

## **CHIEF JUSTICE'S REPORT TO THE OPENING OF THE GRAND COURT ON 14TH JANUARY 2015**

After inspection of the Guard of Honour by the Hon. Chief Justice (with the other members of the Judiciary, the profession and members of Court staff in attendance) proceedings were commenced in Court with prayers led by Pastor Winston Rose.

### **SALUTATIONS**

Your Excellency The Governor, Hon. Premier, Hon. Members of cabinet, Hon. Members of the Legislative Assembly, other distinguished guests, members of the Bar, Ladies and Gentlemen, welcome.

The Chief Justice thanked Pastor Rose for having led the gathering in prayers.

The Chief Justice then invited the Hon. Attorney General to move the motion for the opening of the Court for the year 2015, to be seconded by Mr. Alasdair Robertson, President of the Cayman Islands Law Society, Mr. Abraham Thoppil, President of the Caymanian Bar Association and Mr. Colin McKie QC, speaking on behalf of the editors of the Cayman Islands Law Reports.

The Chief Justice made *ex tempore* responses to each mover in turn and then presented the following report.

## TRANSITIONS

- **Retirements.**

1. As you have heard, Justice Alexander Henderson retires this year after serving as a judge of the Grand Court for 12 years since 2003 and as an acting judge for some two years before that. We will miss him on this Court very much and we join with the fitting remarks which have been made in appreciation of his service to the courts and to this country.

Regarded by his colleagues as a judges' judge, he has dealt with every kind of case coming before the Court with consummate fairness, skill and efficiency. With the help and support of other colleagues and stalwarts of the Bar over the years – none more so than Mr. Alberga QC – he and I have seen the judiciary through some very difficult times. From these experiences, I can attest to his unflinching and uncompromising sense of purpose and professionalism. These Islands have been very fortunate indeed to have had his services as a judge of this Court.

2. As you have also heard, Justice Angus Foster also retires this year after more than 5 years of service on the Financial Services Division and before that, as an acting judge. He was appointed as a judge for assignment to that Division from its inception in 2009 and so will be remembered as one of its pioneer specialist judges.

3. There will be more suitable occasions to mark the actual conclusion of the service of these two fine judges on the Court later this year and at which time more will no doubt be said in appreciation including by members of the Bar. It is expected that Justice Henderson will have concluded his cases by end of February and Justice Foster by end of June and so you may expect to hear of arrangements coinciding with those times.
4. You have been reminded that there were a number of other important transitions this past year as well. We announced the retirement of Justice Cresswell on this occasion last year but his actual conclusion of office has been extended to June 2015 to allow for conclusion of his dedicated FSD cases. In his absence and on his behalf, we thank the Movers and Mr. McKie in particular for their kind and informative remarks.

- **Appointments**

5. Although no stranger to the jurisdiction, having served before as an acting judge, we are very pleased to note the presence of Justice Mangatal presiding with us today at her first opening of the Court. As you have heard and perhaps would have read in the Press, Justice Mangatal was sworn in by her Excellency The Governor on the 5th January as a permanent member of the Court and dealt with an active list of cases last week. I can say on behalf of her colleagues that we are all very enthusiastic about her appointment and very

much look forward to the special insights she will no doubt bring to our collegial deliberations from her already extensive background and experience as a lawyer and judge, including as a judge dealing with complex cases on the Commercial Division of the Supreme Court of Jamaica and in the Court of Appeal there, as an acting appellate judge.

6. Also already well known to many of you, Mr Robin McMillan (who is present this morning) was also sworn in on the 5th January by Her Excellency as an acting judge of this court. Mr McMillan's appointment from among the ranks of our most senior and experienced local practitioners to the panel of 14 acting judges, will certainly enhance our ability to deal with the ever-increasing number of difficult and complex cases coming before the court, including it is important to emphasise, our ability to release the other judges from the otherwise relentless trial of cases so that they can write their judgments, prepare for the next cases and take well-earned leave when it is due.
  
