



THE CAYMAN ISLANDS LAW REFORM COMMISSION



FINAL REPORT

USURY:

THE COMMON LAW AND STATUTORY POSITION IN THE CAYMAN ISLANDS?

3RD OCTOBER, 2022

THE CAYMAN ISLANDS LAW REFORM COMMISSION

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FINAL REPORT

INTRODUCTION

USURY: THE COMMON LAW AND STATUTORY POSITION IN THE CAYMAN ISLANDS?

1. In accordance with section 12 of the *Law Reform Commission Act (2019 Revision)*, the Law Reform Commission (“the Commission”) submits for the consideration of the Honourable Attorney General its Final Report titled “**Usury: The Common Law and Statutory Position in the Cayman Islands?**”.
2. This Final Report contains recommendations which seek to bring clarity with respect to the issue of whether any prohibition against usury exists in Cayman Islands legislation, whether at common law, by statute, or both and is supported by a proposed “*Usury (Common Law Abrogation) Bill, 2022*”. The proposed Bill for consideration is attached as *Appendix 1*.

BACKGROUND

3. The examination into this issue came against the background of questions being raised by legal practitioners querying whether there are any usury laws in the Cayman Islands. Commentators have expressed the view that no legislation exists in the Cayman Islands to regulate usury¹. The Commission noted that the Cayman Islands Monetary Authority (“CIMA”), in response to a question posted on its website that asks whether or not the Authority monitors or supervises the spread between the interest rates that banks charge customers on loans and the interest rates that banks pay on deposits, indicated that “..... there are no usury laws in the Cayman Islands and that the Authority does not have power under the Monetary Authority Act (2020 Revision) or the Banks and Trust Companies Act (2021 Revision) to prescribe the maximum or minimum interest rates that may be charged or paid by retail banks and other deposit-taking institutions.”²

RESEARCH AND CONSULTATION PROCESS

4. The research of the Commission included an examination of –
 - (a) Usury under the Common Law and the Ecclesiastical Jurisdictions;
 - (b) Usury and the Common Law Position in the Cayman Islands; and
 - (c) Usury under Statute.
5. The research findings of the Commission resulted in the formulation, for public consultation, of a Discussion Paper titled – “**Usury: The Common Law and Statutory Position in the Cayman Islands?**”³. The Paper is attached as *Appendix 2*.

¹ Alasdair Robertson and Tina Meigh, ‘Lending and taking security in the Cayman Islands: overview’, (Maples and Calder) <<https://uk.practicallaw.thomsonreuters.com/4-502-7605>>; Lexology - Getting The Deal Through, ‘Loans & Secured Financing 2017’ in George E Zobitz (Cravath, Swaine & Moore LLP) (ed), *Loans & Secured Financing*, (Law Business Research Ltd 2016) <https://www.walkersglobal.com/images/Publications/Articles/2016/09.24.2016_GTDI_Loans_Secured_Financing.pdf>; Lexology - Getting The Deal Through, ‘Ship Finance 2018’ in Lawrence Rutkowski (Seward & Kissell LLP) (ed), *Ship Finance 2018*, (Law Business Research Ltd 2018) < <https://www.harneys.com/media/1648/getting-the-deal-through-cayman-islands-ship-finance-ndp-eyc.pdf>>; Chambers Global Practice Guides, ‘Law & Practice - Cayman Islands’ in Appleby: Bryan Hunter, Peter Colegate, Katie Fleming (eds), *Fin-Tech* (Chambers and Partners 2018) <<https://www.applebyglobal.com/wp-content/uploads/2019/04/chambers-fintech-cayman.pdf>>;

² CIMA, ‘General - Banking Services’ <<https://www.cima.ky/banking-services-faqs>>

³ 1st November, 2021

6. The Discussion Paper was subsequently published and forwarded to the following institutional stakeholders –
 - the Cayman Islands Bankers’ Association;
 - the Cayman Islands Legal Practitioners Association;
 - the Cayman Islands Monetary Authority;
 - the Ministry of Financial Services and Commerce;
 - the Ministry of Finance and Economic Development; and
 - the Judiciary.
7. Stakeholders were accordingly invited to respond to the issues in the Discussion Paper. The consultation period for the Discussion Paper commenced on 1st November, 2021 and concluded on 6th December, 2021. By the end of the consultation period, the Commission received responses from –
 - the Cayman Islands Monetary Authority; and
 - the Ministry of Financial Services and Commerce.

