1973

CAYMAN ISLANDS

CIVIL APPEAL No. 1 of 1973

BEFORE: The Hon. Mr. Justice Smith, J.A.(Presiding).
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

Re: JAMES DAVID McDONALD

R.N.A. Henriques for appellant.

G.E. Waddington Q.C. (Attorney General) and
Seymour Panton as amici curiae.

1973 - Mar. 14. Apr. 30

SMITH, J.A.:

This is an appeal from a decision of the Grand Court of the Cayman Islands in the exercise of its jurisdiction under s.16(1) of the Caymanian Protection Law, 1971 (Law 23 of 1971). A preliminary objection was taken to the hearing of the appeal on the ground that the decision of the Grand Court in the matter was final and binding and no appeal lay in respect thereof. By a majority decision of the Court the objection was overruled on the ground that no declaration as contemplated by s.16(1) had in fact been made.

The appellant is a British subject who claims to be a person of Caymanian status as defined in s.14 of Law 23 of 1971. He claims to be qualified as of right for this status by virtue of the provisions of s.15(b) of the Law. Section 15 provides as follows:

"Every British subject who -

(a) was born in the Cayman Islands or of parents at least one of whom at the time of his birth was domiciled or ordinarily resident in the Cayman Islands; or

(b) was domiciled in the Cayman Islands at the time of the coming into effect of this Law and has been declared to be so domiciled under subsection (1) of Section 16; or

(c) has been ordinarily resident in the Cayman Islands for a total period of five years out of the seven years immediately prior to the coming into effect of this Law; or

(d) has been and remained a grantee of Caymanian status under section 17 for a period of five years and upwards; or

(e) is the child, or a step-child or an adopted child under the age of eighteen years, of a person to whom any of the foregoing paragraphs of this section apply, provided that in the case of an adopted child such adoption has been in a manner

recognised by the law of the domicile of such person at the time of such adoption; or

(f)is a citizen of the United Kingdom and Colonies by reason of the grant by the Governor or a certificate of Naturalisation under the British Nationality and Status of Aliens Acts 1914-1943, or a certificate of Naturalisation or of registration under the British Nationality Acts 1948-1965 or any Act amending or replacing those Acts,

is a person of Caymanian status as of right."

The Law came into operation on March 27, 1972, the day appointed for that purpose under s.1.

The appellant petitioned the Grand Court for a declaration under s.16(1). The petition, dated August 22, 1972, alleged, inter alia, that the appellant had abandoned his domicil of origin, which was Canadian, on or before the month of October, 1960 on his arrival in the Cayman Islands and that he "is and was on the 27th day of March, 1972 domiciled in the Cayman Islands." The petition prayed for a declaration that the petitioner "is a British subject who was domiciled in the Cayman Islands on the 27th day of March, A.D. 1972, and is of, and is qualified for, Caymanian status as of right."

At the hearing of the petition, the appellant claimed, in substance, to be domiciled for the purposes of s.15(b) in the sense that the word "domicil" is defined in s.2 of the Law. The Attorney General who appeared before the Grand Court, and before us, as amicus curiae, contended, in effect, that the domicil of the appellant was to be determined by the relevant law in force immediately before Law 23 of 1971 came into operation. He contended that that law was the Immigration Restriction (British Subjects) Law, Cap.67 (1963 Revised Edition). The learned judge of the Grand Court accepted the contention of the Attorney General and held that a petitioner for a declaration under s.16(1) of the Law of 1971 on the ground of domicil must satisfy the court that he was domiciled in the Cayman Islands "when the Cayman (sic) Protection Law came into operation within the meaning of this definition in Cap.67." He dismissed the petition on the ground, apparently, that the evidence presented was inconclusive on this interpretation of the Law for a declaration to be made. The grounds of appeal challenge both the interpretation placed upon the provisions of s.15(b) and the finding that the appellant had not established that he was domiciled under the section as interpreted.

The preamble to Law 23 of 1971 is in the following terms:

> "A Law to consolidate the law affecting persons who do not belong to the Cayman Islands, whereby control is exercised over the entry, residence, engagement in gainful occupation, removal and deportation of such persons, and to make provisions with respect to the acquisition and enjoyment by persons who belong to these Islands, of Caymanian status."

