



Five Years of CCJ's Contribution to Caribbean Jurisprudence

The Right Honourable Mr Justice Michael
de la Bastide, President of the Caribbean
Court of Justice

The Fifth Anniversary of the inauguration of the Caribbean Court of Justice

Hyatt Regency Hotel
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The Caribbean Court of Justice (CCJ) was inaugurated in Port of Spain, Republic of Trinidad and Tobago on 16 April 2005 and presently has a Bench of seven judges presided over by CCJ President, the Right Honourable Mr Justice Michael de la Bastide. The CCJ has an Original and an Appellate Jurisdiction and is effectively, therefore, two courts in one. In its Original Jurisdiction, it is an international court with exclusive jurisdiction to interpret and apply the rules set out in the Revised Treaty of Chaguaramas (RTC) and to decide disputes arising under it. The RTC established the Caribbean Community (CARICOM) and the CARICOM Single Market and Economy (CSME). In its Appellate Jurisdiction, the CCJ is the final court of appeal for criminal and civil matters for those countries in the Caribbean that alter their national Constitutions to enable the CCJ to perform that role. At present, four states access the Court in its Appellate Jurisdiction, these being Barbados, Belize, Dominica and Guyana.

Remarks

By

**The Right Honourable Mr Justice Michael de la Bastide, President of the Caribbean Court
of Justice,**

on the occasion of

The Fifth Anniversary of the Caribbean Court of Justice

16 April 2010

Good Evening ladies and gentlemen. Welcome to this celebration of the 5th Anniversary of the Inauguration of the Caribbean Court of Justice. On behalf of the Court, I thank you for your attendance. According to the programme I am scheduled to review the decisions which the Caribbean Court of Justice has handed down during the first five years of its existence and show how they have contributed to the development of a Caribbean jurisprudence. If I were to attempt such a review in the depth which it deserves, I would exceed the limits of both your endurance and my own. So what I propose to offer you within what I hope will be an acceptable timeframe, is more of a bird's-eye view of the caselaw we have so far produced, identifying the areas in which we might with some justification claim to have clarified, expanded or modified the preexisting body of law in the Caribbean Community both on the international and on the national planes. It would be invidious for me to attempt any assessment of the value or quality of those contributions. That judgment I leave to others.

I shall deal first with the judgments of the Court in the three cases which have been filed, heard and disposed of in the Court's original jurisdiction, and then with the much larger volume of cases that have been determined by the Court in its appellate jurisdiction.

ORIGINAL JURISDICTION

It is noteworthy that of the three cases that have so far come before the Court in its original jurisdiction, one was launched by a company, Trinidad Cement Limited, against the Caribbean Community¹, another by that same company and a Guyanese subsidiary against the State of Guyana² and the third by an individual human person (Doreen Johnson) against the Caribbean Centre for Development Administration³ (CARICAD), an Institution of CARICOM. In all three cases it was necessary for the applicants to apply for leave to bring the proceedings under Article 222 of the Revised Treaty of Chaguaramas. In the first two cases mentioned above, leave was granted but in the third, it was refused. In the course of its judgments on these applications for leave, the Court had to deal with the multiple issues that may be subsumed in the single question: “Who can sue whom and for what?” In other words the Court had to start pretty well from scratch in determining the limits of its original jurisdiction. It had no difficulty in holding that Article 222 empowered private entities and individuals to call Member States of CARICOM to account before the Court for breaches of their obligations under the Revised Treaty subject to the conditions for leave imposed by that Article being satisfied. The Court also held that a company which was either incorporated or registered in a Member State of CARICOM was for the purposes of Article 222 to be regarded as a person of that State regardless of whether or not the ownership or control of the company was in the hands of non-nationals⁴.

