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EDITORIAL

The most recent “Judicial Independence Issues” section of the CMJA’s November 2016 newsletter is replete with developments which may have an impact on judicial independence and the rule of law in the Commonwealth. From the Maldives Government’s announcement that it will be withdrawing from the Commonwealth, issued on 13 October 2016, to the impeachment of judges in Botswana, in relation to which the CMJA, together with other organisations, issued a statement expressing its concerns. In this editorial, I will focus however on the news that South Africa, together with Burundi and the Gambia, intend to withdraw from the Rome Statute of the International Criminal Court (ICC).

As a founding member of the ICC with a rich history of supporting international criminal justice, South Africa’s decision was a first in the history of the Court. The SA government cited three main reasons for this move: (1) Diplomatic immunity for sitting leaders; (2) Incompatibility with South Africa’s diplomatic mandate with respect to the peaceful resolution of conflicts; and (3) Unfair targeting of African states. It is the third reason which may have gained the greatest resonance, especially as all the current situation countries are African states. While it is often pointed out that the majority of cases before the ICC were either self-referrals by the African states themselves, or referred to the ICC by the Security Council, it would be wrong to dismiss this criticism of the ICC as a mere “misperception,” to use the words of the ICC’s chief prosecutor, Fatou Bensouda.

It is true that there will inevitably be a geographic imbalance in cases appearing before the ICC, either for jurisdictional grounds (the jurisdictional criteria set out in Article 13 of the Rome Statute mean that powerful, non-States Parties are unlikely to end up before the ICC), or admissibility reasons (eg. according to the complementarity principle under Article 17 of the Rome Statute, States Parties with developed court systems are unlikely to end up before the ICC, as the country will be willing and able to try cases domestically). However, the positive complementarity enshrined in the Rome Statute should serve to incentivise States Parties to strengthen their national

and regional justice systems, as was the case with respect to Hissene Habre’s trial at the extraordinary African Chambers.

The ICC certainly has flaws, and it is not in itself surprising that South Africa has apparently lost patience. But the government’s actions are a shame nonetheless. In 2002, when the Rome Statute came into force, the ICC was hailed as a historic step forward. Here at last was a court “for trying individuals responsible for war crimes as a powerful tool for prosecuting and preventing atrocities”. The court has had some successes and several setbacks in its 15 years of operation, but it remains one of the best hopes we have for bringing the abusers of state power to justice. The South African government’s move to back out of it is a retrograde step – one that will only encourage impunity for powerful perpetrators of some of the world’s most heinous crimes.

Onto a separate matter now, by way of announcements, registration for the CMJA Conference on “Building an Effective, Accountable and Inclusive Judiciary,” to be held in Dar Es Salaam, Tanzania on 24-28 September 2016, will be available shortly on www.cmja.biz.

This issue opens with Nicky Padfield’s article on “Austerity Justice”. Her article was developed on the basis of contributions from England and Wales, Australia and Nigeria, and I would like to express my thanks to those readers who provided insights from their jurisdictions. Clive Plaskett then writes about the role, and limitations, of expert evidence in his article entitled “The Limits of Expert Evidence.” Subsequently, Bernard McCloskey tackles the contemporary challenge of climate change and how this could impact on refugee law in his article “Climate Change and Refugee Law.” Ian R.C. Kawaley provides some reflections on 400 years of continuous courts in Bermuda in his article “Reflections on 400 years of continuous courts in Bermuda: the enduring value of the judicial oath”. It is claimed that Bermuda’s courts are the oldest common law courts in the New World, with the first sitting of the Court of General Assize taking place 400 years ago, on 15 June 1616. This is followed by His Excellency Anthony T

A Carmona’s article on “The Judiciary as Guarantors of the Rule of Law,” in which the author underscores that the guarantorship role of the Courts to the Rule of Law can only be derived from the effective exercise of judicial power. Finally, Peter Gross outlines the role and importance of judicial reform programmes in his article “Providing Sufficient Resources For The Courts And Judiciary As A Fundamental Constitutional Obligation.”

The CJJ has once again collaborated with the Law Reports of the Commonwealth (LRC) to publish two cases, namely Economic Freedom Fighters v Speaker Of The National Assembly And Others; Democratic Alliance v Speaker Of The National Assembly, concerning jurisdiction with respect to works carried out on the private residence of the President of South Africa, and Grewals (Mauritius) Ltd V Koo Seen Lin; Koo Seen Lin V Grewals (Mauritius) Ltd, concerning constructive dismissal case. In this respect, I wish to renew our thanks to Dr Peter E. Slinn and Prof. James S. Read, general editors of the LRC, for allowing us to republish these law reports. I would also like to thank Katie Green from LexisNexis / Reed Elsevier (UK) Limited.



AUSTERITY JUSTICE

Nicola Margaret Padfield is a British barrister and academic. She is the current Master of Fitzwilliam College, Cambridge.

Abstract: *This article explores some of the implications of austerity justice in England and Wales, Australia and Nigeria. The author considers that austerity cuts hurt as much in Australia and Nigeria as they do in England. However, even in a time of austerity there can be imaginative change for the better. The author notes that, particularly in these times, we need to think very hard about how out-of-court disposals are developed; how courts can better solve problems and how inefficiencies can be removed from the system.*

Keywords: austerity – justice spaces – court closures – disability discrimination – problem solving – sentencing levels

The Editorial Board of this Journal decided a year ago that it might be of interest to readers if we explored the impact of financial ‘austerity’ on justice around the Commonwealth. We asked, for example, for examples of the impact of any cuts in public spending which might be being felt in different justice systems. As it turned out, despite the excellent chivving of Dr Brewer, we have only had three responses, but I have taken the liberty of using these to weave together a response. The views expressed should not be taken to be those of anyone else, except where explicitly stated.

In England and Wales, the impacts of austerity and “efficiency savings” are obvious: a very slimmed down Crown Prosecution Service, fewer police officers, limited access to legal aid, more unrepresented defendants etc. Perhaps one of the most obvious effect of ‘cuts’ has been court closures. In England and Wales, we have seen many court closures in recent decades and a number of unsuccessful legal challenges. Thus the Administrative Court in *R (Robin Murray & Co) v Lord Chancellor* [2011] EWHC 1528 (Admin) reviewed the government’s decision in 2010 to close a total of ninety-three magistrates’ courts, including Sittingbourne court, the focus of this challenge. Five criteria had been adopted nationally to assist in determining the adequacy of court facilities and buildings: (i) the number of

magistrates’ courtrooms; (ii) the standard of custody facilities; (iii) the standard of security; (iv) the standard of victims’ and witnesses’ facilities; and (v) compliance with the Disability Discrimination Act 1995. The application was unsuccessful – the Lord Chancellor was not acting unlawfully. The decision was critiqued by Thom Dyke in an article called ‘Judicial review in an age of austerity’ published in *Judicial Review* 2002-215. In this, Dyke examined judicial review actions where the applicants had challenged a number of controversial consequences of the then Coalition Government’s programme of public spending cuts, including the withdrawal of local authority commissioned services and funding to voluntary organisations; the withdrawal of the programme of grants for secondary school refurbishment; as well as the programme of court closures. The pace of closure continues: another 86 closures were announced in 2016, which included another 54 magistrates’ courts. I share the concerns of many in England that local justice is something worth protecting. The sale of court buildings is also adding to the loss of community, public buildings: there seems to have been little attempt to develop shared spaces, where for example public libraries might co-exist with courts. The ‘localism agenda’ includes developing ideas for local justice as well as the public involvement in community justice.

This summer Justice, the NGO, published a report called ‘What is a court?’ (see <http://justice.org.uk>). They point out that:

So far, delivery of justice in the 21st century has been characterised by increasing levels of state retrenchment, cuts to legal aid and a sharp rise in the number of litigants in person. Significant alterations to the family justice system, new procedural rules in tribunals, and the introduction of an online court system all promise further change.The current court and tribunal estate is outdated and underperforming. It lacks the flexibility and technological capacity required of a modern justice system. Although motivated primarily by the demands of austerity, the HMCTS Reform Programme in fact provides a crucial

opportunity to rationalise the estate in a way that maximises effective and accessible justice for all.

They recommended a new model which reconceptualises court and tribunal rooms as ‘justice spaces’, a model defined by “its inherent flexibility and rejection of the over-standardisation prevalent in existing courts and tribunals”. They identify three categories of justice space:

- Simple justice spaces: less formal and highly flexible spaces capable of accommodating the majority of the disputes currently heard by courts and tribunals.
- Standard justice spaces: semi-formal and flexible spaces ideal for hearings which require some permanent fixtures – such as extensive technological equipment, or a raised judges’ bench.
- Formal justice spaces: formal, semi-flexible and purpose-built spaces used in a limited number of very serious cases including major criminal trials.

Justice envisage an estate that comprises:

- Flagship Justice Centres
- Local Justice Centres
- ‘Pop-up’ courts
- Remote access justice facilities, and Digital justice spaces.

They are well aware that these ‘spaces’ won’t work without an investment “in responsive, motivated and highly skilled staff to buttress the system”. I’m not convinced that ‘remote access justice facilities’ are as ‘fair’ as ‘real’ courts, but a more flexible approach to court architecture and to ‘justice spaces’ seems a much better way forward than the short-sighted closure of so many local courts which we have witnessed in recent decades. But can this be achieved when there’s a “lack of shared accountability and ... costs are being shunted from one part of the system to another”, as the Public Accounts Committee of the House of Commons recently put it in their hard-hitting report *Efficiency in the criminal system* (see <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/72/72.pdf>).

The summary includes this:

The criminal justice system is close to breaking point. Lack of shared accountability and

resource pressures mean that costs are being shunted from one part of the system to another and the system suffers from too many delays and inefficiencies. There is insufficient focus on victims, who face a postcode lottery in their access to justice due to the significant variations in performance in different areas of the country. The system is already overstretched and we consider that the Ministry of Justice has exhausted the scope to make more cuts without further detriment to performance.....

A connection must exist between court closures and reducing numbers of judicial officers and staff. In England and Wales the shrinking number of lay magistrates is dramatic: on 1 April 2016 there were 17,552 lay magistrates in post (down from 19,634 on 1 April 2015; 25,155 on 1 April 2012; and 29,270 April 2010).

The view from Australia

This is very much the picture that we have received from Australia. In New South Wales, the Local Court has been subject to “austerity decision making” for the last 4 financial years, notwithstanding the continuing rise of success in the State budget, culminating in the total elimination of state debt in 2016-2017 budget. From the perspective of the Local Court and its judicial resources “austerity” is an ideology imposed on the Court and hence the people of New South Wales by decision makers with little or no insight into the relationship between resources and consequences.

Over the last 4 financial years the Local Court has been progressively cut by 2 magistrates per annum, culminating in the removal of funding for 8 full time magistrates as at 31 December 2015. This decision has resulted in the suspension of court sittings at a number of metropolitan courts that have provided access to justice at a local level for many years. Magistrates are no longer sent to suburban courts at Balmain, Kogarah, North Sydney and Ryde and the case loads of those courts have been redirected to nearby larger court complexes – the Downing Centre, Burwood and Sutherland. This reduction in resources has signalled the demise of single magistrates courts in the metropolitan area. Further, court complexes such as Manly, Hornsby, Bankstown and Fairfield are under threat in the event of further cuts. There is a limit to the capacity of larger court complexes to absorb increases

in their caseloads caused by the suspension of court sittings at other locations.

The position with the courts is to be contrasted with increased funding of the New South Wales Police Force. During the period 2010-2016 the police force has increased its numbers by 750. Despite the fact that the New South Wales Department of Justice has been informed of the nexus between the increase in police resources and the increased success in charging matters in the court system there has been no cohesive response or acknowledgment of the downstream consequence of imposing austerity measures on one part of the system against the background of an increase in police resources.

This has had real implications for the Local Court. In the last 4 financial years the caseload of the Local Court has risen by 40,000 criminal prosecutions. This has had a significant impact on the Court's listing practices but no less importantly, the increase in police resources coupled with the benefits of technological advances has also meant the prosecution of serious offenders more regularly, with the downstream consequence that committal proceedings have exploded and the criminal trial and sentencing backlog in the District Court (18 months to 2 years) has reached the stage of political embarrassment. At the beginning of 2016 the New South Wales government allocated \$20 million to address the backlog. A further \$20 million has been allocated in the 2016-2017 budget to address the problem.

The District Court was for a period of time also subject to cuts to judicial resources. It has now been restored to its 2010 position. However the damage has been done and the consequence of "austerity" in relation to cuts to judicial resources has meant that New South Wales prisons are overflowing with people who have been refused bail and are on remand, but are unable to get a trial date within a reasonable period. It is arguable that the perceived benefits of austerity measures are completely eroded by the cost of keeping people in prison on remand.

Austerity measures have not been confined to the judiciary and have extended to related areas, in particular to the office of the Sheriff. The Sheriff in New South Wales is responsible under the Court Security Act for providing court security within court premises.

The resources of the Sheriff has also been progressively cut for "austerity" reasons, with the result that a significant number of Local Courts in New South Wales are operating without any security presence whatsoever. It is possible that the failure of the government to respond to security issues brought about by the "austerity measures" may lead to the Local Court ceasing to operate at those places where there is an absence of security.

The magistrates' court in Western Australia has not faced the same reduction in numbers as New South Wales, the number of magistrates being reduced by only one. However, this has had a significant impact on listing intervals in Perth, the capital of Western Australia. The Court has been informed that there is no guarantee that any retiring magistrate will be replaced and a case for a replacement will have to be made in each case, which leads to inefficiencies in listing practices. More significant consequences have resulted from the impact of government policies on court staff. In addition to the so called "efficiency dividends", there has been a "renewal of the public service" which reduces the salary of any retirements by 40% (based on the average retirements over 3 years - not the actual retirements) and a freeze imposed on the replacement of any vacancies for blocks of 6 months at a time. This has led to multiple vacant positions, with many people acting in positions beyond their skills and abilities and there being a complete breakdown in systems. The number of errors, lost documents and unnecessary delays keeps increasing, despite the best efforts of dedicated court staff.

Funding for the Magistrates' Court of Queensland was increased in the most recent budget, largely on the back of domestic violence reforms. Major funding for the roll-out of domestic violence courts will not commence until 2017/18.

Although the court has finally got the extra funding that it has been requesting over the past 4 years, the court is not "flush with funds", and is still a long way from the funding that is needed. Furthermore, the additional funding that has been obtained is only guaranteed for the next 2 years. There have not been any closures of courts for some years. Nor are any future closures contemplated by the government because of lack of funding.

The Australian Capital Territory Court's budget was trimmed with an “efficiency dividend” of about 10% in 2014/15 and 2015/2016. Due to the utilisation of special magistrates, the Court was given a special payment of approximately \$400,000 to cover this usage. The court has requested an additional full time magistrate, which is supported by independent modelling. To date, there has been no agreement on the part of government to provide this additional resource. The Court has received some additional funding in support of family violence initiatives. Again on the positive side, a new Courts complex is being constructed which will house both the Supreme Court and Magistrates’ Court. As a result some of the facilities of the Magistrates’ Court, notably the audio-visual communication links, are being upgraded.

Following community consultation in 2014 on proposed court closures, the State Courts Administration Council Chairman, the Chief Justice of the Supreme Court of South Australia, issued a public announcement about court closures (The State Courts Administration Council is vested with the power to provide courts with the administrative facilities and services to administer the court system in South Australia). The announcement included:

- Holden Hill Magistrates Court would close by September 2015;
- Port Adelaide Magistrates Court to remain open on a full time basis;
- Mount Barker and Tanunda Magistrates Courts to convert to, and operate as, circuit courts without full time court registries.

