Chief Justice Honourable Anthony Smellie and the Judges of the Grand Court

2022 GUEST LECTURE

By the Rt Hon Lady Arden of Heswall

TAKING STOCK OF RECENT CASE LAW OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL – ITS BREADTH AND DEPTH

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CAYMAN ISLANDS

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INTRODUCTION

1. I wish to thank Chief Justice Smellie and the Judges of the Grand Court for their invitation to give the Guest Lecture. I had originally planned to come to the Cayman Islands to give this lecture in March 2020, but my visit had to be postponed because of the pandemic. I am very pleased that that life is returning to normal and that I have this opportunity of addressing you. In the intervening period, I have continued to serve on the Judicial Committee of Her Majesty's Privy Council, ceasing to sit on my recent retirement as a Justice of the Supreme Court of the United Kingdom on 24 January 2022. I regard it as a great honour to have served as a member of the Judicial

Committee. It carries out important work in jurisdictions in which it serves, and it is privileged to be able to do so.

2. AIMS OF THIS LECTURE

3. My first aim in giving this lecture is to provide a tour d'horizon of some recent case law of the Judicial Committee. In reviewing the case law, I will describe the key points that I consider show the methodology and possible direction of travel of the Judicial Committee. My second aim is to show the breadth and depth of the cases which the Judicial Committee has decided. It has had to adapt its skills, and the flexibility and versatility of the Judicial Committee's approach is remarkable. I make the point at the outset that the Judicial Committee is asked to determine points of law, not social or political controversies. There may be those who do not agree with a decision because of these controversies, but so far as this lecture is concerned what is in issue is the legal approach and not any other approach.[1]

4. ABOUT THE PRIVY COUNCIL

5. For the purposes of this lecture, I need to say very little about how it comes about that the Judicial Committee is the final court of appeal for this and other jurisdictions.[2] As to composition, the Judicial Committee principally consists of the Justices of the United Kingdom, of whom there are a maximum of twelve. They spend a substantial proportion of their time, possibly as much as 40%, on the work of the Judicial Committee. The Judicial Committee applies the law of the jurisdiction from the appeal comes, for example its companies code, but, where it is not suggested that the law of that jurisdiction is different from that of England and Wales, English and Welsh law is applied. In this lecture when I refer to English law, I am referring to English and Welsh law as it is a single, unified jurisdiction. There is no single common law which is applicable in all jurisdictions which accept the common law. It is no part of the role of the Judicial Committee then or now to make the law the same for all parts of the Commonwealth Caribbean.

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[1] In relation to decisions to which I have been party, I am not in any event able to go beyond what is said in the decision or talk about related matters that were not discussed in the judgments. Nor am I able to discuss pending matters, such as the interpretation of savings clauses in Westminster constitutions.

[2] See further the website of the Judicial Committee, https://jcpc.uk, where useful information and material can be accessed, including copies of the judgments to which I will refer and also recordings of hearings.

6. The work of the Judicial Committee is diverse. This is shown by the range of work which it does. For example, it determines appeals in criminal law, contract law, land law and constitutional law. The law which it must apply may be very different too. In *Ciel v Central Water Authority*,[3] there was an appeal about the collection of water charges made by the Central Water Authority of Mauritius.[4] The main issues were governed by the Civil Code of Mauritius, which is based on French law, and case law under it. The Judicial Committee also applied Mauritian statute law.

7. So the Judicial Committee has to adapt to different systems and be flexible. But to do that it may need help from the jurisdiction whose law it is determining. In *Ciel*, for instance, we had highly experienced counsel from Mauritius. I have often found that statements in the judgments of the courts of the jurisdiction from which the appeal comes about matters which particularly relate to that jurisdiction can be helpful and illuminating There is sometimes a call for more judges from the jurisdiction from which the appeal comes to be members of the panel hearing the appeal, but a benefit of a final appeal to the Judicial Committee is that it brings an external approach. So, it may be that we should concentrate on informal judicial relations, and possibly overseas sittings of the Judicial Committee, and encourage local counsel to help the panel. Where there are relevant decisions of the Caribbean Court of Justice, the Judicial Committee asks for them to be cited so that it can consider them too.

8. The Judicial Committee has a very large body of case law. From such a field, my selection criterion has been to cite those which are likely to be of topical but enduring interest in this jurisdiction. These cases will fall under the following themes: (1) the Judicial Committee as a constitutional Court (2) the Judicial Committee as the guardian of public law and thus of the rights of the individual against the state; and (3) the Judicial Committee as adjudicator in commercial matters, including trusts established for commercial purposes. With that introduction I now turn to the Judicial Committee as a constitutional court.

9. THE JUDICIAL COMMITTEE AS A CONSTITUTIONAL COURT

10. It is inevitable that I should deal with two very recent cases, *Day and (another) v The Governor of the Cayman Islands*,[5] to which I shall refer as *Day and Bush*, and *AG of Bermuda v Ferguson*[6] from Bermuda. Both these cases concern claims made to a

[3] [2022] UKPC 2.
[4] The Judicial Committee dismissed the appeal.
[5] [2022] UKPC 6.
[6] [2022] UKPC 5.

constitutional right to the legal recognition of a same-sex marriage. I will, however, preface my remarks with a summary of the JCPC's overall approach to constitutional interpretation.

