

Chief Justice's Report - Opening of The Grand Court on The 15th January 2014

As the opening of the court is mandated by law to take place in the month of January, it is always appropriate that like Janus for whom the month is named¹, we take time to reflect on the year past while seeking to anticipate and plan for the events of the year ahead.

I begin my report as usual this year with personnel matters, an area in which, again, there have been and will be significant developments.

SIR PETER CRESSWELL

As this will be the last time that Sir Peter Cresswell will preside as a member of this court on an occasion like this, everyone will understand that I should mention this fact as a first order of business by way of appreciation for his service on this Court.

I speak for all the Judiciary and staff of the Courts when I say that we could not have hoped to serve with a finer gentleman and colleague.

Justice Cresswell is a judge's judge – an uncompromising professional in his conduct of judicial business and an unswerving believer in the rule of law and in the Judicial Oath of Office in its mandate to do right by all manner of people without fear or favour, affection or ill will.

¹ In ancient Roman mythology and religion, the god of endings and beginnings, depicted with a double-faced head, each looking in different directions –backwards and forwards.

Over the past six years, his contributions to our jurisprudence and to the development of procedures and practices for the Financial Services Division in particular, have been invaluable.

I am confident that when events over that period of years are revisited from the point of view of historical appreciation, Cayman will come to appreciate the lasting debt of gratitude that we owe to this wonderful judge.

I will be indulged the privilege of speaking personally for a moment, to say what an honour it has been to work with Justice Creswell as a colleague on this court. His wise counsel, advice and unstinting professional support on matters of principle have always been forthcoming when they matter most.

Recognising the Judiciary's vulnerability to attack and criticism while at the same time having to be the final arbiter of the rule of law, some highly regarded Australian judges have famously described the judiciary as a "fragile bastion"². The notion might seem a contradiction in terms until one realises that ultimately, the judiciary gathers its strength and independence not from outside but from within. I know of no judge who more fully and deeply understands the importance of this than Justice Cresswell. He has been a source of inspiration to me, and I am sure to my colleagues as well, not only in the way he conducts judicial business, but also in the manner of his stalwart support for his colleagues when support is needed and in the honest, frank and constructive criticism offered when criticism is due.

On behalf of everyone here at the Courts and on behalf of this jurisdiction of ours which you have served so admirably and so well, we

² By Sir Anthony Mason and others and by Sir Michael Kirby, in books so entitled, inspired by Sir Ninian Stephen, in the 1981 Southey Memorial Lecture, where he described judicial independence as a "fragile bastion", reproduced in (1982) 13 (3) Univ Melb Law Rev 334.

thank you, judge. Your presence on this court will be deeply missed but long appreciated and remembered.

RETURNING TO THE SUBJECT OF PERSONNEL:

COURT OF APPEAL

The past year was one of transitions on the Court of Appeal as well, with the retirement of Justices Forte and Conteh and the appointment of Justices Sir Bernard Rix, Mr. John Martin QC and Sir George Newman.

My understanding is that these appointments are also meant to allow for the retirement of Justice Sir Anthony Campbell which occurs following the Easter Session this year. We thank Justices Forte, Conteh and Campbell for their invaluable service on the Court of Appeal. They have each contributed very significantly to the jurisprudence of the Islands and exercised a steadying influence that will be missed.

We also, of course, look forward to welcoming each of the equally highly acclaimed newly appointed Justices to the jurisdiction. Mr. John Martin QC is scheduled for the Easter Session and so there will be a further opportunity shortly to welcome him in person then.

ACTING/TEMPORARY JUDGES AND MAGISTRATES

The established arrangements by which we have been able to call on judges from overseas for assistance has been put on a more formal footing with the pre-approval of a list of judges from this region and from the UK upon whom we can call to serve as acting or temporary judges. This arrangement avoids the need to establish the suitability of candidates for appointment on each occasion and will be especially

welcome going forward as we will continue to need judicial assistance with the criminal and other domestic case load in particular. The pre-approved list contains the names of 13 experienced judges almost all of whom have already served from time to time on the Grand Court. In fact, I am very pleased to note the presence of Justice Beswick this morning, as she returns as one of those judges to serve for a stint of three weeks.

A similar exercise has resulted in the extension of the appointments by Her Excellency the Governor of ex-Magistrate Donalds and Mrs. Nervik QC and the appointment of Mrs. Angelyn Hernandez, Mrs. Phillipa McFarlane Ebanks and Mr. Adam Roberts as supernumery magistrates. These very welcome appointments will help to ensure the availability of judicial support whenever the need arises in the Summary Courts and will allow greater flexibility for a more specialised approach to dealing with cases coming before the Summary Courts.

