), who is P's sister, together with their father ("F"). F died on 30th August 2008 and his interest in the property was vested in P and D as remaining proprietors; P and D therefore hold the property in equal proportion, as joint proprietors. Evidence was adduced from the Cayman Islands Land Register to demonstrate this fact. Also resident at the property was P and D's elderly mother, and D's 11 year old daughter.

In October 2008 it was agreed that Mr Hoybia ("H"), D's long term partner and the father of D's child, could move into the property. P agreed on the understanding that the arrangement would be a temporary one. For reasons not reported in the judgment, the relationship between P and D broke down and P left the property in September 2011. Six months after P had left the property, D and H married. In May 2013, P and D's elderly mother moved out of the property due to health issues.

P argued that she received no benefit from the property and that D was not maintaining it well. P sought an order for sale of a registered property pursuant to s.4 of the Partition Law (1997R). On the first day of the hearing on 8th August 2016, Williams J raised concerns about D's mental health and that D was a Litigant in Person. D appeared not to understand the legal issues in question and Williams J therefore adjourned the matter part-heard to enable D to file an application for Legal Aid. At a Case Management hearing on 18th May 2018, the parties agreed that a full hearing could not proceed and that the parties would ask the Court to determine whether it had jurisdiction to make the order sought in light of s.100 of the Registered Land Law (2018R) ("RLL") and the Court of Appeal's ruling in *Mums Incorporated and Thiam-Hong Tan v Cayman Capital Trust Company, B.V. Randall and E.G. Randall* [2000] CILR 131.

Held (finding that the Court possessed jurisdiction on the present facts)

Breaking the question over preliminary jurisdiction into the following matters:

(i) The Petition Law (1997R)

There would be no order made in relation to the authorities on the Petition Law (1997R) as the sole matter in question was the question of jurisdiction.

(ii) Jurisdiction – Effect of the Registered Land Law (2018R)

D had claimed that the decision in *Mums* suggested that the RLL is "exhaustive on the issue"; while P argued that the RLL was not exhaustive on the issue. Having examined Ss.3, 37(1), 100 and 164 of the RLL, there was no provision in any of these sections that dealt with the partition of land held jointly.

Ss102 and 103 of the RLL – giving authority to the Registrar of Land to order a partition of land owned in common, and in certain circumstances impose a requirement to order sale – exists concurrently with the Court's authority to order for partition or sale under the Partition Law (1997R).

(iii) Jurisdiction – Effect of the Registered Land Law (2018R) in light of *Mums Incorporated and Thiam-Hong Tan v Cayman Capital Trust Company, B.V. Randall and E.G. Randall* [2000] CILR 131

Having referred extensively to the judgment of Smellie CJ in *Mums*, that case was distinguishable from the present on the basis that *Mums* related to the application of the Matrimonial Causes Law when a third party sought an order for sale of a property held in joint proprietorship in order to realise the interest of one party for the purposes of satisfying that party's debt. In the present case there was no debt and therefore the authority in *Mums* was inapplicable to the present facts with no analogy to be drawn between the cases.

(iv) The Petition Law and the RLL vest the Court with jurisdiction to direct the sale of property in situations such as those found in the present case.

MJ

TRUSTS

Ahmad Hamad Algosaibi and Brothers Company ('AHAB') v Saad Investments Company Limited ('SICL')

Trusts – breaches of fiduciary duty – compensation – knowing assistance – knowing receipt – tracing – illegality

Cause No: FSD 54 of 2009

Grand Court
Smellie CJ
May 31st 2018

Legislation referred to

Saudi Arabian Banking Control Law, Art 9
Trustee Act 1925 (UK), s.41
Banks and Trust Companies Law (2013R)
Trusts Law (2011R), Ss10, 12 and 64

Cases referred to

Agip (Africa) Ltd v Jackson [1990] 1 Ch 265; [1991] Ch 547
Akers v Samba [2017] 2 WLR 713
Amerasia Industrial Corporation v E Rasko and M Rasko [1980-83] CILR 19
Armagos Ltd v Mungados SA ('The Ocean Frost') [1985] 1 Lloyd's Rep 1
Armitage v Nurse [1998] Ch 241
Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109
Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2001] Ch 437
Bank of India v Morris [2005] 2 BCLC 328
Banque Financier de la Cite v Parc (Battersea) Ltd [1999] 1 AC 221
Barclays Bank plc v Kenton Capital Ltd, Etoile Ltd and Highlander Ltd [1994-95] CILR 489
Barlow Clowes International Ltd (in liquidation) v Vaughan [1992] 4 All ER 22
Barros Mattos Jnr v Macdaniels Ltd [2005] EWHC 1323
Beach Petroleum NL v Johnson (1993) FCR 1
Belmont Finance Corporation v Williams Furniture Ltd (No 2) [1980] 1 All ER 393
Bilta v Nazir (No 2) [2016] AC 1
Bishopsgate Investment Management Ltd v Homan [1995] Ch 211
Boscawen v Bajwa [1996] 1 WLR 328

Boys v Chaplin [1971] AC 356
Burnden Holdings (UK) v Fielding [2017] 1 WLR 39
CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] AC 1013
Chase Manhattan v Israel-British Bank [1981] Ch 105
Chettiar v Chettiar [1962] AC 294
Chisholm v Smith [2013] (2) CILR 32
Clayton's Case (1816) 1 Mer 529
Commerzbank Aktiengesellschaft v IMB Morgan plc [2005] 2 All ER 564 (Comm)
Commissioners for H M Revenue and Customs v Investment Trust Companies (in liquidation) [2017] UKSC 29
Constantine Line v Imperial Smelting Corporation [1942] AC 154
Cory Brothers and Company Limited v The Owners of the Turkish Steamship 'Mecca' ('The Mecca') [1897] AC 286
Cox v Ergo Versicherung AG [2014] UKSC 22
Dering v Earl of Winchelsea (1787) 1 Cox 318
Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 167
El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717
Everet v Williams (1893) 9 LQR 197n
Fairfield Sentry PC [2014] 1 CLC 611
Federal Republic of Brazil v Durant International Corporation [2015] 3 WLR 599
FHR European Ventures v Mankarious [2015] AC 250
Fiona Trust Holdings Corp v Privalov [2010] EWHC 3199
Foskett v McKeown [2001] 1 AC 102
Foster v Foster (Unreported, 9 December 2015, Grand Court)
Fuller v Strum [2000] All ER (D) 2392
Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)
Gordon Ramsay v Love [2015] EWHC 65
Grace Shipping v Sharp & Co [1987] 1 Lloyd's Rep 207
Gray v Thames Trains Ltd [2009] AC 1339
Grimaldi v Chamelon [2012] FCAFC 6
Grupo Torras SA v Sheikh Fahad & Ors [1999] EWHC 3000
Gunewardena v Conran Holdings Ltd [2017] Bus LR 301
Hall v Hebert (1993) 101 DLR (4th) 129
Hampshire Cosmetic Laboratories Ltd v Mutschmann and Cayman National Bank [1999] CILR 21
Harding v Wealands [2007] 2 AC 1
Ho Tung [1902] AC 232
Holman v Johnson (1775) 1 Cowp 341
Hounga v Allen [2014] 1 WLR 2889
In re Duomatic Ltd [1969] 2 Ch 365

In re Express Engineering Works Ltd [1920] 1 Ch 426
In re George Newman & Co Ltd [1895] 1 Ch 674
In re Goldcorp Exchange Ltd [1995] 1 AC 74
In re Hallett's Estate (1880) LR 13 ChD 696
In re Oatway [1903] 2 Ch 356
International Credit and Investment Company (Overseas) Ltd (in liquidation) and Finance Investment International Ltd v Adham [1996] CILR 89
James Roscoe (Bolton) Ltd v Winder [1915] 1 Ch 62
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Mr Thomas Lowe QC and Mr Jack Watson instructed by Mr William Peake, Mr Marc Kish, Ms Gráinne King and Mr James Elliott of Harney Westwood & Riegels for the 34th Defendant

Facts:

The claims

AHAB pleaded a number of claims against Mr Maan Al Sanea and a number of his companies. The main claims were for alleged fraudulent breaches of fiduciary duty committed by Al Sanea together with claims for knowing assistance and knowing receipt by the companies. The total value of their claims amounted to $6 billion. The Defendants pleaded, *inter alia*, that AHAB was prevented from advancing its claims due to its own illegal conduct.

Background

AHAB was a family partnership, established by three brothers in Saudi Arabia. Mr Al Sanea married into the family and was appointed Managing Director of AHAB's Money Exchange business ('Money Exchange'). Originally, Money Exchange was a bureau de change but, after 1981, it changed strategy so that it would be, in theory, a vehicle for AHAB to raise money in order for AHAB to increase its investments. What actually (and deliberately) happened was that Money Exchange fraudulently obtained billions of US dollars (over $330bn in the last 10 years alone of the scheme and an unknown amount before then) from over 100 local and international banks. Some of this money was paid out to the AHAB partners and, in addition, Al Sanea also borrowed money from Money Exchange. Eventually, in 2009, Money Exchange collapsed. AHAB sought to reclaim money from Al Sanea and his co-Defendants, which were companies controlled by him.

The billions of dollars borrowed from banks were obtained through false financial statements from Money Exchange which purported to hide the true extent of the borrowing undertaken. Later borrowing was used to repay earlier borrowing (in the form of a Ponzi scheme), until Money Exchange collapsed. AHAB claimed that its knowledge of this practice (and of Al Sanea borrowing money for his own benefit) was limited to borrowing entered into only after 2000, when the family had given Al Sanea an instruction only to borrow further if existing debts were repaid: the so-called 'New for Old' policy.

Evidence came out, however, of a high degree of control and knowledge of the practices and operations of Money Exchange by the various AHAB partners over the decades during which the defrauding activities took place.

Author's note
Tracing has been explained to be a process in which the claimant's property is followed into others' hands and, although its form might change, the resulting property can still be claimed as it is seen to be the original property of the claimant. It is not a remedy in its own right but leads to one. Knowing assistance and knowing receipt are personal claims against, respectively, a Defendant who has helped in a breach of trust and one who has received trust property and where it is unconscionable for them to retain it.

Held (dismissing the claims)

(i) The Plaintiff partners had known throughout of Al Sanea's personal borrowing from Money Exchange together with his business' defrauding of the banks. Given the Plaintiff partners' knowledge – and authorization – of Al Sanea's activities, the claim for breach of fiduciary duty that Al Sanea owed AHAB had to be dismissed.

(ii) The tracing and personal claims against the Defendants for knowing assistance and knowing receipt of the defrauded money were also rejected. (As the claim for breach of fiduciary duty was dismissed, much of the remainder of the judgment of the Court was *obiter dicta*.)

(iii) In terms of the tracing claim, AHAB had to show that there had been a breach of trust together with AHAB's property (or traceable assets) ending up in the hands of the Defendant companies. Given AHAB's knowledge of Al Sanea's practices, it could not show any breach of trust. But, in addition, AHAB had failed to show a series of connected events such that its money had ended up in the hands of the Defendant companies. Instead, relying on *Relfo Limited (in liquidation) v Varsani* and *Federal Republic of Brazil v Durant International Corporation,* AHAB argued that it would be sufficient for them to show that their property must have reached the Defendant companies without showing exactly the links in the transactions as to how that occurred. Smellie CJ held that that principle would only apply in the event of a fraudulent scheme. On the facts, there were numerous other reasons for transactions between Al Sanea and his companies and, given that, the general rule would continue to apply that AHAB had to establish a series of transactional links between them, showing that its money ended up with the recipient companies. It could not do so and hence there was no valid tracing claim. The claims largely failed to come up to the requisite standard of proof that the Defendants had received money which they had no right to receive.

In addition, the proper law for the claims for the other equitable claims was the law of Saudi Arabia, given that that was the country to which the claims were more connected. Saudi law does not recognize proprietary claims against intangible property. That meant that such claims could not succeed in any event.

(iv) Whilst the allegation of Al Sanea having defrauded the AHAB partners was dismissed, it was necessary to also consider whether Al Sanea's knowledge could be attributed to numerous other companies over which his was the directing mind and will. In applying established English law (*In Re Hampshire Land Company* and *Bilta v Nazir (No 2)*), it was held that all of the multiple Defendant companies could not, effectively, be tarred with the same brush of knowledge that Al Sanea

possessed. That would only apply where an officer of one company had a duty upon him to communicate knowledge to a recipient company and the latter had a duty to receive the information. Neither duty existed on the present facts.

Even if AHAB's claims had been successful, it was held that the Defendants could have successfully pleaded a defence based on illegality, on the basis of AHAB's complicity with the fraud against the banks. This complicity continued even if the 'New for Old' policy had been found to exist as, even under that policy, the practice of continuing to supply false accounts to the banks carried on. AHAB had started the dishonest practices and deception of the banks itself and benefitted handsomely from it. They could not use their illegal conduct to claim money from the Defendants.

The principle underpinning the notion of illegality was set out in *Holman v Johnson.* Lord Mansfield CJ had explained that, for reasons of public policy to preserve the integrity of the legal system, the Court would not allow illegal or immoral acts to be enforced. The Supreme Court held in *Patel v Mirza* that the earlier reliance principle, espoused in the House of Lords' decision in *Tinsley v Milligan,* should be overruled: namely, that if a claimant did not have to rely on their illegal act, they could (assuming some other cause of action was open to them) nonetheless pursue a successful claim. In *Patel v Mirza,* the Supreme Court held that the Court should take a more flexible approach as to whether it would permit a litigant to pursue their claim even if they had to rely on an illegal act. The Court's conclusion would depend on whether the public interest would be harmed if a claim based on an illegal act were permitted. According to Lord Toulson in the Supreme Court, in assessing that, the Court had to consider

> '(a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim, (b)…any other relevant public policy on which the denial of the claim may have an impact and (c)…whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts'.

If *Patel v Mirza* were applied to the present facts, AHAB had partaken in a hugely serious fraud, over 28 years, in which it had been admitted that every single dollar borrowed had been fraudulent. For AHAB to claim that Al Sanea had defrauded them of $6bn was little compared to the scale of deceit in which its partners had been involved. Indeed, the very reason for the business that the AHAB partners had established in setting up Money Exchange was to obtain money through deception.

There was no doubt that it would be contrary to the public interest to enforce AHAB's claims against Al Sanea, even if such claims could be established.

It used to be the case that if the Claimant had expressed repentance (*locus poenitentiae*) of their illegality, they might be able to rely on their otherwise illegal conduct to enforce their claim. In the light of the reform of the law of illegality in *Patel v Mirza*, the Court doubted whether that defence had any separate and distinct relevance to the law. But it was relevant to consider whether there had been a *locus poenitentiae* in relation to whether it was right overall for the law to enforce the claim. Smellie CJ concluded there had been none. The 'New for Old' policy was no evidence of repentance, as AHAB claimed. Instead, it was evidence that AHAB had sanctioned the fraud over the banks both to continue and to escalate.

Patel v Mirza did seem to leave another strand of the law of illegality untouched, namely, the strand in *Everet v Williams*. In that case, one highwayman claimed against another highwayman as the former felt the latter had not evenly split the proceeds of their crimes. The Court refused to entertain such a claim. The present case squarely fell into this category of illegality in any event: in the same way that the highwaymen were partners in their robberies, so AHAB was a partner in defrauding the banks with Al Sanea. Neither could claim the proceeds of their ill-gotten gains from their partners.

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ARTICLES

The Law of Trusts: two out of three ain't bad

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Introduction

At the end of a typical trusts' law module on their degree programme, many students are likely to remember the well-known topic of The Three Certainties. Certainty of intention, subject matter and object were first expounded by Lord Langdale MR in the Court of Chancery in *Knight v Knight*[1] as critical requirements to form a valid express trust. As the Master of the Rolls said, 'it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed as a trust in this Court'.[2] The testator's words had to be 'imperative'; the subject (property) 'of the recommendation be certain' and 'the objects or persons intended to have the benefit…be also certain.'[3] The requirements were needed in order that the trustees (and, if necessary, the Ccourt) could be categorically sure that a trust had been formed and that it was clear what the terms of it were. The three certainties, then, are not new requirements in English (or Caymanian) Law. Indeed, one might be forgiven for thinking that they were probably well settled but, in February 2018, the English Court of Appeal handed down a judgment in *North v Wilkinson*[4] dealing with a point which had never before arisen: whether there could be sufficient certainty of subject matter in a promise to share part of a sole trader's business. The Court also addressed whether certainty of intention had been demonstrated by the lawyerly-sounding prose that the parties had used in their documentation. The decision was a timely reminder of two of the three certainties. Moreover, as English cases are highly persuasive in the Caymanian courts and given that trusts established under Caymanian law may well feature business assets as their trust property, it is useful to consider the decision in this case.

History of Certainty of Subject Matter

The trust property must be defined with sufficient clarity. This is only fair: the trustee is, after all, responsible for administering the trust and personally liable should any loss occur to it. It has always been the case that the subject matter of the trust should therefore be clearly defined.

[1] *Knight v Knight* (1840) 3 Beav 148; 49 ER 58
[2] Ibid at 172; 67-68
[3] Ibid at 173; 68
[4] *North v Wilkinson* [2018] EWCA Civ 161

Traditionally, the easiest way to show that the subject matter was certain was to set the property to be held on trust aside from other property that the settlor may own. Old cases, which remain persuasive in Caymanian law, demonstrate this. In *Sprange v Barnard*,[5] the testatrix left a sum of money to her husband and then provided that 'the remaining part of what is left, that he does not want for his own wants and use' was to be split equally between her siblings. The Court of Chancery held that this description of the property was insufficiently certain for there to be a trust. It was, due to the testatrix's choice of words, impossible for a trustee to know how much money to hold on trust for the husband and how much for the other relatives. *Palmer v Simmonds*[6] reached the same conclusion where a testatrix left money to her nephew, his widow and thereafter provided that the 'bulk' of the residuary estate was to be left to her other relatives. Again, the Court of Chancery held that there was no trust: the trust property had not been clearly set aside so that the trustees could know how much money to administer for each alleged beneficiary. The Vice-Chancellor described the word 'bulk' as 'a term which has not in law any appropriate meaning.'[7] It was simply too imprecise a term to describe the extent of the property the testatrix wished to leave on trust.

Undivided shares of a whole

Over the latter half of the twentieth century, the trust was increasingly used as a mechanism to manage business assets in place of the traditional means of protecting family wealth. The types of property placed into trusts arguably became more sophisticated. Instead of placing money and family-owned property into trust, settlors began to declare trusts involving company assets. To begin with, the courts applied traditional trusts' rules and held that the trust property still had to be kept separate from the settlor's other property in order to establish the trust. *Re London Wine Company (Shippers) Ltd*[8] was a good example of this approach. A company sold wine to customers for investment purposes but instead of receiving the bottles themselves, each customer would receive a note from the company confirming that the customer was the sole, equitable, owner in the number of bottles they had bought. Each customer's consignment was never, however, separated from any other customers' wine or the business' own stock in the warehouse. The company went into receivership. The customers argued that their wine was held on trust for them.

This argument was rejected by Oliver J in the High Court, due to the lack of segregation of each customer's wine from every other bottle of wine in the warehouse. It was impossible to know which property was held on trust for which customer. The bottles were, in short, all mixed up both with other customers' orders and with the general stock of the business. The note the

[5] *Sprange v Barnard* (1789) 2 Bro CC 585; 29 ER 320
[6] *Palmer v Simmonds* (1854) 2 Drew 221; 61 ER 704
[7] Ibid at 225; 705
[8] *Re London Wine Co (Shippers) Ltd* [1986] PCC 121

company had sent to each customer was simply to advise each customer that they were entitled to a certain quantity of wine matching a particular description. Failing to demarcate each customer's property meant that certainty of subject matter had not been shown and hence no trust had been formed.

Where property was segregated, it was successfully argued in the later case of *Re Stapylton Fletcher Ltd*[9] that purchasers of the wine had acquired legal title in the bottles conveyed to them. This case involved very similar facts to *Re London Wine Co (Shippers) Ltd*. The clear difference was that the selling company had separated the customers' wine from its stock and kept careful records of the owners' details. This act of segregation meant that the customers were able to rely on section 16 of the Sale of Goods Act 1979 to hold that property had been ascertained in the wine. In turn, property had passed to the buyers under section 17 of that Act as it was the parties' common intention that property should pass. The buyers did not have to rely on the alternate, secondary, argument that the seller held the wine on trust for them.

Both *Re London Wine Co (Shippers) Ltd* and *Re Stapylton Fletcher Ltd* concerned tangible goods but the principles from both cases were illustrations of more widely applicable trusts' principles: that to ensure the subject matter of a trust was certain, the property of the trust had to be segregated from the settlor's remaining property so that it could clearly be seen what property was supposed to be administered for the benefit of the trust. The decision of the Court of Appeal in *Hunter v Moss*[10] was, therefore, surprising, as it held that, in the case of intangible property, there was no requirement to separate trust property from the whole. Yet despite this lack of separation, a trust of part of that intangible property would be certain.

The facts of *Hunter v Moss* concerned two business colleagues. From his shareholding of 950 shares, Robert Moss agreed to hold 50 shares in Moss Electrical Ltd on trust for David Hunter. The parties fell out and Mr Hunter claimed that Mr Moss held the shares on trust for him. The difficulty with his claim was that Mr Moss had never segregated those shares from the remainder of his shareholding. Nonetheless, the Court of Appeal held that there was sufficient certainty of subject matter for a trust to be recognized. In giving the only substantive judgment of the Court, Dillon LJ likened the declaration of trust to a testator leaving a certain number of shares in a company in his will. Just as that gift would be upheld, so a trust of a part of the settlor's property would satisfy the requirement of certainty of subject matter. It did not matter that the 50 shares had not been segregated from the rest of the shareholding: all the shares were of the same class, were therefore inter-changeable, and it mattered not which particular portion the settlor held on trust for the beneficiary.

Dillon LJ treated *Re London Wine Co (Shippers) Ltd* as solely a decision involving the segregation of the legal title in goods for the purposes of the Sale of Goods Act 1979 and hence decided only when legal title in the property in the goods passed to the buyer. In Dillon LJ's

[9] *Re Staplyton Fletcher Ltd* [1994] 1 WLR 1181
[10] *Hunter v Moss* [1994] 1 WLR 452, CA

view, the decision in *Re London Wine Co (Shippers) Ltd* was nothing to do with the law of trusts. By reaching this conclusion, he was able to distinguish the decision in the case. The difficulty with that approach was that it ran contrary to the judgment in the earlier case. Oliver J had also dealt expressly with the trust argument in *Re London Wine Co (Shippers) Ltd* and had rejected it as there was no segregation of trust property from non-trust property. Moreover, as Professor Penner[11] points out, Dillon LJ's analogy to a bequest in a will is misplaced. The beneficiary under a will is only entitled to their bequest once all the testator's debts have been paid and the estate settled. It is at that point that the beneficiary's property is ascertained. The testator does not, by definition, declare an immediate trust when writing his will; rather, the trust applies at a later stage when the property is found to be certain by a process which might be akin to exhaustion in the law of sale of goods. The decision in *Hunter v Moss* held that a trust had been declared immediately by the settlor when there was no process for identifying which shares were held for Mr Hunter. One might be inclined to the view that the Court of Appeal arguably reached the morally 'right' result: Mr Hunter had effectively been promised 50 shares and the facts of the case might suggest that Mr Moss was trying to renege on that arrangement. But the jurisprudence behind the decision was shaky. The result was that, in the law of trusts, segregation was needed to form an express trust of tangible property but not a trust of intangible property. This distinction serves little purpose and results in the law being unnecessarily complex.

The Sale of Goods (Amendment) Act 1995 rectified the position vis-à-vis the legal title in tangible goods by inserting section 20A into the Sale of Goods Act 1979. This now provides that buyers of bulk property will be considered to be owners in common in those goods provided that the goods are identified between the buyers and the seller and the buyers have paid the price for the goods. If the facts of *Re London Wine Co (Shippers) Ltd* were to arise today, the customers would therefore all be treated as owners in common of the bottles. The position of intangible goods remains the same as that decided in *Hunter v Moss*, however.
The law on certainty of subject matter therefore now seems to have three strands to it. First, trusts will be certain if the trust property is segregated from the settlor's other property. Secondly, multiple buyers of tangible goods need not have their individual property segregated to establish a trust, thanks to section 20A of the Sale of Goods Act 1979. Finally, intangible property need not be segregated from the settlor's other property provided it is of all the same type.

Undivided shares in a sole trader's business

Despite academic criticism of *Hunter v Moss*, the decision has been approved and was, effectively, applied by the Court of Appeal in the most recent case on certainty of subject

[11] J E Penner, *The Law of Trusts* (10th edn, Oxford, 2016) at 7.56-7.59

matter, *North v Wilkinson.*[12] This case is particularly interesting because it considered, for the first time, whether there could be certainty of subject matter in a sole trader promising another party a share in his business without separating that share from the rest of the promisor's interest. It was held that there was sufficient certainty of subject matter for a trust to be recognized but that, in addition, questions surrounding certainty of intention arose on the facts of the case.

