



The Cayman Islands
Law Reform Commission
1 April, 2012/31 March, 2013

**EIGHTH ANNUAL REPORT OF THE
LAW REFORM COMMISSION**





FOREWORD

It gives me pleasure to present to the Honourable Attorney General the Eighth Annual Report of the Law Reform Commission (LRC). The Report covers the activities of the LRC from 1st April, 2012 to 31st, March, 2013.

During the period under review, the LRC continued to pursue law reform projects intended to contribute to the development of a society based on democratic values, social justice and fundamental human rights for all.

The year proved to be challenging but productive. We concluded two Final Reports which dealt respectively with-

- (i) the feasibility of the introduction of the office of Administrator-General;
- (ii) interim orders in aid of foreign proceedings and the enforcement of foreign judgments.

These reports were supported by the relevant Bills which seek to give effect to the recommendations of the LRC. It is hoped that our reports will be viewed favourably during the deliberations that form part of the legislative process.

Our work continued with a focus on the advancement of on-going projects, the most significant of which is strata titles reform. The other projects include family law reform, codification of directors' duties and the reform of the succession law.

Also, during the period, the LRC received three referrals from the Attorney General. These relate to the review of the law relating to conditional fee and contingency fee agreements, the reform of the coroners law and codification of the laws relating to the governance of statutory authorities. We have already commenced work on the first two-mentioned references and I am confident that the LRC's processes anchored in research, analysis and consultation will ensure that we are able to respond appropriately to the critical issues.

The LRC's engagement with stakeholders and the community has continued to be a hallmark of our reform process. I therefore take this opportunity to formally recognise

and thank the many persons from government departments and agencies, the legal profession, academia, stakeholder industries and the general public who have contributed to the law reform process. The quality of the work of the LRC is a testament to this contribution and helps us to work towards ensuring that our proposals are sensible, achievable and that they strike the right balance between competing interests and perspectives in order to deliver realisable reforms intended to benefit the Cayman Islands.

We have continued to embrace online publication by further enhancing our website in order to provide more information on the activities of the LRC. In line with our objective to lead and inform the debate on law reform we are committed to initiatives that build a strong online presence and develop tools that make it easier for stakeholders to participate in the process. It is anticipated that in continuing to build on the modest steps taken year after year to enhance and promote greater discussion of law reform proposals this will assist us to analyse the public response more efficiently and ultimately impact on the timeliness of our recommendations to Government.

I certainly acknowledge the commitment of all Commissioners and staff and extend my appreciation for their ongoing dedication, professionalism and thoroughness in conducting the work of the LRC. Our aim at the LRC is to pursue a high standard of legal scholarship and analysis and to maintain focus on independent, relevant and responsible law reform. The LRC team has continued to be instrumental in this regard.

I expect the upcoming year to be another busy one for the LRC. We will continue to pursue projects that facilitate informed responses to the challenges of this new and unfolding environment and will help our legal system to respond appropriately and effectively.

We will strive to ensure that our work programme contributes to the priorities for social and economic development in these constrained times and that our processes ultimately deliver reports that are independently researched and contribute to the Government's ability to make informed decisions in the areas we have examined.

Ian Paget-Brown

Chairman

OVERVIEW OF THE LAW REFORM COMMISSION

The Law Reform Commission was established by the Law Reform Commission Law No. 6 of 2005 and commenced operation on 16 September, 2005.

In accordance with the Law, the Commission's mandate is to study and keep under constant review the statutes and other laws comprising the law of the Cayman Islands with a view to its systematic development and reform, including in particular -

- the modification of any branch of the law as far as that is practicable;
- the elimination of anomalies in the law, the repeal of obsolete and unnecessary enactments and the simplification and modernisation of the law;
- the development of new areas in the law with the aim of making them more responsive to the changing needs of Cayman Islands society;
- the adoption of new or more effective methods for the administration of the law and the dispensation of justice; and
- the codification of the unwritten laws of the Cayman Islands.

The Commission, in the performance of its functions, may-

- review and consider any proposals for the reform of the law which may be referred to it by any person or authority;
- prepare and submit to the Attorney General from time to time, a programme for the study and examination of any branch of the law with a view to making recommendations for its improvement, modernisation and reform;
- initiate and carry out or direct the initiation and carrying out of, studies and research necessary for the improvement and modernisation of the law;
- undertake, pursuant to any such recommendation approved by the Attorney General, the formulation and preparation of drafts in the form of Bills or other instruments for consideration by the Governor in Cabinet and the Legislative Assembly;
- provide, at the instance of Government departments and other authorities concerned, advice, information and proposals for reform or amendment of any branch of the law; and
- with the approval of the Attorney-General, appoint or empanel committees, whether from among members of the Commission or from among persons outside the Commission or both, to study and make recommendations to the Commission on any aspect of the law referred to it by the Commission.

The work of the Commission is carried out by five part-time Commissioners and two full time legal counsel (the Director and Legislative Counsel) and one executive officer. The Commission is a department of the Portfolio of Legal Affairs but it acts independently in

its review of matters. Its recommendations are based on its own research and analysis of ideas submitted by stakeholders and by the public.

The Attorney General refers matters to the Commission but the Commission may initiate and carry out studies and research necessary for the improvement and modernisation of any area of the law based on comments from the public, interest groups or on its research.

The law reform process is a time consuming one and comprises extensive consultation, legal research and writing. The Commission usually prepares two publications during the course of a project. The first publication, the Discussion or Consultation Paper, sets out the Commission's preliminary suggestions for reform. The preliminary suggestions are usually made after legal research is carried out by the staff of the Commission and after such research has been considered by the Commissioners. The Commission either publishes the Discussion or Consultation paper on <http://www.lrc.gov.ky>, www.gov.ky or the www.judicial.ky or it submits the consultation paper to identified stakeholders for comments.

The second publication is a Final Report, which is submitted to the Attorney General. It contains the final recommendations of the Commission and, in all cases to date, a draft law. The Commission makes its final recommendations after it takes into account the responses it receives to the Discussion or Consultation Paper. Since its establishment the Commission has produced several project reports and five annual reports which are listed in the Appendix.

THE COMMISSIONERS AND STAFF OF THE LAW REFORM COMMISSION



Commissioners from left- Chairman Mr. Ian Paget-Brown, Mrs. Eileen Nervik, Ms. Cheryl Richards Q.C. Mr. Kenneth Farrow Q.C.



Staff of the Commission from left-Legislative Counsel, Mr. José Griffith, Director, Ms. Cheryl Neblett and Executive Officer, Mrs. Kimberly Allen

TABLE OF CONTENTS

OVERVIEW OF THE LAW REFORM COMMISSION	4
THE COMMISSIONERS AND STAFF OF THE LAW REFORM COMMISSION	6
YEAR IN REVIEW- PROJECTS OF THE LAW REFORM COMMISSION FROM 1 APRIL, 2012 TO 31 MARCH, 2013	

Meetings of the Commission	9
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COMPLETED PROJECTS

Introduction of the office of the Administrator-General in the Cayman Islands	9
Enforcement of Foreign Judgments and Interim Orders in aid of Foreign Proceedings	12

CURRENT PROJECTS

Sexual harassment	18
Review of the Strata Titles Registration Law and Regulations	21
Family Law Project - the Matrimonial Causes Bill 2013; the Maintenance Bill, 2013 and the Family Property (Rights of Spouses) Bill, 2013	23
Review of the law regulating the duties of company directors	25
Stalking	27
Conditional and contingency fee agreements	28

Reform of the Coroners Law and Rules	30
Reform of the Succession Law and Wills Law	30
Review of the law of contempt	31
APPENDIX- PUBLICATIONS/PAPERS	32

YEAR IN REVIEW- PROJECTS OF THE LAW REFORM COMMISSION FROM 1 APRIL, 2012 TO 31 MARCH, 2013

Meetings of the Commission

5. The Commission met five times between 1 April, 2012 and 31 March, 2013 on the following dates-

- 13 June, 2012
- 17 September, 2012
- 5 December, 2012
- 11 February, 2013
- 26 March, 2013.

