
THE DISPUTE RESOLUTION REVIEW

SECOND EDITION

EDITOR
RICHARD CLARK

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

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THE DISPUTE RESOLUTION REVIEW

Second Edition

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Chapter 5

BERMUDA

*Kiernan Bell **

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Lawyers in Bermuda are members of a fused profession, meaning that no distinction is made, as in England, between barristers and solicitors. All practising lawyers in Bermuda (subject to a residency requirement for non-Bermudians) are called to the Bar and all have rights of audience before the courts. Most lawyers practise in law firms and recent changes in the law are seeing some law firms restructuring into limited liability companies.

Parties to disputes in Bermuda have considerable choice as to how they will resolve the matter. Disputes may be litigated, arbitrated or mediated, or resolved through other consensual means.

Arbitration is a popular dispute resolution mechanism for reinsurance companies and as Bermuda is a leading offshore jurisdiction with the second-largest world reinsurance market (second only to New York), arbitration is quite common and the jurisdiction is very ‘arbitration-friendly’.

The Arbitration Act 1986 governs domestic arbitration proceedings and non-commercial international arbitration proceedings. The Bermuda International Conciliation and Arbitration Act 1993 governs international commercial arbitration and enforcement of foreign arbitral awards. The 1993 Act enacts the UNCITRAL Model Law on International Commercial Arbitration.

So far as litigation is concerned, Bermuda’s principal trial court is the Supreme Court of Bermuda, which has since 2006 included a specialist Commercial Court division. The Supreme Court is bound by decisions of the Court of Appeal of Bermuda, which in turn is bound by decisions of Bermuda’s highest appellate court, the Judicial Committee of the Privy Council, which sits in London, England.

* Kiernan Bell is a partner at Appleby.

While the Bermuda courts are not hierarchically subordinate to the English House of Lords or other English courts, the Bermuda courts will generally accept the decisions of the House of Lords on common law matters as binding. In addition, Bermuda courts are referred to and rely upon decisions from other Commonwealth jurisdictions such as Hong Kong and Australia.

II THE YEAR IN REVIEW

*i Phoenix Global Fund Ltd v. Citigroup Fund Services (Bermuda) Ltd*¹

The Supreme Court considered a case brought by two private hedge funds against their custodian and fund administrators, alleging that the service providers were liable for the large losses made by the funds. The allegation was that the service providers had failed to stop the funds from making investments in breach of the liquidity and quality restrictions contained in the prospectuses. The funds sought to impose liability on the service providers on the theory that the Bermuda Monetary Authority (Collective Investment Scheme Classification) Regulations 1998 impose a statutory duty upon the administrators to manage the funds in accordance with the terms of each of the prospectuses that had been incorporated by reference into the by-laws of each of the funds. The court rejected this interpretation of the regulations.

In addition, the court affirmed the principle that contractual and tortious liability must be analysed in the context of the contractual duties assumed and refused to imply additional duties that would conflict with the terms that the parties had actually agreed. Furthermore, the court held that the funds could not rely upon their own breaches of the prospectuses, which triggered the principle *ex turpi causa non oritur actio*. Further findings on the scope of indemnification provisions and definition of an ‘officer’ under the Bermuda Companies Act are also of interest.

*ii Guardian Limited v. Bermuda Trust Company Limited*²

In this Bermuda trusts case, the court considered the appropriate practice as to the publication of judgments in chambers’ applications and privacy in trust cases in general. The substance of the case was an application by the protector to construe the trust deed as to whether the widow of the settlor was an ‘excluded person’ (as defined in the trust deed). The settlor was an excluded person as were ‘the spouses of persons who are excluded persons’. The question was whether the status of the wife as an excluded person continued beyond the settlor’s death. The court held that as a matter of construction ‘excluded persons’ did not apply to a widow.

Regarding publication of judgments, the court held that the 2006 Practice Direction of the court was consistent with the Bermuda Constitution Order. Where, in a trust case, a ruling was necessary, the public interest was served by publication without

1 *Phoenix Global Fund Ltd. v. Citigroup Fund Services (Bermuda) Ltd* (Bell J) Sup Ct, 4 December 2009.

2 *Guardian Limited v. Bermuda Trust Company Limited* [2009] SC (Bda) 54 Civ (Kawaley J) 1 December 2009.

revealing the identities of the trust and the beneficiaries concerned. The court declined to make an order restraining publication but the judge drafted the ruling in such a way that the identity of the trust and the beneficiaries was not revealed.

*iii Jennings v. Jennings*³

The court reconsidered its approach to letters of request directed to Bermuda trustees from the English Family Court. In so doing, the Bermuda court reversed its December 2005 decision in *Charman v. Charman*, where the court, acting on a Bermuda trustee's application, set aside an order for document production made pursuant to a letter of request from the English Family Court.

iv In the matter of the liquidation of Founding Partners Global Fund Ltd and in the matter of a letter of request of the Grand Court of Cayman (Kawaley J) 29 July 2009

The court extended the principles previously applicable with respect to recognition of foreign office holders of foreign insolvent companies in Bermuda.

*v Validus Holdings Ltd v. IPC Holdings Ltd*⁴

Validus had made a hostile offer for IPC, which was proposing to merge with another Bermuda-based reinsurance company. While the court declined to grant the relief sought by Validus, it was required to consider the novel issues of whether hostile schemes of arrangement were possible and concluded that they were.

III COURT PROCEDURE

i Overview of court procedure

Effective as of 1 January 2006, the Rules of the Supreme Court 1985, which govern the way in which civil litigation is conducted in Bermuda, were changed by the Supreme Court Amendment Rules 2005 ('the Rules'). The Rules now include what is known as the 'overriding objective', which directs that the court must deal with a case 'justly' including so far as is practicable to:

- a* ensure that the parties are on an equal footing;
- b* save expense;
- c* deal with the case in ways that are proportionate to:
 - the amount of money involved;
 - the importance of the case;
 - the complexity of the issues; and
 - the financial position of each party.

The Supreme Court of Bermuda must ensure that the matter is dealt with expeditiously and fairly, and allot to the case an appropriate share of the court's resources. At any time

3 *Jennings v. Jennings* [2009] SC (Bda) 62 Civ (Bell J), 23 December 2009.

4 *Validus Holdings Ltd v. IPC Holdings Ltd* (Ground CJ), 29 May 2009.

the court exercises its powers under the Rules, it must do so in order to give effect to the overriding objective.

Bermuda now has a Commercial Division of the Supreme Court. Commercial cases are allocated to specialist commercial judges, thus ensuring that commercial matters are dealt with by judges with the appropriate expertise and are dealt with expeditiously.

ii Procedures and time frames

The Rules provide for the time frames and procedures for the various types of claims that may be brought.

As a matter of good practice, before commencing a claim, the plaintiff (the claimant) should generally write a letter before action, setting out the basis of the claim and giving the recipient a reasonable period in which to respond.

Proceedings are generally commenced by way of a writ, although there are other types of originating process, for example, an originating summons or petition. This summary sets out the procedure for those claims brought by writ and that are defended.

A plaintiff can initially file either a generally endorsed writ – which simply provides a short summary of the cause of action and must be followed within 14 days by a statement of claim – or can file a specially endorsed writ, which includes the statement of claim. The statement of claim sets out the facts and basis for the claim together with the relief sought.

Fourteen days after service of the statement of claim, the defendant should generally file his or her defence, although this time frame can be extended by agreement of the parties or by direction of the court.

Following service of the defence, the plaintiff then has the right to reply within 14 days to any new matters raised in the defence. In the event that the defendant has also asserted a counterclaim, the plaintiff also has the right to file a defence to the counterclaim.

Thereafter, the parties typically seek directions from the court on matters such as discovery and the timetable for discovery, witness statements and exchange of expert reports. In complex matters, there may be an additional directions hearing before the matter is set down for trial.

Regarding interim and interlocutory remedies, such as injunctive relief and interim preservation of property, if the circumstances require, such applications can be made without notice to the other side, for example, if there is a risk of dissipation of assets or destruction of documents would occur if notice of the application were given.

The applicant for such emergency relief is under a strict obligation to give full and frank disclosure of all material facts to the court and, depending on the nature of the relief sought, may be required to provide an undertaking in damages in the event that the applicant was not entitled to the emergency relief granted.

iii Class actions

The Rules in Order 15, Rules 12 and 13 set out the procedure applicable to representative proceedings. The Rules require that the persons represented (whether as plaintiffs or defendants) should ‘have the same interest in any proceedings’.

Representative actions in Bermuda are relatively rare.

iv Representation in proceedings

There is no requirement that a litigant, other than an infant or person with a disability, have professional legal representation. Order 80 of the Rules governs the procedure when a person is an infant or has a disability, and provides that such a person must not bring or make a claim except by his next friend and may not defend, make a counterclaim or intervene in any proceedings except by his or her guardian *ad litem*.

Litigants (who are not persons with a disability) frequently appear in person before Bermudan courts.

v Service out of jurisdiction

The 2005 amendments to the Rules made changes in respect of those documents capable of being served out of the jurisdiction. While it used to be that only proceedings begun by way of writ could be served out of the jurisdiction, the Rules now allow the court to grant permission to serve out of the jurisdiction any summons, notice or order issued by the court. This naturally provides litigants with more choices when faced with pursuing a person or company located outside Bermuda's jurisdiction.

An application for leave to serve out of the jurisdiction is made to the Supreme Court under Order 11 of the Rules. In making the application, the applicant will first need to satisfy the court that they have a good arguable case in relation to one of the categories of case listed in Order 11, Rule 1 (for example, the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract that was made within the jurisdiction). The case is required to fall within the spirit as well as the letter of Order 11, Rule 1.

Once the court is satisfied that it has jurisdiction to grant leave to serve out, it should also consider whether, in its discretion, it should do so. The court will consider whether there is a serious issue to be tried and whether the facts show that Bermuda is the *forum conveniens*.

vi Enforcement of foreign judgments

There are two possible mechanisms by which a judgment creditor can seek to enforce a foreign judgment in its favour.

The first is by statute, and if the judgment creditor comes from a Commonwealth country, it is likely that the court has the power under the Judgments (Reciprocal Enforcement) Act 1958 to enforce the foreign judgment. The Act applies to judgments of the courts of the UK and certain Commonwealth territories.

In order to qualify for registration under the Act, the foreign judgment must be final and conclusive between the parties, and for a sum payable that is not in respect of taxes or similar nature and not in the nature of a fine or penalty.

A judgment creditor may apply to the court at any time within six years of the date of the judgment. Once registered it can be enforced in the same manner as any judgment issued by the Bermuda court.

A party can apply to set aside a registered judgment if:

- a* the judgment is not a judgment to which the Act applies or that was registered in contravention of the Act;
- b* the foreign court had no jurisdiction in the circumstances of the case;

- c* the judgment debtor did not receive sufficient notice of the proceedings to enable him or her to defend the proceedings and he or she did not appear;
- d* the foreign judgment was obtained fraudulently; or
- e* the rights under the foreign judgment are not vested in the person by whom the application for registration was made.

Judgments from all other jurisdictions (including the United States) may be enforced at common law through what is known as the ‘doctrine of obligations’. This requires the judgment creditor to issue a claim in debt (based on the judgment itself) and then apply for summary judgment. In order to recover in this manner:

- a* the judgment debt will need to be final and conclusive;
- b* the judgment debt will need to be for a debt or definitive sum of money, and is not in the nature of a fine or penalty.
- c* the foreign court will have to have been competent to make the judgment according to Bermuda’s rules of private international law;

vii Assistance to foreign courts

The Rules of the Supreme Court, in particular Orders 69 and 70, make provision for assistance in relation to foreign proceedings.

Order 69 provides for service of process in connection with civil or commercial proceedings pending before a court or other tribunal of a foreign country. Order 70 provides for courts of foreign countries to request the assistance of the Bermuda courts to obtain evidence for the foreign proceedings. The Bermuda courts will, in appropriate cases, grant assistance for the examination of witnesses as evidence for trial and order production of documents. The court will not look favourably upon requests for assistance if it appears to the court that the request is in the nature of pretrial discovery or a fishing expedition.

viii Access to court files

There is limited public access to court files and papers. The fact that an action has been filed is entered in the cause book and is a matter of public record. At the conclusion of the matter the cause book will enter a note as to the judgment delivered.

Records of the pleadings themselves – that is the statement of claim, defence and other documents – are not publicly available.

Judgments and rulings are public unless there are compelling reasons not to make the decisions public in accordance with a 2006 Practice Direction.

ix Litigation funding

While there have not been many recent cases in Bermuda on maintenance and champerty, it is likely that the Bermuda Courts will consider and apply the recent common law developments in England and Wales where the restrictions against third-party funding of litigation have become more permissive.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The Barristers' Code of Professional Conduct 1981 governs conflict of interest. A barrister or firm of barristers must neither advise nor represent both sides to a dispute.

Regarding non-contentious matters, a barrister or the firm should not act or continue to act in a matter when there is or there is likely to be a conflict of interest unless there has been adequate disclosure to both clients and the clients have consented to the firm continuing to act. In doing so, the firm is likely to need to create an information barrier, or 'Chinese wall' by implementing internal arrangements and procedures to prevent confidential information belonging to one client being accessed by the legal team acting for a different client.

In the event that a law firm in Bermuda decides, with appropriate client consent, to act notwithstanding a potential conflict of interest between the clients, the firm will need to implement such measures and procedures. Such measures may include identifying all members of the firm able to advise on a particular matter or for a particular client, segregating and protecting confidential information and files and providing for limited and secure access to documents. In the event that the firm cannot take internal measures that can effectively protect the confidential information, even with the client consents, the firm should not act.

ii Money laundering, proceeds of crime and funds related to terrorism

The statutory framework in Bermuda to address money laundering has been in place since 1940 with the Defence (Finance) Regulations 1940, which requires persons to provide information on those benefiting from such activities. Bermuda has had subsequent enhancements to its money-laundering legislation, beginning with the Exchange Control Act Regulations 1973 and an Anti-Money Laundering Code of Conduct issued by the Bermuda Regulator (the Bermuda Monetary Authority) in 1991.

The primary statutory framework governing money laundering, terrorist financing and proliferation financing is now found in the Proceeds of Crime Act 1997 (as amended), the Proceeds of Crime (Supervision and Enforcement) Act 2008, the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, the Anti-Terrorism (Financial and Other Measures) Act 2004 (as amended), and the guidance on these matters issued by the Bermuda Monetary Authority.

The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (the Regulations) have not yet been made effective for 'independent professionals', which includes law firms, though this is expected to occur in the first half of 2010. This is purely with reference to the money-laundering regulatory and supervisory structure with respect to the provision of certain professional legal and accounting services.

While strengthening Bermuda's anti-money laundering and anti-terrorist financing (AML/ATF) regime, the Bermuda authorities have also increased the responsibilities expected of AML/ATF-regulated financial institutions, to detect and prevent money-laundering and terrorist-financing operations using a risk-based approach (with the exception of any Directions/Orders issued by the Minister to combat proliferation financing of nuclear weapons). It is, however, a matter for each institution to make its

own assessment of its obligations in line with the AML/ATF regime. This results in the regulated sector meeting certain criteria with respect to, among other things: (1) customer due diligence, (2) enhanced due diligence, (3) reliance on third parties, (4) the time period for which records must be held, (5) training of staff, (6) policies and procedures being in place, (7) having systems to undertake ongoing monitoring of customers and (8) the reporting of suspicious activities to the Financial Intelligence Agency (FIA).

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The Bermuda courts will generally follow and apply English common law on privilege and recognise the categories of privilege that may be claimed by a party as regards classes of documents and communications that do not have to be disclosed to third parties. These are as follows:

- a* Legal advice privilege: this covers communications between a lawyer and client made for the dominant purpose of receiving or giving legal advice. This can apply to communications with in-house legal advisers, though it needs to be clear that the communication or document was for the purposes of legal advice as opposed to the general business affairs of the company.
- b* Litigation privilege: this is wider than legal advice privilege and applies to certain communications and documents created when litigation is contemplated or pending. Attorney client communications are clearly covered if for the purpose of legal advice. In addition communications between a non-professional agent or third party (such documents are privileged if they came into existence for the dominant purpose of obtaining legal advice in existing or anticipated proceedings), as are communications between attorney and non-professional agent or third party.

Generally communications that come into existence after litigation is contemplated or commenced and are created with a view to such litigation, either for the purpose of obtaining or giving advice in regards to the same (or of obtaining or collecting evidence to be used in it), or obtaining information that may lead to the obtaining of such evidence, are privileged.

Further, documents obtained by an attorney with a view to enabling him or her to prosecute or defend a claim, or give advice with reference to existing or contemplated litigation, are also privileged, as are documents that come into existence as materials under the attorney's instructions.

In addition, Bermuda courts recognise that in certain circumstances, two or more persons can be entitled to assert joint or common interest privilege.

Joint interest privilege arises where there is either a joint retainer or joint interest in the subject matter of a privileged document. Similarly, common interest privilege arises when a third party shares a common interest in the subject matter of the privileged document. It can only exist where two or more parties hold the same interest and enables disclosure of the document to that party without waiver or loss of privilege.

The Bermuda courts will also recognise and enforce the privilege attached to without prejudice communications – namely, communications made between parties to

a dispute in an effort to settle a dispute or claim. Such communications are protected from disclosure.

ii Production of documents

Order 24 of the Rules requires that parties to civil litigation give discovery of all relevant documents that are or have been in their possession, custody or control. This means that parties must disclose every document that could help or adversely affect either their own case or that of the other side.

The category of what constitutes a ‘document’ is quite wide and is not restricted to paper writings, but extends to anything upon which evidence or information is recorded. Tape recordings, computer databases, emails, text messages and voicemails are all considered ‘documents’ for the purposes of discovery.

Privileged documents do not have to be produced, although they must be disclosed as existing and relating to the matters in question in the action.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The two primary forms of alternative dispute resolution in Bermuda are arbitration and mediation.

ii Arbitration

The Arbitration Act 1986 governs domestic arbitration proceedings and non-commercial international arbitration proceedings. The Bermuda International Conciliation and Arbitration Act 1993 governs international commercial arbitration and enforcement of foreign arbitral awards. The 1993 Act enacts the UNCITRAL Model Law on International Commercial Arbitration.

The courts regularly enforce arbitration agreements. Repudiation, frustration or rescission of a contract will not prevent the enforcement of an arbitration agreement, as the arbitration agreement itself would survive. Accordingly, the Bermuda court would recognise the jurisdiction of the arbitral tribunal to determine for itself whether the contract relating to the underlying dispute had been repudiated, rescinded or frustrated. The arbitration agreement itself can be repudiated if both parties litigate the dispute before the courts and take no steps to stay the proceedings,

Arbitrations may be institutional or *ad hoc* arbitrations and there is a Bermuda Branch of the Chartered Institute of Arbitrators.

Arbitration awards are enforceable by the courts as if they were judgments or orders of the court. The Bermuda Courts will also enforce foreign arbitral awards. Bermuda is a party to the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (‘the New York Convention’). Awards made in a country that is a signatory to the New York Convention are recognised as binding in Bermuda and may, with the court’s permission, be enforced in Bermuda.

iii Mediation

Mediation is a voluntary and non-binding process by which parties try and settle their disputes. Mediations have been increasing in frequency in Bermuda and the parties to mediation are entirely free to agree the process. Mediations are ‘without prejudice’ and the parties will not be in a position to use material provided in the course of a mediation in litigation or arbitration should the mediation effort fail.

iv Other forms of alternative dispute resolution

Parties are always free to agree to other forms of consensual dispute resolution such as neutral evaluations or binding determination by a neutral expert.