Since that announcement:

- Port Adelaide Magistrates Court has remained open on a full time basis;
- Tanunda Magistrates Court registry closed on 26 June 2015 and Tanunda Court has operated as a circuit court from Elizabeth Magistrates Court and continues to sit approximately 11 weeks per year, with the registry being open while the court is sitting;
- All registry and court operations at Holden Hill ceased on 28 August 2015;
- Work and staffing resources were redistributed to Elizabeth and Adelaide Magistrates Courts;

- The Mount Barker Magistrates Court currently sits 3 days per week approximately 40 weeks per year and operates as a circuit court. The court registry is open when the court is sitting.

In order to achieve budgetary savings, the number of country circuits have been reduced.

And so to Nigeria

Dan Ogo reports on the centrality of proper and adequate financial funding to the judiciary, which enhances speedy delivery and administration of justice. Where that is lacking, he argues, justice delivery will be badly affected: the citizenry and the entire system suffer because justice is the cornerstone of all societal developments – whether political, social, economic and even technologically. He raises the question of financial autonomy. In Nigeria for example, sections 84(3), 121(3) and 162(9), of the 1999 constitution (as amended) explicitly provide for financial autonomy for the judiciary, both at the federal and state levels. However, the implementation of the provisions were deliberately delayed over the years by the executive arm of Government. But on the 13th day of January, 2014, came a bang! It was like a volcanic eruption, following a suit between the Judiciary Staff Union of Nigeria and National Judicial Council and 74 others in Suit No. FHC/ABJ/CS/667/13.

The Court declared the holding of funds appropriated to the judiciary by the Executive unconstitutional and therefore should be abated. The court further gave a perpetual injunction restraining “the 2nd – 74 defendants, their agents, assigns, privies, etc, from committing any further breach of the aforesaid Constitutional/Statutory Provisions”. All parties like the Accountant-General of the Federal Republic of Nigeria, the states, as well as the President of the Senate, the Honourable Speaker of the House of Representatives, Speakers of the States Assemblies, Auditors-General of the Federation and States were ordered to comply with the judgment forthwith. Since this momentous decision the Nigeria judiciary has heaped a sigh of relief from the unnecessary control and withholding of funds to the judiciary.

The Latimer House Guidelines for the Commonwealth entrench the preservation of judicial independence. Thus it recognized “sufficient funding to enable the Judiciary to

perform its functions to the highest standards Judicial salaries and benefits should be set by an independent body/commission and should be maintained, and further that administration of monies allocated to the judiciary should be under the control of the judiciary” (see Parliamentary Supremacy and Judicial Independence – A Commonwealth Approach, Edited by Peter Slinn (Cavendish Publishing Ltd), at page 20.

The negative impact of insufficient funding of the judiciary cannot be overemphasized. It is common knowledge that many nations are going through global financial constraints, leading to application of financial austerity measures, both on the judiciary and other sectors of governance. In Nigeria, for example, the matter is taking the front burner in public discourse. This is because, the country used to rely heavily on revenues generated from the oil sector. Oil prices have crashed. Thus both the national and state budgets have been greatly affected. Therefore, there has been a severe cut in running the government generally. Thus the judiciary has also become a victim. Issues range from recruitment of appropriate staff, both to the bench, and other supporting staff, infrastructural developments, procurement of modern equipment, stationery, standard library and transportation, come to the mind. Continuous judicial education cannot be carried out effectively either. Increased work load for the few judges on stream can only cause delays in expeditious disposal of cases. It is not possible to exhaust the impact of austere funding on the judiciary. It is enough to say that only adequate funding and early releases of appropriated budgets to the judiciary can enhance timely, efficient and effective justice delivery. This cannot be compromised. The independence of the judiciary becomes meaningless without financial autonomy. Sufficient funding of the judiciary is imperative to having a good judiciary.

Some positive signs?

From Dan Odo’s pessimistic view from Nigeria we turn to retired Judge John Samuels QC, back in England, a member of the CMJA until his retirement. He suggests that we might, in a time of austerity, find ways of doing some things better. First, he argues for problem solving courts. He suggests that sentencers need actively to engage with

those whose primary task it is to deliver the sentence of the court; and, in a light-touch supervisory capacity, to maintain an interest in the progress of those who have been sentenced by them if, as is the underlying assumption of most sentencers, the imposition of the sentence will enable the offender to mend his ways, whether in the community or in custody. The ethos of the problem-solving court, particularly as satisfactorily entrenched in other jurisdictions, affirms the principle that under the positive leadership of a judicial officer a team of those determined to promote beneficial change in the offender’s way of life can be promoted in harmonious liaison. The judicial leader seeks to promote consensus within a multi-disciplinary team. With time those who represent defendants recognised that the best interests of their lay clients would be achieved by encouraging their client’s full cooperation with this process. This paper suggests that a similar liaison between the initial sentencer and those responsible for the immediate management and supervision of the offender *in custody* will achieve a far more effective outcome in terms of rehabilitation and reoffending.

Second, he suggests we should reduce sentencing levels. He points out that in 1964 there were 29,600 prisoners in custody in England and Wales. In 2016 there are over 85,000 prisoners. Tariffs in murder cases have doubled. He points out the malign consequences of Schedule 21 of the Criminal Justice Act 2003 which has caused this huge increase. Sentencing is a pyramid: if tariffs go up in the gravest cases, they have pull consequences all the way down the pyramid. There are now over 86,000 prisoners. He suggests that sentencing reform is urgently needed.

Conclusion

What does this review reveal? First, that readers of this Journal are reluctant to respond! Secondly that austerity cuts hurt as much in Australia and Nigeria as they do in England. Third, that even in a time of austerity there can be imaginative change for the better. We need to think very hard about how out-of-court disposals are developed; how courts can better solve problems and how inefficiencies can be removed from the system. But the wrong cuts in the wrong places do not improve the quality of justice.

THE LIMITS OF EXPERT EVIDENCE

Justice Clive Plaskett, Judge of the High Court of South Africa. This article is based on a paper delivered at the CMJA Triennial Conference in Wellington, New Zealand, September 2015.

Abstract: *This paper considers the correct approach to expert evidence – and its limits – when there is also direct evidence available, in light of three cases. The author notes that, when expert testify, there is a risk that they become champions of the party who called them rather than independent witnesses whose function is to assist the court. As such, where one has direct, credible evidence as to what has happened in a case, all things being equal, it should be preferred over the reconstructed evidence of an expert working from assumptions that may or may not be accurate. Moreover, even though the opinions of experts may, as a general rule, have to bow to the direct evidence of eye witnesses, the expert evidence may do two important things. It may provide an understanding of surrounding circumstances, and it may also assist the court in determining the probabilities. The author concludes that, while some cases simply may not be decided without regard to the opinion of expert witnesses, it is also necessary to bear in mind the limits of the usefulness of expert evidence.*

Keywords: expert evidence – direct evidence – admissibility – limitations

Introduction

Strictly speaking, the evidence of an expert is a form of opinion evidence. Unlike opinion evidence in general, however, expert evidence will be admissible if the expert is qualified to express the opinion and it is relevant to the issues before the court. Expressed slightly differently, Trollip JA, in *Gentiruco AG v Firestone SA (Pty) Ltd* (1972 (1) SA 589 (A), 616H), said that an expert's opinion evidence would be admissible if the court would receive appreciable help from the witness on the particular issue concerned. The role of the expert witness in court proceedings was set out thus by Addleson J in *Menday v Protea Assurance Co Ltd* (1976 (1) SA 565 (E), 569B-G):

‘In essence the function of an expert is to assist the Court to reach a conclusion on

matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable. . .

Phipson and Hoffmann, *op. cit.*, both point out the dangers inherent in expert testimony. For example, the inability of the Court to verify the expert's conclusions and the tendency of experts to be partisan and over-ready to find and multiply confirmation of their theories from harmless facts. . . Nonetheless the Court, while exercising due caution, must be guided by the views of an expert when it is satisfied of his qualification to speak with authority and with the reasons given for his opinion.

However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise - of being overawed by a recital of degrees and diplomas - are obvious; the Court has then no way of being satisfied that it is not being blinded by pure “theory” untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field.’

The evidence of experts (or, indeed, of anyone else) will never be admissible in relation to certain issues, no matter how eminent the expert may be. In the first place, generally speaking, expert evidence as to the law is not admissible. In South Africa, however, that is subject to qualification. Section 1 of the Law of Evidence Amendment Act 45 of 1988 provides that, if a court is not in a position to take judicial notice of a rule of customary law or international law, it may be proved by

evidence, inevitably expert evidence. Secondly, expert evidence may not be led on the very issue that the court is required to decide, such as, for instance, the credibility of a witness. Thirdly, the evidence of an expert as to the meaning of a statute, a contract, a patent or any other document is inadmissible because ‘questions of interpretation of documents are matters of law’ (*International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise* 1985 (4) SA 582 (A), 874A-C).

In this paper, I intend to discuss three cases that highlight, in one way or another, the correct approach to expert evidence – and its limits – when there is also direct evidence available. The first case concerns the cause of a serious injury to a player in a game of rugby, the second the cause of a collision between a ship and a structure in a port and the third, the cause of a latent defect in a luxury car.

‘Jack-knife’: the rugby injury

Rugby union is a contact sport played by teams of 15 a side which compete for an oval shaped ball that players may carry, pass and kick with the aim of scoring tries by dotting the ball down behind the opposition’s goal-line. The force inherent in the game is exemplified by the scrum – a way of restarting the game after a minor infringement of the rules. Rule 20 of the rules of rugby describes the scrum as follows:

A scrum is formed in the field of play when eight players from each team, bound together in three rows for each team, close up with their opponents so that the heads of the front row are interlocked. This creates a tunnel into which a scrum-half throws in the ball so that front row players can compete for possession by hooking the ball with either of their feet.’

The front rows of each team comprises of a tight-head prop on the right, a hooker in the middle, and a loose-head prop on the left. Rule 20.1(f) defines how the front rows are supposed to engage with each other. It states:

‘First, the referee marks with a foot the place where the scrum is to be formed. Before the two front rows come together they must be standing not more than an arm’s length apart. The ball is in the scrum-half’s hands, ready to be thrown in. The front rows must crouch so that when they meet, each player’s head and shoulders are no lower than his hips. The

front row must interlock so that no player’s head is next to the head of a team-mate.’

The case of *Roux v Hattingh* (2012 (6) SA 428 (SCA)) concerned a game of rugby played between the first teams of two schools, Laborie High School and Stellenbosch High School. The principal issues involved were whether Roux, the hooker in the Stellenbosch team, caused, either intentionally or negligently, an injury to Hattingh, the hooker in the Laborie side, and, if so, whether his conduct was wrongful. In the trial, the evidence of a number of players on both sides was led. The coach of the Stellenbosch side was also called, as were three expert witnesses.

The evidence of the Laborie players, including Hattingh, was that before the scrum in which the injury occurred, Roux shouted the word ‘jack-knife’, obviously a call for a manoeuvre of some sort. When the front rows were about to engage, Roux loosened his bind on his loose-head prop (to his left) and moved to his right. This had the effect of closing the channel into which Hattingh’s head was supposed to go – between Roux’s head and Roux’s tight-head prop to his right. When the scrum engaged, Hattingh’s head, with no channel to go into was forced down under Roux’s head, placing pressure of his neck. When the scrum collapsed, as it inevitably was bound to, the downward pressure on Hattingh’s neck resulted in a fracture.

Roux’s evidence (and that of his team mates) was that the call of ‘jack-knife’ was a code for the wheeling of the scrum, either to the left or the right. He gave two different versions of what had happened in the scrum. In the first, he said that he had engaged in the scrum in accordance with the rules and with no difficulty whatsoever. In the second, he claimed that the scrum had collapsed, not because of anything he had done, but because the Laborie tight-head prop had scrummed in at an angle towards the centre of the scrum, forcing him to the right.

The three experts who gave evidence were Andre Watson, an international referee widely regarded before his retirement as one of the best referees in the world; Balie Swart who had been the tight-head prop in the Springbok team that won the Rugby World Cup in 1995 and who had subsequently been involved in coaching the Springbok forward pack; and

Mathew Proudfoot, a South African who had played as a front-row forward for Scotland and who also had been involved in coaching after his retirement as a player.

The trial court had found that the version given by Hattingh and his teammates was more probable than that given by Roux and his teammates, and it regarded Hattingh to have been the more credible witness of the two. On appeal, the court found that there was no basis upon which the factual findings of the trial court could be interfered with. It concluded:

‘From the credibility findings made in favour of [Hattingh’s] version, which included the evidence that the word “jack-knife” was called by [Roux] and he only uttered that word, as well as the illogical explanations of [Roux] and his teammates that it related to the wheeling of the scrum, it seems to me that the probabilities are overwhelming that it related to the manoeuvre in terms of which [Roux] was to change his position in the scrum in order to close [Hattingh’s] channel and then scrum over him. Fourie J’s finding that it denoted a “manoeuvre which would cause the scrum to ‘jack-knife’, ie to collapse due to the opposition hooker being forced into a bent or doubled-up position” cannot be faulted.’

It confirmed the finding that Roux had acted intentionally in injuring Hattingh.

In so far as the evidence given by the experts was concerned, the court noted that while a great deal of time was taken up by the leading and cross-examination of these witnesses, none of them were present when the injury occurred with the result that their evidence really consisted of speculation as to what had happened based on a short video clip of the scrum in question and still photographs distilled from the video. Despite these shortcomings, however, the trial court had acknowledged that it had obtained ‘valuable assistance’ from them on ‘technical aspects of the game’. The place of expert witnesses in a case such as this was dealt with as follows by the court:

‘In *Motor Vehicle Assurance Fund v Kenny Eksteen J* held, in the context of a motor collision that “[d]irect or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight

than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training”; that the view of an expert witness as to what might probably have occurred should generally “give way to the assertions of the direct and credible evidence of an eye witness”; and that it is “only where such direct evidence is so improbable that its very credibility is impugned that an expert’s opinion as to what may or may not have occurred can persuade the Court to his view”. This is such a case: despite the undoubted experience and expertise of the three experts, and their useful contribution that was acknowledged by Fourie J, the direct, eyewitness evidence of [Hattingh] as to what happened in the fateful scrum, rather than the speculation of the experts as to what may have occurred, drawn from their viewing of the video clip and the photographs, must surely carry the day, as Fourie J concluded.’

The views of the experts in this case were important in three respects. In the first place, they confirmed the credibility of the version given by Hattingh: all of them knew of this method of blocking the hooker’s channel and scrumming over him as part of the dark arts of front row play (although neither Swart nor Proudfoot admitted to ever having done this); secondly, they confirmed that if Roux and his teammates had blocked Hattingh’s channel in this way, the scrum would have been unstable and bound to collapse, as it did; and thirdly, they confirmed that the move was inherently dangerous and bound to have the result which it did, a piece of evidence that went to the court’s conclusion that the act of closing the channel was not only intentional but wrongful as well.

‘Hard to port’: the Banglar Mookh’s mishap in the port of Cape Town

MV Banglar Mookh: Owners of MV Banglar Mookh v Transnet Ltd (2012 (4) SA 300 (SCA)) concerned whether the pilot who was bringing a ship into the port of Cape Town was either reckless or grossly negligent when the starboard bow of the vessel struck a structure in the port. The trial court found that the pilot had been negligent but not grossly so, with the result that Transnet was not liable for the damage to the vessel. The owners of the vessel took the matter on appeal.

For the owners of the vessel, the main witness was the vessel's master. He testified that the cause of the collision was the speed with which the pilot had brought the vessel into the harbour basin, coupled with him having taken it on an incorrect line in the approach channel, necessitating him having to steer hard to starboard to avoid colliding with a structure on the port side, which then put it on a collision course with a structure on the starboard bow, which it struck. The judge in the court below accepted this evidence and the evidence of an expert, one Captain McAllister, who had calculated the speeds at which the vessel had travelled as it entered the port.

