EXHIBIT 91
Part 1

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[2007 CILR 18]

MILLER v. GIANNE and REDWOOD HOTEL INVESTMENT CORPORATION

GRAND COURT (Smellie, C.J.): March 29th, 2007

Civil Procedure—service of process—service out of jurisdiction—service within jurisdiction of ex juris writ not precluded by Grand Court Rules, O.6, r.6, which provides alternative, not exclusive procedure for service—by O.2, r.1, action not nullity because of irregularity

Conflict of Laws—divorce—property—foreign community property regime recognized as applicable to movables and immovables owned in Cayman Islands by parties domiciled in foreign jurisdiction where applicable

Conflict of Laws—recognition of foreign proceedings—judgment in personam—foreign in personam non-monetary judgment (e.g. requiring transfer of Cayman assets, including immovables, to another) recognized and enforced in Islands if final and conclusive and subject to specific performance—recognition and enforcement no longer limited to judgment for debt for determinate sum of money

The plaintiff (the wife) applied *inter partes* for a *Mareva* injunction in respect of the Cayman assets of the first defendant (the husband) pending the determination of her entitlement to share in them, and the appointment of a receiver to manage the second defendant company, which was owned by the husband

The husband and wife were married in California, where they remained domiciled until their divorce in 2006, though from time to time resident in the Cayman Islands. They agreed to a "stipulated judgment" by the Los Angeles Family Court, which stated *inter alia* that the husband had disclosed all his assets to the wife and, as he claimed to be bankrupt, she agreed to forego the financial provision to which she would otherwise have been entitled. Since a community property regime applied to matrimonial assets in California, the judgment further stated that if the husband were found to have property which he had not disclosed, the wife would be entitled to receive, at her discretion, either half the property itself or half its market value. They also agreed that the Los Angeles Family Court would have exclusive jurisdiction to hear disputes arising under the judgment. The wife later discovered information suggesting that the husband owned a Cayman company (the second

defendant) which had acquired a number of valuable property contracts during the course of the marriage. She therefore issued proceedings in the Los Angeles Family Court (subsequently stayed) seeking declaratory orders in respect of any Cayman assets it was proved the husband owned.

In a series of actions in the Cayman Islands, the wife tried to prove the husband's interest in the company. Her action for fraudulent misrepresentation was dismissed by the Grand Court on the ground that, in the light of the agreement as to jurisdiction in the stipulated judgment, the Los Angeles Family Court was the appropriate forum to decide the claim. When she discovered that the husband was attempting to sell the Cayman property, however, she sought an *ex parte* injunction from the Grand Court (dismissed subject to an *inter partes* application), restraining the husband's dealings with the Cayman assets and leave to serve the writ and statement of claim in the present proceedings on him in California. He was instead fortuitously served with a copy of the writ at the airport in Grand Cayman, while in transit.

At the *inter partes* hearing, the defendants submitted that (a) the husband had been improperly served with process, as the wife's writ had been designated for service outside the jurisdiction, and had been served upon him in the Cayman Islands in breach of the Grand Court Rules, O.6, r.6(3), which provided that an *ex juris* writ could only be served within the Islands by an office copy of the writ endorsed for service within the jurisdiction; (b) the court had no jurisdiction to try the plaintiff's claim because she did not assert a proprietary claim against the property here, and accordingly the question of whether the Cayman assets were community property under California law must be decided in the California courts before she could exert a claim over them in the Cayman courts; (c) the Cayman assets were mostly immovable property which the plaintiff might not be entitled to claim as community property as it was not clear that immovables would be governed by the law of the domicile of the marriage rather than the *lex situs*; (d) the action should in any case be dismissed as *res judicata*, since the Grand Court had already decided that the Los Angeles Family Court was the appropriate forum for the dispute, given the agreement to that effect in the stipulated judgment; (e) the wife should not be allowed to amend her pleadings to seek the recognition and enforcement of the stipulated judgment, since the judgment did not declare any Cayman property to be community property; only the Los Angeles court could determine whether the husband had breached that judgment so as to create an *in personam* liability, which itself could only be recognized if it were for a debt for a definite sum of money, and if it were final and conclusive; furthermore the amendment should be refused because the wife would still need to re-amend if she obtained the necessary declarations from the Los Angeles court; (f) the plaintiff should not be allowed to maintain concurrent proceedings in the Cayman Islands and California, since the doctrine of *lis alibi pendens* required her to choose one jurisdiction in which to bring her case; and (g) the present proceedings should be

dismissed as the *forum conveniens* was California, as that was the domicile of both husband and wife and the location of other suits between them.

