The Civil Procedure Rules and the Role of the Court of Appeal in Developing and Preserving an Independent and Just Society

The Honourable Mr Justice Adrian Saunders, Judge of the Caribbean Court of

Organization of the Eastern Caribbean States (OECS) Bar Association 9th Regional Law Firm

St Vincent and the Grenadines
14-16 September 2012

The OECS Bar Association is an organization of legal practitioners and representative Bar Associations all functioning within and under the jurisdiction of the EASTERN CARIBBEAN SUPREME COURT a superior Court of record of the Eastern Caribbean.
The OECS Bar Association comprises the Caribbean islands within the regional geopolitical grouping of the Organization of Eastern Caribbean States (Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, St Lucia, and St Vincent and the Grenadines) together with Anguilla and the British Virgin Islands.

Remarks

By

The Honourable Mr Justice Adrian Saunders, Judge of the Caribbean Court of Justice,

on the occasion of

OECS Bar Association 9th Regional

14-16 September 2012

My Lady, Hon Chief Justice Madame Justice Perreira, Madame Attorney General Mrs Judith Jones-Morgan, colleague judges both of the Court of Appeal and of the High Court (and in particular Justice Yorke-So Hon who is visiting with us from Trinidad and Tobago), other judicial officers including Your Worship the Chief Magistrate Ms Sonya Young and other Magistrates, Registrar of the High Court Ms Tamara Marks, Director of Public Prosecutions Mr Colin Williams, learned Queen's Counsel, President and Members of the OECS Bar, distinguished guests, ladies and gentlemen, I bring you greetings from Sir Dennis Byron, who I have the honour to represent today. Sir Dennis expresses his sincere regret that he is unable personally to be here with you. He is of course a past member and executive officer of the Bar of St Kitts and Nevis, a former High Court and Appellate Court judge of the ECSC and a former Chief Justice of the ECSC. The OECS Bar Association therefore holds a special place in his heart and he had every intention of being here himself. He has just completed his first year back in the Caribbean at the region's apex Court and unfortunately a hectic schedule did not permit him to be here. He therefore asked me instead to substitute for him and naturally I was only too happy to oblige, especially as this year's Law fair is taking place in my homeland.

I wish first to take this opportunity to convey publicly my warmest congratulations to you, Madame Chief Justice on your historic appointment. As I previously expressed to you in a private communication, I do believe that your temperament, fine legal mind and experience as a Registrar, private practitioner, judge first of the High Court and then of the Court of Appeal, all make you ideally suited to discharge the twin tasks of Chief Justice and President of the Court of Appeal. The stature and general trajectory of a court, its standing among the legal profession and fraternal courts, are largely informed and conditioned by the disposition, attitude to reform and the jurisprudential skills of the Judge who sits at the head. In you, the OECS Court remains in solid hands. As I can personally attest, the job of Chief Justice of the ECSC is no easy one. But I know that you are equal to the task and that you will meet this new challenge with the same calm competence that has characterized all your professional life.

I was informed that I could deliver an address on any topic I chose. In light of the presence here of a significant number of attorneys as well as judges of the Court of Appeal of the ECSC I thought I should express briefly some thoughts on three matters; firstly, the Civil Procedure Rules and particularly the issue of non-compliance with the rules; secondly, the relationship in general between the Court of Appeal and judges of courts below and thirdly, the need to build confidence in our justice system. My remarks are actually a very compressed version of Lectures I have given on these subjects over the past year.

Earlier this year the Grenada Bar Association invited me to speak about the Rules. Very wisely, the Bar there had considered that the time was ripe for a review. How were the Rules working?

What were the major issues posed in working with them? Were the Rules accomplishing the goals they set out to achieve? These are questions about which I have a continuing interest as I was deeply involved in the process of creating and implementing the rules in the OECS.

Moreover, over the last four years I have taught Civil Procedure at the Hugh Wooding Law School and I have been a Contributing Editor of The Caribbean Civil Court Practice.