The evidence of the pilot was that he had brought the vessel into the basin of the port without incident except for the fact that the incompetence of the vessel's crew had hindered the forward tug from making fast. When the vessel entered the entrance to the dock where it was to berth, he ordered the helmsman to move the helm to port. He noticed, however, that the bow had veered to starboard. He then ordered the helmsman to steer hard to port and rushed to the helm. He found that the helmsman had the helm hard to starboard. He took the helm and swung it hard to port but this was too late to avoid the starboard bow striking a structure in the port.

The appeal court found that the trial court had misdirected itself in its assessment of the evidence and its factual findings. It had ignored the fact, in rejecting the evidence of the pilot, that his evidence was corroborated by the evidence of the master of one of the tugs and the engineer of the other, and the evidence of all three was consistent with the recording of their communications at the time. It had overlooked a range of difficulties with the evidence of the master of the vessel. More importantly, for present purposes, the appeal court expressed grave doubts about the reliability of the expert evidence of Captain McAllister, which had been accepted by the trial court as corroborative of the master's evidence. It summed up these problems as follows:

‘We do not think that Captain McAllister's reconstruction can be regarded as having been based on accurate data — on the contrary, we think that it rested on “a potentially imperfect foundation”. A number of aspects are not clear. The deck and engine logs did not

coincide and the assumption that the engine log could be taken as reliable lacked a factual basis. Accordingly there was no clarity on the engine speeds at different stages. To take but one example, the deck log said that the order “full ahead” was given after passing the breakwater, whilst the engine log showed it as having been given before passing the breakwater. The difference between the two is one minute, and that would materially affect the calculations. What was meant by “past the breakwater”? If that point was taken only once the vessel's superstructure was past the end of the breakwater, it reduced the distance to be covered to the point of collision by around 10 % and the speed by between one and two knots, from the 9 knots calculated by Captain McAllister to a little over seven knots, which no one described as too fast. The position of the vessel at the various stages was not clear. What effect did the heading of the vessel have on the calculation? Captain McAllister agreed that it was not possible to assess the speed of the vessel as it passed the breakwater. Was the vessel on the easterly side of the channel as it passed the breakwater? Captain Islam said it was, and the judge accepted this evidence and found that this was a result of an easterly set caused by the wind and swell. But in coming to this conclusion he ignored the unchallenged evidence of the respondent's expert, Captain Woodend, who had extensive experience in piloting vessels entering the port of Cape Town, that the effect of wind and tide at the point is to set the vessel to the west, as described by the pilot, and not to the east, which is what mariners unfamiliar with the port would expect. While the judge was correct in criticising his evidence because he was unwilling to reject the pilot's version on certain issues, that criticism does not apply to his evidence on this point. Here he was in any event not testifying as an expert, but on his experience as a pilot, which was that there is no easterly set in the entrance to Table Bay if the wind and swell are coming from the west (as they were on the day of the collision). If there was no easterly set and the vessel was more or less on the leading line, subject only to minor course corrections as described by the pilot, then it was also travelling significantly slower than Captain McAllister's calculations suggested. The fact that the pilot came down the channel, well before reaching

the breakwater, with the number four buoy “fine on the port bow” (ie at an angle of up to 45 degrees from the port bow looking ahead), lends no support to Captain Islam’s evidence that the vessel was on the easterly side of the channel.’

A number of observations are apposite arising from the judgment and this passage in particular. First, the passage highlights the problem that the accuracy of an expert witness’s evidence often depends on the accuracy of the in-put data. Secondly, and related to that, it is only supportive of the eye witness if the eye-witness is credible: one has to be careful to avoid the approach that the evidence of the eye witness corroborates the expert, rather than assessing the eye witness properly before considering the expert’s evidence. Thirdly, one has to guard against being seduced by what appears to be a sound and attractive theory of what happened at the expense of a proper analysis of the evidence given by those best placed to say what happened. Fourthly, one has to be astute to identify the precise area of expertise of the expert witness. In this case, McAllister had been a container ship captain who had experience of bringing vessels into the Ben Schoeman dock in the port of Cape Town, while Transnet’s expert, Captain Woodend, a former port captain, had been a pilot with extensive experience of bringing vessels into the Duncan Dock, where the collision occurred.

The luxury BMW and Sherlock Holmes

In *Vousvoukis v Queen Ace CC t/a Ace Motors* ((3878/2013) ZAECGHC 64 (19 June 2015)), Mr Georgios Vousvoukis had bought the type of second-hand BMW M5 that gives us all nightmares. Having driven it for only 5 000 kilometres, it experienced mechanical problems which required the replacement of the engine. When he had driven another 8,000 kilometres, the second engine also broke down. Having lost confidence in the BMW, Vousvoukis tendered the return of the vehicle against the repayment of the purchase price, a tender rejected by the defendant, the used car dealership that had sold him the lemon. He issued summons against the dealership for the refund of the purchase price on the basis that the BMW was latently defective.

It was common cause that the problem had occurred when some of the teeth of the oil

pump’s drive gear had sheared off, but what had caused this to happen was the subject of dispute. It had been pleaded by the dealership that, while the cause was unknown, it was likely to have been brought about by an object falling into the sump when Vousvoukis replenished the oil. Vousvoukis, in his evidence denied that he had replenished the oil during the 8,000 kilometres of driving between the replacement of the engine and its breakdown, or that the oil light had come on. (This, according to the two experts who testified, would have occurred when a litre of oil had been used.)

The dealership’s expert was of the opinion that Vousvoukis would have had to replenish the oil during the course of the 8,000 kilometres because of the high oil usage of the BMW M5. His theory as to the most likely cause of the problem was that when oil was replenished, a plastic or foil object from the oil container must have fallen into the sump, been thrown up when the engine was running and sheared the teeth of the gear. The competing theory of the expert called by Vousvoukis was that when the sump from the first engine was used to replace the cracked sump on the second engine, a foreign body somehow found its way into the sump.

A number of problems manifested themselves in relation to the dealership’s expert’s theory. The first, as Pickering J pointed out was that a central pillar of this theory was that the oil must have been replenished, a fact which Vousvoukis denied. Secondly, his basis for this assumption was not first-hand knowledge of the BMW M5’s actual oil consumption but ‘anecdotal, hearsay averments by certain unnamed clients’, some of whom appeared to have driven their cars very hard indeed. Thirdly, he did not know if the plastic or foil objects he had in mind could have caused the damage, conceding that ‘[s]ome type of material engineer’ may have been able to give that answer. Fourthly, he conceded, initially at least, that the plaintiff’s expert’s theory was possible that the damage was caused by an object like an aluminium shard or chip having been in the sump all along. Fifthly, having made this and other concessions, he withdrew them when he got a chance, at a cost to his credibility. This led Pickering J to observe that he ‘appears to have adopted the evidentiary equivalent of a scorched earth policy, metaphorically burning

every concession he had originally made as he retreated to the redoubt of re-examination’.

Having made the point that, in addition to the evidence of the experts, there was also the evidence of Vousvoukis before him to the effect that he had never taken off the oil filler cap and replenished the oil, Pickering J concluded as follows:

[68] In the light of what in my view was the unsatisfactory and speculative evidence of Gravett as to the oil consumption of the BMW it cannot be said that plaintiff’s evidence that he did not replenish the oil is so improbable that its very credibility is impugned. On the contrary, plaintiff was, in my view, a credible witness who made a favourable impression upon me. I am satisfied that he was an entirely honest witness and I accept his evidence that he did not replenish the oil during the relevant period. The underlying facts on which Gravett’s theory was based were therefore not established and his theory must therefore be rejected as being impossible.

[69] What was said by Sherlock Holmes over 150 years ago in *The Adventure of the Beryl Coronet* is apposite namely, once the impossible is excluded, whatever remains, however improbable, must be the truth.

[70] Once the possibility of an object having fallen through the oil filler cap into the engine is eliminated then the only inference to be drawn in my view is that the damage must have been occasioned by an object present inside the engine itself. Once that is established as a fact then, it seems to me, the only further plausible inference to be drawn is that such object must have been present inside the engine at the time of its installation into the BMW. In the absence of any forensic examination of the engine it is not possible to determine what exactly that object was nor, in my view is it necessary to attempt to do so.

[71] I am satisfied therefore that plaintiff has discharged the onus upon him of proving that the damage to the oil pump was occasioned in consequence of an object present in the engine at the time of its installation into the BMW.’

Conclusion

What lessons can be drawn from the three cases that I have discussed? First, it seems to me, the Vousvoukis case highlights a problem that one finds all too often when experts testify: they become champions of the party who called them rather than independent witnesses whose function is to assist the court. It is difficult enough to arrive at the truth when dealing with complex technical evidence without an expert digging his or her heels in and trying to hold a line, come what may.

Secondly, the Roux and Banglar Mookh cases, in their different ways, are good illustrations of the idea that where one has direct, credible evidence as to what has happened in a case, all things being equal, it should be preferred over the reconstructed evidence of an expert working from assumptions that may or may not be accurate. That is, I think, a valuable, if trite, lesson because it is easy to be seduced by convincingly presented theories of an expert in his or her field. That is precisely what happened in the Banglar Mookh case. There is no substitute for a proper evaluation of all of the evidence and a thorough analysis of the probabilities.

Thirdly, even though the opinions of experts may, as a general rule, have to bow to the direct evidence of eye witnesses, the expert evidence may do two important things. It may provide an understanding of surrounding circumstances, such as the valuable assistance given by Watson, Swart and Proudfoot on technical aspects of rugby, especially scrumming, in the Roux case. It may, in other words, inform the court’s understanding of the direct evidence. The opinions of experts may also assist the court in determining the probabilities. In Roux, once again, the experts all knew of the ‘jack-knife’ move and what its effect on a scrum – and on the opposing hooker – would be.

The opposite was true in Vousvoukis. The defendant’s expert evidence as to the car’s oil consumption was not satisfactory so it could not serve to undermine the probabilities in favour of Vousvoukis not having taken off the oil filler cap and replenished the oil. Once the evidence of Vousvoukis was accepted as credible, that blew the defendant’s expert’s theory out of the water because it was based on an assumption that had been rejected.

Finally, it seems to me, the Banglar Mookh and Vousvoukis cases highlight the very real limits of expert evidence when it is tacked onto the direct evidence of one of the parties, and dependant on the acceptance of that evidence: it is often an all or nothing game. In Banglar Mookh, for instance, McAllister's evidence was only as good as the assumptions upon which it was based, and they were drawn from the version of the master of the vessel. Once his evidence was not accepted, McAllister's speculation as to the speed of the vessel and its course was vulnerable to challenge.

Conversely, in Vousvoukis, once the direct evidence of Vousvoukis was accepted, that of the opposing expert had to be rejected as it lacked a proper foundation.

All of this is not to say that expert evidence does not serve an important role in the administration of justice. There are many cases that simply cannot be decided without regard to the opinions of expert witnesses. But it is nonetheless necessary to bear in mind the limits of the usefulness of expert evidence.

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CLIMATE CHANGE AND REFUGEE LAW

Justice Bernard McCloskey, President, UK Upper Tribunal, Immigration and Asylum Chamber. This paper was originally presented at the Four Jurisdictions Conference, Middle Temple, May 2016.

Abstract: *A surprisingly large number of litigants, particularly in the southern seas of the planet, have aspired to the historic designation of “world’s first climate change refugee”. The nexus between climate change and refugee law may not be immediately obvious. However, in a rapidly changing world, there is clear potential for refugee law to develop in this somewhat unexpected direction.*

Keywords: climate change – natural disasters – Refugee Convention – persecution – imminence of the risk

“World’s First Climate Change Refugee” screamed the newspaper headlines. Not quite – a near miss rather and, as we shall see, in this instance a miss was as good as a mile.

Article 1A (2) of the Refugee Convention defines refugee as a person who has a –

“...well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

While persecution lies at the heart of this definition, all of its constituent elements must be satisfied in order to achieve refugee status.

The story runs as follows. Ioane Teitiota and his wife were living, far from happily, on the island of their birth, Kiribati in the Southern Pacific. In 2007 they moved from there to New Zealand, where their three children were born. Their presence was lawful initially, pursuant to time limited visas which expired in 2010, from when they were unlawfully resident. Mr Teitiota, invoking the UN Convention relating to the Status of Refugees (1951 – the “Refugee Convention”) applied for refugee status. His

application for protection was squarely based on climate change, namely –

“...on the basis of changes to his environment in Kiribati caused by sea level rise associated with climate change” (AF (Kiribati) [2013] NZIPT 800413 (25 June 2013) at [2]).

His claim was refused initially by the appropriate organ of Government. This refusal was upheld on appeal to the Immigration and Protection Tribunal. His application for leave to appeal was declined subsequently at three successive judicial levels: the High Court, the Court of Appeal and, ultimately, the Supreme Court. There was no significant dispute about the factual basis of the asylum claim. In its decision the Tribunal stated –

“The limited capacity of (the island) to carry its population is being significantly compromised by the effects of population growth, urbanisation and limited infrastructure development, particularly in relation to sanitation. The negative impacts of this factor on the carrying capacity of the land on (the island) are being exacerbated by the effects of both sudden onset environmental events and slow-onset processes.”

(As this passage demonstrates, the legal lexicon has adapted quickly to this new wave of litigation. Phrases such as “rapid onset weather related disasters” have become increasingly familiar.)

In dismissing Mr Teitiota’s appeal, the Tribunal reasoned that he had engaged in “*voluntary adoptive migration*”: in other words, there had been no coercion, or enforced flight, in the couple’s departure from their island. Continuing its analysis of the internationally recognised elements of refugee status, the Tribunal concluded that there was no persecution since this involves either a failure on the part of a state to control its own agents or a failure to reasonably reduce the risk of the perpetration of serious harm by non-state actors.

The Tribunal's omnibus conclusion was that Mr Teitiota had failed to demonstrate –

“... a real chance of a sustained or systemic violation of a core human right demonstrative of a failure of state protection which has sufficient nexus to a Convention ground.”

The evidence did not establish that the environmental conditions which the appellant and his family would encounter upon returning to the island were –

“... so parlous that his life will be placed in jeopardy, or that he and his family will not be able to resume their prior subsistence life with dignity.”

Further, the Tribunal reasoned, the effects of environmental degradation on the standard of living of the Appellant's family were shared by all members of the island's population. Finally, the Tribunal gave consideration to international law regarding natural disasters and environmental degradation, which it considered fortified its main conclusion.

The most intriguing feature of the Tribunal's detailed judgment is its recognition that in principle environmental degradation, whether associated with climate change or not, could conceivably create a pathway into the Refugee Convention. From the perspective of abstract legal analysis and while recognising the potential for fuller examination and argument in sudden future case, this assessment would appear sustainable.

Mr Teitiota attempted to challenge the Tribunal's decision. While the High Court refused permission to appeal, it was notably less sanguine than the Tribunal about the prospects of a claim of this kind ever succeeding. It characterised the appellant's case as *“novel and optimistic”*, emphasising that a *“sociological”* refugee is not embraced by the Refugee Convention in its present incarnation ([2013] NZHC 3125 at [51]). The Court of Appeal was equally unenthusiastic. It considered that even the “most sympathetic, ambulatory approach to interpreting the Convention” would not suffice for the appellant to succeed. Ultimately, a five member panel of the New Zealand Supreme Court refused permission to appeal, since –

“... the questions identified raise no

arguable question of law of general or public importance” ([2015] NZSC 107 at [12]).

However, and notably, the Court added that its decision in this particular case –

“... should not be taken as ruling out [the possibility of engaging the Refugee Convention] in an appropriate case.”

Thus the door which the two intervening Courts had closed so vigorously was reopened at the highest judicial level.

The Supreme Court's decision cannot be criticised as poorly informed. A notable feature is that the Judges admitted new evidence, namely the Synthesis Report of the Fifth Assessment Report of the Inter-Governmental Panel on Climate Change, promulgated in November 2014. This, the Court considered, made no difference.