COMPLETED PROJECTS

Introduction of the office of the Administrator-General in the Cayman Islands

6. Pursuant to a referral by the Attorney General in January, 2011, the Commission agreed to examine the feasibility of the introduction of the post or office of Administrator-General.

7. An Administrator-General carries out duties and functions similar to those of a public trustee and of a public guardian and in some jurisdictions the office is known as the Administrator-General/ Public Trustee office.¹ There is a variety of nomenclature for such office, such as public guardian, official solicitor and official receiver depending on the duties assigned to the office.

8. The Public Trustee, which has its origins in New Zealand, was once described by one of the opponents² to it during the passage of legislation to establish the office as "one of the most extraordinary that ever entered in to the imagination of any persons out of the limit of those buildings which were appointed for the custody of persons not able to take care of their own property".

9. In June, 2011 a preliminary discussion paper and draft Bill were submitted to the Chief Justice and the Attorney-General for their input. In preparing the paper and Bill, legislation in the UK, British Columbia, Alberta, New Zealand and Jamaica were considered, among others. Pursuant to comments received in October, 2011 from the Chief Justice and discussion by the Commission in November, 2011, the Bill was re-drafted and submitted for public comment on 22 March, 2012.

¹ Kenya, Uganda

² Henry Sewell, Colonial Secretary, 1872

10. The discussion paper examined how similar offices operated in countries such as the UK, Jamaica, Barbados and the Bahamas and the failures and successes of such operations. Our research showed that the main pitfalls which faced such offices over the years were underfunding, understaffing and lack of accountability.

11. The paper and Bill were published on www.gov.ky and www.lrc.gov.ky and in the local press on 22 March, 2012. It was also submitted directly to the following persons or organisations-

- The Attorney General
- Acting Solicitor General, the Portfolio of Legal Affairs
- The Cayman Islands Law Society
- The Cayman Islands Law School
- The Caymanian Bar Association
- The Ministry of Community Affairs, Gender and Housing
- The Department of Children and Family Services
- The Chief Justice
- The Society of Trust and Estate Practitioners.

12. The deadline for submission of comments was 3 May, 2012. The Commission received comments only from the Acting Solicitor General of the Portfolio of Legal Affairs. The Commission concluded its work on this project on 8 August 2012 and submitted a Final report and Draft Administrator-General Bill to the Attorney-General on that date.

13. The Bill provides for the appointment of an Administrator-General, his deputy and other officers. Clause 3 provides that the Administrator-General should be an attorney-at-law of seven or more years' call to the Bar and that his deputy should have at least three years' call. The Administrator-General will be deemed to be an officer of the court and would be supervised in his duties by the Chief Justice. The Bill provides that a person who already holds another public office may be appointed Administrator-General where the Governor is of the opinion that that person can properly hold two public offices together.

14. The functions and duties of the Administrator-General proposed in the Bill would include the following-

- (a) the administration of small estates i.e. estates with a value of less than \$20,000;
- (b) the administration of estates of intestates with no next of kin or where next of kin has not taken out letters of administration within a specified time period;
- (c) acting as executor under the will of any person;
- (d) acting as trustee;
- (e) acting as a court appointed receiver;

- (f) acting as next friend, guardian ad litem or legal representative of person under physical or legal disability;
- (g) appointing the guardian of child;
- (h) acting as guardian of the estate of child; and
- (i) investigating and auditing the affairs, dealings and accounts of a trustee, of an attorney under a power of attorney or those of a decision maker or guardian of a person under a disability.

15. The Bill also provides that the Administrator-General shall keep full, complete and accurate books of account of all transactions with respect to all estates and trusts vested in or administered by him and shall keep all such books as may be necessary for that purpose.

16. With regard to the keeping of funds by the Administrator-General, the Bill provides that all sums of money received by the Administrator-General in that capacity would forthwith or within such time as may be prescribed-

- (a) be paid by him into a Class A bank or a specified financial institution to the credit of an account to be entitled “Administrator-General’s Account”;
- or
- (b) be invested by him in securities approved by the Government.

17. The provisions of the Public Management and Finance Law (2012 Revision) will apply to and in respect of the Administrator-General and the operations of his office. Further, it is proposed that the Administrator-General would have to, within three months of the beginning of each year, prepare and submit to the Minister responsible for social services a report containing a summary of the operations of the office for the preceding year in such form and containing such information as the Minister may direct. The Minister would be required thereafter to lay such report in the Legislative Assembly.

18. The Commission is of the view that this legislation, which has the potential to provide valuable social assistance to the Cayman Islands society, could have been better informed if other stakeholders participated in the consultation process by offering comments on the proposals.

19. In promoting the first Public Trustee Act in the UK Sir Howard Vincent³ subtitled his proposals as a “bill for the protection of orphans and widows”⁴ as part of his campaign in introducing the legislation. The draft Administrator-General Bill, 2012 would not only protect widows, widowers and orphans, it would provide readily accessible services for the physically and legally disabled in the society. The Commission has sought to propose, by the draft legislation, a range of services necessary for our needs but which would not prove overwhelming to the office and which would

3 Colonel Sir Charles Edward Howard Vincent KCMG CB DL (31 May 1849 – 7 April 1908), known as Howard Vincent or C. E. Howard Vincent, was a British soldier, barrister, police official and Conservative Party politician who sat in the House of Commons from 1885 to 1908, Wikipedia

⁴ The Public Trustee in England, 1906-1986, Journal of Legal History

ensure that the problems highlighted in the discussion paper and this report will not occur.

Enforcement of Foreign Judgments and Interim Orders in aid of Foreign Proceedings

20. The Law Reform Commission (“LRC”), on 8th March, 2013 concluded its work on the review of the law dealing with enforcement of foreign and judgments and interim orders in aid of foreign proceedings. The Final Report and the supporting Bills comprising the Grand Court Amendment Bill, 2013, the Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2013 and the Foreign Judgments Reciprocal Enforcement (Scheduled Countries and Territories) Order, 2013 were submitted to the Hon. Attorney General for consideration.

21. The LRC review focussed on-

- (i) the process through which judgments of the Cayman Islands Grand Court are enforceable in the United Kingdom;
- (ii) the process through which judgments of the superior courts of the united Kingdom and by extension, the superior courts of other jurisdictions are enforceable in the Cayman Islands;
- (iii) the enforcement of foreign superior court non-monetary judgments in the Cayman Islands; and
- (iv) facilitating the enforcement of foreign interim orders in the Cayman Islands.

22. Our Final Report was divided into two parts. Part 1 dealt with the making in the Cayman Islands of interim orders in aid of foreign proceedings and Part 2 dealt with the enforcement of foreign judgments and the issues relating to reciprocity.

Part 1

23. In relation to Part 1 we commenced research by examining the Mareva injunction concept. This examination extended to the question of whether all foreign interim/interlocutory orders should be enforceable by the Grand Court.

24. Our research was primarily informed by an examination of the Cayman Islands cases of *Gillies-Smith v Smith*⁵ and *VTB Capital Plc v. Malofeev*⁶. The issue which was brought to the fore in these cases was whether the Grand Court has jurisdiction to give effect to injunctive relief issued in another jurisdiction in circumstances where the assets affected by the injunction are in the Cayman Islands and there are no substantive proceedings in relation to those assets. We also benefited from an examination of the following legislation-

⁵ Unreported, Quin J, May 12 2011.