VII OUTLOOK AND CONCLUSIONS

Bermuda over the past four years has become known for having a strong dispute resolution framework. Bermuda enjoys a strong judiciary, an experienced commercial court and a procedural framework, which encourages cost-effective and fair resolution of civil disputes.

KIERNAN BELL

Appleby

Kiernan Bell is a partner in the litigation and insolvency practice group, local leader of the fund disputes team and a member of the commercial dispute resolution team at Appleby in Bermuda. Ms Bell specialises in complex commercial disputes, and has practice experience in shareholder disputes, derivative actions, professional negligence, M&A, contentious insolvency, insurance and reinsurance disputes.

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Chapter 7

BRITISH VIRGIN ISLANDS

*Eliot Simpson**

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The British Virgin Islands ('BVI') are located approximately 60 miles due east of Puerto Rico at the north-eastern corner of the Caribbean Sea. They have a population of around 24,000, most on Tortola, the largest island at 12 miles long by three miles wide; nevertheless, the territory has achieved the status as a leading financial centre. Well over 800,000 companies have been incorporated within its shores, including a significant number of mutual funds and hedge funds and captive insurance and trust companies. It is the world's second largest jurisdiction for the incorporation of hedge funds.

The BVI (or technically, the Virgin Islands) remain a British overseas territory, with the British government retaining responsibility for its foreign policy and defence. Executive authority invested in the Queen is exercised on her behalf by the Governor, currently His Excellency, Mr David Pearey. Otherwise, it is a largely self-governing jurisdiction, with its own Constitution (adopted in 2007 by the Virgin Islands Constitution Order) and parliament.

The court system in the BVI consists of a Magistrates Court, a High Court and a Court of Appeal, with the final court with appellate jurisdiction being the Privy Council in London. The Superior Court of Record for the BVI is the Eastern Caribbean Supreme Court ('ECSC'), which also serves as the Superior Court of Record for two other British overseas territories (Anguilla and Montserrat) and six independent Member States of the Organisation of Eastern Caribbean States (Antigua and Barbuda, the Commonwealth of Dominica, Grenada, St Christopher and Nevis, Saint Lucia, and St Vincent and the Grenadines) ('OECS').

The ECSC consists of three divisions: the Court of Appeal, the High Court of Justice and the Commercial Court. The Court of Appeal is an itinerant court whose sittings rotate between the nine members of the OECS. The BVI also has a Magistrates

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Court, from which appeals lie direct to the Court of Appeal. The Magistrates Court has both a criminal and a petty civil jurisdiction.

In what is widely seen as an important development, not just for the BVI but for the wider Eastern Caribbean region, the Commercial Division of the High Court opened in BVI in 2009. The court's first judge, Edward Bannister QC (an experienced English silk) began sitting in temporary premises in April 2009. In October 2009, the new and modern Commercial Court building opened for business.

II THE YEAR IN REVIEW

The Commercial Court, specifically Mr Justice Bannister, began sitting in April 2009. In one of his first written judgments, Bannister J addressed the question whether the failure by a company to apply to set aside a statutory demand within the strict 14-day time limit set out in the Insolvency Act 2003 meant that the company could not later assert that the debt was disputed or, in effect, oppose a winding-up application. This appeared to be the effect of a 2006 decision of Hariprashad-Charles J in *Metalloyd Ltd v. Burnwill Resources Ltd*¹. In *Fogerty v. Island Point Properties SA*² Bannister J held that Hariprashad-Charles J cannot have meant that the Act overrode the court's inherent jurisdiction to see that its processes are not abused and, moreover, that 'statutory demand' in Section 8(1)(a) of the Act must mean a valid statutory demand.

Much of the commercial litigation active in 2009 has dealt with hedge funds and other types of mutual funds. During the summer, two of the largest investors in Madoff Securities, Kingate Global Fund and Fairfield Sentry, went into liquidation. Early in 2010, Bannister J appointed liquidators to Reserve International Fund, which suffered losses in late 2008 following the collapse of Lehman Brothers.

On 18 September 2009, Bannister J gave a judgment in *Citco Global Custody NV v. Y2K Finance Inc*³. The judgment was given on an application to strike out a member's application for the appointment of liquidators. The claimant was a shareholder in a mutual fund that had made substantial redemptions, which the claimant considered prejudicial to its interests. Bannister J decided first that the proceeding was not an abuse of process, notwithstanding the existence of an earlier proceeding by which the claimant sought relief for unfair prejudice. That earlier proceeding had been struck out, but after the liquidation proceeding had been commenced. On the question whether the application was bound to fail, Bannister J made a number of findings, principally (1) that there was a reasonable prospect of success on the just and equitable ground (particularly loss of substratum) based on statements by the company that its life had come to an end and it had no reasonable expectation of meeting its objects as a mutual fund, and that it would distribute its remaining assets to its members; and (2) that assertions that the company might have claims against its directors that needed to be investigated was not a basis for a winding-up order.

1 BVIHCV 2006/0083.

2 BVIHCV 2008/0258.

3 BVIHCV 2009/0020A.

In a subsequent judgment dated 25 November 2009, Bannister J declined to make a winding-up order against Y2K Finance Inc. Although satisfied that the company's substratum had gone, the judge concluded that the company should be allowed to wind down its own affairs and proceed to a voluntary liquidation. He was also influenced by the weight of shareholder opposition to the application. In a judgment dated 19 October 2009, the Court of Appeal allowed an appeal of the order of Hariprashad-Charles J striking out the unfair prejudice action.

On 28 September 2009, the Court of Appeal gave judgment in *Alfa Telecom Turkey Limited v. TeliaSonera Finland OYJ*.⁴ The case is related to the ongoing disputes in relation to Turkcell Holdings AS, part of a group that operates the largest mobile telecoms business in Turkey. In the instant proceedings, Telia claimed that Alfa Telecom was threatening to induce Cukurova Telecoms Holdings Limited to breach a shareholders' agreement between Cukurova and Telia and sought injunctive relief. The Court of Appeal reversed the grant of an injunction by the High Court. In a wide-ranging judgment, the Court of Appeal considered a number of issues relevant to injunctions generally, including the offer of undertakings and delay. The court also reviewed whether the tort of inducing a breach of contract could be established on the facts. In an earlier judgment in May 2009 in the related BVI action, *Cukurova Finance International Limited v. Alfa Telecom Turkey Limited*, the Privy Council considered issues of English law of appropriation in relation to the enforcement of a charge over shares.

On 30 December 2008, Joseph-Olivetti J discharged *ex parte* receivership and freezing injunctions in the well-publicised *Danone*⁵ litigation, principally on the grounds that the case had not been presented fairly by leading counsel for the claimants at the *ex-parte* stage. The judgment of Joseph-Olivetti J is under appeal. On 28 September 2009, the Court of Appeal gave a judgment dealing with the question whether leave to appeal was required. This required the court to construe Section 30(4)(ii) of the Eastern Caribbean Supreme Court (Virgin Islands) Act. It confirmed that an appeal from an order in respect of injunctive relief or a receivership order whether by way of grant, refusal, regrant, continuance or discharge does not require leave.

Many of these cases are ongoing and further interesting judgments will no doubt follow.

III COURT PROCEDURE

Overview of court procedure

The rules of the Eastern Caribbean Supreme Court ('ECSC CPR') are largely modelled upon the English Civil Procedure Rules ('CPR'). There are, however, differences and some areas covered in the English CPR do not appear in the ECSC CPR. There is no detailed commentary published on the Rules.

4 HCVAP 2008/012.

5 BVIHCV2007/0262.

In 2009, a new Rule, 79A, was added to the ECSC CPR in relation to the new Commercial Court. The Commercial Court has also issued a practice direction dealing with procedure in that court.

Also of considerable importance in BVI are the Insolvency Rules 2005. These set out detailed provisions on procedure and practice in insolvency matters. The ECSC CPR applies in insolvency matters only to the extent that there is nothing inconsistent in the Insolvency Act 2003 or the Insolvency Rules, or a relevant practice direction.

Procedures and time frames

Cases may be commenced by claim form, fixed-date claim form or originating application.

A fixed-date claim form is used for matters that would formerly have been the subject of an originating summons or motion, and generally these are matters that will be decided on affidavit evidence without pleadings. These cases would typically take a few months to be dealt with.

Applications under the Insolvency Act where there is not an existing court proceeding, such as applications for the appointment of liquidators, will be made by originating application. These matters will typically take around two to three months to be dealt with.

Other cases where full pleadings are required will generally be commenced by claim form. These cases might be expected to take longer (such as one to two years) to reach trial.

Class actions

There are no class actions in BVI.

The ECSC CPR contains provision on representative proceedings. Where five or more persons have the same or a similar interest, these provisions allow the court to appoint a representative body or one or more of those persons to represent all or some of the persons with the same or similar interest. These provisions are not widely used.

Representation in proceedings

A natural person may appear in court on their own behalf.

A body corporate can be represented by a duly authorised director or other officer, but it must be represented in 'open court' by a legal practitioner unless the court permits it to be represented by a director or officer.

Service out of jurisdiction

ECSC CPR Part 7 deals with service of court process out of the jurisdiction.

Rule 7.3 sets out the circumstances in which the court may permit a claim form to be served out of the jurisdiction.

The rules of the BVI High Court are broadly modelled on the English CPR. Leave may be given by the court to serve proceedings out of jurisdiction in appropriate cases. This could include cases where the defendant is a necessary and proper party to a claim that has been or will be served on another defendant, where a claim is founded on a contract with a BVI connection, cases where a tort was committed within the jurisdiction and cases relating to property within the jurisdiction.

The BVI court will apply English principles of *forum non conveniens*. Where jurisdiction to entertain a dispute is established, the court thus retains a residual discretion to determine whether or not BVI is the forum most appropriate for the resolution of the dispute.

Enforcement of foreign judgments

Foreign judgments may only be enforced in the BVI at common law or in one of the limited instances provided for by Statute.

The statutory machinery is to be found in:

- a* The Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964; and
- b* The Reciprocal Enforcement of Judgments Act (Cap 65) 1922.

i The Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964

The Governor in Council may nominate the High Courts of jurisdictions in which he is satisfied that ‘substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the High Court’. To those jurisdictions, the intention was that an application for registration of the foreign judgment might be made under Section 4. Certain jurisdictions have purportedly been designated, but it is widely thought that the designation exercise was not carried out effectively.

ii The Reciprocal Enforcement of Judgments Act (Cap 65) 1922

The Reciprocal Enforcement of Judgments Act applies only to judgments given in the High Court of England and Wales, Northern Ireland and the Court of Session in Scotland. It also been extended to additional jurisdictions.

The judgment must be final and conclusive for a specified sum of money. Section 3(2) of the Act excludes judgments from the system of registration where they were obtained by fraud (Section 3(2)(d)), an appeal is pending or the time for appealing has not expired (Section 3(2)(e)) or it would be contrary to public policy to enforce the award. The BVI court would generally look to English decisions as to the types of conduct that may affront public policy; as a matter of policy, the courts of this jurisdiction will not enforce, directly or indirectly, foreign tax claims.

Section 3(2)(a) of the Act excludes judgments obtained from the system of registration judgments obtained where the original court lacked jurisdiction, or where:

- a* in the case of a judgment debtor present within the jurisdiction, he or she was not served with the proceedings (Section 3(2)(c)); and
- b* in the case of a judgment debtor not ordinarily resident or carrying on business within the jurisdiction of the home court, he or she did not submit to the jurisdiction of the court.

An application must be made under Part 72 of the ECSC CPR. The application is made without notice, but supported by evidence. The application must contain certain prescribed information and have exhibited to it:

- a* a duly authenticated copy of the judgment; and
- b* details of the interest that has become due under the law of the country in which judgment has been entered.

The simplicity of the without-notice application is to be contrasted with the common law route, which is to sue on the judgment itself.

iii Enforcement at common law

At common law, the courts in the BVI will treat any final and conclusive monetary judgment as being a cause of action in itself under the doctrine of obligation by action, irrespective of the jurisdiction in which the judgment was obtained. There is no requirement of reciprocity.

The judgment creditor must:

- a* prove the judgment; and
- b* show that it is a final and conclusive monetary judgment for a specified sum.

If these matters are established, a retrial of the issues in the action will not be necessary. The creditor may instead apply for summary judgment under Part 15 of the ECSC CPR.

However, since the judgment creditor is proceeding by way of a fresh action, he or she will only be able to proceed in the BVI if he or she is able to serve the proceedings upon the judgment debtor by means permitted by Parts 5 and 7 of the ECSC CPR.

The mere existence of assets within the territory is not, in itself, sufficient to found jurisdiction in the BVI courts. The need to serve proceedings can therefore give rise to difficulty where the debtor has assets within the territory, but is not himself or herself resident within it. The ECSC CPR contain no power in those circumstances to serve out of the jurisdiction – a position that contrasts curiously with the procedural rules in force in England.

It will still be possible to defeat an application for summary judgment, or indeed an action founded upon a foreign judgment, even one which is conclusive and made in respect of a specific sum, if:

- a* the foreign court did not have jurisdiction in the matter, meaning that the judgment debtor either submitted to the jurisdiction or was resident or carrying on business within the jurisdiction and was duly served with the process;
- b* the foreign judgment includes penalties, taxes, fines or similar fiscal or revenue obligations;
- c* the judgment was obtained by fraud;
- d* recognition or enforcement of the judgment in the BVI would not be contrary to public policy; and
- e* the foreign proceedings were conducted in a manner which infringes the rules of natural justice.

In practice, BVI sees very little activity in relation to the cross-border enforcement of foreign judgments, unless it is through the invocation of the insolvency jurisdictions to be found within the BVI Insolvency Act 2003. This is not surprising: it is a jurisdiction with only 24,000 people but with over 800,000 business companies. Those wishing to enforce judgments will therefore typically be concerned with a corporate debtor – typically one with little connection to the jurisdiction – and whose assets may well be found elsewhere.

Assistance to foreign courts

The Hague Evidence Convention has not formally been extended to BVI by Order in Council. However, BVI has implemented the Convention by the Evidence (Proceedings in Foreign Jurisdictions) Ordinance 1988. The BVI High Court will therefore provide assistance in response to a letter of request issued by a court in another jurisdiction. This might involve obtaining documents in BVI or obtaining depositions.

Part XIX of the Insolvency Act 2003 provides for orders that may be made in aid of foreign insolvency proceedings. This may assist a foreign office holder to restrain BVI proceedings, to obtain information or to obtain property.

Access to court files

A member of the public may obtain copies of a claim form, notice of appeal and any judgments and orders from the court file.

Litigation funding

The position in BVI on third parties' funding litigation mirrors English common law. BVI does not have any statutory provisions on conditional fee arrangements.

Third-party funding arrangements, with independent parties funding litigation, is not common in BVI.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Issues of conflicts of interest and Chinese walls are generally governed by English common law.

The OECS Bar Association publishes a Code of Ethics that is observed in BVI. This includes provision that an attorney-at-law may represent multiple clients only if he can adequately represent the interests of each and if each consents to such representation after full disclosure of the possible effects of multiple representation. In all situations where a possible conflict of interest arises, an attorney-at-law must avoid all risk of conflict by leaning against multiple representation. In addition, except with the specific approval of his client given after full disclosure, an attorney-at-law must not act in any manner in which his professional duties and personal interests conflict or are likely to conflict. An attorney-at-law must not accept or continue his or her retainer or employment on behalf of two or more clients if their interests are likely to conflict or if his or her independent professional judgement is likely to be impaired.

ii Money laundering, proceeds of crime and funds related to terrorism

Lawyers conducting certain types of business are considered to be professionals conducting relevant business under BVI's Anti-Money Laundering and Terrorist Finance Code of Practice 2008. Such business includes real estate transactions, managing client funds, and the creation, operation or management of legal persons or arrangements, or buying and selling of business entities. Lawyers engaged in those areas of business are

required to obtain full 'KYC' information⁶ on their clients and to report any suspicious activity or transaction (failure to do so being a criminal offence).

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

Privilege

English common law is applied to the issue of privilege. Privilege attaches principally to those documents that have been prepared for the purpose of seeking or providing legal advice, and those documents prepared in contemplation of litigation.

Production of documents

BVI does not have any recognised form of application for pre-action disclosure. There is nothing within the local Civil Procedure Rules that regulates such applications.

It is possible that an argument could be made that BVI law does (or should) possess a jurisdiction to order pre-action disclosure. Section 11 of the West Indies Associated States Supreme Court (Virgin Islands) Act, provides that the jurisdiction vested in the High Court in civil proceedings and in probate, divorce and matrimonial causes, shall be exercised in accordance with the provisions of the Ordinance and any other law in operation in the territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.

The English High Court of Justice does recognise a jurisdiction to make orders for pre-action disclosure. That derives from the Supreme Court Act 1981. There is some debate as to whether Section 11 is apt to confer a jurisdiction to grant pre-action disclosure. Probably there is no such thing as pre-action disclosure under BVI law.

i Disclosure

Part 28 of the ECSC CPR contains provision on disclosure and inspection broadly modelled on the English CPR. However, in BVI the test for production is whether a document is directly relevant to the issues (rather than simply relevant).

ii Norwich Pharmacal Relief

The English *Norwich Pharmacal* line of cases has been applied in the BVI and there is really nothing between English and BVI law in that regard.

Morgan & Morgan is the leading BVI appellate decision relevant to the grant of Norwich Pharmacal relief. Following a period when such orders were perhaps more freely granted, *Morgan & Morgan* has served to emphasise the importance of paying careful attention to whether or not the disclosure respondent, and the disclosure sought and its purpose, fall within conventionally accepted *Norwich Pharmacal* principles. As a rule, an application can succeed but only if it is shown:

6 'Know your customer' information.

- a* that a wrong has been carried out by the wrongdoer, or at least arguably carried out;
- b* that the claimant intends to assert his legal rights against the wrongdoer;
- c* that there is a need for the order to enable the action to be brought against the wrongdoer, usually to identify the wrongdoer; to put it another way, that it is necessary to assist the claimant in achieving justice, and that there is no other practical source of information, and that it is just and convenient to make the order sought; and
- d* that the respondent was mixed up, or facilitated the wrongdoing (if only innocently) or had some relationship with the wrongdoer and is able to provide the information necessary.

iii Norwich Pharmacal in support of foreign proceedings

There is some authority that the BVI court will not grant disclosure (through the use of *Norwich Pharmacal* principles) in aid of foreign proceedings: in *Pacific International Sport Clubs Limited v. Comerco Commercial Limited*⁷ Olivetti J held:

Without deciding the point, as it does not fall for determination, I also understand that the law governing Norwich Pharmacal orders is such that it does not permit an order to be made requiring anyone to disclose information for use in foreign proceedings (a different regime covers this) but in aid of suit in this jurisdiction.

The different regime to which Olivetti J refers is, of course, the potential for a letter of request under the Hague Convention.

BVI does not have an equivalent of Section 25 of the Civil Jurisdiction and Judgments Act 1982. However, in practice the court has made orders even where no BVI proceedings are commenced and it is quite possible that in appropriate cases the court will take a broad view of its jurisdiction.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Commercial disputes that are pursued in BVI are generally dealt with in the Commercial Division of the High Court rather than by alternative means. If a dispute is subject to an arbitration agreement, or the parties are minded to mediate, these processes will typically take place elsewhere. Nevertheless, most commercial litigators in BVI have experience in other jurisdictions and are familiar with arbitration and mediation and can consider these options where appropriate. In practice, issues that arise in relation to arbitration tend to be either questions of enforcement or of ancillary orders.

