

Address by Colin McKie Q.C. at the Opening of the Grand Court for the year 2014

My Lord Chief Justice, Honourable Justices, Hon. Chief Magistrate, Hon. Magistrates, Mr Attorney, Madam DPP, my colleagues at the Bar, our Special and Distinguished Guests, Ladies & Gentlemen

If it may please my Lord.

This is the 23rd ceremony marking the opening of the Grand Court for the New Year since it was inaugurated in 1992 by our late Chief Justice Sir Dennis Malone. It has become an occasion for the Bench and Profession to take stock on the previous year and look forward to the new year, and afterwards to enjoy some judicial hospitality.

I am privileged to be able to associate myself with the motions to open the Grand Court for the year 2014 moved by Mr Attorney and seconded jointly and comprehensively by the President of the Bar Association and the President of the Law Society, and to provide a short addendum of my own.

In a common-law, precedent-based, jurisdiction such as ours there are some areas in which judges necessarily make law. They lay down general statements of principle which then stand as authority in future cases. They make law within broad limits determined by statute and legal policy. In 2005 Lord Nichols described the function in these terms¹:

“Judges have a legitimate law-making function. It is a function they have long exercised. In common law countries much of the basic law is still the common law. The common law is judge-made law. For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. ... Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary. Had judges not discharged this responsibility the common law would be the same now as it was in the reign of King Henry II. It is because of this that, 'the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live'²”

¹ *Re Spectrum Plus Ltd* [2005] 2 AC 680 at para.

² *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 at 377, per Lord Goff.

Just as common law judges make law, so also they unmake it. Sometimes it is necessary to overrule past decisions, even those of the highest appellate courts and those that have stood for very long periods of time.

That is not to say that judges have a free hand to change the common law. Judicial development of the common law comprises the reasoned application of established common law principles in current social conditions. Development in any one case is usually marginal. Occasionally, it is more far reaching.

For instance, in *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* the Grand Court followed long authority that the ancient tort of malicious prosecution was available only in respect of criminal proceedings, not civil proceedings save for a few special types of civil proceedings, none of which were applicable on the facts. The appeal to the Court of Appeal was dismissed for substantially the same reasons. There was a further appeal to the Privy Council. In its decision delivered a few months ago³, the Privy Council gave five detailed judgments considering the Mediaeval origins of the tort and its subsequent development over the centuries in this jurisdiction, England, various parts of the Commonwealth and of the United States, and how the balance of the various policy considerations had evolved. The majority concluded that the tort is in fact available in respect of civil proceedings. The common law was thus changed.

I am reminded of what Lord Atkin said some 70 years ago:

*"when the ghosts of the past stand in the path of justice clanking their Mediaeval chains the proper course for the judge is to pass through them undeterred."*⁴

That brings me to the importance of written Judgments. Judgments are the means through which judges address parties and the public at large, and explain their reasons for reaching their decisions. As the very word necessarily implies, judges are required to exercise judgment. Without the exercise of judgment there would be no justice, and without Judgments there would be no justice because important decisions affecting the parties' lives, liberties, limbs and property without reasons erode public confidence in the fairness and justice of the Courts.

It is therefore an absolutely essential part of common law justice that Judgments be available to, and accessible by, the public not just lawyers, judges and academics. I am pleased to be able to report that with the assistance of Dr Alan Milner, the Judicial and Legal Information web-site has now been populated with

³ *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17.

⁴ *United Australia Ltd v Barclays Bank* [1941] AC 1 at 29 (HL).

all the decisions of the Law Reports up to and including 2012. The Law Reports cover the last 60 years of Cayman Islands judgments and now contain some 1,616 judgments. A back-fill exercise has been started to populate the website with unreported judgments, starting with judgments of the FSD. It is only right to acknowledge the pro bono assistance provided by the Restructuring and Insolvency Specialists Association in assisting the Judicial Dept with that part of the back-fill exercise. Work has also been started on unreported judgments from the other divisions of the Court.