⁶ Unreported, Cresswell J, August 18 2011. Later decisions are reflected in *VTB Capital Plc v Malofeev & Two others* (unreported, CICA, Cause No. 9 of 2011, 30 November 2011) and *VTB Capital Plc v Malofeev & Two others* (unreported, Grand Court, Cause No. FSD 141 of 2011, 16 January 2012)

- (a) the Hong Kong High Court Ordinance, 2009;
- (b) the Isle of Man High Court Act, 1991;
- (c) the UK Civil Jurisdiction and Judgments Act, 1982;
- (d) the Bahamas Supreme Court Act, 1996;
- (e) the Bermuda Supreme Court Act, 1989 Revision; and
- (f) the United States Foreign Money-Judgments Recognition Act, 2005.

25. The research findings of the LRC were relied upon in the formulation of an Issues Paper entitled “The Enforcement of Foreign Judgments and Interim Orders” of 6th March 2012”. This paper was published for stakeholder and general public comment.

26. In the Issues Paper we examined whether Mareva injunctions can be enforced in the Cayman Islands without their being substantive proceedings within the jurisdiction. The discussion was expanded to address the wider issue of whether the Grand Court should be empowered to make interim orders to facilitate proceedings that may have been commenced in foreign courts.

27. We recommended that in order to advance the Cayman judicial process, it seems appropriate for legislation to build upon the foundation laid by the common law and to seek to bring clarity and certainty to this issue. In this regard, the objective would be to facilitate the proceedings of foreign jurisdictions by granting the appropriate interim relief.

28. A related issue examined was whether the basis for granting interim relief in cases adjudicated in a foreign jurisdiction should be predicated on the countries identified by the Governor in Cabinet by order, or whether the power to decide when to grant interim relief should fall within the sole purview of the Courts as seems to be contemplated under UK, Isle of Man, Bahamian, Hong Kong and Bermudian legislation.

29. The consultation period on the Issues Paper expired 30th April, 2012. By the end of the consultation period, the LRC received responses from Justice Creswell, the joint committee of the Cayman Islands Law Society and the Cayman Islands Bar Association (CILS/CBA) and Bermudian attorney, Mr. Alex Potts.

30. The CILS/CBA in their comments expressed general support for the proposed reforms in this area and felt it appropriate to enable the Grand Court to grant interim relief in the facilitation of foreign proceedings where there are no substantive proceedings in the Cayman Islands.

31. In response to the issue of whether a recommendation should be made for the Governor in Cabinet to direct how the grant of interim relief should be governed and the jurisdictions to which this should apply, the CILS/CBA held the view that the question of whether interim relief should be granted should be left to the discretion of the Court and should not be limited to any list of designated jurisdictions.

32. Taking into account the views of stakeholders, the LRC formulated a draft Bill entitled “The Grand Court (Amendment) Bill, 2012”. This Bill contained legislative proposals intended to empower the Grand Court, in the exercise of its discretion, to facilitate proceedings that have commenced in a foreign superior court, by enforcing any order made for interim relief in circumstances where there is no substantive cause of action within the Cayman Islands’ jurisdiction.

33. This Bill was forwarded to the Chief Justice on 26th July, 2012 and later to the CILS/CBA on 28th September, 2012 for consultation. The consultation period expired on 3rd December, 2012.

34. The CILS/CBA expressed general agreement with the provisions contained in the Bill and advised that consequential changes to the Grand Court Rules will be necessary to allow for service out of the jurisdiction and for those Rules to specify the requisite originating procedure applicable for commencing claims under the proposed section 11A.

35. Accordingly, the LRC recommended the proposed Grand Court (Amendment) Bill, 2013 which provides for the following-

- (a) it permits the Grand Court to make an order appointing a receiver or granting other interim relief in aid of proceedings which have been or are to be commenced in a court outside the Islands and are capable of giving rise to a judgment which may be enforced in the Islands under any Law or at common law;
- (b) it defines interim relief to include an interlocutory injunction;
- (c) it permits the Court to grant interim relief of any kind which it has power to grant in proceedings relating to matters within its jurisdiction;
- (d) the court has a discretion to attach conditions to an interim order;
- (e) it empowers the Court to refuse an application for appointment of a receiver or the grant of interim relief if, in its opinion, it would be unjust or inconvenient to approve the application;
- (f) in making an order, it requires the Court to have regard to the fact that its power is ancillary to proceedings that have been or are to be commenced in a place outside the Islands and are for the purpose of facilitating the process of a court outside the Islands;
- (g) it permits the Court to retain the same power to make any incidental order or direction for the purpose of ensuring the effectiveness of an order granted under the legislation as if the order were granted in relation to proceedings commenced in the Islands; and

- (h) the Court may make rules applicable to an application for appointment of a receiver or interim relief and for the service out of the jurisdiction.

36. Our recommendations reflect the judicial principles and approaches of superior courts, within and outside the Islands. The relevant principles and approaches signal a willingness on the part of the judiciary to facilitate, on an interim basis, proceedings commenced in foreign jurisdictions in the absence of any local substantive proceedings or legislative framework.

Part 2

37. In relation to Part 2 of our report we sought to introduce legislative proposals to facilitate the enforcement, through the registration process, of judgments from other jurisdictions without the need for parties to pursue the common law procedure which requires a judgment creditor to commence new proceedings in the Cayman Islands Grand Court.

38. The research of the LRC into the concept of the enforcement of the foreign judgments encompassed the examination of (a) the process through which judgments of the Cayman Islands Grand Court are enforceable in the United Kingdom; (b) the process through which judgments superior courts of the United Kingdom and other jurisdictions are enforceable in the Cayman Islands; and (c) the enforcement of foreign superior court non-monetary judgments in the Cayman Islands.

39. In the Cayman Islands, it was noted, that the enforcement of foreign judgments concept had gained prominence through judicial dicta emerging from several leading cases⁷. In these cases, the Court demonstrated a willingness to recognise that modern-day cross-border legal problems require the adoption of novel or innovative approaches to addressing the issues of enforcement of foreign judgments.

40. In addressing the issue of the process through which judgments of the Cayman Islands Grand Court are enforceable in the United Kingdom we examined the common law rules dealing with the recognition and enforcement of foreign judgments in the UK. Also, we examined the UK Administration of Justice Act, 1920. Under this law English Courts have jurisdiction to recognise money judgments of courts of specified Commonwealth countries.

41. By way of the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Consolidation) Order 1984 (“REJ Order 1984”) an order was made extending Part II of the “AJA 1920” to several countries and territories specified in Schedule 1 to the Order. Jamaica was identified as one of those countries.

⁷See *post*, *Masri and Manning v. Consolidated Contractors International Company Sal*, *Gillies-Smith v Smith* and *VTB Capital Plc v Malofeev*.

42. Later, Schedule 1 to the “REJ Order 1984” was amended by the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Amendment) Order 1985 (“REJ Order 1985”) to include the Cayman Islands.

43. Against the background of the “REJ Order 1985” it was concluded that the judgments arising from the Grand Court are enforceable in the UK through the rules and conditions governing the registration process stipulated in the “AJA 1920”.

44. In relation to the process through which judgments of the United Kingdom superior courts are enforceable in the Cayman Islands it was determined that generally, in the Cayman Islands, foreign judgments may be enforced by way of common law enforcement or statutory enforcement.

