CHIEF JUSTICE'S SPEECH AT THE OPENING OF THE GRAND COURT 13TH JANUARY 2010

SALUTATIONS

I begin by extending our gratitude to Pastor Von Kanel of the Cayman Islands Baptist Church for having led us in prayer.

I extend a special welcome to and acknowledge the presence of H.E. The Acting Governor, the Hon. Premier, the Hon. Deputy Premier, Minister Adams, Minister Scotland and Ms. Nicole Williams, the Complaints Commissioner.

I thank Acting Justice Roy Jones, our visiting colleague from the Supreme Court of Jamaica, for participating in these proceedings.

Before inviting the Hon. Attorney General to present the motion for the opening of the Court, allow me also to acknowledge the presence of the Commissioner of Police and to wish for you sir, and your family, an enjoyable and rewarding time in the Cayman Islands. We hope to see you at many more openings of the Court. We understand the very demanding nature of your responsibilities, and on behalf of the Judiciary and staff of this Administration, you are assured of our support.

Please also extend our gratitude and appreciation to the men and women of the Royal Cayman Islands Police Service as they continue to undertake their difficult duties and thank them also, as always, for their resplendent turn out on parade.

[Chief Justice then invited the Hon. Attorney General to move for the opening of the Grand Court; to be seconded by Mr. Alasdair Robertson, on behalf of the President of the Law Society Mr. Charles Jennings who is unavoidably away from the Islands; Mr. James Bergstrom, president of the Caymanian Bar Association and Mr. Collin McKie, to report on Law Reporting.]

Responses

To: Mr. McKie:

Thank you for that comprehensive overview of law reporting and other comments on behalf of Mr. Alberga.

I'm glad to see he's here to observe you do so in such eloquent terms.

Please convey our congratulations to Dr. Milner on his OBE award, and accept, on behalf of the Bench our appreciation for the work he and the rest of his staff continue to do in producing our law reports of such high quality. And to both you and Mr. Alberga for your excellent work as the consultant editors of the CILRs.

To: Mr. Bergstrom

Thank you for your insightful comments on legal aid. I'm pleased that the Hon. Premier is here to hear first hand the nature of the concerns of the local Bar.

Our congratulations also on the growing number of the membership of the Caymanian Bar Association. From the perspective of the Judges, it is clear that your leadership has brought new stimulation and life to the CBA.

I must make special mention, as you have, of Articled Clerks. A number of persons are in need of articleship. It is a shame that having invested so much of their time, effort and money to get their academic qualifications, trainee lawyers are unable to get articles. I think we all have a moral obligation to assist them and implore the profession to do all that it can to ensure them the opportunity to complete their training.

To Mr. Robertson

Thank you for presenting Mr. Jennings' report and for the important issues raised in it. I join you in recognizing our new "silks" and extend an invitation to all to attend their call to the Inner Bar on 22nd January 2010. The motions for admission will be presented by Mr. Alberga as the leader of the Bar.

You mention a number of areas in which legislative changes are required for keeping our financial industry competitive. We agree.

Like Jack on the Bean Stalk, we must be both "nimble and quick" if we are going to stay ahead of the competition.

To the Attorney General

Thank you for leading the motion and for your support in the number of issues which you discussed. I will, of course, weigh in on some of the issues involving legislative reform on behalf of the Judiciary, in due course.

For now, I will comment especially on the proposed reforms for more types of "judge alone" trials. I think we should be careful not to invite our citizens to become disengaged from the processes of the administration of justice for, as you also said, there will ultimately be no hope of suppressing crime unless the law enforcement authorities have their support. The Judiciary's view is that such changes should therefore be approached with great care.

CHIEF JUSTICE'S SPEECH

As we enter a new decade, the conversation which I think the Judiciary, the Profession and all involved in law enforcement should seek to have with the Nation this year, is one of encouragement and enlightenment.

Encouragement, because in the face of what may seem to be increasing threats to our security and stability as a society; the solution is still well within our grasp and must ever remain within our grasp.

Enlightenment, because we must all understand the importance of public confidence in the institutions of law enforcement and justice if we are to continue to engender public support in our common quest for the administration of justice.

As observers of recent events would understand, the maintenance of the equilibrium which those of us within the Judiciary and Judicial Administration require to be able to do our work of administering justice, has not been an easy task.