The plaintiff submitted in reply that (a) the husband had been properly served with the copy of the writ, as the Grand Court Rules, O.6, r.6 was enabling rather than restrictive in its language, and did not operate so as to negate personal service of an *ex juris* writ within the jurisdiction, and in any case the husband had not suffered any prejudice by being served in this way; (b) the Grand Court had jurisdiction to decide whether the husband's Cayman assets would be treated as community property in California, as California law could readily be adjudicated upon before the Cayman courts as an issue of fact, presented by way of expert evidence; (c) it was well established that the law of community property applicable in the domicile of parties to a marriage would apply to movables acquired abroad by a party to the marriage prior to divorce; (d) as Cayman law contained no provision precluding the immovable property here being treated as community property, there was a strong argument that that too would be validly treated as such under California law; (e) she wished to amend her statement of claim to plead that part of the stipulated judgment requiring the transfer of half of any community property found to exist in the Cayman Islands contrary to the husband's warranties, it being a conclusive judgment capable of recognition and enforcement here as a foreign *in personam* judgment; (f) it would not be *res judicata* to allow the wife to invoke the jurisdiction of the Grand Court in these proceedings, since the court's earlier decision in favour of the Los Angeles Family Court as the appropriate forum (based on the agreement in the stipulated judgment) had been given in the context of a claim based on fraudulent misrepresentation, whereas here she was attempting to lay the basis for a proprietary claim to the Cayman assets; indeed, it would be unjust to allow an agreement as to jurisdiction in the very judgment the husband had breached, to prevent her from pursuing a necessary action here; (g) she should not be forced by the doctrine of *lis alibi pendens* to choose between the Cayman and Californian actions, as both jurisdictions offered advantages which were unavailable in the other; and (h) California did not represent a more appropriate forum for the trial of her present application as significant expense would be incurred in transporting documents, witnesses and experts in Cayman law to California to give evidence.

Held, allowing the plaintiff's application to continue but adjourning the final decision until the resolution of the wife's application for a declaration in the Los Angeles court:

(1) The service of the copy of the writ on the husband would not be set aside, as the Grand Court Rules, O.6, r.6 was not intended to prevent the service of a copy of an *ex juris* writ within the jurisdiction, but rather to allow the further option of serving an endorsed office copy in circumstances in which the original was not available. Moreover, even if the way

in which service had been effected was not justified under the Rules, it could be treated as a mere irregularity under O.2, r.1 and would not nullify the proceedings. The court would only ever stay an action where a defendant had been properly served within the jurisdiction if he could show that to continue the action would be oppressive of him or an abuse of process, and on the other hand that a stay would not cause injustice to the plaintiff. The husband here had clearly suffered no prejudice through the manner of his service (paras. 14–17).

(2) The Grand Court could, without difficulty, assume jurisdiction over the wife's claim even though it fundamentally involved questions of foreign law. Such questions were readily justiciable in the Cayman courts as questions of fact, resolved by expert evidence as to their meaning and effect. It was clear that the shares in the second defendant, as movable assets, would be subject to the Californian law of community property as the law of the matrimonial domicile, and therefore could be seen as being held in trust by the husband subject to the wife's rights. Furthermore, it was also arguable on the authorities that the immovable property acquired by the second defendant was also likely to be subject to the Californian law of community property, as there was no provision in Cayman law which prevented that from being the case. The wife's pleadings clearly indicated that the question the Grand Court had to decide—namely, what was the effect of marriage in California upon property located in the Cayman Islands—was one it had jurisdiction to entertain. There was, however, precedent suggesting that a more suitable approach might be to defer to the decision of the California court on whether the property here would be regarded as community property under California law, and then decide upon the wife's claim in accordance with that opinion. This was the safest approach to take (paras. 23–45).