11. The Judicial Committee's principle of generous interpretation of a constitution

12. A constitution is a social compact by which everyone agrees with everyone else that all should be governed by certain laws made for the common good. It is not a commercial contract. As Lord Hoffmann explained in *Matadeen v Pointu*,[7]

> It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the South African Constitutional Court in *State v. Zuma, 1995 (4)*

[7] [1998] UKPC 9 [1999] 1 AC 98, section 7.

> *B.C.L.R. 401*, 412: "If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.

13. A constitution must be enduring, so it must, where it is foreseen that development in constitutional rights might occur and be desirable, be drafted in terms which enables it to evolve.

14. The Judicial Committee considered the nature of constitutional interpretation in some of its early case law relating to Canada. In *Edwards v Attorney General of Canada*,[8] the Judicial Committee had to consider whether

15. women could be appointed to the Senate of Canada, which is the Upper House of its Parliament. The provisions of the British North America Act 1867 which provided for such appointments used the word "persons". Women were ineligible to hold public office at common law and the question was whether the British North America Act had changed the position. The Judicial Committee was firmly of the view that women were eligible to hold office as Senators. The Act was a "living tree" which could be interpreted in accordance with current conditions and therefore women were eligible to be appointed to the Senate:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention": Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.
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> Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her

[8] [1930] AC 124

> own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

16. The United Kingdom does not have a written constitution or fundamental rights which override other legislation, but the Judicial Committee addressed the point that the British North America Act was just a statute, like any other statute of the Westminster Parliament. It held:

> The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony": see Clement's Canadian Constitution, 3rd ed., p. 347. (pages 136-7)

17. In that passage, Lord Sankey LC, giving the advice of the Judicial Committee, held that it was important that Canada would be mistress in her own house, i.e. that Canada should be able to develop without hindrance from the Westminster Parliament.

18. This jurisprudence forms part of the background to the famous case of *Ministry for Home Affairs v Fisher,*[9] which is now the classic place for finding the important principle that constitutions should be generously interpreted. In *Fisher*, the issue was whether an illegitimate child of a non-Bermudian mother whom her Bermudian husband had accepted into the family could be a "child" of a Bermudian for rights of residence purposes. The Judicial Committee gave several reasons for interpreting the word "child" as including an illegitimate child in those circumstances because it was clearly the intention of the relevant provision that a child should be entitled to remain with his family and not be subject to deportation. Lord Wilberforce, giving the advice of the Judicial Committee, noted that the Constitution had special characteristics, in particular that it was drafted in broad language, that it had been greatly influenced by

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6. [1980] AC 319.

the European Convention on Human Rights ("the Convention") , which was in turn influenced by the United Nations' Universal Declaration of Human Rights, and that the stated purpose of the relevant Chapter of the Constitution was to protect individual rights, subject only to limits in the public interest:

> 1. It is, particularly Chapter I, drafted in a broad and ample style which lays down principles of width and generality.
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> 2. Chapter I is headed "Protection of Fundamental Rights and Freedoms of the Individual." It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by [the Convention]. That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.
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> 3. Section 11 of the Constitution forms part of Chapter I. It is thus to "have effect for the purpose of affording protection to the aforesaid rights and freedoms " subject only to such limitations contained in it " being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice ... the public interest.[10]

19. Thus, in the words of Lord Wilberforce, constitutional rights had to be given "a generous interpretation for the purpose of avoiding 'the austerity of tabulated

[10] Page 329.

legalism'". This was a consideration to be balanced against other considerations, such as the language used, and the traditions and usages surrounding it:

20. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must paid be to the language which has been used and to the traditions and usages which have given meaning to that language.[11]

21. Lord Wilberforce pointed out that the right on which the appellant relied in *Fisher* was derived from Article 8 of the Convention. He noted that Article 8, which guarantees the right to respect for private and family life, had been interpreted by the European Court of Human Rights, the authoritative court for interpreting Convention rights, as including illegitimate children. Lord Wilberforce concluded that it should be interpreted by the Judicial Committee to include the child in question.

22. Some of you will recall that in fairy stories there is a magical coat, that grows and grows as the wearer grows and never wears out. The drafters of a constitution work on a similar basis, that the people subject to it should continue always to live a peaceful life one with another and that their society will develop. But the coat must always remain recognisably a coat. It cannot become something else altogether. Why should that be? Because a common law court is there to interpret the meaning of instruments whose language is settled by the democratic process.

23. Professor Rose-Marie Belle Antoine, a distinguished constitutional scholar in this region, perceived that there was good sense behind this approach. In 2009 she wrote:

> Some courts, in particular the Privy Council, sometimes appear to be redirecting their decisions away from perhaps more abstract ideas of international law and practice to more concrete expressions of legislative will. ..They demonstrate a willingness to turn away from a liberal internationalist trend, preferring instead to give effect to the intention of the legislature, even where that intent seemingly violates accepted international values about human rights. This allows domestic law to once again trump international law and constitutional jurisprudence to be more predictable, albeit more

[11] Page 329.