The learned Attorney General relied on the terms of the preamble in support of his contention that the Law is a consolidating statute and that, therefore, the principle of interpretation that the legislature did not intend to make any alteration in the existing law in enacting it is relevant in interpreting s.15(b) In order to examine this contention and for the purpose of assisting in seeking to ascertain the intention of the legislature, it is necessary to take a brief look at the relevant laws governing the status of residents of, and visitors to, the Cayman Islands prior to March 27, 1972.

By s.77, the Law of 1971 repealed the Aliens Law (Cap.3), the Deportation (British Subjects) Law (Cap.37), the Immigration Restriction (British Subjects) Law (Cap.67) and the Work Permit Law, 1965. These were the laws which, together, related to the status of residents and visitors. Maxwell on the Interpretation of Statutes (12th edn.)(at p.20) defines a consolidating statute as one "which collects the statutory provisions relating to a particular topic, and embodies them in a single Act of Parliament, making only minor amendments and improvements." A comparison of the provisions of the Law of 1971 with those of the laws it repealed shows at once that the former is not truly a consolidating statute. While by and large the provisions in the Law of 1971 are to the same effect as those contained in the repealed laws, it cannot be said that the provisions in those laws have been repeated in the new law "making only minor amendments and improvements." It is, therefore, doubtful whether the principle of interpretation relating to consolidating statutes to which reference has been made can properly be applied in this case and I do not, therefore, place any reliance on this contention of the learned Attorney General.

The provisions of the repealed laws, however, when contrasted with those of the Law of 1971, are clear pointers to the intention of the legislature when the latter law was enacted. As this will be relied on later as an aid to the construction of s.15(b), I will now set out certain of the

provisions of the repealed laws and contrast them with provisions in the Law of 1971. Those laws, between them, divided residents of, and visitors to, the Cayman Islands into three categories. Their status, rights and obligations as residents in, and visitors to, the Islands depended on the category into which they fell. The categories were: (a) British subjects who "belonged to the Islands," (b) British subjects who did not "belong to the Islands" and (c) aliens. As provided in s.2 of each of Caps. 37 and 67 and the Law of 1965, a British subject "belonged to the Islands" if he:

> "(a) was born in the (Cayman) Islands or of parents who at the time of his birth were domiciled or ordinarily resident in the (Cayman) Islands; or
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> (b) is domiciled in the (Cayman) Islands; or
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> (c) has been ordinarily resident in the (Cayman) Islands continuously for a period of five years or more, and since the completion of such period of residence has not been ordinarily resident in any other part of Her Majesty's dominions or any territory under the protection of Her Majesty continuously for a period of five years or more; or
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> (d) obtained the status of a British subject whilst resident in the (Cayman) Islands by reason of the grant .... of a certificate of naturalization under the British Nationality Act, 1948; or
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> (e) is a dependent of a person to whom any of the foregoing paragraphs apply."

Note the repeal to Cap 37 by Law 10 of 1968 whereby the definition of "domicile" was repealed and para (b) was repealed.

There is a common definition of "domicile" in these three repealed laws, as follows:

> " 'domicile' means the place in which a person has his present home or in which he resides or to which he returns as his place of present permanent abode and not for a mere special or temporary purpose; and a British subject shall not be deemed to have a domicile within the (Cayman) Islands for the purposes of this Law unless he has resided therein for at least two years otherwise than under terms of conditional or temporary residence permitted by this Law or any other Law in force in the (Cayman) Islands or as a person under detention in a prison, reformatory, orphanage, mental hospital or leper asylum ...."

The Law of 1971 reduces the categories to two - persons with Caymanian status and those without. Those in the latter category are referred to in the Law as persons of "non-Caymanian status." Part III of the Law deals with the qualification for, and the grant, loss and forfeit of,

Caymanian status. Only British subjects are qualified for, or may be granted, Caymanian status. On a comparison of s.15 of this Law with the repealed laws, it will be seen that, except for minor (but, as will be shown, significant) alterations, the classes of persons who under the repealed laws "belonged to the Islands" are included among those qualified under s.15 for Caymanian status as of right. This is in keeping with the declared object in the preamble "to make provision with respect to the acquisition and enjoyment by persons who belong to these Islands, of Caymanian status." The only other class included in s.15 is that in para.(d), viz., persons who have been granted Caymanian status under s.17 of the Law. Section 2 states that "domicil" and its derivatives "has the meaning ordinarily applied to that expression at Common Law."