¹ (2009) 74 WIR 319

² (2009) 74 WIR 302

³ (2009) 74 WIR 57

⁴ Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana (2009) 74 WIR 302

A much more difficult question with which the Court was faced, was whether a person (including a company) could obtain leave under Article 222 to sue the State to which he (or it) belonged. On what may be argued is the more natural or literal interpretation of Article 222, that Article does not contemplate a person or a private entity suing his or its own State, as one of the conditions for obtaining leave is that the State to which the applicant for leave belongs, must expressly or impliedly indicate that it has no interest in or intention of bringing an action of its own in respect of the breach of which the applicant wishes to complain. Obviously that requirement does not cater to a situation in which the State to which the applicant belongs is the same State against which the applicant wishes to proceed. I must admit that that was an argument which initially I found difficult to resist. The Court, however, in its judgment rejected that interpretation in favour of a more purposive one which was supported by three lines of argument⁵. Firstly, to prevent a person from suing his own State would tend to frustrate the achievement of the goals of the Revised Treaty and encourage breaches of that Treaty when the only persons affected belonged to the delinquent State. Secondly, there was nothing in the Agreement establishing the CCJ to preclude a private entity that had a substantial interest capable of being affected by a decision of the Court from applying to intervene on the side of the claimant in proceedings before the Court in which his own State was the defendant. It would be illogical and inconsistent if he could join in an action against his own State brought by someone else but could not himself institute such an action. Thirdly, the restrictive interpretation would produce a collision with Article 7 of the Revised Treaty which prohibits discrimination on grounds of nationality only. That discrimination would have been highlighted in the actual case if

⁵ Ibid

Trinidad Cement Limited could as a person of Trinidad and Tobago be unaffected by a disability which prevented its Guyanese subsidiary from suing the State of Guyana.

Supported by these arguments, the Court preferred the teleological approach and treated the requirement that the State to which an applicant for leave belongs should manifest an intention not to sue as meant to prevent a duplication of proceedings and as inapplicable and irrelevant in any case in which the applicant belongs to the State which he wishes to sue. This decision of the Court has been criticised in some quarters, but I must confess that the more I reflect upon our decision, the more unrepentant I am about it.

With regard to who can be sued in the Court's original jurisdiction, the short answer provided by the judgment in **Johnson v CARICAD**⁶ is only Member States or the Caribbean Community. The Court drew a distinction between entities identified in the Revised Treaty as Organs and Bodies of the Community and those identified as Institutions and Associate Institutions of the Community. The Community can be sued for the actions of the former but not for those of the latter. The distinction was based on the greater degree of identification of Organs Bodies with the Community and the fact that they have the power which the Institutions and Associate Institutions lack, to bind and represent the Community with the result that the Community may be held legally accountable for their acts and omissions but not for those of Institutions and Associate Institutions. The Court accordingly held that neither CARICAD itself nor the Community could be sued in the Court for the actions or decisions of CARICAD.

The **Johnson** case also assisted in clarifying the jurisdiction of the Court in another respect, that is, with regard to the type of complaints that are justiciable in the Court. It was held, for instance, that

⁶ (2009) 74 WIR 57

the complaints that were made by Ms. Johnson of wrongful dismissal, breach of contract and breach of the constitution and labour laws of Barbados, were not justiciable in the CCJ. In fact, the only matter of complaint raised by her that the Court could have entertained, was the allegation of discrimination on the ground of nationality only, contrary to Article 7 of the Revised Treaty.

There was another respect in which the Court filled what might be regarded as an interstice in Article 222; this was in relation to the standard of proof which an applicant is required to satisfy in order to establish that the conditions prescribed in (a) and (b) of that Article, have been satisfied. These conditions in substance are that the right which is sought to be enforced is one that was intended to enure directly to the benefit of the applicant and that breach of that right has resulted in prejudice to the applicant. Since these are matters which the claimant will have to prove in order to succeed on his substantive claim, assuming that leave is granted, the Court held that on the application for leave, the applicant is only required to show an arguable case that these requirements have been satisfied (**Trinidad Cement Limited & Anor. v Co-operative Republic of Guyana**⁷).