> conservative. This is not an undesirable approach as it allows constitutional change to be what it is supposed to be, the rational, reflective expressions of the ideals of the people in any particular society as laid down by their representative legislature. In contrast, ignoring the legislative will creates the danger of making law the unpredictable plaything of judges influenced by norms which do not always represent that society.[12]

24. The Judicial Committee interprets constitution of the Cayman Islands as excluding the right to legal recognition of same-sex marriage

25. The first of the two recent cases I mentioned is *Day and Bush*. This concerns the Constitution of the Cayman Islands adopted in 2009. The Judicial Committee described this as

> a self-contained legal instrument drafted in terms specifically appropriate to the Cayman Islands. [13]

26. The appeal concerned the question whether the appellants had a constitutional right to same-sex marriage. This question turned on various sections of the Bill of Rights which forms part of the Constitution of the Cayman Islands: section 14(1) (the right to marry a person of the opposite sex) versus sections 9 (right to private life), 10 (freedom of thought and religion) and 16 (right not to be discriminated against on grounds of sex).

27. The appellants sought to establish a right to same-sex marriage from the provisions of the Bill of Rights of the Cayman Islands. However, section 14 provides that a person has a constitutional right to marry a person of the opposite sex and makes no provision for any other form of marriage. The right to private life and the right to freedom of conscience have to be read as subject to that right because the Bill of Rights has to be read as a whole and receive a harmonious interpretation which gives the maximum effect to every provision and minimises any conflict with any other provision. As the Bill of Rights had specified a particular form of marriage, there was a limitation on the right to marry which could not be removed by invoking other

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[12] Rose-Marie Belle Antoine, New Directions in Public Law in the Commonwealth Caribbean - Some Reflections, 35 COMMW. L. BULL. 31 (2009). 50.

[13] Para 44.

provisions of the Constitution. The other rights had to be fitted around this limited right and not used to circumvent the limitations of the Constitutions.

28. As Lord Sales, giving the advice of the Judicial Committee said:

> The right to marry in section 14(1) of the Bill of Rights has been drafted in highly specific terms to make it clear that it is a right "freely to marry a person of the opposite sex …". Comparing section 14(1) with article 12 of the ECHR, which was the model for it, it is obvious that this language has been used to emphasise the limited ambit of the right and to ensure that it could not be read as capable of covering same-sex marriage. The reference to "traditional Christian values" in the preamble to the Constitution and the reference to "the distinct history, culture [and] Christian values" in section 1(2)(a) of the Bill of Rights reinforce the point by referring to the cultural and religious values which led to this emphasis being given to opposite-sex marriage in section 14(1).[14]

29. The provisions of the Bill of Rights reflected provisions of the Convention. The European Court of Human Rights has held that the Convention guarantees same-sex couples to legal recognition of their union (a conclusion which it reached by giving the Convention an evolutive interpretation), but that it did not guarantee them the right to have their union recognised as marriage. The Judicial Committee considered that other jurisprudence from the Human Rights Committee of the United Nations did not alter the interpretation of the Bill of Rights.

30. Like the Court of Appeal of the Cayman Islands, the Judicial Committee held that its interpretation of the Bill of Rights did not prevent the Parliament of the Cayman Islands from passing legislation to create a right for same-sex couples to marry, but there was nothing in the Bill of Rights which obliged it to do so. In these circumstances, the "living instrument" doctrine did not assist. The wording of section 14 was highly specific and not inherently evolutive and dynamic so as to enable a court to reflect any

[14] Para 39.

change in society.[15] A court cannot by the process of interpretation rewrite a constitution.[16] That is not what generous interpretation means. The Judicial Committee therefore dismissed the appeal.

31. You may ask, as indeed one of the students at the Truman Bodden Law School asked: Why is the Convention given the role of aiding the interpretation of the constitution? The reason is that the Convention had a profound influence on the Constitution when it was drafted and is a treaty binding on the Cayman Islands in International law. The Convention was therefore the best guide to what the Constitution was intended to mean. The Judicial Committee's interpretation did not preclude the legislature from recognising same-sex marriage if it saw fit.

32. The *lex specialis* is also relevant to the preamble or first section in a bill of rights or constitution which sets out what the constitution is intended to achieve before setting out the rights which are expressly conferred. In the case of the Cayman Islands, for example, there is a very long preamble to the Bill of Rights. It affirms that the Cayman Islands is "a country committed to the democratic values of human dignity, equality and freedom." Could it be said that the preamble creates a right to dignity? Dignity is not one of the specified rights. Some say that there is therefore "a lack of fit" between a very general preamble or first section in a bill of rights or constitution, which expressed rights in unqualified terms or even indicates different rights n very general terms, and the specified rights which follow, and which tend to be drafted in more precise terms. There is, as I see it, no such disharmony. In principle the constitution must be interpreted as a whole. The preamble or first section is generally an introduction to the rights which follow. It is the text of those rights which then matters. The meaning of them may be reinforced by the preamble or first section but the preamble or first section generallly cannot lead to the specified rights having a meaning which their text cannot sustain, or being a source of unenumerated rights,