Let me turn now to the provisions of s.15(b) of the Law of 1971, the construction of which is in question. Mr. Henriques, for the appellant, referred to the definition of "domicile" in Cap.67 (repealed) and to the definition of "domicil" in the Law of 1971. He contrasted them and contended that if a person can establish that he has a domicil at common law he can do so even though his residence was conditional. He did not elaborate on this contention. He submitted that the legislature intended to change the law by changing the definition of "domicil" and that the new definition must prevail, unless the context otherwise requires. Mr. Henriques was compelled to qualify his submission because of the presence of the words "unless the context otherwise requires" in the definition section, s.2. For what it is worth, it may be noted, in passing, that the definition sections in the repealed laws did not have those, or any other, qualifying words, though this was not necessary in view of s.12(1) of the Interpretation Law, Cap.70. By the inclusion of these words the legislature is saying, expressly, that the words defined in the section are not necessarily used in the defined sense throughout the law. The real question for decision is, therefore, whether the context in which "domiciled" appears in s.15(b) requires that it be given a meaning other than the defined meaning. The Attorney General contends that it does and the appellant that it does not.

In my view, this contention of the Attorney General is clearly right. This is the result if the words of para.(b) of s.15 are construed either by themselves, in the context of the whole Law or with the use of external aids.

The first thing to notice is that the domicil is to be ascertained at a fixed time, viz., "at the time of the coming into effect" of the Law. It is said by the appellant that that time is the day the Law came into operation. This is borne out by the allegation in his petition that he "is and was on the 27th day of March 1972 domiciled in the Cayman Islands." This has to be the appellant's contention unless the definition of "domicil" in the Law of 1971 is to be given retrospective effect. So, what the appellant is really saying is that he was domiciled in the Cayman Islands on the day that the Law came into operation. But that is not what the paragraph says. If that is what was meant it could have been simply so stated. I do not think that "at the time of" and "on the day (or date) of" are necessarily synonymous. It seems also that effect must be given to the words "the coming into effect," which suggest movement. Section 16 of the Interpretation Law, Cap.70 provides that: "Where any Law, or part of a Law, ... came or comes into operation on a particular day, it shall be deemed to have come or shall come into operation immediately on the expiration of the day next preceding such day." In my view, the time that is being fixed by the words of the paragraph is the very first moment of time of March 27, 1972.

Context

It will, of course, be said that the first moment of March 27, 1972 is in fact March 27, which is what the appellant contends. But there is yet the word "was" to be considered. A statute speaks from the day it comes into operation and from day to day thereafter. It, therefore, normally speaks in the present tense. When it speaks of or concerning the past or future it usually says so either expressly or by necessary implication. Mr. Henriques said that if "is", denoting the present, was used in place of "was" it would be bad grammar. I do not see why this should be so, unless he means that one would then expect the paragraph to read "is domiciled in the Cayman Islands at the time this Law comes into effect." Authority is not required for the proposition that "was", in its ordinary sense, refers to something past and not something present or in the future, but I hope that I will be forgiven for pointing out that Romer, J. said as much in Tithe Redemption Commission v. The Governors of the Bounty of Queen Anne (1946) 1 All E.R.146 at 154 when he said: "Prima facie I should have thought ..... that the word 'was' in its primary meaning refers to something that is past and not to something that is future ...." I should think that if it were relevant

the learned judge would have added the words "present or" before the word "future." In my judgment, it is plain that by use of the word "was" in conjunction with the words "at the time of the coming into effect", the legislature was saying that in order for a British subject to be qualified as of right for Caymanian status on the ground of his domicil under s.15(b) he must establish that at the moment of time when March 26 was going out and March 27 was coming in he already had a domicil in the Cayman Islands. His domicil would thus fall to be decided on the state of the law as it existed before the Law of 1971 actually came into effect.

If I am wrong and the meaning of the provisions of para.(b) of s.15 is not plain then it is obscure. This lets in external aids and viewing the provisions of para.(b) in the light of other provisions in the Law in order to discover the intention of the legislature. On general principles, it is permissible as an external aid to look at the historical setting of the Law, but the preamble makes it inevitable that the history of the Law and the reasons which led to its being passed be examined.