Mr North had designed a particular mass market device that could be used in vacuum cleaners and washing machines. He sued Electrolux in the American courts after the company had breached a confidentiality agreement with him, and he obtained substantial damages of over US$17 million. Several claimants claimed that they had invested in the device and, in return, that Mr North had promised them both a monetary return and a share in his business. Mr Wilkinson evidenced his claim by reference to an agreement signed by himself and Mr North.
Counsel for Mr North suggested that there were considerable difficulties in holding that Mr North had declared a trust over the assets of his business. First, for a sole trader, it was impossible to demarcate business and personal assets. Secondly, as the business was trading, its assets were constantly changing and it would be difficult to recognize a trust over changing property. Thirdly, going against *Hunter v Moss*, a trust should not take effect over trust property which was not identified sufficiently.
In handing down the only substantive judgment in the Court of Appeal, David Richards LJ rejected all three arguments. First, the court had held in previous cases[13] that business and personal property could be identified separately. It was, presumably, a question of a party leading sufficient evidence in support of their claim that the property was either business or personal. Secondly, in the context of dealing with clients' money following the collapse of Lehman Brothers International (Europe), the Court of Appeal had held that a trust could be formed over constantly changing property. [14]

In addressing the argument about *Hunter v Moss*, David Richards LJ adopted an alternate approach to that taken by Dillon LJ in that earlier decision. Rather than holding that the settlor held a particular amount of property on trust for the beneficiary, David Richards LJ held that the settlor could hold *all* of the property on trust for both himself and the beneficiary, with the beneficiary then having the right to claim the share promised to him. The trust would, therefore, affect the entire interest that the settlor owned. By employing such an approach, segregation of

[12] *North v Wilkinson* [2018] EWCA Civ 161
[13] *In re Rhagg (Deceased)* [1938] Ch 828; *In re White (Dec'd)* [1958] Ch 762
[14] *Re Lehman Brothers International (Europe)* [2010] EWCA Civ 917. Note that the majority in the Supreme Court in the further appeal of the case (at [2012] Bus LR 667) decided the issue of Lehman Brothers International (Europe) clients' entitlement on their insolvency not on the basis of the law of trusts but instead on the interpretation of the rules in Chapter 7 of the Client Assets Sourcebook ('CASS 7') issued by the Financial Services Authority.

the property in favour of the beneficiary was not needed: certainty of subject matter was assured because the trust attached to the whole of the property. As David Richards LJ put it, 'in a case where A declares himself trustee of a 5% share of his business for B, it could take effect as an equitable tenancy in common between A and B in the agreed proportions.'[15] This approach effectively reaches the same result as for tangible goods under section 20A of the Sale of Goods Act 1979 albeit the statutory provision requires all buyers to have paid for the goods beforehand.

Although not mentioned by David Richards LJ, the approach under which the settlor's entire relevant property would be subject to the trust had been adopted by the Supreme Court of New South Wales in *White v Shortall*[16] in preference to the approach taken in *Hunter v Moss*. This approach seems to have found greater favour with academics too.[17] It avoids the artificiality of distinguishing between tangible and intangible property and thence effectively dispensing with certainty of subject matter for intangible property. Similarly, it circumvents the need to draw a parallel (which cannot be maintained) with property being left under a will. It means that certainty of subject matter continues to be a requirement for trusts of all property and leaves the law simpler and clearer than if different rules apply for different types of property for no apparent reason. Campbell J explained the simplicity of the result using this analysis in *White v Shortall* as follows,

> one can identify the property that is subject to the trust (the entire shareholding) one can identify the trustee (the Defendant), and one can identify the beneficiaries (the plaintiff as to 220,000 shares, the Defendant as to the rest). That is all that is needed for a valid trust.[18]

English law now seems more settled on certainty of subject matter. Whilst *Hunter v Moss* has not been disapproved judicially, the alternate approach suggested in *North v Wilkinson* means that the same requirements for subject matter to be certain may be applied regardless of the nature of the property in the trust and it matters not if an entire piece, or part, of tangible or intangible property is placed on trust. Such an approach, in simplifying the law, is to be welcomed and arguably this new, more straightforward, approach should be followed with regards to trusts declared under Caymanian law.

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[15] *North v Wilkinson* [2018] EWCA Civ 161 at [23]
[16] *White v Shortall* [2006] NSWSC 1379 at [212]. This approach was also considered earlier by Oliver J in *Re London Wine Co (Shippers) Ltd* [1986] PCC 121 at [137]
[17] See, for example, Alastair Hudson in *Equity & Trusts* (9th edn, Routledge, 2017) at p105
[18] *White v Shortall* [2006] NSWSC 1379 at [213]

Problems with certainty of intention

David Richards LJ considered a greater difficulty lay in *North v Wilkinson* with certainty of intention in declaring a trust of a sole trader's business.

Certainty of intention is the requirement that it must be clear that the settlor intended to place the trustee under a legal obligation to use the trust property for the chosen beneficiary. Most of the English cases in this area, like many of the fundamental concepts of the law of trusts, were decided in the Victorian-era. The principle in these cases can be illustrated in the words of Jessel MR in *Richards v Delbridge*[19] who said,

> It is true that he [the settlor] need not use the words "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning for, however anxious the court may be to carry out a man's intentions, it is not at liberty to construe the words otherwise than according to their proper meaning.[20]

The Victorian cases tended to focus on when certainty of intention was lacking as settlors failed to subject the trustee to a clear intention to hold trust property for a beneficiary. For instance, by stating that property could be at his wife's disposal 'in any way she may think best' the testator in *Lambe v Eames*[21] had failed to use such imperative words as were required to subject his wife to a trust.

Mr Wilkinson claimed that the written agreement he had entered into with Mr North demonstrated sufficient certainty of intention. David Richards LJ pointed out that the agreement used 'legal jargon'[22] but '[t]o a lawyer, it borders in many places on the incoherent'.[23] It seemed that whoever had drafted it (presumably Mr North) had written it in a style that he thought a lawyer should use. Mr Wilkinson's claim to a trust was based on the sentence that read, 'The equity position will cover the activities of any company or corporate vehicle, trust, partnership, or similar of John North, his heirs or successors.'

The trial judge held, with hesitation, that a trust had been declared over the business' assets. The Court of Appeal disagreed and held that there was no trust. Mr Wilkinson had no proprietary interest in the business.

David Richards LJ listed three reasons for this decision. First, although the agreement entitled Mr Wilkinson to shares in any company that Mr North formed, such an entitlement would not give any shareholder a proprietary interest in the *assets* of the company: shares merely give shareholders a contractual right to be entitled to any dividends declared and in any capital

[19] *Richards v Delbridge* (1874) LR 18 Eq 11
[20] Ibid at 14
[21] *Lambe v Eames* (1870-71) LR 6 Ch App 597
[22] *North v Wilkinson* [2018] EWCA Civ 161 at [28]
[23] ibid

money paid out if the company was wound up. The agreement was silent on what assets Mr Wilkinson would share in if the business was not incorporated but, by analogy to the position of a company, it was held that Mr Wilkinson's entitlement to its assets must be of the same category – that is, he was entitled not to the business' assets on a proprietary basis but to enforce personal rights in contract against Mr North. Secondly, there was no provision for Mr Wilkinson to share any losses in the business. Owners of a proprietary interest would, of course, bear losses as well as enjoy the profits from the business. The parties never made any agreement for being responsible for any losses the business may have incurred. Lastly, the language of the agreement did not support a trust being declared. The actual words used by the parties suggested that Mr North had merely agreed to be personally liable to Mr Wilkinson for the profits which the business made, as opposed to giving him a proprietary interest in that business. The language failed to satisfy the requirement that Scarman LJ had laid down in the earlier decision of the Court of Appeal in *Paul v Constance*[24] that there had to be 'clear evidence from what is said or done of an intention to create a trust'.[25]

As the cases from *Knight v Knight* onwards have shown, the decision in *North v Wilkinson* demonstrates the need for a clear intention on the part of the settlor to declare an express trust. The case, as ever with a first instance decision that is successfully appealed, shows how different judges can come to opposite conclusions on the same facts. However, the case shows that it is, in principle, possible to declare a trust of a sole trading business. Previous cases had focused on declaring trusts of shareholdings in companies but this decision extends the concept of the trust to shares in a sole trader's business. This may have an impact on what sole traders choose to do with their business property. In 2017, there were 5.7 million private sector businesses in the UK.[26] 99.3% of these were classified as 'small businesses'.[27] 60% (or 3.4 million) were sole traders.[28] By confirming that a trust can be declared of a sole trader's business property in principle, it is likely that this decision will be useful to a large number of these traders, even if only a few percent of them declare trusts. With small businesses forming an essential part of the business community in the Islands, it is likely that this decision will impact on the Cayman Islands just as much as in the UK.

Conclusion

[24] *Paul v Constance* [1977] 1 WLR 527, CA
[25] Ibid at 531
[26] www.fsb.org.uk/media-centre/small-business-statistics (accessed 7 March 2018)
[27] ibid
[28] ibid

Overall, *North v Wilkinson* is a comparatively rare reminder that the requirements of certainty of intention and certainty of subject matter must be met successfully to declare an express trust. It stresses the traditional need that the language used, in its context, must impose an obligation on the trustee to hold property for the benefit of the beneficiary. The decision suggests that, whilst there is nothing preventing a sole trader from declaring a trust over his business, as ever, care must be taken over the words that the settlor uses, albeit the law has been clarified and simplified over the requirement of certainty of subject matter. Whilst strictly only persuasive in Caymanian law, it is suggested that the decision is both a useful reminder of the requirements for certainty of intention and confirms that it is feasible for a sole trader to declare a trust over part of his business. Finally, whilst two out of three might not be bad, as Meatloaf sang, settlors should not forget that all three certainties are required for an express trust to be sufficiently certain.

Life - in the Cayman Islands

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This article reviews the tariff allocation set for 14 offenders, who were serving a life sentence, by the Grand Court during 2017-18. Commentary is given on the first cases dealt with under the new legislation, which were heard prior to the review cases. A thematic analysis of the aggravating and extenuating circumstances leading to the determination of an applicable minimum tariff is presented, along with comparative commentary on the position in England & Wales to distill the general principles of aggravating and mitigating circumstances which were cited by the Grand Court in these cases.

Introduction

Imprisonment for life exists as a general punitive measure under sections 21 and 22 of the Penal Code (2018 Revision) with the court having discretion to sentence to a shorter term, in accordance with the Prisons Law 1975. Additionally, discretionary life imprisonment under section 23 exists under the Code for a person convicted of a Category A offence for the second time where the court shall have regard to the circumstances relating either to the offences or the offender.[1] Furthermore, there are 27 sections in the Code which stipulates that an offender is liable to imprisonment for life and one section where an offender shall be sentenced to imprisonment for life for the offence of murder.

It is under section 181 of the Code that a mandatory life sentence exists for murder. However, the Conditional Release Law, 2014 which came into effect on 15 February 2016 ushered in a series of court hearings to allocate minimum tariffs to those currently serving life sentences along with the Conditional Release of Prisoners Regulations, 2016 designed to regulate conditional release, if granted after the minimum tariff has been served.[2]

The memorandum of objects and reasons accompanying the Conditional Release Bill, 2014 outlined the general principle that a whole of life term is considered inhuman and degrading punishment when there is no possibility of ever being released. This concords with changes made in England & Wales when release on licence of persons sentenced to imprisonment for life, by the Home Secretary, was brought about under the Criminal Justice Act 1967 not long after the abolition of the death penalty in 1965 when the sentence for murder was replaced with life imprisonment. The concept of minimum

[1] This applies only for offences committed after 31 August 2004 by a person aged 18 or over.
[2] Conditional Release Law, 2014 (Commencement) Order, 2016, s 2

tariff allocation was first set by the Home Secretary in 1983,[3] and latterly imposed by the courts as an independent tribunal following statutory reform in 2003.[4]

The Conditional Release Law, 2014 introduced a new tariff system with the starting point of 30 years to be adjusted according to the presence of aggravating or extenuating circumstances which are exceptional in nature.[5] This differs from the starting points of 15, 25 or 30 years in England & Wales under the Criminal Justice Act 2003 but the concept remains the same. Indeed, many of the aggravating and extenuating circumstances within the Caymanian regulations are identical to those found in schedule 21 of the English legislation.[6]

To avoid absolute judicial discretion in evaluating what may be construed as aggravating or extenuating circumstances or indeed whether such circumstances were exceptional in nature, the Cabinet issued the Conditional Release of Prisoners Regulations 2016. Schedule 12 provides a list of several aggravating and several extenuating circumstances which will be considered below, in conjunction with the tariff review cases.

Discretionary Release on Licence

As a comparator, the seven prisoners who were released in 2013-2018 had, on average, served 24.8 years, ranging from 19 to 28 years as indicated in table 1. *Dixon, Dixon & Bruce*[7] were jointly convicted and sentenced to death but the executions were commuted to life in prison in 1991. *Powell* was also sentenced to death and likewise subsequently commuted.[8]

Table 1 Discretionary Release Data

Name	Age at offence	Sentence	Release Date	Sentence served	Age on release
Blanford Dixon	26	21 January 1987	21 June 2013	26.5	54
Linsel Dixon	33	21 January 1987	9 June 2014	27.5	61
Owen Bruce	31	06 November 1987	16 May 2014	26.5	58

[3] By a statement made to the House of Commons on 30 November 1983 the Home Secretary (Mr. Leon Brittan) introduced a tariff system for prisoners serving mandatory life sentences: Hansard (H.C. Debates), cols. 505-507.

[4] Following the decision in *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, tariffs were to be set by an independent tribunal and not a political figure; subsequent legislative provisions for tariffs were made under the Criminal Justice Act 2003.

[5] Now superceded by the Conditional Release Law (2019R), s 7 which repeats substantially the same conditional release minimum periods of incarceration as found in the original 2014 Law

[6] Criminal Justice Act 2003, sch 12 para 10 (a) to (g) are identical aggravations, with (h) to (j) being novel to the Caymanian regulations; para 11 (a) to (g) are also identical with only one further (h) catch-all category added to the Caymanian regulations

[7] *R v Dixon, Dixon & Bruce* (GC, 21 January 1987)

[8] Data in Table 1 acquired from the Conditional Release Board on 9 August 2019

McAndy Thomas	18	17 May 1991	6 November 2014	23.5	43
William Powell	39	31 July 1987	13 July 2015	28	68
George Roper	22	15 March 1996	17 July 2015	19	44
Steve Manderson	24	15 March 1996	1 October 2018	22.5	49
Kurt Ebanks	23	26 January 2001	-	Pending application	
Average	30.9			24.8	53.9

None of the offenders in these discretionary release cases was approaching old age or had served a particularly lengthy sentence when compared against the tariff cases illustrated in table 2. They had, however, served longer than the average life sentence in England which has remained at an average of 16 years over the past ten years.[9]

Should *Ebanks*[10] fail in his current applications under section 31A of the Prison Law, he may apply to the Grand Court for a tariff to be set, having so far served 17 years, which is discussed below in conjunction with his co-Defendant under the paragraph 2(3)(h) catch-all category.

Initial Tariff Allocations

Prior to the review hearings taking place for those who had previously been convicted, two contemporaneous case sentencings arose where the mandatory life sentence was imposed and the court was required to hand down a minimum tariff to be served under the new legislation.

The *Butler*[11] case was heard by an Acting Justice of the Grand Court, only three weeks after the Conditional Release Law came into effect, who identified four agggravating and two extenuating circumstances. The judge took an approach which, ultimately, can be viewed as different to the subsequent tariff allocation calculations, by starting from the statutory minimum of 30 years, increasing this by four years due to the aggravations, then decreasing by six years for extenuating circumstances. Whilst this is not improper, other judges have taken a holistic approach and arrived solely at an overall tariff rather than quantifying the aggravating and extenuating circumstances independently of each other.

Ramoon & Douglas[12] were also sentenced later that same year prior to the recall of the remaining offenders already serving a sentence of life imprisonment for life. An appeal against conviction and sentence was then made to the Court of Appeal in November of 2018 post-dating the tariff cases, which rejected the appeal against conviction and affirmed the tariffs set by the Grand Court. Noting that the term 'exceptional in nature' cannot refer to frequency, as

[9] Ministry of Justice, Offender Management Statistics, annual table A3.3
[10] *R v Ebanks* (GC, 26 January 2001)
[11] *R v Butler* 2016 (1) CILR n 13 (GC)
[12] *R v Ramoon & Douglas* 2016 (2) CILR 429 (GC)

repetition of similar events would reduce subsequent occurrences as no longer unusual or uncommon, the appellate court concluded that in the intention of the Legislative Assembly 'the words relate not to the frequency of the conduct, but its seriousness'.[13]

Review Hearings

The Grand Court held review hearings for the remaining 14 life prisoners between February 2017 and February 2018. The review hearings were not heard in any discernible order of term served, date of conviction or indeed by date of birth of the offender.[14] They are presented in tabular form below in table 2 in order of the total minimum tariff to be served.

Overall, only two tariffs remained at the starting point of 30 years, five fell below the starting point and ten were given a higher tariff. The overall average is 32 years, however the total number of cases is low so any statistical analysis is less meaningful in comparison to a larger jurisdiction.

There were no aggravating or extenuating circumstances in *Ricketts*[15] which was the first of the 14 review hearings, although the court in this case did set what was later referred to as the 'Ricketts two-stage test'[16] as the guiding principles for tariff allocation. The first step requires an assessment of what is to be considered exceptional in nature. Henderson J referred to Lord Bingham's definition of exceptional as circumstances that must be 'unusual or special or uncommon', although they need not be 'unique or unprecedented or very rare'.[17] This is not wholly out of line with the subsequent comments of the Appeal Court in relation to frequency not overriding seriousness although this will be explored further under the relevant circumstances below. The second step is then 'to decide whether, in light of any exceptional circumstances that are found to exist, a minimum term of 30 years would be arbitrary and disproportionate'.[18]

Ricketts is also notable as establishing that gun crime per se, as argued under subparagraph 2(2)(j) is not unusual in cases of murder in the Cayman Islands, which set a precedent for subsequent review hearings involving guns; however gangland killings are further discussed under subpara (j) below and the acquisition of a gun as a an element of planning or premeditation under subpara (a).

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[13] *Ramoon & Douglas v The Queen* (CICA, 7 December 2018) [105] (Goldring P)
[14] Conditional Release of Prisoners Regulations, 2016, sch 13 Transitional Arrangements, states that the priority in which each case is to be heard shall be based upon the length of time since original sentence was imposed and any other factor that the DPP considers to be relevant
[15] *R v Ricketts* 2017 (1) CILR 191 (GC)
[16] Specifically referred to as such by Quin, J in *R v Gouldbourne* (GC, 12 February 2018)
[17] *Ricketts* n 15 [19] (Henderson J) citing *Attorney-General's Reference (No 53 of 1998) (R v Kelly)* [2000] QB 198, 208 (Lord Bingham CJ) (CA)
[18] ibid [28] (Henderson J)

Barnes is notable as the only life sentence not for murder, this was a conviction for two counts of rape and a further count of burglary with intent to rape.[19] Whilst such a life sentence was not mandatory, there is a discretionary power to impose a life sentence for numerous other offences which, under schedule 12 of the 2016 Regulations, need not have a minimum tariff of 30 years. A notional determinate sentence was passed of 35 years taking into account the general principles of sentencing that are broader than the statutory framework for murder cases.

When imposing a life sentence for offences other than murder, schedule 12 does not require the consideration of the detailed paragraph 2 aggravating or paragraph 3 extenuating circumstances. Instead, paragraph 1(2) states that the aggravating and extenuating circumstances may include all the relevant circumstances of the offence and or the offender. These may be more broad in scope and less easily codified for such a range of offences in comparison to the specific circumstances for murder. It is worth noting that the language used in paras 2 and 3 is not all written in language exclusively for murder, although the circumstances in *Barnes* can be mapped loosely onto these statutory terms. The relevant circumstances in this case included planning, suffering (which included threats made to the victim) and previous convictions.

Aggravating Circumstances

As with the extenuating circumstances described below, any aggravating circumstance must be exceptional in nature, in accordance with the Law.[20] The 2016 Regulations provide a list of 10 aggravations that may be relevant to the offence of murder, the last of which is general catch-all of 'any other circumstances which may be considered relevant'.

Each of the 10 aggravations are presented below together with brief discussion of the circumstances either argued or found as exceptional in the relevant cases.

Para 2(2)(a) a significant degree of planning or premeditation

This ground was argued unsuccessfully by the Crown in *Gouldbourne*[21] where the Defendant had a firearm and bullets in his car which was conceded by the Crown as not exceptional in nature; and also unsuccessful in *Butler*[22] where there was insufficient evidence of premeditation to make this an aggravating circumstance.

The defence argument in *Martin*[23] was of an unplanned spur of the moment attack; however the court found that obtaining the necessary weapons and equipment, the telephone messages

[19] *R v Barnes* (GC, 2 February 2018)
[20] Conditional Release Law, 2014, s 14(1)(a) and (b)
[21] *R v Gouldbourne* (GC, 12 February 2018)
[22] n 11
[23] *R v Martin* (GC, 7 February 2018)

between the Defendant and the deceased, and that these activities took place from within HMP Northward showed a very significant degree of planning and premeditation.

In *Borden*,[24] the stalking of the victim and repeated assertions of an intent to kill, coupled with the efforts made to convey death threats, amounted to a premeditated aggravation.

Whilst not a spontaneous killing, the defence in *Ebanks*[25] argued that the intention to kill could have formed only minutes beforehand, submitting that this fell short of the significant degree of planning required. The judge found that dressing in black to avoid detection, being armed with a firearm and covering his hand to avoid gunshot residue did amount to significant planning as to be an aggravating circumstance.

Ramoon & Douglas[26] were both found to have a very significant degree of planning and premeditation, each Defendant having a distinct role before, at the time and after the shooting, the CCTV evidence alone was noted powerful evidence against the Appellants and clear evidence of a pre-arranged plan in the appeal judgment.

Although *Barnes*[27] does not strictly fall under the statutory regime of paragraph 2 as a discretionary life sentence, the degree of planning was evidenced through the Defendant's knowledge of the location of the victim's apartment.

Jeffers[28] was convicted on two indictments and sentenced to seven terms of life imprisonment. Planning and premeditation was argued for both situations and countered by the defence with argument as to whether evidence of significant planning is exceptional in nature. Quin J found that the deliberate acquisition of an unlicenced firearm with the intention to kill as exceptional in both indictments as 'a cold calculating gangland murder'[29] and that the acquisition of such firearms overlaps both 2(2)(a) and could be considered separately under 2(2)(j) as any other circumstance considered relevant.

In *Henry & Ricketts*,[30] both were found to have acted in concert, despite defence submissions that Henry's involvement in the criminal enterprise came about without pre-planning. The Chief Justice accepted it was Ricketts who suffocated the deceased and Henry made no attempt to withdraw, his presence and behaviour amounted to tacit encouragement. The Court of Appeal in this case concluded that it was 'one incident, one plan to commit crimes of violence upon the deceased, that is to say, abduction, rape and robbery, in the course of the commission

[24] *R v Borden* (GC, 9 February 2018)
[25] *R v Ebanks* (GC, 13 February 2018)
[26] n 12
[27] n 19
[28] *R v Jeffers* (GC, 12 February 2018); indictment 61/2010 contained 1 count of murder and 5 counts of attempted murder (GC, 23 February 2012; indictment 60/2010 contained 1 count of murder (GC, 3 April 2014)
[29] ibid [102] (Quin J)
[30] *R v Henry & Ricketts* (GC, 15 February 2018)

of which, and in furtherance of those crimes a decision is made to kill the deceased, for the purpose of avoiding being subsequently identified as the persons who committed those crimes.'[31]

This circumstance was the most prevalent specific aggravating circumstance found for 9 life sentences and present in all cases where an increase above 30 years was made, and notably lacking in any of the cases where a reduction was given.

Para 2(2)(b) the fact that the victim was particularly vulnerable because of age or disability

This circumstance was only present in *Butler*,[32] where the victim was six years of age. Malcom J (Actg) noted that whilst this was an aggravation, it did not add to the aggravating effect of the other two relevant circumstances, namely abuse of position of trust and mental or physical suffering as discussed below.

No other victim in these cases was a child, particularly elderly or had a disability that rendered them particularly vulnerable.

Para 2(2)(c) mental or physical suffering inflicted on the victim before death

In order to be successfully argued as an aggravating circumstance the suffering must be exceptional in nature and was largely supported by post mortem evidence of the injuries sustained. Evidence of suffering in the few seconds before death was not sufficiently unusual in *Powell*[33] to make it an exceptional circumstance despite being a knife attack with several wounds.

Post mortem evidence in *Gouldbourne*[34] of voluminous knife injuries and witness evidence of screams from the victim showed both physical and mental suffering of an exceptional nature. Two gunshots were also fired during this attack but the post mortem revealed extensive knife injuries and a bullet to the head.

Butler[35] involved a parent breaking into a child's bedroom, removing her mobile phone, shaving her head and an attack involving two knives and 35 wounds to the back of the head and chest, with the forensic report detailing a further extensive number of superficial incised and stab wounds throughout the abdomen. Forensic examination also noted extensive blood and footprints indicating an attempted escape whilst severely wounded.

A number of defensive wounds in *Martin*[36] involved near amputation of the right thumb and of the left hand, which along with other chop wounds from a machete that led to profuse bleeding

[31] *R v Henry & Ricketts* (CICA 15 April 2011) [101] (Forte JA)
[32] n 11
[33] *R v Powell* (GC, 30 October 2017)
[34] n 21
[35] n 11
[36] n 23

and death within minutes. This was accepted by the court as a terrifying mental ordeal as well as horrific physical suffering.

The *Barnes* rape case found that 'the victim endured intense fear together with extreme physical and mental suffering'[37] at the time of the offence. Notably, evidence was led through a Victim Impact Report detailing the subsequent effects on the victim thereafter which typically would not be applicable to or available for any of the fatal offences discussed under this heading.

Henry & Ricketts[38] is the only fatality under this heading not caused by a weapon or blunt object, the remaining cases involve a knife or machete. The victim in this case was suffocated although a knife was used during the course of the abduction and described by one of the Defendants as causing 'a very big cut',[39] the victim was raped, robbed and duct tape was used as a restraint. These items also contributed towards the exceptional planning circumstance above.

All of the cases where this aggravation was found to be exceptional in nature involved a knife or machete. *Powell*[40] is the notable exception where the cause of death involved a knife but did not cause exceptional mental or physical suffering, and the remaining cases where this circumstance was not argued were exclusively gun shootings.