The challenges which we have had to face, both from without and within; could readily have destabilized our mission had we not had the experience, knowledge and, thankfully, the professional support to deal with those challenges and to face them with the assurance that they emanated from quarters which were at best deeply misinformed and misguided or, at worst, maliciously motivated and opportunistically driven.

While we are assured that the recent incursions and internecine disruptions are behind us; the restoration of a full sense of equanimity is a matter that quite naturally, will take time.

And, indeed, this is true not just from the point of view of the persons directly or indirectly affected, but also from the point of view of the client public as well; who, on numerous occasions, and indeed, too numerous to count, have suggested to me and others within the Administration; that there seemed to be deliberate attempts on the part of others to discredit the Administration of Justice within these Islands.

Such misgivings on the part of the public are nothing less than tragic, given the well-established and long-lasting assurance that the People of these

Islands have had in the stability, independence and security of their judiciary and of their other institutions of justice. It is of vital importance that the public are assured that there is no basis for such concerns and it behooves not only the judiciary, but also all the other agencies of State which may be seen as implicated, to so conduct themselves as to avoid such negative impressions in the future.

For its part, the judiciary is, I truly believe, able to offer the necessary reassurances to the public, not just by virtue of things we have said, but by our steadfast attention to the timely and just dispensation of the ever increasing number of cases coming before the Courts. That, I suggest, must surely be the litmus test for perseverance in the face of adversity. And, it is in this regard that we are most grateful for the supportive comments and reports from the Bar – both Public and Private – in reaffirmation of these objectives and results.

Our intention and the promise that we give to the public, is that it will ever be thus.

That, particularly at this crucial time amidst the heightened concerns for security of our Society, is the special message of encouragement that I believe the Judicial Administration must extend to the Nation. For the real challenge is not only the threats themselves to our national security; the challenge is also to ensure that we always muster the proper response to them. And, in our national conversation about that response, there simply is no room in the vocabulary for words such as “fear” or “intimidation”. Nor is there any room for apathy or turning the blind eye.

As has been famously said and often repeated: all it takes for evil to triumph, is for good men and women to remain silent – what Mr. Attorney General refers to as people power.

We therefore urge the citizens of this country to remain actively involved in the process of law enforcement and in the administration of justice; and to give their unyielding support to the lawful authorities.

The public can do this by being steadfast in the fulfilment of their civic duties – be they witnesses, jurors or just ordinary persons who, in the course of their every day lives, may come across information that can assist the police in carrying out their very difficult responsibilities.

With those brief opening remarks, I propose in my report to give an update on the most important and pressing issues facing the Judicial Administration and to conclude, as usual, with a review of case disposals.

At the beginning of a new decade, we are obliged to take stock and to assess what progress or lack of progress has occurred.

LEGAL AID

I begin, perhaps predictably, with the subject of Legal Aid. Legal Aid became, since about the middle of the last decade, a subject of note at each yearly opening of this Court.

While there had been only a single criticism of note about the workings of the system (one which actually found expression in an application for Judicial Review), there were perennial concerns raised in Finance Committee about the increasing costs as this was reflected in the increasing budget submissions made on behalf of the Judicial Administration relating to Legal Aid.

These concerns of the Finance Committee were however – and it is important to remember this – never related to concerns over the equity or fairness of the system or the manner in which legal aid was distributed among the local law firms.

While there was always room for improvement in the administration of legal aid and, in an ideal world desirable that we had the ability to fund every deserving case, there certainly was no sense of general public dissatisfaction about the system. Specifically, no complaint was ever made with the Courts that the people most in need, were being denied legal aid.

Far from it, as the Law Reform Commission eventually reported in 2008 and as others have observed, the Legal Aid System administered through the Courts was found to deliver a high calibre of service and to be good value for money. In that Report, the Commission also advised that such administrative modernisation and improvement as is necessary could readily be achieved by the appointment of a Legal Aid Administrator and by the strengthening of the Rules; and firmly recommended that the system should

remain a Judicare system under the Administration of the Courts as it had been for more than thirty (30) years.

In this context, it should not be forgotten that the current system was put in place by the Assembly at a time when men such as those who founded the Law Society over 40 years ago – Messrs. Warren Conolly, James McDonald, William Watler, Arthur Hunter and others, supported it. The Law Society has continued to support the Judicare System ever since.