45. In the Cayman Islands a party seeking to enforce a judgment at common law would have to issue fresh originating proceedings for a declaration and then seek summary judgment in the amount of the foreign judgment. The statutory regime for the recognition and enforcement of foreign judgments commences with the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (“FJRE 1996”). Under the FJRE it was however noted that no order was made under that Law for the recognition of UK superior court decisions in the Grand Court.

46. It was found in the case of *Masri and Manning v. Consolidated Contractors International Company Sal*⁸ (*Masri case*) that the payment of money imposed a final and conclusive obligation on the defendant and as such the decision was enforceable in the Cayman Islands but only at common law through an action commenced by writ in the Grand Court.

47. Accordingly, it was concluded that monetary judgments emerging from UK superior courts are enforceable at common law by issuing new proceedings in the Cayman Islands even though the UK “REJ 1985 Order” permits Cayman judgments to be enforced in the UK.

48. The LRC analysed the common law approach to enforcing UK judgments in order to determine whether the Islands have been adopting the right approach when seeking to enforce UK judgments. In so doing we examined the Jamaica Judgments and Awards (Reciprocal Enforcement) Act, 1923, Judgments (Foreign) (Reciprocal Enforcement) Act, 1936, Reciprocal Enforcement of Foreign Judgments Order, 1936 and their implications for the Cayman Islands. We also examined the issue of the Enforcement of UK judgments in the Cayman Islands post 1962.

49. It was concluded that prior to 1962 and as a consequence of the relationship between Jamaica and the Cayman Islands there was in fact legislation which permitted UK judgments to be enforced in the Cayman Islands through the process of registration. Therefore, resort to the common law procedure would not have been necessary at the time. However, after 1962 UK superior court judgments could only be enforced in the

⁸ [2010 (1) CILR 265].

Cayman Islands via the common law process and this would commence by way of initiating new proceedings and using the judgment debt as evidence for the proceedings.

50. Several reform options were identified in the Issues Paper to deal with the enforcement of foreign judgments in order to facilitate a far more simplified process for enforcing judgments arising from the UK and other foreign jurisdictions. Following upon the views of stakeholders on this matter and based on the assessment of the options, the LRC formulated for stakeholder comments, a draft Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2012. This Bill sought to remove the requirement for reciprocity in determining which foreign superior court judgments may be enforced in the Cayman Islands.

51. This Bill was forwarded to the Hon. Chief Justice and the Cayman Islands Law Society and the Caymanian Bar Association. The CILS/CBA expressed the view that the principle of reciprocity should be maintained and that the addition of countries by way of orders made by the Governor in Cabinet under FJRE 1996 would be the more appropriate option. They cautioned against a “blanket approach” to recognition, and instead urged extension on an individual and targeted basis.

52. Taking into account the views of stakeholders and in order to modernise and simplify the process of enforcing foreign judgments and extend the jurisdictional reach of the application process, the LRC recommended that two options be considered. These are-

- (a) amendment of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision); or
- (b) increasing, by order, the number of jurisdictions recognised under Part II of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision).

53. We expressed support of option (a) which contemplates amendments to the “FJRE 1996” to remove the issue of reciprocity in determining whether to enforce a foreign judgment.

54. The LRC also examined in its Issues Paper the enforceability of non-monetary judgments under the Foreign Judgments and Reciprocal Enforcement Law, (1996 Revision). It was pointed out that foreign non-monetary judgments such as an order for specific performance or an injunction have traditionally been regarded as unenforceable.

55. The issue examined was whether enforcement of foreign judgments should remain within the monetary confines of the definition of judgment as reflected in the “FJRE 1996” or whether Cayman legal jurisprudence should keep pace with modern legislative and business trends by facilitating remedies in respect of enforcement of foreign judgments which go beyond monetary judgments and are in the interests of justice.

56. These questions it was noted have been the subject of several judicial pronouncements and one of the more celebrated cases which led to fundamental changes in the approach of the courts in the enforcement of non-monetary judgments is the Canadian case of *Pro Swing Inc v Elta Golf Inc*⁹. Cayman judicial jurisprudence has generally followed the approach of *Pro Swing*. In the case of *Miller v Gianne*¹⁰, the Hon. Chief Justice referred to the decision of the Privy Council in *Pattni v Ali*¹¹, holding that it was “highly arguable” that the Cayman Islands court would be able to recognise and enforce non-money judgments in personam.

57. The LRC proposed that we move towards enforcing non-monetary judgments and that a legislative model from which we could benefit in terms of approach is that of the Canadian Enforcement of Judgments Act, 2002.

58. The CILS/CBA in responding to this issue expressed opposition to legislative reform in this area. The view expressed is that the common law continues to develop and that the potential consequences for the enforcement of non-monetary judgments are complex and raise issues which require careful consideration given the potential risk to the financial services industry.

59. The LRC is of the view that the ability to enforce foreign non-money judgments by way of legislation would represent an important change in the common law of the Cayman Islands. Modern judicial practice requires that we allow enforcement of non-money judgments in appropriate cases, subject to a cautious, discretion based judicial approach. However, given that this area of the law continues to develop, we did not recommend any changes at this time and believe it to be more prudent to wait until the common law principles become generally settled.

CURRENT PROJECTS

Sexual harassment

60. The Law Reform Commission (“LRC”), is in the process of concluding its work on the review of sexual harassment. The Final Report and the supporting Sexual Harassment Bill, 2013 are being considered by the Commissioners and it is anticipated that this review will be concluded in April, 2013 when the Report and the Sexual Harassment Bill, 2013 will be submitted to the Hon. Attorney General for consideration. This Bill contains legislative proposals which seek to respond to the issues that touch and concern acts of sexual harassment in the workplace environment and other professional contexts.

⁹ [2006] 2 SCR.

¹⁰ *Miller v Gianne and Redwood Hotel Investment Corporation* [2007] CILR 18.

¹¹ *Pattni v Ali* [2007] 2 AC 85 (Isle of Man).

61. Following upon the Report of the Special Advisory Committee on Gender Violence in 2008, the then Cabinet issued a directive¹² that the issue of gender violence should be examined by a committee established by the Portfolio of Legal Affairs in consultation with the then Ministry of Health and Human Services. It was instructed that the examination should fall within the parameters of the LRC and address interpersonal and gender-based violence issues such as rape, marital rape, sexual harassment, stalking, domestic violence, incest, child abuse and prostitution.

62. The Report of the Special Advisory Committee on Gender Violence along with the Report prepared by the Young Business and Professional Women's Club on Sexual Harassment and Stalking was subsequently referred to the LRC in 2009 by the Senior Policy Advisor (Gender Affairs) in the Ministry of Community Affairs, Gender and Housing.

63. The LRC treated this project as strictly a legislative drafting project having had the benefit of reviewing the report of the Young Business and Professional Women's Club on Sexual Harassment and Stalking.

64. The primary conclusion which emerged from the Report of the Young Business and Professional Women's Club on Sexual Harassment and Stalking is that there is a need for comprehensive legislation to protect potential victims from sexual harassment. It was recommended that the legislation include the following-

- (i) a test of sexual harassment which combines a subjective test (i.e. the perception of the alleged victim) and an objective test (i.e. the perception of a reasonable person);
- (ii) a civil offence of sexual harassment which enables one party to bring an action directly against the alleged perpetrator;
- (iii) remedies which include dismissal of a complaint, power to direct reimbursement of legal fees in bringing an action, directions to stop the offending conduct, compensation for any loss or damage suffered, employer being ordered to take appropriate action and penalties for victimising a complainant; and
- (iv) power to compel information or documents, direct the attendance of witnesses prohibit publication of details of hearings and impose punishment for interruption of proceedings.

