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Applicability of Ancient English Statutes in Common Law Offshore Jurisdictions

*Most offshore jurisdictions use every effort to ensure that the key statutes and laws relating to financial services business are updated regularly to keep pace with the changing landscape of cross-border commerce. However, outside of that statutory regime most lawyers are aware that in the British Dependent Territories like the British Virgin Islands (**BVI**) and the Cayman Islands there is also a substantial body of case law which fills in the gaps between statutes. That case law can be surprisingly helpful – after all, who would have thought that one could find case law supporting segregating the assets and liabilities of a segregated portfolio company in an 18th century case relating to a French Duke.*[1]

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But although most people are aware of the potential applicability of the old common law, what people tend to be less cognisant of is the effect of ancient English statutes. Whilst the common law continues to evolve through subsequent judicial decisions, ancient statutes are frozen in time, and have the power to reach out from the recesses of history like a zombie from the crypt, grabbing at the foot of an innocent commercial transaction passing nearby.

Most of the major British Dependant Territories (including the BVI and Cayman) are regarded as “settled territories” (meaning that the British Crown acquired dominion over them by settlement rather than conquest). In the case of the BVI at least that is a questionable historic assertion, but the case law is clear that once a territory is generally regarded as a settled territory no subsequent investigation of the historical facts will disturb the position.[2]

As a consequence the original British settlers were deemed to bring all of the laws of England with them when they first settled those places. This

includes all statutes which were in force at the relevant time, subject to certain exceptions in relation to laws inapplicable to the nascent settlement.[3] Notwithstanding that a law has been superseded in the United Kingdom, it would continue to apply as adopted in British Overseas Territories.[4]

In some jurisdictions there is a degree of ambiguity as to what is to be treated as the official date of establishing settlement. In the BVI no court has ever made a definitive pronouncement on this, but the most workable date is usually treated as 1665.[5] In Cayman, unusually, there is the benefit of a case setting out definitively a date - 1734.[6]

In fairness, it should be noted that very few relevant English statutes from prior to those dates have any potential relevance, but some do. Potential zombie statutes (depending upon the cut-off date used) can include the Grantees of Reversion Act 1540, the Statute of Charitable Uses 1601, the Marine Insurance Act 1745 and the Life Assurance Act 1774. Potentially more significant is the Statute of Frauds 1677. But possibly the most significant Act which might apply is the Fraudulent Conveyances Act 1571, usually referred to as the Statute of Elizabeth (or Statute of 13 Elizabeth).

The Statute of Elizabeth broadly provides that any voluntary transaction or disposition of assets entered into to defraud creditors is absolutely void. There is no expressed limit on time for any application to have a transaction declared void. The Statute of Elizabeth is very short, but very broad. Importantly, the Statute of Elizabeth is not limited to transfers intended simply to defraud creditors – it also applies to any actions taken to "*disturb*", "*delay*" or "*hinder*" any creditors. Accordingly, it creates a wide range of grounds on which to attack a transaction which may only have had a moderate impact on the rights of a creditor.

The Statute of Elizabeth was generally construed widely by the courts.

(a) In *Ideal Bedding v Holland* [1907] 2 Ch 157 it was noted by Kekewich J that in England, by virtue of subsequent enactments widening the potential relief available to creditors, the Act had come to be applied in a wide variety of circumstances which seemed to broaden the original intended application by creating a lot more avenues for creditors' relief which might potentially be hindered by a transaction.

(b) In *Twyne's case* (1601) 3 Coke 80b, 76 ER 809 it was held that any transfer of title to another person whilst the debtor remained in possession (such as a mortgage) would constitute a fraudulent conveyance under the Act. That clearly no longer appears to be good law, although the case does not appear ever to have been overruled.

(c) Further in *Alderson v Temple* (1746-1779) 1 Black W 660, 96 ER 384 Lord Mansfield held that the Act also applied to what would in modern times be referred to as an unfair preference as between creditors.

Not all jurisdictions have sat on their hands in relation to these ancient statutes. In Cayman the Statute of Elizabeth was repealed by section 3 of the Fraudulent Dispositions Law (1996 Revision). The BVI not expressly repealed it, but it is certainly arguable that the Statute of Elizabeth no longer applies in BVI pursuant to section 81 of the Conveyancing and Law of Property Act 1961 by virtue of the doctrine of implied repeal.[7]

However, the basic principle remains sound. Legal practitioners in the British Overseas Territories should be ever mindful to watch for zombie statutes, stretching out from beyond the grave seeking to disrupt modern commercial transactions.

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1 *Melan v The Duke de Fitzjames* (1797) 1 Bos & Pul 138.

2 *Christian v R* [2007] 2 AC 400 per Lord Hope at paragraph 47.

3 *Kielley v Carson* (1842) 1 Moo PC 63, per Lord Wensleydale (at 84) "To such colony [a settled colony] there is no doubt that the settlers from the mother-country carried with them such portion of its Common and Statute Law as was applicable to their new situation."

4 *Trustee of the property of Pehrsson (a bankrupt) v Von Greyerz* [1999] 4 LRC 135 (PC)(Gibraltar).

5 BVI colonial history is usually taken to start from 1672, which was the date of the conquest of the islands by Colonel Stapleton. However, that is at odds with the accepted position of the BVI as a settled territory, so the earlier date of nascent British settlement is used, and the window of time when the British were forced out by the Dutch is gracefully overlooked.

6 *Quayum v Hexagon Trust Company (Cayman Islands) Limited* [2002] CILR 161. Note that the Interpretation Law refers to 1725 as the relevant date, but the Court held this to be a drafting error.

7 It is also worth noting in BVI that the Trustee Act 1961 also refers to the Statute of Elizabeth (albeit in a margin note, adjacent to section 83A(15)) and the implication is that the draftsman believed that the statute may potentially to continue to apply, although the reference is qualified by the words "to the extent, if any, that that Act has any application in the Territory".

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