Some very important rulings have been made by the Court with regard to the remedies which it can grant against a Member State or the Community. This is an area in which the Court has had to walk a very fine line and maintain a proper balance between discharging its responsibility to give effect to the Revised Treaty and the rule of law on the one hand and recognising the constraints inherent in granting redress under international law against defendants who are sovereign States on the other

The Court has rejected submissions that the relief which it can grant against Member States of CARICOM and the CARICOM Community is limited to the making of declarations⁸. It has held that it has power to make mandatory orders of a coercive nature against them, and it did make such

⁷ (2009) 74 WIR 302

⁸ *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 4 (OJ)

an order when it ordered Guyana to re-impose the CET on cement imported from nonCARICOM sources⁹. The Court explained the source of this power when it rejected a submission made in the case against the Caribbean Community that to permit a private party to challenge the decision and process of the Community would “constrain the exercise of state sovereignty by Member States Parties to the Revised Treaty.” In response the Court said:

“By signing and ratifying the Revised Treaty and thereby conferring on this Court ipso facto a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the member states transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law. ... The rule of law brings with it legal certainty and protection of the rights of states and individuals alike, but at the same time of necessity it creates legal accountability. Even if such accountability imposes some constraint upon the exercise of sovereign rights of states, the very acceptance of such a constraint in a treaty is in itself an act of sovereignty.” (Paragraph [32] of the judgment in *Trinidad Cement Limited v The Caribbean Community*¹⁰).

The Court held that the power to make mandatory orders of a coercive nature was essential for the effective performance of the Court’s function and was implicit in the provisions made for enforcement of, and compliance with, judgments and orders of the Court¹¹. See, for example, Article XXVI (a) of the Agreement Establishing the CCJ and Article 215 of the Revised Treaty.

⁹ *Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana* [2009] CCJ 5 (OJ)

¹⁰ (2009) 74 WIR 319

¹¹ *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 4 (OJ)

The Court has also held that it has power to award compensatory damages for breach of Treaty obligation provided four conditions are satisfied. Firstly, the provision breached must have been intended to benefit the claimant. Secondly, the breach must be serious. Thirdly, the damage must be substantial and fourthly, there must be a close causal link between the breach and the damage¹². With regard to exemplary damages, the Court has opined that the award of punitive damages is not a principle accepted by international law¹³.

Enforcement

The failure of the Guyana Government to comply for nearly four months with the mandatory order made for the re-imposition of CET on non-CARICOM cement turned the spotlight on questions related to the enforcement of orders made by the Court in its original jurisdiction. Trinidad Cement Limited and its Guyanese subsidiary sought to compel compliance with the Court's order by bringing contempt proceedings. The relief which they claimed, however, made it unnecessary for the Court to answer definitively some difficult questions concerning the Court's competence to deal with disobedience of its orders as a contempt of court. The orders which the companies sought in their notice of application were with one exception directed against the Attorney-General of Guyana, and since it was not proved that he had any responsibility for Guyana's failure to comply with the Court's order, the Court was able to dismiss the claims against him on that ground alone. There was one claim pleaded against Guyana and that was for a declaration that Guyana was in

¹² Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana [2009] CCI 5 (OJ)

¹³ Ibid

breach of Article 215 of the Revised Treaty which imposes an obligation on Member States among others to comply promptly with judgments of the Court that apply to them. The Court had no difficulty in making that declaration. At the hearing there was an attempt by counsel for the companies to introduce a claim for a declaration that Guyana was in contempt of court. But the Court did not allow that claim to be introduced at such a late stage.

In the course of its judgment¹⁴ on the contempt application, the Court discussed a number of important issues relating to the power of the Court to deal with disobedience of its orders as a contempt of court in the way in which municipal courts in common law countries deal with it.

The Court did not express a final view on this issue but was clearly not persuaded that under international law such a power could be considered to be part of the Court's inherent jurisdiction or that it could be implied from Article XXVI (b) of the Agreement. In its judgment the Court also pointed to a very fundamental principle which the drafters of legislation in Member States seem on occasion to have forgotten. It is that the Court's powers in its original jurisdiction cannot be either expanded or reduced by domestic legislation. A good example of the local draftsman losing sight of this principle is provided by section 11(3) and (4) of the Caribbean Court of Justice Act of Guyana. These sub-sections purport to define the powers of the Court by reference to those exercised by the Supreme Court on the domestic plane. Another example, this time of a lapse by the drafters of the Agreement, is provided by Article XXVI(b) of that document which seems to anticipate that the Court will be given power by domestic legislation to deal with compelling the production of documents and the attendance of witnesses and the punishment of contempt. In the course of its judgment the Court also expressed the hope that a new protocol would state expressly

¹⁴ Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana [2010] CCJ 1 (OJ)

what powers the Court has in relation to contempt of court and that there would be closer coordination between the drafters respectively of regional instruments and domestic legislation.