At the time of Mr Teitiota's challenge, there were pending substantial numbers of other claims for asylum from residents of another south Pacific island, Tuvalu, based on environmental factors – including inundation, coastal erosion, salination of the water table and lack of sanitation. The case which received most exposure concerned a family of four from this island. Interestingly, the legal grounds were now wider and more imaginative. They claimed that they were refugees or, in the alternative, that there were substantial grounds for believing that in the event of returning to Tuvalu they would be in danger of arbitrary deprivation of their lives or, alternatively, cruel treatment. The ingredients of their case, while based fundamentally on environment degradation, included assertions that they had no land available to them on the island, that the father would be unable to find work as a teacher (his profession) and the family would not be financially supported in consequence (AD (Tuvalu) [2014] NZIPT 501370 and [2014] NZIPT 800517). This claim also was dismissed.

Comparable claims have also been brought by nationals of Congo, Bangladesh and Fiji. In broad compass the feature common to most of these claims has been that of environmental risk in low-lying countries attributable to climate change. There is no report of any successful claim to date. Most of the jurisprudence is to be found in New Zealand. More distorted media reporting suggested that

a family from the Pacific island state of Tuvalu had succeeded in their claim. However, this case, while successful, was ultimately based on humanitarian and discretionary grounds rooted in the strong family ties which the claimants had within New Zealand.

Climate change asylum claims have foundered on several rocks: the failure to demonstrate persecution; the absence of a so-called Refugee Convention reason viz persecution on account of a person's race, religion, nationality, political opinion or membership of a particular social group; the impossibility of arguing successfully that the "persecutor" is the international community, based on a global failure to reduce greenhouse gas emissions; and the claimant's inability to establish a lack of state protection: evidence has been adduced on behalf of the New Zealand Government that it has been taking active measures to mitigate the impact of climate change in the islands concerned.

The figures are disturbing. While the phenomenon of human conflict throughout the globe seems to be constantly increasing, it is a sobering reflecting that in 2013 the displacement of members of the world's population on account of natural disasters was three times greater than that caused by conflict: some 22 million people in at least 119 countries were afflicted by rapid onset weather-related disasters, almost invariably within developing countries and mostly in Asia. Small island states were disproportionately affected. Even greater displacement is predicted for the future. This is based on, *inter alia*, the slower onset and longer term impacts of climate change: desertification, drought, increased temperatures and sea-level rise. All of these factors, whether singly or in combination, will detrimentally affect the habitability of various parts of the globe.

Some commentators, however, argue that in many instances the relevant natural disaster precipitated by climate change is not the sole reason for displacement or migration. Rather, it operates in conjunction with economic, social and political factors. Thus, it is said, many of those who migrate in the wake of such disasters have already been suffering poor quality lives due to an amalgam of factors. There is clearly potential for interesting causation, or nexus, debates in future cases.

The Future

Drawing on both the New Zealand litigation and the jurisprudence of international courts such as the European Court of Human Rights, it is likely that the potentially most fruitful argument will centre on the right to life and, specifically, the positive obligation on the state to fulfil the right to life by taking reasonable protective prophylactic, or anticipatory, steps. The prohibition against cruel or inhuman or degrading treatment may also be expected to feature. Unsurprisingly, a distinction has been made between natural hazards and man-made hazards. Thus the New Zealand Immigration and Protection Tribunal has stated:

"The disasters that occur in Tuvalu derive from vulnerability of [to?] natural hazards such as droughts and hurricanes and inundation due to sea level rise and storm surges. The content of [the Government's] positive obligations to take steps to protect the life of persons within its jurisdiction from such hazards must necessarily be shaped by this reality" (AF (Kiribati) [2013] NZIPT 800413 at [87]).

Echoing the well-known Osman test (Osman – v – United Kingdom [1998] EHRR 101, at [116]) the Tribunal added that the law would not subject the state to the "impossible burden" of mitigating the environmental factors giving rise to such hazards.

In this reasoning one finds the familiar human rights doctrine of proportionality and its common law counterpart, namely reasonableness. The Tribunal further concluded that the claimants had not established that their lives in Tuvalu would be so precarious as a result of any act or omission by the government that they would be in danger of arbitrary deprivation of their lives. Thus the positive state protective duty which under the guise of the citizen's right to life may be engendered in certain circumstances was not triggered.

In short, the more brutal and irresistible the forces of nature the worse the prospects of a successful claim.

The New Zealand Immigration Protection Tribunal has also been disposed to recognise *obiter* the possibility of a successful Refugee Convention claim arising from "secondary" threats and risks associated with displacement linked to an environmental threat or disaster:

for example, increases in gender based violence in temporary shelters, discrimination in assistance and solutions and shortcomings in evacuation procedures. These types of risk and threat fall much more comfortably within the realm of international refugee law.

While arguments based on cruel, inhuman or degrading treatment and the best interests of the child have been considered and rejected, these, have featured largely in fact sensitive cases. There is, therefore, potential for stronger cases to emerge. In particular, one may expect the positive state duty to vindicate the right to life and the prohibition against cruel, inhuman or degrading treatment, which may also trigger a positive duty on the part of the State in certain circumstances, to feature in future litigation.

Conclusion

Drawing together the various strands:

- (a) Environmental degradation brought about by climate change (and otherwise) may in principle give rise to protective obligations on the part of the state under the Refugee Convention or human rights law.
- (b) Such obligations will be rooted in the positive duties imposed on states in respect of certain human rights – life, health and adequate nutrition.
- (c) The imminence of the risk of serious harm is a factor of considerable importance, bearing in mind that certain climate change processes may not have significant consequences until several decades, or even longer, have elapsed.

This analysis is linked to the truism that every decision in asylum cases is necessarily an essay in hypothesis, an attempt to prophecy what might happen to the person concerned in the future in the event of returning to his or her country of origin.

To conclude, for victims of climate change there are significant limitations in existing international protection frameworks. Neither the Refugee Convention nor international human rights law provides an obvious panacea for such persons. There is, however, potential within existing international law for successful outcomes.

There are also important intergovernmental initiatives. These include the *soi disant* “Nansen” initiative, developed by the Norwegian and Swiss governments, which aims to build consensus on the adoption of a protection agenda addressing the needs of people displaced across international borders by natural disasters, including the effects of climate change. As ever, state priorities in the allocation of its resources will be determinative of progress. The efficacy of measures such as the UN Framework Convention on Climate Change (1992) and (in Europe) the Long Range Transboundary Air Pollution Convention (1979) and its subsequent protocols remains to be seen. Governments appear to be genuinely apprehensive of any measures which could be harmful to economic growth and prosperity. Meanwhile, the phenomenon of environmentally induced large scale migration increases steadily in certain parts of the globe and human suffering of unprecedented dimensions continues.

The plight of refugees in the aftermath of the Second World War was truly shocking and provided the stimulus for the Refugee Convention and subsequent international measures. The world has grown older since. But has it really grown any wiser? Is human life to be sacrificed indiscriminately on the altars of ruthless economic growth or the prioritisation of investment in the acquisition of territory and the elimination of racial and ethnic groups?

REFLECTIONS ON 400 YEARS OF CONTINUOUS COURTS IN BERMUDA: THE ENDURING VALUE OF THE JUDICIAL OATH

Justice Ian R.C. Kawaley, Chief Justice of Bermuda. This article is based on remarks made at a Special Sitting of the Supreme Court, Sessions House, Hamilton, Bermuda, on 15 June 2016.

Abstract: *This article reflects on the 400 year history of Bermuda's courts, which it is claimed are the oldest common law courts in the New World. Bermuda began its life as an appendage of Virginia but became an autonomous settlement in 1615. Through slavery to the modern era, the identity and role of the courts have shifted with the sands of time. Bermuda's strongest legal links have been with England and Wales and, in modern times, the Commonwealth Caribbean as well. In serving an increasingly diverse local community and also international commercial investors from around the globe, the judicial oath will continue to provide Bermudian judges with their best job description.*

Keywords: Bermuda - legal history - judicial independence - judicial administration -judicial oath

Introduction

A Special Sitting of the Supreme Court of Bermuda was organised, on 15 June 2016, to commemorate the first sitting of the Court of General Assize 400 years ago on 15 June 1616. This occasion afforded participants with a unique opportunity to reflect on the present identity of Bermuda's judicial and legal system through looking back on the past. It is also an opportunity to connect with those other overseas jurisdictions which have, so far, had the greatest impact on Bermuda's legal development.

Virginian roots

Most distantly, but yet also most poignantly, we owe our very existence to the American State of Virginia, represented on the bench today by Chief Justice Hon. Donald Lemons. Bermuda was first constituted as a legal jurisdiction and settled in 1612 by way of extension to the Royal Charter granted to the Virginia Company. The Company era in both jurisdictions was constitutionally regulated by similar legal principles embodied in similar

Charters drafted by the Earl of Sandys, a member of Middle Temple, my own Inn, and a man who gave my own native parish its name. Largely because Bermuda's colonists were able to take up vacant possession of a self-contained territory, our courts have operated continuously for longer than their Virginian counterparts, and we can fairly claim to be the oldest common law courts in the New World. It is quite apposite that CJ Lemons is also an Honorary Bencher of the Middle Temple.

Enduring influence of the English legal system

The influence of the English legal system on our own has been the strongest and most enduring influence on Bermudian law. Through the Company era, and with greater formality from 1684 into the Crown Colony era, Bermuda's courts assumed the names and adopted the procedure of contemporary English courts, applying English rules of law and equity modified only by local statutes. Our legal system has been largely shaped by lawyers and judges who have been either English or legally trained in England & Wales. Sir Scott Baker, President of our own Court of Appeal, a former England & Wales Court of Appeal judge and Bencher of Middle Temple, represents that English heritage on the Bench today.

Commonwealth Caribbean and other connections

Bermuda has always had strong commercial and cultural ties with the United States and Britain. The same is true of the Commonwealth Caribbean. In the 20th century men and women of Caribbean birth or descent played a pivotal role in the social and political changes which culminated with the enactment of the Bermuda Constitution Order 1968. Since the late 1970's the Court of Appeal for Bermuda has consistently included panel members from

the Commonwealth Caribbean. Bermuda's constitutional and legal system probably has most in common with our sister jurisdictions from the south. That region is represented on the Bench today by Sir Dennis Byron, President of the Caribbean Court of Justice. An Honorary Bencher of the Inner Temple, he is a native of St Kitts & Nevis, the islands where many Bermudians have their roots.

Other jurisdictions, like Canada, have had an important influence on Bermudian law in recent years. Portugal (and the Azores in particular) has contributed significantly to Bermuda in a more general way since the 19th century. All strands of our past heritage and our present cultural and professional connections and, indeed, every gender, philosophical and sexual orientation, are hopefully represented amongst the combined ranks of the Bench and the Bar here today.

The shifting identity and mission of the courts over time

Looking back over the last 400 years, it is possible to discern how the identity of the courts and the guiding principles under which they operated has shifted with the sands of time. The first Court of General Assize sat in the original St Peter's Church reflecting the fact that Church and State were joined at the hip. That First Assize convicted for sedition and sentenced to death a man who, despite his English name, was identified as Frenchman, for a drunken rant at the Governor. The condemned man was hanged some two days after the trial. Clearly, not only did free speech have its limits; the principle that justice delayed is justice denied was given what now seems overly zealous recognition.

The only fully-fledged citizens were English men with all others occupying a twilight legal zone in which their status was an explicitly unequal one. Slavery lasted for over 200 years, with the courts playing an ambiguous role. At their best, the criminal courts upheld the fair trial rights of slaves who were (remarkably) generally afforded jury trial rights. At their worst the civil courts, even in the days just before Emancipation on August 1, 1834, supported a legal framework according to which slaves were ultimately chattels and were auctioned alongside furniture by way of execution of civil money judgments.

In 1835, Thomas Butterfield CJ impressively declared that all of the slaves on the US Brig 'Enterprise' were free men and women, after the Pembroke Friendly Society issued a Writ of Habeas Corpus. The next 133 years were, it appears, dominated by a modified period in which generations of judges and lawyers actively or passively supported a system of Government in which only the land-owning classes were first class citizens before the law. Although the connection between Church and State gradually waned, the Judiciary remained closely connected to the Legislature, and not just in terms of sharing the same building, and lacking full independence from the Executive. Under the 1888 Letters Patent, judges held office at the Governor's pleasure. Chief Justices chaired the Legislative Council, the forerunner of today's Senate, until 1968.

If we are seeking to learn lessons from the past to inspire future progress, we must not close our eyes to the reality that slavery's shadow is a long one indeed. It is surely not purely coincidental that the male descendants of slaves are quite manifestly over-represented in the ranks of criminal defendants and those who are in prison. It is surely not wholly accidental that societies such as ours, who based an entire economic and social system on the deprivation of liberty, currently dominate the upper reaches of the world's incarceration per capita tables. We should not only care about these perturbing trends, and seek to reverse them (and recently, some progress has been made), but we must also be wary about replacing one manifestation of social outcast with another.

The 1968 Constitution and the modern Judiciary defined

While it is important to remember and not repeat our historical record for tolerating intolerably high levels of inhumanity, we can take pride in an impressive and uninterrupted record of adherence to the rule of law, as imperfect as the law may have been. That provides grounds for considerable confidence that, looking forward, Bermuda's judicial and legal system can better discharge its modern function if we ensure that our constitutional and legal frameworks are kept attuned to the highest possible global standards. Our modern function is thankfully clear. It is defined primarily by the 1968 Constitution.

The Constitution not only contains in Chapter 1 a bill of fundamental rights and freedoms. It limits Parliamentary sovereignty and empowers the courts to strike down legislation which is inconsistent with that bill of rights. The Judiciary is clearly now separate from the other branches of Government. Judicial independence is constitutionally guaranteed for judges of the Supreme Court and Court of Appeal.

Judicial administration and the need for reform

Part V of the Constitution which deals with the Judiciary could do with updating, nearly 50 years on. It now seems anomalous, and is inconsistent with international best practice, that Magistrates are not accorded similar protections. Nor do we have a constitutionally established Judicial and Legal Services Commission, unlike the other British Overseas Territories with more modern constitutional provisions. Various aspects of the Judiciary's infrastructure today are no longer fit for purpose. Despite the separation of powers principles embedded in our Constitution since 1968, we still share premises with Parliament and other Government Departments. The Registry is housed in premises which are manifestly unhealthy and unsafe. The Supreme Court operates from four different locations while Government Departments wholly unrelated to the courts occupy space the Judiciary should be using in a building originally intended to house only the courts. An Executive which claims to be concerned with controlling costs compels the Judiciary to work within an institutional framework which is guaranteed to waste costs through spending money on equipment in multiple locations, costs which could be saved from operating from one or two hubs. Cayman's Judiciary has long had full control over its budget, once it is allocated by Parliament, a level of autonomy we still lack.

Worse still, an Executive branch of Government which would profess to respect judicial independence stubbornly refuses to adhere to best international practice standards in terms of affording the Judiciary the degree of administrative autonomy which it requires to operate effectively. The spectre of having to seek Cabinet approval to fill vacant Registry positions at various levels ought to be the stuff of political satire, not a real-life millstone

around the Judiciary's neck in 21st century Bermuda. Meanwhile, 14 years ago in 2002 when Sir Dennis Byron was Chief Justice of the Eastern Caribbean Supreme Court, a Department of Court Administration was established with its own Department of Human Resources dedicated to supporting the Judiciary's administrative needs.

The Attorney-General is well aware of the important role the courts and our legal system play in promoting the rule of law and supporting Bermuda's primary industry. Mr Attorney, you are enjoined to continue your tireless efforts of encouraging your Cabinet colleagues to give the Judiciary the tools that it needs for at least the first 10 of the next 400 years. I pledge to fight by any means necessary-within the law-to ensure that the oldest common law court system in the Americas does not fall further behind the courts of our sister jurisdictions in the north, south, west and east. Although our administrative structures and our buildings may be creaking, I still believe that we are far from laggards in terms of the delivery of substantive criminal and civil justice in a fair and timely way. That is in no small measure due to the depth of ability and commitment displayed today and over the last 400 years by judicial officers, court staff and lawyers alike. To those who carried the baton in the past, too many to mention, a very big thank you. To those who are carrying the baton today, also a very big thank you.