The Movers of the Motion have already mentioned the excellent work that has been done to reduce the Coroners case load and we join in expressing our appreciation, especially to Mrs. Nervik in that regard.

ADMINISTRATIVE STAFF

There have been developments in administrative staffing as well. As you have heard, Tomica Daley, an attorney-at-law and experienced Registrar from Jamaica was appointed as Registrar of the Financial Services Division last year. I take this opportunity publicly to welcome her. She succeeds Mrs. Audrey Bodden who will continue exclusively in the role as Registrar of the Court of Appeal, a welcome enhancement of her ability to deal with the continuing substantial work load of that court.

We also publicly welcome Mr. Richard Harford, a former officer of the Royal Cayman Islands Police Service, to his new appointment as Chief Bailiff/Chief Marshall. He succeeds Mr. Wellington Dilbert as Chief Marshall and we take the opportunity to once more thank Mr. Dilbert and his fellow marshall, Mr. Eric Greenidge and Mrs. Velma Hewitt, former bailiff, who also retired last year, for their dedicated service to the courts.

LEGAL AID

We continue to see an increase in the need for legal aid commensurate with the numbers of serious criminal, child care and constitutional cases coming before the courts. This is borne out by the number of applications – up from 276 in 2012 to 370 last year for criminal cases and from 281 to 313 for civil cases; increases of 34% and 12%, respectively.

I am therefore pleased to note that the Government has provided a timely increase to the 2013-2014 budget to allow for legal representation for Guardians Ad Litem appointed under the Children Law. With this added provision, I am able to say that it is now more likely that representation will be available for the guardians of children most in need of care and protection. It is also to be expected that Legal Aid Bills will be paid more promptly. This I am sure will be welcome news for those practitioners who provide the crucially important service of legal aid representation, especially in the Family, Constitutional and Criminal Law jurisdictions of the courts.

Despite those positive developments, however, I am obliged to mention the growing concerns of the magistrates, particularly over the lack of legal representation for persons charged with what the law regards as the

less serious offences – those which are not expressly provided for under the Legal Aid Law as it stands. The consequence is that many persons charged with offences that could result in imprisonment are not aided³.

This presents great difficulty for the Summary Courts, as defendants charged with these less serious offences are awakening to the Constitutional protections which mandate that as an aspect of the right to a fair trial, legal representation for those who cannot afford to pay shall be provided at public expense through an established public legal aid scheme as prescribed by Law.

It goes without saying that the existing allocation for legal aid would be grossly insufficient to extend cover for all such offences as well. Nonetheless, I am bound to express the Judiciary’s concern about the fairness and perhaps even the constitutionality of a system that fails to provide assistance to persons in need and who are charged with any offence that could result in loss of liberty.

I have noted Mr. Attorney’s “guarded optimism” that attention might once again turn to this important area of reform this year. I will treat that as nothing but a positive sign and so will shortly be making further representations to the LRC on behalf of the Judiciary.

Other reforms and workload

Children law.

Family Proceedings were an important focus for 2013 and this gathering will recall my announcement last year of the appointment of Justice Williams as judge in charge of the family division. This initiative highlighted the urgent need for more specialised administrative support as

³ Section 3 of the Law refers to a schedule which contains a list of the most serious offences and extends to “any other offence punishable with imprisonment for fourteen years or more.”

well and I am pleased to announce that a new family unit within the Registry has been established under the supervision of Mrs. Wilma Ebanks. While continuing to provide assistance especially to the many mothers who need to enforce maintenance orders, this unit will also provide combined support to the Grand Court Family Division and to the Summary Courts which also have a substantial workload under the Children Law. The introduction of that Law in 2012 and the extensive Rules of Court which are required for its application, present unique challenges for all agencies involved. Not only the Judiciary, but also the administrative staff must grapple with the new rules and procedures, even while being hampered by the same resource constraints which have been imposed throughout the public service.

This is but the latest indication of the need for a significant increase in the staff of the Judicial Administration as soon as circumstances will allow.

Regrettably though I must note that the panel of Guardians Ad Litem mandated by the Children Law is still to be appointed. These appointments must be made immediately if Government is not to be blatantly in breach of its own policies mandated by the Children Law. Already the court has been required to make a number of Guardian Ad Litem appointments which, although necessary and helpful, are of an ad hoc nature not contemplated by the Law. We urge the Ministry to see to the regularisation of this important matter as soon as possible.