⁷ BVIHCV 70 of 2005.

ii *Arbitration*

Arbitration in BVI is governed by the Arbitration Ordinance 1976, which contains provisions relevant both to domestic and foreign arbitrations and in relation to the enforcement of arbitral awards.

The Arbitration Ordinance gives the High Court jurisdiction to grant ancillary relief in connection with an arbitration, although it remains a moot point whether this can be used in relation to a foreign arbitration.

The BVI is a dependent territory of the United Kingdom which is a party to the New York Convention. The BVI Parliament has given effect to the Convention by enacting Part IX of the Arbitration Ordinance (Cap 6), 1976. In what the Court of Appeal have held to be a clear signal of the legislatures intent (*IPOC International v. LV Finance Group Limited* (2007)), the text of the New York Convention is to be found within a schedule to the Ordinance.

A 'convention award' is defined as meaning an award made in pursuance of an arbitration agreement in the territory of a state other than the territory or the United Kingdom that is a party to the New York Convention.

The Ordinance provides that any such award can be enforced:

- a by action; or
- b with leave of the judge of the High Court, in the same manner as a judgment or order of the High Court; where leave is given, judgment may be entered in the terms of the award.

These provisions spawned litigation in the IPOC case where the award included declaratory relief. The court rejected the submission that the common law operated to prevent the enforcement of purely declaratory relief. In rejecting that submission, the Court of Appeal noted that Section 36(1) provides that the '[e]nforcement of a Convention Award shall not be refused except in the cases mentioned in this section'. IPOC also put to bed the question of whether or not partial arbitral awards could be enforced.

The only grounds upon which enforcement may be refused are where:

- a that a party to the award, under the law applicable to him, was under some incapacity;
- b that the agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the law was made;
- c that a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- d the award goes beyond the scope of the issues beyond the scope of the submission to arbitration;
- e that the composition of the arbitral authority or procedure was not in accordance with the agreement of the parties or, failing agreement, with the law of the country where it took place;
- f that the award has not yet become binding or has been set aside;

In addition, similar jurisdiction and public policy exceptions appear at Section 36(3): ‘enforcement of a convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or it would be contrary to public policy to enforce the award’.

The procedural mechanism for enforcement is to be found within the ECSC CPR 43.10, which provides that the application may be made without notice to the court but supported by an affidavit that exhibits the award, gives an address for service for the debtor and, where the award is for the payment of money, a certificate as to the sum due.

In January 2010, Bannister J gave judgment in *Grand Pacific Holdings Limited v. Pacific China Holdings Limited*.⁸ In this judgment he considered whether a debt based on an arbitral award could be disputed for the purpose of an application to set aside a statutory demand. He found that a dispute as to the enforceability of an award amounted to, or was analogous to, a dispute about the status of the party as a creditor and therefore if the dispute was substantial the court should not appoint liquidators.

iii Mediation

By Rule 27.7 of the ECSC CPR the court may adjourn a case management conference to enable settlement discussions or a form of ADR procedure to continue.

VII OUTLOOK AND CONCLUSIONS

The past 12 months have seen a marked increase in litigation, particularly insolvency proceedings, in relation to investment funds. We can expect this to continue. The litigation in relation to Y2K Finance Inc. is yet to run its course and further judgments can be expected. The court will also continue to be busy dealing with the liquidations of the BVI-registered Madoff feeder funds. The appointment of liquidators to the Reserve International Fund has been appealed to the Court of Appeal.

A number of recent judgments in this area have looked at the position of investors who have filed redemption requests. When do they become creditors and what is their status when they seek the appointment of liquidators? At what point can it be said that an investment fund that has suspended redemptions has lost its ‘substratum’ such that it may be wound up on just and equitable grounds? Bannister J has given a number of helpful judgments in this area and more can be expected from him in the coming months, and from the Court of Appeal.

8 BVIHCV2009/389.

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Mr Simpson graduated in law from Clare College, Cambridge in 1989, and completed his Law Society finals at the College of Law in London in 1990. He trained and qualified with Clifford Chance in London and was admitted as a solicitor in England and Wales in 1992 (now non-practising). He is also admitted as an attorney in the Cayman Islands, as an advocate of the Royal Court of Jersey and as a solicitor advocate in the British Virgin Islands.

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Chapter 9

CAYMAN ISLANDS

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I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Litigation remains the principal method for resolving disputes in the Cayman Islands. This is partly because of the accommodating approach shown by the Cayman Islands courts to parties that require confidentiality or flexible timetables (two factors that usually attract parties to arbitration).

As the general awareness and appreciation of alternative dispute resolution ('ADR') mechanisms continues to grow, however, there has been a significant rise in local arbitrations, principally for insurance and construction disputes. The Arbitration Law was revised and updated in 2001 and there are proposals to reform it substantially. There has also been an increasing use of mediation in the Cayman Islands.

The procedural rules of court are subject to an overriding objective to deal with every matter in a just, expeditious and economical way. The Grand Court of the Cayman Islands ('the Grand Court') has the power to give directions to achieve this objective, including directions that facilitate ADR, and has shown an increasing willingness to use this power.

The legal system of the Cayman Islands is based upon English Common Law, complemented by locally enacted statutes, Orders-in-Council, and domestic case law.

i Legislature

The Cayman Islands is a British overseas territory and as such the United Kingdom retains the right to extend certain provisions of UK Parliamentary Acts to the Islands by way of an express provision in the Act itself or by Order in Council. While the UK has power to legislate over certain affairs of the Cayman Islands, local principal statutes are approved by the Legislative Assembly of the Cayman Islands and assented to by the

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Governor, the representative of the Sovereign. A Cayman Islands constitution came into force on 6 November 2009 reflecting and further defining the increased scope of local legislative authority and introducing a Bill of Rights.¹

ii The court system

Significant commercial litigation takes place in the Grand Court. The Grand Court judiciary consists of the Chief Justice and four other full-time judges (supplemented from time to time by acting judges brought in from overseas or drawn from the ranks of senior Cayman Islands practitioners) who exercise the same jurisdiction as that of the English High Court and Divisional Courts. The Grand Court judges have considerable experience of disputes involving complex offshore structures, particularly in the context of hedge fund and commercial trust litigation.

Civil actions brought before the Grand Court in the Cayman Islands are governed by the Grand Court Rules (1995 Revision) ('the Rules'). The Rules lay down procedural requirements which have to be complied with at each stage of litigation. Save for some exceptions, the Rules closely follow the English Rules of the Supreme Court as they stood before the coming into force of the Civil Procedure Rules. There are limited but significant differences between the Rules and the previous English regime.

Appeals from the Grand Court to the Cayman Islands Court of Appeal are governed by rules set out in the Court of Appeal Law² and the Court of Appeal Rules.³ The Cayman Islands Court of Appeal is widely regarded as one of the strongest appellate courts in the Caribbean and the offshore world.

In 2009, the Court of Appeal (Amendment) Rules introduced summary determination, in appropriate cases, of the question whether an appeal is one for which leave is required. Objections to the hearing of appeals for which leave has not been sought and applications for leave to appeal are, in the ordinary course, placed at first instance before a single judge of the Court of Appeal. A party dissatisfied with the upholding of an objection or the application for leave to appeal by a single judge has the unfettered right to renew the objection or application for leave to appeal to the full court.

In certain circumstances an appeal of a decision from the Cayman Islands Court of Appeal can be made to Her Majesty's Judicial Committee of the Privy Council. The process is governed by the Cayman Islands (Appeals to Privy Council) Order 1984, a UK statutory instrument that came into operation on 1 September 1984. The procedures governing appeals to the Privy Council are in the process of a review, although the changes are anticipated to be largely technical and procedural.

Decisions of the Grand Court, the Court of Appeal and the Privy Council on appeals from the Cayman Islands are reported in the jurisdiction's own series of law reports, the *Cayman Islands Law Reports*, cited as CILR, which are published by Law Reports International.

1 The Bill of Rights will come into force on 6 November 2012.

2 2006 Revision.

3 2004 Revision.

Since 2006, a right of petition to the European Court of Human Rights following the exhaustion of traditional domestic legal remedies has existed. In 2009, the first case from Cayman using this procedure was heard and ruled admissible by the European Court of Human Rights.

II THE YEAR IN REVIEW

An outline of recent notable court decisions in the Cayman Islands (and on appeal to the Privy Council from Cayman appellate cases) is set out below.

*i Phoenix Meridian Equity Limited v. Lyxor Asset Management SA*⁴

In this case, an important issue of Cayman Islands civil procedure arose in relation to a cross-jurisdictional matter. The question was whether the Cayman court should restrain US-resident potential witnesses in a Cayman action from giving US court-ordered depositions in the US, where Cayman was clearly the only appropriate forum for the action's ultimate trial. At first instance, Lyxor was refused an application for an anti-suit injunction restraining Phoenix from continuing its proceedings in the US, in which US residents affiliated with SG Americas Securities LLC would be compelled under Section 1782 of Title 28 of the US Civil Procedure Code to give depositions. On appeal, the Court of Appeal held that the depositions by the US-based witnesses would be allowed on the condition that the transcripts of the New York depositions could not be used in the Cayman proceedings except with the leave of and on the conditions imposed by the Cayman court. In the same matter, Lyxor was subsequently refused an application for discovery by oral examination. It was held that Grand Court Order 24, Rule 16 is an exceptional procedure and that oral discovery was unnecessary and would not save costs.

*ii In the matter of Strategic Turnaround Master Partnership Limited*⁵

The Privy Council has recently granted leave to appeal the much-publicised case of *Strategic Turnaround*. The Court of Appeal had previously refused leave to appeal to the Privy Council on the basis that the decision appealed from concerned the effect and construction of the confidential explanatory memoranda ('CEM') and articles of association on which the shares were issued. Furthermore, the issue was not of great public or general importance as there was no evidence that the provisions in question were standard among the industry.⁶

To recap on the first-instance ruling:

- a* The Grand Court considered the rights of the investor who was prevented from receiving his full redemption proceeds as a result of the directors' decision to suspend redemptions, in particular his right to present a petition for the winding up of the fund.

4 Unreported, Court of Appeal, 7 July 2009.

5 [2008] CILR 447

6 Unreported, Court of Appeal, 30 March 2009.

- b* This related specifically to the construction of the company's articles of association and the CEM and the powers of suspension of redemption payments therein, and certain issues of law.
- c* The company's application to strike out the winding up petition was dismissed, and it was held to be liable to make the appropriate payment to the respondent at the redemption date of 31 March 2008.
- d* The respondent was a shareholder before 31 March 2008 and became a creditor, in its capacity as shareholder, after that date. The respondent did not have standing to petition on the 'unable to pay its debts' ground, as he had a future debt which was not presently due and payable. The respondent could however petition on the ground of non-payment of the redemption proceeds, and on the 'just and equitable' ground.

The Court of Appeal allowed the appeal in part. The company had the power to suspend the redemption payment prior to the redemption date as provided by the CEM and the articles of association. The payment of the remainder of the proceeds within 30 days of the redemption date, as described in the CEM, was an undertaking subject to circumstances existing to make that possible, as opposed to a guarantee. As to the other grounds of appeal, the appellate court found that Grand Court had been correct in holding the findings of fact set out above. The case now awaits further appeal to the Privy Council.

Despite the controversial *Strategic Turnaround* matter proceeding to a further appeal, it appears that the impact of the case has been rendered nugatory by the combined 2007 and 2009 changes in Cayman Islands Companies Law.⁷ Notwithstanding the lack of a balance sheet test for insolvency in the Cayman Islands and the reliance upon a cashflow test for insolvency,⁸ the introduction in March 2009 of the right of contingent and prospective creditors to wind up a company requires the Grand Court to take into account the future debts and future cashflow. The addition of a right of contingent and prospective creditors to petition the Grand Court on an inability-to-pay-debt basis as opposed to solely on the just and equitable grounds will open the way to winding up petitions by redeeming investors whose redemption requests are subject to suspension. It is likely that articles of association of funds will adapt to provide contractual restrictions against such petitions.⁹ Such restrictions will be buttressed by the 2009 amendments to the Companies Law which expressly provides that non-petition covenants in contracts will be upheld by the Grand Court.

7 Companies (Amendment) (No. 2) Law (2009 Revision).

8 The 2007 amending legislation declined to introduce a balance sheet test.

9 For a full discussion of the impact of the recent Companies Law changes upon the law post-*Strategic Turnaround* see Heaver-Wren, T 'Contingent and Prospective Creditors and the Cayman Islands Insolvency Regime', *Corporate Rescue and Insolvency Journal*, April 2010.

iii *HSH Nordbank*¹⁰

The background to this matter was that a syndicate of banks loaned €350 million to a series of Alberta limited partnerships for the purpose of acquiring shares in the German bank, HSH Nordbank AG. The partnerships fell into default in their loan repayments. The syndicate issued proceedings to wind up the general partners of the partnerships. Following a series of hearings (including an appeal), the general partners were wound up on 12 February 2010. During the course of the litigation, the following important points were determined by the Grand Court. First, the Cayman Companies Winding up Rules ('CWR')¹¹ are to be regarded as essentially a code and, unless there is express provision to the contrary, ought to be considered independently from the Rules. Of particular note is that the court does not have the power to relax the application of the CWR unless the non-compliance relates to time. For example, if the petition is not served 'together with' (i.e., as a single package) the supporting affidavit material, then the documents will need to be re-served. Second, if a relaxation of the time stipulations in the CWR is sought, there must be sworn evidence explaining the non-compliance. Finally, if a company is cashflow insolvent, then except in exceptional circumstances, it should be wound up. The fact that the company may otherwise be balance sheet solvent is not sufficient, unless such solvency can be converted to cash sufficient to pay the outstanding debt within a short period.

iv *TNT NV v. Logispring GP, LP (a Cayman Islands Exempted Limited Partnership)*¹²

In this case, the Grand Court had to determine whether it had the power to appoint or replace a liquidator of Logispring II, a Cayman Islands Exempted Limited Partnership. This issue turned on whether the Limited Partnership Agreement ('LPA'), as a matter of construction, amounted to an agreement to exclude a limited partner's right to apply to the court under Section 7(5) of the Exempted Limited Partnership Law ('ELPL')¹³ for a liquidator other than the general partner to be appointed, and whether the LPA could in any event override the jurisdiction of the Grand Court. The first instance judge refused the application for the appointment of the professional liquidator.

On appeal, the Court of Appeal held that on the true construction of the LPA, the power of the court to replace the liquidator on the application of a partner was not excluded pursuant to Sections 7(5) and 15 of the ELPL. By including an express reference to the power of the court to appoint a liquidator on the application of a creditor, the parties were not to be taken to have intended to exclude the power to appoint a liquidator on the application of a partner; it was, however, open to them to do so explicitly. Furthermore, the court should be hesitant to have recourse to the maxim *expressio unius est exclusio alterius*, and in this case the omission of a reference to a 'partner' was likely the result of inadvertence. There was no reason why the parties would wish the residual power of the court to appoint a liquidator on the application of a partner to be excluded.

10 Unreported, Grand Court, 12 February 2010.

11 Companies Winding Up Rules (2008).

12 Civil Appeal No. 5 of 2009.

13 2007 Revision.

v *Unilever Plc and six others v. ABC International and Molson Coors Brewing Company and nine others v. ABC International*¹⁴

The Grand Court dismissed an application for an order setting aside summary judgment obtained by the plaintiffs in both causes. The summary injunctive orders were upheld. ABC International failed to show that it had any prospect of proving its primary argument that Saudi law was the governing law of the relevant agreement. The agreement provided for all disputes to be submitted for arbitration according to the rules of the International Chamber of Commerce, and as a result, the governing law was English law. The agreement had the most real and closest connection to England. Furthermore, the Grand Court affirmed that, as a matter of general principle, an injunction restraining a foreign party from pursuing foreign proceedings should be granted sparingly as it was an interference with the foreign court's jurisdiction. Unilever subsequently applied for leave to appeal out of time on the point of Saudi law and for leave to appeal against the decision on summary judgment on 24 March 2009. Both applications were refused.

vi *In the matter of Matador Investments Ltd*¹⁵

The Grand Court considered a shareholder's rights of redemption where the hedge fund subsequently decides to suspend redemptions, and where a petition for the winding up is then brought by the redeeming shareholder whose proceeds are unpaid as a result of the suspension. The court held that the unpaid redemption proceeds were due to be paid. On the construction of the fund's articles of association and offering documents, the company did not have the power to suspend the 'right to receive redemption proceeds.' The company only had the power to suspend 'redemptions'. Furthermore, the directors' resolution to suspend redemptions was made after the date for payment of the proceeds, and the Cayman law was confirmed that a fund cannot impose retrospective suspension of redemptions. As there was no suspension in existence at the time the redemption request had been made and the redemption funds were due to be paid, the petitioner had standing to bring the petition as a petitioning creditor on the basis of the debt due.

vii *Trade and Commerce Bank v. Arthur Andersen LLP*¹⁶

The Grand Court granted the application brought by Arthur Andersen to strike out TCB's action for damages for negligence. It was found that TCB's claim had no real prospect of succeeding as it was the vehicle of the fraud. A fraudster cannot blame another party for its own unlawful conduct when that other party is said only to be negligent. TCB had become a vehicle for fraud but TCB had accepted the illegality of the publication of its false financial statements, and then relief on the basis of that illegality. The principle of *ex turpi causa non oritur actio* meant that as the claim was based on TCB's own illegality, it should be automatically barred. The pleadings could not be amended to counteract this principle. Furthermore, there was no principle in law that *ex turpi causa non oritur actio* could be overridden where the claim was based on the commission of a fraud and where

14 [2008] CILR 415.

15 Unreported, Grand Court, 27 August 2009.

16 [2008] CILR 486.

the prevention of that fraud was the ‘very thing’ that it had contracted the other party to do. TCB had pleaded those facts in the statement of claim and in ascertaining whether the claim had a reasonable prospect of success in striking out applications, the court had to assume those facts pleaded to be true.

viii *Helmsman Limited & the Hotban Trustee Company Limited v. the Bank of New York Trust Company (Cayman) Limited*¹⁷

The court considered whether a forum clause in two trust deeds assigned exclusive jurisdiction to the courts of England and if not, whether England was in any event the most appropriate forum. The forum clause made the English Court the ‘forum for the administration’ of the settlements; however, it was open to the plaintiff trustees to change the forum ‘at any time or times.’ The question of whether ‘trust administration’ included contentious breach of trust litigation was academic as the trustees had elected to change the forum for administration to Cayman, and there was no court with exclusive jurisdiction over the dispute. As to which was the most appropriate jurisdiction, the court considered, *inter alia*, the location of witnesses and documents, the residence of the plaintiffs and trustees, the proper law of trusts resulting from the settlements, the forums for administration, issues of contribution and indemnity and enforcement of the judgments, and found neither forum could clearly be said to be the natural one. Public policy considerations, however, mean that in general, breaches of Cayman Islands trusts purportedly committed in Cayman should be adjudicated by Cayman courts.

ix *Renova Resources Private Equity Limited*¹⁸

The Grand Court considered whether to grant leave for a multiple derivative action, that is, whether a derivative action may be brought by a shareholder in the holding company of the ultimate subsidiary company, in this case an exempted limited partnership, and in which the cause of action against the defendant is vested.