7. And it is in this context that I must add our appreciation to that already expressed by Mr. McKie, for the support which we got from other members of the panel last year. Acting Justices Beswick, Panton, Brooks, Swift, Mettyear and Owen were here at different times and disposed of a number of difficult cases, in no small measure assisting with the criminal indictments in particular. Justices Panton and Swift also resolved important Judicial Review cases.

The movers also mentioned two further appointments to this Court made since the beginning of this year. Justice Nigel Clifford and Justice Nicholas Segal have both been appointed by Her Excellency to this Court and assigned to the FSD.

Justice Clifford is well known to many of you having practised as a leader at the Commercial Bar and partner of the law firm Appleby (and its predecessor firm Hunter and Hunter) for many years.

Justice Segal (who is also present this morning) is a litigation partner at the well-known London firm of Freshfields where he has dealt with many complex commercial cases of the kind that regularly comes before our FSD. I am sure you will take the opportunity to greet him at our reception to follow this morning. With the appointment of Justices Clifford, Segal and Mangatal to the FSD, along with the three others of us who will continue, we are assured of having the full complement of six experienced commercial judges dedicated to the FSD, for the foreseeable future.

- **THE COURT OF APPEAL**

8. There were last year and will continue this year to be important transitions on the Court of Appeal. We note the retirement of Justice Conteh with great appreciation for his service on that Court. His renowned erudition, unfailing courtesy and balanced approach to the treatment of appellate issues were hall-marks of his service. Justice Conteh

continues to serve as an appellate judge in the Bahamas and has been called to serve in important capacities for the restoration of the justice system of his native Sierra Leone. We wish for him and his family all the very best for the future.

9. We have been reminded of the sad and untimely passing of Sir Richard Ground when full and heartfelt tributes were paid. Last year we also held a special ceremony to mark the retirement of Justice Sir Anthony Campbell and I must now announce the retirement later this year also of Justice Elliott Mottley after some eight years of service on the Court of Appeal. There will, of course, be a further occasion later this year to mark his actual retirement.
10. Commensurate with those transitions and retirements from the court of appeal we saw the appointments last year to that Court of Justices Martin, Rix and Newman and at different times welcomed each of those eminent judges to the jurisdiction. More latterly during the year, a further round of recruitments resulted in the appointments of Justice Sir Richard Field, Justice Sir Alan Moses, Justice Dennis Morrison and Justice John Goldring to the Court of Appeal, increasing the compliment of that Court to eight Justices of Appeal. There will certainly also be occasion for extending the customary welcome to these new justices when they arrive to actually commence their duties.
11. With this very full complement of appellate judges, it is indeed to be expected, as Mr. McKie remarked, that

inordinate delay in delivery of judgments will become a thing of the past. Indeed, there is already evidence of this as during the past year the Court of Appeal managed to deliver judgments in timely fashion. In the 19 civil appeals heard, 14 written judgments were delivered, 3 written judgments are awaited and judgments were reserved in two matters. I am also advised that the long awaited judgment in the *Weaving* case is expected to be delivered shortly. Arrangements can be put in place to ensure that time is available for the production of outstanding judgments and I will again raise the matter with the President.

## **STAFFING**

- **THE ADMINISTRATION**

12. Last year the Administration provided substantial opportunities for eight young Caymanian interns – during the usual summer months and others at other times; one intern from a previous year stayed on as a volunteer and then was successful in competition when a vacancy arose. Another intern is now staying on in a temporary post covering a staff absence on study leave and yet another continuing to volunteer as support staff in the IT Unit.

- **Information technology**

13. Continuing with administrative matters, last year marked further progress with our use of technology with the establishment of state of the art video link facilities in every court room and with the prison. This means that remand hearings are now taken without the need to physically transport the defendants to George Town. Instead they appear by video link and those who are represented have their lawyers present in the court room. This arrangement had been requested by the prisons because of its obvious logistical and security advantages. With appropriate practice directions in place, the arrangements have been working satisfactorily from the points of view both of the prisons and the rights of defendants to appear before the Court. I must now emphasise however, for the benefit of the practitioners in particular, that where an unscheduled video link appearance is requested, at least 24 hours' notice is required. Otherwise, it will be impossible to guarantee a response at short notice in every situation.
14. At last year's opening I announced the establishment of the [judicial.ky](http://judicial.ky) domain. During the year its capacities were enhanced by the upgrade of basic hardware and the creation of a separate server room with its own environmental controls. This work will continue this year with the creation of an auxiliary supply system and the provision of wireless access across both buildings for a wider range of court users and better viewing of TV screens for jurors and the judiciary.