There is, perhaps understandably, a tendency which we have noticed for regional lawyers to treat as part of international or community law principles and concepts which are part of the common law and which as in the case of civil contempt of court, may be unknown to the civil law. In this connection, we must always be conscious of the fact that in Suriname and Haiti there are two members of CARICOM who belong to the group of civil law countries. Accordingly, principles and doctrines which are part of the common law do not automatically qualify for inclusion in the community law of CARICOM. The Court has also pointed out that from a practical point of view, there is no coercive order which the Court can effectively make against a Member State which it holds in contempt. The options of imprisonment and sequestration are not available. The imposition of a fine would itself call for some effective machinery for enforcement and would probably require the express sanction of all Member States of CARICOM. What is left then is a simple declaration that a State is in contempt of court and one may question what practical advantage that has over a declaration of breach of Article 215. Accordingly, the question whether the CCJ can deal with disobedience of its orders as a civil contempt, may be intellectually stimulating but is probably of little practical consequence.

One feature of the Court's judgment in the Caribbean Community case¹⁵ is what Dr. Berry¹⁶ has described as the Court's "hands-on approach". This is a reference to the guidelines which the Court offered to the Secretary-General of CARICOM with regard to the manner in which applications for suspension of the CET should be made and processed. These guidelines were informed by the

¹⁵ Trinidad Cement Limited v The Caribbean Community [2009] CCJ 4 (OJ)

¹⁶ The First Original Jurisdiction Decisions of the Caribbean Court of Justice: Implications for the Private Sector" Presented at the Inaugural Caribbean Law Institute Centre Conference (CLIC), November 2009 at page 15.

Court's concern that permission to suspend the CET should only be granted when the conditions prescribed by the Treaty for its grant, are satisfied. Basically, these conditions are satisfied if there is not available from a source within CARICOM on a timely basis to the State seeking the suspension, a supply of the commodity which is sufficient to meet its requirements. The Court also drew attention to the requirement of consultations at the national and regional levels imposed by Article 26 of the Revised Treaty and suggested steps which might be taken to monitor and ensure meaningful consultation in relation to establishing both the demand for, and the available supply of, the relevant commodity.

There is also to be found in the judgments of the Court in its original jurisdiction a recognition that the Court has a responsibility to ensure not only that the substantive provisions of the Revised Treaty are adhered to, but also that the decisions of the Organs and Bodies of CARICOM and of the Secretary-General himself, are made in accordance with standards of procedural fairness which are recognised and accepted by all the Member States of CARICOM. The question whether the Court is entitled to examine and strike down such decisions on the ground of irrationality is one which has been discussed but not finally decided so far.

This concludes my bird's eye view of the judgments given in our original jurisdiction. I apologise for the fact that the role I have adopted is that of a chronicler rather than a commentator, but that is a constraint which judicial propriety imposes on me.

APPELLATE JURISDICTION

I turn now to consider some of the judgments delivered in our appellate jurisdiction. There are at present two adherents to this jurisdiction - Barbados and Guyana. Although there are only these

two sources of appeals, the Court in its appellate jurisdiction has delivered judgment in many areas of the law, both civil and criminal. These areas include land law, equity, private international law, contract, public law, interpretation and application of constitutions and statutes and commercial law. The last three volumes of the West Indian Reports (Volumes 72, 73 and 74) report the judgments in a total of 13 cases decided by the CCJ. The best I can do in the circumstances is to give a relatively small sample of judgments which may be considered to have added something of value to the regional jurisprudence.

Undoubtedly the case which has attracted most attention on the appellate side is **The Attorney General v Joseph & Boyce**¹⁷, a death penalty case from Barbados. This case has already been the subject of a good deal of academic comment and I propose to draw attention primarily to what may be regarded as some innovative aspects of the judgments delivered by the Court in that matter.

There were, in fact, six judgments delivered. Mr. Justice Saunders and I delivered a joint judgment, which I suppose can be described as the lead judgment as three other judges (Nelson, Bernard and Hayton, JJCCJ) expressed agreement with it. Because of limitations of time, I shall focus on the lead judgment, although the other two judgments delivered respectively by Pollard and Wit JJCCJ, are very interesting to say the least.