Para 2(2)(d) the abuse of a position of trust

This circumstance was only to be found in *Butler*,[41] whether the mother and daughter relationship was described as a position of trust that was broken. The language of this circumstance is broad and likely applicable to a range of relationships beyond the family and may in future cases encompass other roles invoking a duty of care such as education, employment, medical or social care.

Para 2(2)(e) the use of duress or threats against another person to facilitate the commission of the offence

Argued in *Scott* as a threat or intimidation directed at a potential witness after the shooting. This circumstance was rejected by the judge, stating 'I am not sure that what Mr Scott said rises to the level of a threat as opposed to a direction or a peremptory order'.[42] If indeed this had amounted to a threat, it was not clear whether it would have facilitated the commission of the crime but rather pointed towards the avoidance of prosecution or conviction. Witness intimidation is dealt with under (j) below in the catch-all category.

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[37] n 19 [92] (Quin J)
[38] n 30
[39] ibid [33] (Smellie CJ)
[40] n 33
[41] n 11
[42] *R v Scott* (21 April 2017) [9] (Henderson J)

This circumstance, if present in future cases, would appear to be more readily applicable where a third party is potentially liable as an accomplice but may be afforded the defence of duress, or not,[43] and the principal's tariff is thus affected as the cause of such duress irrespective of the liability of the other party.

Para 2(2)(f) the fact that the victim was providing a public service or performing a public duty

This circumstance did not feature in any case. It may be inferred that the legislation was aimed at increasing the tariff for the death of police or prison officer on duty, but may indeed be broader in encompassing any public servant from government, or members and employees of the legislative and judicial branches. Whilst the nomen juris of murder does not alter according to the status of the victim, non-fatal offences such as threat of injury to persons employed in the public service exist under the Penal Code.[44] Analogies may usefully be drawn from sentencing policy for cases resulting in the death of a police officer or various terrorist offences given the demise of treason in the modern day.[45]

Para 2(2)(g) concealment, destruction or dismemberment of the body

This circumstance was present in *Anglin (Chad)*[46] as destruction or at the least an attempted distruction by burning, but not concealment as the body was found in the victim's vehicle parked on the victim's driveway.

The body in *Martin*[47] was concealed and not discovered until six days after the murder. The victim's car was also deliberately hidden along a dirt track and the glove acquired during the planning stage, along with other necessary weapons, was also concealed and later found to contain blood and DNA of the deceased and the Defendant. No destruction or attempted destruction by the Defendant was evidenced, although the court in the original conviction took note of the 'state of decomposition and … changes from the insect activity and post-mortem scavenging'[48] as a result of the Defendant's concealment.

In *Henry & Ricketts*[49] the body was unidentifiable except by way of forensic analysis due to the deliberate burning of the victim's body in a vehicle in order to conceal the evidence of the identify of the victim, leading to the highest tariff set in these cases.

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[43] Whilst the House of Lords removed the distinction between principals and accomplices for duress in murder cases in *R v Howe* [1987] AC 417, the earlier Privy Council case *Abbott v R* (1884) technically still carries binding authority in Cayman Islands

[44] Penal Code (2018R), s 100

[45] See also Graham McBain, 'High Treason, Killing the Sovereign or Her Judges' [2009] Kings Law Journal 457

[46] *R v Anglin (Chad)* (GC, 9 June 2017)

[47] n 23

[48] *R v Martin* (GC, 26 January 2010) [9] (Quin J)

[49] n 30

Para 2(2)(h) previous convictions

Paragraph 1(3) sets out the general principle that extenuating or aggravating circumstances must be exceptional in nature, before setting out the list of aggravating and extenuating circumstances in paragraph 2. This particular aggravation has further provision given in paragraph 3, under which the court must treat each previous conviction as an aggravation, having regard to the nature of the offence and the time elapsed since conviction. There does not appear to be any explicit condition for previous convictions under paragraph 3 to have the requirement of an exceptional nature.

Powell[50] had previous convictions for resisting arrest and assaulting a police officer resulting in a suspended sentence, plus a second conviction of 13 months imprisonment for burglary and ABH. The judge accepted that these were relevant and proximate, but did not have a substantial impact on the tariff.

In *Anglin (Devon),* Smellie CJ identified four reasons why a previous serious assault (notably on a prison officer within the prison confines) was not exceptional in nature for the murder tariff.

> "First, some 2 years and 9 months had elapsed between that offence and the murder under consideration. Second, because of the obvious relative disparity in seriousness of the offences. Third, having regard but to a lesser extent, to Devon Anglin's youthfulness at the time of the offence… Fourth… having been his first offence involving violence against the person, by itself could not be regarded as evidence of propensity to violence."[51]

However, in *Anglin (Chad)*[52] Henderson J found five counts of previous indecent assault some 16 years earlier as relevant and proximate. Additionally, Henderson J also took account of two assault convictions that took place after the date of the murder conviction but before the tariff setting hearing. Minor offences of drug possession were disregarded.

The convictions for *Martin*[53] included possession of firearms, offensive weapons assault and wounding. They were found to be relevant and no argument as to whether they were exceptional or not was made, indeed defence counsel accepted them as relevant to the tariff hearing.

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[50] n 33
[51] *R v Anglin (Devon)* 2018 (1) CILR 85 [70] (Smellie CJ)
[52] *R v Anglin (Chad)* n 46
[53] n 23

Inflicting injuries with a knife and machete that resulted in a suspended sentence in *Borden*[54] were not treated as aggravating on the basis of the sentence being indicative of the offence being a less serious matter.

Quin J found a number of previous convictions relevant in *Ebanks*[55] and treated them as aggravating circumstances. They included assault and offensive weapon convictions resulting in six months' imprisonment, plus two longer custodial sentences of five and four and a half years for robbery and assault. Likewise the same judge considered a six year sentence for GBH and a 30 day sentence for ABH as aggravating under paragraph 3 in *Jeffers*.[56]

A previous conviction for possession of a prohibited weapon and for possession of ganja with intent to supply were disregarded for *Ramoon*[57] such as to justify an increase in the tariff.

No case where the tariff either remained at 30 years or was reduced by extenuating circumstances had any previous convictions that were substantially treated as aggravating circumstances. However, there was no uniformity of previous convictions forming aggravations for the more serious cases nor any pattern of increasing severity of prior offences for the highest set tariffs.

Para 2(2)(i) abduction and sexual or sadistic conduct

This circumstance is novel to the Cayman Islands and not present in the English counterpart schedule 21. It was argued by the Crown only in *Henry & Ricketts*[58] where it was acknowledged that whilst Henry had raped and ultimately caused the subsequent death of the victim, Ricketts was an accomplice to the rape having encouraged and assisted Henry's admitted sexual and sadistic assaults. Furthermore, he 'also had photographic reminders which he chose to keep of the terrible ordeal'.[59]

This circumstance was not argued in *Anglin (Chad)*[60] which was described in the Court of Appeal judgment as a homosexual encounter that was in part brought about by the Appellant who had 'at some point recruited his cousin... to have sex with Mr Bise'.[61] The facts of the case did not appear to be an abduction and the evidence of intercourse was not evidentially linked to the Appellant.

[54] n 24
[55] n 25
[56] n 28 [131] (Quin J)
[57] n 12
[58] n 30
[59] ibid [27] (Smellie CJ)
[60] n 46
[61] R v Anglin (Chad) (CICA 24 July 2015) [12] (Field JA)

Neither was reference made to this specific aggravation in *Martin*[62] where the facts of the case at trial described a sexual encounter that led to intercourse,[63] it would appear this was consensual and the victim was a willing visitor to the prison farm. Indeed, the defence argument during the tariff allocation hearing was that the prisoner had no way of luring the victim to the prison farm.

The circumstances of the *Barnes* rape case were described as 'aggravating factors of the most serious nature'[64] lending some analogy to the exceptional quality required for the murder tariff cases.

Para 2(2)(j) any other circumstances which may be considered relevant

This is a very broad catch-all category argued in one form or another in all bar two of the murder cases discussed.

In *Butler*,[65] the loss suffered by the Defendant's husband of their child was listed as an aggravation. Evidence from the mother of the victim in *Anglin (Devon)* and victim impact as an aggravating circumstance was argued by the Crown as falling within this broad category. Smellie CJ arrived at the position that loss and trauma as a conclusion to a fatal offence are 'such obvious consequences [that] are to be regarded as being already reflected in the statutory minimum sentence of 30 years'. [66]

Murder for gain was considered by Henderson J in two cases. Firstly in *Anglin (Chad)*,[67] but rejected as opportunistic and that the theft of personal possessions was not planned, but mundane and unremarkable, not exceptional in nature. Secondly in *Powell*, which involved a small sum of money. Both of these cases involve the taking of personal possessions or money from the victim, rather than a subsequent financial gain following the death of the victim. In any event, such motive may well be properly covered under the heading of planning and premeditation rather than risk any double counting of circumstances and inflating the tariff twice on the same facts. Financial gain was accepted as an exceptional circumstance in *Henry & Ricketts*[68] which was not opportunistic or common-place, having taken a laptop and cell phones from the victim and bank records showed an attempt to use the deceased's debit card on two occasions.

[62] n 23
[63] *R v Martin* (GC, 26 January 2010)
[64] n 19 [85] (Quin J)
[65] n 11
[66] n 51 [81] (Smellie CJ)
[67] n 46
[68] n 30

Henderson J, in *Ricketts*,[69] established that gun crime per se is not exceptional, which was followed as a general principle in three later cases[70] although the gangland context in *Borden*[71] was considered by Henderson J as sufficiently unusual as to make it exceptional in nature. Likewise, in *Ebanks*,[72] Quin J upheld the use of an illegal firearm along with gangland culture and public execution as aggravating circumstances falling under (2)(j). Furthermore, this case also found the intimidation of a witness to be an aggravation under this heading. This intimidation is similar in nature to sub-paragraph (2)(e) duress or a threat, but without the required link to facilitate the commission of the offence and so could rightly fall under this heading.

The number of shots fired by *Jeffers*[73] amounting to more than 10 shots fired from an illegal firearm at three unarmed victims made this circumstance exceptional in nature. The gangland context was also considered by the court under (2)(j) as a public execution along with the acquisition storage of the gun close to the ultimate murder scene, which does overlap with the circumstances of (2)(a) as discussed above. *Ramoon & Douglas*[74] was also described as a public execution and subsequent to the shooting there was an attempt to fire at another person but the firearm failed to operate a second time. Whilst apparently not labelled as attempted murder, a second charge of possession of an unlicenced firearm received ten years imprisonment to run concurrent with the life tariff.

Bodden[75] is a case of double murder, treated as an aggravation under this heading, but future such incidences of multiple or repeat fatal offences will be dealt with by way of the 2018 amendment discussed below.

Despite being a general catch-all category, this sub-heading covered four broad areas across the cases: victim impact, financial gain, gun or gangland culture, and multiple fatalities. The fact that loss and trauma were seen by the Chief Justice as obvious consequences to a fatal offence and are already factored into the statutory minimum of 30 years also reflects the concept of exceptionality as being more serious than an ordinary consequence. Nevertheless, victim impact can, where it is shown to be exceptional in nature, fall within this subparagraph.

Para 4 offences committed on bail

The was only present in *Anglin (Chad)*[76] who was on bail at the time of the offence. There is a parallel to be drawn with unlicenced firearms and witness intimidation in that these all comprise

[69] n 15
[70] Namely *R v Bodden* (GC, 12 May 2017), *Scott* n 42, *Borden* n 24
[71] n 24
[72] n 25
[73] n 28
[74] n 12
[75] n 70
[76] n 46

separate criminal offences themselves. Committing offences whilst on bail is generally dealt with if and when sentencing for the bailed offence and would also take into account previous convictions whether exceptional in nature under 2(2)(h) or under paragraph 3. There does not appear to be any discretion as the language of the statute clearly states that the court must treat offences committed whilst on bail as an aggravating circumstance. Therefore there is no apparent need to refer to exceptionality as is necessary for the para 2 aggravating or extenuating circumstances.

Extenuating Circumstances

The extenuating circumstances listed in schedule 12 include 8 circumstances, again including a general catch-all of any other circumstances which may be considered relevant. They were less frequently argued and only accepted for three distinctly identified circumstances and two more falling under the catch-all category.

Para 2(3)(a) an intention to cause serious bodily harm rather than to kill

Whilst not argued in any of these cases, intention to kill and intention to cause really serious harm are both accepted as satisfying the mens rea requirements for murder. Making a distinction on sentencing is acceptable in terms of setting out a hierarchy of seriousness without venturing into partial defences or creating a 'concealed' partial defence through legislation.[77]

Para 2(3)(b) lack of premeditation

This circumstance, argued unsuccesfully in only one case, would, in any event, have been incompatible with any of the cases where planning or premeditation under 2(3)(a) was established. In *Martin*[78] it was argued that the murder happened on the spur of the moment which was rejected by the judge in finding a significant degree of planning and premeditation.

Para 2(3)(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 185(1) of the Penal Code (2013 Revision)), lowered the offender's degree of culpability

Argued unsucessfully on behalf of *Henry*,[79] the evidential requirement on sentencing is indeed lower than the burden for the partial defence of diminished responsibility but the medical psychiatric report evidenced developments since original sentencing and not a psychotic disorder at the time of the offence. The same circumstance was present in *Powell*[80] where a preliminary issue of the Defendant's fitness to instruct counsel led to the appointment of an amicus curiae, but there was no evidence that he was mentally disordered at the time of the offence.

[77] Law Commission, *A New Homicide Act for England and Wales?: A Consultation Paper* (Law Com No 177, 2006)
[78] n 23
[79] n 30
[80] n 33

Gouldbourne argued in the Court of Appeal[81] that procedural errors led to the jury rejecting a partial defence of diminished responsibility. During the tariff allocation hearing, it was acknowledged that 'the threshold for acceptance of this submission regarding mental disorder or mental disability is a great deal lower than that required for persuading a jury of diminished responsibility'.[82]
Evidence of a paranoid personality disorder was preferred in *Butler*[83] as falling successfully under this heading over an alternative report that was rejected on the balance of probabilities at trial of a partial defence suggesting a schizoaffective disorder.

Para 2(3)(d) the fact that the offender was provoked (for example, by prolonged stress)
This is a second circumstance similar to and presumably lower, although not explicitly stated in the wording of the Regulations, than the a partial defence which under this heading is that of provocation as outlined in s 186 of the Penal Code. This was argued unsuccessfully in *Anglin (Devon)*[84] despite the conduct of the victim and another appearing to be provocative, the gangland context and cold-blooded retribution countered any alleged loss of self-control.
The Crown argued against any finding of provocation in *Bodden*[85] as the nature and degree in that case was not exceptional in nature, but this argument was rejected by the judge who also noted that provocation in this context can fall short of the criteria for returning a verdict of manslaughter. The trial judge had left that possibility open to the jury 'and they likely concluded that the interval between the end of the fight and the Defendant's return with a firearm was sufficiently long that he could reasonably have been expected to regain his self-control'.[86]

Para 2(3)(e) the fact that the offender acted to any extent in self-defence or in fear of violence
This circumstance was not argued in any of these cases but may be viewed as either falling short of the full defence of self-defence or falling within some alternate category of fear or duress. Whilst the debate on whether duress can be argued as a full or partial defence or not at all in homicide continues, the interpretation of 2(3)(c) and (d) above would suggest that the existence of or criteria for any defence at trial would be somewhat higher than what is required for the purposes of determining the minimum tariff for murder at the sentencing stage. *Para 2(3)(f) a belief by the offender that the murder was an act of mercy*
Similarly, this was not argued in any case but may come close to the partial defence of a suicide pact, although not constrained solely to such narrow circumstances where death of all parties

[81] R v Gouldbourne (CICA, 6 December 2007)
[82] n 16 on page 19 (Quin J)
[83] n 11
[84] n 51
[85] n 70
[86] ibid [8] (Henderson J)

is the objective of the common agreement. Whilst there is no partial or complete defence for mercy killings either in England and Wales or in the Cayman Islands, again the sentencing policy attempts to construct a hierarchy of seriousness for which mercy killings are not towards the higher end.

Para 2(3)(g) the age of the offender

This circumstance was unsucessfully argued in *Powell*[87] (aged 20 at time) but was successful in two cases at either end of the age spectrum for *Gouldbourne*[88] (aged 55 at time) and *Scott*[89] (aged 18 at the time). It was not argued in *Bodden*[90] or *Ricketts*[91] who were aged 21 at the time of their respective offence, suggesting that the lower cut-off is more likely to coincide with the age of majority.

Para 2(3)(h) any other circumstances which may be considered relevant

Good character and the Defendant's 'exemplary record' in *Gouldbourne*[92] was accepted as something the court could take into consideration which was also accepted in *Butler* along with a 'history of being an excellent mother to [the victim] up until that night'.[93] Good character would not be compatible with any of the findings of relevant previous convictions under 2(2)(h) and is only to be found in the two lowest tariffs allocated.

Powell was found guilty along with a co-Defendant and parity was argued and accepted by the court to 'avoid an unjustified disparity'[94] as a mitigating factor when setting a tariff. Other cases involving co-Defendants have arrived at tariffs that are either identical or different by one year. Uniquely, the co-Defendant in this case had already applied for release on licence and whilst this was pending had not been granted at the time of the tariff allocation hearing, the co-Defendant fell outwith the tariff allocation process, at least for the time being. This was a factor that the judge gave considerable weight, in this case, although noted that a disparity between the sentence of two offenders in a joint enterprise is entirely justifiable on personal background and circumstance

[87] n 33
[88] n 21
[89] n 42
[90] n 70
[91] n 15
[92] n 21 on page 23 (Quin J)
[93] n 11 [30] (Malcolm J (Actg))
[94] n 33 [23] (Henderson J)

Table 2 Summary of aggravating and extenuating circumstances argued (marked as ○) and accepted (marked as ●)

Na	Age at	Tariff	Age at	2(2)(a)	2(2)(b)	2(2)(c)	2(2)(d)	2(2)(e)	2(2)(f)	2(2)(g)	2(2)(h)	2(2)(i)	2(2)(i)	On s.4	2(3)(a)	2(3)(b)	2(3)(c)	2(3)(d)	2(3)(e)	2(3)(f)	2(3)(g)	2(3)(h)
Gou	5	**2**	8	○		●											●				●	●
Pow	2	***2***	4			○					●		○								●	●
Butl	3	**2**	6	○	●	●	●						●				●					●
Scot	1	**2**	5					○					○								●	
Bod	2	**2**	5										● ●					● ○				
Rick	2	**3**	5										○									
Ang	2	**3**	6								○		○					○				
Ang	2	**3**	7							●	●		○	●								
Mart	3	**3**		●		●				●	●					○						
Bor	2	**3**	6	●							○		●									
Eba	3	**3**	6	●							●		●									
Ram	2	**3**		●							○		●									
Douglas	28	**34**	64	●									●									
Barnes	31	**35**	68	●		●					●											
Jeffers	25	**38**	67	● ●							●		●									○

Henry &	25	**40**	73	●		●				●		●	●					○						○
Ricketts, L	27	**40**	75	●		●				●		●	●											
Average	27.9	32.4	63.6																					

Subsequent Amendment of the Law

The Conditional Release Law was amended in August 2018, six months after the last whole of life prisoner was allocated a tariff, to include, inter alia, the power for a court to specify an increased minimum period of incarceration as the whole of life for four specific sets of circumstances:

> (a) the murder of two or more persons, where each murder involves any of the following –
>
> > (i) a substantial degree of premeditation or planning;
> >
> > (ii) the abduction of a victim; or
> >
> > (iii) sexual or sadistic conduct;
>
> (b) the murder of a child where the murder also involves the abduction of the child or sexual or sadistic conduct;
>
> (c) a murder done for the purpose of advancing a political, religious, racial or ideological motivation; or
>
> (d) a murder by an offender previously convicted of murder.

This does not necessarily vest any new powers on the sentencing judge to set a high tariff above 30 years for the most serious of murder cases, but this amendment does confirm that the tariff need not be a definite numerical value and that an indefinite punitative element is available to the courts, albeit limited to four specific, but nonetheless broad, set of aggravating circumstances which are identical to the requirements for whole of life orders in England and Wales in sch 12 of the Criminal Justice Act 2003.

Indeed, by introducing this amending legislation after the completion of the tariff allocation process to existing whole of life prisoners and the very recent sentencing of three newly convicted, all of the cases described herein were not subject to the amended law as it currently

stands. As the amendment focuses solely on particular aggravations, it would not have been pertinent for all cases. Those which could have been affected are few in number.

There was only one multiple fatality murder case, which was accepted as an aggravation under the (j) catch-all category as an obvious aggravation. However, this was the only aggravation and not coupled with any of the new provisions under subparagraph (a) as planned, involving abduction or having sexual or sadistic conduct. As obiter, Henderson J remarked in *Bodden* that 'if the second killing fell to be considered in isolation, a very large addition to the 30-year norm would be appropriate'.[95]

The *Jeffers*[96] case was indeed two separate murders; so also categorised as a previous conviction under 2(2)(h) and the tariff set accordingly for both murders. Whilst this case was not the highest tariff allocation, it was in fact significantly higher than the 30-year norm and both featured a degree of planning or premeditation under 2(2)(a) thus it would have fallen within the new provisions as eligible for a whole of life minimum period, but not mandatory. This is, therefore, the only case that could have been attracted a whole of life order.

Discussion

There are many difficulties in comparing cases, especially a small number of cases. As noted in *Jeffers*, 'it is deeply unattractive to compare one murder with another murder – because all murder cases could generally be described as exceptional before one even considers any aggravating and extenuating circumstances'.[97]

The clearest pattern to emerge across these cases is the presence of planning or premeditation for all cases receiving an uplift above 30 years. There is also an absence of planning or premeditation in all those with extenuating circumstances.

Less clear is the relationship with gun killings, which comprise 11 of the 16 fatalities, and any overall increase in tariff allocation. Possession of an unlicenced firearm is a separate offence in itself, carrying a minimum sentence of seven years for a guilty plea and ten years following a trial. Whilst this may lead to an additional, and most likely consecutive, sentence it does not always affect the final calculated minimum tariff for murder whether it is or is not included as an aggravation. Reference was made by the Crown in *Jeffers*[98] to the corresponding provisions in England and Wales[99] where the use of a firearm if sufficient on its own to elevate and double the appropriate starting point from 15 to 30 years for murder.

[95] *Bodden* n75 [15] (Henderson J)
[96] n 28
[97] ibid [98] (Quin J)
[98] n 28 [63] (Mr Radcliffe QC for the Crown)
[99] Criminal Justice Act 2003, sch 21

The context of gangland culture was closely linked to gun crime and gangland killings typically featured in the upper ranges of tariffs set, ranging from 30 to 38.

It is difficult to make any meaningful comparison with the discretionary release cases that had already been effected, and conducted under a different framework, but the discretionary releases do represent a general trend of total sentences served that are towards the lower end of the range of tariff allocations and there is no apparent link to age of offender at release or length of time already served. The average age at the time of offence differs little between the discretionary release cases (30.9) and tariff cases (27.9 or 26.2 if Gouldbourne is removed as an outlier). The average of the total time served for discretionary release cases is substantially lower (24.8, ranging from 19-28) compared to the minimum tariffs set (32.4, ranging from 23-40) and the average age at discretionary release (53.9, ranging from 44-68) is also much lower than the average age when the tariff cases will become eligible to apply for parole (63.6, ranging from 47-80).

There is an argument that the discretionary releases may have set a legitimate expectation for those serving a life sentence, especially given the relatively shorter total sentences served in comparison to the minimum tariffs set. However, only a relatively low number of prisoners have been released and none had been released at the time that the tariff murder offences took place. Most, though, had been released before all of the tariff allocation hearings took place and significant press coverage was given to the first release which took place along with two others before the Conditional Release Bill was published in September 2014. Three more were then released before the law came into effect in 2016, thus emptying the prison of all offenders, bar one, given a life sentence prior to 2001.

Although the aggravating and extenuating circumstances listed have an element of clarity in their definition, the catch-all category for aggravations was argued by the Crown in almost all cases, successfully in many of them, and on more than one occasion, leading to a discrete set of judicially formulated aggravations, thereby extending the list. The concept of exceptionality also was aired in several cases, drawing from English case law to define a sense of what is unusual in nature, in relation to all aggravating and extenuating circumstances. Exceptionality is not linked to the frequency of such factors, which would be hard to justify in a small jurisdiction such as the Cayman Islands, and in any event would dilute through any such repetition and thus exceptionality would diminish for the same circumstance over time. Instead the concept of exceptionality is tied to the seriousness of the circumstances which will ordinarily be very much dependent on the facts of the case and not necessarily established in all cases.

Indeed, the legislative framework has also been amended in 2018, consolidated into the 2019 revision, indicating that government or the legislature were not fully satisfied with the provisions as first enacted in 2014. The regulations governing the tariff allocations have remained the same and whilst the paragraphs defining the aggravating and extenuating

circumstances were not amended, the principal law was amended post tariff hearings to introduce a whole of life tariff in 2018 but this was not in force at the time of any of the tariff allocations and no case has yet to be subject to this type of order.

Whilst the newly formed Conditional Release Board will undoubtedly have a case load to consider from the outset, the first eligible life sentence minimum tariffs will not be completed until 2027, unless future cases received a substantially lower tariff, and the consideration of early release will not be automatic or necessarily based solely on the aggravating and extenuating circumstances listed in schedule 12 or argued during the tariff allocation cases. A tariff is normally based upon the circumstances of the offence and of the offender at the time of sentencing, whereas Regulation 4 of the 2016 regulations allow for a wider range of information to be submitted to the board. This includes the offender's more recent history during incarceration, including conduct, demeanour and health; attitude towards authority, the offence and incarceration; and more broad content that may arise from home background reports and risk assessments. There is, therefore, no guarantee of release upon completion of the minimum tariff, but irrespective of whether any offender had any legitimate expectation of a discretionary release under the repealed provisions of the Prisons Law 1975, there now exists a statutory framework for offenders serving a life sentence to apply for conditional release.