These improvements will also enhance our ability to save time and costs by the use of video-conferencing with locations overseas, including for FSD hearings where it has proven to be a very useful tool for the taking of interlocutory hearings.

15. However, all these developments have resulted in a desperate need for more support and so I must note that we have been unsuccessful over the past two years in seeking an appointment of only a second IT officer. The need for this appointment must be considered in the context now of a very extensive IT operation that supports not only an independent domain with some 80 internal users but a system that must also provide all the usual support to over 100 external users who have access to JEMS and now at least 3 video link sessions with the prison each week, some of which can be quite complex and lengthy.

- Court building

16. Last year we added another small court room to the available facilities. Designated court room #7, it is located with chambers for our acting magistrates on the ground floor of kirk house.
17. Our efforts at coping with the chronic lack of space naturally bring me to the now perennial subject of the new Court building. So long has this been promised, that still speaking of it brings to mind that well known verse from Alexander

Pope: “Hope springs eternal in the human breast: man never is, but always to be blest”.

18. And so it is that I report again this year that we are soon to be blest. There is once again approval from cabinet to start the process of sourcing new court facilities and a first meeting of the project committee was held this Monday, 12th January. We hope at next year’s opening to be speaking of the building in tangible, even if more prosaic and concrete terms.

- **Legal aid**

19. There are also, I am pleased to report, some significant developments with Legal Aid, another subject of perennial concern. A decision of Justice Henderson’s last year recognised the right to legal advice of defendants in custody pending police investigations. The government responded in a timely and appropriate manner by an addition to the legal aid budget. Pending its formalisation in the new legal aid bill which is now being considered, a temporary scheme was established just before the end of the year to ensure that persons in police custody pending investigations, would be afforded legal representation.

20. We have exchanged extensive comments on the Legal Aid Bill with the director of the Law Reform Commission and so we are encouraged that things are moving forward to the approval of Cabinet and passage of the new Law early this year.

## **PRACTICAL AND PROCEDURAL REFORMS**

21. The Criminal Justice Reform Committee (“CJRC”) has produced a draft of the general principles for the new Cayman Islands Sentencing Guidelines and these will be published shortly. The CJRC has also circulated a first draft of the Sentencing Guidelines specifically for the offence of robbery. The chairman, Justice Quin, has confirmed that the general and robbery sentencing guidelines should be available for publication following the CJRC’s next meeting on 6th February. He has also confirmed that the work of the CJRC will next turn to the guidelines for the offences of theft and burglary.
  
22. As announced last year, the intention is to promulgate specific guidelines for each category of offence. This is a very significant undertaking requiring the members of the CJRC who are all volunteers, to dedicate a great deal of time and effort. As was the case when the first such committee was established in 1998 to look more broadly at the matter of restorative justice, the membership of the CJRC is wide-ranging, with a representative from each government stakeholder entity, as well as from the private criminal bar. The terms of reference and membership of the CJRC will be published on the judicial website.

## **EXTERNAL EVENTS AND PUBLIC EDUCATION**

23. Our commitment to continuing education was reaffirmed last year by participation in a number of events.
24. A very successful work shop for training on Children Law issues was led by retired district judge Nick Crichton CBE and senior probation officer Mrs. Gill Timmis, MBE, in September. Primarily convened to provide training for guardians ad litem and care officers of the Department of Children and Family Services (“DCFS”), sessions were also presented for the judges, magistrates and members of court staff who deal with children matters and for attorneys from both the private and public Bars who act in these types of cases.
25. We also, again last year, received a number of invitations to overseas Conferences and Justice Quin and I were invited and spoke at conferences respectively in Zambia<sup>1</sup> and Geneva, Switzerland.<sup>2</sup>
26. Already there are a number of invitations to speak at Conferences in 2015 and our ability to participate will be enhanced by the fact that for a number of these the convenors have offered to meet expenses.
27. In April we hosted the 4th annual Grand Court guest lecture and this was delivered by Maura McGowan QC. Her very