In addition, our own domestic legislation and UK statutory instruments applicable to the Cayman Islands may now to be found on the website. Special mention must be made to acknowledge the considerable assistance made by Mrs Christine Cooke of the Attorney General's chambers with that project.

The final stage is to put on the database all the relevant Imperial Acts applicable to the Cayman Islands. That project, which is a difficult one, is now underway. Once it is complete, we may be proud that the public, practitioners and judges will have a comprehensive and public database of all the legislation applicable to these Islands.

One of the aims of writing Judgments is to enable reasonably intelligent members of the public to understand what the case was about, what decision was reached, and why that decision was reached, even if they would not fully comprehend the analysis of the finer legal principles. An important section of the public for that purpose are the newspapers, both foreign and domestic, and the specialist press overseas whose readers have an interest in our financial services industry.

The need for public availability of Judgments rests on the fundamental principles of due process, open justice, and the rule of law. Thus a reasoned Judgment enables the parties to the proceedings to understand why the court reached the decision that it did. A reasoned Judgment also enables the public to understand what the law is and how it is being administered by the courts. This is a necessary part of ensuring that the public has confidence in, and understanding of, the courts and the administration of justice, and thus ensure public confidence in the rule of law.

The Law Reports provide support to our financial services industry which, as we have heard, is the single largest contributing sector of the economy, and thus to the well-being, of these Islands. They provide a continuing advertisement to the world's financial and commercial communities that disputes involving Cayman Islands structures, no matter how complex, may be fairly, efficiently and predictably litigated in our courts. In the early 1980s Mr Alberga, as the then

President of the Law Society, and his colleagues understood this and, with the support of Sir John Summerfield, our late Chief Justice, and Michael Bradley QC, our late Attorney General, they initiated the production and publication of the Law Reports. Each of their respective successors and up to an including those here present today, have continued to support the regular production of our Law Reports. We remain grateful for their continuing support.

It is therefore only right that we take this opportunity to acknowledge the vital role of the judiciary in producing written Judgments. It is pleasing to see (and an excellent advertisement of the quality of the work undertaken in our Courts) that it is not uncommon to see courts in other jurisdictions considering and analysing Judgments of our Court. A quick internet search shows that Judgments from our courts have recently been considered by courts in the UK but also as far afield as Queensland, Hong Kong, and Bermuda and the BVI.

2013 was yet another busy year in all of our Courts. Our judges undertook and completed a great volume of work. Some 135 written judgments and rulings were handed down in the past 12 months by the judges sitting in this Court and the Court of Appeal, a handful fewer than those delivered in each of the previous five years.

Many of these judgments concerned difficult and novel matters. The judges sitting in the Financial Services Division delivered judgments on complex issues arising out of investment funds; duties of directors and other fiduciaries; professional negligence; tracing claims and restitution; confidentiality; insolvencies, bankruptcies, and receiverships; cross-border judicial cooperation in insolvencies and in the exchange of tax information.

The Civil Division judges delivered Judgments on topics as diverse as personal injuries disputes (regrettably, often arising out of road traffic accidents); land disputes; and employment disputes. It was another active year for judicial review and judgments were delivered concerning matters as diverse as the challenges to the development of the West Bay Road, the granting of the George Town Heliport licence, and disclosures ordered by the Information Commissioner, as well as more well-established challenges to decisions of the immigration boards and valuations of land on compulsory acquisition. Notably the judges have also dealt with an election petition and the first challenges to compatibility of our domestic statutes with the Constitution, and in one declared one section of the Police Law to be incompatible.

The Civil Division has had its fair share of proceedings arising out of the local consequences of the prevailing economic conditions; in particular the number of proceedings arising out of defaults on mortgages remains very high.

The judges of the Family Division gave a number of important decisions concerning the custody of children and financial provision in divorces; adoption of children; and the unlawful removal of children out of the jurisdiction. Some of the advances in the medical sciences associated with fertilisation and embryology are now beginning to have an impact in the cases that come before it.