65. In seeking to give effect to these recommendations, the LRC commenced its review by providing a brief overview of the sexual harassment issue. The issue of sexual

¹² Extract From Minutes of the Cabinet of the Cayman Islands, Item No 2812 or Meeting No 178/08 on 16th December, 2008 (see para. 4c) and Cabinet Paper by the Honourable Minister of Health and Human Services, 8th April, 2009, (see para. 7).

harassment, the LRC noted, has long been recognised internationally and in recent years has been increasingly viewed as a major international human rights problem.

66. Also, the LRC recognised the effort of the Government to protect human dignity and ensure the right of individuals to a safe and non-threatening environment by enacting the Gender Equality Law, 2011. We however pointed out that this Law dealt only with sexual harassment as it relates to gender discrimination within employment and occupational contexts.

67. The LRC expressed the view that the Gender Equality Law is restrictive in nature and does present limitations in light of the broader spectre of the sexual harassment issue.

68. In addition to the recommendations of the Young Business and Professional Women's Club on Sexual Harassment and Stalking we indicated that there is a need for legislation which mandates the formulation of a sexual harassment policy and expands the contexts in which the conduct can occur to include, among other things, educational and other institutions, associations and accommodations.

69. In advancing this process, the LRC prepared for consideration a draft Sexual Harassment Bill, 2012 which was forwarded to stakeholders and the general public.

70. The provisions of the Bill were informed by several legislative precedents including the Australian Sex Discrimination Act, 1984, the Bahamian Sexual Offences and Domestic Violence Act, 2006, the CARICOM Model Law on Sexual Harassment, the Belizean Sexual Harassment Act, 2000, the California Civil Code, the Canadian Labour Code and the Sex Discrimination Act, 1975 of the United Kingdom.

71. The consultation period on Bill expired on 27th September, 2012 by which time we received comments from the Ministry of Community Affairs, Gender and Housing, the Cayman Islands Law Society and Bishop Nicholas Sykes. Following upon the examination of the comments of all stakeholders the Bill has been revised to reflect those amendments which were consistent with its objectives to respond to the sexual harassment issue.

72. Accordingly, the proposed Sexual Harassment Bill, 2013 contains recommendations which include-

- (a) a definition of sexual harassment;
- (b) identify the types of conduct that may constitute sexual harassment;
- (c) require the formulation of policies dealing with sexual harassment conduct in a number of professional relationship settings;
- (d) provide for sexual harassment complaints to be made to the Gender Equality Tribunal; and
- (e) introduce protective remedies for victims or potential victims who have been or might be exposed to sexual harassment conduct within different interpersonal relationships.

Review of the Strata Titles Registration Law and Regulations

73. The reform of the strata titles legislation commenced in April 2009 and in November, 2011 the Commission appointed well-known local attorney Mr. David Ritch as consultant to advise on the Bill. After receiving final public responses to the first stage of the review in November, 2011 a draft Bill was finalised in December, 2011 and consultation with Mr. Ritch commenced on 16 January, 2012.

74. Pursuant to discussions and guidance provided by Mr. Ritch the Bill was re-drafted and submitted to the Ministry of District Administration, Works, Lands and Agriculture in July 2012. Comments were received from the Ministry in October 2012 and after further review and discussion with the Ministry a draft Bill and consultation paper were sent for public input on 3 January 2013. The original deadline for consultation was 11 March 2013 but pursuant to a request by CIREBA the deadline has been extended to 12 April, 2013 to allow more persons to submit comments.

75. The Commission has since the date of publication of the Bill and paper in January received many responses from a wide-cross section of the community. The main areas of concern are how to best provide for the collection by a strata corporation of arrears of strata fees and the provisions of the bill which seek to re-enact the 2012 Strata Titles (Amendment) Law, 2012.

76. Notwithstanding the three options provided in the Bill for the collection of arrears, the complaint has been that the Bill has not provided enough solutions in this area. The Bill provides in clause 40 for civil action in the court and in clause 41 for intervention by the bank holding a charge over a strata lot. Clause 41 provides that every charge of a strata lot shall be deemed to contain a provision that-

- (a) the chargee has the right to collect the proprietor's contribution to the administrative expenses and shall promptly pay the amount so collected to the corporation on behalf of the proprietor;
- (b) the proprietor's default in the obligation to contribute to the administrative expenses constitutes default under the charge;
- (c) the chargee has the right to pay-
 - (i) the amounts of the proprietor's contribution to the administrative expenses that from time to time fall due and are unpaid in respect of the charged strata lot; and
 - (ii) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in subparagraph (i);
- (d) payments made by the chargee under paragraph (c), together with interest and all reasonable costs, charges and expenses incurred in respect of the payments, are to be added to the debt secured by the charge and to be payable, with interest at the rate payable on the charge; and

- (e) if after demand the proprietor fails to fully reimburse the chargee, the charge immediately becomes due and payable at the option of the chargee and the chargee shall have such rights as are applicable in the circumstances in accordance with sections 72 and 74 of the Registered Land Law (2004 Revision).

77. In accordance with clause 41 the bank can intervene in the collection of outstanding strata fees and a proprietor could face the possibility of losing ownership of his strata lot.

78. The model bye-laws set out in Schedule 2 to the Bill provide an alternative method of collection. In paragraph 36 of the bye-laws it is provided that a proprietor shall pay to the corporation within thirty-one days of demand-

- (a) all contributions necessary to establish and maintain an administrative fund sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of insurance premiums and for the discharge of any of the other obligations of the corporation; and
- (b) all other costs and expenses incurred by the corporation in connection with the performance of its duties under the Law and under these bye-laws.

79. Paragraph 37 provides that where a proprietor does not make the payments specified in paragraph 36 within the thirty-one days specified, the proprietor shall pay interest thereon at the rate of twelve per cent per annum from the date of default which interest shall accrue from day to day until payment. Further where-

- (a) a proprietor does not make the payments specified within one hundred and twenty days of demand or the due date;
- (b) the proprietor becomes bankrupt or makes composition with his creditors;
or
- (c) the proprietor, being a corporation, enters into liquidation,

the proprietor shall authorise the corporation to enter into possession of his strata lot and shall appoint the corporation to be the receiver of the rents and profits of his strata lot until such date as the payments (together with interest accrued) have been made by him to the corporation or received by the corporation pursuant to the appointment.

80. Where the strata lot is not rented at the date payments are due, the executive committee shall apply to the court for an order of possession giving it authority to lease such strata lot for such period or periods specified by the court in order to recover the monies due and owing to the corporation, together with all expenses incurred in recovering the monies owed.

81. The corporation will not be liable for any damage or loss caused to the strata lot or chattel therein which loss or damage may have arisen after action is taken by the

corporation and the executive committee under this paragraph unless such loss or damage is caused by the negligence of the corporation or the executive committee.

82. It had been suggested that those provisions of the model bye-laws should be included in the main part of the Bill itself and this is being considered. There have been suggestions that legislation should provide for the cutting off of utilities and other such remedies. The Commission is of the view that those types of measures can only make a delicate situation volatile and could not enhance living conditions on any strata scheme.

83. There have been many objections to the amendments made to the Law by the Legislative Assembly in August 2012 more particularly the amendment which provides for the special and super-majority resolutions under which less than all of the strata owners may be permitted to vote on selling a strata scheme. The provisions have been described in some correspondence as unconstitutional. The Commission has agreed to examine the submissions on the special and super-majority resolutions with a view to making recommendations thereon.