Bill of Rights cases

I have already mentioned the Constitutional Bill of Rights cases in the context of Legal Aid Law but I must join with Mr. Attorney and Mr. McKie to mention the subject in the context of the overall case load

as well. Already we have seen constitutional cases dealing with such diverse matters as public safety and property rights⁴; on qualification to serve as an elected member of the Legislative Assembly⁵; challenges to the period of detention allowed under the Police Law⁶; challenges to the Bail Law⁷; to decisions taken under the Immigration Law⁸ and to the imposition of the mandatory sentence of life imprisonment⁹.

Especially for those cases which deal with the liberty of persons, the time constraints imposed by the Constitution for their resolution bring new challenges for the Judiciary and staff of the courts. I must therefore repeat with emphasis, that the task of continuing to meet the increasing demands of the caseload without the additional administrative support and other resources required cannot be faced indefinitely.

THE NEW COURT HOUSE

Any discussion of the ever increasing demands upon the Judicial Administration inevitably leads to the need for space and the new Court House and year after year on this occasion, the profession has recognized this need in the way Mr. Crowley did today. Indeed, the Government has itself recognised the need for well over a decade now and plans had reached an advanced stage for ground-breaking at the Half Way Pond site when the financial crisis reached our shores in 2008.

While the project has been stalled, the need for more court rooms and administrative space has only increased. Well, there is hope that things might change this year and I am able to say that the business case for at

⁴ AXIS v. THE CIVIL AVIATION AUTHORITY, CAUSE NO. 56 OF 2012 (THE HELIPORT CASE)

⁵ HEWITT v RIVERS, CAUSE NO. 198 OF 2013

⁶ EX PARTE NAIRNES, CAUSE NOS. 10 AND 18 OF 2013

⁷ EX PARTE BORDEN, CAUSE NO. 0209 OF 2013

⁸ EX PARTE DAVIDSON, CAUSE NO. G0468 OF 2011 (AND OTHER CHALLENGES)

⁹ EX PARTE RICKETTS, CAUSE NO. G 324 OF 2013

least two alternative proposals will be presented to Cabinet, hopefully within the next few months. And hopefully next year, at long last, I will be able to report that the project for a new court house will be realised.

SIGNIFICANT OTHER REFORMS AND LEGAL DEVELOPMENTS

Taxations of Bills of Costs.

Taxation of Bills of Costs has become an area of concern because of the increased numbers and the increased pace at which the FSD cases and Legal Aid cases in particular are resolved. Gone are the days when the Clerk of Courts, as the sole taxing officer, could be expected to undertake the taxation of all Bills in a timely manner while meeting the other demands of that office. Indeed, it is a tribute to Magistrate Foldats that he managed effectively to combine the roles until a few years ago while in that office.

Now, to meet the growing demands, appointments of five additional taxing officers have been made by the exercise of the power given under Order 62 of the Grand Court Rules. And, with approval of Cabinet, a new fee structure has been put in place to enable the payment of a reasonable fee for the taxation of Bills relating to commercial cases.

As the first under these arrangements, Mrs. Delene Cacho was appointed last year to undertake the taxation of legal aid bills and thanks to her efforts; we have already seen a significant improvement in the resolution of those claims.

Grand Court Rules Committee and Practice Directions.

As you have been told, last year was another busy and productive year for the GCR Committee. With the energetic and able support of member Colin McKie QC in particular, new rules were promulgated in a number of areas of practice ranging from arbitration, to applications for case stated, to applications under the Status of Children Law. The new Fees Rules already mentioned as well as rules for fees for the Law Reports and Laws online and other website recovery costs were promulgated with the approval of Cabinet. A draft of new Coroners' Rules was also produced for consultation. Allow me to mark the invaluable assistance of Attorney Jeremy Walton on the promulgation of the Arbitration Rules.

In October, long serving member Graham Ritchie QC retired from practice and so retired from his seat on the GCR Committee as a representative of the profession. Hector Robinson has been appointed to that seat on the Committee. We take this opportunity publicly to thank Mr. Ritchie for his invaluable service on the Committee and to welcome Mr. Robinson who has already provided constructive input at meetings.

At last year's Opening, I mentioned the need for the constant review of practice and procedure and the number of Practice Directions that had been issued as a result. Well, this trend continued with Directions issued in eight areas of practice during the past twelve months¹⁰, four of which were issued since the beginning of 2014.