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[15] I can illustrate this as I did in a recent Supreme Court case by reference to the need for accounts to disclose a true and fair view. When I was at the Bar, the leading accounting bodies put a question to Lord Hoffmann (as he later became) and myself. Professional accounting standards had just then been introduced, and they were being developed all the time to include new requirements on companies drawing up accounts. So the question was asked whether the statutory requirement for accounts to show and fair view meant a true and fair view as the legislature must have understood that phrase when the requirement was introduced or whether it could include a reference to developing standards. We opined that the meaning of the words "true" and "fair" did not change over time, but their application may develop as professional opinion changed. The words "true" and "fair" were dynamic.

[16] Per Lord Sales at [37]: [The living tree concept and the principle of generous interpretation] are only capable of extending meaning in line with changing practices and understandings so far as the language used in the relevant constitutional provisions can reasonably be said to bear a particular meaning.

such as the right to dignity. The rights are in this context the lex specialis, and the preamble or first section cannot be a separate source of rights.

33. The Judicial Committee reaches the conclusion that the Bermudian Constitution likewise does not confer the right to legal recognition of same-sex marriage

34. In *Attorney General v Ferguson*, the Judicial Committee had to consider whether there was a constitutional right to same-sex marriage under the Constitution of Bermuda. The Judicial Committee reached the same outcome in *Day and Bush* but the Constitution of Bermuda was entirely different and the grounds of appeal were different. The Constitution of Bermuda contained no constitutional right to marry, and no lex specialis question arose. But there was a right to freedom from discrimination on the grounds of sexual orientation and there was also a right to freedom of conscience, which includes a right to manifest one's beliefs, and a right to freedom from discrimination on grounds of creed.

35. The facts of Ferguson were also very different from those of *Day and Bush*. Part of the background to *Ferguson* was that in 2017 it was held in judicial review proceedings brought by a Mr Godwin that the Registrar General was bound to register a same-sex marriage between two individuals.[17] The government did not appeal. There was a referendum to ask people whether same-sex marriages should be recognised in law, which did not receive the necessary majority and therefore was inconclusive. But the majority as not in favour of either same-sex marriage or any other form of legal recognition of same-sex couples (ie civil partnerships). There was an election and change of government. The new government introduced a new bill to provide for civil partnerships for same-sex couples. The bill became the Domestic Partnerships Act. By section 53 the decision in *Godwin* was reversed with prospective effect. The same Act used a power in the Human Rights Act 1981 of Bermuda to disapply the right not to be discriminated against on ground of sexual orientation in relation to same-sex marriage.

36. There were three grounds of appeal or cross-appeal before the Judicial Committee: (1) that section 53 was unconstitutional as it had been passed for a religious purpose, (2) that section 53 violated the appellants' rights to freedom of conscience and (3) that belief in same-sex marriage was a creed and so section 53 violated the right to freedom from creed-based discrimination.

[17] *Godwin & DeRoche v Registrar General* [2017] SC (BDA) 36 Civ

37. The Chief Justice of Bermuda, Justice Kawaley, found in favour of the appellants on two grounds – freedom of conscience and creed-based discrimination – but rejected the challenge that the legislation was invalid because (or so it was alleged) it had been passed for a religious purpose. The Court of Appeal of Bermuda came to the same conclusion but overturned the decision of the Chief Justice on creed-based discrimination but held in favour of the appellants on the ground on which he had rejected, namely that the legislation had been passed for a religious purpose and was therefore unconstitutional.

38. As in the case of the Cayman Islands, the Convention formed one of the antecedents to the Bermudian Constitution and it influenced its drafting The Judicial Committee held that manifestly the intention of the Constitution was that the way in which Convention rights were understood under the case law of the Strasbourg Court should be a particularly relevant consideration in the interpretation of those of the rights conferred by the Constitution that could be traced back to the Convention.[18]

39. The challenge before the Judicial Committee was formidable. The submissions on the first point drew on a line of jurisprudence from the Supreme Court of Canada. In *R v Big M Drugmart Ltd*,[19] the Supreme Court of Canada had struck down the Lord's Day Observance Act on the ground that it had been passed for the purpose of protecting Christian beliefs at the expense of other religions, such as Jews, Muslims and Sabbatarians, whose religious beliefs prevented them from working on a Saturday so that they lost two days in a week. This is potentially a very far-reaching doctrine. It applies even if it was shown in fact not to violate constitutional rights by the time when the court had to determine whether it was a valid law.[20] It would raise the issue of how in practice a court could be satisfied that legislation was passed for a religious purpose and the issue of when a law passed for a religious purpose could be constitutional.

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[18] [14].

[19] [1985] 1 SCR 295.