84. The draft Bill covers areas which had not been previously expressly regulated by the Law such as vacant land strata schemes; leasehold strata schemes; mixed strata schemes; the protection of purchasers and the information which should be provided by the developers; the termination of strata schemes and resolution of disputes in strata schemes. The Law also includes changes to the definition of a strata scheme to cover two lot schemes and provides model management statements to be used in mixed strata schemes.

Family Law Project - the Matrimonial Causes Bill 2013; the Maintenance Bill, 2013 and the Family Property (Rights of Spouses) Bill, 2013

85. On 24 February, 2011 a discussion paper on the reform of the Matrimonial Causes Law (2005 Revision) was submitted for public comment. A wide range of issues were addressed including reform of the grounds for divorce; promotion of counseling and mediation in family proceedings; recognition of pre-nuptial agreements and abolition of damages and actions for adultery.

86. A number of persons and organisations including the Cayman Ministers Association, CBA and CILS responded. Pursuant to those responses, a Matrimonial Causes Bill, Maintenance Bill and Family Property (Rights of Spouses) Bill were drafted.

87. The Commission submitted in May 2012 the Matrimonial Causes Bill and Maintenance Bill to Mr. David McGrath and Ms. Karin Thompson, two well-known practitioners in this area of the law for their preliminary comments. Their views were taken into account in the re-draft of the legislation and the Commission thanks them for their invaluable input. The three Bills are being finalised and will be submitted for public comment in April 2013.

88. The Matrimonial Causes Bill will cover areas such as the following -

- use of marriage and maintenance agreements in matrimonial proceedings;
- mandatory marriage counselling and mediation;
- changing the jurisdiction of the court in matrimonial proceedings;
- the duty of attorneys-at-law to promote reconciliation;
- changing the grounds for dissolution of marriage;
- restrictions on petitions during the early years of marriage;
- impediment to the grant of a decree;
- welfare of and parental responsibility for children in matrimonial proceedings;
- separate representation of child in matrimonial proceedings;
- entitlement to and use of matrimonial home;
- the duty of court to end financial relations;
- financial relief in the Islands after overseas divorce etc;
- matrimonial property and protection of creditors;
- procedure and evidence in matrimonial proceedings;
- recognition of overseas decrees; and
- abolition of actions for damages for adultery.

89. The Maintenance Bill, 2013 seeks to reform matters such as obligation of spouses to maintain each other and children of the marriage; maintenance orders for spouses and adult children; obligation to support parents and regulation of maintenance agreements. The Bill sets out for example the matters which must be taken into account in awarding maintenance to a spouse. Such matters would include the following-

- (a) the length of time of the marriage;
- (b) the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;
- (c) the effect of the responsibilities assumed during the marriage on the spouse's earning capacity;
- (d) the spouse's needs, having regard to the accustomed standard of living during the marriage;
- (e) whether the spouse has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself;
- (f) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing to the earnings to the family's support;
- (g) the effect of the spouse's child care responsibilities on the spouse's earnings and career development;
- (h) the eligibility of either spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund or scheme, and the rate of that pension, allowance or benefit.

90. The third Bill, the Family Property (Rights of Spouses) is based on the Jamaican Act of the same name and regulates rights to property between spouses and former spouses. "Spouse" for the purposes of the legislation includes married person as well as a single man or single woman who is in a de facto relationship with a person of the opposite sex for a period of not less than five years immediately preceding the institution of proceedings under the legislation or the termination of cohabitation.

91. The legislation will provide that a person is in a de facto relationship with another person if-

- (a) the persons are not legally married to each other;
- (b) the persons are not related by family; and
- (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

92. The circumstances referred to may include any or all of the following-

- (a) the duration of the relationship;
- (b) the nature and extent of their common residence;
- (c) whether a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (e) the ownership, use and acquisition of their property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children; and
- (h) the reputation and public aspects of the relationship.

93. The Family Property (Rights of Spouses) Bill will-

- (a) bring common law unions within the ambit of the provisions with respect to the division of property where there is a breakdown of the union;
- (b) make provision for the family home to be equally divided except where such division would not be equitable;
- (c) make provision for the court to have the power to divide property owned by either or both spouses except the family home;
- (d) provide for-
 - (i) ante and post nuptial agreements;
 - (ii) declaration of property rights;
 - (iii) determination of value and share of property;
 - (iv) the manner in which property is to be divided;
 - (v) property and creditors;
 - (vi) cases where the disposition of property is made to defeat the claim of a spouse or other party; and
 - (vii) proceedings of and orders that the Court may make in relation to property.

Review of the law regulating the duties of company directors

94. The Law Reform Commission has been considering whether the duties of company directors should be codified. At present, the general duties of directors in the Cayman Islands are found primarily in the common law and the Cayman Islands Directors Code. They can be classified into two broad categories, namely fiduciary duties and duties of care and skill. Some common law jurisdictions such as the UK, Australia and Singapore have codified the fiduciary duties and the duties of care and skill in statute law. The main reason is that the case law is complex and often inaccessible to the public. It is viewed therefore that codification can improve clarity and certainty for company management and members.

95. However, there have been arguments against codifying directors' duties. The view has been expressed among commentators that fiduciary duties cannot be codified without being stated in detailed terms in which case there will be a loss of flexibility. Further, it is argued that if codification co-exists with common law and its development through judicial interpretation, this may lead to greater uncertainty.

96. In advancing our research in this area, to date we have been reviewing the literature dealing with the question of who is a director and the rationale behind the broad need for the regulation of directors in the execution of their duties. This examination is focussed on the contractual duties of directors and their equitable duties.

97. In the case of contractual duties, the focus is on express and implied duties owed to the company, including a duty of care in the performance of the contract.

98. In examining the equitable duties of directors which are commonly termed fiduciary duties we are focussing on a duty- (i) to act in good faith (ii) to act for a proper purpose (iii) not to fetter discretion (iv) not to act where there is a conflict of interest (v) to act with loyalty (vi) to preserve confidentialities (vii) to act in accordance with the company's constitution and (viii) to deal fairly between different shareholders.

99. The question of to whom this duty is owed and whose interest constitutes the company's interest having regard to the fact that the company is an artificial entity is being explored.

100. Several options for reform are being considered. The first involves comprehensive codification of directors' duties and in this regard we are examining the literature on the benefits and drawbacks of codifying the duties of directors under the Companies Law. The second option entails partial codification of directors' fiduciary duties.

101. The third option requires the formulation of a statutory statement of directors' duties. This statement will not replace the common law but instead seek to make the common law more accessible without causing it to lose any of its flexibility.

102. The fourth option deals with the application of the business judgment rule if a statutory statement is introduced. The rule would encompass the principle of non-interference by the courts in commercial decisions made in good faith.

103. Our research will culminate in the formulation of a discussion paper which identifies the issues and suggests various reform options for consideration by stakeholders and the general public.

Stalking

104. The examination of the LRC into the issue of stalking comes against the background of the Report of the Special Advisory Committee on Gender Violence in 2008. The then Cabinet issued a directive¹³ that the issue of gender violence should be examined by a committee established by the Portfolio of Legal Affairs in consultation with the then Ministry of Health and Human Services. It was instructed that the examination should fall within the parameters of the LRC and address interpersonal and gender-based violence issues such as domestic violence, sexual harassment and stalking.

105. To date, our review of the literature indicates that the legal understanding of stalking has moved away from the dictionary definition to one where it has taken on a meaning which speaks to harassment of another person in the strict sense.

106. Stalking has been considered in several jurisdictions as a form of harassment and whereas some jurisdictions may use the term stalking others refer to harassment. This notwithstanding, they all deal with the same issues and recognise that the broader term harassment addresses stalking behaviour.