The judicial oath still provides Bermudian judges with their best job description

The 1968 Constitution is in one important respect still very much fit for purpose. It provides judges with their job description by way of the judicial oath. Bermudian judges (like their Commonwealth counterparts elsewhere) are all sworn to "*do right to all manner of people after the laws and usages of Bermuda without fear or favour, affection or ill will*". It is doubtful whether the drafters of the Constitution appreciated how valuable that oath would be and how much variability there would be in the 'manner of people' coming before the courts. But they doubtless hoped that the spirit of the oath would have a universal appeal beyond the corridors and halls of Westminster. It surely does. It reflects, to give only one example, the spirit of the

pre-colonial kingdom in what is now Eastern Nigeria, whose people felt compelled, in the words of an American mid-20th century anthropologist, to see “*the king in every man*”.

Bermuda’s legal system today is no longer serving a small island community, divided principally along racial and property lines. Our population is today an increasingly cosmopolitan one. The overwhelming majority of Bermuda’s lawyers work, whether directly or indirectly, in service of an international business clientele. The courts must not only be competent to adjudicate cases in a way which commands the respect of an increasingly diverse local community. We must be mindful of the expectations of a dizzying range of investors, from all parts of the globe, as

well. Administering a legal system which is both local and international may sometimes resemble riding two spirited horses at the same time. In the mushrooming public law arena in particular, defining the parameters between the boundaries of parallel rights is perhaps the greatest challenge judges and Governments will face not just in Bermuda, but in democratic societies everywhere in the 21st century. If we in Bermuda can get the balance even nearly right, and I hazard a guess that we can, we will create the sort of society that all manner of people are encouraged to flock to, rather than flee from. The judicial oath is the best lamp to light the path which judges must follow towards this goal.

DOROTHY WINTON TRAVEL BURSARIES FUND WE NEED YOUR DONATIONS!

This fund was set up in the name of the first Secretary of the Association who died in October 2003. Dorothy’s time as the first Secretary of the Association was a very happy one and she was very concerned that justice (and support for justices) should be available to poor and rich nations alike.

“ She had considerable knowledge of the Commonwealth, a genuine interest in its people and she was prepared to travel extensively to promote the Association, being especially concerned that people from the less well developed countries should be able to play a full part.” Stated Brenda Hindley, former Editor of the CJJ.

The Fund have been used to assist participation from magistrates from Cameroon, Jamaica, Nauru, Malawi, Solomon Islands, South Africa and Uganda at the CMJA’s Conferences, and will be used to assist participation of judicial officers who would not otherwise have the opportunity to benefit from the training opportunity offered by the educational programme of the CMJA’s Regional and Triennial Conferences.

We WELCOME ALL CONTRIBUTIONS the Bursary fund. Contributions should be (by cheques drawn on a UK bank, bank transfers- making clear what the transfer is related to or bankers draft made payable to CMJA) and should be sent to the

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Please remember that as a registered charity, the CMJA can reclaim tax paid by UK tax payers. If you include your name and address (eg on the back of the cheque), we can send you the form to fill in for gift aid purposes - a simple declaration and signature.

THE JUDICIARY AS GUARANTORS OF THE RULE OF LAW

His Excellency Anthony Thomas Aquinas Carmona SC ORTT, President of the Republic of Trinidad and Tobago. His a former judge of the International Criminal Court. This paper is based on a Keynote Address at the Commonwealth Magistrates' and Judges' Association Annual Conference: Georgetown, Guyana, 20 September 2016.

Abstract: *In this article, concerning the role of the judiciary as guarantors of the Rule of Law, the author notes that the existence of a jurisdiction, even if expressed in a Constitution, does not necessarily provide an effective guarantee to the Rule of Law. The security that is expressed, and indeed, desired, in the guarantorship role of the Courts to the Rule of Law can only be derived from the effective exercise of judicial power and judicial outreach of, and in, its decisions. The author proceeds to discuss certain non-negotiable features that must characterise Judiciaries throughout the Commonwealth in order to achieve the type of management that is required for the protection and support of the Rule of Law.*

Keywords: rule of law – judiciary – constitution – judicial education – independence – comity – delay

There is no denying that the law must consider the culture of a people in determining avenues, for adaptability of the Rule of Law, in an efficient and progressive way. The artiste in society is the conscience and pulse-beat of a people. I can say without contradiction, that in our neck of the woods, the artiste, whether he be a calypso or reggae singer, poet, dramatist, writer or painter, often captures what is wrong in society, what is right and what should be made right. The lexicon of the artiste is however different from the lexicon of the judge. What is very real is that the artiste in burgeoning societies is often the true messenger of human rights and justice. By condemning what is, he tells us what should be. As one of Trinidad and Tobago's calypsonians, the Mighty Chalkdust, said just a few days ago, on 16 September 2016 at the Opening of the 2016-2017 law term, "*There is law in culture...and culture in law*".

As guarantors of the Rule of Law, the Judiciary is in the business of formal assurance and

restitution in the event of default. The poet activist that demands equality of standards and treatment demonstrates a culture at work that often both invokes justice and exposes unfairness. It brings to mind a great son of this soil; a man revered as "*Guyana's poet laureate*"; a poet activist whose advocacy and poems about human rights and freedom in colonial and post-colonial Guyana were as deliberate as they were necessary. His work may well have assisted in the deep philosophical underpinnings of the Guyanese Constitution. In the 1960s, in an era of governance transition, Martin Carter's writings spoke of human rights, the denial of those fundamental rights and the subjugation of a people by those in "*boots of steel*".

In a spirited poetic treatise, he demonstrated that culture and cultural expression can be a champion of the Rule of Law. Sometime after the British suspended the Constitution of British Guiana in 1962, Martin Carter lamented:

"This is the dark time, my love
It is the season of oppression, dark metals
and tears,
It is the festival of guns, the carnival of
misery
Everywhere the faces of men are strained
and anxious
Who comes walking in the dark night time?
Whose boot of steel tramps down the
slender grass?
It is the man of death my love, the strange
invader
Watching you sleep and aiming at your
dream."

It is fair to say that this poet may have understood a thing or two about equality of treatment and respect for universal, human and fundamental rights - indeed, the very basis of the Rule of Law. Today, in more ways than one, the 'boots of steel' continue

to trample on our fundamental rights, due process and the rules of natural justice and this is often exemplified by the afflictions of mass migration, human displacement, human trafficking and terrorism. In this ever-evolving war, the Judiciary is an important peacemaker and stabilizing force in a country by means of its indomitable adherence to, and furtherance of, the Rule of Law.

Practically and jurisprudentially, the “Rule of Law” is a daily subject matter that infuses the functions and responsibilities of every Judicial Officer- from Magistrates to Judges to Court administrators. Ricardo Gosalbo Bono, Professor of Law and the Director of Legal Services of the Council of the European Union suggested an applicable definition of the Rule of Law that could be applied to maintain the just sustainability of all Nation States, incorporating the following principles:

1. The principle that power may not be encouraged ambitiously. This principle requires a rejection of the rule by man and the notion that laws should be prospective, accessible and clear;
2. The principle of supremacy and independence of law. This principle distinguishes the rule of law and requires acceptance of the principle of the separation of powers, which is the idea that law applies to all, including the sovereign and there must be provisions for an independent institution, such as a judiciary, to apply the law to specific cases;
3. The principle that law must apply equally, offering equal protection without discrimination. This principle requires that law should be of general application and capable of being obeyed and; (*a catch all*)
4. The principle of respect for universal known rights as laid down in the instruments and conventions accepted by the international community as a whole.

Indeed, many of the principles upon which the Rule of Law is based, are given their life-blood by the Constitutions of our Commonwealth Nations, with special reference to the fundamental rights provisions contained therein. In the Caribbean, the Constitution

represents the supreme law; a signal reminder of our independence and institutional sovereignty. It is therefore not in doubt, that our Constitutions seek to establish the Rule of Law as the center of our democratic and dynamic civilisations. The inter-relationship between fundamental rights, the Constitution which guards same and the Rule of Law is therefore certain.

When I was confronted with the theme for this Conference, “*The Judiciary as Guarantors of the Rule of Law*”, I have to admit that I paused for cause. My academic reaction was to retreat to the often cited dicta in the case of *Collymore v. the Attorney General of Trinidad and Tobago* (1967) 12 WIR 5, a judicial review case under the new Independence Constitution (1962) of Trinidad and Tobago. The Court of Appeal had to determine the constitutionality of an Act of Parliament which was at variance with the particular provisions of the Constitution. Justice of Appeal Aubrey Fraser stated in *Collymore*, “*No one, not even the Parliament, can disobey the Constitution with impunity.*”

In that same case, Chief Justice Wooding famously pronounced, “*the Courts are the guardians of the Constitution.*” Indeed, His Lordship could equally have intended that *the Courts are the guarantors of the Rule of Law.*

At the Second Distinguished Lecture Series, hosted by the Trinidad and Tobago Judicial Education Institute, at the Hall of Justice, Port of Spain in 2012, the eminent Justice Adrian Saunders, Judge of the Caribbean Court of Justice, succinctly underscored the guardianship and guarantorship role of the Courts in upholding the Rule of Law. Justice Saunders stated, “*This guardianship role [of Courts to the Constitution] is central to the broad role of the Court of Appeal [and I now submit, the Judiciary as a whole] in protecting democracy and advancing the rule of law. The rule of law in this context means a lot more than guaranteeing simple adherence to the law. It implies as well legal accountability, fairness, respect for minorities, the observance of human rights, judicial independence, the separation of powers, equality before the law, the absence of arbitrariness.*”

It is against the background of Justice Saunders’ understanding of the Rule of Law and its

encompassing principles, that it becomes immediately apparent, in my humble view, that the Judiciary's ability to efficiently discharge its role as guardian of the Constitution and guarantor of the Rule of Law, rests primarily on 3 tenets:

- (1) Its source of power, that is, its jurisdiction;
- (2) Its institutional effectiveness; and
- (3) The fair, just, transparent and independent dispensation of said power in its adjudication process. Indeed, I am here reminded of a quote in yesterday's keynote address by Chief Justice of Jersey, William Bailhache, that "judges must be, and be seen, as being independent."

On the matter of jurisdiction, any proper claim to the assertion that the Judiciary is the Guarantor of the Rule of Law- a guarantee being a security, whether of money, services or of legal rights- lies in an analysis of the measure of security and rights that are *actually*, as opposed to *ideally*, afforded to an individual of the State under the Constitution and its laws. How the Judiciary addresses infractions of rights so fundamental is important in the context of understanding its role as guarantor of the Rule of Law.

A useful example of the gap, that can be created, when constitutional jurisdiction is represented by a functioning Judiciary, in the absence of effective application of law by the Judiciary as deemed Guarantor, is the American experience in its Constitutional development.

Over 200 years ago, Alexander Hamilton, one of the framers of the American Constitution declared "*Where the will of the legislation declared in the statutes, stood in opposition to that of the people declared in the Constitution, the Judges ought to be governed by the latter rather than the former.*" However, it was the experience of the American people thereafter that the drafters, once elected to Government, were far less comfortable with the impact of their own rhetoric.

This is a prime example of implementation deficit in the Rule of Law.

In 1803, the then Chief Justice of the Supreme Court, John Marshall, boldly asserted in his

landmark judgment in *Marbury v Madison*, the Court's right to invalidate unconstitutional legislation. However, the judicial tendency remained to protect the *status quo* by becoming activist only where Government appeared to encroach on vested interest. As a result, until the mid 1950's, segregation, the battle of Senator McCarthy against communism, the imprisonment of Japanese Americans were not challenged by the Judiciary. It was only until 1954 in *Brown v Board of Education* that segregation in schools was banned. Shaken by the horror of World War II and the Holocaust, the International community ushered in the Universal Declaration of Human Rights, which became the forerunner of our Constitution.

The point I am making is that the existence of a jurisdiction, even if expressed in a Constitution, does not necessarily provide an effective guarantee to the Rule of Law. The American Court did not prevent the institution of slavery from subsisting, it did not rule against Mc Carthyism or internment of Americans based on race or the segregation of schools based on race. Historically, it may be argued that even in the face of overt and covert transgressions of the Rule of Law, the Courts tended to remain within its conservative role, maintaining the *status quo*, even defending it, and certainly not upsetting it. But judicial attitudes are changing to keep up the needs of a modern society.

The security that is expressed, and indeed, desired, in the guarantorship role of the Courts to the Rule of Law can only be derived from the effective exercise of judicial power and judicial outreach of, and in, its decisions. It is trite that in its simplest form, the Courts guarantee the particular aspects of the Rule of Law over which it adjudicates when its decisions are rendered not only binding, but meaningful and relevant to the affected litigants, and the society as a whole. To a large extent therefore, the effectiveness of the Judiciary goes beyond the question of jurisdiction, to that of management, resources and financial autonomy.

When one speaks of Management, it is often easy to view it as an exercise of power and authority. However, judicial management has both an internal and external component.

The Judge is required to be effective in his/her individual time management, whether personal or under the Management function envisaged by the Civil Proceeding Rules or similar time and case management mechanisms. There is an expectation- more often than not, satisfied- that the Judge is a proactive person driving the operation of the Judicial System. The Rule of Law therefore places a personal responsibility on the Judge or Magistrate to further its principles and objectives.

As a result, the Internal Management of the system can be looked at from 2 perspectives. The individual self-management of Judges and Support Staff and the Infrastructural Support System in place to promote the Rule of Law and to deliver the product that we call "Justice".

There are certain non-negotiable features that must characterise Judiciaries throughout the Commonwealth in order to achieve the type of Internal Management that is required for the protection and support of the Rule of Law:

(1) A Judge must be informed and versed in the laws of the Court over which he presides. That is a given. He must also be knowledgeable of, and concerned with, laws that not only impact his particular jurisdiction, but as well, those laws which may impact the society in which he functions. The Judge must continue to familiarise himself with, for example, international obligatory Rules, Conventions and Protocols on human rights and climate change and cannot be indifferent to those Conventions and Protocols signed on by Nation States. The evolving nature of the Rule of Law demands that judgements and decisions of the Court be steeped in socially conscious attitudes and considerations.

One way of meeting that demand is by continuing education. Continuing education and training in the legal profession is mandatory. To endorse what My Lord the Honourable Chief Justice of Trinidad and Tobago, Ivor Archie, said at the Opening of the 2016/2017 Law Term, *"It is accepted international best practice in developed societies for Judiciaries to have continuous training...in order to maintain relevance and effectiveness."*

In this regard, I wish to publicly highlight and commend the extraordinary event and publication that is the Distinguished Lecture Series, since its inauguration 6 years ago to date. This Lecture Series, hosted by the Trinidad and Tobago Judicial Education Institute, is a pillar testament to one of the fundamental conduits for advancing the Rule of Law in any judicial system- that of continuing education for its judges, magistrates and the general Bar Association. It is also significant that the Distinguished Lecture Series are informed by social scientists, anthropologists and other stakeholders in the general administration of justice. At the risk of appearing to advertise, the JEI model of continuing education in Trinidad and Tobago works. Its Lectures are made available in print for public consumption and edification. These Lecture Series breathe fresh life into the Judiciary's conduct of its affairs in the administration of justice; and ensure that Judges, Magistrates and lawyers are educated, in a practical way, on new developments in the law.