Last year the Admiralty Division delivered no written rulings.

Regrettably, our criminal courts were just as busy as the civil courts. The judges of the Criminal Division delivered a range of judgments relating to murder, rape, malicious wounding, defilement of minors, arson, burglary, robbery, handling of stolen goods, misconduct in public office, drugs offences, and the international transfer of prisoners. It is noteworthy that the number of cases concerning the possession of firearms and those concerning theft and other offences of dishonesty against employers continued at their previous high levels.

Unusually, the reporting of criminal proceedings was itself the subject of a judgment. We note the Law Reform Commission has just published a consultation report concerning, among other matters, the reporting of Court proceedings. We hope that any reforms that follow from their report will encourage responsible, fair and accurate reporting of proceedings.

The complexity of the issues in our judgments has never been so great, and is substantially greater than the other offshore jurisdictions for which Law Reports International are responsible. Considering and editing the rulings handed down in 2013 for reporting this year will keep Dr Milner, Mr Alberga and I busier than ever.

The preparation of written judgments requires an enormous amount of time and effort outside the hours spent sitting in Court and I know that I speak for the whole of the profession when I say that we are particularly grateful to our judges for the provision of these detailed reasons and their work to ensure that the requirements for judicial diligence as now formalised in the Code of Conduct for the Cayman Islands Judiciary and Practice Direction No 1 of 2012 are met. The short time that usually elapses between the conclusion of a hearing and the appearance of the written reasons is commendable.

Last year I observed that in recent times the Court of Appeal has sometimes fallen short in this regard, not uncommonly with respect to complex commercial appeals. Unfortunately the problem persists. It has not been uncommon for reasons in reserved commercial appeals to be delivered about a year after the appeal was heard. In one case, a commercial appeal was heard in April 2012 and so far – almost two years later - no judgment has been delivered. Delays such as these are at odds with the Code of Conduct and international norms, and undermine public confidence in the courts which, in the context of commercial

appeals, includes the international financial community. We can only hope that the recent and much-welcomed appointments to the Court of Appeal will increase its resources and make delays such as these a thing of the past.

I would also like to express our thanks to those overseas judges and practitioners, as well as local practitioners, who have willingly given up their valuable time to sit as acting judges of the Court of Appeal, Grand Court, Coroner's Court and Magistrates Court during 2013. From England - Lord Justice Alan Moses, former Lord Justice Sir Andrew Morritt, His Honour Judge Michael Mettyear, and Mr Malcolm Swift QC have each sat as acting Grand Court judges. From Jamaica - former Justice of Appeal Ian Forte sat in the Court of Appeal, and Justice of Appeal Seymour Panton, Mrs Justice Carol Beswick and Mrs Justice Marva McDonald-Bishop sat as acting Grand Court judges. Mrs Grace Donalds sat as an acting Magistrate and Mrs Eileen Nervik QC sat as an acting Coroner.

I join in welcoming our new and distinguished Justices of Appeal: Sir Bernard Rix, Sir George Newman, and Mr John Martin QC, and our new Registrar Tomica Daley. We also wish a well-earned and peaceful retirement to Justices of Appeal Elliott Mottley and Abdulai Conteh, both of whom have served with distinction for several years as a member of our Court of Appeal, and also to Mr Justice Cresswell who has similarly served with distinction as a Grand Court judge for over 4 years.

Dr Milner has asked me to convey to your Lordships and to the entire legal profession his best wishes for a successful and happy 2014 and regrets that he was not able to be present today.

It is an honour and a privilege to have been allowed to add these few remarks. It now only remains for me to wish a prosperous, healthy and happy New Year to you and all the judges and magistrates of this Court, and to their administrative staff, and to all members of the profession, and to the people of the Cayman Islands.

I have the honour to support Mr Attorney's motion this morning

Colin McKie QC

15 January 2014