(3) There was no estoppel *in rem judicatam* to bar the wife's application for the Grand Court to assume jurisdiction. The earlier judgment of the Grand Court in favour of the jurisdiction of the Los Angeles court had been given in the context of her *in personam* claim against her husband based on fraudulent misrepresentation; it did not purport to bar all further action in the Cayman Islands and since the present proceedings were attempting to lay the basis for her proprietary claim to the Cayman assets, it was clear that they involved different issues from those decided previously. The court would exercise its jurisdiction in the wife's favour, as it would be unjust to allow the husband to rely on the judgment he had breached (as the previous decision was based on the agreement embodied in the stipulated judgment) to prevent her from doing so (paras. 49–52).

(4) Additionally, the plaintiff would be allowed to amend her statement of claim in order to plead part of the stipulated judgment as a final and conclusive judgment on the community property obligations of the parties capable of recognition and enforcement in the Cayman Islands. Although it represented only an *in personam* judgment against the first defendant

until the Los Angeles court made its finding on community property, it was no longer the law that only a judgment for a debt for a definite sum of money was enforceable overseas—and a foreign *in personam* non-monetary judgment could be recognized and enforced if specific performance of it could be ordered (in this case requiring the husband to transfer to the wife half his assets found here in breach of his warranties that none existed), since it was not precluded by the *lex situs*. The plaintiff would be allowed to amend her claim and it was not a valid objection that, if she did, she might have to re-amend at a later stage after the Los Angeles court had made its further determination (paras. 59–70).

(5) The Cayman proceedings would not be struck out under the doctrine of *lis alibi pendens*, as the expense and inconvenience of allowing two sets of proceedings to continue had to be weighed against the potential injustice to the plaintiff if she were forced to choose one jurisdiction in which to pursue the action. There were clearly issues of California law which needed to be decided there, yet if the Cayman application were not allowed to proceed, the assets here would no longer be restrained by the Grand Court's injunction and there was a significant risk that they would be dissipated. The balance of convenience pointed to the Cayman Islands as the appropriate forum for the trial, as the documents, the assets and the witnesses were all located here, requiring only that experts on California law be brought to testify—but the court would compromise between the two jurisdictions in the interests of efficiency and cost and would adjourn the Cayman proceedings until the Los Angeles Family Court had first made a declaration as to the status of the Cayman assets as community property (para. 43; paras. 74–78; paras. 80–83).

Cases cited:

(1) *Abidin Daver, The*, [1984] A.C. 398; [1984] 1 All E.R. 470; [1984] 1 Lloyd's Rep. 339, followed.

(2) *Bank of Butterfield (Cayman) Ltd.* v. *Crang*, 1992–93 CILR 409, applied.

(3) *Bass* v. *Bass*, 2001 CILR 317, referred to.

(4) *Beatty* v. *Beatty*, [1924] 1 K.B. 807; [1924] All E.R. Rep. 314; (1924), 93 L.J.K.B. 750, referred to.

(5) *Brasil Telecom S.A.* v. *Opportunity Fund*, Grand Ct., Cause 102 of 2006, unreported, considered.

(6) *Bumper Dev. Corp.* v. *Metropolitan Police Commr.*, [1991] 1 W.L.R. 1362; [1991] 4 All E.R. 638, followed.

(7) *Callwood* v. *Callwood*, [1960] A.C. 659; [1960] 2 All E.R. 1, considered.

(8) *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 3)*, [1970] Ch. 506; [1969] 3 All E.R. 897, applied.

(9) *Chiwell* v. *Carlyon* (1897), 14 S.C. 61; 7 C.T.R. 83, considered.

(10) *De Nicols, In re*, [1900] 2 Ch. 410; (1900), 69 L.J. Ch. 680, considered.