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<sup>1</sup> At the East African Regional Meeting of the Commonwealth Magistrates and Judges Association

<sup>2</sup> At the IBC Trust Conference on 17 June 2014

informative and insightful delivery was on the subject “*The Criminal Law: The challenges now and in the years ahead*”. Mrs McGowan, many of you will be pleased to hear, is now lady Justice McGowan, having since been appointed a judge of the senior courts of England and Wales.

## **CASE DISPOSAL**

28. As usual I will conclude my report with a brief overview of case intake and disposal and, like last year, I regret to report that the trends have not improved. We again failed to meet the bench marks for rates of disposal which we regularly met until a few years ago when the intake of serious indictments increased sharply.

As at 31 December 2014, there were 118 indictments awaiting trial. During 2014, 109 new indictments were laid and a few more – 115 - were completed, including 40 which were laid in 2014. The rest of those laid in 2014; that is: 75, were carried over.

The consequence is that of the 118 indictments pending as at 31 December 2014:

- 1 is from 2009
- 7 are from 2010
- 5 are from 2011
- 10 are from 2012
- 20 are from 2013,

And as already mentioned, 75 are from 2014.

In light of the State's constitutional obligation to provide a timely trial, this trend cannot be allowed to continue. And so to reinforce the importance of Cabinet's recent decision, I again emphasise that there is simply no hope of reversing the trend without more court rooms suitable for the trial of these cases. Given the logistical and security issues attendant upon these cases, there are still only two suitable court rooms and they are both in this building. The facilities at Kirk House are not suitable for these cases.

Moreover, given the daily needs of the summary court for dealing with the intake of these cases and the many other less serious criminal cases, in actuality we have available only a single court room for the trial of indictments, this very one.

Trends in the other divisions of the Grand Court continued as they did over the past few years and the statistics will, as usual, be published on the website with my report. In particular, in the FSD, 176 new cases were filed, compared to 157 in 2013.

In the Court of Appeal 33 criminal and 24 civil appeals were filed, compared respectively to 39 and 29 in 2013.

In the Summary Court, I am pleased to report from the Chief Magistrate – and as the DPP has reported through the Attorney General – that further significant inroads have been made into the back log of cases. Along with the dedication of additional prosecutorial staff, this has been made possible by the vigorous engagement of the acting magistrates in particular while the Chief Magistrate herself,

along with Magistrates Foldats and Gunn, assume responsibility for tackling the current intake of cases.

Magistrate Foldats also continues to oversee the diversionary programmes including the Drug Court and all the magistrates are engaged with the ever increasing number of Children Law and Affiliation Law cases – the latter, despite the advent of the Children Law, being the only provision under which paternity orders and maintenance orders can be made for children born out of wedlock.

It is in respect of the children cases, and those in respect of children in need of care and protection in particular, that I must again return on this occasion to the pressing need for secure accommodations.

The Children Law was brought into force on 1 July 2012, some two and a half years ago. On that date, most of the relevant agencies were caught off-guard for want of facilities, manpower and familiarity with the law. As a result, the initial hearings before the court were somewhat chaotic. Matters have slowly improved in a number of respects with diligent application and some training, as you have heard. Also legal representation for DCFS and the guardians ad litem is now in place, several practice directions have been issued and parties are becoming more familiar with the intricacies of the legislation. However, the judiciary and the magistrates in particular who deal with many of the public law or state applications, continue to struggle with the absence of the

physical facilities which are required by the law to be in place.

The most significant facility, still absent although its necessity has for decades been acknowledged by successive Governments, is the “secure accommodation” facility.

The Children Law now places a further statutory obligation upon Government where it empowers and requires the Court to place a child (who is “in care” of the state) in secure accommodation for up to 3 months. While on the face of it this is a harsh measure, it is in fact a necessary and powerful tool to be used by the Court in limited circumstances set out in the law itself<sup>3</sup>. These include where there is a history of absconding, the likelihood of psychological harm or physical injury to the child or where the child is charged or convicted of a violent offence or remanded under the youth justice law.