FINAL REPORT

AREAS OF EXAMINATION

8. In the Discussion Paper, the Commission first defined the concept of usury as meaning the imposition of a charge for anything whether it is labelled as “interest” or something else for the loan of money and noted that the concept of usury has biblical origins. The Commission pointed out that from as far back as the twelfth century, usury was forbidden by ecclesiastical law and was viewed as morally wrong. The canons of the church viewed acts of usury as sinful and against the scriptures. From the period of 1235, A.D. usury became a statutory offence under English Law⁴ and legislative provisions remained in place until 1854.⁵
9. The Commission then sought to determine the legality of usury and took a two-tiered approach. The first of which was to examine whether any common law rules relating to usury were received in the Cayman Islands on settlement and whether such rules have been saved or expressly abrogated. The second was to examine the statutory laws of the Cayman Islands in order to determine the impact those laws would have had on the common law and, in particular, determine whether there are any enactments in respect of usury which are applicable to the Cayman Islands by way of either an extension to the Cayman Islands by Order in Council, the Jamaica Parliament or by enactment by the Legislature of the Cayman Islands.

(a) Usury under the Common Law and the Ecclesiastical Jurisdictions

10. The Commission discussed the position of usury under the common law and ecclesiastical jurisdictions. Under the common law, usury was considered unlawful and the payment of usury or interest could be enforced by a legal remedy once the payment was determined to be excessive. Legal authority points to usury being an indictable misdemeanour at common law.

⁴ 20 Henry III, c. 5 A.D. 1235.

⁵ 17 & 18 Victoria, C90, A.D. 1854.

11. The Commission noted that there have been cases in which providing for the payment of excessive interest was determined to be unconscionable⁶ and that the common law position on usury has been debated between legal authorities such as Sir Edward Coke and Chief Justice Hale as represented in “The History of Usury”.⁷
12. The Commission concluded that usury has a very long and complex history, most of which concerned the creation of exceptions to the prohibition in aid of commerce. Prior to the *Statute of 17 & 18 Victoria, 1854*,⁸ it appeared that at common law, usurious contracts were illegal and therefore, a usurious contract was void for illegality and would be declared as such by the Court of Chancery.⁹
13. The Commission found that there is some uncertainty as to whether a usurious contract is outright illegal at common law or whether it is illegal only to the extent that the interest charged exceeded a certain rate.¹⁰

(b) Usury and the Common Law Position in the Cayman Islands

14. The Commission discussed the common law position of usury in the Cayman Islands and noted that in the Cayman Islands, English law, including existing English statutes and the common law, was received into the law of the Cayman Islands either in 1725 or in 1734. The first date is specified in section 40 of the *Interpretation Act (1995 Revision)*¹¹ and the second is suggested by the fact that the earliest grants of land in the Islands were made in 1734.¹² Section 40 of the *Interpretation Act (1995 Revision)* provides that “all such laws and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted or received as laws in the Islands shall continue to be laws in the Islands save in so far as any such laws or Statutes have been, or may be, repealed or amended by any Law of the Islands.”¹³
15. In addition, if usury was regarded as an offence at common law, unless it has been expressly abrogated, then the offence would have been preserved by section 2(a) of the *Penal Code (2022 Revision)*¹⁴. The Commission noted that the *Penal Code (2022 Revision)* provides no exception for the offence of usury.

⁶ *Samuel v Newbold* [1906] AC 461; *Re A Debtor, Ex parte The Debtor* [1903] 1 KB 705.

⁷ J.B.C. Murray, *The History of Usury from the Earliest Period to the Present Time: Together with a Brief Statement of General Principles Concerning the Conflict of the Laws in Different States and Countries, and an Examination Into the Policy of Laws on Usury and Their Effect Upon Commerce* (Philadelphia: J.B. Lippincott 1866).

⁸ Statute of 17 & 18 Victoria c. 33, 1854. This Act abolished the offence of Usury and has been commonly referred to as the Usury Laws Repeal Act, 1855.

⁹ See *Flight v Reed* (1863) 1 Hurlstone & Coltman 703 (Exch.).

¹⁰ *Flight v Reed* 1H&C 716.

¹¹ Interpretation Act (1995 Revision), s 40.

¹² This is explained in detail in *Quayum et al v Hexagon Trust Company* 2002 CILR 161 at para. 14 ff.

¹³ Interpretation Act (1995 Revision), s. 40.

¹⁴ Penal Code (2022 Revision), s 2(a).