Criminal practice and procedure

At last year's Opening I also mentioned the setting up of a committee to be chaired by Justice Quin to review practice and procedures with a view to improving efficiency in every part of criminal process. The

¹⁰ Practice Directions are available on the Judicial Website <http://www.judicial.ky/courts/practice-directions-judicial-admin>.

work of this Committee will continue to be a main point of focus for 2014. Supported by Mr. McCormac, with his invaluable experience as past head of the secretariat that supports the UK's Sentencing Advisory council, the committee will also advise on the updating and expansion of the Sentencing Guidelines to reflect and allow for the increasing reference to the UK guidelines in the local case law.

INFORMATION TECHNOLOGY AND PUBLIC EDUCATION

Website, the CILRs and new domain www.judicial.ky

Another area of constant work in progress, the website was enhanced during the past year by the restoration of the online access to the Laws of the Cayman Islands as well as to the unreported judgments of the courts. This service will be made freely available to the public in recognition of the right to access and the need for this kind of public information, the importance of which Mr. McKie has quite rightly explained.

The **CILRs** will of course continue to be publicly available on the website although only by paid access subscription. Access to the **CILRs** will, of course, continue to be available to every Cayman Islands attorney upon payment of the modest annual fee that is required. And I am pleased to hear that many have already willingly paid this fee.

The growing number and complexity of the cases coming before all divisions of the court will be reflected in the publication of the **CILRs** in three volumes this year.

In the latter part of last year the new www.judicial.ky domain was launched. This is a significant development in the modernisation of the courts' information technology system. Among other important advances, this independent domain will enable the Administration to

vouchsafe the confidentiality of all records maintained in the Registry. An independent domain is also a prerequisite for the introduction of an electronic filing system, having regard to the many case filings which will involve private or sensitive information. Ultimately, e-filing will also, of course, allow for the creation of a modern paperless environment for the administration of justice, an environment which is already a reality in other sectors of industry and which has realised very significant savings of time and costs, such as those related to photocopying and storage of hard copy documents.

The transition to the new domain required extraordinary efforts by our staff and co-ordination with our external service providers. The plans for the introduction of the e-filing system also required the registry staff to undergo training and updating. It is only fitting therefore that I should take this opportunity to express appreciation to Mr. McCormac, Ms. Philander, Mrs. Cecile Collins and the members of their teams, especially Andrew Doussept, our information technologist, who spearheaded our internal efforts.

EXTERNAL EVENTS AND PUBLIC EDUCATION

Recognising the need for public education and information on matters relating to the administration of justice, the judges and senior administrative staff continue to deliver lectures and participate in public discussions on issues of public interest. Accordingly, last year we co-hosted, at the request of our librarian Mrs. Beverley Speirs and along with the Attorney General's Chambers, a well-attended conference of the Caribbean Association of Law Librarians.

At the invitation of INSOL, UNCITRAL and the World Bank, the Judiciary also hosted the First Regional Judicial Colloquium on

Insolvency Matters. This was also a well-attended meeting at which the judges benefitted from a key note delivered by Sir Andrew Morritt¹¹ and at which the regional judges were able to exchange views with each other and with visiting judges from the New York Bankruptcy and the Toronto Bankruptcy Courts – two important courts with which we must co-operate for the effective resolution of cross-border insolvency cases.

We also hosted the third in the series of Grand Court distinguished lectures, presented last year by Dr. William Gilmore¹²

Justice Quin received a class of students from the University of Texas on a familiarisation visit and I gave a lecture on judicial independence to students of the Stetson University School of Law Overseas Winter Programme, which is hosted here by the Cayman Islands Law School. In the same vein, last year saw a substantial increase in the number of interns and volunteers – arrangements made by the court administrator and clerk of courts which allow our aspiring students and trainee professionals to develop their skills.

Indicative of the growing international reputation of the jurisdiction, several judges were invited to speak at Conferences, with expenses paid by the convenors, and in places as far flung as Geneva, Miami¹³, Hong Kong¹⁴, the Eastern Caribbean¹⁵, New York¹⁶ and Jersey in the Channel

¹¹Former Chancellor of the High Court of England and Wales who recently served as a judge of the Grand Court (pro tem).

¹² Former Dean of the University of Edinburgh Law School; expert adviser to the Council of Europe on anti-money laundering initiatives and a member of the Board of the Cayman Islands Monetary Authority. Dr Gilmore spoke on the latest FATF initiatives on money-laundering.