The first issue with which the Court had to deal was whether the exercise of the prerogative of mercy and more particularly the way in which the Barbados Privy Council (“the BPC”) went about advising the Governor General to carry out the death sentences on the respondent was subject to review by the courts. It was well established that where a prerogative power has been embodied in

¹⁷ (2006) 69 WIR 104

a statute, the conversion of the prerogative power to a statutory power removes from its exercise any immunity from judicial review. There was nevertheless authority for the proposition that the prerogative of mercy (like treaty-making) was a special kind of prerogative power which was not subject to scrutiny by the courts. See for example **de Freitas v Benny**¹⁸. The lead judgment, however, firmly rejected this suggestion and held that particularly in a country where the death penalty is mandatory, the power to decide whether in the circumstances of a particular case, the death penalty should be confirmed or commuted, is far too important to be exempt from judicial scrutiny. In this context, as well as in other parts of the lead judgment, one finds a great deal of emphasis being placed on the uniqueness of the death penalty as compared with other forms of punishment. We also had no difficulty in holding that section 77(4) of the Constitution which provides that the question whether the BPC has validly performed any function vested in it by the Constitution, should not be enquired into in any court, was ineffective to oust the supervisory jurisdiction of the court.

The more difficult question was whether the decision of the BPC confirming the death sentences passed on the respondents, without waiting for their petitions to the Inter-American Commission on Human Rights to be dealt with, was a breach of their constitutional rights. In this connection the Court had to consider two decisions of the Judicial Committee of the Privy Council (“the JCPC”) in **Thomas v Baptiste**¹⁹ and **Lewis v Attorney-General of Jamaica**²⁰. In these cases the JCPC held that when a right to petition a foreign tribunal or body such as the Inter-American Commission on Human Rights, was granted to persons sentenced to death by a treaty made by their Government, then those persons were entitled to have the report or decision of the international body considered

¹⁸ (1975) 27 WIR 318

¹⁹ (1999) 54 WIR 387

²⁰ (2000) 57 WIR 275

by the authority which had to make the final decision as to whether the death sentence should be carried out or not. It followed therefore that they were entitled to have that decision delayed until completion of the process before the international body. Failure by the State to respect this entitlement was held to be a breach of due process in **Thomas v Baptiste** and an infringement of the condemned man's right to the protection of the law in **Lewis v Attorney-General**. The reasoning in both cases was that the effect of the Treaty was to add to what constituted due process domestically, the proceedings before the foreign tribunal. While the extent of the obligation of the State was held in **Thomas v Baptiste** to be to await the results of the foreign process for a reasonable time, it was in the later case of **Lewis** treated as open-ended.

There were two important respects in which the lead judgment disagreed with these two decisions. Firstly, we held that the suggestion that an unincorporated treaty could have the effect of expanding what constituted due process within a country, was inconsistent with the dualist system in force in Barbados (and the rest of the Commonwealth Caribbean). We rejected this therefore as the basis for imposing on the State an obligation to delay execution pending the completion of the foreign process. Secondly, we found that it was unacceptable that on the one hand a State should be required to wait indefinitely for the completion of the foreign process over which it had no control and that on the other, undue delay in completing that process was not catered for by an extension of the five-year time limit or by excluding it in computing that period.

In order to fill the gap which was created by our rejection of the reasoning in **Thomas** and **Lewis**, we invoked the doctrine of legitimate expectation. We held that if (as happened in this case) a Government had not merely ratified the treaty giving the right of access to a foreign tribunal, but had indicated by statements made through its authorised representatives and by the practice that it had previously followed, that it intended to perform its obligations under the treaty, the effect was

to create in a person condemned to death a legitimate expectation that he would be given a reasonable time to exercise his right of access to the international (or regional) forum. We held that the law had so developed that it recognised and enforced legitimate expectations of substantive benefits as well as of those procedural benefits. We also held that the State would not be required to wait beyond a reasonable time for completion of the foreign process. We also indicated that we inclined to the view that if the time taken by the foreign tribunal was more than the eighteen months which had been factored into the five year period established by **Pratt and Morgan**²¹, then the excess time ought not to be taken into account for the purpose of computing that five year period.