[20] In contrast to *Big M*, the US Supreme Court, in four judgments issued on the same day (*McGowan v Maryland* 366 US 420 (1961); *Two Guys from Harrison-Allentown v McGinley*, 366 US 582 (1961), *Braunfeld v Brown*, 366 US 599 (1961), and *Gallagher v Crown Kosher Super Market*, 366 US 617 (1961) and discussed in *Big M*, held that Sunday closing laws did not infringe either the non-establishment nor the free exercise clause of the First Amendment to the US Constitution. The US Supreme Court held that, although the original motivation behind such laws may have been religious, their purpose had evolved and become secular (so it applied the concept of "shifting purpose").

40. The Judicial Committee held that, under the Bermudian Constitution, there was no constitutional bar to legislation passed for a religious purpose (unless of course it was discriminatory on one of the specified grounds). The focus was on the effect of the law: did the law as passed actually violate one of the specified rights in the Constitution? This approach was reinforced by the jurisprudence of the European Court of Human Rights which would not strike down legislation simply because it was passed for a religious purpose but only if it violated constitutional rights in its effect.

41. Moreover, the Judicial Committee agreed with Chief Justice Kawaley that in any event section 53 of the Domestic Partnerships Act had not in fact been passed for a religious purpose. It was passed as part of compromise between those who wanted to prevent legal recognition of a same-sex union, and those who were prepared that the law should give some measure of legal recognition to them.

42. On the right to freedom of conscience and belief, the Judicial Committee held that section 53 did not interfere with any belief that a person might hold concerning legal recognition for same-sex marriages. The Judicial Committee applied mainly Convention jurisprudence. To be protected, the belief must attain a certain level of cogency, seriousness, cohesion and importance. It could be a political belief, but the state had no positive obligation to protect a belief that the law should be changed from what it was. There was no Convention obligation to give legal recognition to same-sex marriages. As the Judicial Committee pointed out:

> A further difficulty with the interpretation of section 8 which the respondents advocate is that those who conscientiously believe that same-sex marriage should not be given legal recognition would also have a right which must be recognised in the same way under section 8. That would place the state in an impossible position in performing its obligations to respect constitutional rights.[21]

43. Lord Sales gave a powerful dissenting judgment in which he drew on international instruments and other constitutions. The Judicial Committee did not consider that this material could be used in this way. The Convention was in a

[21] Para 34.

different position because of the role it had played in the formulation of the rights conferred by the Bermudian Constitution.

44. The *Ferguson* judgment contains an interesting explanation of how the constitutions of Bermuda and other Commonwealth countries came to be drafted, as they were, with different combinations of rights. It appears from a document recently made available in the public archives in the UK that it was the policy of the UK in the 1950s and 1960s to ensure, if it could, that its colonies which were about to become independent and those which were moving towards internal self-government adopted constitutions which protected fundamental rights, particularly where there were minorities. What could be achieved depended on negotiation because the UK generally could not insist on fundamental rights being part of any new constitution.[22]

45. The fact that constitutions were individually negotiated and vary was an additional reason for an important point made by the Judicial Committee in *Ferguson* that its task is to interpret the constitution of a state according to its own special combination of provisions and in the light of the conditions in that state and its history. Some provisions from the Convention found their way into the Bermudian Constitution, but others did not. In these circumstances, it is particularly important that the court should respect the role of the legislature, as the people's elected representatives, to decide on any change in the law that went outside the text of the constitution.

46. There is a point I would like to add about statute law, which is a branch of constitutional law. Just as there is no single or universal common law which is the same for all jurisdictions, statutes likewise are to be interpreted against the background of the jurisdiction from which they come. As Lord Sankey held in *Edwards v Attorney General of Canada*:

> The communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution. His Majesty the King in Council is the final Court of Appeal from all these

[22] See Colonial Constitutional Note 23 (CO 1032/283) discussed in para [16] of *Ferguson*, and see Charles Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford, 2007), Chapter 9.

> communities, and this Board must take great care therefore not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another.[23]

47. I will now summarise some salient points under this section of my lecture.

Conclusion on the Judicial Committee as a constitutional court

48. To conclude on this theme, the Judicial Committee discharges the role of as a constitutional court. It performs this role even though the UK itself does not have a written constitution or any concept of fundamental rights. The Judicial Committee discharges its role by focusing on the constitution of the jurisdiction from which the appeal comes in the light of its particular content and provisions as a unique document and in the context of the traditions and customs of that jurisdiction. There is evidence that the original constitutions of countries which had formerly been British colonies that they were negotiated individually with local representatives of the people of that country. This supports the Judicial Committee's approach. Moreover, even applying a generous interpretation, there are limits on fundamental rights, and that where those limits apply, it is for the democratically elected legislature of that country to decide what steps to take. The Judicial Committee will consider any relevant international instrument that will help it interpret the text. The Convention is particularly relevant where the bill of rights or constitution reflects those rights. The Judicial Committee does not, of course, apply its own conception of values. It will give the provisions of the constitution a liberal or generous interpretation so far as the text permits.

49. I now turn to the Judicial Committee's role in public law.

50. 2. THE JUDICIAL COMMITTEE AS GUARDIAN OF PUBLIC LAW AND THUS THE EXERCISE OF THE POWERS OF THE STATE

51. I propose to take two topics only: substantive legitimate expectations and apparent bias.

52. Substantive legitimate expectations

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[23] Page 135.