Against that background, the recent criticisms of the Judicare System; which have led to the initiative by Government to disband it and replace it with a proposed form of privately run system; is of understandable concern to everyone.

These are concerns which, as the public would expect, I have pressed with Government. The upshot is the consultation committee now studying the system and about which we have heard others speak this morning and through which the Hon. Premier has undertaken to ensure a true consultative process and an objective report to Cabinet.

In the meantime, the Legal Aid system is being funded on an ad hoc basis with the understanding that it will continue, unless and until, after that proper process of consultation, the Government decides to change it by legislation and replace it with something else.

We are, of course, obliged to await the outcome of that process of consultation.

In the meantime however, the public has been invited to make their views known and we encourage them to do so. Otherwise, perhaps by default, the public may be at risk of having its tried and proven system of legal aid replaced by something that fails to meet its basic needs or that may be aimed at doing so, but results only in significantly greater costs. And, indeed, I'm glad to note that the Hon. Premier, as the public's chief representative, is here with us to hear these concerns himself.

In keeping with the spirit of encouragement and enlightenment with which I began, I must emphasise that none of us can afford to lose sight of what is at risk here; a point already underscored by Mr. Bergstrom.

For my part, I am obliged to emphasize that what is at stake is nothing less than the ability of the Courts to ensure that justice is done and done in a timely and efficient manner. To illustrate the concern, permit me to reflect a bit on the recent past.

For a number of years – during the late 1990's and the beginning to the middle of the last decade – we were at serious risk of the system failing to give timely justice because of the escalating number of criminal cases and the chronic shortage of lawyers who were willing to undertake legal aid work, especially on the criminal side. The system had become beset by delay as the few criminal law practitioners, overburdened by too many cases, shuttled from one Court to the other, managing most of the time only to juggle the cases in the air. Few cases were tried in a timely fashion, with the majority adjourned from trial date to trial date, until the time finally came when the lawyers' schedules allowed for a trial in one Court instead of another.

While there is still a shortage of criminal lawyers, things improved as the profession gradually responded to the Court's exhortations to undertake legal aid work.

We have seen the roster of legal aid lawyers grow to 54 and the previously small number of those willing to do criminal work, to an all-time high of between 15 and 20.

In the face of the uncertainties now confronting the system, we are once again in danger of losing this small cadre of lawyers and so of having once more to contemplate the risks of injustice to defendants from lack of representation and delay – concerns which we thought had become a thing of the past.

Already, two of the larger law firms – who between them provided 5 defence lawyers and were responsible for fully a third of the cases – have decided no longer to do legal aid work, at least until the uncertainties have been resolved.

Already also, a number of lawyers who are currently involved in cases, have sought the assurance of the Courts that they might continue to act.

While we give the assurance that their legal aid certificates will be honoured, it is a shame that we can give no assurances about their continued participation in the scheme, despite the history which I just recited and despite the dedicated service which they have given and continue to give.

There is, of course, a lot more that can be said about the subject of legal aid, but given the assurance of Government of a full and transparent process of consultation and the work of the Committee which is already underway; I am obliged not to seem to be pre-empting its work in any way.

I will therefore part from the subject with but the salutary reminder that legal aid for those in need – and most of all for those persons facing serious criminal charges and the full might of the State in the prosecution of their cases – is nothing less than a fundamental human right. No State that prides itself on the Rule of Law and due process in the administration of justice, might seek to deny that right or seek to shift its obligations to provide legal aid to a pro bono system at the expense of the legal profession. While the legal profession has an ethical duty to provide a reasonable amount of pro bono service – as some unsung lawyers do – that may not be expected to substitute for a legally mandated system of legal aid, properly funded by the State to ensure the protection of the fundamental right and the fulfillment of what is a primary obligation of the State.

THE FINANCIAL SERVICES AND OTHER DIVISIONS OF THE GRAND COURT

On the commercial side, the increasing number of cases coming before the Courts continue to create demands of a different kind.

Here, because of the complexities and large stakes involved in commercial cases, there is always legal representation of the highest calibre. But what this means is that the pressures on the Court to resolve the issues arising in these cases and to do so in a timely fashion, is relentless. To a significant degree, this arises from the knowledge that delay can result in serious loses to investors, shareholders, creditors and other stake-holders. Ultimately therefore, also in the loss of reputation of the Islands as a financial services jurisdiction of the first order.