A good understanding and hence a correct interpretation and application of the rules depend on an appreciation of the philosophy and the fundamental premises upon which the Rules were crafted. The justification for new Rules lay in the significant problems that plagued litigants in the civil justice system. These were listed as:

-Delay (in the processing of the case; in the time elapsed between filing and hearing; in the actual length of the hearing; in the time taken to deliver judgments; in the time taken to have the judgment enforced);

-complex, arcane rules and directions written in legalese,

-a civil justice system that meandered along, driverless, often countenancing a severe disproportion between the value of the *res* in dispute and the time, effort and cost involved in adjudicating the dispute, and

-a pervasive sense, on the part of the litigants, of alienation from the adjudication process.

At the time we embarked on creating the rules the Civil Justice system was under severe stress.

The litigant and the society were looking for

-fairness

-basic predictability (of for example, outcome, timescales and costs)

-transparency

-less expensive justice

-ready enforceability of judgments, and

-an efficient and effective judicially managed system of litigation

The key objectives of the transition to new rules were therefore:

- to find the most appropriate solution to a filed dispute and hence to encourage in particular mediation;
- to assist litigants where possible to reach resolution of their dispute as early as possible;
- to provide cheaper and quicker alternatives to a full trial where appropriate;
- to restrict the scope of the dispute to relevant and substantive issues;
- to place the court in control of the direction and pace of litigation;
- to address in a positive, pro-active manner issues of fairness and transparency;

Unlike the old rules, the new rules approach civil justice not so much from the vantage point of the legal profession but from the standpoint of the principal beneficiaries of the civil justice system i.e. the litigant and the society in general. The judges, the legal profession and the court staff are merely instruments, players in achieving the fundamental goal of satisfying the litigants and society in general.

To better satisfy litigants and society, the Rules seek to encourage a monumental change in mind-set on the part of all the critical players. Judicial officers and court staff must now focus energies on the pro-active management of cases from filing to final disposition. For lawyers the new rules work best if the focus shifts away from a mentality of seeking to win at all costs to one of resolving

and facilitating the resolution of the dispute in a timely, transparent and inexpensive manner which need not be *via* a trial. This requires a huge cultural shift especially in the context of a justice system that is fundamentally still an adversarial one. It perhaps may take a whole generation to accomplish the requisite change in mind-set on the part of the legal profession. I think even as we struggle to see that change evolve judges need to steer a course between too great a level of impatience on the one hand and on the other, arbitrary imposition of heavyhanded sanctions for non-compliance with the rules. Excessive impatience could tempt judges needlessly to impose counter-productive sanctions for non-compliance. But equally, on the other hand, judicial indifference to non-compliance would rob the rules of their utility. The sanctions regime contained in the rules are designed to work much like an electric fence does for animals in a pasture. The fence is there not to kill the animals but to ensure that they remain where they are supposed to be.

The chief architect of the Rules, Judge Richard Greenslade, advocated and I commend this to all the lawyers present, that you regard each case as a project i.e. a series of inter-related activities leading to a defined objective. To realize this project you will make use of such resources as time, personnel and money. Successful completion will involve teamwork within your Chambers and inter-relationships with other participants such as the client, the opposing side, experts, judicial officers and court staff. You, the lead attorney, are the project manager and, like every project manager, in order to accomplish your task efficiently you need first to devise a project plan. And you need to prepare that plan from the very beginning.

From the time you take instructions on any case you should begin formulating your case plan and conceptualizing how it would unfold. You need to determine the principal steps that will have to be taken in order to see the plan through to completion; you must identify the personnel who will influence each step and envision just how they will do so. You also have to consider the resources

you will need to see the project through to completion. You need to establish a schedule of the work needed to be done and the sequential relationship between the various items on this schedule. First up, in my view, always, you should ask yourself: Is this a case for ADR, for mediation? If it is, then the plan must necessarily involve taking all the necessary measures to secure early mediation. But the Plan should also cater for the possibility that mediation may fail. And so you ask yourself other questions. Is this such a tenuous case that you need to advise your to make or accept the best offer possible as quickly as possible? Is this a case that requires a detailed investigation of facts and if so, what is the plan for carrying out such an investigation? Is this a case which turns on specific issues of law such that at a CMC you should ask for a point or points of law to be determined? Is this a case that can be resolved through a mini-trial geared specifically at resolving a discrete set of disputed facts? Is this a case requiring evidence from an expert? Can the expert, whether it's a doctor, a surveyor, an accountant, be agreed with the other side? Then there is the question of costs which requires you to assess the value of the claim. If you determine the value of the claim you can then predict what are the prescribed costs allowed by the Rules. Is the value of the claim so low or so high that you need to make an application for the prescribed costs to be calculated on the basis of some lower or higher value?