As has been shown, in keeping with the stated object in the preamble, the class of persons who qualify for Caymanian status as of right under s.15 of the Law of 1971 are, with one addition, the same as those who formerly enjoyed the status of "belonging to the Islands." The words "belong to these Islands" in the preamble must necessarily bear the defined meaning in the repealed laws. It has also been shown that the new Law makes a clear distinction between persons of "Caymanian status" and those of "non-Caymanian status" comparable to the distinction between "belongers" under the repealed laws and "non-belongers", terms which were formerly in common use in the Cayman Islands. Paragraph (a) of s.15 of the new Law is identical in terms with para.(a) of the definition of persons "belonging to the Islands" under the repealed laws. Para.(b) of the former is based on domicil at a fixed time and is in the past tense while (b) of the latter is in the present tense and there is no time fixed. Para.(c) of both are based on residence but the difference in wording is of special significance. In the repealed laws the person "belonged to the Islands" once he had been ordinarily resident for a period of five years or more continuously and had not since then been ordinarily resident for a similar period in any other British territory. Under the new Law the residence must have been for five years out of the seven

years immediately prior to the coming into effect of the Law. Paras.(d) and (e) of the definition in the repealed laws are substantially the same as paras. (e) and (f) of s.15. The word "dependent" in para.(e) of the former is defined in the repealed laws in terms similar to those of para.(e) of the latter, except that wives are included in the former and not in the latter and the age of the child is sixteen years in the former but eighteen years in the latter. The alteration of the language and tense in paras.(b) and (c) in the respective laws and their retention in the other paragraphs seem, without doubt, to indicate that the legislature intended that paras.(b) and (c) in the new Law should refer to a closed class of persons whose qualification for Caymanian status is based on the status which they enjoyed under the repealed laws. These classes should be contrasted with the classes in the other paragraphs of s.15 (except para.(d)) where the essential quality which identifies each class remains unchanged, thus making it unnecessary to alter their description. This view of these provisions is supported by the fact that the Law of 1971 contains other provisions by which Caymanian status can be acquired on the grounds of residence and domicil. Reference will be made later to these provisions.

The definition of "domicil" in the new Law appears to be narrower in its application than the definition in the repealed laws. While an animus manendi is required to establish a domicil of choice under the new Law it does not seem to have been essential to establish a domicil for the purposes of the repealed laws. The declared object of making provisions enabling Caymanian status to be acquired by persons formerly "belonging to the Islands" could be defeated if "domiciled" in s.15(b) is given the new meaning. Take the case of a British subject who was domiciled for the purposes, and within the meaning, of the repealed laws and, therefore, "belonged to the Islands". He may be unable to prove, because of the absence of an animus manendi, that he had acquired a domicil of choice at common law on March 27, 1972. He would thus be disqualified from claiming Caymanian status under s.15(b). On the other hand, persons who were not domiciled and, therefore, did not "belong to the Islands" on March 26, 1972 could acquire Caymanian status under s.15(b). Take the case of an immigrant British subject who had lived in the Islands for six months up to March 26, 1972 or had lived for, say, four years up to that date under terms of

conditional residence or under detention in a prison, mental hospital or leper asylum. He may be able to satisfy the Court that on March 27 he was domiciled at common law in the Islands by establishing the constituents of residence and intention and so acquire Caymanian status as of right under s.15(b). In the case of the resident for six months, he would thus be able to engage in gainful employment lawfully though he had previously been refused a work permit under Law 36 of 1965. These results could not have been intended by the legislature when the Law of 1971 was enacted. They would be contrary to the clear intention apparent in the preamble to maintain in the Law of 1971 the distinction which previously existed between persons who "belonged to the Islands" and those who did not.

When the provisions of s.15(b) are viewed in the context of the rest of the law the meaning of those provisions, in my opinion, become clear. First, the deliberate use of the past and present tenses in paras.(a),(b), (e) and (f) of s.15 should be noticed. The significance of this use of the tenses is accentuated when the words "was domiciled" in para.(b) of s.15 are compared with the words "is .... domiciled" in para.(b) of s.17. If the appellant's contention is right and these set of words fell to be interpreted on March 27, 1972 they would have the same meaning notwithstanding the difference in tenses. This would have a curious result. Caymanian status by grant under s.17 may not be acquired on the ground of domicil alone. It has to be combined with residence for at least five years and proof of good character and the grant must not be contrary to the public interest. On the appellant's interpretation of s.15(b), it would be possible for an immigrant British subject to claim Caymanian status as of right on the sole ground that he was domiciled on March 27, 1972 even though he could not obtain a grant under s.17 on the basis of that same domicil because he was otherwise disqualified from obtaining it.