(11) *De Nicols* v. *Curlier*, [1900] A.C. 21; (1900), 69 L.J. Ch. 109, applied.
(12) *Electric Dev. Co. of Ontario* v. *Att. Gen. (Ontario)*, [1919] A.C. 687, applied.
(13) *Golden Ocean Assur. Ltd.* v. *Martin (The Goldean Mariner)*, [1990] 2 Lloyd's Rep. 215, considered.
(14) *Grupo Torras S.A.* v. *Bank of Butterfield Intl. (Cayman) Ltd.*, 2001 CILR 9, followed.
(15) *Higgins* v. *Woodhall* (1890), 6 T.L.R. 1, applied.
(16) *India (Republic)* v. *India SS. Co.*, [1993] A.C. 410; [1993] 1 All E.R. 998, considered.
(17) *KTH Capital Management Ltd.* v. *China One Fin. Ltd.*, 2004–05 CILR 213, considered.
(18) *Letang* v. *Cooper*, [1965] 1 Q.B. 232; [1964] 2 All E.R. 929, referred to.
(19) *McHenry* v. *Lewis* (1882), 22 Ch. D. 397, referred to.
(20) *Mercedes Benz A.G.* v. *Leiduck*, [1996] A.C. 284; [1995] 3 All E.R. 929; [1995] 3 L.R.C. 227, referred to.
(21) *Morgan's Case* (1737), 1 Atk. 408; 26 E.R. 259, considered.
(22) *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1; 59 L.J. Ch. 337, followed.
(23) *Omni Secs. Ltd.* v. *Deloitte & Touche*, 2000 CILR 102, referred to.
(24) *Pattni* v. *Ali*, 2005–06 MLR 586; [2007] 2 W.L.R. 102; [2006] UKPC 51, followed.
(25) *Pearse's Settlement, In re*, [1909] 1 Ch. 304; (1909), 78 L.J. Ch. 73, considered.
(26) *Phillips Petroleum Co.* v. *Quintin*, 1994–95 CILR *N*–15, followed.
(27) *Pro Swing Inc.* v. *Elta Golf Inc.*, [2006] S.C.R. 612; 2006 SCC 52, followed.
(28) *Prospect Properties Ltd.* v. *McNeill*, 1990–91 CILR 32, considered.
(29) *Sadler* v. *Robins* (1808), 1 Camp. 253; 170 E.R. 948, not followed.
(30) *St. Pierre* v. *South American Stores Ltd.*, [1936] K.B. 382, considered.
(31) *Seethadevi (H.R.H. Maharanee)* v. *Wildenstein*, [1972] 2 Q.B. 283; [1972] All E.R. 689, considered.
(32) *Société Nationale Indus. Aerospatiale* v. *Lee Kui Jak*, [1987] A.C. 871; [1987] 3 All E.R. 510, considered.
(33) *Spiliada Maritime Corp.* v. *Cansulex Ltd.*, [1987] A.C. 460; [1986] 3 All E.R. 843; [1987] 1 Lloyd's Rep. 1, applied.
(34) *Stephenson* v. *Garnett*, [1891] 1 Q.B. 677; (1891), 67 L.J.Q.B. 447, applied.
(35) *Swiss Bank & Trust Corp. Ltd.* v. *Iorgulescu*, 1994–95 CILR 149, referred to.
(36) *Welch* v. *Tennent*, [1891] A.C. 639, not followed.

Legislation construed:
Grand Court Rules 1995, O.2, r.1(1):

"Where, in beginning or purporting to begin any proceedings . . . there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings . . ."

O.6, r.6: The relevant terms of this rule are set out at para. 14.

T. Lowe and *A. Horsbrugh-Porter* for the plaintiff;
S. Hall-Jones and *S.N. Diamond* for the first defendant;
R.D. Alberga, Q.C. and *S. Wilson* for the second defendant.

1 **SMELLIE, C.J.:** The plaintiff, Ms. Miller, and first defendant, Mr. Gianne, are domiciled in California. There, after a marriage of more than 20 years, divorce proceedings were taken by Ms. Miller before the Family Court of California and this resulted in an order called a "stipulated judgment" on August 26th, 2006.