The Grand Court held that multiple derivative actions should be permitted in the appropriate circumstances, and that in these circumstances this was not objectionable. It was held that it is open to a shareholder of a holding company to bring an action on behalf of the subsidiary that has directly suffered the loss; however, the shareholder will not be able to bring a single derivative action for loss merely reflecting what the subsidiary has lost.

x *Tasarruf Meduati Sigorta Fonu v. Merrill Lynch (Cayman) Limited and Others*¹⁹

The Grand Court considered whether it has the jurisdiction to appoint a receiver by way of equitable execution over a settlor’s power of revocation of a trust, at the behest of a single judgment creditor. At first instance the application to appoint a receiver was refused. On appeal, the decision of the Grand Court was upheld, although the Court of Appeal disagreed with some of the first-instance reasoning. The Court of Appeal observed

17 Unreported, Grand Court, 14 September 2009.

18 Unreported, Grand Court, 14 April 2009.

19 Unreported, Court of Appeal, 9 September 2009.

that the power of revocation on its proper construction was unfettered and could be exercised without anyone else's consent. Furthermore, the Court of Appeal decided that the jurisdiction to appoint a receiver by way of equitable execution could be advanced incrementally, but that the advancement of the equitable jurisdiction to extend over a power of revocation of a trust should be made by legislation and not by the court.

III COURT PROCEDURE

Overview of court procedure

Petition hearings and the trials of writ actions are held in open court and are public. Interlocutory (interim) hearings are held in chambers and are private, although chambers judgments are not confidential to the parties unless the Grand Court orders them to be. All forms of originating process (such as petitions and writs) are open to public inspection; documents subsequently filed in the proceedings are not. Parties are prohibited from using documents disclosed under compulsion (of rule or order) in the proceedings for purposes outside of the litigation, until they have been read by the court or referred to in open court. There are a number of specific measures available to preserve the confidentiality of particular proceedings. Parties can apply for a hearing that would usually be public to take place in private, or the court file to be sealed from public inspection (or both), or for the publication of information relating to proceedings to be restricted, or details contained in court judgments to be edited (or both).

The Grand Court is sensitive to the need for the protection of confidentiality of commercial arrangements, and will in appropriate cases make suitable orders to protect parties' commercial interests.

Procedures and time frames

A writ or other form of originating process (such as an originating summons, notice of motion, or petition) is filed for issue by the Grand Court.

The plaintiff gives notice by serving the originating process on the defendant (or its authorised representative or appointed attorneys). Personal service is usually required, which in the case of a corporate defendant means delivery to its registered office.

The default stages provided by rules are as follows:

- a* Acknowledgment of service and notice of intention to defend: for Cayman companies and residents, this must be filed with the court within 14 days of service of the writ. For other parties, there are different times depending on the parties' place of residence.
- b* Statement of claim: to be served within 14 days after service of notice of intention to defend (if not served with the writ).
- c* Defence (and any counterclaim): to be served within 14 days of the acknowledgment of the statement of claim, whichever is later (but no less than 28 days after service of the writ).
- d* Reply (and any defence to counterclaim): to be served within 14 days after the defence.
- e* Lists of disclosable documents: to be exchanged within 28 days after the reply.

- f* Summons for directions: to be issued within 14 days after exchanges of the lists, to deal with future conduct of action towards trial and any other interim matters.

In large commercial disputes, these periods are usually extended by agreement between the parties or by order of the court, and they can be shortened in cases of exceptional urgency. Non-compliance with deadlines can ultimately result in a plaintiff's claim being struck out or judgment being entered against a defendant (as the case may be), but this normally requires non-compliance with at least two successive court orders.

A party can apply to the Grand Court for summary judgment or strike out before a case proceeds to a full trial. The following summary judgment procedures are available:

- a* A plaintiff can apply any time after the defendant has acknowledged service, on the basis that the defendant has no real or *bona fide* defence.
- b* A defendant can apply any time after serving a defence, on the basis that the plaintiff's claim, or part of the claim, has no prospect of success or prospect of recovering more than nominal damages.

The Grand Court can at any stage be asked to strike out a pleading (and order the action to be stayed, dismissed or judgment to be entered accordingly), on the following grounds:

- a* it discloses no reasonable cause of action or defence (as the case may be);
- b* it is scandalous, frivolous or vexatious;
- c* it may prejudice, embarrass or delay the fair trial of the action;
- d* it is otherwise an abuse of the process of the court; or
- e* there has been a wilfully disobedient breach of a final court order imposing a deadline for filing or serving a required document (such as a pleading, a list of documents or a witness statement).

Most interim remedies (in particular, injunctions to restrain the disposal of assets) can be obtained *ex parte*, or without notice to the defendant, in urgent cases or where the relief sought would be frustrated if notice were given to the defendant. Applications made without notice impose extra burdens on the applicant and its attorneys, in particular an obligation to make full and frank disclosure to the Grand Court.

In exceptionally urgent cases, the Grand Court can hear an application on the same day as or the day after it is filed, although it is rare that the court is persuaded that the matter is urgent enough to bypass the normal listing requirements.

Where an order is obtained without notice, the defendant is entitled to challenge the order at a later hearing. Injunctions can be mandatory or prohibitory.

A plaintiff can apply to court for an order to restrain a defendant from dealing with, disposing of or otherwise dissipating its assets to frustrate any judgment obtained against it. This type of order, a *Mareva* injunction, can relate to assets within the court's jurisdiction, or in some cases worldwide. No proprietary claim to the assets is required, but the injunction only takes effect as a personal prohibition, not as a physical attachment. To obtain such an injunction, it may be necessary to establish a substantive cause of action, which can be determined by the Grand Court. Third parties, such as banks, who are put on notice of an injunction, must not assist the defendant in removing assets from their control.

In exceptional circumstances, a search-and-seizure order or *Anton Piller* order is available. This requires a person, on pain of penalties for contempt of court, to allow the applicant access to premises and to effect the physical seizure of assets that need to be preserved as the subject matter of the action, and that may otherwise be concealed or destroyed.

Urgent applications may, in exceptional circumstances, be heard on the day of filing. Plaintiffs will be required to give an undertaking, to pay any damages that may be caused to the other parties for which they may be held liable, in virtually all cases where interim relief is granted. Plaintiffs can also be required to provide security to support their undertaking.

Other interim remedies include:

- a* orders for interim payments (whether in relation to debts, damages or accounts to be taken);
- b* other forms of interim injunctions, both mandatory and prohibitory; and
- c* discovery orders, including against third parties (discovery orders are particularly important in asset tracing cases, and the Grand Court regularly considers applications for disclosure of banking documentation to assist international asset tracing disputes).

The principal remedies are damages (for breach of contract or tortious duty), which are compensatory rather than punitive, specific performance of contractual obligations, injunctions (prohibitory or mandatory) and declarations (as to rights or as to a particular state of affairs).

Appeals can be made to the Court of Appeal. A further appeal can be made, in certain circumstances, to the Judicial Committee of the Privy Council, which sits in England. Grounds of appeal are usually based on error of law, mistaken conclusion of facts, improper exercise of discretion or procedural impropriety.

Appeals must be filed within 14 days. Leave of the court is sometimes required to pursue an appeal from some decisions, including consent orders, orders for costs, and most interim orders. Some orders cannot be appealed at all, including an order dismissing a summary judgment application or where legislation provides that the court's decision is final. Once the notice and grounds of appeal have been filed, the Registrar of the Court of Appeal lays down a timetable for the exchange of written arguments and other materials to be lodged with the court, and fixes a hearing date in consultation with the parties' counsel.

In general, the successful party can expect to recover from the losing party its reasonable costs incurred in conducting the proceedings in an economical, expeditious and proper manner, unless the Grand Court orders otherwise.

Detailed guidelines govern the recoverability of certain fees and disbursements and the taxation process (by which the successful party's costs are assessed). The costs are then made the subject of an award, which is enforceable as a money judgment against the unsuccessful party. This process can result in a significant proportion of a party's actual costs – as much as 25 per cent or even 40 per cent in some cases – being irrecoverable, usually because the allowable rates fall short of realistic commercial fees, or because specific items are deemed excessive or because it would otherwise be unreasonable for them to be paid by the losing party.

Where a plaintiff rejects an offer to settle and then succeeds at trial, but is awarded less than a settlement offer made by the defendant, it may be ordered to pay the defendant's costs from the date of the offer.

Interest is payable from the date of service of a costs award, according to prescribed rates which are amended from time to time. The present rate of interest, effective from 1 December 2008, is 5 per cent.

Limitation periods for commencing proceedings run from the date of accrual of the cause of action, and different claims are subject to different general limitation periods, although in each case there are exceptions:

- a* contract claims must be brought within six years of the breach of contract;
- b* tort claims must be brought within six years of the accrual of the cause of action; in the tort of negligence (the most common tort), this period is six years from the suffering of damages as a result of the conduct in question;
- c* claims for recovery of land must be brought within 12 years;
- d* claims for breach of trust and for equitable relief have no statutory limitation period, although delaying claims unfairly can result in the court refusing to allow a claim to succeed; and
- e* there are special rules extending the limitation period in certain circumstances where the part did not know immediately that it had suffered damage, or the alleged wrongdoing was deliberately concealed from the proposed claimant (plaintiff).

Class actions

The Rules do not provide for group litigation in the Cayman Islands. In practice, however, the Grand Court will allow a representative action to be heard where there are a number of like cases. Company winding up is the only truly collective action provided for in the Cayman Islands.

Representation in proceedings

In order to appear as an advocate or instructing solicitor in the Grand Court, visiting counsel must obtain a temporary work permit to allow them to appear in Cayman court proceedings and be granted a limited admission to the Bar of the Cayman Islands for the purpose of the specific case.

Service out of jurisdiction

In order to obtain leave to serve an originating process filed at the Grand Court outside of Cayman, the plaintiff will need to demonstrate to the Grand Court that the action falls within one of the prescribed categories of case set out in the Rules. Order 11 provides that the Grand Court will have a discretion to appear in Cayman Islands where one of the prescribed forms of nexus with the Cayman Islands in Order 11 of the Rules is satisfied.

Enforcement of foreign judgments

A foreign judgment creates a debt between the parties to that action, which is enforceable in the Cayman Islands under the common law principles of the law of obligations. In order to enforce a judgment under common law, a foreign claimant will accordingly be

required to bring a new action in the Cayman Islands in which the cause of action is a debt claim based on the foreign judgment and non-payment thereof. The debt claimed for is a simple contract debt and subject to the usual limitation period. By this process, the Cayman court will not need to re-examine the merits of the underlying case, obviating the delay and expense for the claimant of having to re-try the claim. Instead, the Cayman court will look to see if there is a valid judgment that has not been paid and at factors governing the granting of the judgment. Of course, it is always open to the claimant to sue on the original cause of action should he wish to do so.

Notwithstanding that the foreign court may have determined that it had jurisdiction over the defendant, the Cayman court will need to be satisfied that the foreign court had such jurisdiction according to Cayman Islands principles of law; a foreign court will be recognised as having had personal jurisdiction over the defendant in the following cases:

- a* if the defendant was ordinarily resident in the foreign country at the time of commencing the foreign proceedings. Residence for a corporation in this context is determined by the place in which it carries on business;
- b* if the defendant voluntarily participated in the proceedings before the foreign court, other than simply to contest jurisdiction;
- c* if the defendant appeared as a party in the proceedings before the foreign court, whether as a plaintiff or counterclaimant; or
- d* if the defendant expressly agreed to submit to the jurisdiction of the foreign court (as opposed to the laws of the foreign country), by contract or subsequent conduct.

It should be noted that the nationality of the defendant is not regarded as a sufficient base for jurisdiction, nor is mere transient presence in the foreign country, nor the fact that the defendant has property within the foreign country.

A Cayman court will only recognise or enforce a foreign judgment that is final and conclusive, rather than interim or interlocutory in nature. A judgment will be regarded as final and conclusive even if it is under appeal in the foreign court, though if execution has been stayed, the Cayman court will usually also stay enforcement of the judgment which it grants in the Cayman Islands. It is also a well-accepted principle that a court should not recognise or enforce a foreign judgment where doing so would be contrary to public policy.

Assistance to foreign courts

i Letters of request

The UK Evidence (Proceedings in Other Jurisdictions) Act 1975 extends to the Cayman Islands by virtue of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978. Where an application is made to the Grand Court for an order for evidence to be obtained in the Cayman Islands, the Grand Court has the powers conferred on it by the Act as long as it is satisfied that (1) the application is made in pursuance of a request issued by or on behalf of a court or tribunal exercising jurisdiction in a country or territory outside the Cayman Islands; and (2) the evidence to which the application relates is to be

obtained for the purposes of civil proceedings that either have been instituted before the requesting court or whose institution before that court is contemplated.

This provision is almost identical to the provisions of the 1975 Act and it follows that for the Grand Court to give effect to letters of request:

- a* there must be a formal application to the court;
- b* the application must be made pursuant to a formal request;
- c* the request must be made by or on behalf of a court or tribunal exercising jurisdiction in the relevant country or territory;
- d* the request, and consequent application, must be for evidence to be obtained;
- e* that evidence must be for proceedings that have been instituted before the requesting court or whose institution is contemplated; and
- f* those proceedings must be ‘civil proceedings’.

In the interests of comity the general approach of the Grand Court is to give effect to letters of request where it is proper, practicable and permitted under Cayman law. The Grand Court will generally be accommodating, for example by salvaging the remainder of a problematic letter of request; however, it will not always be entirely deferential to foreign courts.

ii Information orders

In *Miller v. Condoco Grand Cayman Resort Ltd*²⁰ the Cayman courts considered an application for a *Norwich Pharmacal* order. The Grand Court granted the order, confirming that the relief is available in aid of an applicant’s assertion of his or her legal rights whether in Cayman or abroad, in this case, California. The court furthermore ruled that *Norwich Pharmacal* orders can be granted even where the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 provides an alternative means of obtaining information.

The Cayman courts also have the jurisdiction to issue Bankers Trust orders. These order disclosure of information by a bank where there is *prima facie* evidence of fraud by its customer. Bankers Trust orders raise issues of the protection of confidential information. As a result, an application for directions regarding the disclosure under the Confidential Relationships (Preservation) Law (‘CRPL’)²¹ should follow the issuance of the order.

iii Voluntary gathering of evidence

Provided evidence is obtained from a person who is willing to give it and who is legally entitled to do so, there are no restrictions on the taking of evidence within the jurisdiction of the Cayman Islands. However, where the information sought and the capacity in which the witness has the information is covered by the CRPL, the witness will only be able to divulge the information after obtaining permission from the court. The CRPL is designed to prevent professionals and their staff disclosing information concerning their clients’ assets, and it makes it a criminal offence for anyone in possession of ‘confidential information’ to

20 1980-83 CILR 403.

21 2009 Revision.

divulge, attempt to divulge, to offer or to threaten to divulge that information, and even to wilfully obtain or attempt to obtain it, subject to narrow exceptions.

Access to court files

The public can gain access only to originating processes and final orders. The register of writs and other originating processes provides access to any writ, originating summons, originating motion or petition issued by the court, and the register of judgments provides access to every final order made or treated as having been made in open court.²² Access can be gained to these registers by the payment of a prescribed fee. The registers were created on 1 June 1995 and any person wishing to obtain a copy of an originating process or final order issued prior to that date must make a written application by letter addressed to the clerk of the court. Third parties may apply to inspect other court files; however, the court would require exceptional reasons and circumstances to grant access to such documents.

Litigation funding

Litigation is usually funded by the parties themselves. It is possible for third parties to fund litigation, subject to compliance with the rules against maintenance and champerty. Maintenance is the giving of assistance to a party in litigation by a person who has no interest or motive recognised by law as justifying his interference. Champerty is maintenance of an action in return for a promise of a share of the proceeds of the action. Whether a third party has a legitimate commercial interest in funding the litigation, for example, a shareholder of the party, depends on a number of factors, including whether the maintainer accepts liability for the opposing party's fees and the degree to which the maintainer influences the proceedings.

Insurance may be available, but there is no established market for litigation insurance among local providers.

IV LEGAL PRACTICE

i Conflicts of interest and confidentiality

Regulation of the legal profession in the Cayman Islands currently falls within the remit of the Chief Justice on the basis of an amalgamation of the relevant rules of conduct of the English Bar and solicitors' profession, with those attorneys qualified overseas remaining of course bound by their home jurisdiction's rules as to conduct. The Legal Practitioners Law 2007 modernised the regulation and discipline of the legal profession and made provision for specific local professional conduct rules in the Cayman Islands.

Conflicts of interests and the duty of confidentiality are governed by the English Common Law rule in *Prince Jefri Bolkiah v. KPMG*.²³ The case concerned an accounting firm which had in its possession confidential information of a former client as a result

22 This does not include court files of the Family Division.

23 [1998] All ER (D) 767.

of providing to it litigation support services and whether and in what circumstances the firm could undertake work for another client with an adverse interest. It was held that the court could intervene by imposing an injunction if (1) the solicitor was in the possession of information which was confidential to the former client; and (2) such information was or might be relevant to the matter on which the solicitor was instructed by the second client. Therefore, there is no conflict of interest where the client is a former client; the only duty which remains after termination of the retainer is the duty of confidentiality of information imparted during its subsistence.

The duty to preserve confidentiality is unqualified. It is a duty not to communicate the information to a third party and not to misuse the confidential information for the benefit of others and without the consent of the client. Although the client is not completely protected from accidental disclosure of the confidential information, he is entitled to prevent the former solicitor from exposing him to any avoidable risk. Lord Millett in the *Prince Jefri* case said, ‘it is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret.’ Accordingly, the court should intervene unless it is satisfied there is no risk of disclosure. This risk must be real and not merely fanciful, however it need not be substantial. A solicitor should not accept instructions if it will increase the risk that information which is confidential to a former client may be disclosed to a party with an adverse interest without the consent of that former client.

Once the former client has established the two-part test, the burden shifts to the firm in possession of the confidential information, to show there is no risk that the information will come into the possession of those acting for the party with the adverse interest. Chinese walls and other measures can be taken to eliminate the risk of disclosure, and there must be clear and convincing evidence that all reasonable measures have been taken to prevent disclosure.

The Royal Court of Jersey has since taken a more practical approach to conflicts of interest and the duty of confidentiality than onshore because of the limited number of attorneys capable of dealing with the complex international litigation that often arise offshore and this is likely to prove particularly relevant authority in the similar circumstances prevailing in the Cayman Islands.²⁴

ii Money Laundering

The Proceeds of Crime Law 2008 (‘POCL’)²⁵ came into force on 30 September 2008 in response to recommendations made by the Caribbean Financial Action Task Force. The Law aims to harmonise anti-money-laundering (‘AML’) and anti-terrorist-financing legislation in the Cayman Islands and update the AML regime in line with changes to international AML standards since Cayman’s AML regime was last substantially

24 *RBC Trustees (CI) Limited and Michael David de Figueiredo v. John Bisson and Eleven Others (exercising the profession of advocates and solicitors under the name and style of Appleby)*.

25 See also the Money Laundering Regulations (2009 Revision) and the Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands.

overhauled in 2000. POCL replaced the Proceeds of Criminal Conduct Law and some sections of the Misuse of Drugs Law, and is now the primary legislation dealing with AML and terrorist financing in the Cayman Islands, although the Misuse of Drugs Law (2009 Revision) and the Terrorism Law (2009 Revision) are also relevant to AML. In particular, POCL imposes new reporting obligations on regulated financial institutions and gives the courts and the Attorney General broader powers in restraining and recovering the proceeds of criminal conduct on civil grounds.

‘Criminal conduct’ is defined in POCL as conduct that constitutes an offence in the Cayman Islands or that would constitute an offence if committed in Cayman. ‘Criminal property’, including terrorist property, constitutes or represents a person’s benefit or interest arising, in whole or in part and directly or indirectly, from criminal conduct when the offender knows or suspects that the property constitutes or represents such a benefit. POCL applies to property wherever situated and it is immaterial where the criminal conduct took place. Furthermore, it is immaterial who carried out or benefited from the criminal conduct and whether the conduct occurred before or after POCL’s commencement.