(2) Guaranteeing the Rule of Law requires that judicial independence must never be breached. A Judiciary that is confident in its independence is reflected not only in its decision but also its *approach* to decision-making. The way the Judicial system deals with persons who appear before it, or even third parties, in the public sphere, often goes a long way in not only reflecting the confidence of the Judiciary but also encourages confidence in members of the public towards the Judiciary. Judicial independence, whether from majority or populist views, pressure from the 'other Court'- the 'Court of Public Opinion'; or from fear, favour or financial gain or indeed, from the dictates of political interference, must always be maintained. A bone of contention, integral to the Judiciary's independence, is the politically marred issue of financial autonomy. As guarantors of the Rule of Law, it is my respectful view that Judiciaries throughout the Commonwealth Caribbean must pursue financial autonomy in the conduct of their affairs. It is to the credit of the Chief Justice of Trinidad and Tobago, the Honourable Justice of Appeal Ivor

Archie and the Chancellor and Head of the Judiciary of Guyana, the Honourable Carl Singh, that this enviable ideal of financial autonomy has been achieved, in these respective countries, after many long years of struggle and opposition.

- (3) In ensuring that the Rule of Law is upheld, a Court must always engage in the required civility and probity, informed by its inherent humility and the necessary courtesies. It is this humility that allows the Judge to listen and learn. That modicum of conduct relates as much to the litigant who appears before the Judge as to the lawyer who has conduct of the particular case. As a Judge, I recall a Senior Counsel who appeared before me in a criminal matter, belligerently seeking the start of his trial, because as I later understood, he was being handsomely paid for his retainer. Five minutes before I entered Court, I received information that the said Senior Counsel's Practising Certificate was suspended, pending repayment of fees to another client, based on an inquiry conducted by the then Disciplinary Committee of the Law Association. The Courtroom was packed to capacity- over 100 persons, both comprising the general public and potential jurors. Rather than chastise that Senior Counsel openly in Court, I called him side-bar, informed him of the status and that he needed to seek an adjournment. None was the wiser and the legal profession was not brought into ridicule, and by extension, the legal system and the profession were not further undermined in the eyes of the public. There was nothing wrong, in my view, with preserving the status quo in that case.

In engaging civility and probity, the Judiciary must support genuine inclusivity and be sensitive to all manner of persons who appear before it. Genuine inclusivity means full access to justice by all citizens including the differently-abled. A peculiar situation arose in the Trinidad and Tobago jurisdiction a few years ago where the President of the differently-abled society sued the Judiciary for its lack of physical access to the Hall of Justice since there was no lift available for the differently-abled to access the ground floor. The Court *ruled*

against itself and found in the Claimant's favour. I can also recall that before the lifts were built in the Hall of Justice, there was a well-established attorney, who with the concurrence of all the Judges, accessed the Courts by using the basement lifts of the Judiciary that were exclusive to Judges. To the credit of the Judiciary of Trinidad and Tobago, wheelchair access is now available.

In another matter, Magistrate Averson Jules of the Judiciary of Trinidad and Tobago, reminded me yesterday how important it is to ensure that the differently-abled litigant feels included in the judicial process. She explained how she took careful time to observe the evidence of a deaf and dumb litigant who appeared before her, notwithstanding the presence of an interpreter. This, ladies and gentlemen is the human touch that is sometimes required, to demystify the Judiciary and allow persons to feel included in the process of the Rule of Law.

- (4) The proper promulgation of the Rule of Law requires a Judiciary that is intellectually ambitious. The common law has a continuing relevance in the judicial system, filling the lacuna of statutory provisions. A Judge on a daily basis is asked to decide questions that affect society in general. Transformational judge-made law can only be established where a Judge's ambition remains focused on the pivotal role of the Judiciary as the guardian of the Constitution. The assumption therefore is that the judge understands the society which, not only exists, but is envisioned by the Constitution. There is therefore a pressing need for Judges and Magistrates to be informed, if only to remain relevant, so that you can secure the application of The Rule of Law. That need to be informed can transcend current law. The Internet and social media challenge the development of the law as they impact the laws of Privacy, Contract Law and Tort. Can Hacking be a tort? Is it part of the law of trespass? When and how do postings on social media impact on the common law or Constitutional law? In many of these areas, judges are required to be activists and not necessarily slaves to precedent to protect the Rule of Law.

In relation to social media, legislation in small island jurisdictions have not been very progressive or timely. At times, judges have had to raise from the dead, archaic laws, that may be invoked either in its statutory form or by way of common law. A good example of this was in the Trinidad and Tobago decision of *Therese Ho and Lendl Simmons*. The issue concerned nude photos which the Claimant's former boyfriend disseminated to his friends. She claimed, inter alia, damages for breach of confidence, succeeded and was awarded aggravated damages. The presiding Judge stated in the judgement:

“It appears that the common law concept of breach of confidence has never been applied in this jurisdiction to deal with a circumstance where intimate photographs taken in private have been distributed without the consent of the other party. In this jurisdiction therefore no action can be founded based on the failure to respect the privacy of a person. Given the rapid pace with which the face and fabric of the society has changed and cognizant of the infinite reach of social media, it cannot be denied that the privacy of the person is under attack and there is dire need for the enactment of statute to afford protection for citizen's personal privacy.

It must also be recognized that while the Courts in the United Kingdom are now obligated to apply the law in relation to breach of confidence in a manner that is consistent with that Nation's obligations under the Human Rights Act 1988 and its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms, no such obligation exists in this jurisdiction.

The instant case reinforces this Court's belief that it cannot confine itself to a myopic view of the law and in the absence of legislative protection, the common law concept of Breach of Confidence has to be moulded so as to address modern societal demands. The law has to be dynamic and has to develop in such a way to ensure that it remains relevant and it must be recognised that there is an obligation of conscience

which requires that videos, photographs and/or recordings that capture private intimate relations, should be clothed with a quality of confidentiality.”

- (5) The timely delivery of justice ought to be a matter of priority for every Judiciary. The cries of delay are not unique to any one corner or region of the Commonwealth. The system is simply overwhelmed and suffers from the resource and human capacity needed to drive it. Delay in the judicial system is like a cancer that starves the system of relevance and respect. Some jurisdictions, including Trinidad and Tobago, have employed the use of mediation and Alternative Dispute Resolution (ADR) in cases which qualify. This is a step in the right direction- both for the Court in aiding the efficient disposition of cases and an unburdening of the caseload as well as for the litigants, who may benefit from a just resolution of the case for both parties, enabled by the amicable environment that a mediation/ADR session generally provides. In the criminal law, My Lord Chief Justice of Trinidad and Tobago, the Honourable Ivor Archie, indicated in his Address at the Opening of the Law Term 2016 that the Criminal Procedure Rules are under way for implementation in early 2017. It will bode well for Judiciaries, especially in the Commonwealth Caribbean, to implement similar ADR and case management rules in addressing the issues of delay in the criminal and civil justice systems. In this regard, it will certainly be worth their while to liaise with the TT judiciary so as not to reinvent the wheel and CJ Ivor Archie is only too willing to accede to a request of this nature. I am fearful that my suggestion is not seen as an encroachment-Separation of Powers. I need to emphasise that it is merely an encroachment
- (6) It is imperative that in promoting the Rule of Law, judges promote and articulate as well a clear understanding of the law. Judgments ought to be written in a manner that is easily understood and that is relevant to existing social norms and mores.

An integral part of the communication aspect is the issue of public perception that can become skewed, with the resulting

fallout, if not properly done. A judge does not give interviews on his judgment even if it the subject of great criticism in the common law tradition and judges have been pillared, if organisations and organizations . In these circumstances the role of the Bar or Law Associations is critical in taking up the mantle of communicating with the public the ramifications in a judgment in circumstances where the Judiciary ought not to defend itself or be seen to be defending itself. This implies that the relationship between Bench and Bar must always be encouraged and cultivated. That relationship is threatened if Bar or Law Associations are perceived as political associations at the executive level.

With respect to the second non-negotiable feature a Judiciary must possess in order to further the Rule of Law, let us turn now to the matter of Resources and Funding. Having regard to the foregoing, it is axiomatic that the ability to act as a Guarantor is heavily dependent on the availability and prudent development of resources to support the work of the judicial system especially in the context of a Constitutional system that establishes the Judiciary as mediator, promotor and protector of rights, freedom and institutional power and authority. The judicial system is in itself, a national support system that can only effectively function if it is provided with management systems human and electronic which allow for production. If resources are absent, the Judiciary is in danger of becoming a façade. The resources and support system must be properly qualified, trained and exhibit an ethos to work that will allow the Judiciary to deliver its Constitutional objective.

I turn now to a matter that is very near and dear to my heart, that of Restorative Justice. It is a matter that is absolutely vital to expediting a Judiciary's effectiveness and caseload, in an effort to comply with the timely administration of justice. If crime and recidivism are seen as an anathema to the Rule of Law, then solutions with a juridical input must be sought so that there are both sanctions and relief in dispensing criminal matters. The Judge in the criminal court can be the prime mover of ensuring continuance of the Rule of Law through transformational action, some may even say activism. Restorative Justice therefore

has an indelible place in the Rule of Law.

It will therefore be important to consider the law not as rigid and inflexible because of precedent, since more often than not, the best decisions on the Bench are made when Judges and indeed, the lawyers who appear before them, consider the human relationships that inevitably inform the justice of the case. Restorative justice in the civil and criminal arena, focuses on restoring the human relationships that are damaged or broken as a result of the misfeasance caused by one party to another. The *raison d'être* is that if damaged relationships are restored, and the offender is not only made fully aware of the damage caused by actions, but is also given the tools, as well as the opportunity, to address the issues within himself that led to that offending behaviour, then the likelihood of an offence being repeated is drastically reduced.

The retributive approach in the criminal law continues to fail us, in stemming the seemingly endless flow of crime that by extension shake the portals of the Rule of Law. Restorative Justice places on the offender, the responsibility to take active steps for atonement, rather than a passive term of reflection behind prison walls. However, let me disabuse your minds immediately that in any restorative justice system, prison incarceration still has its place.

This ideal of restorative justice requires a combination of social engineering and judicial action, even activism. How can the law therefore be utilized as a transformational tool to promote restorative justice? And what is the role of the Judiciary in that process? The Judiciary may thus be required to take a more activist or interventionist role, not only to preserve the Rule of law in society, but to interpret the law in a manner that promotes Restorative Justice in a way that does not undermine the public's confidence in the judicial system. Indeed, perceptive confidence in the judicial system is critical to the rule of law, for "*Justice must not only be done, but must be seen to be done.*"

Judges therefore are required to uphold the law and the Constitution of their respective jurisdictions. Giving effect to the law entails doing what is right and not what is necessarily popular.

In 2009, when I was a Senior Criminal Judge in the Assize, apart from being a trial Judge with criminal overload, I adjudicated in the Bail Court. I had by then, been speaking in my sentencing judgments in trials for some time that the “man child was in crisis,” a type of rally cry from the Bench, to my society to wake up to the reality that we were losing our young men between the ages of 17-30 generally to murder, gang warfare and drugs. With every young man that came into my courtroom, accused of murder, rape, robbery, with tattooed tears running from their sunken eyes, I felt an increased sense of desperation triggered by the urgency of now. I began the Bail Boys Project as a working component of restorative justice. I am happy to report years on, the Bail Boys Project, now under a new nomenclature, continues to make progress under the stewardship of Justice Malcolm Holdip, who is here with us today. The Bail Boys have been given a second shot at redeeming themselves.

The Bail Act allowed for conditions when an accused person is placed on bail. There is no system in Trinidad and Tobago analogous to Bail Houses in the United States and some parts of the Commonwealth. As a result, there were scores of accused persons awaiting trial for some 8 and 9 years without hope of coming to trial given the overload of case files in the criminal courts. Apart from surety, the conditions were traditionally reporting conditions to police stations and distance orders to stay away from the victims of crime. A prisoner on remand for very serious offences- attempted murder, rape, violent robbery and assaults- was not afforded any structured life skills training or programme whilst in remand yard, primarily because such training was exclusive to the convicted and not to the transient accused. And by “transient” I mean upwards of 5 years. These remand prisoners appeared before me bitter and vicious. The first thing I did was to apologise to them- these accused young men- for not having an early trial. They were often shocked by that. They were even more shocked when I granted them bail, some of them without surety. Yes, this type of action hovers between judicial perseverance and judicial risk. Instead of reporting conditions in police stations where they were often harassed, verbally and sometimes demeaned, I sent them to probation welfare officers. They were further

exposed to psychologist and experts, some who were brought on board voluntarily to deal with anger management, substance abuse, self-esteem issues, sex education, parenting and fiscal management. The Probation Welfare Office at the behest of the Court, sought out jobs and got reports from employers on their industry. They were placed on curfews, required to reside at specific addresses and if illiterate, one of the conditions of bail was to attend literacy classes and if literate, to enroll in courses that were beneficial to them. Absenteeism would result in a breach of bail condition and possible revocation.

There was a reward system in place for obeying curfews and not violating bail conditions. This is not to say that recidivism did not occur- because the runner stumbles- and when they stumbled, bail was revoked for a few months to trigger reflection. I can say that while I presided over the Bail Boys Project on the Bench, out of 35-40 hardcore criminals, only 3 or 4 became repeat offenders. Some got married, formed small contracting firms, even offering their services to the Court to employ other accused persons. In some instances we moved gang members from the streets to upper secondary and tertiary education.

Let me share with you another example where it may be useful for Judges and Magistrates to think outside the box and employ restorative justice mechanisms in the cases before them, by referencing cultural modes of dispute resolution. The Panchite was a system for dispute resolution used by the indentured immigrants from India where generally 3 persons of authority- be it the schoolmaster, the schoolmaster or the pundit- would seek to resolve disputes among those in their community. The decisions were binding and upheld by the community. It has fallen into total disuse with the development of the Court system and the growth of litigation. When I was on the Bench, a family matter came before me. It concerned two brothers, from a very rural village in Trinidad, fighting over land. The Panchite system was used by me in the Criminal High Court before I sentenced the brother who, accused of attempted murder, was found guilty of wounding with intent. It was the first time that a trial judge in Trinidad and Tobago used the Panchite system in determining the type of sentence that would

have met the justice of the case, maintain harmony in the family and the Rule of Law in the community.

By now, you must have realised that Restorative Justice, innovative Judicial Action- and if you prefer, “judicial activism”- can co-exist harmoniously to support the Rule of Law.

Let me lastly turn to this ripe issue of the place of International Law in the Rule of Law. It is often forgotten that the Rule of Law and the rule of the Judiciary is not solely linked to domestic law in the Constitutional context. In his 2004 Report to the United Nation, then Secretary-General Kofi Annan, recognized the international Rule of Law as an important feature of world harmony, which must be “consistent with international human rights norms and standards.”

The International Order is integral to the promotion of the Rule of the Law through the development of an International judicial system- whether by adjudicating on trade issues through the World Trade Organisation (WTO), or the promotion of Human Rights, through the various international Tribunals established under the umbrella of the United Nations dealing with the breach of Human Rights treaties or breach of International Criminal law or Humanitarian Law , the settlement of Investment Disputes through the various Dispute resolution systems established in Bi-Lateral Trade Agreements or International Law Disputes concerning Borders, Environmental issues, the use of Force, all determined through the International Court of Justice.