Brexit from an offshore perspective

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1. EU-UK dynamics: to the continent or the open sea?

The European Union is (now) a union of 27 Member States (MS). It is unique because it is based on *integration*, producing its own laws and policies via its own institutions. The EU is a legal and economic powerhouse. Economically, it is one of the largest trading blocs worldwide, with the value of trade with other countries amounting to €3.94 trillion annually.[1] Legally, the EU permeates almost every aspect of its Member States' laws. This is because of incremental transfers of competences (powers pooled from the Member States to the EU) and a growing number of decisions taken by qualified majority voting rather than by unanimity.

The UK was not a founding member of the (then) European Economic Community in 1957. At the time, the Commonwealth was the UK's major strategic interest: the Import Duties Acts of 1932 and 1958 had set an 'imperial preference' to trade with the colonies, defined as a '[s]ystem of trading deals where colonies and dominions have lower rates of import tariffs than other countries, stimulating trade within an Empire'.[2] This imperial preference would last until 1973. The United Nations-led movement towards decolonisation in the 1940s–60s and a growing Europe shifted the UK's trade priorities. In 1961, the UK applied to join the European Economic Community for the first time.[3] The UK was keen on imposing some conditions to preserve privileged economic and monetary relations with the Commonwealth, which nevertheless felt like the UK had 'betrayed [their] relationships'.[4] The French veto prevented accession in 1963. The UK tried a second time in 1967. But Charles de Gaulle, the French President, vetoed it again due to concerns that the UK was too different from those of the six founding EEC countries: he believed Britain was 'not continental [and] remains, because of the Commonwealth and because she is an island, committed far beyond the seas, who is tied to the United States by all kinds of special agreements'.[5] Following de Gaulle's death, the French

[1] Figures from 2018, see European Commission, 'EU Customs Union – unique in the world', https://ec.europa.eu/taxation_customs/facts-figures/eu-customs-union-unique-world_en, accessed 31 January 2020.
[2] The National Archives, 'Imperial Preference', https://www.nationalarchives.gov.uk/cabinetpapers/help/glossary-i.htm#imperial_preference, accessed 31 January 2020.
[3] The National Archives, 'The EEC and Britain's late entry', https://www.nationalarchives.gov.uk/cabinetpapers/themes/eec-britains-late-entry.htm, accessed 31 January 2020.
[4] Peg Murray-Evans, 'Myths of Commonwealth betrayal: UK–Africa trade before and after Brexit', The Round Table, 105:4, 489.
[5] Paul Halsall, 'President Charles de Gaulle: Le Grand "Non": Britain's Proposed Entry Into The Common Market, May 16, 1967' (Fordham University, July 1998), https://sourcebooks.fordham.edu/mod/1967-degaulle-non-

attitude changed as it hoped the UK could act as a counterbalance against German dominance in the EEC. At the same time, Ted Heath redoubled the UK Government's efforts to join the EEC, which it did successfully in 1973.[6]

Fast-forward to 2015: under pressure from the Eurosceptic right-wing of his party and having suffered a number of defections to the UK Independence Party, David Cameron, then Prime Minister, promised to renegotiate the terms of the UK's membership of the EU and then put the new terms to a simple 'in/out' referendum. Harold Wilson had done the same in 1975. The 2016 result, however, was different. 'Leave' won with 52% of the vote. Cameron resigned the next morning and Teresa May led the UK into withdrawal negotiations.

2. Brexit as a negotiation process

Chris Mason, BBC political correspondent, did not have 'the foggiest idea of what [was] going to happen in the coming weeks' in the midst of Brexit negotiations.[7] This response was emblematic of the feeling surrounding Brexit. Why are these negotiations so tough?

This is the first time that a MS has left the EU. Indeed, the idea that one might leave only arose in 2009. The now-famous Article 50 of the Treaty on European Union set out the procedure for withdrawal.[8] This article defined five key stages: the exiting MS taking the decision to leave according to its own constitutional requirements; the opportunity for the exiting MS to decide when to start the two years of the negotiation clock by notifying the European Council (the institution representing the MS' interests); the arrangements to apply after concluding the exiting negotiations; the exclusion of the exiting MS in the EU's internal discussions on the negotiation; and offering the exiting MS to reapply for membership in the future. In line with Article 50 TEU, the UK decided to leave on the basis of its 2016 referendum. On 29 March 2017, the UK triggered article 50 TEU with a letter from the Prime Minister to the European Council, thus starting the two years of negotiation. After two agreed extensions, the UK finally left the EU on 31 January 2020.

The exit date starts a challenging transition period lasting until 31 December 2020. the parties have only 11 months to negotiate the terms to their future relationship. The EU has made clear that there is no possible deal that could ever be better than membership.[9] Understandably, the EU wants to prevent an exodus of other MS. Negotiating difficulties are best illustrated with the four freedoms of movement: goods, persons, capitals and services. The EU has made

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uk.asp?fbclid=IwAR2GmezD5BNBLEKOf_8zs9HunRS3ZklrZW88DVouMfiP3y6XiKWewfhiPiU, accessed 31 January 2020.

[6] More information available at University of Luxembourg CVCE.eu, 'The United Kingdom's accession to the EEC', https://www.cvce.eu/en/education/unit-content/-/unit/dd10d6bf-e14d-40b5-9ee6-37f978c87a01/3cf54bc7-03f0-4306-9f25-316d508d0c38, accessed 31 January 2020.

[7] Chris Mason, '"I haven't got the foggiest idea" @ChrisMasonBBC beautifully sums up the complexities of #Brexit' (Twitter, 12 November 2018), https://twitter.com/BBCBreakfast/status/1061939138419716097, 0:14-0:18, accessed 31 January 2020.

[8] See Consolidated Version of the Treaty on European Union [2008] OJ C115/13, article 50.

[9] European Commission, 'Joint press statement by President von der Leyen with President Sassoli and President Michel on the withdrawal of the United Kingdom from the European Union' (press statement,31January2020), https://ec.europa.eu/commission/presscorner/detail/en/speech_20_169, accessed 31 January 2020.

it clear that the four freedoms of movement are an 'indivisible package' and that the UK should take them all or none.[10] On the other hand, the UK would like to bring freedom of movement of persons to 'an end […] once and for all' whilst keeping that of goods.[11] Neither the UK nor the Republic of Ireland can countenance a hard border for Northern Ireland but reconciling this with Brexit appears technologically impossible. The CJEU is also a hard negotiating point: the EU insists that the CJEU must have jurisdiction over EU matters between the UK and EU after Brexit. Nobody knows yet what the relationship terms beyond 2021 will be.

3. The impact of Brexit on British Overseas Territories: a critical view from a local perspective

There are many questions left unanswered about the UK's future after the transition period and the position of its BOTs is even less clear. At present, the BOTs are part of the larger Overseas Countries and Territories to the EU, according to the Overseas Association Decision (OAD), together with other countries constitutionally linked to Denmark, France and the Netherlands.[12] The BOTs have not featured highly in the UK's priorities in negotiating Brexit. The House of Lords European Union Committee warned early on of the 'Government's inadequate response' to the implications of Brexit for BOTs, arguing that it came late, not detailed enough and showed insufficient engagement.[13]

BOTs have benefited from political dialogue with the EU. Instead, Brexit 'throws into sharp relief the disadvantage in international affairs'.[14] The BOTs will exit the annual meetings of the OCT-EU Forum; tripartite meetings between the Commission, the Overseas Countries and Territories and the MS to which they are linked; and partnership working parties covering technical discussions.[15] In addition, the impact on the UK's *soft power* is uncertain. '*Soft*

[10] European Commission, 'Factsheet on the Single market', https://ec.europa.eu/commission/sites/beta-political/files/factsheet_single_market.pdf, accessed 31 January 2020; Special meeting of the European Council (Article 50) (29 April 2017); Catherine Barnard, 'Brexit and the EU internal market', in Federico Fabbrini (ed), *The Law and Politics of Brexit* (OUP 2017), 203.

[11] Guardian News, 'Theresa May promises 'an end to free movement once and for all' (The Guardian UK, 2 October 2018) <https://www.youtube.com/watch?v=bjuo4qExJic> accessed 31 January 2020.

[12] Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision'), OJ L 344, 19.12.2013, p. 1–118.

[13] Letter to Rt Hon David Davis MP, Secretary of State for Exiting the European Union (13 September 2017), https://www.parliament.uk/documents/lords-committees/eu-select/Correspondence-2017-19/11-09-17-Overseas-Territories-letter-to-David-Davis-MP.pdf, accessed 31 January 2020; Letter to Rt Hon David Davis MP, Secretary of State for Exiting the European Union (1 March 2018), https://www.parliament.uk/documents/lords-committees/eu-select/01-03-18-Overseas-Territories-letter-to-Rt-Hon-David-Davis.pdf, accessed 31 January 2020.

[14] Jessica Byron, 'Prospects for decolonisation in the Third International Decade: a discussion bsed on an analysis of Brexit and its implications for British Dependent Territories in the Americas', United Nations Regional Seminar on the Implementation of the Third International Decade for the Eradication of Colonialism, St Vincent and the Grenadines, 16-18 May 2017, 2.

[15] Association of the Overseas Countries and Territories of the European Union, 'Political dialogue', http://www.octassociation.org/political-dialogue-eu-oct-ms, accessed 31 January 2020.

power' refers to the UK's capacity to push forward UK and BOTs' own agenda at the international level.

There needs to be a new legal framework for trade between BOTs and the EU. BOTs goods are neither subject to the full extent of EU laws, nor part of the single market,[16] but they have enjoyed unilateral 'preferential trade status', with duty- and quota-free access to the EU market.[17] A new round of bilaterally negotiated trade Treaties between each individual BOT and the EU would have to be put in place, potentially this time outside of the EU's preferential system.

Freedom of movement of persons has also been notable for BOT citizens, especially those holding UK passports. Those holding BOT passports will see their rights unchanged during and after transition: including 90-day visa-free access to the Schengen area in any 180 days.[18] However, for those holding UK passports, their rights to travel, reside and seek employment all across the EU under the same conditions as the nationals of the host MS will be subject to the terms of the future EU-UK relationship.

The EU has contributed significantly to BOTs, even the more prosperous ones. For instance, Cayman has received €7 million for post-disaster recovery following Hurricane Ivan and €500,000 for its Blue Iguana Recovery Programme to set up a visitor centre, undertake land purchases and deploy education and awareness programmes.[19] In the 2014–2020 budget period, the BOTs received more than €80 million for biodiversity and natural disaster recovery.[20] The Biodiversity and Ecosystem Services in Territories of European Overseas (BEST) has awarded €100 million to the British Virgin Islands to repair a damaged beach and reef in a prime touristic spot and €63,000 to Montserrat. Montserrat received a further €34 million in 2008–2020 and Turks and Caicos was awarded €6.25 million in 2008 for natural disaster response and recovery. The UK's equivalent fund, Darwin Plus, has not been extended so far to compensate for the EU funding shortfall.

3.1 BOT country-specific impact

Some BOTs will suffer from funding shortfalls, financial services and disputes of diplomatic character.

The EU made significant contributions by way of development funding to BOTs in 2014–2020, but the UK has not confirmed equivalent funding beyond that. Anguilla received

[16] Overseas Association Decision (n11), Preamble, para. 4.

[17] Ibid, article 9; European Commission, 'The Overseas Countries and Territories (OCT)', https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/overseas-countries-territories-oct_en, accessed 31 January 2020.

[18] Lord Ahmad of Wimbledon, 'Statement from Lord Ahmad of Wimbledon (Minister for the Commonwealth, the UN and South Asia) on the UK's departure from the EU' (personal email communication, 30 January 2020).

[19] Matthew Benwell and Alasdair Pinkerton, 'Brexit and the British Overseas Territories', The RUSI Journal 161:4, 12.

[20] Peter Clegg, 'The United Kingdom Overseas Territories and the European Union: Benefits and Prospects – Part I: EU benefits to the United Kingdom Overseas Territories', UK Overseas Territories Association, June 2016, 2 & 7-8.

€14 million, with the EU being the 'only source of significant development aid' and accounting for 36% of its capital budget in 2016.[21] Tristan da Cunha will have received a total of €3.25 million and Turks and Caicos Islands, €14.6 million. Montserrat received EDF funding to develop a port and develop fibre optic internet connections across the country. In 2000–2020, Pitcairn Islands will have received EDF funds accounting for 30% of its budget and part of €36 million shared with other Overseas Development Funds.

Many of the BOTs, including Anguilla, the Cayman Islands, Montserrat, Turks and Caicos Islands, British Virgin Islands and Bermuda, rely on financial services and banking as major industries.[22] Smith, BVI Premier, believes that the UK has been 'a champion for well-regulated jurisdictions'.[23] McLaughlin, Cayman Premier, has argued that 'with the [UK] no longer providing a voice of advocacy and balance around the EU table, there could be some challenges in […] ensuring there is a level playing field and fair consideration of the Cayman Islands' efforts as it relates to EU-driven financial services initiatives'.[24] Bermuda and Gibraltar depend on their access to the EU's financial markets to survive. Cayman is interested in maintaining a good relationship with the EU, on the basis of bilateral agreements with some of its MS.

Brexit will cause problems where BOTs share a land border with the EU. Gibraltar shares a border with Spain and Anguilla borders both France and the Netherlands on St Martin island. Anguilla is in a particularly precarious position because its essential commodities and services and over 95% of its visitors come from French and Dutch St Martin.[25] The impact might be devastating for Gibraltar because 40% of its workforce travels daily from and to Spain.[26] Argentina still disputes the sovereignty of the Falkland Islands and it is not yet known whether Brexit will disrupt the diplomatic pressures on the Falklands.

4 Conclusion

Like the dog that finally caught the car, the UK has barked and barked for decades but is surprised to have got what it thought it wanted and is not sure what to do now. The British Overseas Territories have had to watch from the margins. None of the challenges identified early on in the Brexit negotiations have been solved as of yet. All BOTs will suffer from decreased opportunities for political dialogue, trade, freedom of movement of persons and funding for biodiversity and natural disaster recovery. Poorer BOTs will suffer more acutely

[21] Letter to David Davis MP (13 September 2017) (n12), para. 7.
[22] I. Ioannides and J Tymowski, 'Tax evasion, money laundering and tax transparency in the EU Overseas Countries and Territories – Ex-post impact assessment', *European Parliament Research Service*, PE593.803, 16.
[23] Ibid, para. 28.
[24] Reshma Ragoonath, 'Premier: Brexit could bring opportunities' (Cayman Compass, 2 February 2020), https://www.caymancompass.com/2020/02/02/premier-brexit-could-bring-opportunities/, accessed 3 February 2020.
[25] The Government of Anguilla London Office and The West India Committee, 'Anguilla & Brexit: Britain's forgotten EU border' (The West India Committee 2017), http://westindiacommittee.org/wp-content/uploads/2017/06/The-White-Paper-on-Anguilla-and-Brexit.pdf, accessed 31 January 2020, 23.
[26] Matthew L. Bishop and Peter Clegg, 'Brexit: Challenges and Opportunities for Small Countries and Territories', The Round Table – The Commonwealth Journal of International Affairs, 107:3, 336.

than others from reduced available development funding in the Caribbean and the richer BOTs will have a weaker voice to speak up for their offshore banking and financial services industries. Anguilla and Gibraltar can expect border difficulties and the Falkland Islands may once again be subject to a diplomatic dispute. Brexit has become a high-risk venture for the UK, with lots of open questions for the BOTs to answer on their own. In times of such high uncertainty, there can be no complacency.

Psychiatric Injury of Medical Professionals: Two Alternative Approaches

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Liability for claims in negligence for psychiatric harm represents an area of the law in transition. The case law and legislation reveal several points of continued controversy, and as yet no clear pathways exist for determining novel cases in this area. Medicine is a field which traditionally involves prolonged hours, shift work and frequently extended on-call requirements. These working conditions represent an entrenched feature of the medical culture. Given the rapidly increasing volume of professional negligence claims against medical professionals, and a growing awareness of the relationship between excessive working hours and the risk of psychiatric harm, there is a clear risk of claims by members of the profession against their employers. This paper will consider the scope of potential claims by employees in the hospital setting for mental harm arising from destructive working conditions.

The Development of the Law Regarding 'Nervous Shock'

Different classes of claim have arisen over time in respect to psychiatric injury. Traditionally, the most commonly litigated claims are those by persons classified as a secondary victim: an observer who witnesses an accident caused by the negligent actions of another, giving rise to the development of a psychiatric condition. However, this paper will consider the mental harm suffered by employees in the course of their employment, and while there are significant distinctions between the two, the principles espoused in the course of development of the body of 'nervous shock' law is nevertheless relevant.

Over time, there has been a divergence between the approaches adopted by the Australian and British courts on this issue. It is instructive to review the British position, specifically to highlight the points of distinction with Australian law. British courts dealing with such cases apply restrictive control mechanisms to limit the potential volume of psychiatric injury claims. Importantly, this would appear to be based on policy concerns which are inherently associated with injuries of an apparently intangible nature. In the case of *McLoughlin v O'Brian*[1], Lord Wilberforce enumerated the policy concerns which informed his judgment.[2] His Lordship set out three principal considerations for establishing liability, which served the dual purpose of controlling the volume of claims, while still preserving a remedial right for those injured:

1. The victim should have close ties to the physically injured party;
2. There should be proximity in time and space to the accident or event; and

[1] [1982] 2 All ER 298
[2] Especially at p. 302.

3. The means by which the information is communicated.[3]

Of note is that in subsequent House of Lords decisions, Lord Wilberforce's considerations assumed the role of standards to be met in order to make out a claim. Rather than merely representing relevant factors to be taken into account, cases such as *Alcock*[4] and *White*[5] elevated these criteria to a position of requirements which must be met in order to attain the standard necessary for a successful claim. While these particular control mechanisms are not directly relevant to the case of an employee subjected to ongoing to stresses resulting in psychiatric injury, it does highlight the judicial interest in placing some limitations on claims made for mental harm.

The appropriate test of foreseeability was established in McLoughlin as being the foreseeability of psychiatric injury, which affirmed the test in *King v Phillips*,[6] as stated by Lord Denning. In the subsequent case of *Page v Smith*,[7] the test was reformulated as requiring only that personal injury be foreseen, in the case of primary victims. This is another point of discrepancy between Australian and British law in that the position in Australia is clearly that the class of psychiatric injury must itself be foreseen or foreseeable.

Therefore, it can be seen that there are the three specific points of divergence between Australian and British law: the Australian Plaintiff must establish that psychiatric, rather than merely personal, injury must have been reasonably foreseeable; secondly, Australian courts have resisted the distinction between primary and secondary victims, and lastly, there is no requirement in Australia that liability for psychiatric injury be limited to situations in which there is also risk of physical harm.[8] It should also be noted that the criteria which act as preconditions in secondary victim cases in Britain, are largely only operative as 'relevant considerations' in Australian courts. It becomes clear that the less restrictive Australian position may arguably leave the way open for a wider range of claims.

Justice Windeyer delivered the leading judgment in *Mt Isa Mines v Pusey*.[9] This case involved an employee who rushed to the aid of two fellow workers who were fatally injured by an electrical accident arising from the negligence of the Defendant employers. The Plaintiff developed a severe psychiatric injury following his involvement in this event. Under the

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[3] See pages 302 to 304.

[4] *Alcock and Others v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907; see especially Lord Kinkel at 913-914, Lord Ackner at 918-920 and Lord Jauncey of Tullichettle at 935.

[5] *White and Others v Chief Constable of the South Yorkshire Police* [1999] 1 All ER1; see especially Lord Griffiths at 4, Lord Goff at 17 and Lord Hoffman at 42.

[6] [1953] 1 All ER 617 at 623

[7] [1995] 2 All ER 736; held in a 3:2 decision

[8] D. Butler, "Voyages on Uncertain Seas with Dated Maps: Recent Developments in Liability for Psychiatric Injury in Australia", *Torts Law Journal* (2001) vol. 9, 14 at p. 16.

[9] [1970] HCA 60

British law, this would have been a secondary victim case, in that the Plaintiff suffered an injury as a result of witnessing injury to others but was also an employee.

His Honour acknowledged that a duty of care was established by virtue of the employer/employee relationship.[10] He accepted that mental harm can constitute a severe and compensable injury,[11] and ultimately found in favour of the Plaintiff. His rationale for doing so was that the class of injury was a foreseeable consequence of the employer's breach.[12]

His Honour also adverted to the process of the law moving cautiously, "step by step".[13] A survey of subsequent case law identifies just such a slow and cautious but indisputable expansion of the law in this regard. The subsequent case of *Jaensch* v. *Coffey*[14] showed just such an incremental expansion of the law. In this case a wife was able to claim for psychiatric injury sustained on attending the hospital where her husband was being treated for severe injuries as a result of the negligent Defendant's actions. This case has been identified as the turning point in the law as it effectively removed the requirement for direct perception.[15]

Chief Justice Gibbs referred to Lord Wilberforce's restrictions, and while he considered them to be "relevant elements"[16] he did not consider it appropriate to apply them with the rigidity of the House of Lords. In fact, he determined that while the closeness of ties to the injured party remained important in establishing a claim, the remaining two restrictions are less convincing as appropriate control mechanisms.[17] This development can be seen to represent a gradual progression of the law and while directly pertinent to the claims for mental harm arising from a sudden shocking event, it represents the law moving towards a greater understanding of the issues of mental health, how such psychiatric conditions arise, and constitutes an expansion of the situations in which such claims may be successful.

More recently the issue was reconsidered in the cases of *Tame* v. *New South Wales; Annetts and another* v. *Australian Stations Ply Ltd*[18] heard together before the High Court. *Tame* involved a woman who developed a psychiatric injury, having become obsessed with the inaccurate recording of an elevated blood alcohol level by a policeman, following her involvement in a car accident. While this error was subsequently corrected, and no harm

[10] Ibid. at [15]
[11] *Ibid* at [3]
[12] *Ibid* at [12]
[13] *Ibid* [14]
[14] *Jaensch v Coffey* (1984) 54 ALR 417
[15] H Luntz, "Turning points in the Law of Torts", *Insurance Law Journal* (2003) 15, p. 5.
[16] *Jaensch v. Coffey* op. cit at 421
[17] *Ibid*
[18] (2002) 191 ALR 449

directly flowed from the error, the Plaintiff suffered neurosis in response to the perceived blight upon her reputation. The court found that such a claim could not be successful as this was not a reasonably foreseeable outcome of the original error. Further, policy reasons would dictate that police should be able to conduct their investigations without fear of potential litigation.

In contrast, *Annetts* was a three party claim, which was successful. Parents of a 16-year-old boy experienced a significant grief reaction, commensurate with a psychiatric injury, on hearing of the death of their son. The circumstances here were that an employer had offered an assurance to the parents to watch over their son, and not leave him alone. They had then sent him to an isolated outpost, and in trying to return, he had become lost and died of dehydration and hypothermia. He was missing for a time before his remains were found. The court found that the assurance by the employer to the parents had established a duty of care to the parents. While there was not one single horrific incident, there was a prolonged period of uncertainty, followed by a phone call notifying the Annetts that their deceased son had been found. It was held that a direct perception of a shocking event was not a precondition for recovery. Further, it was held that all the circumstances established a duty of care to the Annetts, and that it was foreseeable that they might develop a psychiatric injury.

These cases resolved some of the confusion regarding psychiatric injury cases. The control mechanisms effective in British courts were essentially removed in Australia, with the exception of the requirement for a recognizable psychiatric illness. This case can be seen as a further extension of principles applied to psychiatric injury claims. The court arguably accepted the proposition that prolonged anxiety can be a source of mental harm which may sound in damages. Certainly, direct apprehension of a single shocking event was considered a prerequisite.

Gifford v. *Strang Patrick Stevedoring Pry Ltd*[19] is a subsequent High Court decision which further extended these principles. This case dealt with a claim by the children of an employee of Strang Patrick who had died in a workplace accident, which was accepted to be the result of the negligence of the employer. Despite the fact that the news was merely conveyed to the children, they were successful in a claim for mental harm. This is quite clearly a complete revocation of the 'aftermath doctrine'. It also extends the acknowledged duty of care between employer and employee to children of the employee, on the basis that it is foreseeable that the children might experience this kind of injury on hearing about the violent and sudden death of their father.

So it is apparent that, in Australian law, there has been a progression from the traditional category of secondary victims to the more general application of principles of negligence to

[19] [2003] HCA 33

parties suffering mental harm. It is also clear that there has been a significant divergence in the law between Britain and Australia in this field of law.

The Current Position in Two Party claims for Mental Harm

Duty of Care

The situation of an employee who sustains a psychiatric injury can be distinguished from the traditional nervous shock cases in that it is established principle that a duty of care is inherent to this relationship. There is a long line of case law which demonstrates this principle.[20] While cases such as *Annetts* turn on determining whether the Defendant in fact owed the Plaintiff a duty of care, a duty of care to an employee requires no debate. It is one of a class of relationships, such as teacher-student, and road user to another road user which inherently entail such obligations. The scope and limitations of that duty, however, have been the subject of many attempts at formulation. It is a duty which has been said to be "undeniable"[21] and "non-delegable"[22] and which requires that the employer ensures reasonable care is taken.[23] The weight of opinion suggests that the standard of care required is that of the reasonably prudent employer providing a safe working environment for his employee.