The five main offences under POCL are:

- a* concealing, disguising, converting, transferring or removing criminal property from the Cayman Islands;²⁶
- b* entering into or becoming concerned in an arrangement that the person knows or suspects facilitates the acquisition, retention, use or control of criminal property;²⁷
- c* acquiring, using or having possession of criminal property;²⁸
- d* an employee or money-laundering reporting officer (‘MLRO’) failing to disclose to the MLRO or Financial Reporting Authority (‘FRA’) respectively, a knowledge or suspicion of another person’s money laundering;²⁹ and
- e* ‘Tipping off’ – making a disclosure to a third party that is likely to prejudice any investigation arising from a money-laundering disclosure to the FRA.³⁰

The main defence to the first three offences is the making of a suspicious activity report to the FRA. In relation to the first four offences, professional legal advisers do not commit an offence if the information is received in privileged circumstances. Also in relation to offence four, a similar statutory privilege defence applies to accountants, auditors and tax advisers. Reporting suspicious activity to the FRA will not give rise to any civil liability and does not constitute a breach of the duty of confidentiality under Cayman law.

The penalty for the offences following summary conviction is a fine of up to CI\$5,000 and/or imprisonment for up to two years. Following conviction on indictment, offences (*a*) to (*c*) attract a penalty of imprisonment for up to 14 years and offences (*d*) and (*e*) attract a penalty of imprisonment for up to five years and/or a fine.

26 Section 133 of the POCL

27 Section 134 of the POCL.

28 Section 135 of the POCL.

29 Sections 136-137 of the POCL.

30 Section 139 of the POCL.

The Money Laundering Regulations ('the Regulations')³¹ supplement POCL and are mandatory. They apply to financial service providers and professional intermediaries, and obligate them to comply with specific administrative requirements in support of AML. The Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands support the Regulations and are also mandatory by virtue of regulation 5(4)(a). The four key requirements relate to client identification and verification procedures, record keeping procedures, internal reporting procedures, and internal control procedures.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

Privilege

A party can withhold certain documents from inspection by the other party on the grounds of privilege, although their existence must still be disclosed in general terms in a party's list of documents. Whether or not a particular document or class of documents is privileged can be contentious, but the following categories of documents are generally privileged:

- a* correspondence between a party and its lawyers, whether or not connected with the litigation, which is confidential and written for the purpose of giving or obtaining legal advice (this includes correspondence with in-house lawyers, unless it relates to administrative matters and not legal advice);
- b* correspondence between a party's lawyers and third persons, where that correspondence is connected with the litigation (other than open correspondence with the other party's lawyers);
- c* a party's lawyers' file notes, drafts, instructions and briefs to counsel and counsel's opinions and notes; and
- d* experts' reports and witness statements prepared in connection with the litigation (unless and until disclosed to the other party).

The following documents are not privileged:

- a* notes relating to the litigation prepared by a party for internal purposes (including board minutes recording discussions of the litigation), unless for the purposes of reporting, when strictly necessary, to others in the party's organisation on advice received from lawyers, or seeking information requested by lawyers;
- b* notes to the published accounts concerning the litigation and any provision for the proceedings in the accounts, and related correspondence with accountants; and
- c* written communications between a party and outsiders (such as the party's parent company or subsidiary, the police and other authorities, insurers and professional advisers other than the party's own lawyers), or written notes recording these communications, unless these documents came into existence for the dominant purpose of obtaining legal advice in connection with existing or contemplated proceedings.

31 2009 Revision.

A document is not privileged just because it is considered (or marked) confidential or because it is produced internally. In particular, current case law in England (likely to be followed in the Cayman Islands) suggests that if litigation is not actually in prospect, documents prepared by employees of a party to be sent to its lawyers may not be privileged if they do not amount to communications between the client and its lawyers for the purpose of taking advice.

The following categories of privilege are recognised by Cayman Islands law.

i Legal advice privilege

Traditionally legal advice privilege has been held to attach to confidential communications between a party and his or her attorney that were written for the purpose of providing legal advice for the client but not otherwise. This includes communications with in-house counsel provided that those communications relate to legal, as opposed to administrative, issues.

The House of Lords in the English case of *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 6)*³² held that legal advice privilege extends to communications written for the purpose of providing advice as to prudent practical steps to take in the relevant legal context. It remains to be seen how the Cayman courts will interpret legal advice privilege in light of this decision.

ii Litigation privilege

Unlike legal advice privilege, litigation privilege only attaches to documents created at a time when litigation is contemplated or pending. Documents covered by litigation privilege fall into two categories:

- a* communications between a party's attorney and a third party are covered by litigation privilege if they are created at a time when litigation is contemplated and are connected with the litigation; and
- b* communications between the party and a third party are covered by litigation privilege if they are created for the dominant purpose of submission to a legal adviser in view of contemplated proceedings.

iii Privilege against self-incrimination

A party is entitled to claim privilege over documents that tend to expose it to a criminal penalty.

iv Public interest immunity

This operates to prevent disclosure of documents production of which would be so injurious to the public interest that it ought to be withheld, even at the cost of justice in the litigation in question.³³

32 [2004] UKHL 48.

33 *Burmab Oil Co Ltd v. Governor and Company of the Bank of England* [1980] AC 1090.

v Without prejudice privilege

This attaches to communications between the parties or their legal advisers that are made in a good faith effort to settle proceedings.³⁴

Other rules regarding confidential information

CRPL creates a statutory regime regulating the disclosure of confidential information held by professionals in the course of conducting professional business in the Cayman Islands. ‘Confidential information’ is information relating to property which the recipient is not, otherwise than in the normal course of business, authorised by the principal to divulge. Such information may not be divulged unless the situation falls within certain exceptions which are listed in Section 3(2) of the CRPL, or if the principal has applied for, and the court has given, directions that the information be divulged under Section 4(1) of CRPL. Anyone divulging information in contravention of CRPL is guilty of an offence and liable to a fine or imprisonment. CRPL is likely to be replaced in the near future by data protection legislation.

VI PRODUCTION OF DOCUMENTS

In actions commenced by writ, Order 24 of the Rules provides for discovery to take place automatically 14 days after close of pleadings, unless the court makes a different order.

There are also other provisions under which a litigant can seek disclosure of documents, for example:

- In exceptional circumstances, a prospective plaintiff may be able to obtain an order for discovery of documents against a prospective defendant before the commencement of proceedings if the documents sought are necessary to enable the case to be properly formulated.
- It may be possible to obtain an order for discovery of documents by a third party who has become involved, albeit innocently, in the defendant’s (or prospective defendant’s) wrongdoing. Such an order is referred to as a *Norwich Pharmacal* order, following the English case of *Norwich Pharmacal Co v. Customs and Excise Commissioners*.³⁵ This jurisdiction is typically used by victims of fraud to obtain discovery against banks who have received misappropriated funds. However, it should be noted that if the documents sought to be discovered contain ‘confidential information’ within the meaning of CRPL, then even if the order is granted, the party subject to the order will not be allowed to disclose the documents unless he has made a separate application to the Court for directions under Section 4(1) of the Law and the court has directed that the information be provided.
- A party to litigation can apply under Order 24 Rule 10 of the Rules for disclosure of any document to which the other party has referred in a pleading or affidavit.

34 *Brown v. Rice* [2007] EWHC 625 (Ch).

35 [1973] 2 All ER 943.

- A party to litigation may apply under Section 8 of the Evidence Law³⁶ for an order that he be at liberty to inspect and take copies of any matter in a banker's book. The application will have to be supported by affidavit evidence stating why the inspection is necessary and how the entries in question will be admissible at the trial of the proceedings in question. Again, if the order is granted, the banker subject to the order will have to make a separate application for directions under Section 4(1) of CRPL.

Discovery under Order 24 takes place in two stages. First each party has to produce a list of discoverable documents, then he has to provide each other party with the opportunity to inspect and take copies of those documents (excepting those that are covered by privilege).

'Discoverable' documents are those which are in a party's 'possession, custody or power' relating to matters in question in the proceedings.³⁷

A 'document' includes anything in which information is recorded, including computer and other electronic records, photographs, text messages, voicemail and other audio recordings, and includes documents held both in the Cayman Islands and overseas.

As to 'possession, custody or power', 'custody' means mere physical holding and 'possession' is more than mere physical holding – for example, a bailee or agent has possession of documents entrusted to him by their owner. Documents in a person's 'power' include documents which that person has a right to call for and would include documents held by that person's servant or agent. The question of whether documents held by a third-party adviser or a subsidiary company are in a party's 'control' will be a question of fact to be determined by reference to the circumstances of the particular situation.

The test of relevance is a broad one. It has been held that documents relate to the matters in issue if it is not unreasonable to suppose that they contain information that may directly or indirectly enable a party either to advance his or her own case or to damage that of his or her adversary.³⁸

In general, the court will not allow applications for discovery where they are held to be mere 'fishing expeditions'. The party making such an application will have to show that there is a real possibility of evidential materiality.³⁹

VII ALTERNATIVES TO LITIGATION

The principal alternative to litigation is arbitration, since arbitration awards can be readily enforced in local and foreign courts under international conventions and bilateral treaties for the reciprocal enforcement of arbitral awards. However, increasing numbers of disputes are now being settled by mediation, in cases where the traditional adversarial

36 2007 Revision.

37 Grand Court Rules Order 24, Rule 1.

38 *Compagnie Financière v. Peruvian Guano Co* (1882) 11 QBD 55.

39 *Grupo Torras v. Butterfield Bank* 2000 CILR 452.

approach may not allow for a resolution that is satisfactory to the parties. The answers to the following questions exclude arbitration.

Alternative dispute resolution ('ADR') is essentially a matter of mutual agreement between the parties. There are no procedural rules requiring it, and the courts have no powers to force parties to attempt ADR before resorting to or continuing with litigation. However, the Grand Court's duty to actively manage legal proceedings does include helping the parties to settle the whole or part of the proceedings, and the court encourages parties to use ADR in appropriate cases.

Whether ADR is confidential is a matter for the parties to decide. Mediation is usually not only confidential but also without prejudice to the parties' publicly stated position, in the event the mediation is unsuccessful.

The question of how evidence is given in ADR and whether documents or admissions made or produced in or for the purposes of the ADR later be protected from disclosure by privilege depends on what form of ADR process is used and what the parties agree on. The aim of most ADR processes is to avoid the formalities and adversarial elements in litigation, which may be counterproductive to resolving a dispute, such as giving or exchanging evidence.

If the parties commit to a binding process such as binding neutral evaluation or adjudication, documents produced and admissions made in that process are not likely to be privileged. On the other hand, if the parties attempt resolution through a non-binding process like early neutral evaluation or mediation, documents and admissions are usually privileged.

The treatment of costs in ADR is a matter for the parties to decide. Very often, costs are a significant point of issue between the parties and the allocation or reimbursement of costs forms part of any settlement. However, once the parties manage to resolve their principal points of dispute in an ADR process, they frequently agree to make no provision for costs and leave them to lie as they have been incurred.

ADR is used particularly in insurance and construction disputes, although it can assist in resolving almost any kind of dispute (except where judicial determination of a legal question is required).

There are no dedicated organisations that offer ADR services in the Cayman Islands; however, a number of local firms include practitioners who have ADR qualifications and are members of recognised institutions, such as the Chartered Institute of Arbitrators, the Centre for Effective Dispute Resolution (CEDR) or ADR Chambers.

The Law Society is currently preparing draft legislation for recommendation to the government, which would radically reform and update the Arbitration Law⁴⁰ to bring it in line with modern international models, such as the UNCITRAL Model Law on International Commercial Arbitration 1985. Currently, the Arbitration Law governs domestic arbitration proceedings and the enforcement of domestic arbitration awards, while the Foreign Arbitral Awards Enforcement Law⁴¹ governs the recognition of foreign arbitration proceedings and the enforcement of foreign arbitral awards.

40 2001 Revision.

41 1997 Revision.

VIII OUTLOOK AND CONCLUSIONS

The new Financial Services Division ('the FSD') was opened as a division of the Grand Court on 1 November 2009 in response to a steadily increasing amount of complex and high-profile commercial litigation in the Cayman Islands. The FSD deals with financial services cases, and aims to allow the Court to enhance its case management capabilities thereby promoting greater efficiency. Each case begun or transferred to the FSD is assigned a judge with specialist financial services expertise who manages the case from its start to finish.

As of 4 December 2009, the fee required for issuing a writ, petition, originating summons or originating notice of motion in the FSD is \$5,000 (fees in the FSD being denominated in US dollars⁴²). Financial proceedings that may be transferred or begun in the FSD include proceedings relating to:

- mutual funds;
- an exempted insurer;
- claims for \$1 million or more arising from breach of a contract of insurance;
- certain financial services regulatory laws;
- certain applications under the Trust Law, and claims for breaches of trust or fiduciary duty, where the trust is worth \$1 million or more;
- the winding up of companies and other applications pursuant to the Companies Law;
- any application for the dissolution of a mutual fund formed as a partnership;
- certain breach of contract or breach of duty by or against a professional service provider;
- applications for evidence pursuant to a letter of request issued by a foreign court;
- applications concerning local and international bankruptcies; and
- enforcement of a foreign judgment or arbitral award.

A case can also be transferred to the FSD even if it does not fall within the above as long as the court is satisfied it is an appropriate case to be heard there.

42 This fee includes the hearing fee for three days of court time, which in the Civil Division of the Grand Court would cost approximately \$2,700 in total, in addition to the issue fee in that division of approximately \$1,200.

TONY HEAVER-WREN

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Tony Heaver-Wren is an associate in the litigation and insolvency practice group and practises in the insolvency and restructuring team at Appleby in the Cayman Islands. He works primarily in the areas of fund disputes, solvent and insolvent liquidations and restructurings, shareholder and director disputes and insolvency litigation.

Mr Heaver-Wren has over 13 years' experience in advising major lenders, liquidators, administrators, receivers and boards of private and publicly listed companies on all aspects of contentious insolvency and corporate restructuring. Mr Heaver-Wren was called to the Western Australian Bar in February 1994, was admitted as a solicitor in England and Wales in 2006 (now non-practising) and in February 2008 was admitted as an attorney in the Cayman Islands. He has published extensively and was a committee member of the Association of Business Recovery Professionals in England and of the Insolvency Professionals' Network in Australia.

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Chapter 24

ISLE OF MAN

*Christopher Cope, Fletcher Craine and Claire Collister**

I INTRODUCTION

The Isle of Man is a self-governing Crown dependency and has its own parliament ‘Tynwald’, which dates back to 979AD. Acts of Tynwald and Orders and Regulations made under these Acts are the principal source of Manx law. Each Act of Tynwald requires the assent of the Queen.

The Isle of Man is not part of the European Union. It has a limited relationship with the EU through Protocol 3 to the United Kingdom’s Treaty of Accession. This provides for movement of goods between the Island and EU countries. Otherwise, EU legislation does not extend to the island.

The island’s legal system is based on common law but has a jurisdiction distinct from England. Decisions of English courts are not binding on Manx courts but they are of highly persuasive authority. English decisions are generally followed unless there is a Manx provision to the contrary or if there is a local condition that would give good reason not to follow the English decision.¹

The principal civil courts are the High Court and Staff of Government Division. The High Court has jurisdiction to hear matters at first instance, with the Staff of Government Division hearing the appeals. Senior judges are known as deemsters.

The High Court has four separate procedures – small claims, summary, chancery and ordinary. The allocation is not made automatically by the court and must be selected by the claimant on the claim form at commencement of proceedings.

The small claims procedure is for all disputes regarding claims of up to £10,000 (or £5,000 in the case of a claim for personal injury). Where a defence is filed to the claim, or an application is made for the assessment of damages or the determination

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1 *Re Frankland and Moore* (1987) AC 576 (PC).

of any other matter in dispute, the claim is automatically referred to adjudication. The adjudication is conducted informally and the strict rules of evidence do not apply. If a case is unsuited to this procedure its reference may be rescinded by the court. Legal representation is permitted but is rare at small claims because legal costs are not recoverable from the other side.

A claim that is allocated to the summary procedure must be below the limit of £100,000 with an estimated time for hearing of less than two days. In the summary procedure, oral expert evidence at trial is limited to one expert per party in relation to any expert field (and expert evidence in only two expert fields). Each claim allocated to the summary procedure is normally given standard directions and a timetable, including the trial date, is fixed by court without application and without parties' attendance.

The chancery procedure is used for all claims that are unlikely to involve a substantial dispute of fact including, claims under the companies legislation, claims concerning land, administrative law claims and applications for injunctions. Chancery claims are typically dealt with on written evidence alone. Any claim that is not covered by the small claims, summary or chancery procedure is allocated to the ordinary procedure.

The Staff of Government Division hears appeals in civil cases from the High Court. The final court of appeal is the Judicial Committee of the Privy Council ('the Privy Council'). Permission is required to appeal to the Privy Council either from the Staff of Government Division or from the Privy Council itself. Permission will only be granted where the appeal raised an arguable point law of general public interest.²

In addition, there are several statutory tribunals on the Island, for example, the Employment Tribunal, the Data Protections Tribunal and the Copyright Tribunal.

II THE YEAR IN REVIEW

*i Kyrgyz Mobil & Others v. Fellowes Int & Others*³

This is a very substantial matter, which has occupied the courts for some years. Three Isle of Man companies sought to bring substantial claims against a number of foreign parties (in fact by counterclaim) for the unlawful misappropriation of their assets.

The Isle of Man companies alleged a fraudulent scheme to seize the assets involving fraudulent misrepresentation, forgery, the obtaining of judgments from the courts of Kyrgyzstan by means of political or other improper influence and flagrant breaches of orders made by the courts of England and Wales and the British Virgin Islands. The assets in question were shares in the Kyrgyz telecommunications company Bitel LLC.

Leave to serve the foreign parties out of the jurisdiction was granted on an initial *ex parte* application. The foreign parties sought to set aside leave to serve them out of the jurisdiction arguing that the appropriate forum for the dispute was Kyrgyzstan.

2 Judicial Committee (Appellate Jurisdiction) Rules Order 2009.

3 (2208) SGA Judgment of Judge Tattersall and Acting Deemster Otton Goulder dated 28 November 2008.

The Isle of Man companies adduced substantial expert evidence of corruption in the Kyrgyz judicial system. They argued that were very substantial obstacles to them obtaining justice in Kyrgyzstan, as evidenced by their own treatment there.

At first instance, the High Court set aside leave to serve the foreign parties out of the jurisdiction holding that the courts of Kyrgyzstan were the appropriate forum for determination of the dispute.

On the Isle of Man companies' appeal to the Staff of Government Division, Judge of Appeal Tattersall and Acting Deemster Otton-Gouldon considered the principle stated in *Abouloff v. Oppenheimer & Co.*,⁴ that no party shall be able to take advantage of its own fraud and that foreign judgments obtained by fraud should not be enforced. This is an important exception to the general rule that a foreign judgment is conclusive on the merits and cannot be impeached for any error of fact or law.

The foreign parties submitted that the Isle of Man companies could not seek to challenge the relevant Kyrgyz judgments in the Isle of Man on the grounds of fraud or related matters, and invited the Staff of Government Division not to follow *Abouloff* on the basis that it had been subject to academic criticism⁵ and had not been adopted in some other Commonwealth jurisdictions.