For these reasons, the need for the establishment of a Commercial Court was first raised by the Judiciary several years ago and I am pleased to reflect on the fact that such a Court – now designated the Financial Services Division – with its own set of Rules and with an increased number of judges available to undertake its work – commenced operation on 1st November last year.

This led naturally to the creation of Divisions for the streamlining of the other areas of work as well.

The expectation is that with the increased availability of FSD judges and a soon to be completed Courtroom No. 6 for the FSD; the work of the Grand Court in all its divisions will be significantly enhanced.

As we have already been reminded, two of the newly appointed FSD Judges – Justices Andrew Jones and Angus Foster hail from within the ranks of the local profession and, being home-grown, need no introduction. Nor, for that matter, should Justice Cresswell – the same highly respected and experienced judge who served in this jurisdiction in 2008. Although they are all off Island and so unable to be here, I bid them "welcome" to the Courts, on behalf of all of us present here today.

NEW COURT BUILDING

All of these developments also serve, however, to underscore the need for the new Court Building and I welcome the observations already made in this regard. This project – although in an advanced stage of preparation – with the land dedicated for it and the architectural work virtually completed – has been suspended because of the worldwide financial crisis that impacted the Islands last year.

While a definite start-up date for construction is not yet agreed with Government, it was said in the most recent Throne Speech that the commitment still exists to bring this project to fruition as soon as funding becomes available.

This is a commitment that I can only urge the Government to fulfill and will continue to do so. As Mr. Bergstrom mentioned, the new Building is very badly needed. There is simply no room for the expansion that is required to meet the demands of the massive increases in the case load.

When we contemplate the Building we are in, there can be no meaningful comparison with the case load in 1972 when this building was constructed. Indeed, there are not even available statistics going that far back as there may have appeared no need to keep them. But just a comparison with the situation a decade ago in the Summary Court, suffices to make the point. In 1999 there were 5,020 criminal and traffic cases filed. Last year alone and over each of the past five years, there were more than 10,000 traffic cases and more than 1,000 other criminal cases of the more serious kind.

This kind of massive increase in case volume was bound to translate into the need for more Court rooms, judicial and support staff, for dealing with them. But, to keep matters in perspective, these increasing demands of the Courts may well be entirely proportionate to the increasing demands of the other arms of Government, even though it seems they are the last to be addressed.

LAW REPORTING

Before turning finally to the usual report on the rate of case disposal, in which context I will comment more specifically on the subject of "delay", I need to say a few words on law reporting, adding to what Mr. McKie and Mr. Jennings have so kindly said.

The project for the creation of the on-line version of the CILRs is in an advanced stage. Reported cases from the start of the series (1952-79 volumes) to 2008 are now available on the website and the work is continuing forwards with quarterly publications. The next stage of the project will provide the capability to search by hyperlinks between annotated versions of the Reports and the Cayman Islands statute law.

The Law Reports are an indispensable tool for legal research for Cayman Islands lawyers and an essential source of information for the public. As we have heard, they are now being routinely cited in many other jurisdictions.

Making them available online is, however, a fairly expensive undertaking and with the initial services already paid for by Government; the ongoing costs must be met. A decision must therefore be taken early this year on just how that will be done and after further consultation with the profession, this Administration intends to make a proposal to Government.

I now turn, in more detail, to the subject of disposal of cases.

CASE DISPOSAL

GRAND COURT

In the Grand Court, while 88 cases were disposed of last year, 62 were carried over to this year. Of those 62, 16 date back to 2008 and 1 to 2007. What this means is that a significant number of cases were not resolved within the benchmark period of 12 months which has been maintained in the Grand Court for the past several years.

But for lack of Courtroom space to try them, an obvious solution would be to increase the number of simultaneous indictment trials from 2 to at least 3. A similar approach was effective in reducing the backlog, when we doubled the number from 1 to 2 simultaneous trials several years ago.

Without any immediate prospect of dealing with this problem simply by way of case management, I must once more emphasise the need for more space, if the Courts are going to continue to be able to ensure a timely trial for people charged with criminal offences.

I must also make the point, however, that many cases come up to the Grand Court because defendants elect to bring them up, although they could, quite appropriately, be dealt with in the Summary Court.