I have endeavoured to show that the provisions of paras.(a),(d) and (e) of the definition in the repealed laws, whereby persons within those provisions were deemed to "belong to the Islands", have been substantially re-enacted in paras.(a),(e) and (f) of s.15. The remaining grounds upon which persons were deemed to "belong to the Islands" were those of domicil and residence, under paras.(b) and (c) of the definition. Para.(c) of s.15 is, in terms, in respect of residence prior to the Law of 1971 coming into

effect. This clearly was intended to make provision for the acquisition of Caymanian status by a person who was deemed to "belong to the Islands" under para.(c) of the definition in the repealed laws. If the appellant's contention is right the only persons who were deemed to "belong to the Islands" for whom provisions have not been made for the acquisition of Caymanian status as of right are those who based their claim under the repealed laws on domicil.

Another matter of significance is the fact that the operation of the provisions of paras.(b) and (c) of s.15, which relate to domicil and residence, are tied to the "coming into effect" of the Law while s.17 makes provision for the acquisition of Caymanian status by grant on the grounds of domicil and residence in combination. This is a clear indication, in my view, that the legislature intended to alter the previous law insofar as it enabled the status of a person "belonging to the Islands" to be acquired on the ground of domicil as well as on the ground of residence while, at the same time, protecting the status which had been acquired on those grounds under the repealed laws.

In my opinion, the only conclusion that can reasonably be drawn from the examination which has been made of the historical setting of the Law of 1971 and the provisions of that law, viewed as a whole, is that the legislature intended the domicil referred to in s.15(b) to be one which was already established when the Law of 1971 came into operation. Both by these methods of construction and by construing the relevant provisions by themselves, the result is that a claimant of Caymanian status under s.15(b) must establish that he had acquired a domicil in the Cayman Islands prior to the coming into effect of the Law of 1971 and that it existed when that law actually came into operation. That domicil, in my judgment, must necessarily be established on the state of the law as it existed at the time of its alleged acquisition. I reject as untenable any contention that though the domicil is to be determined at a time prior to the Law of 1971 taking effect it must nevertheless be determined by the application of the definition contained in that law. This would clearly be giving a retrospective operation to the law and there is no indication either from the subject-matter or from the wording of the statute that it is to receive a retrospective construction. In my opinion, the indications are to the contrary.

Applying the law, as I have endeavoured to construe it, to the facts and circumstances of the case under appeal, I think the learned judge of the Grand Court was in error in holding, as he did, that the appellant and others who petition for a declaration on the ground of domicil under s.15(b) must satisfy the Court that they were "domiciled" within the meaning of that word in Cap.67. He was in error insofar as he intended this ruling to apply in every case regardless of the circumstances. The Immigration Restriction (British Subjects) Law, Cap.67 came into force on March 1, 1962. If a British subject had acquired a domicil before that date his status as a person domiciled in the Cayman Islands would not be affected by the provisions of Cap.67. Unless he had abandoned that domicil before the Law of 1971 came into effect he would be a person domiciled within the provisions of s.15(b) and could claim Caymanian status. The question whether a claimant under s.15(b) was "domiciled" or not is to be determined by the law in existence when it is alleged the domicil was acquired and not by the law in force immediately prior to the Law of 1971 taking effect.

The appellant's petition, as already stated, alleged that he arrived in the Cayman Islands "on or before the month of October, 1960" after abandoning his Canadian domicil of origin. He alleged that his only residence and home is in the Cayman Islands. No reference was made either in the Grand Court or on appeal to the state of the law relevant to domicil during the period between the appellant's arrival to reside in the Cayman Islands and the coming into force of Cap.67. It may eventuate that the governing law at the time was the common law. In saying, at the conclusion of his judgment, that the "petition shows that (the appellant) arrived in the Cayman Islands on or before the month of October 1960 but his residence could have been conditional or temporary", the learned judge was clearly applying the definition of "domicil" in Cap.67 to the period from October, 1960. There is no apparent justification for his applying that definition retrospectively. The appellant may well have acquired a domicil before March 1, 1962 under the then existing law. I do not know. If he did, then it appears that he was domiciled within the provisions of s.15(b) of the Law of 1971 and was entitled to a declaration. The learned judge obviously did not consider the appellant's petition from this point of view. His conclusion that the appellant had not made out his claim, therefore, cannot be supported.

I would allow the appeal and remit the matter to the Grand Court for a re-consideration of the evidence tendered in support of the petition on the basis of the relevant law.