Determining the Extent of the Application of English Law in the British Virgin Islands

To what extent does English law apply to the British Virgin Islands? This has been a long vexed question and before the Court of Appeal decision in *Veda Doyle v Agnes Deane* HCVAP was 2011/020 one to which there was no clear answer. While the English common law plainly applies by virtue of section 72 of the Common Law (Declaration of Application) Act, the uncertainty surrounding the application of English statute and rules of court remained unclear. The issue is primarily one of construction and centres around the interpretation and scope of what are called reception provisions. Reception (perhaps inaccurately described) provisions are usually found in the Supreme Court Acts and in some cases Interpretation Acts of some of the Territories and States of the Organisation of Eastern Caribbean States (OECS) to which the BVI is an associate member. It allows for the reception, where there is a lacunae in the local law, of the practice and in some cases, law, of England. The language of the various reception provisions are very similar and in some instances identical. In the BVI the relevant reception provision is section 11 of the Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act (the "Act"). According to that section, "*…The jurisdiction vested in the High Court in civil proceedings, and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.*"

In *Panacom International Inc v Sunset Investments Ltd and Another* (1994) 47 WIR 139 the Court of Appeal had to consider the scope of section 11 of the Supreme Court Act of Saint Vincent and the Grenadines, which in terms is identical to that of the BVI. The then Chief Justice, Sir Vincent Floissac, delivering the judgment of the full court made two crucial points. First, section 11 relates solely to the manner of the

exercise of a pre-existing jurisdiction and was intrinsically a procedural provision and second, the words "law" and "law and practice" were "*evidently intended to be references to procedural (as distinct from) substantive law*." Further, the Learned Chief Justice (as he then was) said, without further elaboration, that the legislature of Saint Vincent and the Grenadines could not have intended to import English substantive law nor English procedural law, which is adjectival and purely ancillary to English substantive law.

Matters went somewhat awry a few years later. In *Dominica and Industrial Development Bank v Mavis Williams* (Commonwealth of Dominica Civil Appeal No 20 of 2005), the Court was asked to consider whether pre-judgment interest could be awarded in Dominica by virtue of the importation of section 35A of the English Supreme Court Act which did provide for pre-judgment interest. In that case, the Court of Appeal relying on the authority of *Eversley Thompson v The Queen* held that the words "law and practice administered" in England must be taken to include Acts of the United Kingdom Parliament and indicated that section 11 was capable of importing the English statute; although, in that case, the Court did not do so because there was a local legislation that specifically dealt with awarding interest in judgments. The conclusion that section 11 was capable of importing English statute law was plainly at odds with the decision in *Panacom*. As matters stood, there were two distinct schools of thought on the scope of the English law that was intended to be imported into local law as a result of the reception provisions.

The issue in the recent case of *Veda Doyle* was whether the Judgments Act 1838 of England, which provided for the automatic attachment of post-judgment interest on a judgment debt, could be imported into the law of Grenada in the face of no local law governing the award of interest following judgment. The facts were similar to those in *Dominica and Industrial Development Bank* and concerned identical reception provisions. Pereira JA, delivering the Judgment of the full court, considered the decision in *Panacom* and *Dominica and Industrial Development Bank,* and preferred the view of the Court in *Panacom*. In a judgment of admirable clarity, the Court held that the English law intended to be imported by section 11 was the procedural law administered in the High Court of Justice in England and not English statute nor English procedural law which is adjectival and purely ancillary to English substantive law.

In distinguishing *Dominica and Industrial Development Bank,* the Court held that the court in *Eversley Thompson v The Queen* was concerned with the construction of the Saint Vincent Evidence Act and not a reception provision. The question which arose in that case was to what extent English (evidence) statute, in particular the Police

and Criminal Evidence Act 1984 (PACE), would apply in Staint Vincent and the Grenadines. To answer that question, the Court examined section 3 of the Evidence Act 1988 and whether on a true construction of that section it permitted the application of English statute law. In that case, the Court felt that it was clear and obvious that the words "laws and practice administered in England" employed in the Evidence Act must be taken to include the Acts of the United Kingdom Parliament for the time being enforced. The Court in *Veda* expressed no views about that finding and indeed it still appears to be good law that in so far as it concerns evidential matters, it may be that certain English statutes would apply in the BVI.

In *Veda*, the Learned Judge also relied on legislative intention to support the conclusion that what was not intended was the importation of English law generally to fill a lacunae, however desirable filling the gap may seem. To underscore the point, the Learned Judge said that such a construction would leave much to be desired in any Sovereign State and would create a state of uncertainty as to what laws a citizen of the State may be subject at any given point without regard to its own parliament which is charged with the making of laws. In other words, in order for the decision in *Dominica and Industrial Development Bank* to have prevailed, the court would have had to conclude that the intention of the various legislatures who enacted similar reception provisions was to cede its law-making powers to another state whose legislature owes no responsibility to its citizens, in circumstances where it has omitted to legislate on a particular subject matter. Such a conclusion is incredible. It is no more credible in the case of a British Overseas Territory like the British Virgin Islands which has some autonomy in matters of law making. It has its own legislature which, by virtue of section 71 of the Virgin Islands Constitution Order 2007, is empowered to make laws for the peace, order and good government of the Virgin Island. Based on the foregoing, the decision in *Dominica and Industrial Development Bank* should therefore be treated as being of dubious authority.

The judgment in *Veda Doyle* makes unambiguous the extent to which one may pray in aide English law using reception provisions like the one to be found in the Virgin Islands Supreme Court Act. The position can be stated as follows: If there is no local statute which addresses a subject matter, recourse may be had to the English common law, and while English procedural rules relating to the manner of the exercise of the jurisdiction were capable of importation, there was no room for reception into local law of either English statute nor English procedural law which is purely ancillary to English substantive law. But what is this elusive "jurisdiction" and how do you identify what English procedural rules may be imported into BVI law to support it? The Court in *Veda* was not asked to consider this question. However, some guidance may be sought from the decision of the Commercial Court

Judge in *Ocean Conversion v Attorney General of the Virgin Islands BVI HCV2008/0192* (British Virgin Islands). There the Learned Judge was being asked by Ocean Conversion to award pre-judgment interest by reference to the English Law Reform (Miscellaneous Provisions) Act 1938 since there was no express power in the BVI which permitted the Judge to do so. Counsel for Ocean Conversion sought to rely on section 7 of the Act which provided that "…*The High Court shall have and exercise within the Territory all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the first day of January, 1940, were vested in the High Court of Justice in England...*"

The Commercial Court rejected the notion that section 7 of the Act conferred on the BVI Court the jurisdiction to grant pre-award interest because the English Law Reform (Miscellaneous Provisions) Act 1938 gave the High Court that power, and that power existed as at the date of the Act. Instead, the Judge held that when section 7 of the Act refers to powers and authorities *incidental* to such jurisdiction, it is referring to the Court's inherent jurisdiction and not referring to specific powers conferred on the High Court under particular English statutes. The Judge felt that such specific powers were not *vested* in the High Court of Justice in England; they are made available to it by legislation passed for the purpose. While the decision was appealed the judge's finding on that point did not appear to be disturbed.

In summary, therefore, on the current state of the law, it appears that the reception provision of the Act will only permit the importation into BVI law of English procedural law solely and in so far as it is necessary to support the manner of the exercise of the Court's inherent jurisdiction. There do not appear to be many procedural rules which will fall into this category and, in light of the recent amendments to the Eastern Caribbean Supreme Court Rules 2000 in October 2011, even less opportunities to do so.

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