53. A substantive legitimate expectation may arise where the state makes clear and unequivocal representations to a defined group of people about a substantive benefit. The state may not be able to resile from these representations where it is not fair that it should do so.[24]

54. In *United Policyholders Group v Attorney General of Trinidad and Tobago*[25] a major insurance company, CLICO, had offered short-term investment products with high rates of interest payable over short maturity periods. It then had cash flow difficulties as a result of policyholders withdrawing their deposit balances during the global financial crisis in 2008/09. To manage the crisis, the government made a statement in 2009 that policyholders would "get back and recoup all of their losses". In May 2010 a new government was elected. The new government investigated CLICO's financial position and found it to be substantially worse that it had been thought to be. The new government considered the 2009 statement to be imprudent and introduced legislation for a moratorium on claims against CLICO. A revised offer was made to policyholders, offering them less that what was due to them. The policyholders contended that the statements of the previous administration gave rise to a legitimate expectation that, should they refrain from withdrawing their balances, the government would guarantee to them their full contractual entitlement. The Court of Appeal of Trinidad and Tobago held that the government's action in 2010 was a "methodical, reasonable and proportionate in the circumstances".

55. The Judicial Committee dismissed the appeal. Lord Neuberger, giving the judgment of the Judicial Committee, held that, even if the assurances were sufficiently clear to give rise to the pleaded expectations, the government had been entitled to resile from them. That was because it had acted on the basis of its assessment in 2010 of where the public interest lay. The costs of paying policyholders' claims in full would require some TT$7 billion of taxpayers' money.

56. Lord Carnwath, in a separate judgment, entered the qualification that "In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a macro-economic or macro-political kind".[26] It may, however, be that, in cases involving macro-economic or macro-political issues, there is

[24] See the decision of the Judicial Committee in *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 AC 1.
[25] [2016] UKPC 17, [2016] 1 WLR 3383.
[26] Para 121.

no real difference between the application of proportionality and the more traditional *Wednesbury* test.[27]

57. Lord Carnwath also preferred a narrow interpretation of the doctrine of the doctrine of substantive legitimate expectations by holding that, where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification, has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it."[28]

58. However, some litigants may find it difficult to establish detrimental reliance by each of them or that they each agreed to act or refrain from acting in reliance on the assurances. Detrimental reliance may not, however, always be required.

59. If Lord Carnwath's proposed narrow approach to the doctrine were adopted, litigants who claim to have substantive legitimate expectations will to be likely only succeed where there is a clear promise to an individual or defined group, and that it was relied upon to their detriment or at least that there was a material change of position.[29] In a later case in the Court of Appeal of England and Wales, I held that the court "should apply the formulation of Lord Neuberger in so far as there is any difference between his judgment and that of Lord Carnwath". [30]

60. (b) Apparent bias

61. The test for apparent bias in a judge is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[31] This test is therefore objective. It gives effect to the

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[27] i.e. that is so unreasonable that no reasonable person acting reasonably could have made it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

[28] Para 121.

[29] The Judicial Committee distinguished *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 AC 1, where there was no explanation for the change in policy. .

[30] *R (Hely-Hutchinson) v Revenue and Customs Commissioners* [2017] EWCA Civ 1075, [2018]1 WLR 1682 (Arden, McCombe and Sales LJJ) at para 59.

[31] *Porter v Magill [*2002] 2 AC 357 at [102] to [103].

principle that "justice should not only be done but should manifestly and undoubtedly be seen to be done". But the test is not easy to apply.

62. In the appeal from the Cayman Islands to the Judicial Committee in *Almazeedi v Penner,*[32] there was a challenge to the independence of an additional judge of the Financial Services Division of the Grand Court of the Cayman Islands. In late 2011, he was appointed for a five-year renewable term as a supplementary judge of the Civil and Commercial Court, Qatar Financial Centre ("QFC"), though he was not sworn in there until 8 May 2012.

63. Between 2011 and 2014, the judge had, in the Grand Court of the Cayman Islands, dealt with a winding-up petition and related applications concerning a company, B, and thereafter with its winding-up. B had issued preference shares which represented the entire economic interest in B, and which were mainly owned by Qatari interests with strong state connections. They made serious allegations against the appellant, Mr Almazeedi, who had been the director of B. On 26 June 2013 one of the principal personalities in the dispute became Minister of Finance of Qatar. In that capacity he was responsible for judicial appointments to the QFC.

64. Mr Almazeedi argued that the judge lacked independence throughout due to apparent bias, having regard to his position as judge in Qatar (which was unknown to Mr Almazeedi until he found out, by chance, in mid-2014) and the involvement in the proceedings before him of Qatari interests with strong state connections.