(c) Usury under Statute

16. The Commission examined the statutory position of usury in –

- (a) the United Kingdom;
- (b) Jamaica; and
- (c) the Cayman Islands.

(i) The United Kingdom Statutory Position

17. In the United Kingdom, as early as the reign of King Alfred, penal laws were enacted against usury and punishment for usury was to forfeit any chattels owed to the King. Punishment for usury was extended even at death, as the burial of a usurer could not be held in the church.¹⁵ During that period there have been a range of statutes dealing with usury and in the twentieth year of the reign of Henry III, A.D. 1235, the *Statute of Merton*¹⁶ was enacted. This was the first statute in which the word usury appeared.¹⁷ The reign of Edward I, A.D. 1272, followed and made usury an indictable offence.

18. Ultimately the *Statute of 17 & 18 Victoria, A.D. 1854*¹⁸ (*Usury Repeal Act, 1854*) repealed all existing laws relating to usury in England and Scotland, Great Britain and Ireland. The *Usury Repeal Act, 1854* subsequently provided that interest is payable on any contract, express or implied, for payment of the legal or current rate of interest.¹⁹

19. Since the *Usury Repeal Act, 1854*, the Commission has not been able to identify any new statute dealing with usury in the manner detailed in the earlier enactments.

(ii) The Jamaica Statutory Position

20. The Commission found that the various usury laws in the United Kingdom including the *Usury Repeal Act, 1854*, was not expressly extended to the overseas colonies. The first legislation enacted in Jamaica relating to usury was the *Jamaican Usury Law, 1905*. The *Jamaican Usury Law* placed a limit of 8 per cent on the aggregate amount of interest per annum on money lent.

21. The *Jamaican Usury Law* was later repealed by the *Moneylending Law, 1937* (later referred to as the “*Moneylending Act, 1938*”) which prohibits compound interest and provides that interest exceeding 20 per cent per annum shall be presumed by the court to be harsh and unconscionable.

(iii) The Cayman Islands Statutory Position

22. The Commission examined the Cayman Statutory position and found that under the *Cayman Islands Act, 1863*,²⁰ the Cayman Islands became a dependency of Jamaica and received all of the Laws of Jamaica that were deemed applicable. The *Cayman Islands Act, 1863* was repealed by the *Cayman*

¹⁵ Hon. Robert Eden, *Waterman’s Eden on the Law and Practice of Injunctions* (Third Edition) p 37-2.

¹⁶ 20 Henry III, A.D. 1237.

¹⁷ Sir Edward Coke was of the view that usury intended by this statute was not unlawful and that the prohibition on usury was extended to the Jews only. Co. Lit., 246.

¹⁸ 17 & 18 Victoria, c.90 A.D.1854.

¹⁹ Plowden was of the view that the proper meaning of the words, “acts, statutes and laws” and the construction that they intended to bear seems to include written and unwritten law, that is, both the statute and common law. The statute designated as “acts and statutes” and the common law described as “laws”. Francis Plowden, LL.D., a Barrister of Lincoln’s Inn. ‘A Treatise upon the Law of Usury and Annuities’ (London, 1796, 1797, 8 vo.) p 56.

²⁰ 1863 Cayman Islands Act (26 & 27 Vict. c. 31). 129, (the “Cayman Islands Act 1863”).

Islands and Turks and Caicos Islands Act, 1958 which provided for the Cayman Islands to adopt a new Constitution, namely the Cayman Islands (Constitution) Order in Council 1959²¹ (the “1959 Constitution”).