I can go on and on about the kind of questions you must ask yourself at the very outset. The point is that you are the project manager and so you must plan for the case and do so as early as possible. If both sides adopted this approach to litigating a case, if both parties adopted competent case plans, then case management would be a breeze for the procedural judge. The Masters would be spared much of the stress they get from some lawyers. Each Master would be able to do scores of case management conferences in a single morning as is done elsewhere. It is where one or both sides have prepared no or at least no effective case plan that case management becomes a tedious,

drawn out, messy affair. So that, instead of choosing between alternative plans or merely having to tweak a plan here or there the Master must now herself seek to formulate a case plan and impose it on lawyers who have not yet considered any possible plan.

The Overriding Objective and the court's management powers are to be understood against this background. So that it may deal with cases justly, the Court is given extensive powers of managing each case. Generally speaking, and as long as the litigant is not under direct threat of *a sanction imposed* for non-compliance, the court has an extremely broad discretion in the carrying out of its management powers. That broad discretion is exercised in keeping with the overarching principles set out in the Overriding Objective. But, in applying the Overriding Objective, it is critical that we understand that "Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored".[1] In other words, the Overriding Objective cannot and does not supplant clear written rules.

The rules form an integrated, inter-related whole. Generally speaking, in relation to the treatment of non-compliance with a provision, the rules treat differently a situation where only the interests of the litigants are affected by the non-compliance and a situation where the non-compliance is so serious that it impacts or threatens to affect the due administration of the overall justice system.

In those cases where only the litigants are affected and where the integrity of the overall justice system is not threatened, the principles set out in the Overriding Objective are by themselves sufficient to guide the exercise of judicial discretion in dealing with the non-compliance. It is then

[1] See Vinos v Marks & Spencer (2001) 3 AER 784 @ 789 J

unnecessary and inappropriate for judges to fetter the broad discretion given them by the Overriding Objective.

Where the integrity of the overall justice system is or may be affected because of a litigant's noncompliance, application of the Overriding Objective is constrained by specific provisions in the Rules that condition the exercise of the court's discretion. At such times, when these specific provisions constrain the exercise of discretion, it is no use asking the court to resort to the broad discretion governed by the principles that underpin the Overriding Objective. The integrity of the overall justice system is placed in issue in such circumstances as where, for example, the conduct of a litigant demonstrates deliberate disregard for the authority of the court or for a rule or court order that imposes a sanction for non-compliance or, in circumstances where the non-compliance threatens to derail the date of a critical case event such as a fixed trial date.

The recent Privy Council decision in an appeal from Trinidad and Tobago - **A.G. v Matthews**[2] - should be studied by everyone who has an interest in this area of law. The case has major implications on the circumstances in which Rule 26.8, i.e. the Rule referencing relief from

sanctions, comes into play. Some Courts of Appeal in the region had in the past suggested that you needed to seek relief from sanction any time you applied for an extension of time to do something *after* the expiry of the time limited for doing the thing. In **Matthews** the JCPC rightly disapproved of that approach.

[2] [2011] UKPC 38

Matthews now tells us that the court is not justified in saying that rule 26.8 (the rule referencing relief from sanction) is applicable to extending time (whether within which to appeal or to serve a defence or to do anything else) if the consequence of failure to adhere to the particular time limit has *not* been *specified* by any rule, practice direction, court order or direction. **Matthews** stresses that Rule 26.8 addresses *relief* from a sanction *imposed*. Seeking to extend time after the expiry of a relevant period, is not to be equated with seeking relief from an imposed sanction.

If then we are not constrained to look at the principles set out in Part 26.8 (which addresses Relief from sanctions) as a guide for determining whether to extend time (to cite just one example), where does the court look for the appropriate guiding principles when it considers whether to extend time? The court looks to the Overriding Objective. The principles set out there admit of suitably broad discretion and are designed to accomplish fundamental justice. By contrast, the provisions laid down in 26.8 are geared to a different end. They are designed to give a party in breach a narrow window to escape a penalty that is *prima facie* deserved. The underlying message in **Matthews** is that it is inappropriate to confront a litigant with that narrow window in circumstances where in fact the court should have the broadest discretion to manage the case justly in keeping with the Overriding Objective.