Another novel and important conclusion to which we came had to do with those violations of the right to the protection of the law as formulated in section 11 of the Barbados Constitution which did not involve contravention of any of the individual sections 12 to 23. The jurisdiction given by section 24 to the court to provide redress for breach of constitutional rights was expressly limited by the terms of that section to breaches of sections 12 to 23. We held that even though they fell outside the ambit of section 24, the court had an inherent or implied right to grant a remedy for all violations of the right to the protection of the law as enunciated in section 11. Thus, the court was entitled to strike down the decision of the BPC to confirm its advice to carry out the death sentences passed on the respondents on the ground that that decision was violative of their right to the protection of the law guaranteed by section 11.

I should add as a footnote that consistently I suppose with our hands-on approach, the lead judgment did make some practical suggestions as to when and how many times the BPC should meet to consider commutation of a death sentence.

²¹ (1993) 43 WIR 340

Not surprisingly a number of early cases were concerned with defining our own jurisdiction as a final court of appeal. For example, we held that we could grant special leave to appeal in cases in which the Court of Appeal had wrongly refused leave to appeal when the applicant was entitled as of right to appeal to the CCJ. We also held on the other hand that in such a case we retained the right to refuse special leave if we thought the appeal lacked merit.

In a case from Barbados, **The Queen v Mitchell Lewis**²², we held that the right to appeal as of right conferred by section 6(c) of the Caribbean Court of Justice Act of Barbados when the case involved an interpretation of the Constitution, extended to the Crown in a criminal case. We did not, however, find it necessary to decide whether the result of such an appeal by the Crown succeeding would be the restoration of the conviction which had been quashed by the Court of Appeal. One thorny area which spawned a number of appeals, was the land law of Guyana. This consists of a mixture of Roman-Dutch law and the English common law including the principles of equity. The statute by which this mix was created was the Civil Law of Guyana Act (originally an Ordinance) which has proved a fertile ground for controversy ever since it came into force in 1917. The sort of problems to which this legislation has given rise, is illustrated by the recent case of **Ramkishun v Fung Kee Fung**²³. In this case the owner of a parcel of land agreed to sell it to a purchaser (P) but died without having conveyed the land to P. The owner's widow and administratrix instead of conveying the land to P, transferred it to the owner's heirs, namely, herself and her five children. The transfer to the heirs was duly registered and the issue was whether the heirs could be compelled by an order of specific performance to transfer the land to P (or rather her estate) on the ground that the heirs were volunteers, not having paid anything or given any other consideration for the land.

²² (2007) 70 WIR 75

²³ [2010] CCJ 2 (AJ)

The Civil Law of Guyana Act contained a provision which specifically made applicable in Guyana, the principles of English law with regard to specific performance in cases involving the sale of land. A court of equity in England would have granted such an order, but it would have been based on the English doctrine that the purchaser of land acquires an equitable interest in it and the Court had earlier held in the case of **Ramdass v Jairam**²⁴ that equitable interests in land are not recognised in Guyana. An examination of the Roman-Dutch authorities, however, disclosed that in that system of law which knows nothing of equitable interests in land, specific performance would on general equitable principles be granted against a volunteer to whom land, the subject of a sale to someone else, had been transferred, even though he was not a party to the contract of sale. Accordingly, the Court held that the grant of specific performance in similar circumstances in Guyana would not involve any infringement of the prohibition against the recognition of equitable interests in land. We were thus able to avoid the absurdity of refusing specific performance in circumstances in which it would have been granted under both of the systems which in combination, constitute the law of immovables in Guyana.