Respectfully, I feel that Commonwealth Courts have sometimes neglected, even failed, to understand or indeed, are reluctant to appreciate the impact and relevance of the international jurisprudence on our domestic law development. Why is this? All of us in this room have been schooled in the well-worn rules of the common law that the court will always seek to ensure that the common law is in conformity with the State’s international obligations and secondly, that a domestic Statute will always be interpreted in a manner that conforms with a State’s international obligations, unless there are express words in a domestic Statute that demands a contrary interpretation and thirdly, that the Court will

resolve any ambiguity in domestic legislation to accord with the State’s international obligations (a useful example is the Australian decision in *Minister for Immigration and Ethnic Affairs v Teoh* ((1995) 183 CLR 273). These rules are not new nor are they of recent vintage. These rules have been applied by the English Courts for over a century. However what is striking is the apparent dearth of Commonwealth authority that apply or even accept these long standing common law rules. One only has to look at the Constitutional cases in Human rights issue where the International Treaties are accepted as a source of law in defining the meaning of constitutional rights. These treaty obligations impacted on the Pratt and Morgan Case ([1993] UKPC 1, [1994] 2 AC 1) and The Lewis Decision (Lewis -v- The Attorney General of Jamaica [2001] 2 AC 50) out of Jamaica, The Hughes ([2002] 2 AC 259) , Fox ([2002] 2 AC 284), Reyes ([2002] 2 AC 235) and Spence ([2002] 2 AC 259). Cases out of the Eastern Caribbean and Belize and the Thomas and Hillaire ([2000] 2 AC 1) cases out of Trinidad, to name a few, yet international norms have not received the required momentum in the decisions of some Commonwealth jurisdictions. Is it that that judges are uneasy about the impact of our international obligations on the meaning of our human rights provisions? Are we afraid that such considerations are affected by politics and therefore we avoid the issue that can no longer be avoided? The impact of this approach, especially in the field of Human Rights, is to suggest that the Commonwealth citizen and the non-Commonwealth citizen are entitled to be treated differently. I phrase this in this manner to project the very basic principle that the reason why the field of endeavor, is called “Human Rights” is because it seeks to establish the proposition that humanity is entitled to certain basic rights that are indistinguishable by borders or country. When put in that context, we must consider that guaranteeing ‘Human Rights” means applying Human Rights principles to domestic interpretation, and by so doing, Judges and Magistrates enhance the Rule of Law.

For purposes of economy, to give one example on the issue:

Many Caribbean States are signatories of many bilateral treaties that provide for dispute

settlement before the International Centre for the Settlement of Investment Disputed (ICSID). The treaties provide for “full compensation” if an investor’s properties are seized by the State. There is also local legislation that provide for full compensation where an individual’s land’s are acquired by the State. Often there is no definition of full compensation. There are several international decisions on the meaning of full compensation by the ICSID and other tribunals, all consistent with each other. In the absence of a local definition, the meaning and application of the term “full compensation” ought to conform with our international obligations. So that the decisions of the ICSID on this issue, though not binding domestically, provides a source of law in interpretation, in accordance with the common law principles.

When we speak of a Judiciary as Guarantor of the Rule of Law, we must now include the International Judiciary that preserves the International desire for peace, development and growth. It is also reflected in the establishment of a new legal system, the International Criminal Court. Its hallowed objective, among many others, is to preserve the international Rule of Law by ensuring that impunity does not go unscathed.

It may be well for us to be reminded that one peculiar feature of a failed State is a failed Judiciary. States fail when the Judiciary fails to uphold and protect the Rule of Law.

Even though all that I have said is devoted to the Judiciary as Guarantor of the Rule of Law, there is a much wider and fundamental issue to consider. Would it not be more accurate to suggest that the true Guarantor of the Rule of Law is not the institution of the Judiciary but the Legal Profession as a whole. Lawyers who are well-trained, effective and committed are the agents of the Rule of Law. They are the Advisers, the Advocates, the Judges, the Magistrates, the drafters, the representatives of every individual and organisation in the system of law.

An important component in the Rule of Law is a vibrant, intellectually energised Bar Association that will fuel jurisprudential debate in the public domain in a manner that does not ridicule the Court but supports it; that seeks to guide rather than punish; to inform rather than misinterpret the law. In

the Commonwealth, I have noticed over the years that when lawyers become politicians, to interpret the Constitutions publicly not as lawyers, but as politicians. Lawyer-politicians become individuals of selective, sometimes skewed jurisprudence.

In those circumstances, it may therefore be more accurate to suggest that it is the lawyer at work in society, that promotes the idea that there exists a system that Guarantees the Rule of Law. If we accept this view, we must now ask how do we ensure that the Legal Profession acts as a Guarantor of the Rule of Law? But that is for another day.

As judges we have to engage the esoteric, but the pragmatic is critical for what needs to be done must be done to actualize the philosophical underpinnings of our judicial responsibility and independence, if we are to be truly Guardians and guarantors of the Rule of Law. At times, it may be said that there is an implementation deficit in exercising our wide judicial powers and responsibilities. Not out of indolence or indifference, but out of our guarded, well-intended vision of stewardship as judges, that we must never bend the branch of the law and risk breaking it in the process. In 2016, it may be worth our time to heed the call to arms of Chancellor Carl Singh, and I quote, *“To be able to provide that guarantee for the Rule of Law, the Judiciary must possess certain characteristics and attributes. I speak mainly of judicial independence. I speak of activist Judges, who are bold, outspoken and fearless. Judges who are weak, timorous souls are less likely to be effective guarantors of the Rule of Law.”*

PROVIDING SUFFICIENT RESOURCES FOR THE COURTS AND JUDICIARY AS A FUNDAMENTAL CONSTITUTIONAL OBLIGATION

Rt. Hon. Sir Peter Gross, Lord Justice of Appeal and Senior Presiding Judge for England. This paper is based on a presentation at the Commonwealth Magistrates' and Judges' Association Annual Conference: Georgetown, Guyana, 20 September 2016.

Abstract: *This paper makes the case for The Reform Programme, which is a necessary response to austerity and financial stringency, the alternative being decline by many salami slices. The Reform Programme is something we should be doing anyway: using the resources available to us, strategically and imaginatively, with a view to devising a user-oriented, modernised and improved justice system, while preserving the brand of trust, confidence, integrity and expertise it has historically enjoyed and continues to enjoy.*

Keywords: austerity justice – Reform Programme – IT transformation – estate modernisation – changing work practices

It is axiomatic that the two primary functions of the State are Defence of the Realm and the provision of law and justice. If the State succumbs to its external enemies, all is lost. If it does not uphold law and justice, no other rights can be enforced or entitlements enjoyed. Against this background, it is impossible to overestimate the importance of the rule of law and an independent judiciary to our society. Consider for a moment living or doing business in a society where the rule of law does not function. As often said and as is the title of this Conference, the Judiciary is the guarantor of the Rule of Law and, as such, its role is crucial. As the independent third branch of the State, it serves to define the society we are.

To uphold law and justice, a State must secure necessary institutional structures and resources. It is one thing to make a commitment to separation of powers and the rule of law within written constitutions or – as in the United Kingdom – within an uncodified constitution, it is another to render that commitment real. Without the provision of an independent judiciary, properly appointed, well-versed in the law, and with

security of tenure and salary, there can be no real commitment to either.

A properly independent judiciary is however a necessary but not sufficient condition for a robust commitment to the rule of law. It must be complemented by a properly resourced and accessible infrastructure. That infrastructure must be capable of delivering the proper administration of justice: courts, court buildings, court staff with the relevant expertise and so on. It also requires the provision of sufficient resources for innovation, given the pace of technological and societal change. All this is the topic addressed by the CMJA's important 2015 Resolution.

In England and Wales this aspect of the State's primary duty is, by statute, placed on the Lord Chancellor – who is under a duty to “ensure that there is an efficient and effective system to support the carrying on of the business of the Courts and that appropriate services are provided for those courts” (Courts Act 2003, s.1). Parliament has thus determined that it is the executive's responsibility to discharge this duty. The Lord Chancellor, and all government Ministers, are also placed under a statutory duty to uphold the continued independence of the judiciary; the former being under a specific duty in respect of the constitutional principle of the rule of law. As further provided by statute, the Lord Chancellor must “have regard tothe need for the judiciary to have the support necessary to enable them to exercise their functions”. All these matters are brought together in the Lord Chancellor's oath, whereby he/she swears to:

“ ...respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible...” (Constitutional Reform Act 2005, s.17(2)).

Now, an obligation to provide resources is one thing, though an indispensable and principled starting point. Performance of that obligation, at a time of financial stringency from which the justice system despite its fundamental importance cannot be wholly immune, is another. In terms of the practical provision of resources to the justice system, in England and Wales, there is (to put it colloquially) only “one game in town”: Her Majesty’s Courts and Tribunals Service (HMCTS) Reform. The Reform Programme is our answer, in England and Wales, to the title of this Paper.

To begin with, some context:

- (i) As Senior Presiding Judge (“SPJ”) over the period 2013 – 2015, I had the privilege of the closest involvement in the decision to embark on HMCTS Reform and its introductory phases. Subject of course to the Lord Chief Justice (“LCJ”) and the Judicial Executive Board (“JEB”) – the LCJ’s “cabinet” – the SPJ is the judicial lead on HMCTS Reform. My Deputy (Fulford LJ) led on IT and is now, as the current SPJ, the judicial lead on the reform of HMCTS, together with the Senior President of Tribunals (“SPT”), whose role has also been pivotal.
- (ii) Secondly, a word as to HMCTS. One of the consequences of the constitutional developments since 2003 has been the formation of what is now HMCTS. This is the body that administers the courts and tribunals. HMCTS is unique because it is a partnership between the Lord Chancellor (“LC”) and the LCJ and SPT – thus a partnership between the Executive and the Judiciary. HMCTS officials have dual duties to the LC and the LCJ.
- (iii) Thirdly, the reduction in resources available to the justice system is striking. In terms of funding for the courts, there has been a 25% cut between 2010 – 2015. As to buildings, 636 buildings in 2011 have reduced to 471 by March 2015. Finally, HMCTS staff numbers have reduced from 22,000 in 2009/10 to 17,000 in 2014/15. It is simplistic to regard all reductions as “bad” – some are inevitable and some are “good” as I shall suggest – but (to use one example) there has been a painful loss of institutional knowledge flowing from

the departure of some very experienced managers and the downgrading of some posts.

Against this background of years of salami sliced reductions in resources, it has been apparent from late 2012 (if not before) that strategic reform was an imperative. The only alternative was decline. Reform has proved as daunting as it is exciting – truly a once in a generation opportunity to provide an improved justice system.

HMCTS Reform involves an integrated programme with three strands: (1) transforming our IT; (2) modernising our estate; (3) changes to our working practices. To emphasise: this is a transformational programme (truly so called) and an integrated programme; the three strands stand or fall together. With the support and agreement of both the Treasury (“HMT”) and the Ministry of Justice (“MoJ”) and of successive Lord Chancellors, funding of some £700 million plus has been agreed. Moreover, HMT has agreed various flexibilities and the “ring fencing” of the proceeds of asset sales, so that these can be reinvested in the Programme.

Three matters need to be emphasised at the outset. First (as the LCJ has put it), this is not “reform done to” the Judiciary; quite the contrary. HMCTS Reform can only be successfully accomplished with judicial participation, nationally, at Circuit level and locally – hence the establishment of Local Leadership Groups, now coming into their own. By its nature, much of the programme must be judicially led. Because of the need for engagement by the judiciary across the country, much judicial leadership time has been invested in road shows; my then Deputy and I undertook more than 30 in 2015 and found them, without exception, valuable and stimulating. Communication between the SPJ and judges across the country is an essential part of the process and a matter to which my successor has devoted much attention. Judicial involvement and leadership must also be jurisdictionally based; proposals for reform must satisfy those with practical experience of the jurisdictions in question. For this reason, Judicial Engagement Groups (JEGs) were established, as the fora for testing innovative ideas against the wisdom of practical experience – and have already repeatedly proved their worth.

Secondly, the Reform Programme is not a cost cutting programme. Its objective is a modernised and improved justice system. It will deliver savings – but it will do so through efficiencies. It is right that it does so; HMT like any other investor expects a return on its investment. The savings, however, come as part of a strategy for the future; not as a slash and burn exercise.

Thirdly, in designing the justice system for the future, we are anxious to put court users at the centre of our considerations. Hitherto, we have been more producer/supplier oriented. We really do need to grapple more with that which is in the best interests of those who use the courts.

Elaborating on the three strands, the first concerns IT transformation. In one sense, there is nothing remarkable about this – in an age when so many people do so much online: think about Amazon, grocery deliveries and flight bookings. For the Courts, though, this will be a major change – from a paper based system to one which is digital by default. In terms of HMCTS staffing, there is no gainsaying that a good number of jobs will be lost: if there is no paper to shift, you do not need employees to shift it. But, importantly, there will also be a need for higher grade staff. If we are to be digital by default, it is essential that the IT works and can be rapidly repaired when, inevitably, there are breakdowns. No airline could function if its ticketing operations at a major airport went down for an extended period; nor will the Courts system. Moreover, there will be a need for higher grade staff to assist those members of the public who struggle with IT or lack access to it. We cannot exclude anyone, let alone some of the most vulnerable in society, from the Justice System. An essentially digital system will free acres of space, so bringing me to the second strand – estate rationalisation.

The blunt truth is that we have had too many buildings and certainly far more than we can afford to maintain. I am familiar with cities with a number of courts and tribunals buildings, in close proximity to one another, none of them satisfactory. Furthermore, Courts must command respect; from my own experience, by no means all have been maintained in a condition to do so. We need

a smaller estate – but an improved estate. We must maintain what we retain. This is not an exercise in squashing Judges into less space; we will have to invest in an upgraded estate, fit for purpose in a digital age. We can use the space freed up by losing mountains of paper. We can also improve courtroom utilisation – not by suggesting that individual Judges work longer hours but by improving our listing practices and recognising that, for some users, courts and tribunals, early morning or evening sittings may be preferable to the customary 10.00 – 16.30 or thereabouts. One particular matter requires emphasis. Local justice is and will continue to be an imperative. There cannot be a justice postcode lottery, excluding remote rural areas. Local justice is therefore a given; what is not a given is how best to deliver local justice. It is anything but self-evident that the right course is to spend significant sums on keeping small, under-utilised, poorly maintained courts in service. Instead, we are right to explore alternative options: public buildings which we can use from time to time (so-called “pop-up courts”) together with increased use of technology, permitting evidence to be given by way of remote links, saving much unnecessary travel but preserving (and, hopefully, improving) access to justice.

Finally, changed working practices. Our default position has hitherto involved a presumption in favour of face to face hearings. That is not, necessarily, beneficial either to legal professionals or other court users. For many a professional, the ability to conduct pre-trial hearings from the office or chambers improves productivity. Court users cannot be assumed to relish a visit to a court, where there are suitable online or remote alternatives. The upshot is that in a digital system we should anticipate less face to face hearings, more work being done on screen and more use made of technology. Naturally, we will need in all this to safeguard the needs of open justice but that is perfectly feasible. A striking innovation is the recommendation for an “Online Court”, one of the fruits of the *Civil Courts Structure Review*, conducted by Briggs LJ. In a nutshell, this “...offers a radically new and different procedural and cultural approach to the resolution of civil disputesto resolve money claims up to £25,000 subject to substantial exclusions” (Interim Report, dated December 2015 and

Final Report, dated July 2016 (“Briggs”), at para. 12.6).

Even this brief outline of the Reform programme serves to illustrate the sheer scale of the judicial leadership task, perhaps best exemplified (if I may say so) by the tireless commitment, drive and energy displayed by the LCJ personally to ensure its progress. That said, judicial leadership is a necessary but not sufficient condition for success. HMCTS Reform could not be accomplished without the closest cooperation between the Judiciary and HMCTS – joint working at its best – involving the complete commitment of the HMCTS senior management team, together with support and guidance from the HMCTS Board, under its universally respected and independent Chairman. Importantly, this is an HMCTS programme, as reflected by the governance arrangements under the overall aegis of the HMCTS Board, always subject of course to the Board needing to report to its principals: the Lord Chancellor and the Lord Chief Justice, together with the SPT.

Significant progress has already been made; the Reform Programme is real – it is not aspirational or theoretical. By way of examples only, our criminal courts are now largely equipped to work digitally, a notable development being the Digital Case File. For certain traffic offences, there is the facility for online pleas. The first automated rotas for magistrates have been introduced. The Divorce Online project has commenced. The crime Wi-Fi solution will in due course be extended to Civil Family and Tribunal (CFT) hearing venues. The rationalisation of the estate has begun, with the close and continuous involvement of the Judiciary, both nationally and locally. This is exciting; it is also – as I have already said – daunting. We need to get it right. If we do, it will be a legacy for the future. The foundations are sound; we need to press on, “full ahead” to implement the programme as a whole.