2 A stipulated judgment given in this context is an agreement between the parties to regulate their divorce which is approved by the court and which divides between the parties all the community property of the marriage. California law deems all property owned jointly or separately to be community property, once it is acquired during the marriage and wherever it may be situated. The same applies to any asset to which either party acquires title, if and insofar as it is acquired with funds which were themselves community property.

3 Where there is no pre-nuptial agreement, as is the case here, the respective interests of the parties in community property during the continuance of the marriage are deemed to be equal interests. As would be expected, parties have a mutual obligation to disclose to each other and to the courts, for the purposes of their settlement, all property which they may be aware is capable of being regarded as community property. Notwithstanding these mutual obligations, it is Ms. Miller's assertion in these proceedings, as well as in proceedings in California, that Mr. Gianne deliberately concealed the existence of very valuable assets located in the Cayman Islands. Her claim is that he did so in an effort fraudulently to deprive her of her interest in those assets.

4 It is further pleaded that Ms. Miller's entering into the stipulated judgment by which she agreed to forego substantial spousal support to which she would otherwise have been entitled, was induced by Mr. Gianne's repeated representation throughout the last year of the marriage and at the time of entering into the judgment itself, that he had become bankrupt as the result of the failure of his business interests in companies which he operated in California. It is indeed apparent from the stipulated judgment that Mr. Gianne had warranted that he did not own any property of any kind that had not been disclosed to Ms. Miller or specifically accounted for in the judgment.

5 As the result of disclosure orders made on May 16th, 2006 by Henderson, J. in Cause 181 of 2006 in this court, Ms. Miller obtained evidence which tends to show that Mr. Gianne owns and controls the second defendant, Redwood Hotel Investment Corp., a company incorporated in the Cayman Islands. The evidence also suggests that Redwood has acquired, beginning in 2001 and so during the period of the marriage, a number of very valuable estate contracts. These contracts are for the purchase of five condominium units within an exclusive resort residential development on Grand Cayman.

6 Ms. Miller's efforts to prove Mr. Gianne's interests in Redwood, and thus in the properties, have been met with resistance from Mr. Gianne at every turn. The present action is at least the fifth set of proceedings undertaken in her quest. Previous proceedings brought by her in this jurisdiction in Cause 40 of 2006 were, on the application of Mr. Gianne, struck out by Harrison, Ag. J. on September 19th, 2006. This was on the basis, among others, of want of jurisdiction and failure to conform with the applicable conflict of laws principles.

7 Most to the point here, Harrison, Ag. J. found that Ms. Miller's claim in Cause 40 of 2006 against Mr. Gianne was capable of being one *in personam* only against Mr. Gianne, based upon allegations of fraudulent misrepresentation and breach of the stipulated judgment, claims which were therefore held to be properly justiciable only before the courts of California, where the stipulated judgment was made. Ms. Miller's application for a *Mareva* injunction and other relief in respect of Redwood and its assets were also dismissed in the judgment delivered on September 19th, 2006 in Cause 40 of 2006.

8 Ms. Miller's earlier efforts in California to bring Mr. Gianne to account were also unsuccessful, as he was able to have her case against him for fraud, brought in the Superior Court there, dismissed on the basis that the Los Angeles Family Court continued to have exclusive jurisdiction over their divorce and any proceedings arising in respect of the stipulated judgment. Ms. Miller therefore issued proceedings in the Los Angeles Family Court seeking, among other things, declaratory orders in respect of the Cayman assets.

9 However, on the same date, December 1st, 2006, she entered a stay of those proceedings. That stay was plainly in deference to this present action in Cause 484 of 2006 in which she also issued an *ex parte* summons on December 1st, 2006. By that summons she applied for a *Mareva* injunction and sought leave to serve the writ and statement of claim out of this jurisdiction upon Mr. Gianne in California. At an *ex parte* hearing in this cause, Henderson, J. granted leave for service out of the jurisdiction but dismissed the *ex parte* application for the *Mareva* injunction on the ground that that application should be heard *inter partes*.