107. The LRC has formulated a working definition of stalking to constitute a series of acts directed at a specific person, when taken together over a period of time, causes him or her to feel harassed, alarmed or distressed. The acts in contemplation include watching, loitering near, hindering access, following, stopping, accosting, interfering with property or giving offensive material

108. The LRC is investigating the practical reality facing victims of these types of acts and making a determination into whether legislative reforms are required and the form they should take. The aim of this legislative intervention is to protect victims of stalking by providing a mechanism which primarily focuses on interrupting the behaviour before physical harm ensues.

109. In so doing, due regard is being given to the constitutional rights of the alleged stalker to free speech and the right of assembly. While the focus is on the harmful effect of stalking behavior on victims we are seeking to ensure that legislative intervention does not suppress free speech or assembly rights. Any such impact has to be incidental.

¹³ Extract From Minutes of the Cabinet of the Cayman Islands, Item No 2812 or Meeting No 178/08 on 16th December, 2008 (see para. 4c) and Cabinet Paper by the Honourable Minister of Health and Human Services, 8th April, 2009, (see para. 7).

110. The Penal Code (Amendment) Law, 2011 (sections 88A and 88B) deals with the issue of harassment. The LRC is of the view that the Penal Code amendment does not adequately deal with the issue and the provisions could benefit from reformulation for purposes of clarity. We have examined the extent to which victims of stalking can be protected from harassment under this law and the scope of civil remedies.

111. In particular, we have identified the following which can be viewed as deficiencies in the Penal Code amendment-

- it refers to harassment but does not clearly define the concept;
- “alarm” and “distress” are outcomes of harassment similar to putting a person in fear; and by providing for “harassment”, “alarm” and “distress” in the way stipulated in the provision the focus of the provision seems unclear;
- there is a need for more guidance as to what other acts may constitute harassment; and
- the issue of civil remedies needs to be addressed such as permitting applications for restraining or protection orders.

112. The LRC is in the process of formulating legislative proposals to comprehensively address stalking within the existing framework of the law. The outcome will be stalking provisions which will be submitted for stakeholder and public consideration.

Conditional and contingency fee agreements

113. On 27th February, 2012 the Attorney General requested that the Law Reform Commission undertake a review of the law relating to conditional or contingency fee agreements with a view to its reform. This referral was made pursuant to the case of *Latoya Barrett v the Attorney General*¹⁴ in which the Honourable Justices called for an examination of the law relating to conditional fee agreements in the Cayman Islands.

114. In that case the Attorney General and the Cayman Islands Insurance Association as intervener appealed an order as to costs recoverable by the respondent Latoya Barrett who succeeded in the Grand Court on the issue of liability in proceedings arising out of a road traffic accident involving a police officer who was on duty. The trial judge¹⁵ had ordered that the Attorney General, as the representative of the Government, pay Ms. Barrett’s costs. The judge also approved an uplift fee uplift of 33.3% contained in the conditional fee agreement entered into between the plaintiff and her attorneys-at-law dated 20 August, 2008 and the uplift of 33% contained in the conditional fee agreement entered into between the plaintiff’s attorneys-at-law and counsel and determined them to be reasonable as between attorney and client and as between barrister and attorney respectively.

¹⁴ CICA 19 of 2012, unreported

¹⁵ Justice Quin

115. The trial judge further declared that Section 7.2 of Practice Direction No 1/2001 titled “Guidelines Relating to the Taxation of Costs” did not prohibit the recovery of the uplifts contained in the conditional fee agreement entered into between the Plaintiff and her attorneys-at-law, nor the uplift in the conditional fee agreement entered into between the plaintiff’s attorneys-at-law and Counsel if such uplifts are calculated on an hourly rate basis. It was further ordered that the taxing officer, when assessing the costs payable under the order, may, if in the exercise of his discretion he thinks it just to do so, assess such costs on the footing that the appropriate hourly rates are those which include uplifts.

116. In the notice of appeal the Government sought, inter alia, to set aside that part of the judge’s order. The intervener questioned the application by the trial judge in the case of the decision of the Grand Court in *Quayman and others v Hexagon Trust company (Cayman Islands) Ltd* in arriving at his judgment. In that case although the Chief Justice had acknowledged that champerty and maintenance are still a part of the law of the Cayman Islands he went on to consider whether agreements with a success fee were unlawful as being champertous maintenance and void on the grounds of public policy. The Chief Justice had decided obiter that the balance of public policy must certainly weigh in favour of allowing the conditional fee arrangements.

117. The Chief Justice at paragraphs 36 and 37 of his judgment stated:

“If a lawyer anywhere has too much at stake in the success of litigation he may be tempted to conduct that litigation in a manner which is unethical. The ultimate concern is that the administration of justice could be impaired by improper conduct of litigation motivated by the self-interest of lawyers becoming common place. It follows that a situation should not be encouraged in which lawyers would be exposed to temptations which might lead them to behave other than in accordance with their best traditions. Improbable though such a scenario might seem in an environment where professional honour remains the norm, those who fear have only to look to the experiences in other places where contingency fees are routinely allowed, to find cause.

There is, however, another equally important and competing public interest: that of ensuring that everyone has access to justice. For many, such as the plaintiffs in this case, that access would be denied for want of legal representation, were it not for the willingness of some lawyers to undertake litigation on the risky basis of a conditional fee arrangement.”.

118. The Practice Direction relied upon by the trial judge was enacted after that case in 2001 and came into force in 2002. The Court of Appeal in *Barrett* did not address the wider issue of the enforceability of conditional fee agreements generally in the Islands but held that the Practice Direction did not permit a successful party to recover taxation on the standard basis at an hourly rate above the maximum figure permitted in the Practice Direction. In allowing the appeal the court held that a conditional fee agreement with an uplift fee is unenforceable and that the conditional fee arrangements in the case were to be disregarded.

119. The Court of Appeal urged a review of the law of maintenance, champerty and conditional fees agreements before the making of any relevant legislation. The court noted that complex issues of public policy were involved and that full account must be taken of all interests involved and most importantly of “the need to provide access to justice for those who cannot afford it”.¹⁶

120. The Commission will be considering the status of the law in the Cayman Islands and whether the Islands should legislate for the use of such arrangements. The historical background of the law of maintenance and champerty will be examined as well as the changes to such law in jurisdictions such as the UK, Australia and Canada. Also to be examined are the safeguards which are required if the law is to be changed.

Reform of the Coroners Law and Rules

121. In September 2012 the Attorney General asked the Commission to consider the reform of the outdated Coroners Law and Rules. Draft Rules had been provided to the Rules Committee of the Grand Court in 2012 but a decision by the Committee to review the whole law.

122. The Commission was subsequently advised that interim rules are needed until a new law is passed and in January 2013 draft interim rules were prepared and sent by the Commission to the Rules Committee for their consideration. The current Rules contain very few provisions and consist primarily of forms. These draft Rules are more comprehensive and deal with matters such as the following-

- (a) the persons who are under a duty to notify the Clerk of the Courts of deaths;
- (b) notices to be given to the next of kin, etc.;
- (c) particulars relating to autopsies;
- (d) particulars relating to special autopsies;
- (e) burial orders;
- (f) particulars relating to medical reports; and
- (g) particulars relating to inquests.

123. The Commission is awaiting feedback from the Rules Committee on the interim Rules but has commenced the drafting of Coroners legislation.

Reform of the Succession Law and Wills Law

24. With the assistance of Dr. Simon Cooper, a former lecturer of the then Cayman Islands Law School¹⁷, the Commission is continuing its research on the modernisation of the Succession Law and the Wills Law.