Secured debentures in the English form have been used in Guyana for many years. They create a charge over the assets of a company, including its land and provide a method of enforcing that charge by means of a sale of the assets charged effected by a receiver appointed by the debenture holder. While the validity of the secured debenture appears to have been widely accepted in Guyana, it became necessary to provide a reasoned justification for that acceptance when the validity of the appointment of a receiver and of the sale of land effected by him, was challenged in the case of **LOP Investments Limited v Demerara Bank Limited**²⁵. It was argued in that case

²⁴ (2008) 72 WIR 270

²⁵ [2009] CCJ 10 (AJ)

that since the debenture created or purported to create what was clearly a mortgage or hypothec, and since section 3(d) (ii) of the Civil Law of Guyana Act applied to conventional mortgages and hypothecs the old cumbersome regime (essentially Roman-Dutch in nature) that governed both the making and enforcement of conventional mortgages and hypothecs, a debenture did not have the effect of creating a valid security over land. The old regime for creating a traditional mortgage or hypothec involved the passing and execution of the mortgage or hypothec before the Registrar of Deeds as prescribed by sections 12, 14 and 16 of the Deeds Registry Act. The Court rejected that argument by pointing to the relevant company legislation consisting initially of the Companies (Consolidation) Ordinance 1913 and subsequently the Companies Act, 1991, which exempted debentures from the necessity of compliance with that regime provided the debenture was duly registered after notice had been published in the prescribed manner and at the prescribed time.

There were a number of other respects in which the Court has sought to clarify the land law of Guyana. They include the following rulings:

- (a) that the State can acquire land by prescription and in doing so does not violate any constitutionally guaranteed right of the registered owner²⁶.
- (b) that a person in occupation of land may have the intention to possess required for acquiring a prescriptive title even though he mistakenly believes that he is the true owner and is therefore not aware that his possession is adverse²⁷.

²⁶ Toolsie Persaud Ltd v Andrew James Investments Ltd and Others (2008) 72 WIR 292

²⁷ Ibid

- (c) that where a person who has contracted to sell the land to another instead of transferring the land to that other, conveys it to a third party who has knowledge of the pre-existing contract of sale, both the vendor and the third party are, *prima facie* guilty of “fraud” within the meaning of section 23 of the Deeds Registry Act²⁸.
- (d) that the “indefeasibility” of the title of the registered owner of land under the Deeds Registry Act is not absolute even in the absence of fraud and may have to yield, for instance, to equitable principles²⁹.
- (e) that “fraud” in section 23 of the Deeds Registry Act includes equitable as well as common law fraud, and, therefore, every action challenging the registration of a deed on the ground of “fraud” of whatever kind, must be brought within twelve months of the discovery of the fraud³⁰.

If the CCJ has added anything by way of certainty and clarity to the land law of Guyana, it is because we have been able to build on the solid foundation laid by generations of distinguished judges and jurists in Guyana. We wish respectfully to acknowledge our debt to them.

The Court has had to consider some intriguing questions as to the availability of administrative law remedies in what is essentially a contract law situation and, conversely, of contract law remedies in what is essentially a public law situation. The first of these situations is typified by **Ross v**

²⁸ Ramkishun v Fung Kee Fung [2010] CCJ 2 (AJ)

²⁹ Ibid

³⁰ Ibid

Sinclair³¹, a case involving the sale of the same unit in a condominium owned by a public authority to two persons in succession, and the transfer of the unit to the second purchaser. The question arose as to whether the administrative law doctrine of legitimate expectation could be invoked by the first purchaser in order to annul the transfer to the second purchaser. It was held that there was no sufficient basis for permitting her to do so. The converse situation arose for discussion, if not decision, in the case of **Winton Campbell v Attorney-General of Barbados**³², a case in which the office of a public officer was abolished and the question arose of his entitlement to compensation from the Crown. The Court held that on the facts the plaintiff had been adequately compensated by the accelerated payment of his pension so that no question of damages arose. The judgment, however, discusses how the terms of employment of a public officer that are fixed in some respects by statute or regulation, may be supplemented by terms agreed between him and his employer.

I turn now to consider a few of the criminal law cases which came to us from Barbados.

I would like to think that one of the areas in which we have added something useful to the criminal law of Barbados is in the interpretation and application of new statutes which codify and modernise the law.