The rationale for this principle is that the nature of the relationship allows for the employer to control the environment of the employee. The position was stated thus by Hayne J in *Crimmins* v. *Stevedoring Industry Finance*

The common law imposes a duty on the employer because the employer is il1 a position to direct another to go *in harm's way, and to do* so *in circumstances over which that employer can exercise control.*[24]

This statement is essentially as a result of the power to both direct and control the employee that the employer definitively owes the employee a duty of care.[25]

Giving a scope to the duty and defining limitations on this duty has been a somewhat more complex proposition. As noted earlier, many of the secondary victim claims turn on the duty of care, such that it effectively operates as a control mechanism for that set of claims. Clearly

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[20] Butler D *Voyages on Uncertain Seas* op. cit p.16
[21] *O 'Leary* v. *Golong Aboriginal corporation lnc* [2004] NSWCA 7; see especially Sheller JA at [38]
[22] *Faucett* v. *Sf. George Bank* [2003] NSWCA 43 per Sheller JA at 14; *State of NSW* v. *Seedsman [2000]* NSWCA 119 per Mason J at [162]
[23] Goudkamp J "The Spurious Relationship Between Moral Blameworthiness and Liablity for Negligence", *Melbourne University Law Review* [2004] II at p16
[24] [1999] HCA 59 at [276]
[25] *Crimmins* v. *Stevedoring Industry finance Committee* [1999] HCA 59 at [277]

this is not the case in the employment situation. It is in the other element of negligence, such as breach, that claims will be limited.[26] The weight of opinion is that the standard of care required is that of the "reasonably prudent employer"[27] to "institute, maintain and enforce safe systems of work"[28] and to avoid placing the employee at unreasonable risk of harm.

Justice Kirby defined this in *Schellenberg v Tunnel Holdings Pty Ltd* as "extend[ing] to taking reasonable steps in accident preventing and not waiting for accidents to happen before safeguarding the health and safety of employees…"[29] This position was affirmed in *State of New South Wales v Seedsman*[30] by Mason J. This would be consistent with the principle that the duty owed to the employee exists prior to the negligent behaviour and encompasses a proactive duty of prevention from foreseeable injury.

However, it is equally clear that that duty is not absolute. The employer is not obligated to remove all risk. Barwick CJ addressed what reasonable might mean in *Maloney v. Commissioner of Railways*, stating that

> *It is easy to overlook the all-important emphasis upon the word 'reasonable' in the statement of the duty. Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what* is *reasonable in all the circumstances. The matter must be judged in prospect and not in retrospect.*[31]

This does not imply that the employer is to remove all risk by any means.[32] Rather, he is required to implement *reasonably practicable* means of avoiding foreseeable risk.[33]

In contrast, it is worth considering the most recent formulation of this duty was delivered by the High Court in 2005 in *Czatyrko v. Edith Cowan University* where the Court stated:

> *An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an*

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[26] Handsley E *Sullivan* v, *Moody:* Foreseeability of Injury is not Enough to Found a Duty of Care in Negligence- But Should it Be? 1 at p 3
[27] *Crimmins, op. cit.,* at [276]
[28] *Faucett* per Sheller JA at [14]
[29] [2000] HCA 18 at [101]
[30] At [163]
[31] (1978) 52 ALJR 292
[32] Spigelman J in *O'Leary* at [6] and [22]
[33] *State of New South Wales* v. *Mannall* [2005] NSWCA 367 per Mason P at [165]

injury to an employee in the performance of a task in the workplace, the employer must take reasonable care to avoid the risk by devising a method of operation ... that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work.[34]

Arguably, in talking of elimination of risks, this imposes an even higher standard of care on the employer. It also implies that it is for the employer to accommodate the limitations of his employees in securing a safe environment. However, these observations are specifically directed to physical injury, and it is unclear to what extent this high standard might be transposed to psychiatric injury.

The scope of reasonableness must be determined by having due regard to the employer's available resources. Thus, an employer is not required to compromise the viability of his business (financially or functionally) in order to protect his employee against every potential harm, even where that harm might be foreseeable. It is instead a process of balancing rights, and Gleeson CJ acknowledged this in *Gifford* v. *Strang*, when he noted that "the limiting consideration is reasonableness, which requires that account be taken both of the interests of Plaintiffs, and of burdens on Defendants",[35] McHugh J also addressed this issue in *Tame-Annetts*, commenting that" ... a person is only required to guard against those risks which society recognizes as sufficiently great to demand precaution. The risk must be unreasonable before he can be expected to subordinate his own ends to the interests of others.[36] Practically, this involves "…a consideration of the magnitude of the risk, and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the Defendant may have."[37] Much judicial consideration has been given to determining how to strike the correct balance, but ultimately as noted here it will reflect what is reasonable in all the circumstances.

It is also acknowledged some types of employment carry more inherent risks than others. The performance of those duties may entail risk which cannot be completely excised, but this does not exonerate the employer from minimizing those risks by reasonably available means. In *State of NSW* v. *Seedsman* the New South Wales Court of Appeal dealt with such an issue. A policewoman suffered psychiatric injury as a consequence of a particularly stressful work environment. It was acknowledged by the Court that exposure to stressful events will be an

[34] [2005] ALR 349 per curiam at [12]
[35] *Gifford* v. *Strang Patrick Stevedoring pty Ltd* [2003] HCA 33 at [9]
[36] *Tame-Annetts* at [97]
[37] *State of NSW* v. *Seedsman* op. cit. per Spigelman CJ at [13]

unavoidable risk of such employment, but that it is encompassed within the duty of care of the employer to provide such modalities as counselling and debriefing, surveillance for early predictors of harm and support systems to limit that risk.[38] These would constitute reasonably available and simply applied means of minimizing harm.

In contrast, the British Court of Appeal has also been asked to deal with psychiatric injury suffered by police officers. In *French v Chief Constable of Sussex Police*,[39] the Court of Appeal affirmed that it would not extend the scope of liability for employers of police officers who suffer from a psychiatric injury.

Five police officers, who made an error in the course of the performance of their duties – as a result of the failure of their employer to provide proper training – were charged with errors arising from that error. As a consequence of the stress arising from the criminal prosecution, they suffered psychiatric injury, notwithstanding their ultimate acquittal on the criminal proceedings.

Lord Phillips rejected the appeal, first on the basis of remoteness: the psychiatric injury suffered by the officers was not foreseeable, despite the failure of the employer to provide proper training. Secondly, like the House of Lords in *Frost v Chief Constable of South Yorkshire Police*[40] His Lordship made it clear that any extension of the scope of liability for psychiatric injury is a matter for Parliament, and not for the courts.

The Compensation Act 2006 (UK) presaged the position that liability may be limited if steps necessary to prevent the breach would inhibit the undertaking of desirable acts. The Act requires such factors be considered when considering the deterrent component of compensation.[41] The recent passage of the *Social Action, Responsibility and Heroism Act 2015* (UK) suggests a broader range of protections in negligence liability. S 2 of the Act allows potential protection against liability when the breach occurs in the performance of a social benefit; s 3 limits liability where the person 'demonstrated a predominantly responsible approach towards protecting the safety or other interests of others.' An healthcare employer could conceivably take advantage of these provisions to limit liability on the grounds that provision of health care is a societal benefit, if measures were 'predominantly responsible.' Although emergency is a well-accepted Australian legal doctrine providing protection against negligent breach of duty of care, the less rigorous standard of protection for social benefit has no equivalent in Australian statute or common law.

[38] Per Spigelman CJ at [66].
[39] [2006] EWCA Civ. 312.
[40] [1999] 2 AC 455.
[41] *The Compensation Act 2006* (UK) s 1.

Application of these principles has still been somewhat difficult. It has been noted that applying this formula of reasonableness is not a question of law, but of fact. It will be for the Court to determine in the particular circumstances if a standard of reasonableness has been reached.

In considering the application of these principles in the context of health authorities, several issues arise. Under Australian law, it could certainly be argued that to meet a duty of care the employer would need to consider the findings in *Seedsman* and give consideration to implementing risk management programs such as those identified. While the stressors in *Seedsman* involved extreme repeated exposure to distressing situations of child abuse, an analogy can be drawn that some hospital work does involve repeated exposure to grief and trauma situations. This would foreseeably give rise to a duty to minimize consequential mental harm. However, to counterbalance such liability, it must be borne in mind that those who enter the medical profession know, or ought to know, what to expect. Therefore, the standard of "ordinary phlegm" can be said to be higher in the medical profession than others.

Excessive Working Hours

In terms of excessive working hours, it is clear that a reasonably foreseeable consequence of requiring long working hours in a high stress environment is mental harm. There is a large body of evidence to support this proposition.[42] To meet the requisite standard of care on the basis of the case law it is suggested the employer would need to show that, within the limits of available resources, all reasonably available mechanisms to limit harm had been instituted. This might include such things as monitoring of staff to detect problems early, having appropriate systems in place for assessment and management of problems at an early stage, fair distribution of overtime, and application of rostering templates which are least disruptive to circadian rhythms.[43] Failure to comply with these recommendations, at least within the confines of reasonably available resources, may indicate a failure to meet the standard of reasonable behavior in protecting employees from a foreseeable outcome of psychiatric injury from excessive working hours.

Foreseeability

A survey of the recent case law identifies foreseeability as a crucial, if not determinative, element in defining liability in cases of psychiatric injury in the employment setting, both in Australia and England. This can be distinguished from the secondary victim "nervous shock" cases which more commonly turn on establishing a duty of care. It has been acknowledged that

[42] see eg Rogers N , Grunstein R "24/7 Health: Second Annual Sleep Loss Symposium:Working and Sleeping Around the Clock", *Medical Journal of Australia* (2005) 182(9) 444

[43] AMA National Code of Practice- Hours of Work, Shiftwork and Rostering for Hospital Doctors (1999) at http://www.ama.com.au/web.nsf/doc/WEEN-6E05EL/$file/National code of practice.pdf

the general principles of negligence are the appropriate criteria to apply in claims of this kind.[44] Foreseeability will be the overriding factor in establishing these elements. However, while foreseeability is critical, it is not sufficient. The other elements must also be met.

The Australian common law position regarding foreseeability is somewhat controversially the test outlined by Mason J in *Wyong Shire Council* v. *Shirt and others*[45] namely

> *when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are* ***implicitly asserting that the risk is not one that is far-fetched or fanciful****.*[46] *(Emphasis added.)*

While this is accepted principle, there is undoubtedly some difficulty with this test. The issue was raised in *Tame-Annetts* where McHugh described the test as an 'undemanding' one.[47] He expressed concern at this extension of the test of negligence,[48] and ultimately advocated for a return to the test described by Lord Atkin in *Donoghue v. Stevenson,*[49] that is "to take reasonable care to avoid an act or omission which you can reasonably foresee would be likely to injure your neighbor".[50] McHugh is not alone in his concern at the undemanding nature of the far-fetched or fanciful test.[51]

The 'threshold' question in claims for pure psychiatric injury can be identified as "asking if the *kind* of harm to the *particular* individual Plaintiff was foreseeable".[52] Thus, the appropriate question is whether a psychiatric injury was a reasonably foreseeable result of the act or incident. It is important to note that the class of injury which must be foreseen is a psychiatric injury, as opposed to a physical one. There is a line of Australian authority to confirm this proposition.[53] It has also been established that it is only necessary that the class of injury is foreseeable, not the specific diagnosis.[54]

It is also not enough to foresee mere mental distress. Rather, the suffering of an actual

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[44] *Hatton v. Sutherland* [2002] 2 All ER 1
[45] (1980) 146 CLR 40
[46] Ibid.
[47] *Tame-Annetts* at [96]
[48] *Ibid* at [98]
[49] [1932] AC 562
[50] At 580.
[51] Luntz H *op.cit.* at p. 2
[52] *Hatton* v. *Sutherland* at [23]; this is a British case, but this represents the Australian position also.
[53] For a more comprehensive discussion of this issue, see Butler D *Voyage on Uncertain Seas* p3
[54] *Mount Isa Mines*, at [12].

psychiatric injury must be foreseen.[55] It should be noted that foreseeability is unrelated to probability, so it is not a requirement that the event be a likely outcome,[56] and it may even be a rarity.[57]

It is widely held that foreseeability alone is not sufficient to establish a duty of care. That being said, it has been used to expand the scope of the duty of care, as in such cases as *Perre v Apand*.[58] However, no universal approach is apparent in defining the remainder of the test. Perhaps the most logical approach then is to apply the calculus of negligence.[59] This encompasses an assessment of the likelihood of risk, the magnitude of that risk, the difficulty of introducing risk modification measures, and any conflicting obligations the Defendant may have.[60]

In asking whether an outcome is foreseeable, the appropriate standard to be applied is foreseeability by the ordinary, reasonable man.[61] It does not mandate any particular scientific or psychiatric knowledge. Rather, it is more appropriate to apply a commonsense approach.[62] It could however, be argued that it is the standard of the ordinary reasonable employer. Consequently, in cases involving medical personnel, it is certainly conceivable that a higher standard of reasonable foreseeability may be applied, as increased knowledge and awareness of mental health issues could reasonably be attributed to such an employer.

Certainly, several mental harm cases have failed on the reasonable foreseeability requirement. As noted, in *Tame* it was felt that the response to a clerical error was sufficiently idiosyncratic that it was not a reasonably foreseeable outcome. In *Gillespie v. Commonwealth of Australia*[63], an employee of the Commonwealth was transferred to Caracas, and, as a result of stressful working conditions, experienced a profound and debilitating anxiety response. It was held, that while some general terms of warning and preparation would be required to meet the employer's duty of care, failure to provide this could not reasonably foreseeably result in psychiatric harm.[64] There was no evidence to adduce that the stressors were extreme enough to foreseeably result in mental harm. The Court found that there would need to be adequate evidence supporting a sufficiently stressful environment to result in a foreseeable injury.

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[55] Handley, *op. cit.*, p. 2.
[56] *Seedsman*, supra, 55.
[57] Barwick CJ in *Mt Isa Mines* [10]
[58] (1999) 198 CLR 180
[59] Ipp D Negligence- Where Lies the Future? *Australian Bar Review* (2003) 23 158 at 161
[60] see eg *Romeo v. Conservation Committee of the Northern Territory* [1997] 151 ALR 263 for a treatment and application of the calculus
[61] *State of New South Wales v. Mannall* [2005] NSWCA 367 at [116]
[62] see eg Spigelman 1 in *Seedsman* at [32]
[63] (1991) 104 ACTR 1
[64] *Ibid*. See particularly Miles CJ at pp. 17, 28 and 29.

The issue of normal fortitude is also relevant to foreseeability. The test is whether the reasonable person would have foreseen injury to a person of normal fortitude. This will be a question of fact, not expert evidence. It is also evident that knowledge of a special vulnerability will have implications for foreseeability. That is, if an employer is aware of some particular vulnerability, it can be argued that his awareness of the potential for psychiatric injury is greater, and likely to affect the standard of reasonable foreseeability. It will effectively increase the standard required to be reached by the employer to provide protection for the employee.

It should be noted that several jurisdictions at a state level have modified this test by statute, which fundamentally alters the character of the test. Section 9(1) of the *Civil Liability Act 2003* (Qld) defines a foreseeable risk as one which a) ... the person knew or ought reasonably to have known, and was b)not insignificant. ; this mirrors the provisions of the *Civil Liability Act 2002* (NSW) at s5(b). These provisions provide a distinct point of difference from the common law position. It is clear that "not insignificant" is different in character from "not far-fetched and fanciful". The impact of these changes remains to be seen.

Currently, foreseeability requires proof that a reasonable person in the position of the employer would have reasonably anticipated the possibility of harm (be it rare or unlikely, but not far fetched or fanciful), and have taken reasonable steps to minimize or mitigate the risk which could result causally in that foreseeable outcome. It is a concept which is concerningly undemanding. In an attempt to ameliorate that position, recent Australian judgments are shot through with the understanding that there should be a common sense and reasonable application of these tests, and due consideration given to all the relevant circumstances.

In a claim by a hospital employee, depending on the specific circumstances, foreseeability is unlikely to prove a difficult barrier to a Plaintiff. A health authority, in which immediate supervisors are almost always medically trained, will be judged by the standard of reasonable doctors and should therefore have greater insight into psychological stressors. In addition, they are, or should be, aware of the increasing body of literature regarding psychiatric illness and work stressors. Equally, it may be that they should have a greater awareness of any specific psychological vulnerabilities of employees.

Sudden Shock

As discussed, the requirement for a direct perception of a distressing event, or involvement in the immediate aftermath, is no longer a precondition in the general body of mental harm cases.[65] This view was foreshadowed in *Jaensch* v *Coffey* in which the aftermath doctrine was

[65] Dietrich J Nervous Shock: Tame v. new South wales and Annetts v. Australian Stations Pty Ltd.*Torts Law journal* (2003) **11** 11 at 13

effectively overturned.[66] In the subsequent Victorian case of *APQ* v *Commonwealth Serum Laboratories*, a Plaintiff had been treated with a drug the result of which was exposure to a devastating terminal and degenerative illness, and in consequence she developed a severe depression in consequence. It was held that the absence of a 'close temporal coincidence' and the negligent act, did not place her beyond the category of a duty of care recognized for nervous shock.[67]

Sudden shock does however, still retain the status of a general consideration, and has not changed under British law. This is distinct from the employer cases, in which it is established that the "sudden shock" requirement has no role where an independent duty is in play. This is so as it is related to establishment of a duty of care, which is not in issue here. As pointed out by Gummow and Kirby JJ prolonged exposure to stress is better addressed under the heads of causation and remoteness of damage in order to avoid the 'arbitrary and inconsistent' operation which is the effect of this requirement.[68] This also reflected the opinions of Gleeson CJ and Gaudron J, with Callinan J dissenting. Thus, prolonged stress in the form of excessive working hours would not by its nature prove a barrier to a successful claim by an employee.

Industry Standards

It is well established principle in negligence that industry standards will also be a relevant consideration, in that they may modify the scope of the duty owed. Again this is not an absolute indicator, but the employer who is operating within industry standards is less likely to be in breach of his duty.[69] Standards of reasonableness would still apply. For example, in *Illawarra Health Service* v. *Dell*[70] in which an employee suffered a latex allergy, conforming to industry standards provided an incomplete defence. This was in the context of a body of available knowledge regarding latex allergies. In the case of psychiatric injury arising from working conditions, *Koehler* v. *Cerebos* specifically addressed the question of 'excessive' working hours, and noted that making such a determination would require reference to external standards.[71] It is suggested that, while practices of excessive working hours are entrenched and endemic in the medical community, widespread practice does not necessarily imply an industry standard. This question however would ultimately need to be assessed by the Court. Additionally, in the presence of knowledge regarding potential risks, there would be little defence to a claim for consequential mental harm.

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[66] op cit
[67] [1999] 3 VR 633
[68] *Tame-Annetts* op cit per Gummow and Kirby JJ at [207]
[69] see eg Discussion in *Koehler V. Cerebos* [2005] RCA 15 per majority judgment at[3 I] 68 [2005] NSWCA 381
[70] [2005] NSWCA 381
[71] *Ibid* at [29]

It is clear that the employer's duty does not operate in a vacuum. Rather, there are mutual obligations and duties, and this will also modify the employer's duty to some extent. The difficulty arises in weighing and balancing those duties and is demonstrated in *Koehler* v. *Cerebos.*[72]

This case involved a claim for psychiatric injury due to stress which arose from performing duties set out in the employment contract. In the event they proved to be more time-consuming and stressful than the Plaintiff had originally assumed, and she ultimately developed a psychiatric injury. The New South Wales Court of Appeal considered the issues related to an employer's duties, in the context of contractual obligations. They also noted that statutory provisions would be relevant in determining the nature of the duty of care. On the facts, the claim failed on foreseeability. In *obiter* it was acknowledged that in the particular circumstances the employer had not breached its duty in requiring the employee to undertake the contractual obligations.

It was certainly suggested that the duty of care must be considered within the context of the contract.[73] The terms of the contract will inform the nature of the subsequent relationship between the parties, and assist in defining the scope of the duty of care. The Court noted that voluntary assumption of particular conditions held some sway in this case, but that this alone was of "limited significance".[74] In *lllawarra,* the Court acknowledged that performance of contracted duties by the employee will not free the employer from tortious responsibility.[75]

The fact that an individual contract to undertake certain duties must be taken into account in considering the scope of the duty, although will not be absolutely determinative. The implication here is that it is not for the law of negligence to undermine the weight of the contract. In order to overcome this, it would devolve to the Plaintiff to show that working hours were excessive and unacceptable, and in this case that could perhaps be best done by reference to the weight of scholarly authority on safe working hours. Acquiescence by the employee to the terms of the contract would not necessarily be sufficient to obviate the claim.

In *Johnstone v. Bloomsbury Health Authority*[76] a British court considered this issue. The Plaintiff was a junior doctor who contracted to undertake up to 48 hours per week of overtime and suffered a psychiatric injury as a consequence of the heavy workload imposed. It was held that the plea of *volenti non fit injuria* did not extend to accepting reasonably foreseeable injury

[72] [2005] HCA 15
[73] Discussion per majority judgment in *Koehler* v. *Cerebos* op cit at [21]
[74] Ibid [29]
[75] Ibid at [86]
[76] [1991] 2 All ER 293

to health, and as such the employer was in breach of its duty of care.[77]

Variance of the terms of the contract is an alternative mechanism which would undermine the validity of the contract.[78] Thus, were the employer to vary the terms of the contract after it is made, such as increasing the workload or extending rostered hours, and were such conditions shown to be a contributing factor to subsequent psychiatric injury, the contract would not necessarily have a significant impact on the claim. Therefore, an *ad hoc* modification to the terms of the employment contract will not affect the liability of the employer.

In the hospital environment it is also common practice to extend rostered overtime requirements and increase on call time during the course of any year, as natural attrition of staff occurs, and replacement of qualified professionals can be difficult. This is a multi-factorial process, partially based on staffing which does not encompass these inevitable losses. It is also partially due to a significant shortage of suitably trained staff. Operating on a marginal basis will inevitably result in such shortages. It could be argued that this represents variance of the terms of the contract, and consistent with the principles highlighted in *Koehler*, this might be relevant in determining the weight which should be given to the contract.

Recognizable Psychiatric Injury

In order to make a successful claim for damages for psychiatric illness sustained in the course of employment it is established principle in Australia and England that a Plaintiff must prove that a recognizable psychiatric illness has been sustained, in order to establish a compensable injury. It has been noted that the rationale for this view is two-fold, in that it provides both a limitation on claims and a description of a compensable injury.[79] Justice Windeyer in *Mt Isa Mines* v. *Pusey* noted the principle succinctly when he stated that "sorrow does not sound in damages."[80] It could equally be argued that neither does stress, and in the more recent cases of *Koehler*[81] and *O'Leary*,[82] the judgments indicated that stress is an inevitable part of life, and equally was not compensable. Stress is also frequently a component of one's employment, but that alone is insufficient to give rise to a claim in damages. It should be noted that this is not true of many jurisdictions, such as Canada, South Africa and some states in the United States, where mental distress can be a compensable injury.[83]

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[77] *Ibid* see Browne- Wilkinson at p.305
[78] *Koehler* v *Cerebos* at [37]
[79] Butler D. *Gifford v Strang- The New Landscape for Recovery for Psychiatric Injury in Australia* at p.7
[80] *Mt Isa Mines* op cit at [3]
[81] *Koehler* v, *Cerebos* per Callinan J at [57]
[82] *Ibid.* per Spigelman JA at [15]
[83] Mullany ,Handford R "Moving the Boundary Stone by Statute- The Law Commission on Psychiatric Illness" *University of NSW Law Journal* (1999) 22(2) 350 at p362

It was affirmed by Sheller JA that the boundaries between emotional distress and psychiatric illness should remain firmly drawn.[84] However, he also went on to note that this distinction is essentially one of degree rather than kind, and as such will require interpretation by the Court. He commented that this distinction has been given little consideration by the courts to date.[85] In at least one observer's opinion, the decision in *Tame-Annetts* began the process of 'removing the forensically distinctive character of psychiatric injuries.[86]
What is also clear however, is that a precise diagnosis of a specific condition is not required. Rather, it must be an illness which falls within the class of psychiatric injury.[87] The DSM-V (Diagnostic and Statistical Manual of Mental Disorders) has expanded relevant definitions in the current iteration, but clearly provides only guidelines.[88] What qualifies as psychiatric injury, as opposed to stress or grief, will ultimately be for the court to determine.

It should also be noted that the definition of psychiatric illness will be subject to change over time, which must be reflected in the law. Justice Windeyer acknowledged this phenomenon in 1970 in *Mt Isa Mines*, when he commented that "law marches with medicine but in the rear and limping a little ...".[89] It is certainly true that categories of recognized psychiatric illness have expanded over time. More recently Gummow and Kirby JJ noted that "psychiatry distinguished between mere mental distress and psychiatric illness, albeit the distinction was one of degree rather than kind and might change with advances in medical knowledge."[90] For example, the symptoms of post-traumatic stress disorder were identified in the 19th century in association with trauma. It did not achieve the status of a recognized illness with a definition in the DSM-Ill until 1980.[91] Thus, as medical knowledge expands, the range of potential claims does also, and provides some impact on what constitutes a recognizable psychiatric illness.[92] This does not detract from the fact that currently a claimant against an employer hospital would still be required to prove that he was suffering from more than mere stress related to his excessive working hours. It is not necessary to prove a specific diagnosis, but he must establish an injury that is in the class of psychiatric illness.

Normal Fortitude

Historically the concept of persons of who were 'peculiarly susceptible' arose as early as 1937

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[84] *O'Leary* at [55]
[85] *Ibid.* This position was affirmed by Spigelman J at [15]
[86] T Freckleton "New Directions in Compensability for Psychiatric Injuries", *Psychiatry, Psychology and Law* (2002) 9(2) 271 at p273
[87] see Windeyer J in *Mt Isa Mines* at [12]
[88] *Seedsman* at [I 14]
[89] *Ibid.* at [3]
[90] *Tame-Annetts* at [193]
[91] Beall L. *Post-Traumatic Stress Disorder. A Bibliographic Essay* 1997 at http://www.lib.auburn.edu/socsci/docs/ptsd.html. accessed 1.02.06
[92] per Sheller JA in *O'Leary* at [8]

in the case of *Bunyan v. Jordan*.[93] The High Court affirmed the position in *Allsop v. Allsop* that "the law deals with damage which might *reasonably* result, not with that which may depend on the idiosyncrasy of the party (sic)."[94] Thus, in order for a Plaintiff to recover, the action complained of had to be of a nature to give rise to psychiatric harm to a person of 'normal fortitude'.[95] In *Jaensch* v. *Coffey*, support was given to the concept of normal fortitude.[96] More recent cases such as *Wodrow* v. *The Commonwealth*[97] and *Midwest Radio v. Arnold*[98] in the Queensland Court of Appeal similarly reinforced the requisite criterion of 'normal fortitude'. Acting 'reasonably' and 'prudently' did not extend to acting to protect persons with unknown special vulnerabilities from harm. This is true unless the employer is aware, or should be aware, of those special vulnerabilities.