65. The Court of Appeal of the Cayman Islands held that there was no apparent bias before 26 June 2013. The Judicial Committee, however, by a majority, allowed an appeal. The majority rejected the argument that the judge's orders before and after the winding-up order, which was a consent order, were limited so that any flaw in his apparent independence could be disregarded.[33] Moreover, in the opinion of the Judicial Committee, the "fair-minded and informed observer", in this context, was "a figure on the Cayman Islands legal scene" but that he was person who would see the whole position in its overall social, political and geographical context. He must therefore be taken to be aware of the Qatari background, including the personalities involved, their important positions in Qatar and their relationships with each other as well as being unaware of the judge's intended appointment to the Qatari Court. The

[32] [2018] UKPC 1. An addendum to the judgment on the Judicial Committee's website states that, subsequently to the judgment, the Judicial Committee was informed that it was possible that the judge had in fact made the disclosure of it which the Judicial Committee held ought to have been made.
[33] Applying the decision of the Judicial Committee in *Millar v Dickson* [2001] UKPC D4.

Judicial Committee considered that the judge should have disclosed his position to the parties.

66. This case is an important reminder of the salutary rule that judges must be independent and be free from interests which may cause them to be perceived to be biased. The common law adopts the same test in relation to alleged bias on the part of arbitrators. The Supreme Court of the United Kingdom recently had to consider arbitral bias in *Halliburton v Chubb*,[34] and its judgment took into account of the decision in *Almazeedi*. So, this case, like *United Policyholders*, is an example of the cross-fertilisation of ideas between the UK Supreme Court and the Judicial Committee.

67. Conclusions on public law cases:

68. I have only been able by these examples to identify the tip of the iceberg in Convention jurisprudence on public law. There are very many other cases, including cases dealing with the independence of the judiciary, the rules of natural justice, the conditions of service of civil servants, and policemen whose rights are governed by statute law, the conduct of public service commissions, the abuse or fettering of discretion by a public body or official, and so on.[35] The case law of the Judicial Committee has made a substantial contribution in this important area, and it has taken strength from, and given strength to, the principles of judicial review in the UK.

69. I now turn to the Judicial Committee's work in relation to commercial matters.

70. 3. THE JUDICIAL COMMITTEE AS EXPOUNDER OF THE GENERAL LAW IN COMMERCIAL MATTERS, INCLUDING TRUST LAW, IN THE LIGHT OF MODERN CONDITIONS

71. I have already written about the important contribution which the case law of the Judicial Committee makes in the field of financial services.[36] In this lecture I move to an area which will be familiar to the lawyers practising in the Cayman Islands,

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[34] [2021] AC 1083.

[35] See for example, *Hinds v R* [1977] AC 195 and *Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113, and more recently *Royal Cayman Islands Police Association v Commissioners of the Royal Cayman Islands Police Service* [2021] UKPC 21.

[36] *The Judicial Committee as an important source of financial services jurisprudence*, 9th annual P.R.I.M.E. Conference, The Hague, 3 February 2020, https://www.jcpc.uk/news/speeches.html

namely trust law. The Cayman Islands have been described as the premier offshore trust domicile.[37]

72. Trusts are not companies governed by well-known provisions of statute law. In fact, they are not legal entities at all: the trust is a non-person. It does not exist in law. Under the general law, the trustees are liable personally to all the trust creditors, including those to whom they properly incurred liabilities on behalf of the trust. Sometimes, however, the trust deed or instrument of appointment or contract with the third party limits the trustees' obligations to the third party to the assets which they hold on behalf of the trust. The creditors must enforce their rights in respect of the trust's assets by enforcing the trustees' rights against the trust assets as they cannot enforce their rights directly against the trust, which as explained is a non-person.

73. But suppose the trustees fail to secure the appropriate provision in the contract but the limitation of their liability is provided for by the proper law of the trust? This was the issue in the recent case of *Investec Trust (Guernsey) Ltd and another v Glenalla Properties Ltd.*[38] Here the Guernsey-based trustees of a Jersey trust had become liable to repay bank loans incurred by a previous trustee, and these loans exceeded the amount of the trust assets. The trust was what has been described as a trading trust, i.e. one which took an active part in the carrying on of a business. Were the trustees liable to pay these sums out of their own assets? The Judicial Committee held by a majority that they were not so liable. This was because of Jersey law, which was the proper law of the trust. The Judicial Committee held (by a majority) that Article 32(1)(a) of the Trusts (Jersey) Law 1984, as substituted, had introduced a new legal distinction between a trustee's personal and fiduciary capacities. It modified the general law. But the trustee then had a right of indemnity against trust assets provided that the debt was not unreasonably or improperly incurred. While Article 32 had removed the creditor's right to obtain payment out of the trustees' personal estate if the creditor knew it was dealing with trustees, it left intact the creditor's right to enforce his debt utilising any claim or beneficial interest of[39] the trustees against the trust property. This would include by way of subrogation to the trustees' right of indemnity.[40]

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[37] Justice Kawaley, keynote address, STEP conference, Cayman Islands, January 31, 2019.

[38] [2018] UKPC 7

[39] Relying on article 54 of the Jersey law.

[40] paras 56, 59, 61, 62–63, 194, 237.

74. In sum, the Judicial Committee held, as a matter of Guernsey and English private international law, that the liability of trustees under a contract can be limited by the proper law of the trust alone. This was possible even where the proper law of the contract was different from that of the trust.