The Staff of Government Division held:

*We agree that, as a matter of English law, the Abouloff principle retains its force, and that it should be accepted as the law of the Isle of Man. In principle, courts ought not to be bound to enforce judgments obtained by fraud, and it would [be] inappropriate that Manx law should differ from English law on a point so long-standing...*⁶

As to *forums conveniens*, it was accepted by all parties that the natural forum for proceedings was Kyrgyzstan, being the place with the most real and substantial connection to the dispute. It was held, however, that it did not automatically follow that Kyrgyzstan was the most appropriate forum to hear the matter. The (admitted) substantial obstacles to the Isle of Man companies bringing proceedings in Kyrgyzstan, combined with the evidence of corruption, meant that in all probability there would be no trial in Kyrgyzstan of the issues raised. As such, the natural forum was displaced in favour of the Isle of Man.

The appeal was allowed. In 2009, the Privy Council granted the foreign parties permission to appeal. That appeal will be heard in December 2010.

ii *Hafner v. Attorney General and Others*

These proceedings concern a letter of request from the Australian Securities and Investments Commission ('ASIC') to the Isle of Man courts dated 2005, seeking evidence in relation to a criminal investigation being carried on in Australia.

4 (1882) 10 QBD 295.

5 As acknowledged in *Owens Bank Ltd v. Bracco* ([1994] 1 All ER 336) and *Owens Bank Ltd v. Etoile Commerciale SA* ([1995] 1 WLR 44 PC).

6 This is an example of the application of the principle in *Re Frankland & Moore* (1987) AC 576 (PC) (see *supra*).

Since then, Mr Hafner, a Swiss lawyer formerly acting for one of the subjects, Trevor Kennedy (a citizen of Australia), as well as Mr Kennedy himself, have sought to challenge numerous aspects of the Isle of Man court's assistance to ASIC. In particular, they have sought to argue that assistance would breach their Article 8 rights to respect for private and family life. Concurrently, there have been proceedings between the same parties in England. Lord Phillips LCJ held that a court nominated to receive evidence under the equivalent English legislation must, when considering evidence, give consideration to the rights conferred by Article 8.1, as qualified by Article 8.2. It was for the nominated court to decide upon the appropriate procedure where a decision had to be made as to the application of article 8(2).⁷ Further, it is unlikely that a person's Article 8(1) right would prevail over Article 8(2) where disclosure is required for the prevention of crime, but documents that went beyond that purpose may not be transmitted. Where a document contained information of a highly sensitive nature relating to a third party, unrelated to the investigation, such material may be redacted.

The extraordinarily lengthy proceedings have been procedural in nature, with Mr Hafner or Mr Kennedy seeking disclosure of the letter of request (refused) and latterly extensive participation in the evidence-gathering process in order that they might argue that documentation should not be transmitted to ASIC. Most recently, Mr Kennedy sought an order that his Isle of Man and Australian lawyers be entitled to review documentation gathered in the Isle of Man with a view to them making submissions as to whether their transmission to ASIC would infringe his Article 8 rights. This was initially granted but quashed on judicial review by petition of dolence brought by ASIC.⁸

The matter is ongoing and further applications with yet further applications for judicial review and appeals pending.

iii R v. Baines and Baines

This was a major criminal prosecution under the island's anti-money laundering legislation, observed closely by the media, authorities and practitioners. Although a criminal case, it is of particular importance and significance to all lawyers and other professionals in the finance sector.

The principal defendant, Trevor Baines, had acted as a trustee for a family trust holding the proceeds of a massive fraud on investors in the NASDAQ-listed Aremisoft Corporation. Extensive litigation arising out of the collapse of Aremisoft had previously occupied the island's civil courts from 2001 to 2005.

Mr Baines was convicted of retaining and controlling the proceeds of criminal conduct by transferring some \$175 million to the Isle of Man from Swiss banks. He was also convicted of false accounting contrary to Section 19 of the Theft Act 1981. He was sentenced to six years' imprisonment. His wife was sentenced to nine months' imprisonment suspended for two years for her role in the affair. They are currently appealing conviction.

7 *R (on the Application of Hafner and another) v. City of Westminster Magistrates' Court* [2008] All ER 52 (Mar).

8 *Kennedy v. Australian Securities and Investments Commission*, Deemster Doyle, 11 November 2009.

III COURT PROCEDURE

Overview of court procedure

Civil procedure in the Isle of Man is governed by the Rules of the High Court of Justice 2009 ('2009 Rules'). They came into operation on 1 September 2009. They introduced the overriding objective that the court must deal with all cases justly. The court should ensure that parties are on an equal footing. It will also endeavour to deal with cases in a manner proportionate to value, importance and complexity. Parties are required to assist the court in the furtherance of the overriding objective.

Procedures and time frames

Actions are subject to the Limitation Act 1984, which specifies a general limitation period of six years for tort and contract. In personal injury matters, a claim cannot be brought after the expiration of three years from the date of action or the date of knowledge, whichever is later.

All proceedings are commenced when the court issues a claim form at the request of a claimant. The claim form must then be served within four months of the date of issue from the court or six months if it is to be served out of the jurisdiction. The court will only grant an extension to this time frame if the claimant has taken reasonable steps to serve but has been unable to do so.

The claim form must contain a concise statement of the nature of the claim, the specific remedy the claimant is seeking and, if claiming for money, a statement of value. This statement should disregard any possibility that he or she may recover interest or costs or that the value may be reduced by a filing of a counterclaim, set-off or contributory negligence.

The particulars of claim are ordinarily served with the claim form or set out within the claim form itself. The particulars may be served separately within 14 days of the claim form and in any event no later than the latest time for serving the claim form (i.e., four months). When the claim form is served on the defendant it must be accompanied with forms for defending, admitting and acknowledging service.

A defendant may file an acknowledgement of service within 14 days of service of the claim form if he or she is unable to file a defence in that time period or wishes to dispute the court's jurisdiction. If the particulars of claim are served separately, the defendant has 14 days to acknowledge from the service of the particulars.

An admission must be served within 14 days after service of the particulars of claim. A party may admit the truth of the whole or any part of another party's case.

Where a defendant wishes to defend all or part of the claim, the defence must be filed either 14 days after service of the particulars of claim, or if an acknowledgement of service has been served, then 28 days after service of the particulars of claim. The parties may agree to extend the period for filing a defence by up to 28 days.

If the claimant wishes to serve a reply to the defence, it must be done within 14 days of the defence being served. A claimant who does not file a reply to the defence is not taken to admit the matters raised in the defence.

Class actions

i Representative Actions

Representative actions are permitted under Part 3, Chapter 6 of the 2009 Rules where a number of individuals have the same interest in an action. One or more representatives will act on behalf of the group and any order of the court will be binding upon each and all of those represented, although an order will only be enforceable against an individual who is not party to the proceedings with the permission of the court.

Where potential parties to an action cannot be ascertained (e.g., unborn potential beneficiaries under a trust), the court may appoint a representative to act on their behalf. Derivative actions are permissible, but require the permission of the court.

ii Group litigation

Part 3, Chapter 7 of the 2009 Rules deals with group litigation, which is permissible where a group of individuals have claims in relation to common or related issues of fact or law. The court may make a group litigation order where there are likely to be a number of claims giving rise to group issues and only with the permission of the First Deemster. Orders made in respect of group litigation may be binding on all or some members of the group as the court decides. Such an order can be appealed by any person adversely affected by that order unless that person is one who is registered as part of the group, in which case they can apply for an order that the original order does not apply to them.

Class actions have been scarce in the Isle of Man, but have become more prevalent in the past 18 months following the bringing of high profile cases such as that relating to the collapse of Kaupthing Singer & Friedlander and that brought on behalf of a group seeking confirmation of Isle of Man public rights of way.

Representation in proceedings

Manx law is very similar to that of England and Wales in this regard. With certain exceptions, any person may represent himself in an action. Minors and patients under the Mental Health Act 1998 act by a litigation friend.⁹

The court may treat a litigant in person with some leniency to ensure parties are on an equal footing,¹⁰ otherwise litigants must appeal by an Isle of Man advocate. In exceptional cases, a licence may be issued to an English barrister.

Service out of jurisdiction

The rules for service out of jurisdiction are set out at Part 2, Chapter 9 of the 2009 Rules and apply to all defendants whether a natural person or non-natural. A claimant must apply for permission from the court to serve the claim form out of the jurisdiction and the Rules set out 21 circumstances under which permission may be granted. If the circumstances do not fall within those specified in the Rules, there is a 'catch-all'

⁹ Part 3, Chapter 4, Rule 3.13 of the Rules of the High Court of Justice 2009.

¹⁰ Part 1, Rule 1.2 of the Rules of the High Court of Justice 2009.

provision whereby the court will grant permission if it is satisfied that there are special grounds that warrant service.

Every application for service out of jurisdiction must be supported by written evidence setting out the grounds under which the application is made and stating that the claimant believes they have a reasonable prospect of success. The claimant must make full and frank disclosure in making the application and the court must be satisfied that the island is the proper place to in which to bring the claim. In consideration of *forum conveniens*, the island's courts will follow *Spiliada Maritime Corp v. Cansulex Ltd.*¹¹

If the court grants permission, the claim form may then be served by any method permitted by the law of the in the country in which it is to be served. If the country is a party to the Hague Convention, then the claim form may be served through the authority designated under the Convention in respect of that country or if the law of that country permits through the judicial authorities of that country or through a British consular authority in that country.

Enforcement of foreign judgments

The enforcement of judgments issued by overseas Courts is governed by (1) the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968; and (2) the common law. The 1968 Act applies to the following countries: the United Kingdom, Italy, Jersey, Guernsey, Israel, Suriname and the Netherlands.

Any person, being a judgment creditor, may apply to the court within six years of the judgment to have it registered on the Isle of Man. The application is made by claim form and may be made without notice. It must be supported by written evidence exhibiting the judgment and a translation of the judgment if it is not in English.

If the judgment is registered, the registration order must then be served on the judgment debtor. In the case of a company, it will typically be served by leaving it at, or sending it by post to, the registered office. The judgment cannot be enforced before the end of a period specified by the court, which is typically 14 days. During this period, the judgment debtor can apply to have the registration set aside.

For judgments of courts other than those covered by the 1968 Act, a fresh action may be commenced with the judgment as the debt. The defences to such an action are very limited; for example, that the judgment was obtained by fraud or that its enforcement would be contrary to public policy.

The Isle of Man is not party to the Brussels or Lugano Conventions.

Assistance to foreign courts

The Isle of Man courts have long recognised their global responsibilities and they have been assisting foreign courts for many years.

11 [1968] 1 AC 389. See, *inter alia*, *Manco Limited v. Institute of Chartered Accountants*, 1987-89 MLR 252 and *Kyrgyz Mobil & Others v. Fellowes Int & Others*, Staff of Government Division, 28 November 2008

The Isle of Man is party to the Hague Evidence Convention.¹² The Convention was given domestic effect in England and Wales by the Evidence (Proceedings in Other Jurisdictions) Act 1975. This was extended to the Isle of Man by Order in Council – Proceedings in Other Jurisdictions) (Isle of Man) Order 1979 (SI 1979 No. 1711).

Foreign courts seek the assistance of the Isle of Man courts by letter of request. A list of questions should be annexed to the letter, and the questions must be framed precisely. Requests for documentation and information must not be based on speculation or conjecture. Other than in the most straightforward cases, it is desirable for a draft letter to be reviewed by an Isle of Man advocate prior to issue, to ensure compatibility with Manx law and procedure. The letter of request is enforced under the procedure set out in Part 8 of Chapter 5 of the 2009 Rules.

The application should be supported by written evidence, together with a copy of the request.¹³ The court may order examination of the evidence or witness.¹⁴ The examiner will file the deposition of the witness.¹⁵ A certified copy of the deposition will be transmitted to the requesting court.

The 1975 Act contains important safeguards for witnesses. A witness cannot be asked to answer any question he would not be obliged to answer under Manx procedure.¹⁶ A witness may also claim that he or she is exempt from giving evidence.¹⁷

The courts also frequently grant letters of request issued by foreign courts or authorities exercising criminal jurisdiction.

Access to court files

i Access by any person

The 2009 Rules provide that court must keep an indexed register of all claims issued by it, which may be inspected by any person subject to the payment of a fee. In addition, any person may with the permission of the court obtain a copy of the claim form (but not any related or attached documents filed or served with it) and copies of any communication between the court and parties to an action or any other person. Copies of claim forms, judgments and orders may also be obtained subject to certain conditions relating to the claim itself.¹⁸

ii Access by parties

Parties to a claim are given much broader rights of access to documents filed at court. A number of documents are viewable without the permission of the court (unless the court orders otherwise) including all statements of case and documents filed or served with them, application notices, any written evidence and any judgments or orders. Parties

12 The Hague Convention Taking of Evidence Abroad in Civil and Commercial Matters 1975.

13 Part 8 Chapter 5 Rule 8.46.

14 Part 8 Chapter 5 Rule 8.47.

15 Part 8 Chapter 5 Rule 8.48.

16 Section 2(3).

17 Section 3 and Rule 8.49.

18 Part 2 Chapter 6 Rule 2.21(3).

may also gain access to correspondence between the Court and parties or others with permission.

Litigation funding

There are no rules allowing contingency fees or conditional fees.

The rules on third-party funding are similar to that of England and Wales. Where the costs of a party who fails in litigation have been financed by a third party, the court has power to order costs against that third party, even if he is out of the jurisdiction.¹⁹ In *Tomlinson v. Thane Investments Ltd and others*,²⁰ the court directed that the name of the third-party funding the action be disclosed. The court may also order the disclosure of the basis and conditions of such funding.

IV LEGAL PRACTICE

i Conflict of interest

Under the Advocates Practice Rules 2001, Isle of Man advocates must not act in a way that may compromise or impair their integrity or independence or their duty to act in the best interests of their clients. Therefore, advocates must not act when there is a conflict or a risk of conflict. Generally, if a conflict arises during the course of a matter advocates should cease to act for one or both parties.

There are no specific rules relating to conflict of interests in the 2001 Practice Rules except relating to property matters. The English Law Society's Solicitor's Code of Conduct is of general guidance.

ii Money laundering, proceeds of crime and funds related to terrorism

The island has been proactive in establishing international standards of supervision and in 2009 was commended by the IMF for its robust regulatory regime.

Lawyers are subject to stringent obligations under the Criminal Justice (Money Laundering) Code 2008 in order to identify and prevent money laundering. The 2008 Code imposes a duty for lawyers to carry out a money-laundering and terrorist-financing risk assessment for the purpose of determining the measures to be taken when undertaking customer due diligence.

Lawyers must not form a business relationship unless they establish, operate and maintain identification, record-keeping, internal-reporting and staff-screening procedures. Each firm must have a money-laundering reporting officer who has a duty to report any suspicious transaction to the Isle of Man Constabulary's financial crime unit.

It is a criminal offence, subject to a fine or imprisonment for a person to enter into or become concerned in an arrangement that the person knows or suspects, facilitates

19 *Clucas Food Service Limited and Ice Mann* (CPL 2004/6 unreported judgment delivered on 15 December 2005).

20 (Chancery 2005/1 unreported judgment delivered on the 2nd March 2006).

the acquisition, retention, use or control of criminal property.²¹ Although the island is not a member of the Financial Action Task Force, it fully endorses its recommendations on money laundering and terrorist financing.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

Privilege

The 2009 Rules permit parties to object to disclosure on grounds of privilege.

There are a number of circumstances in which privilege is recognised by the Common Law. The circumstances in which privilege arises in the Isle of Man mirror those of England and Wales and can be categorised as follows.

i Litigation privilege

Protection is afforded to communications between an advocate and client or an advocate or client and a third party when such communications relate either to a legal action that has commenced or being contemplated.

ii Legal advice privilege

This covers advice given by an advocate to his or her client. It differs from litigation privilege in that the protection does not extend to third parties. As such, in order to fall within legal advice privilege it is necessary to identify exactly who the client is. This is particularly important in the context of large organisations and corporate entities. Protection will not be afforded if the communication took place with someone other than the client. At an early stage in the litigation, it is essential to define the person who will give instructions and to restrict circulation of advice to them.

iii Common interest privilege

Confidential communications between parties who share a common interest in legal advice received or given in the context of actual or contemplated litigation will fall into this category. Protection will also arise where legal advice is received in respect of a transaction in which parties have a common interest.

iv Privilege against self-incrimination

This category protects individuals from disclosing information by which they may incriminate themselves. Incrimination in this context relates to criminal proceedings only. The protection extends not only to documents which would actually incriminate an individual, but also to those which may expose a person to the risk of self-incrimination.

v Public interest immunity

Under Part 7, Chapter 5, Rule 7.48(1), a person may make an application to the court for permission to withhold a document on the basis that disclosure would damage the public

21 Section 140 of the Proceeds of Crime Act 2008.

interest. In deciding whether the immunity applies, the potential damage which may be caused by disclosure must be weighed against the public interest in the administration of justice, which would normally require such documents to be disclosed.

vi Without-prejudice communications

Bona fide offers to settle or compromise are protected by privilege. They cannot be disclosed while liability remains at issue, but may be relied upon once liability has been determined and while costs remain in issue. The mere fact that a document or communication is marked ‘without prejudice’ does not in itself afford the document protection.

vii Waiver of privilege

In most cases (other than public interest immunity), a party may waive its right to privilege in whole or in part. If so, the document or information should be disclosed and may be used against that party in proceedings.²²

Where a privileged document is accidentally inspected, the party who has inspected it may only use it with the permission of the court.²³

Production of documents

The 2009 Rules have codified the rules relating to disclosure and inspection of documents.

i Disclosure of documents

Each party to a claim is under a duty to disclose documents. ‘Document’ in this context means anything in which information of any description is recorded.²⁴ The duty of disclosure is ongoing and so any new documents that come to light after initial disclosure has been made must also be disclosed.²⁵

A duty in respect of disclosure is not only placed upon a party to a claim, but also an advocate representing that party. An advocate must adopt a proactive approach and should supervise discovery. The advocate should ensure from the outset that the client is aware of his or her duty to disclose and thus keeps all documents that may potentially need to be disclosed. This forms part of the advocate’s duty not to purposefully or recklessly mislead the court.²⁶ The advocate’s duty is discussed in detail in *MTM v. Jones & Others*²⁷ (a judgment given under the old court rules).

22 *Montpelier Tax Planning v. Jones & Others* (2007) SGD as to waiver of legal advice privilege.

23 Part 7, Chapter 5, Rule 7.49.

24 Part 7, Chapter 5, Rule 7.31.

25 Part 7, Chapter 5, Rule 7.40.

26 Advocates Practice Rules 2001, Rule 19.

27 CLA 2001 Judgment dated 16 February 2006 CLD Superior Business

The 2009 Rules provide that an order for disclosure means an order for standard disclosure. Standard disclosure can be limited or dispensed with by the Court or by agreement between the parties.²⁸

The procedure for standard disclosure is set out in Rule 7.39 and involves each party to an action making a concise list of documents for disclosure presented in a convenient order and manner. The list must identify which of those documents the party claims a right to withhold and which are no longer in the party's control and why. A disclosure statement must also be made on the list stating that the party understands and has complied with their duty of disclosure. An action for contempt of court may be brought against any person who makes or causes to be made a false disclosure statement knowing it to be untrue.²⁹

Under standard disclosure, parties are obliged to disclose documents upon which they rely, documents that adversely affect their case, documents that adversely affect another party's case and those documents that support another party's case.³⁰

Disclosure is limited to those documents that are within the party's control. A document is said to be in the party's control if it is in the party's physical possession, he or she has or has had a right to possession of it or he or she has or has had a right to inspect or take copies of it.