Most recently, *Tame-Annetts* gave substantial consideration to the role of normal fortitude. There is some confusion in the interpretation of the judgments regarding the 'normal fortitude' requirement. Four, and possibly five of the judgments appeared to favour the view that normal fortitude was not a precondition for recovery. It would appear that it still holds some weight in determining the likely foreseeability of an injury.[99] Gummow and Kirby JJ noted that "...'normal fortitude', is not a free-standing criterion of liability, but a postulate which assists in the assessment, at the stage of breach ...." Interestingly, the Court was able to dismiss the appeal by Mrs. Tame on the basis that her response was so peculiarly idiosyncratic as to be unforeseeable.[100] Of significance is the fact that the majority in obiter determined that 'normal fortitude' was another fact to be considered but did not operate as a precondition for a successful claim.[101] For example, Gleeson CJ noted "... 'normal fortitude' cannot be regarded as a separate and definitive test of liability."[102] After *Tame-Annetts* the concept of normal fortitude appears to hold the weight of a factor for consideration rather than an essential element of recovery.

What is also increasingly clear is that normal fortitude represents an artificial concept. It is not a concept which sits easily within modern medical understanding of the human psyche. It is obvious that all people will have a point beyond which they can bear no more. There is in reality no "normal"

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[93] [1937] HCA 5; accessed at www.austlii.edu.au on 5.12.05; per Latham CJ at p.3 of download.
[94] (1860) 157 ER 1292 at p.1293; quoted in judgment Dixon J Ibid. (italics added)
[95] Butler D *Voyages in Uncertain Seas with Dated Maps: Recent developments in Liability for Psychitric Injury in Australia* accessed via www.lexisnexis.com accessed 14.11.05; at p3 of download
[96] *loc. sit.* see Gibbs CJ at p421; Brennan J at p.431
[97] (1993) Australian Torts Reports 81-260; case which turned on foreseeability and as a result of the 'unusual' personality of the Plaintiff, the response was not considered foreseeable.
[98] [1999] QCA 20
[99] *Tame-Annetts*. see eg Gaudron J at [62]
[100] *Ibid* at [189]
[101] Butler, D *Voyages on Uncertain seas* op cit at p8
[102] *Tame-Annetts* at [16]

person in whom that point can be predicted.[103] Lord Wright recognized this difficulty in saying that "a reasonably normal condition, *if medical evidence is capable of defining it*, would be the standard."[104] While the idea of the person of normal fortitude has been used to help balance the rights of the parties,[105] in the light of advanced scientific knowledge, this view is now 'medically unsustainable'.[106]

The other significant difficulty isolated in regard to the concept of 'normal fortitude' is the difficulty of application. Butler identifies three mechanisms utilized by courts in order to determine normal fortitude.[107] These are: use medical evidence; use intuitive judgment of medical experts; and rely on the intuitive judgment of the judge himself. The inevitable consequence of these approaches is that the determination of whether or not the Plaintiff is subject to a particular vulnerability will become a value judgment of the court.[108] There are both medical and practical difficulties in identifying such a person. These issues highlight the ongoing difficulty with the concept of 'normal fortitude'.

This approach addresses the question of special vulnerabilities which are not known. However, the issue of special vulnerabilities which *should* have been known to the employer has been raised in several cases. Both *State of NSW* v. *Mannell*[109] and *Seedsman* dealt with this issue, and it was clear in both cases that the employee had had several prolonged periods of leave of absence for stress-related illnesses. This was deemed sufficient to generate knowledge, or the expectation of knowledge on behalf of the employer. In contrast, the medical certificate supplied in 0 *'Leary* was not deemed sufficient to create an expectation that the employer should have been aware of the Plaintiff's vulnerability.

In obiter in *Illawarra* it was also noted that in some circumstances it would be the obligation of the employee to draw the employer's attention to the problem.[110] While this was a case which dealt with physical injury, it was noted that some illnesses or injuries would not be conspicuous to employers, and as such it would be the obligation of the employee to make known to the employer that he or she suffers from such an injury. Psychiatric illness is likely

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[103] *Tame-Annetts* , see eg Gleeson CJ at [16]: "This does not mean that judges suffer from the delusion that there is a 'normal' person with whose emotional and psychological qualities those of any other person can be compared."
[104] *Bourhill v. Young* [1943] AC 92 at 110; (italics added)
[105] Seeto N Shock "Rebounds: Tort reform and Negligently Inflicted Psychiatric Injury", *Sydney Law Review* [2004] 14 via www.austlii.edu.au at p5 of download
[106] *Ibid*
[107] Butler, *Gifford* v. *Strang and the New Landscape for Recovery for Psychiatric Injury in Australia*. at p7
[108] Seeto, *op. cit.* at p.5
[109] *Ibid.*
[110] *IIlawarra Health Authority v. Dell* at [114]

to be included in such a case.

It should also be noted that if it can be established that there has been breach of a duty of care which is likely to cause harm to a person of normal fortitude, then a susceptibility on behalf of the particular Plaintiff will affect neither the claim nor damages to the extent of the injury actually sustained. This is consistent with the outcome in *Mt Isa Mines* in which the evidence revealed that a psychiatric injury to a person of normal fortitude was a foreseeable consequence of the Defendant's breach. That the Plaintiff sustained a severe psychotic illness suggested an underlying predisposition, but this did not detract from his claim. Justice Murphy in *Jaensch* v. *Coffey* affirmed the position that a predisposed person should be able to recover at least to the extent that a "normal" person would, but left open the question of whether the full extent of injuries would be compensable.[111] It is likely that any confusion here could be resolved by reference to general tortious principles.[112]

It would not be difficult to argue that working protracted hours in frequently stressful conditions could foreseeably give rise to psychiatric illness in persons of normal fortitude. It could be suggested that the existence of recommendations regarding safe working hours, by their very nature acknowledge that the person of normal fortitude will start to fail when exposed to excessive working hours and inadequate sleep.

The counterargument would be that such conditions have existed for generations, and that many employees are currently working under these conditions. It could be extrapolated that the employee who does not tolerate these conditions therefore reveals a susceptibility. As noted above the concept of normal fortitude does not hold the weight of a precondition, but is a relevant consideration. It would be for the Plaintiff to refute this argument perhaps by showing that in some way his particular working environment went beyond even those general standards, or some additional stressful factor was extant. Further, it may be argued that recommendations regarding limiting working hours go more to the issue of patient safety than minimizing liability for injury to staff.

Causation

It is also a fundamental aspect of negligence claims in general that not only must the Plaintiff prove a breach of duty by the Defendant, but that the injury sustained is a result of the Defendant's breach through an unbroken chain. It must be possible to prove that but for the action or omission of the Defendant, the Plaintiff would not be in the position in which he finds

[111] *loc. cit.* at p 422-423
[112] See, for example, *Dulieu v White* [1901] 2 KB 669

himself. A case on point is *Craig* v. *Qantas,*[113] in which the Plaintiff alleged that as the result of work related stress and the failure of the Defendant to provide better systems of work to resolve that stress, he developed an adjustment disorder which impacted on his ability to function. However, the Plaintiff was not able to establish that his injury was a result of the Defendant's breach of duty. Rather, evidence suggested that symptoms of his disorder manifested themselves prior to the incidents complained of and that any further deterioration was a natural progression of his illness.[114]

Thus, it falls to the Plaintiff to make the link between the act or omission of the Defendant and the consequent injury. Of course, it is also clear that the Defendant's breach does not have to be the only causative agent.[115] This point was highlighted in *Seedsman* where other stressors beyond the work environment were also identifiable. It was noted that the particular act or omission need only be a material contributing factor.[116]

Current Knowledge Regarding Working Hours and Conditions

In the last few decades an increasing volume of research has been undertaken in the field of sleep and circadian rhythms.[117] This research consistently highlights that many aspects of health are affected by both shiftwork and prolonged working hours. Both physical and psychological health are affected.[118] Research has highlighted a significant increase in coronary artery disease, peptic ulcer disease, and breast cancer.[119] A range of endocrine alterations have been noted. Of particular relevance to this discussion, there has been a documented increase in fatigue-related accidents, and also depression in this group of workers.[120] A recent American study assessing the rate of car accidents over a 12 month period found an increased risk of 9.1% of suffering a car accident for every prolonged (24 hours or more) shift undertaken per month, and 16% increase for accidents occurring during a commute.[121]

Many studies have also been undertaken specifically regarding assessment of mental health

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[113] [2001] QSC 385
[114] Ibid at [50]
[115] Goudkamp *op. cit.* p12; Freckleton *op. cit.* p274
[116] per Spigelman CJ at [95]
[117] Wylie C. Sleep Science and Policy Change *New England Journal of Medicine (2005)* 352(2) 196 at 196
[118] Rogers and Grunstein. 24/7 Health: Second Annual Sleep Loss Symposium:Working and Sleeping Around the Clock. 444 at 445
[119] *Ibid* at 444
[120] Ibid at 444
[121] Burger L, Cade B, Agnes N et at. Extended Work Shifts and Risk of Motor Vehicle Crashes A 11long Interns *New England Journal Medicine* (2005) 352 (2) 125 at 125

amongst the medical profession.[122] These studies globally indicate a level of psychiatric morbidity substantially higher than the general community. Rates of suicide have been documented as up to 2.3 times the national average. A recent study of Australian medical graduates over an 18 month period revealed a gradual incidence in psychiatric morbidity over that time. The authors also commented that this incidence did not dissipate over time, and thus that more experienced practitioners were equally susceptible to depression.[123] The other observation of note made by the researchers here was that the result was not attributable to a single issue such as working hours.

A number of factors have been identified as contributory to this situation. A combination of prolonged working hours, high intensity of the work, conflicting demands on time, a heavy professional responsibility, perceived fear of litigation, all of which is frequently undertaken in an environment of limited resources.[124] Personality traits such as obsessionality, which is an observed feature of the medical personality, is also likely to have some impact on mental health outcomes.[125]

The phenomenon of 'burnout' is also marked in groups of shift workers and those working prolonged hours. It consists of marked lethargy without sleep restitution, depressive symptoms, poor concentration and reduced performance. It should be noted that these individuals often have poor insight into their condition.[126]

As a result of such findings, more than one observer has exhorted organizational change to address these issues.[127] It has been noted that the traditional model of long working hours, extensive on-call time and prolonged shift work is not sustainable, as the working environment has altered. Such factors as high patient turnover, an increasingly complex body of medical knowledge and elevated patient expectations will all impact on the issue of sustainability and inherent stresses in the workplace. This can be allied with a cultural change in the community, in that traditionally these working hours may have been facilitated by a supportive partner, which is much less commonly the situation today.

It is relevant to consider the situation in Canada, where a large national level program has been

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[122] Riley G . Understanding the Stresses and Strains of Being a Doctor. *Medical Journal of Australia (2004)* 181(7) 350
[123] Wilcock S. Daly M. et al. Burnout and Psychiatric Morbidity in New Medical Graduates *Medical Journal of Australia*. (2004) 181(7) 357 at 358
[124] Riley, *op. cit.* at 350
[125] *Ibid.*
[126] Rogers, Grunstein op cit at 444
[127] see eg Riley *op. cit.* 352; Wilcock et al 358 amongst others.

instituted to address the issues of mental and physical health of doctors.[128] As significant health issues have been identified, there has been a national call for more research, and a variety of reforms at both local and national levels, which have addressed working conditions, working hours, salaries, benefits and annual leave in order to minimize the risk of harm.

Looking outside the medical field, the aeronautical industry has implemented comprehensive reform stipulating safe working hours. These reforms are industry-wide, and the hours are restrictive not only in order to protect both the employee and employer, but also to limit the risk of fatigue related errors. The hours are also mandated to be undertaken in a way that is least likely to disrupt circadian rhythm, and periods of leave between shifts are mandated and strictly enforced. Both of these examples indicate that there is an increasing acknowledgment of the need to take an approach of organizational change in order to protect employees from the effects of sleep disturbance and stressful working conditions, but thereby protecting employees from liability.

The European Union has recommended that the upper limit of a working week should be 48 hours. The AMA Safe Working Hours Project has noted that "community standards, expressed through Federal and State industrial awards, have consistently adopted a standard working week considerably less than 50 hours".[129] Yet anecdotally it is very common practice for junior doctors to work 80 hours or more in any week.

In light of all of the risk factors noted above, it is suggested that a health institution may have a responsibility to monitor its employees for evidence of psychiatric illness, and to formulate systems for identifying predictors of risk. This is especially so as processes such as burnout may involve a lack of insight. It could certainly be argued that these risks represent reasonably foreseeable outcomes to the reasonable health organisation employer. As such, it falls to the employer to establish pathways for suitable surveillance and response mechanisms to intervene early for prevention of potential injury.[130]

There is clear evidence that the standards required of an employer will vary with time, and scientific advances. As McHugh JA stated in *Bankstown Foundry Pty Ltd* v. *Braistina* noted:

> *Reasonable care, however, varies with the circumstances of the case. It varies with the advent of new methods and machines and it varies in accordance with changing ideas of justice and increasing safety in the community.*

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[128] Puddester D. Canada responds: An Explosion in Doctor's Health ,Awareness, Promotion and Intervention *Medical Journal Of Australia* (2004) 181(7) 356
[129] AMA Safe Hours Project (1998) at http://www.ama.com.au/web.nsf/doc/SHED-5G2UPA.
[130] Riley, *op. cit.* 352

> *I think that it is impossible to read recent decisions of the High court of Australia without realizing that employers are required to comply with safety standards which, only twenty years ago, would have been seen as imposing an onerous, even an absurd burden on employers…*[131]

On appeal to the High Court, the judgment of Brennan and Deane JJ affirmed this position.[132] While reinforcing that the standard is not higher for employers, it is simply the standard to take reasonable care in all the circumstances. Consequently, it is not unreasonable to assume that an employer of shift workers would need to encompass some measures to introduce minimization of risk of mental harm to employees on the basis of this body of knowledge. It could certainly be argued that in the health setting, the standard of care in regard to this might be deemed higher, as an awareness of these issues could be expected.

Also worthy of note is a recent line of British authority, which although not binding is of interest.[133] A series of employment cases related to mental harm arising from that employment have been largely decided in favour of Plaintiffs. In at least one case, the availability of counseling services was not deemed adequate to meet the employer's required standard of care.[134]

Policy Considerations

There is little doubt that the restrictive "control mechanism" instituted by the British courts in response to secondary victim mental harm cases reflected perceived risks associated with allowing such claims. A number of policy concerns have been highlighted regarding the general class of psychiatric injury claims. These include concerns of opening "floodgates", difficulties related to confirming the diagnosis (and therefore a risk of fraud), and a concomitant concern about conflicting opinions amongst medical professionals, a perception that it is a form of injury less worthy of compensation than physical harm, and also the belief that litigation may negatively impact on recovery (in that incentive for recovery is reduced).

As noted, the control mechanisms extant in the UK have not been affirmed in Australia. This is not to say that the suggestion of policy considerations has not arisen in Australia. The courts have traditionally avoided, or at least been seen to avoid, involvement in decisions which may shape policy. Justice Windeyer noted that it is not for courts to shape policy.[135] However, it has been

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[131] Supreme Court NSW Court of Appeal 1985 BC8500878 at 20; quoted in Goudkamp J at 10
[132] [1986] ALR I at 10 lines 40-50
[133] *Barber* v. *Somerset County Council* [2004] UKHL 13; *Hatton v. Sutherland* [2002] 2 All ER 1
[134] *Barber* per Lord Walker of Gestingthorpe at [67]
[135] *Mt 1sa Mines* at [4] "…with a caveat to myself that it is not for an individual judge to determine the policy of the law according to his own view of what social interests dictate."

argued that it is an inevitable consequence of drawing the limits of liability that policy will be directed to an extent. This has been acknowledged by Kirby J who has advocated for a more open approach to the policy aspect of judicial decision-making.[136] It is also inevitable that decisions will reflect changing community values, which ultimately correlates with public policy.

In regard to policy related to psychiatric harm, the body of judicial decision reflects the growing community awareness of, and respect for, what Butler refers to as 'psychic integrity'.[137] It has been acknowledged judicially that protection of the psyche can be as important as protection of the body, and indeed it has been suggested that mental harm can be just as, or even more, devastating than physical injury.[138]

At the same time, it is the role of courts to balance the rights of one body against another.[139] This is inevitably a moral and value laden process. Policy would dictate that in order not to weigh the scales too heavily in favour of one party, which may have widespread community effects, there need to be some limitations. At present, the requirement that the injury be a recognizable psychiatric illness is the only identified restriction on mental harm cases. It would be untenable, as a matter of policy, that mere distress be compensable.[140]

In respect of the floodgates argument however, evidence has been that despite opening the doors to such claims, neither the growth of volume of such claims, nor the compensation involved has been more than moderate.[141] In *Jaensch* v. *Coffey,* it was noted that the presence of an extensive social welfare system existed in Australia, and that system provides some protection for injured individuals and many would inform decisions regarding such claims.[142]

Another issue is that in claims relating to public bodies, it is foreseeable that poor staffing may contribute to potential claims. In *NSW* v. *Heins,* the Court determined that police manning issues were not justiciable and were not within the purview of the Court to determine.[143] It could certainly be extrapolated that there would be major implications for public authorities

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[136] Burns K. The Way the World Is: Social facts in the High Court Negligence Cases *Torts Law Journal 12,* 215.
See also *Cattanach v. Melchior* (2003) 215 CLR 1 per Kirby J at [122]: .. 1 regard it as self-evident that courts take such policy considerations into account in deciding novel problems of this kind, the majority of this couli does not accept that such a transparent evaluation of issues of policy is appropriate to the courts in Australia." See also [152]
[137] Butler D An Assessment of competing policy considerations in cases of psychiatric injury resulting from negligence *Torts Law Journa1l2002)* p. 13
[138] Lord Steyn in *White v. South Yorkshire Police* at 31; quoted in Butler D *Ibid* at 3.1.1.
[139] *Ibid.* at 4
[140] *Ibid.*
[141] *Ibid* at 3.3
[142] *Jaensch* v. *Coffey* at 423
[143] *State of NSW v. Heins* at [24]

were the courts to intervene.

Policy will inevitably provide the backdrop to judicial decision-making. This will especially be so when there is the potential for significant impact on the community. It is difficult to predict how individual courts will weigh the various factors in the postulated situation, but it is suggested that there would of necessity be consideration given to the broader public interest questions which may arise in such a case.

Conclusion

The field of mental harm in two party cases remains somewhat unsettled. Most of the restrictive preconditions which have traditionally been applied to such claims now fall with in the category of relevant considerations. This is with the exception of the requirement for recognizable psychiatric injury, although there have arguably been inroads here also. In general, the principles of negligence will be applied. It is clear, however, that there has been significant divergence between British and Australian authority. While the British courts are largely dismissive of such claims, the Australian courts have been more open, albeit with restrictive filters in place.

Given the body of knowledge regarding the specific stressors related to medical working conditions, and the erosion of many of the "control mechanism" relating to these claims, it is not difficult to foresee that in the right set of circumstances a Plaintiff could be successful in such a claim under Australian law, yet fail before a British court. It would fall to the Plaintiff on evidence to prove excessive working hours, perhaps beyond what is commonly undertaken. Duty of care is not in question, and the standard of care required by an employer has also been subject to extension over time, commensurate with the growing body of psychiatric knowledge. Foreseeability is unlikely to be in issue, and it would be necessary to prove that the employer had no reasonably available options to mitigate the risk. Elements of public policy potentially intervene at this point. Ultimately, it is a field of tort law which continues to require revision in multiple jurisdictions.

A Study in Hypocrisy: The Evolving Position of Slavery in English Law

Andrew Woodcock

Introduction

It is a long tradition of British law that all men are free on equal soil. However, despite the abhorrence with which modern international law views slavery, it has not always been the case. In the centuries leading up to the early 16th century, the institution of slavery was widely accepted in Europe and the Americas. England was a rarity amongst European states, in guaranteeing individual freedom, yet the Empire profited greatly from the financial rewards brought by its holdings in the West Indies, largely generated through slave labour. The English courts had to balance the rights of individuals against the public policy benefits to the state, derived from slave labour. Added to this complexity is the fact that the English courts place a premium on the value of personal property which, at its heart, is the core of the master/slave relationship. Last sentence repeated at beginning of para 3.

British courts have long prided themselves on their enlightened attitude to slavery. However, this is only a very small portion of the story of Britain's relationship with the slave trade. While the courts adopt a view on freedom which can best be characterized as being based upon natural law and the natural rights of man, the political will of the government was dictated by the economic benefits of slavery to imperial interests, which effectively overrode the burgeoning humanitarian considerations of the courts.

Adding to the complexity is the fact that the English courts have always placed a premium on the value of personal property which, at its heart, is the nature of the slave/master relationship. Much of the early case law relies on the principles of natural law in justifying the abolition of slavery. Even if not expressly articulated, the spirit of scholars such as Aristotle and Locke, is to be found in the reasoning of the courts, despite the fact that neither of these writers expressly condemned slavery in their own work.

'Human rights', as we understand the concept today can fairly be said to be a creature of the twentieth century. Although it was the case that the clear articulation of human rights within the context of the law of war began in the latter part of the nineteenth century, with the Geneva and Hague Conventions,[1] the more formal expression of rights generally did not develop until

[1] The Hague Conventions on the Law and Customs of War (1899 and 1907), and the Geneva Conventions on the Treatment of Wounded and Prisoners of War (1864, 1907 and 1929).

the twentieth century. More generally applicable human rights were acknowledged, but not developed in any detail, in the Covenant of the League of Nations, drafted in 1919.[2]
Despite the failure of the League of Nations, the international community sought to revisit the idea of formal rights with the 1944 Dumbarton Agreement, which resulted in the drafting of the Charter of the United Nations.[3] Under the auspices of the United Nations, the 'Bill of Rights' of the international community, the Universal Declaration of Human Rights, was drafted.[4] It was therefore not until the middle of the twentieth century that human rights as we know it today were formalized in international instruments.

Importantly, the present work is directed towards an assessment of the position of slavery in English law up to and including its abolition in 1833. This paper does not seek to address the position of slavery under contemporary domestic and international law.

Slavery in History
The first awareness of the legality of the concept of slavery in modernity arose with the debate over slavery in the Spanish New World. As recently as 2011, the President of the International Court of Justice acknowledged the debt owed by international lawyers to the sixteenth century Spanish monk and scholar, Franciscus Vitoria.[5] Vitoria, as the founder of the Spanish School, was arguably responsible for ushering in an age of internationalism, through his lectures on the rights of the Indians, and, in particular, on the right of the Spanish to enslave them.[6]

Vitoria asserted that there were numerous 'titles' under which the Spaniards were entitled to enslave the Indians. However, in his lectures on the Indians, and on the forced baptism of unbelievers, he systematically eliminated the various titles, to the point that, like Aristotle, only in the most extreme cases can the conquest and slavery of the Indians be justified. Vitoria walked the very dangerous and difficult line between not entirely alienating his political and religious masters in Spain, while still acting as an apologist for the rights of the Indians.
Nevertheless, scholarly opinion on the work of Vitoria is not universally favourable. It has, in fact, even been suggested that Vitoria's principal purpose was to justify the enslavement of the Indians.[7] This view suggests that the structure of Vitoria's work was actually designed to provide a rational and supportable basis for their conquest. This is during a period in which the

[2] The Covenant does not address human rights in any detail, other than Art. 23(a), which refers to "…maintain[ing] fair and humane conditions of labour for men, women and children…"
[3] Similar to the Covenant of the League of Nations, the Charter of the United Nations has limited reference to specific human rights, beyond a general reference in Art. 2.
[4] Arts. 1, 3 and 4 make it clear that slavery is now rejected by the international community.
[5] Charles R. Beitz, *The Idea of Human Rights*, Oxford: Oxford University Press, 2009, p. 14.
[6] See, for example, Franciscus Vitoria's lectures *On Civil Power*, and *On Forcible Conversion*.
[7] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2004, p. 9.

states of Europe were searching for a rational justification for their colonial activities. However, with the greatest of respect to Professor Anghie, his view appears to be in the minority on this issue. [8]

Vitoria was not alone in the middle years of the sixteenth century in protecting the interests of the New World Indians. During the first half of the sixteenth century, the treatment of the Indians sparked a very high profile debate, which dealt with the issue from a theological, ideological and political perspective. The main protagonists within this debate were Bishop Bartolome de las Casas, on behalf of the Indians, and Juan Sepulveda, arguing for their enslavement.

The focus of the debate was on Aristotle's doctrine of the natural slave.[9] It is interesting to note that, in the course of the debate, Las Casas and Sepulveda sought to conduct the dispute on the presumption of the validity of the doctrine of the natural slave. This is particularly interesting on the part of Las Casas, who worked within the boundaries of the doctrine of the natural slave to demonstrate that, not only did it not apply to the Indians, it ought to be construed so narrowly that it would only apply to the most aberrant of groups. Like Vitoria's argument with the 'titles' to conquest, Las Casas argued that the natural slavery principle should be accepted, but then interpreted in such a way that it could be said to have no practical application. [10] Arguably, this acceptance of natural slavery was simply to allow argument on the same terms, and does not necessarily suggest he genuinely accepted the natural slave doctrine.