In Trinidad and Tobago I hear too many complaints that excessive judicial time is taken up, both at the appellate and the subordinate levels, with disputes over the interpretation and application of the rules and that a relatively high proportion of cases are being finally disposed of without the court getting around to examine the merits of the disputes. I don't know if these complaints also exist in the Eastern Caribbean. If they do, and if they are justified, then immediate and concerted attention should be paid to this issue as we are running the risk of the rules becoming discredited.

Lord Woolf in his Preface to the first edition of The Caribbean Civil Court Practice stated, *inter alia*, that "…whenever possible [courts] should avoid giving decisions which seek to bind other judges as to how the CPR should be applied". This was a profound, loaded statement. What could he have meant by it? Aren't we common law courts of precedent? Of course we are. But I think what Lord Woolf meant was that no two cases are the same and hence we need at all costs to eschew a one size fits all approach in our application of the rules. I think he meant that procedural judges need to be allowed scope to be bold and decisive and to go with their instincts in doing justice in the context of the particular case before them. I think Lord Woolf intended to signal to lawyers that they should indeed deal with each case as a separate distinct project, as a project that should not be pigeon-holed by some judgment(s) given in relation to some other project decided by some other judge at some other time perhaps in some other court. I think he intended to indicate to the Court of Appeal that, bearing in mind that no two cases are or can be exactly the same, the Court of Appeal should be slow to disturb the decision of the procedural judge unless that judge has clearly erred in principle.

This brings me to the second part of my address today. It concerns the relationship in general between the judges of the Court of Appeal and the judges of courts below the Court of Appeal, including the magistrates' courts. Some persons think of the various judicial tiers as being hierarchical but I prefer to conceive of Appellate and trial judges alike as colleagues engaged in a joint, a collaborative search for justice. There is much value in regarding an appeal, not as being separate and distinct from the trial process, but as a complementary process; a continuation of the litigant's claim or defence that was advanced in the court below.

The judges at both the trial and appellate levels are part and parcel of a single justice system in which those at the appellate level are endowed with tremendous advantages that trial judges do not and cannot enjoy. We, i.e. judges and lawyers alike, should never be quick to cast an appellate judgment in the vein that a trial judge who is reversed was less than competent. Trial judge carry out their decision-making in relative solitude. The appellate Bench on the other hand can discuss the case among themselves before, during and after oral argument. They have the luxury of approaching the evidence and legal submissions uninfluenced by the drama of the trial process and more often than not, by the time the case reaches the appellate court the lawyers themselves have a better grasp of the essence of the dispute.

Some persons regard the reversal of a trial court decision as a reproach to the judge below. I don't agree. More often than not it reflects merely a difference in point of view. But, even if the overturning of a judgment at first instance is to be considered an admonishment of the trial judge, the mere reversal of the decision constitutes a sufficient rebuke to the court below[3] and no good purpose is served if and when reversal is accompanied by intemperate language directed at the reasoning of the trial judge. We must never get to the stage where judges lose the ability to disagree without being disagreeable[4].

Appellate court decisions that overturn trial judgments should clearly advise the lower court, the litigants and the public of the nature of the perceived error made by the first instance court and the reasons why the judgment is being reversed. An appellate judgment is a judicial education tool and the first instance judge should receive appropriate guidance from it. I believe appellate courts have a responsibility to nurture trial judges, boost their confidence and defend and promote their right

[3] See CIVILITY AMONG JUDGES by William G. Ross (1999) 51 Fla. L. Rev 957
[4] ibid

to exercise discretion within the permitted parameters. Judicial education programs assist in this regard but in addition, more contact, especially informally, should be encouraged between judicial officers of different levels. Regular contact between appellate and subordinate judicial officers helps to eliminate mutual mis-understanding and contributes to the forging of a common judicial ethos.

The responsibility to build public confidence in the justice system

Finally, I wish to close by commenting briefly on one of the very serious challenges we all face in this region. It is this: How do we build public trust and confidence in the justice system. Like the stock market, the justice system thrives on public confidence and judges and lawyers alike have a collective responsibility to build such confidence. This is not an easy task in the Caribbean, not least because the public's assessment of the judiciary is often confused with its appraisal of other facets of law enforcement for which the executive and not the judiciary must take responsibility.