In order to identify the documents that must be disclosed, each party is under a duty to carry out a reasonable search.³¹ Proportionality is the deciding factor in whether a search is reasonable and under Rule 7.36, the following are taken into account: the number of documents involved, the nature and complexity of proceedings, the ease and expense of retrieval of any particular document and the significance of any document which is likely to be located during the search. Each party must indicate the extent of the search which has been undertaken in their list of documents. If any category or class of documents has not been searched for, as it is felt that to do so would be unreasonable, this must also be stated.

ii Inspection

A party has a right to inspect any document that has been disclosed in the list of documents, except where the party who has disclosed the document claims a right to withhold inspection (e.g., due to the document being privileged) or that the document is no longer in the party's control.³² A party may also refuse to disclose a document on the grounds that it would be disproportionate to the issues in the case to require inspection.³³

A party may also inspect any document referred to in a statement of case, witness statement, witness summary or affidavit and may apply for inspection of any document

28 Part 7, Chapter 5, Rule 7.34.

29 Part 7, Chapter 5, Rule 7.52.

30 Part 7, Chapter 5, Rule 7.35.

31 Part 7, Chapter 5, Rule 7.36.

32 Part 7, Chapter 5, Rule 7.33.

33 Part 7, Chapter 5, Rule 7.33(2).

referred to in an expert report which has not been disclosed during the course of the case.³⁴

iii Specific disclosure and inspection

Any party may apply for an order of court for specific disclosure or inspection of documents. The court may also make such an order of its own volition.

An order for specific disclosure will require a party to disclose documents or carry out a search or disclose any documents located in that search.

A party may defend an application for specific disclosure or inspection on the grounds that:

- a* he or she claims a right to withhold disclosure or inspection;
- b* the document is not within his or her control;
- c* disclosure or inspection would be disproportionate to the issues in the claim; or
- d* the applicant is shown to be 'fishing'.

iv Third-party disclosure

Rule 7.46 provide for orders for disclosure to be made against persons other than the parties to a claim. In order to obtain such an order a party must make an application to Court supported by evidence.

An order for disclosure against a third party will only be made where the disclosure of the documents believed to be in the third party's possession is necessary to dispose fairly of the case or save costs. The order will only be granted where the documents to be disclosed are likely to support the case of one of the parties or adversely affect the case of the parties.

An order for third-party disclosure may provide that security for costs be given in respect of the third party's costs.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration in the Isle of Man is governed by the Arbitration Act 1976 and Part 13, Chapter 6 of 2009 Rules. Once parties have entered into an arbitration agreement, any party may apply to the court to have any proceedings relating to a dispute to which the agreement applies stayed.³⁵ Any application under the 1976 Act is known as an arbitration claim.³⁶ Arbitration claims in respect of proceedings already commenced can be made by way of application under the original proceedings and any new claims can be made by way of claim form under the chancery procedure.³⁷ Any limitation period

34 Part 7, Chapter 5, Rule 7.43.

35 Section 5 of the Arbitration Act 1976.

36 Part 13, Chapter 6, Rule 13.49(1).

37 Part 13, Chapter 6, Rule 13.50.

contained in the arbitration agreement for the commencement of proceedings can be extended by the court.³⁸

The appointment of an arbitrator will be as per the arbitration agreement unless such appointment is impractical or impossible in which case the court is given power in certain circumstances to appoint an arbitrator or umpire.³⁹ Such circumstances include when a single arbitrator is to be appointed under an agreement and the parties cannot agree as to the arbitrator to be appointed or where an arbitrator refuses to act.

Certain terms in respect of the conduct of arbitration proceedings are deemed to be included in any arbitration agreement subject to express contrary terms⁴⁰ including a requirement to produce all relevant documents on oath in their possession or power, which may be required or called for and provisions for the examination of parties and witnesses on oath by the arbitrator.

An award may be made in arbitration proceedings at any time⁴¹ and any time limit that may be placed upon the making of an award may be extended by the court.⁴² Any award made is final and binding upon all parties to the action unless a contrary intention is expressed in the arbitration agreement.⁴³ Power is given to the court to remit claims to arbitration or set aside any award.⁴⁴ Any party who wishes to have any award remitted to arbitration or set aside must make an application to court within 21 days of the award being made.⁴⁵

A party may apply to court for an order allowing an arbitration award to be enforced as though it were a judgment of the court.⁴⁶ The rules governing such enforcement are contained in Rule 13.53 of the 2009 Rules.

Special rules apply to arbitration under the Arbitration (International Investment Disputes) Act 1983. These are set out in Chapter 13, Part 6, Rule 13.55 of the 2009 Rules.

ii Mediation

There is no obligation in the Isle of Man for parties to mediate but it is becoming increasingly popular due to the freedom given to parties by the new Rules of the court. At any time after a defence is filed, any party can make an application for the whole or part of the claim to be referred to mediation. The 2009 Rules require all parties to provide written consent that they wish the matter to be referred to mediation and must agree who the mediator is to be between themselves.

38 Section 28 of the Arbitration Act 1976.

39 Section 11 of the Arbitration Act 1976.

40 Section 13 of the Arbitration Act 1976.

41 Section 14(1) of the Arbitration Act 1976.

42 Section 14(2) of the Arbitration Act 1976.

43 Section 17 of the Arbitration Act 1976.

44 Sections 24 and 25 of the Arbitration Act 1976.

45 Part 13, Chapter 6, Rule 13.51.

46 Section 27 of the Arbitration Act 1976.

Although the parties are free to agree on the manner in which to conduct the mediation, the court will set directions specifying when the mediator must report on the parties' progress. It is the duty of the mediator to report to the court if an agreement is reached between the parties or if he or she believes that the mediation should be terminated. The court has the overriding power to terminate the mediation at anytime if it is satisfied that it is unreasonable or inappropriate to continue.

Parties are being encouraged to explore the mediation process as an effective way of resolving their disputes without recourse to protracted, expensive and sometimes destructive litigation rather than wasting valuable time and costs in court. Unless the costs are agreed between the parties, the court has the final discretion and will take into account the conduct of each party throughout the proceedings.

VII OUTLOOK AND CONCLUSIONS

Arbitration, mediation and other forms of dispute resolution may still be less popular than court action, but the trend is definitely upwards.

The introduction of the new Rules in September 2009 has been a fundamental change to the Manx legal system. The new Rules are aimed at increasing the effectiveness and value of the courts, to the benefit of litigants and practitioners. This further development of a modern and efficient legal system will serve the island well in maintaining its position as a highly respected business centre.

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Christopher Cope is a partner with the litigation and insolvency group of Appleby in the Isle of Man and specialises in trust litigation, public law, insolvency and fraud and asset recovery. Mr Cope was named as a leader in his field by *Chambers Europe* 2010 and the publication described him as 'an outstanding lawyer in very high demand'. He is also ranked as a highly recommended individual in *PLC Which Lawyer?* 2009 and is described as a 'well-respected advocate with particular expertise in trusts and professional negligence'. Mr Cope has spoken at various conferences including the C5 Conference on Fraud Asset Tracing and Recovery.

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Chapter 27

JERSEY

*Fraser Robertson, Natasha Clark and Davida Blackmore**

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Jersey is a common law jurisdiction, whose legal system draws on both the common law of England and the ancient customary law of Normandy. In areas such as the law of torts, trusts and criminal law, the court draws heavily on English law whereas in cases involving disputes over land and contract law, it draws on Norman customary law principles, which have been adapted and developed to deal with modern day disputes.

The Royal Court is the principal court of Jersey and has the following divisions:

- a* *Héritage* (dealing with property issues);
- b* Family;
- c* Probate; and
- d* *Samedi* (which deals with all other matters including criminal).

The nature of the dispute determines in which division the matter will be heard, but in general, large commercial disputes are heard in the *Samedi* division. The Bailiff is the President of the Royal Court who determines questions of law whereas questions of fact are decided by a permanent panel of Jurats, who are a type of lay judge.¹

In large commercial cases, the general rule is that all court proceedings are conducted in public, unless otherwise ordered by the court or on the application of one or other of the parties. If a party wants a hearing conducted in private, the court has to be satisfied that the need for confidentiality outweighs the public interest in access to

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1 Jurats are generally persons of high standing within the local community and need not be legally qualified. There are 12 Jurats. Their Inferior Number comprises a judge plus two Jurats, and the Superior Number (convened for serious matters where custodial sentences are likely to exceed four years) comprises judge plus at least five Jurats.

open justice. In certain circumstances, judgments may be anonymised, as in matrimonial disputes or cases involving the welfare of children.

Appeals from decisions of the Royal Court are made to the Court of Appeal of Jersey, and from there to the Judicial Committee of the Privy Council. Any decisions of the Privy Council are final and binding on all the courts below. This is unusual as Jersey law does not recognise the concept of *stare decisis* in the same way as the courts in England and may depart from earlier decisions (although they will not do so unless the matter is plainly wrong). The Privy Council will generally only hear cases that involve a point of law of general public importance.

In addition to the formal court processes, the Jersey Employment Tribunal has been established to hear disputes arising under the jurisdiction granted to them by the relevant legislation. It comprises a legally qualified chairperson who sits with two lay members with appropriate experience. It is possible to appeal a decision made by the Tribunal to the Royal Court, but on a point of law alone. There is no right to appeal any decision made by the Royal Court and their decision is final.

II THE YEAR IN REVIEW

*i Peter Michel v. Her Majesty's Attorney General*²

On 14 May 2007, after a 30-day trial before the Inferior Number of the Royal Court (Sir Geoffrey Nice QC, as Commissioner), Mr Michel was convicted on nine counts of money laundering contrary to Article 32 of the Proceeds of Crime (Jersey) Law 1999 and was later sentenced (by the Commissioner and five Jurats) to six years' imprisonment.

Mr Michel appealed against his conviction (but not against the sentence or the confiscation order), but this was dismissed by the Court of Appeal on 13 December 2007. He was, however, granted special leave to appeal against that decision.

Commissioner Nice was strongly criticised by the Privy Council for his unfair handling of the trial of Mr Michel and the central ground of appeal as to the fairness of the trial focused entirely on the Commissioner's conduct of the hearing and his continual interruptions of the evidence, of prosecution witnesses, as well as the appellant himself, of evidence in chief as well as cross-examination. The court looked at the statistics and determined that Commissioner Nice had 'intervened with substantive questions on no fewer than 273 occasions, 138 of them during evidence in chief. Generally, this was with a whole series of questions, taking up in all just over 18 per cent of the appellant's eight-and-a-half days in the witness box.'

The court quashed the conviction against Mr Michel in a judgment that said that Commissioner Nice had been snide and sarcastic and that his actions had rendered the trial unfair. As Lord Brown stated:

Not often is defence counsel, appealing against conviction on the grounds of an unfair hearing, able to turn the appeal court's feeling from initial rueful concern to eventual deep dismay simply by reference to the number and character of the judge's interventions in the course of the trial. Such,

2 [2009] UKPC 40.

alas, is the position in this case and, overwhelming though the evidence against the appellant may appear to have been, the Board can see no alternative but to set his conviction aside.

ii *B v. C, D & E: In the matter of the A trust*³

This case concerned a settlor who established the A Trust and made a voluntary disposition into it under advice, which subsequently gave rise to a substantial unforeseen tax liability. The settlor sought a declaration by the court that the voluntary disposition had been made under a mistaken belief and that the trust should be invalidated insofar as it related to her voluntary disposition.

In deciding whether to set aside the trust on the grounds of mistake, the starting point is Article 11(2) of the Trusts (Jersey) Law 1984, which states that ‘a trust shall be invalid... to the extent that the court declares that... the trust was established by... mistake...’. The Royal Court then considered the test for setting aside a voluntary disposition under Jersey law, and looked at the English case *Sieff v. Fox*⁴, which stated:

*According to Gibbon v. Mitchell,*⁵ *the mistake must be as to the effect of the disposition, and a mistake as to its consequences is not sufficient. If that is the correct test, this would not justify setting the disposition aside. According to Ogilvie v. Littleboy, the test is more general, namely whether the donor or settlor ‘was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him’. That formula might allow fiscal consequences to be taken into account, if they were sufficiently serious...*

The court held that ‘there is no good reason to restrict the Court’s jurisdiction under Article 11(2) of the Trusts Law to the narrow *Gibbon v. Mitchell* test’, and concluded that under Jersey law the test when considering an application to set aside a voluntary disposition on the grounds of mistake by an individual is that set out in *Ogilvie v. Littleboy*.⁶ It was clear that there had been a mistake of law regarding the settlor’s liability to UK tax and the mistake was serious since it gave rise to an immediate charge to UK tax of up to £1.2 million, a sum which represented a material proportion of the settlor’s wealth. ‘But for’ the mistake, the settlor would never have agreed to make a disposition with such consequences.

iii *AG v. Warren & Ors*⁷

This case attracted an enormous amount of media interest and is interesting, not only because of the notoriety and ‘celebrity’ of the defendant, but also due to the unusual actions of the Jersey police in intercepting the plot. Curtis ‘Cocky’ Warren, a notorious gangster who is the only drug trafficker to appear on the ‘*Sunday Times* Rich List’ was convicted at assize trial of conspiracy to fraudulently evade the prohibition on the importation of a controlled drug, namely cannabis, contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law 1999.

3 2009 JRC 245.

4 (2005) 1 WLR 3811.

5 [1990] 1 WLR 1304.

6 (1897) 13 TLR 399.

7 [2009] JRC 234.

Warren was previously jailed in Holland over a £100 million drugs plot, a sentence that was lengthened when he was convicted of killing a fellow prisoner. Warren had only been out of prison for five weeks when he was arrested by Jersey police and accused of being the ringleader and mastermind of a gang that was trying to import cannabis into the island from Holland via a boat from France. The sentencing court was strongly disapproving of the actions of the Jersey police, who had carried out a bugging operation in France without the lawful authority, but the Jersey Court of Appeal had already ruled that the illegal recordings should be admitted in the interests of justice.

Ultimately, he was sentenced to 12 years' imprisonment.

*iv MacKinnon v. MacKinnon*⁸

In this case, the court examined the circumstances in which an order for costs ought to be made against an executor personally and whether an executor ought to be prevented from recovering his or her own costs, incurred in contesting the litigation, out of the estate. The testatrix, Dorothy MacKinnon, died on 15 October 2002. Part of her estate was contained within certain family trusts. These trusts became the subject of dispute between the testatrix's sons, James and Andrew. They reached a compromise in April 2006, and, as part of that compromise, a grant of probate was issued to Andrew on 10 May 2006. James, who was unhappy with the way in which Andrew was carrying out the administration of the estate issued a representation, then sought an order that the costs of and incidental to the representation be met by Andrew on the indemnity basis, and further, that Andrew be prevented from claiming his costs out of the estate.

The court interestingly followed and applied principles of trust law in considering when it might be appropriate for an award of indemnity costs against an executor, and followed previous decisions where it was held that a trustee's breach of fiduciary duty was, of itself, a sufficiently 'special' or 'unusual' circumstance to justify such an order.⁹

The court confirmed that the general principle is that an executor is entitled to recover the costs of the administration from the estate, citing Article 15 of the Wills and Successions (Jersey) Law 1993, but in cases where an executor is ordered to pay the costs of a legatee personally, it would be wrong to allow an executor to recover his own costs from the gross estate at the expense (in whole or in part) of the same legatee.

III COURT PROCEDURE

i Overview of court procedure

There are no pre-action protocols such as those in England and Wales in relation to civil litigation. Civil litigation is governed generally by the Royal Court Rules 2004 and accompanying Practice Directions, which are available on the Jersey Law website¹⁰ and which are generally based on England's Supreme Court Practice pre-Woolf Reforms.

8 [2009] JRC 218.

9 *Ogier Trustee (Jersey) Limited v. CI Law Trustees Limited* [2006] JRC 158 and *In Re the H Trust* [2009] JRC 158.

10 www.jerseylaw.je.

ii *Procedures and time frames*

Legal proceedings in the Royal Court can be commenced by summons, order of justice or representation. A summons is only used when suing for a liquidated sum, and generally most actions are initiated by order of justice, which sets out the plaintiff's claim and is signed by the locally qualified advocate or solicitor.

If proceedings are commenced by summons, service by post is permissible. However, an order of justice must be served personally on the defendant and will be via the Viscount.

Upon service of the order of justice, the defendant is served with a summons giving a date for appearance before the Royal Court. The matter is then 'tabled' by the plaintiff by 12p.m. on the Thursday before the date on the summons. Assuming the defendant wishes to defend the claim, then the matter may be placed on the Pending List evidencing an intention to defend, or adjourned *sine die* (to a date to be fixed). If the matter is placed on the Pending List, the defendant has 21 days to serve its answer (and counterclaim if required). The plaintiff then has 21 days to file its reply, should it wish to do so. If the defendant does not appear on the Friday afternoon then judgment can be taken in its absence. The matter then proceeds through the usual stages of discovery and so on until the matter settles or the parties are ready for trial.

There is little statutory framework for limitation periods and prescription periods in Jersey are, in most cases, based on case law rather than statute. The majority of commercial claims are based on tort and contract law. The prescription period for tort claims is three years from the date on which the cause of action accrued.¹¹ The prescription period for contract claims is regulated by Jersey customary law and is 10 years from accrual of the cause of action.

Numerous interim remedies are available on the application of either party before trial and include (among many others) interim injunctions, orders for the freezing of property and search orders. It is not possible, however, to ask for pre-action disclosure.

If the defendant fails to file an answer, the plaintiff can apply for judgment in default. A party can also apply to strike out the other's case, because the opposing pleading:

- a* discloses no reasonable cause of action or defence;
- b* is scandalous, frivolous or vexatious;
- c* may prejudice, embarrass or delay the fair trial of the action or any other proceedings; and
- d* is otherwise an abuse of court process.

It is also possible to apply for strike out on the grounds that two months have passed since the close of pleadings and no summons for directions has been issued and can also be struck out for want of prosecution.

11 Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.

iii Class actions

Representative proceedings may be brought where one individual wishes to represent a number of individuals with identical interests in the same proceedings¹² and a plaintiff in proceedings can apply to the court for the court to appoint a defendant to represent other defendants.¹³ The judgment obtained will be binding on the people who are represented, but that judgment will only be enforceable with the leave of the court.¹⁴ In the exercise of its inherent jurisdiction, the Royal Court may stay an action in circumstances in which there are numerous similar cases and one of them may be used as a test case, which will effectively dispose most of the issues of liability in all the cases.¹⁵

iv Representation in proceedings

Only locally qualified Jersey advocates have rights of audience in the Royal Court, but any person who is not a minor or under an incapacity has the right to commence civil proceedings without professional representation and the court will adopt a fairly lenient approach to litigants appearing in person.

v Service out of the jurisdiction

Any civil or commercial matter summoning or citing a person outside Jersey to attend before a court in Jersey may be served in such manner as prescribed by Rules of Court.¹⁶ Under Rules 5 of the Service of Process Rules 1994, leave must be sought from the court in order to serve out and such leave is governed by Rule 7 of the Service of Process (Jersey) Rules 1994. The case must fall within one of the specified circumstances of Rule 7 and, for example, may be allowed where the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction but the defendant resides outside Jersey. The summons must be in the appropriate format¹⁷ and accompanied by affidavit¹⁸ and stating the belief that the plaintiff has a good cause of action,¹⁹ showing the country in which the defendant can be found and detailing the grounds under Rule 7 upon which the application is made.

vi Enforcement of foreign judgments

The Judgments (Reciprocal Enforcement) (Jersey) Law 1960 provides for the registration and enforcement in Jersey of judgments given in the superior courts of countries that give reciprocal treatment to judgments given in Jersey:

12 Rule 4/3(1) of the Royal Court Rules 2004.

13 Rule 4/3(2); *ibid.*

14 Rule 4/3(3); *ibid.*

15 *Labia v. Jefferson Seal Ltd* [1997] JLR n3.