23. The consolidated list of the Cayman Islands Statutes found in the Cayman Islands Revised Edition 1963²² sets out the laws that were in place when the Cayman Islands was removed as a dependent of Jamaica. The consolidated list does not however reflect the *Jamaican Money Lending Act, 1938* which was the Act which regulated the interest rates in Jamaica. Therefore, although the *Moneylending Act, 1938* is in force in Jamaica, this law was not extended to the Cayman Islands in any form.
24. The Commission theorised that the English usury laws pre-1727 did form part of the received laws of Jamaica. But Jamaica subsequently passed its own usury laws, including the *Jamaican Usury Law, 1905*, section 2 of which limited interest to a maximum of 8 per cent per annum. The *1905 Law* appears to have been repealed sometime before 1953, by which time the *Jamaican Moneylending Act, 1938* was the only relevant Jamaican/Caymanian statute restricting the amount of interest recoverable.
25. When the Cayman Islands became a separate British Overseas Territory in 1962, (the year Jamaica became an independent Commonwealth realm) many of the then existing Jamaican statutes were expressly adopted. Neither the *Jamaican Money Lending Act, 1938* assuming that it had not been repealed before 1962, nor any of the prior Jamaican Usury Laws were amongst them.
26. The *Usury Repeal Act, 1854* repealed “all existing laws against usury” in England.²³ Since this statute post-dates the time of reception (1725 or 1734), it forms a part of the law of the Cayman Islands only if it is made applicable by express words or by necessary intendment.
27. Pursuant to the *Colonial Laws Validity Act, 1865* there is nothing in the *Usury Repeal Act, 1854* that makes it apply to the Cayman Islands. In the Commission’s opinion, it is at least arguable that the Act does not apply here by necessary intendment either.
28. The Commission is of the view that tracing of the common law and statute law portrays a complex and uncertain picture about the status of usury in the Cayman Islands. We know that the *Interpretation Act (1995 Revision)* provides that laws before 1728 *George II* should be saved. We know that despite the express repeal of all acts, statutes and laws by the *Usury Repeal Act, 1854*, the Cayman Islands did not receive the *Usury Repeal Act, 1854*. The evidence suggests that the common law offence still existed in 1729 and was saved by the *Interpretation Act (1995 Revision)*.
29. The Commission is therefore of the view that there is a strong basis to argue that the common law prohibition on usury remains applicable in the Cayman Islands.
30. In commenting on the research of the Commission, the Cayman Islands Monetary Authority (CIMA) noted that lending is broadly unregulated in the Cayman Islands. The Authority’s suggestion is that any proposals relating to usury should also be considered within the wider lending discussions. CIMA noted that the research of the Commission is silent on the modern consumer protection that would usually accompany the abrogation of usury generally and that there

²¹ (SI 1959 No. 863).

²² Revised Edition (Laws of the Cayman Islands) (Amendment) Law, 1963 (the Revised Edition).

²³ *Ibid*, s 1.

is a lack of protections for retail and commercial borrowers from entering into contracts for lending where the interest rates could be considered to be excessively high. CIMA proposed that the Commission examine, from a policy standpoint, the regulation of institutions in the lending space and whether appropriate levels of interest are being charged by unregulated entities.

31. The Financial Services and Commerce Ministry (“FSC”) supports the Commission’s position from the perspective of increasing certainty and ensuring stability of contracts, particularly amongst financial institutions. However, the FSC notes that as lending is an activity done both formally and informally, through financial and non-financial institutions, there is the wider issue of consumer protection for all types of borrowers. The FSC feels that a proposal to remove the common law prohibition on usury potentially leaves an exploited borrower without any legal protection. In this regard, the FSC believes an analysis of the impact that the abrogation of usury could have in the Cayman Islands on the public/consumers and the financial services sector as well as the pros and cons of the removal of limits or restrictions on interests rates would be beneficial.
32. The Commission takes note of the comments from both CIMA and the FSC but agreed that the comments received relating to borrowing, interest rates and lending do not impact the central recommendation of the Paper, which is to clarify the state of the law on usury. The Commission further believes that the issue of excessive interest rates and other related matters could be examined by the Government at a later date if they so choose.
33. Given the views on this issue emerging from case law and legal commentators, the Law Reform Commission believes that legislative clarity would be beneficial to stakeholders operating within the commercial and financial sectors.
34. Should it ever be deemed necessary or desirable to impose restrictions on rates of interest charged in any commercial contract, the Commission is of the view that it would be more appropriate for such restriction to be included in legislation which prescribes the precise scope and extent of such restriction.

RECOMMENDATIONS

35. The Commission accordingly recommends the formulation of usury abrogation legislation which will seek to abrogate any common law rule in relation to usury. It is also recommended that the legislation provide that it will not –
 - (a) affect the rights or remedies of a person who is a party to an agreement;
 - (b) diminish or alter the liabilities of a person who is a party to an agreement;
 - (c) affect the interest payable under an agreement, whether express or implied; or
 - (d) affect any debt or sum of money in respect of which interest is payable under an agreement.
36. The Commission accordingly recommends for consideration, the *Usury (Common Law Abrogation) Bill, 2022* as reflected in Appendix 1.

APPENDIX 1

THE PROPOSED USURY (COMMON LAW ABROGATION) BILL, 2022

APPENDIX 2

THE DISCUSSION PAPER

USURY: THE COMMON LAW AND STATUTORY POSITION IN THE CAYMAN ISLANDS?

The Cayman Islands Law Reform Commission
3rd October, 2022

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