Las Casas focused on the level of barbarism required of the natural slave. Such a person is "savage, imperfect, and the worst of men".[11] However, he turns this argument around, to suggest that any person can be said to be barbaric, even one born of civilised men.[12] Las Casas makes the point that barbarism is not determined by one's birth, but by one's actions. It is those actions which determine whether one ought to be considered a slave, and not the accident of birth.

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[8] See, for example, James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations*, New Jersey: The Law Book Exchange, 2000; G Scott Davis, "Conscience and Conquest: Francisco de Vitoria on Justice in the New World", *Modern Theology*, 13:4, Oct. 1997, pp. 475-5000, and generally, Anthony Pagden.
[9] To be found primarily in *Politics* I.2
[10] Bartolome de Las Casas, *In Defence of the Indians*, Stafford Poole (trans.), Dekalb: Northern Illinois University Press (*IDI*), p. 28.
[11] *Politics*, I.2
[12] *IDI*, 29

Therefore, he argues that one cannot categorise an entire class of people as being natural slaves, based on an external determinant.[13] Las Casas relies on St Isidore's *Etymologies*,[14] to argue that it is not birth which dictates barbarism, but conduct. If one acts barbarously, then one is a barbarian, irrespective of whether one is born of civilized people.[15] In the course of the argument, Las Casas sought to limit the operation of the doctrine, such that the barbarian to whom it is applied is such an extreme character that he must be said to be a freak, and therefore extremely rare in nature.[16]

This argument is made in the course of discussing the different categories of barbarism. Importantly, he draws a distinction between mere barbarism, and barbarism to the point of irrationality. It is only those in the latter category who can be said to be the true natural slave.[17] These are a people who are without rule, and act in a brutal and savage manner. Their relations are not governed by rules or laws. They are simply governed by violence, instinct and desire. They are therefore barbarians "in the absolute and strict sense of the word".[18]

His conclusion is that the level of barbarism required of the natural slave is that such men are '…the worst of men, and they are mistakes of nature, or freaks in a rational nature…".[19] In reaching this conclusion, Las Casas relied upon a similar conclusion reached by St Thomas Aquinas, who also limited the operation of the doctrine.[20]

However, this reasoning does not necessarily effectively accord with the rationale of Aristotle, who seemed to suggest that all non-Greeks were barbarians, and therefore all non-Greeks were natural slaves.[21] That being said, there is no wider description or definition of the natural slave, beyond his saying

> *…wherever there is the same wide discrepancy between human beings as there is between soul and body or between man and beasts, then those whose condition is such that their function is the use of their bodies, and nothing better can be expected of them, those, I say, are slaves by nature.*[22]

[13] *IDI*, 53
[14] *The Etymologies*, 14.4
[15] *IDI*, 29
[16] *IDI*, 35
[17] *IDI*, 32
[18] *IDI*, 33
[19] *IDI*, 34
[20] *ST*, I-I Q. 2a A. 3
[21] *Politics*, 1252a34; 1252b5-9
[22] *Politics*, 1254b16ff

Aristotle goes on to distinguish between legal and natural slavery, but does not take any steps towards justifying legal slavery,[23] as it was not contentious within Greek society of the day. As a supplement to the above proposition, he argued that, if some are naturally destined to rule – and ought to do so – then there must be others who are equally naturally destined to be ruled. It is just and beneficial to all that they should accept the rule of their superior.[24] He focuses on the fact that a slave is part of the whole of the master, and there is therefore a mutuality of interest in good governance between the master and the slave.[25]

The theory espoused by Aristotle was therefore sufficiently vague and undefined that it lent itself to be used by the European colonists who came after him. It was entirely open to be relied upon by the colonial powers as a justification for the conquest of the New World, and the enslavement of its people. The mutuality of benefit between the master and slave added great weight to the doctrine, as a moral justification for slavery.[26] It continued to be relied upon for some two hundred years, until the English courts began to cast doubt upon the right of men to enslave their fellows. It must be remembered, however, that the theory itself was not central to Aristotle's work. It was merely a small feature of the general discussion of the nature of political power.[27]

The attitude of Europeans towards slavery was therefore well established by the time the British began to participate in the trade. The view – despite voices such as those of Vitoria and Las Casas – was that the colonial powers were justified, through their moral and intellectual superiority, to enslave others. There was, therefore, no resistance at the outset to the condemnation of the Indians of South American and the tribesmen of Africa to perpetual servitude.

This was made easier not simply by the scholarly debate, and the authority of Aristotle. More importantly, it was rendered possible by the fact of two significant papal bulls. The firstwas *Dum Diversas*, 1452, permitting Alonso V of Portugal to enslave the Saracens. Similarly, in 1493, the papacy issued *Inter Caetera*, which permitted Ferdinand and Isabella of Spain to lay claim to vast tracts of land in South America, together with its people. The Church was therefore entirely supportive of the development of the slave trade, which gave it an imprimatur which carried a lot of weight in future years. In Britain, for example, many churchmen were

[23] *Politics*, 1255a3
[24] *Politics*, 1255b4
[25] *ibid*
[26] *Politics*, 1255b12-15
[27] *Politics*, 1252a7-16

slave owners up to the time of abolition, and therefore shared in the substantial compensation fund in 1834.[28]

Irrespective of the contemporary view of the justification used by the European powers for enslaving the so-called "barbarians" of the New World, it was a useful and convenient logic which the Christian nations of Europe were able to rely upon in order to vindicate their conquest. Thus, for some time the European occupiers were able to absolve themselves with the sense of having brought civilization to the indigenous population of the colonies. However, that rationale gradually lost favour with the people of Europe, such that by the second half of the 18th century, there was a growing abolitionist movement, particularly in Britain. Notwithstanding that growing support for abolition, there remained strong economic and political incentives to preserve the legal *status quo* of slavery for as long as possible.

Economic Benefits of Slavery

Adam Smith argued that the discovery of America and the trade routes of India were two of the most important events in human history. According to Smith, it promoted mercantile activity more than any other event in British history.[29] This had major repercussions for the growth not only of colonial industry, but the slave trade. The slave trade had a position of prime mercantile importance in the New World. William Wood described it as the "spring and parent whence the others flow."[30] During the 18th century it became a principal source of income for leading English cities, such as Bristol and Liverpool.

Through a combination of colonialism and slavery, there developed a "triangular trade" between Britain, Africa and the West Indies. Manufactured goods would leave England – in particular from Manchester – which were then transported to Africa, and traded for negro slaves. The slaves were transported to the plantations in the West Indies, where they were traded for raw materials, which were then returned to Britain.[31] A substantial profit was generated for all of those involved in each step of the trade.

Additionally, this trade had a wider benefit for the British economy. It promoted the ship-building industry within Britain, as well as its manufacturing industry. Further, the need for agricultural supplies for the slaves in the West Indies promoted the economies of both New England and Newfoundland, which were agricultural and fishing colonies respectively. Williams argues that the triangular trade lead to the accumulation of capital, which funded the Industrial Revolution.[32] In fact, it has been noted that "by 1750, there was hardly a trading or a

[28] For example, the Bishop of Exeter owned 855 slaves in 1833, and received compensation for them under the Act.
[29] Adam Smith, *The Wealth of Nations*, London, 1776, pp. 415-16.
[30] William Wood, *A Slave Trade*, London, 1718, p. 191.
[31] Eric Williams, *Capitalism and Slavery*, Chapel Hill: University of Northern Illinois Press, 1944, p. 51.
[32] *Ibid.*, p. 52.

manufacturing town in England which was not in some way connected with the triangular or direct colonial trade."[33] The economic importance of the slave trade therefore cannot be understated.

In 1663, Negro slaves were described as "the strength and sinews of the Western world."[34] The first slave expedition out of England was in 1562, but there was no significant development in the trade until after the Restoration in 1660.[35] However, it was from the middle of the 17th century that English law was asked to deal with the tension between slavery and the concept of fundamental freedom in England.

While the trade was highly profitable, it give did give rise to some concerns about the sale of slaves to non-British purchasers. In fact, by 1788, approximately two thirds of sales were to foreign purchasers.[36] This was during a period of ongoing political and economic tension with both France and the Netherlands. The House of Lords preferred to prevent their citizens from trading with, and benefiting, nations which were perceived as 'the enemy'.

In particular, French and Spanish sugar planters purchased 500,000 slaves. This was particularly profitable for slave cities such as Liverpool, but was considered a negative from a political and economic perspective.[37] This was due to the fact that the slaves were providing manpower to foreign planters, enabling them to compete economically with the British planters.

One of the primary sources of revenue for Britain during the 17th and 18th centuries was sugar so Dolby Thomas, the 17th century merchant, wrote: "the pleasure, glory and grandeur of England has been advanced more by sugar than by any other commodity, wool not excepted."[38] Therefore, given the economic importance of sugar, the workforce responsible for generating that income was invaluable to Britain.

In addition to the economic benefit of the trade was the ancillary benefit to national defence. The need for maritime speed in the Middle Passage – to reduce losses – forced improvements in ship design. Those improvements were able to be transferred into the construction of military vessels. Seasoned personnel were also derived from the operation of the trade, as well as the fishing industry in Newfoundland, which provided food to the plantations. The slave trade was therefore responsible for the provision of ships and sailors, both of whom could be exploited in war against Spain, France or the Netherlands.

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[33] J. Gee, *The Trade and Navigation of Great Britain*, Glasgow, 1750, p. 111.
[34] *Calendar of State Papers, Colonial Series, V*, p. 167.
[35] Williams, *op. cit.*, p. 30.
[36] *Report of the Lords of the Committee of the Privy Council Appointed for the Consideration of all Matters Relating to Trade and Foreign Plantations*, Part VI.
[37] Williams, *op. cit.*, p. 34.
[38] Quoted in ED Ellis, *An Introduction to the History of Sugar as a Commodity*, Philadelphia, 1905, p. 82.

All of this, taken together, made the slave trade an extraordinarily valuable component of the British economy. It was of such importance that any moves towards abolition were met with a strong reaction. In 1749, a pamphlet was published by the pro-slavery movement, in which it was asserted that

> *… That traffic alone affords our planters a constant supply of negro servants for the culture of their lands in the produce of sugars, tobacco, rice, rum, cotton, cystic, pimento and all our other plantation produce… The great brood of seamen consequent thereupon and the daily bread of the most considerable other British manufacturers, owing primarily to the labour of Negroes.*[39]

Abolitionists attempted to emphasise the cruelty of the slave trade. In particular, they focused on the suffering and dangers of the Middle Passage, although it has been suggested that this was exaggerated by abolitionists to support their arguments.[40] Some success was had, with the passage of a reforming regulation in 1788, requiring improved conditions for slave transport. Any attempt at reform outraged the slave merchants, who asserted that it would damage the trade.

Profit from the planters in the West Indies was arguably unprecedented in British economic history. It was suggested that every Englishman in the West Indies with 10 negro slaves created work for four Englishmen.[41] Put another way, it was suggested that each man in the West Indies was seven times as profitable for England as every man in England itself. In more specific financial terms, it has been suggested that each person in the West Indies generated approximately £10 annual profit for England. On contemporary value, this profit by each individual would amount to approximately £2378 per person.[42]

It is clear, therefore, that there was both a direct and indirect economic benefit from the slave trade. The construction of ships for the trade, the exchange of manufactured goods, and the profit itself on the sale of humanity, all created an enormous incentive for the retention of the slave trade. All of these economic benefits were fundamental to the growth of the British Empire. However, even more so, were the West Indian plantations, which could not have functioned without the vast hordes of slaves. Taken together, this provides a clear explanation as to why there was very limited political will on the part of the legislature to abolish slavery.

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[39] Anti-Abolitionist pamphlet, accessed at gallery.nen.gov.uk/audio7897-abolition.html, 30 January 2018.
[40] Williams, *op. cit.*, p. 34.
[41] Quoted in EA Benians, John Holland Rose and AP Newton, *Cambridge History of the British Empire*, Vol. I, Cambridge: Cambridge University Press, 1960.
[42] See www.measuringworth.com/ukcompare/relativevalue.php?use%5B%5D=CPI&use%5B%5D=NOMINALEARN&year_early=1730, accessed 25 January 2019.

Slavery Before the English Courts

On numerous occasions, the English courts have been asked to consider the legality of slavery, both within their colonies, and upon British soil. The position adopted by the English courts and commentators has always been that no man can be a slave upon British soil. While Britain may have tolerated, and even profited from the slave trade, all men in Britain were free – albeit that the concept of "freedom" may be a little different from the contemporary understanding of the term.

A seminal case before the House of Lords was *Somerset v Stewart*,[43] in which, on a return of a writ of habeas corpus, the court was asked to consider the status of a slave purchased in Virginia. The case was brought before the court on behalf of the slave Somerset, who had been transported from Virginia to England by his owner. While in England, he made numerous escape attempts. Eventually, his owner, Stewart, decided to rid himself of the difficult slave, and at the time of the issue of the writ, he was being held aboard a ship, preparatory to being sold to the plantations in the West Indies. The issue for the court was whether, once Somerset was taken to England, he could still be said to be a slave, and therefore the property of Mr Stewart. This has not always been the case. One of the earliest reported decisions on the issue was the case of *Butts v Penny*[44], in which a claim of trover was made in respect to 100 negro slaves.[45] The rationale for treating the slaves as chattels and therefore capable of being the subject of the claim was that they were heathens "… and the subjects of an infidel prince."[46] The legal issue was whether the action in trover could be maintained in respect to human beings. The court accepted that these Negroes were bought and sold by "merchants, as merchandise".[47] Therefore, the action in trover could be maintained. As a consequence, the law regarded the slaves as chattels, capable of being the subject of suit. That determination would suggest that a proprietary interest in slaves was accepted by English law. However, the paucity of detail in the report left many important questions unanswered. Therefore, various conclusions must be extrapolated from the information available.

The most significant missing fact was that of whether the slaves were resident in England or abroad. It is therefore unclear whether the case was an early stage in the evolution of English law, or was in fact consistent with subsequent jurisprudence. On its face, it does suggest that a proprietary interest could be claimed over a human being, provided that human being was not resident in England.

[43] (1772) 98 ER 499.
[44] (1673) 83 ER 518.
[45] Trover is an old action under the English common law for the wrongful conversion of goods.
[46] At 518.
[47] *Ibid.*

A relatively short time later, the issue was resolved in *Chamberlain v Harvey*.[48] In that case, an action in trespass was brought in respect to a slave. It was held that "no man can have property in the person of another while in England."[49] The Chief Justice, Holt, noted that no action for trover lay in respect of a Negro in England. This was in contrast with *Gelly v Cleve*,[50] in which it was held that trover would be available in respect to a Negro boy. Being a heathen, the court was able to accept that a proprietary interest could be acquired, prior to the baptism of the slave. A degree of consistency starts to appear, with the decision in *Smith v Gould*.[51] In that case, there was an action in trover against various chattels, including a Negro slave. This gave the court another opportunity to consider the question of whether there was sufficient property in a person to find a valid claim in trover. In finding that there was no such right, the court considered two fundamental propositions. The first was an acknowledgement that, under the law of Moses, a man may be a slave of another.[52] However, the second point relied upon the entitlement of all men – both Christian and heathen – to habeas corpus, under Magna Carta. The latter prevails over the former, and there is therefore no right of action in trover.

These cases demonstrate that, for a period of some 300 years, English courts have accepted that all men on English soil are free. That being said, it is apparent that there is a high degree of ambivalence within the English case law. While the liberty of all men is repeatedly affirmed by English judges, the ancillary features of the cases are far from generous in the granting of basic rights to slaves or former slaves.

Unusually, a positive decision was made in favour of a former slave in the case of *Shanley v Harvey*,[53] involving an action for recovery. Shanley, the executor of the estate of Mrs Margaret Hamilton, brought an action against Mr Harvey, a former slave owned by Mrs Hamilton. On her deathbed, Mrs Hamilton gave Harvey a purse containing £700-£800. She said it was all for him, to make him happy. The executor sought to recover the money from Harvey.
This case seems to be predicated upon the idea that a slave is not entitled to own property. This issue is only implicitly dealt with in the decision. The fact that the case was dismissed with costs would suggest that he is implicitly regarded as being capable of holding property. That may be read through the Lord Chancellor reiterating the Chief Justice's decision in *Chamberlain*.[54] Justice Best made the same point in *Forbes*, when he noted that, with freedom comes all of the rights and obligations of an Englishman.[55] This idea is, however, contradicted

[48] (1696) 91 ER 994
[49] *Ibid.*
[50] 1 Ld Raym 147.
[51] (1701) 91 ER 567.
[52] Exodus 20:21.
[53] (1763) 28 ER 844.
[54] *Ibid.*
[55] (1823) 2 B & C 448 ay 457.

in *R v Inhabitants of Thames Ditton*.[56] A slave was brought to England in 1781, and her owner died two years later. She continued to live with the widow for a further six months, before she left and applied for support from the county. She was refused such support. The law required that she must have been hired within the county for a period of six months from the date of her application. While the court accepted the freedom of the slave was dictated by her residence in England, that does not mean that she had a right to wages. Lord Mansfield limited the scope of his decision in *Somerset*. He stated that a slave is free, but one who continues to labour for her master has no right to wages. Therefore, there was no hiring, and no right to support from the county.

The court was also asked to adjudicate upon a transaction for the sale of a slave in *Smith v Bowen & Cooper*.[57] The court, in that case, reiterated that no man can be a slave in England. The statement by the Chief Justice, Holt, that any man who steps foot on English soil becomes free, was reiterated.
However, this case did not extend to something as simple as a slave being brought onto English soil. In this case, the slave in question was resident in Virginia, where slavery was lawful. The transaction, being the sale of the slave, took place in London. It is interesting to note that there was no suggestion in the judgment that the transaction should be void for illegality.
Once again, this decision demonstrates the limited extent to which the English courts accepted the concept of the freedom of slaves. The freedom acknowledged by the court was limited to the physical presence of the slave on British soil. The courts did not have any will to go beyond the basic right of freedom, to create any positive prohibition against slave purchase or sale transactions. This decision represented an ideal opportunity for the court to express a policy view about the legality of slavery on a broader level within the Empire. The court could have expressed the view that the transaction which took place in London was unlawful, notwithstanding that the institution of slavery was legal in Virginia. However, the court elected not to do so, and therefore, despite various moral condemnations which had previously been made about slavery, the slave sale transaction was treated as being presumptively valid. The issue of the legality of the transaction was side-stepped by the most technical of arguments.

The Attorney General observed that the transaction required a deed to be lawful. No such deed was executed, and therefore the contract was found to be invalid. In making this argument, it was implicitly accepted that the contract was capable of being validly formed in England. Consequently even though no man could be a slave on English soil, there does not appear to have been any objection to engaging in the commercial trade in slaves in England, provided those slaves lived beyond the English borders. This case tends to belie the veracity of any assertion of 'pure' freedom in Britain. Some level of explanation can be found from the case

[56] (1785) 99 ER 891.
[57] (1701) 91 ER 566.

of *Smith v Gould,*[58] where the scriptural authority for a slave being a master's chattel was rejected.[59] The court found that "men may be the owners" of property, but may not be property.[60]

It may be seeking to read too much into the finding of the court in this matter, but it does seem to suggest that the English judiciary rejects the concept of the natural slave. The biblical reference would suggest that there are those who are naturally subject to the control of others, but this proposition was refused. Further, the conclusion that one cannot own another would suggest that the natural slave is not accepted under English law.

Blackstone makes this point very forcefully, in his *Commentaries*. He starts by defining slavery as "absolute and unlimited power" of one person over another.[61] He goes on to observe that "it is repugnant to reason and the principles of natural law, that such a state should subsist anywhere."[62] He makes it very clear that the law of nature does not permit slavery, either through captivity or by the sale of oneself.[63] The latter proposition is also made by John Locke, when speaking of the right of a man to sell his labour.[64]

Natural law has also had a strong influence on the slavery debate under English law. As already noted, slavery had, by no means, attracted universal acceptance, with critics such as Francisco Vittoria and Bartolomé de loss Casa's both strongly arguing against the natural slave doctrine.[65] Similarly, the British courts often applied natural law reasoning to reject slavery with in its territorial borders.

Prior to the establishment of Austin and Sir Henry Maine as the dominant legal theorists in England, there were some signs of affection towards natural law, not simply in the work of Blackstone. However, generally natural law does not have a particularly strong history within the British courts. From the middle of the 19th century, with the rise of positivism and historical legal theory, natural law was relegated to a relatively minor role in British jurisprudence.

In the context of legal theory, John Locke and Thomas Hobbes were both 17th century proponents of natural law, albeit with very different political agendas. Nevertheless, they both had significant impact on the development of black letter law and political theory during the

[58] (1701) 91 ER 567.
[59] Exodus 21:21 "…since the slave is their property".
[60] At p. 567.
[61] William Blackstone, *Commentaries on the Laws of England, Vol. I*, London, 1871, p. 269.
[62] *Ibid.*, pp. 269-270.
[63] *Ibid.*, p. 270.
[64] John Locke, *Second Treatise on Government*, II, 27.
[65] *IDI*, pp. 35-27.

17th and 18th centuries. Therefore, until the beginning of the 19th century, natural law continued to exert some intermittent influence within the judiciary.

Even outside of the slavery cases, the English courts have demonstrated some anecdotal adherence to natural law reasoning in various substantive fields, including both tangible and intangible property. In *Millar v Taylor*, Justice Yates observed that "…the law of England, with respect to personal property, had its grand foundation in natural law."[66] This view is reinforced by Blackstone in his Commentaries, both on slavery, and more general areas, such as property law.[67]

In the context of slavery, the English courts had no 'human rights' context within which to address the issue. Therefore, although there is a sweeping reliance on the broad concept of freedom of all men on English soil, much of the discussion by the courts is purely property based. This may be objectionable to the modern reader, looking for political correctness. It does, nevertheless provide a framework for the courts to refuse to endorse slavery, without having to resort to a condemnation of the institution as a whole. The political consequences of such a course – given the economic power of the West Indian planters – would have been substantial.

The economic rationale became quite apparent in *Pearne v Lisle*.[68] This case involved an application for an order *ne exeat regno*.[69] In this case, the Plaintiff owned and rented to the Defendant 14 slaves in Antigua. The hiring fee of £100 had not been paid for two years, and so this action was for recovery of a debt, and the return of the slaves. Adopting the wording which would be repugnant to the modern reader, the court said: "I have no doubt but trover will lie for a negro slave, it is as much property as any other thing."[70] In reaching this conclusion, the court expressly referred to the decision of Chief Justice Holt, affirming that all men on English soil are free. However, the court made it equally clear that this proposition does not apply to setting foot in Jamaica, "or any other English plantation."[71] The use of the word 'plantation', rather than 'possession' or 'colony' is very telling. It highlights the court's consciousness of the economic importance of slavery.

This view of slaves as economic units, rather than human beings, was made even clearer when the court observed that the return of the specific 14 slaves rented was not necessary: "others are

[66] (1769) 98 ER 201 at 229.
[67] Blackstone, *op. cit.*, p. 269.
[68] (1749) 27 ER 47.
[69] An old equitable remedy to restrain a Defendant from leaving the jurisdiction while money is owed.
[70] At p. 48.
[71] *Ibid.*

as good".[72] The court also observed that "they wear out with labour, as cattle," and "they are like stock on a farm, the occupier could not do without the…".[73] We thus see a picture of a court which affirms the inherent freedom of all men in England, yet effectively dehumanises slaves as nothing more than farm implements in the colonies.

Consistency was maintained on the limitation of freedom in the case of *The Slave Grace*.[74] The case concerned a woman who was, by birth, a slave. She accompanied her mistress from Antigua, her place of birth, to England, for a year. Her mistress then returned with her to Antigua. Upon her return to Antigua, abolitionists commenced a test case, arguing that Grace's freedom was secured by her period of residence in England. The matter went to the House of Lords, to determine whether her residence in England secured Grace's freedom. Numerous counts were raised in the case, but the primary issue was the legality of her transport to Antigua, as it was argued that Grace was a free citizen when she left England. The heart of the case was whether, through her residence in England, Grace was rendered free in perpetuity. At the outset, Lord Stowell noted that he cannot see any legal justification for the proposition that perennial freedom is derived from temporary residence in Britain.[75] His Lordship noted that the foundation of her claim must be that she was, in fact, a free woman, who was being treated as a slave. Lord Stowell further observed that the crux of the case is that, in order to acquire freedom, a slave must have something more than mere residence in England, although the residence in England does afford a temporary freedom. What the slave needed to do in this case was demonstrate emancipation, rather than a vague assertion of freedom.[76] This obviously imposes a positive duty on the slave, which is different from the duty imposed on a free man.

In this discussion, the court is essentially distinguishing between a naturally free man, and a slave. The slave, quite justifiably, must prove his status as a free man, whereas a freeborn person should never be exposed to such "humiliation".[77] His Lordship therefore distinguished between freeborn men, and those born slaves.