75. This decision opens up many issues in trust law, including issues about nature of the trustees' right to be indemnified for the payment of costs and expenses and for reimbursement. There is at least one more pending case which concerns what happens if the amount of the trust assets is insufficient to meet the liabilities. There had in the case in question been successive appointments of trustees. Should the liabilities properly incurred by all the trustees be on the same ranking? A major argument is that the liabilities should be discharged not pari passu but in the order in which the trustees who incurred the liabilities were appointed. So, under this approach some liabilities incurred by the trustees would be paid in priority to others. It may be relatively straightforward to distribute the assets of trusts where the trustees are personally liable, but it may be more difficult where the trustees have no personal liability.

76. A recent decision of the High Court of Australia plays an important role in this debate because it decides that a trustee is entitled to an equitable charge for his proper costs and expenses. The High Court of Australia did not deal with successive trusteeships and considered that a trustee's right of exoneration (being the relevant aspect of the right of indemnity) generates an equitable interest in the trust assets that is proprietary in nature and takes priority over the interests of beneficiaries for the purpose of paying the trust liabilities. There is no decision of the Judicial Committee as yet.

77. Conclusion on the Judicial Committee as a court for commercial matters

78. The case I have cited is about commercial trusts, but the points could equally be made in other areas of common law which are used in commerce, such as contract, tort and property law. The common law is the language of commerce. Commercial law is widely considered to be much more flexible and facultative under the common law system because under that system the courts take one case at a time and focus on the facts to see if the rule that was laid down in case A applies in case B. There is a constant process of refining the law in the light of experience, not of refining the law in terms of abstract intellectual analysis. Or as one of my former colleagues recently put it, as a broad generalisation, the courts tend to oil the wheels of commerce rather than throw grit in the engine.[41]

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[41] *Procter v Procter* [2021] EWCA Civ 167, [2021] Ch 395 para 8 per Lewison LJ.

79. I have mentioned the trusts case because it illustrates another point about the Judicial Committee, namely its facility for deciding a case in one jurisdiction and bringing to bear authorities from other jurisdiction. It also shows that the Judicial Committee can be the gateway to a sharing of jurisprudence between many countries in the common law world. It also shows that the Judicial Committee moves to new questions of law as the cases which come before it require.

80. DRAWING THE THREADS TOGETHER

81. As I mentioned at the start of this lecture, The ability of the Judicial Committee to adapt is very important in today's world. In March 2020, I had written a speech on an entirely different theme. But that was then and now is now. We now live in a very changed world. We have a new normal and I think some new norms. Courts have had to adapt to new ways of working, particularly remote hearings, and some of these new ways will continue to be used even after the pandemic ends. Things have also moved on in many other ways: for instance, in assessing the things that matter in a society, such as equality of rights and a fairer distribution of rewards, the democratic system (and not one where perhaps lockdown rules can be imposed without proper scrutiny or the right to challenge), and so on.

82. The pandemic was one inflexion point but there are many others: the challenge of the new technologies, climate change and the consequences of the current war in Ukraine are others. Ukraine may sound a distant place, but it is likely to have global consequences. All the inflexion points that I have mentioned are likely to bring new challenges for the law.

83. The developed and developing world have a shared interest and experience in these issues. Undoubtedly, they will impose fresh demands on the legal system and the courts. But 'twas ever thus. The work of the law is never done. The courts can never sit on their laurels and think the job is done.

84. In this lecture, we have looked at several roles of the Judicial Committee. First, as a constitutional court, the Judicial Committee seeks carefully to interpret the constitution of each country as a unique instrument in accordance with its established generous approach, consistently with the text, and taking appropriate account of international fundamental rights instruments. In the field of public law, the Judicial Committee has sought to ensure compliance with the law by public officials and bodies, and the proper exercise of their powers. In commercial law, the Judicial Committee has sought to apply the general law in a way that it keeps it up to date and the wheels of commerce, and therefore the economy, rolling in an appropriate

fashion. The work of the judicial Committee is very varied, and the Judicial Committee considers case law from many jurisdictions. Through its various roles, the Judicial Committee has made a substantial contribution to the development of public and private law.

85. Overall, in each of these areas, as well as others that I have not mentioned, the Judicial Committee has demonstrated its ability to act as the final court of appeal for many different jurisdictions. Its case law demonstrates its valuable contribution in many areas of law, its ability to keep the law up to date, its flexibility in drawing on many sources and its versatility in addressing a wide range of issues as final arbiter. I recall from my time as a QC working occasionally in Bermuda that the Privy Council was held in high esteem. Long may that continue. Moreover, looking at the matter from its own perspective, the Judicial Committee values its role and appreciates the quality of the judgments produced in the various jurisdictions. Furthermore, even in my relatively short and recent experience, it is apparent that many cases that come before the Judicial Committee raise issues which are of international importance. I have sought to show this elsewhere is relation to cases in the financial services field, particularly from this jurisdiction.[42]

86. The Judicial Committee will continue to carry out its role to the highest standards for each jurisdiction so long as that jurisdiction wishes it to do so.

87. Thank you for this opportunity to address you, and for your kind attention.

[42] See above fn 36.