One such statute is the Evidence Act. This is modelled on the report of the Australian Law Commission which proposed a new Evidence Act for Australia; the enactment of which was postponed for the purpose of further study, discussion and report. In **R v Grazette**³³ the admissibility of DNA evidence was challenged on the ground that it was not sufficiently proved that the sample of blood containing the DNA which matched that taken from the victim, was in fact

³¹ [2009] CCJ 11 (AJ)

³² [2009] CCJ 1 (AJ)

³³ (2009) 74 WIR 92

taken from the accused. In other words, it was argued that a proper chain of custody had not been established. It was in connection with this issue that the question of the standard of proof arose. The court held that the correct standard of proof applicable was that of proof on a balance of probabilities as that was the standard prescribed by section 135(1) of the Evidence Act for a finding that “the facts necessary for determining (a) a question whether evidence should be admitted or not admitted ... have been proved”. The Court held that the stricter standard of proof beyond reasonable doubt which the prosecution was by section 134(1) required to achieve in proving their case, related to the determination of guilt and not the admissibility of evidence.

In another case of **R v Francis**³⁴ an issue was raised with regard to certain other provisions of the Evidence Act which dealt with the admissibility of a record made by the police of an oral admission by an accused. Section 73(1) of the Act provides that such a record shall not be admissible in evidence unless it has been authenticated by the accused. In **Francis** a police officer refreshed his memory from such a record for the purpose of giving evidence of an oral admission by the accused. The document from which he refreshed his memory was not put into evidence. The Court held that there was nothing in the Evidence Act to prevent the policeman from refreshing his memory from the unauthenticated note he had made. The Court pointed out that the absence of authentication of the document was not one of the matters which section 30(2) of the Act required the trial judge to take into account when deciding whether or not to permit a witness to refresh his memory from a document. The Court also pointed out that if an unauthenticated record of an oral admission was used to refresh memory, it was incumbent on the judge under section 137(1) and (2) of the Act to warn the jury, *inter alia*, that such evidence may be unreliable.

³⁴ (2009) 74 WIR 108

The provisions of another Act, The Penal System Reform Act were considered by the Court in **Gittens v R**³⁵. Those provisions reflect the modern approach to sentencing which involves treating imprisonment as a form of punishment which requires justification on specified grounds as well as an explanation to the accused of why it is being imposed. This was a case in which the Court of Appeal quashed a conviction for murder and replaced it with a conviction for manslaughter. As a result it became necessary for a new sentence to be passed to replace the mandatory death sentence. Since passing sentence (as opposed to reviewing sentences) is not a usual function of the Court of Appeal, it is perhaps understandable that the Court of Appeal in imposing a sentence of imprisonment on the convicted man, neglected to comply with some of the procedural requirements introduced by the Penal System Reform Act. In fact, the CCJ held that the proper course in the circumstances of the case was for the case to be remitted to the trial judge for sentence and that was the order which it made. The reason for this was that there were a number of unresolved issues of fact relevant to sentence which could be determined by the trial judge on the basis of the evidence given at the trial. The judgment of the CCJ contains a fairly comprehensive review of the provisions of the Penal System Reform Act relating to the imposition of a sentence of imprisonment. It also emphasised a much older principle and that is the importance of offering an accused person or his counsel an opportunity to make a plea in mitigation before passing sentence.

I am very conscious that the selection of cases for inclusion in this review has been somewhat random and that there are several other cases that I could justifiably be criticised for having omitted since reference to them would have served to demonstrate better the variety as well as the importance of the work we have been doing. Hopefully, I have at least given you a sufficient sample

³⁵ (2010) CCJ 1 (AJ)

of that work to demonstrate that it has produced results that have contributed to the development of a regional jurisprudence.

I speak on behalf of the Judges of the Court and on my own behalf when I say that we are looking forward with confidence to an increase in the volume of cases coming to us in both jurisdictions of the Court. We are heartened by the recent passage of legislation in Belize as a result of which the Court will on a date to be appointed replace the JCPC as the final court of that country. It also appears from an announcement made by Prime Minister Skerrit of Dominica that that country will before the end of this year also adopt the CCJ as its final court. It remains to be seen whether other CARICOM countries will follow suit. I am optimistic about the future of the Court. My optimism is born of the knowledge I have gained as President of the Court over the last five years of the quality of the people who comprise the Judges of the Court, its management and staff. When as Chairman of the Regional Judicial and Legal Services Commission I had a hand in the selection of the Judges and senior staff of the Court, I had a belief in the competence and commitment of the persons selected. Then, it was a matter of belief. Now, after working closely with them for five years, it is a matter of knowledge. I salute them.