¹⁶ Justice Campell, para 37, CICA 19 of 2012

¹⁷ Now the Truman Bodden Law School

125. In August 2012 Dr. Cooper submitted to the Commission a draft report on the issues for the reform of the Succession Law. The report is being considered by the Commission and contains recommendations such as the following-

- consideration be given to drafting a new clause which declares that a person's estate vests in a judge of the Grand Court until the grant of administration is made by the court, whenever the deceased died without appointing willing executors;
- consideration be given to drafting a new clause which declares that even though the letters of administration take effect from the time of grant, it occurs without affecting the common law principle of relating back;
- consideration be given to explicitly implementing in Cayman Islands domestic law the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions;
- consideration be given to explicitly legislating for the acceptance or rejection of the chain of representation in Cayman Islands law;
- consideration be given to the sanction that should be applied when a person takes possession of or administers a deceased person's estate without having obtained a grant of representation;
- consideration be given to permitting the issue of a grant of representation despite the absence of any Cayman Islands property; and
- consideration be given to the desirability of enacting a rule that an executor's renunciation operates, subject to the court permitting its retraction, for all time.

126. The above are a few of the recommendations made by Dr. Cooper and which are being considered by the Commission. Dr. Cooper is preparing his second report which will relate to the reform of the Wills law.

Review of the law of contempt

127. Work continues on the review of the law of contempt which is being addressed under three heads (similar to the approach of other commissions such as the Law Commissions of Western Australia and Tasmania). The Commission has to date prepared papers on (a) contempt in the face of the court and (b) contempt by publication (including scandalising the court by publications). Outstanding is the paper on contempt by disobedience to a court order, scandalising the court by acts not including publication and any other issues relating to interference with the administration of justice. There will however be a single final paper for public discussion that encompasses the law of contempt as a whole.

128. The paper currently being reviewed by the Commission relates to contempt by publication. The Western Australia Law Commission noted¹⁸ that the law of contempt by publication sets up tension between the integrity of trial processes and the availability to the public of information relating to those proceedings. Such "tension" has been seen in the Islands over the past year in relation to the extent to which a media house can report

¹⁸ Discussion paper- "Contempt By Publication", March 2002

on a case which is sub judice as it appears that at least one media house is unsure as to the ambit of this area of the law and has been protesting the lack of certainty in this area of the law. In an editorial in 2012, the newspaper referred to rules in this area of the law as being nebulous and argued that different media houses were being held to different standards in reporting on active court cases.

129. In considering whether there is a need to codify the law of contempt, the Commission is therefore cognizant of the urgent need to provide even a summary of the current law as part of its mandate to provide advice and information on any branch of the law. Areas which will be looked at include the test of liability; mens rea; the means of and timing of publication; responsibility for a newspaper or magazine; responsibility of persons engaged in other media; defence of innocent publication and the reporting of court proceedings.

APPENDIX

Publications/Papers

1. A Review of the legal aid system in the Cayman Islands- A preliminary discussion paper; Draft Legal Aid Bill; Draft Legal Aid Regulations (28 March, 2006)
2. First Annual Report of the Law Reform Commission 2005/6 (31 March, 2006)
3. Final Report- A Review of the Corporate Insolvency Law and recommendations for the amendment of Part V of the Companies Law; Draft Companies (Amendment) Bill (12 April, 2006)
4. Discussion paper- The Law of Landlord and Tenant; Draft Residential Tenancies Bill (30 September, 2006)
5. Consultation paper - A Review of the Law regulating legal practitioners in the Cayman Islands (29 January, 2007)
6. Second Annual Report of the Law Reform Commission 2006/7 (31 March, 2007)
7. Final Report - A Review of the Law regulating legal practitioners in the Cayman Islands; Draft Legal Practitioners Bill; Draft Accountant's Reports Regulations (31 May, 2007)
8. Final Supplemental Report of the Law Reform Commission- Review of Corporate Insolvency Law in the Cayman Islands and Recommendations for the Amendment of Part V of the Companies Law (2004 Revision); Companies (Amendment) Bill (20 July, 2007)
9. Discussion paper- A Review of the legal aid system in the Cayman Islands (14 December, 2007)
10. Third Annual Report of the Law Reform Commission 2006/7 (31 March, 2008)
11. Final Report- A Review of the legal aid system in the Cayman Islands (15 July, 2008)
12. Final Report- Review of the Law regulating the relationship of landlords and tenants in the Cayman Islands (11 August, 2008)
13. Preliminary Discussion paper- Is there a need for enduring powers of attorney in the Cayman Islands? (20 January, 2009)

14. Discussion paper- Regulation of Charitable Non-profit Organisations in the Cayman Islands (26 January, 2009); Draft Charities Bill, 2009
15. Review of the Law Regulating Charitable Organisations in the Cayman Islands, Final Report (29 April, 2010)
16. Fourth Annual Report of the Law Reform Commission 2008/9 (31 March, 2009)
17. “Is there a need for enduring powers of attorney in the Cayman Islands? Final Report No. 6 (30 April 2009)
18. Discussion Paper – Review of the Arbitration Laws of the Cayman Islands (11 May, 2009)
19. The Draft Charities Bill (26 June, 2009)
20. The Draft Trusts (Amendment) Bill (26 June, 2009)
21. The Protection Against Domestic Violence Legislative Proposals, (12 October, 2009)
22. The Protection Against Domestic Violence Bill, (12 October, 2009)
23. Fifth Annual Report of the Law Reform Commission 2009/10 (31 March, 2010)
24. Protection Against Domestic Violence Final Report (29 April, 2010)
25. Review of the law of contempt of court in the Cayman Islands (Part 1)- Consultation paper- Contempt in the face of the court (September 2010)
26. Tort Reform Consultation Paper -Caps on Non-Economic Damages and Reducing the Limitation Period (22 October, 2010)
27. Family Law Reform (Part 1) Discussion Paper - the Matrimonial Causes Law (2005 Revision) (18 February 18, 2011)
28. Modernisation of the regulation of Strata titles in the Cayman Islands (Part 1)- Management of Strata Schemes- Discussion Paper and Strata Titles Registration (Amendment) Bill, (4 April 2011)
29. Preliminary Discussion paper -Introduction of the office of the Administrator-General in the Cayman Islands (11 June 2011) (to Attorney General and Chief Justice)
30. Final Report - Review of the Arbitration Laws of the Cayman Islands; Arbitration Bill (4 January, 2012)
31. Issues Paper - The Enforcement of Foreign Judgments and Interim Orders, (6 March, 2012)
32. Discussion paper -Introduction of the office of the Administrator-General in the Cayman Islands (22 March 2012); draft Administrator-General Bill
33. Consultation Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2012 (9 July, 2012)
34. Consultation Sexual Harassment, Bill 2012 (3 August, 2012)
35. Final Report- Introduction of the office of the Administrator-General in the Cayman Islands (8 August 2012); draft Administrator-General Bill
36. Consultation Grand Court (Amendment) Bill, 2012 (28 September, 2012)
37. Discussion paper- Modernisation of the regulation of strata titles in the Cayman Islands (Part 2)-Review of the creation, management and termination of strata schemes (3 January, 2013); draft Strata Titles Bill, 2103
38. Final Report- The Enforcement of Foreign Judgments and Interim Orders- Part 1- Interim Orders in Aid of Foreign Proceedings (8 March, 2013)

39. Final Report- The Enforcement of Foreign Judgments and Interim Orders - Part 2- Enforcement of Foreign Judgments (8 March, 2013)

Mr. Ian Paget-Brown
Chairman of the Law Reform Commission
28th March, 2013