¹³ The Chief Justice on trusts (19 June 2013, 28th Annual Transcontinental Trusts Conference) and on 19th November 2013 (22nd International Trust and Tax Planning Summit) - dealing with mistakes of settlors and trustees; respectively.

¹⁴ Justice Foster on cross-border insolvency at the invitation of INSOL

¹⁵ Justice Quin at the invitation of the OECS lawyers association, on witness protection and other matters of criminal practice and procedure

¹⁶ Justice Jones, on insolvency matters.

Islands¹⁷ and on topics as diverse as the law of trusts, insolvency, witness protection in criminal cases and family law.

Also of note last year was my own appointment as a judicial member of the Society of Trusts and Estates Practitioners, an honour which I believe reflects the regard held throughout the trusts world for the jurisprudence of our courts in that field.

CASE DISPOSAL

As usual I conclude my report with a brief overview of case intake and disposal. I regret that I must begin by stating that the trends have not improved over the year before. They again confirmed the pressing need for the new court house to allow the additional simultaneous trials which are necessary to ensure that persons are afforded the right to timely trials guaranteed by the Constitution.

This need is again clearly demonstrated by the increasing backlogs in the Criminal Divisions of both the Grand and Summary Courts.

In the Grand Court Criminal Division, 94 indictments were carried over from 2013 compared to 62 carried over from 2012. At recent rates of disposal, 94 indictments represent more than a year's case load and is therefore indicative of a now chronic situation requiring persons having to wait for well over a year for their trials. This is more than twice as long as the established international bench mark of 6 months – that which had been maintained in the Grand Court for many years. Regression in this area cannot be an acceptable state of affairs.

In the Summary Courts, while 1579 new charges were filed – up by more than 300 from the 1260 filed in 2012 – 1230 are carried over into

¹⁷ Justice Williams, at the regional meeting of the Commonwealth Magistrates and Judges Association.

2014. Although this figure of 1230 includes 159 cases under review in the courts' diversionary treatment programs¹⁸, this still means that in the Summary Courts also, fully a year's caseload is carried over from last year. And the waiting time to trial is impacted in much the same way as in the Grand Court – borne out by the fact that trial dates in the Summary Court are now being set for as late as August 2014. I am sure everyone will agree that such a state of affairs belies all notions of timely and effective justice.

While I would not want to be understood as saying that the lack of court rooms is the only cause of delay, it is the major and most immediate one.

There are of course other causes which are both case-specific and systemic in nature. Some of these can be ameliorated by more effective case management on the part of the police, the prosecution, the defence and even the courts and are of the kind that will be very much the focus of attention of Justice Quin's Committee. Another cause – the well recognised need for a fourth magistrate – can now be ameliorated by calling on the panel of supernumery magistrates mentioned earlier. It is also encouraging to hear of the DPP's plans to enlarge her team of prosecutors. But such causes – like the perennial shortage of both prosecuting and defence counsel – cannot be effectively addressed in turn, until after the badly needed court facilities are available.

I will therefore again this year conclude my overview of the case load on that note. It is where I really believe the emphasis must be placed again this year if our jurisdiction will continue to maintain its reputation for timely and effective dispensation of justice.

¹⁸ Dealing with Domestic Violence, Mental Health and Driving whilst Intoxicated Offences in which the Court suspends the criminal charges while defendants under treatment and/or counselling with a view to a non-criminal sanction at the successful completion of the treatment programmes. These programmes, like the Drug Treatment Court programme which is already established by law, will be the subject of proposals for formal recognition by way of legislation.

Trends in the other divisions of the courts, including the FSD and in the Court of Appeal, continued as before in 2012 and the statistics which show this will as usual be available with my report on the website.

I conclude by joining in the sentiments of condolence expressed on the passing of Neville Levy, Charles Adam, Melanie McLaughlin and Chantal Whittaker and while we can celebrate the lifetime of service given by those two elder statesmen of the profession, we can only express our deep sorry and sympathy to the families of Melanie and Chantal at the untimely loss of such promising young ladies of the Bar.

As usual, I must also express our appreciation to the Commissioner and the men and women of the RCIPs for their resplendent turn out on parade and for their symbolic expression of support for the administration of justice. And, for you Commissioner, our congratulations on the award of the O.B.E.

In conclusion, I accede to the motion for the opening of the Court, and declare the opening of the Courts for 2014.

HON. ANTHONY SMELLIE
CHIEF JUSTICE

JANUARY 15, 2014