The case of *Somerset* created some difficulty for subsequent courts. However, Lord Stowell emphasised that the decision in *Somerset* was limited to the forcible removal of a slave from England.[78] Throughout the decision, His Lordship is quite implicitly critical of the decision of Lord Mansfield. Residence in England does nothing more than give a temporary right of liberty, including the right to resist removal from England. He repeatedly alludes to the fact that Lord Mansfield was eager to avoid making any comprehensive decision. Lord Stowell seems to be a little disappointed that Lord Mansfield did not take the opportunity to limit the

[72] *Ibid.*
[73] *Ibid.*
[74] (1827) 1 Hagg 94.
[75] At p. 100.
[76] At p. 101.
[77] At p. 102.
[78] At p. 106.

scope of slavery. However, Lord Stowell also made it clear that he was bound by principle. Further to this point, Lord Stowell observed that Lord Mansfield decided the case on the law in England, rather than the law generally. Lord Mansfield noted that slavery was "odious" to the law of England.[79] Lord Mansfield confirmed that it could only be vindicated by positive law. Therefore, Lord Stowell found that the positive law of America and the West Indies could permit the imposition of slavery.[80] Lord Stowell's rejection of any feature of universalism in the abolition of slavery shows a clear move away from natural law reasoning, to rely more heavily upon the black letter law, which was, of course, the economically safer course. It would appear that Lord Stowell may have been opposed to the institution of slavery, while still sensible to the economic impact and importance of slaves. In the course of his judgment, he lamented the fact that no application had been made to Parliament for the abolition of slavery. In the absence of any such application, even the most affluent of citizens may be returned to the state of slavery, upon their return to the West Indies.[81]

A further rejection of the idea of universality is found in the discussion of the maxim "once free for an hour, free forever",[82] which was raised in argument. This proposition was never applicable to negro slavery in any jurisdiction, and there is no reason to start its application. There is nothing in Lord Mansfield's judgment which would suggest that it ought to be accepted. His Lordship observed that the practical impact of establishing such a principle should not be underestimated. Ultimately, his Lordship reaches what would appear to be the reluctant conclusion that the law does not permit the severance of slavery simply by being free for a moment. He notes the fact that slavery was a "great source of the mercantile interest of the country".[83] While he clearly disapproves of slavery, he nevertheless adopts some strangled reasoning to accept that the law of England extends and applies to all of her colonies, except for the slave laws. The reason for that exception appears to be the fact that slavery is one of the most popular forms of trade within the colonies.[84]

The high point of natural law reasoning by the English judiciary in property law, albeit not slavery, was *Millar v Taylor*. However, pragmatism then seemed to dominate, with cases such as *Donaldson v Beckett*, in which the court suggested that there were no natural rights in a property context. *The Slave Grace* represented a reluctant return to the pragmatism of *Donaldson v Beckett*.

[79] (1772) 98 ER 499 at 510.
[80] *The Slave Grace* at p. 110.
[81] At p. 114.
[82] At p. 115.
[83] At p. 127.
[84] At p. 129.

However, a much more universalist approach, which expressly acknowledged natural law, was to be found in *Forbes v Cochrane*.[85] This case was an action by an owner of a cotton plantation, situated in East Florida which was, at the time, a dominion of Spain. The claim was for enticing a number of slaves away from their master. Responding to a proclamation issued in 1814 as part of the War of 1812, 38 of the Plaintiff's slaves sought refuge in a British vessel, after all residents of the United States were invited to join the British Armed forces, or be relocated out of the United States. The Defendants were the captain of the vessel and the Admiral commanding the British squadron. The Plaintiff demanded that the Defendant, the Admiral in command, force the slaves to leave the British vessel. He refused to do so, but did allow the Plaintiff to speak to his slaves, all of whom refused to return to their Master. The question was then whether the proprietary right in the slaves obliged the Defendant to return them to their 'rightful' owner. The case gave the judges an opportunity – to varying degrees – to address the question of the legality of slavery. Justice Bayley side-stepped the issue, by noting that a different standard applied to a captain of a mid-military vessel on operations in a war zone.[86] Therefore, rather than consider the slavery issue, His Lordship focused on denial of liability against the Defendants, on the basis that they were public officers, whose discretion was limited by their duty.[87] He therefore managed to avoid any detailed consideration of the legality or morality of slavery. In contrast, Justice Holroyd relied on the traditional formulation from Lord Mansfield. To this end, he made the point that English ships of war are to be considered a "floating island", and therefore the laws of England applied on board.[88] Therefore, as soon as the slaves bordered the English ship, they were free. Consequently, there was no duty on the part of the British officers to return the slaves to their owner. In fact, pursuant to the decision in *Somerset*, it would have been unlawful to effect the forcible removal of the slaves.[89]

The most clearly articulated natural law judgment is that of Justice Best, who was clearly opposed to the institution of slavery. He cites with approbation the observation of Blackstone that all English law is founded upon the law of nature and revealed law.[90] Early in his judgment, His Lordship refers to the "crime of slavery",[91] making his opposition to slavery quite clear. Perhaps more importantly, a very personalised view is expressed when His Lordship noted with pride that English judges take the "high ground of natural right", while landowners and the legislature take steps to protect the institution of slavery.[92] While the judgment does not go into any great detail on the facts or law of the particular issue, it is very clear that the judge is a

[85] (1823) 2 B & C 448.
[86] At p. 454.
[87] At p. 455.
[88] At p. 456.
[89] At p. 457.
[90] Blackstone, *op. cit.*, p. 42.
[91] At p. 457.
[92] At pp. 458-459.

proponent of natural law, in his reliance upon universal principles in his rejection of slavery. He does accept that slave owners have the capacity to hold a proprietary interest in another person. It is, however, a fragile and purely positive right, which can be extinguished by the slave departing the jurisdiction, which was the case in the present instance.

Forbes was a case decided not many years before the passage of the Abolition of Slavery Act in 1833. There was obviously already a groundswell of public support for the abolition movement, and yet it was still expressed in very indecisive terms. With the exception of Justice Best, the court decided the case on its facts, refusing to make any stand against slavery as an institution. Ultimately, it also cannot be ignored that, while the Plaintiff was British, he was a subject of Spain at the time of the claim, which must have made the decision somewhat easier for the court.

Abolition – Not a Human Rights Act

It is important to bear in mind that the Abolition of Slavery Act 1833 was not an instrument intended to grant wholesale rights to slaves. The principal purpose was, of course, to free the slaves, but the balance of the instrument was directed towards the economic protection of the slave owners. This meant, amongst other things, deferring any genuine freedom for at least half a decade.

Arguably, it was an instrument designed to achieve an objective in the abstract: the freedom of slaves in a world in which slavery was no longer deemed acceptable. The Preamble to the Act itself states that "it is just and expedient that all such persons should be manumitted and set free". The economic protection was reflected in the further statement in the Preamble that "provision should be made for promoting the industry and securing the good conduct" of the freed slaves. By this, it was meant that the Act was not intended simply to grant freedom to the slaves, but to ensure that they continued to provide their labour for the economic benefit of Britain. The Act makes it clear that the freedom granted to slaves within British territory is subject to conditions.[93] Predictably, this caused substantial rancour amongst the slave population, as it had been anticipated that their freedom would be immediate and absolute. This was, in fact, far from the case. For most slaves, freedom was still a long way off. All slaves were classified into one of three classes: those attached to the land, engaged in agricultural labour and; those not attached to the land, but engaged in agricultural labour; and those engaged in non-agricultural labour.[94] All freed slaves, irrespective of their classification, from the day of abolition, being 1 August 1834, became apprenticed labourers to their former owners.[95] The status of apprenticed labourer remained, for agricultural workers ongoing for a period of six

[93] Abolition of Slavery Act ("ASA"), s. 12.
[94] ASA, s. 4.
[95] ASA, s. 1.

years, and for non-agricultural workers, for a period of four years. Genuine freedom was therefore deferred for a significant period of time.
There is some concession to individual liberties to be found in the requirement that food, lodging and medical treatment be provided by the master, and that labourers be required to provide no more than 45 hours service per week.[96] More importantly, while owners retained the right to transfer the contract of apprenticeship to others, the labourers may refuse to be separated from spouses, parents or children.[97] This was not a right which had been extended to slaves, who had no recourse in respect to their movements.

The bulk of the Act deals with the payment of compensation, not to the slaves, but to the slave owners, deprived of their property. The sum of £20 million was set aside for compensation of the slave owners.[98] Special commissions were appointed for the determination and distribution of compensation. This, again, clearly demonstrates the economic emphasis that British law placed upon slavery. Even in its abolition, the focus was upon the loss suffered by the owner, rather than any compensation being awarded to those who had been deprived of their liberty, in many instances from birth. In light of the limitations upon the rights of former slaves, together with the statutory obligations imposed under the Abolition of Slavery Act, a bleak picture of freedom for former slaves is drawn. That was, even after the six year delay in permitting actual freedom. For these reasons, the grant of freedom was quite obviously the result of bowing to internal and external political pressure. The refusal to grant compensation to anyone but the former owners reinforce the truly economic nature of slavery, and the political, rather than moral basis for its abolition. The legislature's response constituted little more than a compromise, designed to secure a basic moral obligation, while still protecting the wider interests of the Empire.

[96] ASA. s. 11.
[97] ASA, s. 10.
[98] ASA, s. 24.

COMMENTARY

"The art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the smallest possible amount of hissing."

Dr. Camille Stoll-Davey discusses the realities of international taxation in small and developing countries.

The same small group of the most developed states, reconstituted as the Organisation for Economic Cooperation and Development (OECD). The inherent lack of democracy, and perhaps inevitable biases, led to the development of an alternative process with the United Nations that was designed to give greater consideration to the interests of smaller and developing states. However, the UN process has never received the same level of economic support or been allowed the same level of influence as the OECD.

Recent developments

The past 20 years have seen a great deal of activity in redefining and expanding the rules relating to international tax competition and cooperation among tax administrations. Given accelerating globalisation, the arrival of the digital economy, and the challenges arising from the increased mobility of capital, much of this activity is understandable.

In 1998, the OECD embarked on an exercise to suppress types of tax competition deemed 'harmful' to the interests of its member countries. The interests of small and developing countries were not represented in setting the tax competition criteria and ground rules. 41 mostly small and developing countries – but no OECD member states – were initially identified under OECD criteria as 'tax havens', as part of that 1998 exercise.

The OECD and the G20 recently introduced a new set of highly complex tax cooperation rules designed to combat tax evasion through the Common Reporting Standard (CRS), an information standard for the automatic exchange of tax and financial information on a global level, and the Base Erosion and Profit Shifting (BEPS) rules, designed to identify gaps in tax rules currently exploited to artificially shift profits to low or no-tax locations.

While there are undoubtedly benefits for all jurisdictions in ensuring that corporate tax abuse is minimised, the rules developed by the OECD demonstrate a lack of awareness of the limited capacities of small and developing countries. Many do not have the economic or human resources required to implement these highly complex standards in the short timeframes set by developed countries, and little assistance has been offered. In some instances, there are fewer than ten qualified professionals to deal with all aspects of a nation's domestic tax administration

and tax treaty management, let alone the burdens created by the introduction of new rules. The predicaments of some of the smallest Caribbean Commonwealth member states have been compounded by recent hurricanes that have destroyed their infrastructure and crippled their economies. These difficulties, together with the demands of the OECD,stand in sharp contrast to the stance of the rulemaking jurisdiction with the largest economy, which has indicated that it has no current intention to implement the OECD's new reporting standard.

What next?

There is little evidence that over the past ten years the playing field has been made level in any meaningful sense. In December 2017, as part of a process that began in 1996, the European Union released a blacklist of 17 'non-cooperative tax jurisdictions' that will be made subject to unspecified sanctions. The EU's criteria for this list are opaque, but it has acknowledged that it excluded assessment of the tax practices of both EU member states themselves and a number of other nations.

Unsurprisingly, both the blacklist and the grey list produced by the EU included only small and developing countries, but no geopolitically powerful ones. In the short term, some of the smallest and least developed Commonwealth countries would clearly benefit from assistance in meeting the tax cooperation obligations imposed on them within the past five years.

In the longer term, hopefully an alignment of interest will be recognised and some mechanism will be found to permit small and developing countries to have a meaningful voice in shaping the rules that they are required to follow. This would go a significant distance towards finding that elusive level playing field.

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CASE NOTES

In The Matter Of Ardon Maroon Asia Master Fund

Ben Hobden, Maree Martin and Kevin Butler of Conyers.

Cayman Grand Court rules on the natural and ordinary meaning of fund constitutional documents in preference to following common practice in the funds industry.

In the unreported judgment delivered 17 July 2018, *In the matter of Ardon Maroon Asia Master Fund (in official liquidation)* Cause no. FSD 18 of 2015, the Hon Justice Robin McMillan found that, in a master-feeder fund structure, a feeder fund redemption was ineffective on the basis that there was a failure by the feeder fund to serve a further redemption notice on the master fund in accordance with the procedures set out in the master fund constitutional documents.

Background

Ardon Maroon Asia Dragon Feeder Fund (the "Feeder Fund") was a feeder fund into Ardon Maroon Asia Master Fund Limited (the "Master Fund") (together, "the Funds"), a structure by which investors would subscribe for shares in the Feeder Fund and the Feeder Fund would use this capital to subscribe for shares in the Master Fund. The Feeder Fund did not retain any liquidity or own any assets other than its Master Fund shareholding and (as is common in such structures) both the Feeder Fund and Master Fund appointed the same service providers including the Investment Manager, Administrator and directors. This structure is one which is common in the Cayman Islands.

On 11 August 2014, an investor in the Feeder Fund (the "Investor") submitted an electronic copy redemption notice for a US$15 million redemption for the 3 October 2014 redemption day (the "Redemption Request") to the Transfer Agent. The Transfer Agent acknowledged receipt on 12 August 2014 and notified the Investment Manager of the Funds that it had received the same on 19 August 2014.

The Master Fund's assets were illiquid and could not be readily realised to meet the Redemption Request. Consequently, on 30 October 2014, the directors of the Funds resolved to suspend redemptions and the payment of redemption proceeds from both Funds. In December 2014, the directors of the Feeder Fund resolved by written resolution that the Administrator should be instructed to record the redemption as a debt due to the investor and adjust the net asset value of the Feeder Fund accordingly.

On 30 December 2014, the Funds passed special resolutions that the Funds should be wound up voluntarily and that joint voluntary liquidators (the "Master Fund JOLs") should be appointed. In 2015, the Investor lodged a proof of debt in the liquidation of the Feeder Fund which was ultimately admitted by the joint official liquidators of the Feeder Fund (the "Feeder Fund JOLs") by consent on 23 March 2016. However, the Master Fund JOLs rejected the Feeder Funds's 'back-to-back' proof of debt. The rejection was on the basis that the Feeder Fund had not completed the redemption process to redeem its shares in the Master Fund as it had not submitted a written notice to do so (as required by the constitutional documents of the Master Fund). An appeal against the rejection of the Feeder fund proof of debt was filed on 1 April 2016.

Matters for Consideration

The key issues in dispute were:

a. What were the requirements for a valid redemption of the Feeder Fund's shares in the Master Fund? In particular, did the Master Fund constitutional documents permit the redemption of shares without a redemption notice and if so, did the directors of the Master Fund make a determination as to the terms and/ or manner in which shares issued by the Master Fund could be redeemed (i.e. without the need for a separate written redemption request by the Feeder Fund)?
b. Were the requirements for a valid redemption of the Feeder Fund's shares in the Master Fund met or (if possible) waived by the Master Fund or persons on its behalf?

It was contended by the directors of the Funds and other highly qualified figures in the Cayman Islands hedge fund industry that an automatic or 'back-to-back' redemption at the Master Fund level is a normal and/ or universal practice utilised to avoid the risk of misalignment of the liquidity profiles between the Master Fund and Feeder Fund. The Court found the expert opinions to be "*largely irrelevant and unhelpful*" in terms of the legal task identified for resolution.

In determining whether the directors of the Master Fund had the power to issue shares on terms that they were capable of being redeemed without a written notice being served, the Court considered the decision of the Privy Council in *Innimore Fund Management Limited -v- Fenris Consulting Ltd.* [2016] UKPC 9, and the English law principles set out in *Arnold -v- Britton* [2015] AC 1619.

It was accepted by the Court that when interpreting the meaning of the relevant words in a written contract that meaning has to be assessed in light of: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the document; (iii) the overall purpose of the

clause and the document; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but, (vi) disregarding subjective evidence of any party's intentions.

Master Fund Amended and Restated Articles

The following Articles were considered relevant to the analysis:

Article 1 defines "Redeeming Shareholder" as "a Shareholder who has requested the redemption of part or all of his Shares in accordance with these Articles".

"Redemption Notice" is defined as "a notice in writing in such form as the Directors may from time to time determine from a Shareholder requesting the redemption of part or all of his Shares."

Article 9 provides: "Subject to these Articles, all Shares for the time being unissued shall be under the control of the Directors who may:

a. Issue, allot and dispose of the same to Persons, in such manner, on such terms, and having such rights and being subject to such restrictions as they may from time to time determine;..."

Article 36 provides, so far as is material: "Subject to the Law, the Company may:

a. Issue shares on terms that they are to be redeemed or liable to be redeemed at the option of the Company or the Shareholder on such terms and in such manner as the Directors may determine, or as may otherwise be determined from time to time;"

Article 37 provides: "Subject to the law, these Articles and any rights and restrictions for the time being attached to any Class or Series:

a. On receipt by the Company or its authorized agent of a Redemption Notice upon at least such number of days' prior notice as the Directors, in consultation with the Investment Manager, may from time to time determine (subject to the discretion of the Directors, in consultation with the Investment Manager, to waive or reduce such period of notice) the Company shall redeem all or any portion of such Redeeming Shareholders Shares on a Redemption Day at the Redemption Price for the relevant Class and Series..."

Given the comprehensive nature of the redemption procedure set out in the Articles, the Court was unable to accept that the procedure could be disregarded entirely by the directors unless such power to so disregard is expressly permitted.

Determination of the Directors

The Court then turned to whether, if there was an authority to dispense with the Redemption Notice procedure, they did indeed make any determination to that effect.

It was contended by the Appellants that there was a clear and express statement in the Feeder Fund Private Placement Memorandum (the "Dragon PPM") that the redemption procedure for the Master Fund was to be identical to the Feeder Fund procedure, such that it was clearly intended that the same redemption procedure should apply for the purposes of redeeming shares in both of the Funds. Given that the directors were common to both the Feeder Fund and Master Fund it was contended that there was "*clear concurrence by the Directors of the Master Fund to the terms of the Dragon PPM"*.

The Court was not persuaded by this noting that "*...there appears to be underlying the argument a conscious infringement of the doctrine of corporate responsibility. In other words, if two companies have the same Directors that surely does not make them one company or enable them to function as one company."*

The Appellants submitted that there was clear, unequivocal, credible and independent evidence from the directors as to what their understanding and intentions were as regards the redemption process; namely that there would be an automatic back-to-back redemption of the Master Fund's shares upon the Feeder Fund receiving a valid redemption request from an investor. Adding this to the broad discretion in the Master Fund Articles to determine the applicable redemption procedure it was submitted that the directors made their subjective intentions and understanding sufficiently manifest in order to amount to a "determination". Again, the Court was not persuaded and described the reasoning as "*tortuous, speculative and unpersuasive*."

In principle, the Court agreed that a redemption at the Feeder Fund level can lead to an automatic corresponding redemption at the Master Fund level without the need for a separate redemption notice to be served if constitutionally authorised, and a determination is made to that effect.

Based on the constitutional documents of the Master Fund and the resolutions passed by the Feeder Fund and Master Fund it was, in the opinion of the Court, the natural and ordinary meaning of the language used that the redemption procedure required two separate identical redemption procedures as between an investor and the Feeder Fund and, subsequently, the

Feeder Fund and the Master Fund, and not simply one procedure that served automatically for two purposes.

The Appellants further submitted that if there was a requirement for a separate redemption notice to be served on the Master Fund, then this requirement was waived. Evidence was adduced to indicate that the directors of the Master Fund considered the redemption to be effective at the Master Fund level and it was for this reason that the Master Fund resolved to suspend the payment of redemption proceeds and any further redemptions and thereafter to resolve to wind up the Master Fund. The register of the Master Fund was updated to record the redemption and the Transfer Agent was permitted to proceed on the basis that the redemption in relation to the Master Fund was effective.

As a matter of construction, the Court preferred the view that the requirement for written notice was not capable of being waived (unlike the period of notice) and even if this view was incorrect, found the argument of the Master Fund JOLs compelling that there had not been any unequivocal representation of the Master Fund directors to indicate that there had been an effective redemption.

The Feeder Fund was held to be unsuccessful in its appeal in all respects.

Potential Effects for Cayman Funds

While the judgment touches on a number of themes, the main issue to emerge will likely be that unless the relevant constitutional and offering documents of Cayman master-feeder fund structures are drafted in such a way that a formal process is not required between a feeder fund and a master fund to effect a redemption, then the process, as set out in the constitutional documents, must be followed in order for an effective and valid redemption to take place. While this is not a controversial point from a legal perspective, investors will now be aware that master-feeder redemption processes set out in legal documents are not always being followed to the letter of the agreement by fund administrators.

The second (and perhaps less surprising) theme will be that industry practice is not a defence to non-compliance with constitutional documents and, while it is operationally helpful for the directors of a master and feeder fund to be the same, sufficient and clear corporate records should be maintained by separate legal entities documenting any actions and resolutions of the directors. This is particularly important in the case of master-feeder funds which, while they may share the same board, must still act as distinct legal entities.

For clients operating such master-feeder structures, it would be advisable to:

i. check with their Administrator and/or fund directors as to what process is being followed upon a redemption and whether written notices are being sent from the feeder to the master if that is what the constitutional documents call for (i.e. are they following the terms of the fund documents specifically or relying on industry practice); and
ii. if necessary, update the fund documents so that the redemption process and documents for the feeder and master are consistent with what is occurring in practice.

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Long Overdue: Judicial Guidance on Dangerous Dogs: Merren v R (2019)

A novel decision of the Grand Court provides a new opportunity

Brett Basdeo of Walkers who acted pro bono for the Appellant.

The entitlement to own a dog in the Cayman Islands is not absolute. In addition to licencing and registration requirements with the Department of Agriculture, owners are responsible not only for the welfare of their animal, but also for the welfare of others (including other animals) who may come into contact with it. Some contact is inevitable and whilst most interaction will be benign there are some cases that are not. In the latter instances, owners may be subject to both civil and criminal liability for damages or injuries caused, usually determined in the first instance by the Magistrates of the Summary Court.

However, whilst empowered with the jurisdiction to deal with such cases, the decisions of the Magistrates (unlike decisions of judges of the Grand Court) are not binding on other Magistrates and therefore do not create binding precedent.[395] Thus, in the absence of any guidance from the Grand Court, and despite diligent reporting by various news outlets, each decision stands alone and the Magistrates are often left to deal with dangerous dog cases in a judicial vacuum.

This has now changed. On 4 February 2019, the Grand Court handed down its judgment in *Merren v R.*[396] In the first known decision of its kind in the Cayman Islands, the Grand Court heard an appeal against the order for the destruction of dangerous dogs made by the Summary Court. At issue was the question whether the Court could impose requirements on persons keeping dogs such that the Court could be satisfied that the animal would not pose a danger to public safety, as an alternative to the dogs being destroyed.

The provisions of the Animals Law (2015 Revision) relating to dogs considered to be: i) a 'nuisance' (trespass and fouling); ii) 'dangerous' (apprehension of the spread of disease, injury or damage); or iii) 'ferocious' (likelihood of injury or damage), can be described as 'control' offences. In each instance, the owner or person in charge of the animal can be charged with an offence which carries a fine and/or imprisonment on conviction (both of which are greatly increased where injury is caused to a person). Whilst the Court may impose requirements to be observed in relation to the future keeping of the animal, the Court also has the discretion to order its immediate destruction. Unfortunately, such destruction orders are made by reference

[395] Decisions of the Judges of the Grand Court (a superior court) are binding on the Summary Court (a subordinate court). However, decisions of the Magistrates are not binding on each other due to their coordinate jurisdiction.

[396] (Unreported) 2 March 2018; Cause No. SCA 1 of 2018 (Hellman, J Actg)

to the action (or inaction) of the owner, rather than after an examination of the temperament of the animal. As such, a dog's life can be forfeited because of the owner's failings. This is especially striking when compared with the position in England and Wales where the courts must consider the histories of both the animal and its owner, including the prospects for the animal's rehabilitation, prior to making an order for destruction.

Review of the approaches taken by the Magistrates in local dangerous dog cases indicates that the practice of the Summary Court in relation to destruction orders can vary greatly. Whilst this may be understandable due to the lack of binding precedent, it is nevertheless unsatisfactory as too wide a range in the exercise of the Court's discretion can lead to injustice and to negative perception by the public. Unfortunately, due to differences in statutory language, English authorities and sentencing guidelines (which in other circumstances are persuasive and typically followed by the Courts in the Cayman Islands) were of limited assistance in the *Merren* case.

The underlying facts in *Merren* related to an all too common occurrence where the owner's four dogs were not kept within a suitable enclosure and were free to roam. An altercation between the owner and his neighbours led to a fight between the dogs in which the neighbours and their dog were bitten whilst on their own property. The presiding Magistrate described the incident as one of the most serious cases of failing to keep dogs under proper control that she had seen and proceeded to make orders for the immediate destruction of the owner's four dogs. The owner appealed the destruction orders.

Acting Justice Stephen Hellman of the Grand Court, who had the opportunity to consider the lack of equivalence between English and Cayman Islands statutory regimes, heard the appeal. The learned judge identified that, despite the absence of statutory authority to make orders for suspended destruction (i.e. where the dog is destroyed only if the owners fails to keep it under control) and the benefit that such alternative sentencing might provide, questions of policy raised in English cases were, as a matter of justice and common sense, equally applicable in the Cayman Islands.

Following analysis, Justice Hellman held that before making a destruction order the Court must first ask itself whether any measure short of a destruction order was sufficient to safeguard the public. In doing so, the learned judge arguably installed an important (and humane) filter on the exercise of the Court's discretion. Owners (or the legal practitioners representing them) have been afforded the additional opportunity to persuade the Court to save the animal, divorced from repercussions of the owner's previous conduct.

Having identified suitably practical and alternative measures which could be (and had been) taken, which included the use of secured enclosures, muzzles and limiting the number of

animals that could be in the control of a single person when in public, the Judge in *Merren* accepted submissions that he was bound to quash the destruction orders. The dogs, which had been impounded with the Department of Agriculture for close to a year whilst awaiting the appeal, were accordingly ordered to be returned to their owners.

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