The sad truth is that in the Caribbean a noticeable gap exists between on the one hand, judicial performance - even if the same is characterized by excellence - and on the other hand, public trust. Many examples demonstrate this. Justice Telford Georges records, for example, that after he had delivered judgment for the Prime Minister in one Caribbean country, it was reported to him that there was a wild rumour being spread that a grand mansion was being built for him in the most glamorous housing development of that country.[5] Now, as many of us here know, even while he was alive, Telford Georges, a judge of the highest rectitude, was rightly regarded throughout the

[5] TELFORD GEORGES, A LEGAL ODYSSEY, *ibid*

international community as one of the icons of the judiciary in the Commonwealth. But not even he could escape the slander that is often heaped on Caribbean judges by Caribbean people.

Has our experience as an uprooted, enslaved and colonised people so damaged our psyche that we find difficulty in trusting our own? Does the lack of public trust in judges extend as well judges to officialdom occupying other organs of the State? Is this perhaps a hangover from a people's instinctive cynicism towards the institutions and office holders of the colonial state? Does it reflect a mentality that suggests that judicial office is too sacred a calling for occupancy by those with whom we went to school? I don't know. But the lack of trust is frustrating. And it must be confronted, especially by the Bar. It is one thing to hold judges to high standards. It is quite another to cast unfair and malicious imputations on honest hard working judicial officers many of whom accept judicial appointment at considerable personal sacrifice. Judges, like everyone else, occasionally make mistakes. But Bar Associations have a responsibility to denounce such slander especially when its source is the lawyer for the losing litigant. Courts also have a role to play. Obviously, care must be taken to ensure that judicial officers conform to the highest standards of conduct and that ethical infractions among judicial officers are immediately and adequately addressed. Beyond these measures, courts must engage with the public in meaningful ways. Comprehensive communication and public education outreach programs would help to inform the public better about the methods of work of the courts. Court staff must be trained to demonstrate towards the public the highest levels of courtesy and efficiency and Court processes should be user friendly. Courts should periodically survey their stakeholders to discover so as to address promptly those areas in which the latter wish to see improvement. In their dealings with the other branches of government, courts and judges must absolutely insist on treatment which demonstrates appropriate respect for the judiciary as a co-equal branch of government. If the public is to respect

the judiciary it is important that they see ample respect being demonstrated by the other branches of the State.

It's been exactly one half of a century since we in the Commonwealth Caribbean States began the long arduous march to reclaim responsibility for our destiny. Fifty years have gone by since first Jamaica and then Trinidad and Tobago struck out on this path of independence. As we look ahead to the next 50 years, we would do well to focus energies on lifting our sense of ourselves and our self-worth and our belief in our abilities as a people. Norman Girvan refers to this as "…our most precious resource of all—the self-knowledge that instills self-respect, respect for one other, a sense of certainty, of the necessity and capacity to chart our own future. It is a resource that the ordinary American, or European, or Chinese or Indian— simply takes for granted. It is something they begin to acquire from infancy; becoming part of their deeply embedded consciousness of self."

The great Barbadian writer, George Lamming, expressed similar sentiments in *Coming, Coming Home*[6] when he stated:

> "I do not think there has been anything in human history quite like the meeting of Africa, Asia, and Europe in this American archipelago we call the Caribbean. But it is so recent since we assumed responsibility for our own destiny, that the antagonistic weight of the past is felt as an inhibiting menace. And that is the most urgent task and the greatest intellectual challenge: How to control the burden of this history and incorporate it into our collective sense of the future".

[6] George Lamming, Coming, Coming Home: Conversations II. Philipsburg, St. Martin: House of Nehesi Publishers, 1995

These are profound challenges. But I am convinced that we can and will meet them. Our lack of self-belief and self-worth has not hindered us in the region from producing for the international community the very best the planet can offer in the fields of literature, poetry, music and sports.

Similarly, and in spite of the cynics and nay-sayers amongst us, I am confident that the Caribbean judiciary will continue to meet its challenges, demonstrate judicial excellence and close the gap between excellence and our people's recognition and affirmation of it.