A recent series of incidents (in late 2014) reinforced the view of the Judiciary that a proper secure accommodation facility must become an immediate priority for the Government. The matter is of such importance and has gone without redress for so long, that I am obliged to impose upon your time for a few more minutes, to explain it once again.

In care proceedings, a child may be in care through no fault of his/her own (for example, the parents are simply unable to provide a healthy or safe environment for the child due to

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<sup>3</sup> Section 27 (1) of the Law.

parental drug abuse). DCFS, then, is under a legal obligation to provide a place of safety for the child. In the case of older females, they are often placed at the Francis Bodden Girls' Home ("FBGH") because no suitable relative or foster parent is available.

I am grateful to Magistrate Foldats in particular for the following account of events.

In late November, four female residents at FBGH absconded. They returned a few days later apparently under the influence of drugs and speaking of sexual exploits. One or more of the girls had a history of absconding. They were obvious candidates for secure accommodation. At this time, however, no such facility existed and so they remained at FBGH. The next night after they had returned, they barricaded themselves in a room at FBGH and reportedly consumed ganja.

Thus, it became clear that DCFS was unable to provide a safe environment for girls who had not previously engaged in criminal activity; where in at least one case, the child was in care due to a family breakdown (that is, through no fault of the child). As well, all other residents of FBGH were exposed to this subversive behaviour.

I am told that the saga continued. The girls remained at FBGH despite its obvious inadequacies as a secure facility. On 3 December 4 girls (I believe but am not sure that they were the same four), violently absconded from the home and now face charges ranging from assault causing bodily harm

to disorderly conduct (at least one of the complainants is a custodian of the girls).

And so to put this in stark terms, girls with no prior criminal convictions have engaged in or been exposed to criminal activity while in the care of the DCFS.

This account of events which you just heard confirms that the nature of the problem of dealing with children who find themselves in care of the state has changed drastically over the years. So too therefore must our expectations in dealing with them and I am sure everyone listening will agree that it is unacceptable that the situation should be allowed to get even worse, due to a lack of funding.

For many years and even before the Children Law came into effect, the judges and magistrates repeatedly expressed our concerns in the cases coming before the Courts. I gather that the DCFS and Legal Department have also more recently been pressing their concerns.

As a result and in response to these incidents, a temporary secure accommodation facility was fashioned out of premises on the site of the Bonaventure Boys' Home. As it stands, this facility accommodates only female detainees. The upshot is that there is no secure accommodation for males, yet I gather from the magistrates that there have been cases where they would have ordered male children to be placed in secure accommodation had it been available.

I leave this subject with what I am told also is good news of plans for an appropriate permanent secure accommodation facility. And once again, the Judiciary implores the Government to make this a most urgent priority.

I join with the movers of the motion in extending condolences on behalf of the Judiciary to the family of former Justice Priya Levers. I am pleased that her children, Dhara, Christopher and Leanne, accomplished professionals in their own rights, will have heard of the appreciation for their mother's contributions as a judge of this Court and we wish for them, the very best in their future endeavours.

Our condolences go out also to the family of the late Mrs Simone Tomkins, and to her husband, son and brother in particular, at her untimely passing.

I join with the Attorney General in expressing appreciation for the continued dedication and hard work of the Commissioner and men and women of the RCIPS in all that they do for the protection of the public and enforcement of the law. As usual Commissioner Baines, please convey our thanks and appreciation for the symbolic expression of support for the administration of justice so fittingly displayed by your officers on parade.

I thank all the speakers for their expressions of support and appreciation for the work of our administrative staff. I am pleased that although they are not all present to hear this for themselves, Mr. McCormac and Ms. Philander are present and will be sure to pass on your comments.

With those final remarks, I join in extending best wishes to everyone for the New Year and now accede to the motion and declare the Court to be open for business for the year 2015.

Hon. Anthony Smellie  
Chief Justice, Cayman Islands

January 14, 2015