16 Article 2 Service of Process and the Taking of Evidence (Jersey) Law 1960.

17 Form 2A or 2B, Schedule, Service of Process Rules 1994.

18 Form 3, *ibid.*

19 See also the case of *Koonmen v. Bender* [2002] JLR 407, citing *American Cyanamid v. Ethicon re* where there is a serious issue to be tried.

The reciprocating countries and their superior courts are:

- a* England and Wales: House of Lords, Court of Appeal, High Court of Justice;
- b* Scotland: Court of Session, Sheriff Court;
- c* Northern Ireland: Supreme Court of Judicature;
- d* Isle of Man: Her Majesty's High Court of Justice (including the Staff of Government Division); and
- e* Guernsey: Royal Court, Court of Appeal.

However, the recent judgment of Jersey's Royal Court in *Brunei Investment Agency and Bandone v. Fidelis and Ors*²⁰ has significantly extended its inherent jurisdiction to enforce foreign judgments in Jersey. The court acknowledged that the Law was limited in application to the above territories and the court was therefore concerned with its inherent jurisdiction to enforce foreign judgments. The court noted that in the area of private international law, regard would be given to the English common law position. Dicey, Morris and Collins' *The Conflict of Laws* is the principle authority on this area, in particular Rule 35(1).²¹ However, the court departed from this rule having looked at other Commonwealth decisions in this area, but importantly the court made it clear that this jurisdiction would not be confined to being exercised in the context of Article 51 of the Trusts (Jersey) Law 1984.

These arrangements do not apply to matrimonial cases, the administration of the estates of deceased persons, bankruptcy, winding up of companies, mental health or guardianship.

The judgment creditor must apply to the Royal Court (*ex parte* to the Judicial Greffier²²) within six years of the date of the judgment itself or, where the judgment has been appealed, the date of the last judgment in the appeal proceedings and must be supported by an affidavit exhibiting a certified copy of the foreign judgment. A foreign judgment will not be registered if the debt has been wholly satisfied at the date of application, or could not be enforced in the foreign country itself. To be registered, the judgment must be for a money sum and must be final and conclusive between the parties.

Once registered, a written notice of registration must be served on the judgment debtor, who has usually 14 or 28 days, subject to any extensions, in which to apply to set aside the registration. A registered judgment cannot be enforced until that time period has expired or any application to set aside the registration has been disposed of but it can then be enforced in the same way as a judgment given in Jersey.

In relation to foreign judgments to which the 1960 Law does not apply, the foreign judgment creditor must sue in Jersey on the foreign judgment.

20 [2008] JRC 152. In this case, proceedings were brought in Jersey by the Brunei Investment Agency to enforce aspects of an order made by the Bruneian Courts against Prince Jefri Bolkiah, the youngest brother of the Sultan of Brunei.

21 Which provides that foreign judgments may be enforced if (1) for a debt or definite sum of money; and (2) the judgment is final and conclusive.

22 The Judicial Greffier's office is similar to that of the Master in the English High Court.

vii *Assistance to foreign courts*

The Service of Process and Taking of Evidence (Jersey) Law 1960 was amended in 1985 to enable Jersey to fulfil its international obligations under the Hague Convention, the purpose of which is to improve international judicial cooperation in civil and commercial matters. Where the relevant criteria are met, the requesting court may apply to the Royal Court for assistance in obtaining evidence. The Royal Court has power to make provision for the obtaining of such evidence in Jersey as appears to it to be appropriate in the circumstances.

The Law Officer's Department (the office of the Attorney General – 'the Department') is the central authority for requests for mutual legal assistance, including requests made under the various Hague Conventions, such as the service of documents in civil and matrimonial cases. The letter of request should be remitted with the sealed, original order of the requesting court, to the Attorney General on behalf of the Royal Court and the Department will then arrange for service to be effected and a certificate of service returned to the requesting party.

The Attorney General has further powers under local legislation to assist overseas authorities in a number of ways including, *inter alia*, the obtaining of documentary and oral evidence for use in civil asset recovery investigations and proceedings, as well as freezing and confiscating assets subject to external civil asset recovery proceedings and rendition of suspects.²³

The request or its accompanying instructions may take such form as the requesting court deems expedient.

Nevertheless, an order made under the 1960 Law cannot require any steps to be taken which may not be taken in the context of ordinary civil proceedings before the Royal Court (see *Continental v. Deery*²⁴).

viii *Access to court files*

Members of the public are able to access pleadings held by the court save for those which relate to matters that have been held *in camera*. If a request for copies of pleadings in an action commenced by way of order of justice is to be acted on, it must be in writing and must state the reasons why they are required. On receipt of such a request, the court will release the pleadings, provided that the reasons given are non-contentious and they will only be released where answers have been filed by all the parties to the action.

23 See Attorney General's Guidelines on International Mutual Legal Assistance, www.gov.je/Government/NonexecLegal/LawOfficers/Pages/InternationalAssistance.aspx

24 [2010] JRC 001. The court should, where possible, give assistance under letters of request duly received: 'It should decline to comply with the foreign request only in so far as it is not proper or permissible or practicable under its own law to give effect to it. Observing faithfully the precept of not delivering what the foreign court has not asked for, and restraining any temptation to rewrite the request, the court may amend letters of request by excision, or by adding or substituting words in order to clarify what is being sought without altering the substance of the Letters of Request'.

In the case of actions commenced by way of representation, no copy pleadings may be released until the matter has been concluded, then they may be released subject to the conditions mentioned previously.

ix *Litigation funding*

Fee arrangements are generally set between the advocate and his client, generally with time-based charging. Conditional or contingency fees are prohibited by the Jersey Law Society Code of Conduct. A Legal Aid scheme²⁵ is available to individuals satisfying the appropriate means test, but is different to the structure in England and Wales. In Jersey, depending on an individual's earnings, a person is charged a percentage of a fixed hourly rate which is set by the court.²⁶ Those who fall below the threshold are exempt from any fees.

A company or an individual not in receipt of Legal Aid generally fund its own litigation, although funding can be provided by insurers, but this depends on whether the client's policy covers the relevant claim and whether there is a cap on legal fees payable. There is no after the event insurance cover. There are, however, no restrictions on third-party funding by anybody who is not a relevant party to the litigation.

IV LEGAL PRACTICE

i *Conflict of interest and Chinese walls*

Conflict of interest is governed by the rules contained in the Code of Conduct of the Law Society of Jersey. Generally, lawyers must refrain from acting in circumstances where there is a real or serious risk that a conflict exists between the interests of two or more different clients in either the same matter or a related matter or where there is a conflict between the lawyer's interests and those of his or her client.

There are circumstances where a lawyer may be permitted to act for more than one client, despite a potential or actual conflict between the client's interests, as may be the case with non-contentious commercial matters. In such cases a lawyer must obtain written consent of all clients who are party to such a transaction.

Where an actual or potential conflict of interest exists, an existing or former client can apply to the court for an order that the lawyer cease to act.²⁷

Lawyers have a duty to protect all confidential information regarding their clients' affairs, which can preclude lawyers from representing a potential client if:

- a* they hold confidential information regarding a client (or former client) which may reasonably be expected to be material to the potential client; or
- b* the work to be undertaken for the potential client would be adverse to the interests of a client (or former client) to whom there is an existing duty of confidence as

25 An advocate of less than 15 years' standing must comply with legitimate instructions of the *Bâtonnier* to represent legally aided clients – by oath of office, the advocate has a duty to represent the '*veuves, pauvres, orphelins et indéfendues*'.

26 Practice Direction RC 09/04 Factor 'A' rates per hour.

27 See *Abacus (CI) Limited v. Bisson* [2007] JRC 150.

might occur if a client is likely to become a party to a negotiation or dispute resolution process arising out of the new matter.

Although a conflict of interest may exist, a firm may be able to act by implementing a Chinese wall. A Chinese wall refers to a firm's internal arrangement intended to ensure members of the firm acting for one client are prevented from accessing confidential information belonging to another client.

While Jersey does not have any legislation, rules or authority to provide a procedural framework on how to deal with Chinese walls, it will take guidance from the rules as laid out in the English solicitors' Code of Conduct.

Generally a firm must obtain written consent from both clients to proceed in such circumstances. However, a situation may arise where a firm is already acting for a client on a matter, when it discovers it holds confidential information belonging to an existing or former client. If this occurs, it may be possible to create a Chinese wall and continue to act without the consent of the client to whom the existing duty of confidentiality is owed, if it is not possible for that consent to be obtained. The new client must still consent to the firm acting on the circumstances where it is prevented from disclosing all relevant information, and it must be reasonable in all the circumstances.

To establish an adequate Chinese wall, all members of the firm who possess the relevant confidential information must be identified. These members will be precluded from having any involvement in the new matter or disclosing any confidential information to other members of the firm. Access to electronic as well as physical documents will be restricted to those identified members.

ii Money laundering, proceeds of crime and funds related to terrorism

As a well regulated international finance industry, Jersey has a collection of legislation to deal with money laundering and terrorism. Drug Trafficking Offences (Jersey) Law 1988, the Proceeds of Crime (Jersey) Law 1999, and Terrorism (Jersey) Law 2002, and more extensive requirements to prevent and detect money laundering and terrorist financing are set through the Money Laundering (Jersey) Order 2008 ('the Order').

From 1 May 2008, law firms became subject to these laws and together with other finance businesses, now have a greater responsibility for detecting and preventing financial crime; all regulated firms must disclose to law enforcement authorities any knowledge or suspicion of money-laundering activities.

Each firm must put in place a procedure to identify and verify any client's identity. It will look at the type of client (i.e., individual or company), the nature of its instructions (whether or not it deals with financial services business) and, if they are financial services business, the level of risk of money laundering the business poses. If any member of a firm has any knowledge or suspicion regarding a client activities it must report them. Failure to do so is a criminal offence and carries a maximum penalty of five years.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Privilege in Jersey is governed by the common law. The recognised categories of privilege that may be claimed by a party in respect of its documents or communications are:

- a* Legal advice privilege: legal advice privilege protects confidential communication between a lawyer and client made for the dominant purpose of receiving or giving advice in the relevant legal context.
- b* Litigation privilege: Litigation privilege only arises when litigation is in existence or contemplation. In those circumstances, any communication between a lawyer and client, or a lawyer or his client and a third party, is privileged if made for the dominant purpose of obtaining or giving legal advice or collecting evidence or information in relation to the litigation. Litigation privilege is wider than legal advice privilege as it may cover communications with third parties.
- c* Privilege against self-incrimination: documents that incriminate or expose a person to criminal proceedings in Jersey or to the proceedings for the recovery of a penalty in Jersey are generally protected by privilege. It is sufficient if the document has a tendency to incriminate or so expose the person, provided the risk is apparent to the court.
- d* Common interest privilege: Common interest privilege arises where communications are made between parties who share a common interest in the legal advice. This will arise where parties share the same interest in litigation (or potential litigation), or in a commercial transaction to which the legal advice relates. In such cases, communications of privileged information between the parties will be privileged, even if neither legal advice privilege nor litigation privilege applies.
- e* Public interest immunity: This immunity applies where production of the document would be so injurious to the public interest that it ought to be withheld. Jersey follows the law of England in this matter.²⁸
- f* Without-prejudice communications: Any communications made in good faith to attempt to settle proceedings are covered by the without prejudice privilege.

Communications between a company and its qualified in-house lawyers are capable of being privileged, to the extent that the communications concerns the lawyer in his or her legal capacity, rather than some other managerial role.

Communications with qualified lawyers in other jurisdictions may also be privileged in the Jersey courts where they comply with the usual rules of privilege.

Privilege is a substantive right which entitles its holder to refuse to produce any privileged document for inspection. As a substantive right, it can be relied on in all contexts, including in regulatory investigations.

28 *Deeny v. States of Jersey Health & Social Services* UJ 7 April 2003.

ii Production of documents

Rule 6/17 of the Royal Court Rule 2004 provides that civil litigants must give discovery of documents which are or have been in their possession, custody or power relating to matters in issue, whatever the capacity in which the documents came into the party's possession.

The test of relevance is whether the document relates to matters in dispute in the action. This means any document that it is reasonable to suppose contains information which may enable either party to advance its own case or to damage the case of the opponent. The test is whether the document could reasonably be expected to lead to a line of enquiry which would be of assistance to a party in relation to the matters in dispute.

Parties are obliged to disclose all relevant documents which are or have been in their possession (i.e., they hold the document), custody (i.e., it is not their document but they can get hold of it such as a bank holding documents of a third party) or power (i.e., where a party is holding a document in a bank safe). The fact that a document may be situated outside the jurisdiction is therefore irrelevant.

The meaning of 'documents' in this context is broadly construed. In addition to documents and correspondence, it covers other written materials such as emails, handwritten notes, diaries, meeting notes and the like. It will also extend to plans, drawings, photos and videos. Information and documents that are stored electronically on the memory of computers, or other back up storage media, such as discs or tapes may also be discoverable in proceedings.

There is no authority in Jersey dealing with the position of electronically stored documents; however, it is likely the courts would find the approach adopted by the England courts in deal with such matters, as highly persuasive.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Alternate dispute resolution is defined at Rule 6/28 of the Royal Court Rules 2004 as 'any method of resolving disputes otherwise than through the normal trial process and, without prejudice to the generality of the foregoing, includes mediation and conciliation.' The advantages of ADR – the fact it is usually conducted in private, the parties can agree that the outcome remains confidential and it is often a faster and more cost-effective resolution to a dispute than litigating through the courts – has contributed to it becoming increasingly employed in Jersey.

ii Arbitration

The Arbitration (Jersey) Law 1998 ('the Law') makes general provision for arbitration in the Island and gives effect to international conventions on the recognition and enforcement of foreign arbitration awards. While the Law itself was approved by the States of Jersey in September 1997 and sanctioned by the Queen in Council in October 1998, it was not immediately brought into force. This was because the British Home Office was concerned that certain provisions in the law appeared to contravene the Treaty of Rome, in that domestic and non-domestic arbitration agreements were treated differently. Accordingly, the Arbitration Law was only sanctioned on condition that the

relevant articles of the Law were amended to conform to European Union Law, prior to the Law coming into force. The Arbitration (Amendment) (Jersey) Law 1999 ('the Amendment') was therefore passed to deal with these anomalies, and like the substantive Law, the Amendment also came into force on 1 March 2000.

The Law is based largely on the English Arbitration Acts 1950 to 1982, although in England these have been repealed and replaced by the Arbitration Act 1996. As the Jersey statute had been substantially drafted prior to the legislative changes in England, it was finalised and approved, notwithstanding the introduction of the new Act in England. However, the changes in England were brought in to promote England as a centre for international arbitration; this capacity was not thought to be necessarily appropriate for Jersey.

Part 2 of the Law deals with arbitration within the island and it contains a number of provisions relating to the actual procedure that will be implied in arbitration agreements, unless the parties have expressly agreed otherwise; for example, how proceedings are conducted, specifying the number of arbitrators and provides for umpires, majority decisions, the power to call witnesses, delays, enforcement of awards, costs and interest.

The Law gives the court various powers exercisable at the request of one of the parties to the arbitration: for example, to stay court proceedings pending arbitration, to remove and replace arbitrators, to refer points of law to the court for determination, to grant extensions of time and to tax costs. It also sets out rules of general application to arbitrations, such as the effect of the death or bankruptcy of a party to the arbitrations and it limits the right of the court to review an arbitration award, to mistakes of fact or law, and limits further rights of appeal to special cases.

Part 3 of the Law contains provisions relating to the recognition and enforcement of arbitration awards to which the League of Nations Protocol of 1923 or the Geneva Convention of 1927 applies. The Law contains both the enabling provisions and the full text of the 1923 Protocol and the 1927 Geneva Convention (in Schedules 1 and 2).

Part 4 of the Law gives effect to the New York Convention on foreign arbitration awards which was adopted by the United Nations Conference on International Commercial Arbitration in June, 1958 but was not previously applicable in the Island. The full text of the convention is set out in Schedule 3 to the 1998 Law.

The Amendment removed the distinction in the substantive Law between domestic and non-domestic arbitration agreements. Now the court is obliged to stay legal proceedings pending arbitration for both domestic and foreign arbitration agreements. In addition, an exclusion agreement (one which restricts recourse to the Royal Court on a matter of law or for judicial review), has effect in a domestic or foreign arbitration. Similarly, the powers of the Royal Court to grant relief in cases of fraud can also be limited by an exclusion agreement in both a domestic foreign arbitration.

iii Mediation

There are no rules governing mediation in Jersey. Parties are free to agree between themselves all aspects of the mediation process.

Mediation in Jersey is a voluntary, informal and confidential process in which parties' discussions and negotiations are assisted by an experienced mediator (usually a

lawyer). Procedure at mediation is as agreed between the parties, but is usually guided on the day by the mediator. Discussions are without prejudice, giving the parties freedom to explore potential settlement options before incurring (or continuing to incur) significant litigation expenses. In certain disputes, the parties sometimes submit to expert determination, and are bound by the experts' decision.

A significant development in the mediation culture in Jersey has been the introduction of rules both in the Royal Court and the Petty Debts Court, under which the procedures of both courts permit proceedings to be stayed to allow an attempt at mediation. The courts cannot compel mediation, but a strong recommendation can persuade the parties to participate. Refusal to participate can persuade the court to exercise its discretion on costs.

Mediation is becoming increasingly popular in the island for disputes of all sizes. Aside from the changes in the court rules to encourage it, there are many obvious advantages as were emphasised by the Bailiff in Jersey in his 2004 speech for the launch of the new mediation rules:

Mediation can often leave the parties in a better position than litigation. First, if a dispute can be mediated at a relatively early stage, there can be a significant saving in cost to the parties. Secondly, a dispute settled confrontationally through the courts will often have a bruising effect upon the parties. There is always a loser, and sometimes there is no real winner. A mediated settlement, while not necessarily leading to total satisfaction on both sides, can enable the parties better to understand the other's point of view and occasionally to offer or to accept an apology. Particularly in a small community, where trading and even personal relationships between the litigating parties may continue, the ability to settle a disagreement in private without creating lasting wounds is, in my view, an important positive factor in favour of mediation.

iv Other forms of alternative dispute resolution

In Jersey, the most common forms of alternate dispute resolution are mediation and arbitration. However, there are a range of other processes available. For example, round table meetings or private negotiations, which are less structured than a formal mediation and are simply without-prejudice discussions between parties to try and resolve matters without the recourse to the courts or a formal mediator.

VII OUTLOOK AND CONCLUSIONS

ADR is becoming an increasingly utilised method in the resolution of disputes and 2010 will undoubtedly see many more parties using this as an alternative to the more formal route of litigation. Conventional litigation before the courts is still the main arena for the hearing of contentious litigation, however, and it is not thought that there will be drop in the amount of cases coming before the courts.

It is anticipated that there will be further significant trust cases this year in respect of beneficiaries' rights and trustees' dispositive and management powers. Jersey will undoubtedly further enhance its position as the leading offshore jurisdiction in the development of trust law and principles.

i *Review of Crown Officers*

At the time of writing, and in accordance with the decision of the States on 4 February 2009, an independent review of the roles of Jersey's Crown Officers (Bailiff, Attorney General and Solicitor General) is underway. The terms of reference show that the review will consider the Bailiff's dual role, as president of both the Royal Court and also the States Assembly. The Bailiff acts as both chief judge and 'speaker' of the House in the island's parliament. The roles of the Attorney General and Solicitor General are also being reviewed regarding their roles as head of the prosecution service, legal adviser to the States, Council of Ministers and scrutiny panels and 'titular head' of the honorary police. The review will consider whether the current roles should be changed, and if so, how they should be changed and what the likely cost implications of any such change might be.

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