Only last week all these propositions were reiterated and reinforced in the Joint Statement of the LC, the LCJ and SPT, *Transforming Our Justice System* (September 2016), highlighting the three core principles forming the basis of the Reform Programme, namely, *just, proportionate and accessible*. Reform is to be achieved by combining our “respected traditions” – and established strengths – with

the “enabling power of technology”. As the Joint Statement concluded:

“These reforms build on what we already have – a justice system that is revered around the world for its excellence. But they also recognise something important in that system’s unique history. It has always evolved. Our times – with the advent of the internet and an explosion in new technology – provide the opportunity for radical change.....”

Pulling the threads together: we have had to make do with less resources, a matter of grave concern given the vital importance of the justice system. The Reform Programme is a necessary response to this financial stringency, the alternative being decline by many salami slices. But, more importantly, the Reform Programme is something we should be doing anyway: using the resources available to us, strategically and imaginatively, with a view to devising a user-oriented, modernised and improved justice system, while preserving the brand of trust, confidence, integrity and expertise it has historically enjoyed and continues to enjoy. The stakes are high. There is no Plan B.

LAW REPORTS

ECONOMIC FREEDOM FIGHTERS V SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS; DEMOCRATIC ALLIANCE V SPEAKER OF THE NATIONAL ASSEMBLY
9 February, 31 March 2016

South African Constitutional Court [2016] ZACC 11, [2016] 3 LRC 713
Mogoeng CJ, Moseneke DCJ, Bosielo AJ,
Cameron, Froneman, Jafta, Khampepe,
Madlanga, Mhlantla, Nkabinde and Zondo JJ

Security upgrades were carried out at public expense at the private residence of the President of South Africa. Complaints were made to the Public Protector appointed under ss 181 and 182 of the Constitution of South Africa that much of the work, such as construction of a swimming pool and other facilities, was not related to security and amounted to substantial private benefits to the President. The Public Protector investigated and reported to the President and to the National Assembly that much of the work amounted to an undue benefit to, or unlawful enrichment of, the President and his family. The Public Protector ruled that the President had acted in breach of his obligations under s 96 of the Constitution (relating to the conduct of Cabinet members) and took remedial action, ordering that he repay large sums to the Treasury and making a number of consequential orders. The President appointed the Minister of Police to examine the Public Protector's report and the Minister 'exonerated' the President. The President submitted responses to the National Assembly. The National Assembly appointed committees to examine the Public Protector's report and eventually resolved to absolve the President of all liability. The Economic Freedom Fighters and the Democratic Alliance (political parties represented in Parliament) thereupon applied to the Constitutional Court for an order affirming the legally binding effect of the Public Protector's remedial action. That required that the matter come within the exclusive jurisdiction of the Constitutional Court under s 167(4)(e) of the Constitution, which provided that the Constitutional Court alone could decide that Parliament or the President had failed to fulfil a constitutional obligation.

HELD: Order made upholding binding effect of Public Protector's ruling and consequential orders requiring President to comply with

remedial action accordingly; National Assembly resolution declared invalid and set aside.

(1)(i) The exclusive jurisdiction of the court under s 167(4)(e) had to be given a restrictive meaning to avoid unduly depriving the Supreme Court of Appeal and the High Court of their constitutional jurisdiction. An alleged breach of constitutional obligation had to relate to an obligation specifically imposed on the President or Parliament and not shared with other organs of state. Readily ascertainable obligations could be heard by the High Court but where the Constitution imposed the primary obligation on Parliament or the President and left it at large to determine what would be required of it to execute its mandate then the exclusive jurisdiction of the Constitutional Court was engaged.

Per curiam. Where, as in this case, both the President and the National Assembly are said to have breached their respective constitutional obligations but exclusive jurisdiction is only proven in respect of the one but not the other, there might still be room to entertain the application against both provided it is in the interests of justice to do so.

(ii) The conditions for the court to exercise its exclusive jurisdiction had been met. Section 83 of the Constitution, requiring the President to uphold the Constitution as the supreme law, was very broad, extending to all the obligations resting on the President, including those shared with other members of the executive, albeit appointed by him. However, to invoke the exclusive jurisdiction of the court under s 167(4)(e) required conduct by the President himself tending to show his personal failure to fulfil a constitutional obligation expressly imposed on him. The alleged failure of the President to comply

with the remedial action coupled with the failure to uphold the Constitution related to constitutional obligations imposed specifically and only on him that were intimately connected with the issue central to the application: the obligation of the President to comply with the remedial action. The conditions had also been met in respect of the National Assembly's alleged failure to discharge its constitutionally mandated and exclusive obligation under s 182(1)(b), (c) to take appropriate remedial action upon the Public Protector's report. The National Assembly had the exclusive responsibility to hold the President accountable when the report of the Public Protector was received. The Constitution did not give details as to how the National Assembly was to discharge that duty, nor were mechanisms for doing so outlined.

(2) The President had failed to uphold, defend and respect the Constitution as the supreme law of the land. It would be inconsistent with the language, context and purpose of ss 181 and 182 of the Constitution to conclude that the Public Protector enjoyed only the power to make recommendations that could be disregarded if there were a rational basis for doing so. The remedial action taken against the President had binding effect. Concrete and specific steps were to be taken by the President and it was not necessary to investigate whether the specified non-security features were in fact non-security features. The President had been required to comply with the Public Protector's report, absent a court challenge to the report, which had not occurred. Under s 172(1)(a) of the Constitution, the court had no discretion but had to make a declaratory order declaring invalid any law or conduct that was inconsistent with the Constitution. The President's failure to comply with the remedial action recommended by the Public Protector against him was therefore declared invalid and the President was therefore ordered personally to make the relevant payments, the amount to be determined by the National Treasury.

Per curiam. (i) The institution of the Public Protector was created, and its independence and its impartiality guaranteed, by ss 181 and 182 of the Constitution, to strengthen constitutional democracy and facilitate good governance by protecting the public from any impropriety, prejudice, corruption or unlawful enrichment by, *inter alia*, members of the

executive at all levels. The effectiveness of the Public Protector would be compromised if compliance with remedial action recommended was optional. The proposition that the Public Protector's constitutional powers had been diluted by the provisions of the Public Protector Act is irreconcilable with the supremacy of the Constitution.

(ii) The Public Protector's power to take appropriate remedial action is wide but not unfettered. The remedial action is always open to judicial scrutiny. It is not inflexible in its application, but situational. What remedial action to take in a particular case will be informed by the subject-matter of investigation and the type of findings made. Of cardinal significance about the nature, exercise and legal effect of the remedial power is the following. The primary source of the power to take appropriate remedial action is the supreme law itself; the Public Protector Act is but a secondary source. (b) It is exercisable only against those that the Public Protector is constitutionally and statutorily empowered to investigate. (c) Implicit in the words 'take action' is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. 'Action' presupposes, where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence. (d) She has the power to determine the appropriate remedy and prescribe the manner of its implementation. (e) 'Appropriate' means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case. (f) Only when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken. (g) Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of investigation, and in line with the findings made would a non-binding recommendation be made or measure be taken. (h) Whether a particular action taken or measure employed by the Public Protector in terms of her constitutionally allocated remedial power is binding or not or what its legal effect is, is a matter of interpretation aided by context, nature and language.

(3) The National Assembly resolution based on the Minister's findings exonerating the President from liability was declared to be inconsistent with the Constitution, invalid and set aside. The National Assembly had been entitled to satisfy itself about the correctness of the Public Protector's findings and remedial action. The Assembly also had leeway to decide how best to carry out its constitutional mandate. The Constitution did not state how it was to attend to or intervene in relation to the Public Protector's report and it was not for judicial authority to prescribe to the Assembly how to scrutinise and oversee executive action. The court's role was to determine whether what the National Assembly had done amounted in substance and reality to fulfilment of its constitutional obligations. The National Assembly had been duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector unless it had been set aside by a court.

Per curiam. The judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government. It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the executive accountable and fulfilling its oversight role of the executive or organs of state in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations.

GREWALS (MAURITIUS) LTD V KOO SEEN LIN; KOO SEEN LIN V GREWALS (MAURITIUS) LTD

13 April, 5 May 2016

Privy Council (Mauritius) [2016]

3 LRC 752

Lady Hale, Lord Kerr and Lord Hughes

The claimant employee was employed as the defendant employer's general manager. The employer became concerned about a number of allegations concerning the employee's methods of work, in particular, conflicts of interest which he had with suppliers, including a company owned by his son. The employer commissioned an investigation by forensic investigators and in the meantime suspended the employee from his position. A disciplinary committee ('the committee') was set up to consider the evidence, including the investigators' report that the employee had misconducted himself in a number of ways. Whilst the committee carried out its investigations, the employer wrote to a number of its suppliers with whom the employee had been in the habit of dealing, informing those suppliers, inter alia, that the employee was no longer in a managerial position. The employer also stopped the employee's right to be supplied by a local garage with petrol on the employer's account and cancelled the employee's credit account for his company mobile phone. The employee was of the view that the actions of the employer, in particular the letters sent by the employer to its suppliers, had made it plain that a decision had been made to dismiss him and that the committee was, accordingly, a sham. He therefore declined to take any further part in the disciplinary process. The committee continued to sit and subsequently reported that the employee had been guilty of serious misconduct. As a result, the employer dismissed the employee by a letter dated 22 April 2002. However, no salary was paid to the employee for the month of April and, some months later, the employer informed its pension providers that the employee's contract had been cancelled at the end of March 2002. The Industrial Court magistrate held that the employee had been constructively dismissed and that, of all the charges of misconduct

levelled by the employer, none of them had been made out; accordingly, the magistrate awarded severance pay at the punitive rate. The Supreme Court upheld the finding that the employee had been constructively dismissed but held that six complaints of misconduct had afforded the employer justification for dismissal. It concluded that, even if the full extent of the employer's accusations were not proved, the employee had been guilty of conduct amounting to abusive use of his position as general manager by way of favouring a separate company that was owned by his son. On that basis, the Supreme Court held that severance pay at the standard rate, rather than punitive rate, was justified. The employer appealed to the Privy Council against the finding that the employee was constructively dismissed and the employee cross-appealed, challenging the conclusion that his conduct justified dismissal and that severance pay at the standard rate was appropriate. The employee sought to argue before the Board an entirely new point, claiming that, under s 32(2)(a) of the Labour Act 1975, whatever his misconduct, he was entitled to severance pay at the punitive rate.

HELD: Appeal and cross-appeal dismissed.

(1) Whilst it sometimes happened that the argument developed as a case progressed through the courts, the Board would not normally entertain an argument which was not advanced below unless it could be done without injustice. The argument based on s 32(2)(a) of the 1975 Act had not been advanced before either the Industrial Court or the Supreme Court. It was agreed before the Board that, far from advancing the argument now constructed, counsel then appearing for the employee told the Supreme Court that the correct approach to severance pay was to apply the principle enunciated in previous decisions concerning the termination of contracts of employment for valid reasons not involving

misconduct. If the presently advanced argument was correct, that submission to the Supreme Court was not simply a failure to take the point but was positively misleading. The Notice of Appeal to the Board did not raise the point but concentrated on issues of conduct. There were references to s 32(2)(a) in the employee's skeleton argument before the Board, but they were not linked to a contention that it followed that punitive rate severance pay was due, nor were the steps of argument itemised above set out. Although available since 2007, the principal authority relied on before the Board was neither referred to nor included in the authorities submitted to the Board until a very late supplementary list arrived only a day or two before the hearing. That very late development of a new argument denied the employer a proper opportunity to consider it and the Board was in consequence deprived of any considered argument by way of response to it. More importantly, the Board was deprived of the considered conclusions of the Industrial Court and Supreme Court on the point. The argument might have considerable implications for the practice of employment law in Mauritius. An analysis of how it could or could not be accommodated within the law and practice of employment in that jurisdiction was an essential element in arriving at a correct conclusion about it. It would be unfair to the other party to the instant case, and potentially dangerous to the development of Mauritian employment law, for the Board to rule on the point without the necessary groundwork having even been attempted. The Board had considered whether the correct approach to the proposed new argument might be to remit the case to the courts of Mauritius for it to be developed there, but that would work plain injustice. The events with which the instant case was concerned took place 14 years ago. The litigation before the Industrial Court occupied no less than 36 days, over a period of over three years between March 2004 and June 2007. Before the Supreme Court a similarly protracted course followed, spread over a further 17 months from June 2010 to November 2011. Any further prolongation of that already excessively extended litigation could not possibly be justified, and would no doubt simply risk yet further congestion of the overloaded Mauritian courts, to the peril of other litigants as well as of the other party to

this case. In those circumstances, it would be quite wrong to permit the employee to develop the wholly new argument which he wished to advance. He had had ample opportunity to do so in the proper place, but had not taken it.

Per curiam. It may be that in some instances an entirely new argument is so indisputably correct that it can and should be entertained without injustice even though it had been overlooked through all the earlier stages of the litigation. That is not, however, the instant case. It is possible that the new argument is well founded. But that is not the only possible conclusion. There is agreed to be no reported case in which s 32(2)(a) has been applied to a case of constructive dismissal. One possible view is that it simply does not apply to such cases, where the employer may be found to have dismissed constructively without ever intending to do so, but rather is geared entirely to cases where the employer exercises a voluntary decision to dismiss. A second possibility is that, if the subsection does apply to a case of constructive dismissal, it does so in modified fashion when an opportunity to answer was already afoot, as it was here. Those may well not be the only possible interpretations of s 32(2)(a) in the context of constructive dismissal, but they show that this is not an example of a demonstrably unassailable argument to which there can be no possible answer. Nor does the argument answer the question what follows in law if, after a dismissal which does not comply strictly with s 32, it becomes plain beyond dispute that the employee was guilty of misconduct justifying dismissal, indeed possibly very grave misconduct. Nor does the Board overlook other difficulties which might attend the literal reading of the allied s 32(1) for which the employee contended. All of these matters call for sustained and prepared argument on both sides, and the considered view of the Mauritian courts.

(2)(i) When constructive dismissal was in question, the acid test was not whether the employer intended to dismiss but whether it had, by its conduct, objectively judged, repudiated the contract. If the employer had done so, the employee was entitled, by accepting the repudiation, to treat the conduct as constructive dismissal. In the instant case, the stopping of the petrol and mobile telephone

accounts were not necessarily indicative of repudiatory behaviour by the employer; both actions might well have been concomitants of mere suspension of the employee. Moreover, the stopping of the petrol account was in terms for over-use, rather than on the basis that his employment was thenceforth at an end. The non-payment of salary for April 2002 and the employer's notification to its pension providers regarding the date of the employee's termination had occurred too late to constitute an act of repudiation. Both events were, however, of some relevance to the extent that they were capable of demonstrating that the employer thought that the employee's employment had terminated in March 2002 and that it had thus intended to dismiss him before the date when it had notified the employee of his dismissal in April. Although an intention to dismiss was not a necessary part of an employer's repudiatory conduct before it could amount to constructive dismissal, if such intention existed it was plainly material to the question whether such repudiatory conduct had taken place. The crucial fact in the instant case lay in the employer's letters to its trading partners. In that regard, the question was whether the ordinary non-lawyer businessman, reading those letters, would have understood that the employee had been dismissed. It was not necessary to be a lawyer to have understood that the employee was no longer employed as general manager. In those circumstances, the conclusion of the magistrate and the Supreme Court that the employer had committed a repudiatory breach of the contract of employment was entirely justified, if not inevitable.

(ii) The Supreme Court had made a number of findings with regard to transactions which demonstrated a conflict of interest in the employee's dealings and that he had ignored a plain conflict of interest. It was entitled to hold that the findings which it had made demonstrated a plain conflict of interest and amounted to conduct which had given cause for dismissal. The consequence was that the employee was entitled to severance pay at the standard rate, rather than the punitive rate.

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