This is a matter that can only be addressed by legislative change and about which I have already communicated with the Attorney General.

THE SUMMARY COURT

But simply hiving off more work to the Summary Court will not be a solution. The Summary Court is itself already stressed to the limits under the weight of an ever increasing number of cases; already mentioned above.

Last year, 1,452 criminal cases were disposed of, plus traffic cases, of which 9,633 were resolved. In the Youth Court, 103 cases were disposed of – and this, mind you, by three magistrates.

Notwithstanding such notable results, at year end there were over 1,000 criminal cases pending, 1,300 traffic cases and 45 in the Youth Court. In effect therefore – and as in the Grand Court on the criminal side – fully a year's amount of case load has been carried over at end of year.

Again – as in the Grand Court – but for the lack of space from which to operate more Courts, the obvious solution would be to do just that; but given our present inability to do so, chronic delays in the disposal of Summary Court cases threatens once again to become inevitable. Such a prospect is not acceptable, as the adage "justice delayed is justice denied" looms large and the solution of increasing the capacity must be found.

There is, however, a distinctly encouraging side to the results from the Summary Court last year and it would be remiss of me not to point out that the figures do not tell the whole story.

A significant number of the 1,000 cases apparently carried over, some 140, have actually already been resolved by way of plea or trial, but with the defendants remaining as participants in the Drug Court programme or in one of the several other diversionary programmes being offered by the Department of Community Rehabilitation through the Courts.

Like the Drug Court, the other diversionary programmes are designed to reduce the risk of recidivism and the Drug Court model of supervision by the Court has been adopted and is supported by case conferences.

The diversionary programmes include the Domestic Violence Intervention programme which is a 32-week programme. The Anger Management programme is a shorter, 12-week module, aimed at teaching skills for effective conflict resolution. Through these initiatives spear-headed by the Chief Magistrate, the Court also now offers a Healthy Relationships programme to both the offender and the complaining spouse, if such intervention is indicated. That programme too, is 12 weeks long.

Also worthy of mention now, is the Summary Court's introduction of certain aspects of the Mental Health Courts that operate in other jurisdictions. This is another initiative of the Department of Community Rehabilitation and again utilizes the model of court supervised treatment initiatives to ensure compliance with medications and other forms of treatments. There are some 10 persons currently being supervised by the Court who have mental health

issues and at the same time receiving treatment at the Mental Health Unit. The initiative is designed to support the offenders in the community and reduce their risk of offending; as an alternative to incarceration. Many of them suffer from dual diagnosis of mental illness and drug dependency and in many cases their dependency, particularly on marijuana, makes them refractory to treatment. They are an important subset of offenders who are not eligible for the Drug Court because of their mental health issues and for whom no treatment alternatives currently exists.

These and still further initiatives have been undertaken because the advent of the Drug Court has demonstrated the enhanced effectiveness of treatment programmes which are supervised by the Courts. The Courts' involvement as part of the treatment team, encourages greater compliance and ensures longer term effectiveness of the community based orders, often as preferable options to incarceration, when such community based orders are deemed suitable and are finally put in place.

As I said before, these Court supervised interventions currently account for some 140 persons, including those persons in the Drug Rehabilitation Court Programme.

In addition, there are many persons currently undergoing counselling and other forms of alcohol abuse treatment, as a requirement of the DUI offenders' initiative.

The intention is eventually to promote the passage of legislation to strengthen and formalize these initiatives, as was done with the DRC; once the Courts and our partner agencies are satisfied that they are sufficiently tried and proven as piloted programmes.

In conclusion on this aspect of the report, I remind everyone, as in the past years, that the statistics of the Courts' business are available and will be published along with my report, as well as the other speeches, on the website.

I join those who have observed the passing of Messrs. Frank Banks, Gregory Thompson, Dr. Rattray, to extend my sincere condolences to their families and friends. I also observe, along with Reverend Von Kanel, the tragedy in Haiti and extend condolences to the families of the five people missing at sea.

Finally, it remains only for me, on behalf of my colleagues and the staff of this Administration, to thank you for your expressions of support, for your attendance this morning and to wish for everyone present, your families and colleagues; all the very best for 2010 and the years to come.

In acceding to the Motion, I declare the business of the Grand Court for the year 2010, to be open.

Hon. Anthony Smellie
Chief Justice

January 13, 2010