**ADDRESS OF COLIN McKIE Q.C. ON THE OCCASION OF THE OPENING OF THE GRAND COURT ON 16 JANUARY 2019 GIVEN ON BEHALF OF THE CAYMAN ISLANDS LAW REPORTS**

My Lord Chief Justice, Hon. Judges of the Grand Court, Hon. Justices of Appeal, Hon. Chief Magistrate, Hon. Magistrates, Madam Attorney, Acting DPP, my colleagues at the Bar, our Special and Distinguished Guests, Ladies and Gentlemen

If it may please my Lord.

I am privileged to be able to associate myself with the motions to open the Grand Court for the year 2019 moved by Madam Attorney and seconded by the Treasurer of the Cayman Islands Legal Practitioners Association on behalf of its President, and to provide my own remarks.

Today we mark the opening of the Grand Court for the New Year. We are honoured by the presence of representatives of the legal profession, His Excellency the Governor, the Deputy Governor, Members of Cabinet and the Legislative Assembly, and business and civic leaders. We take this opportunity to reflect on the previous year and look forward to the New Year.

Last year, the Courts of the Cayman Islands delivered some 188 written rulings. By way of comparison, in 2008, ten years ago, only 97 judgments were delivered. I cannot fail to mention my Lord's own magisterial judgment delivered in May 2018 at the conclusion of the trial in AHAB v Saad, already referred to by Madam Attorney, which was the product of almost 180 trial days of trial, and long

periods of time before and after that trial. Despite the complexity of the facts and law, it is a remarkably clear judgment.

I am pleased to be able to report that all the decisions of the Cayman Islands Law Reports up to and including December 2017 have been published. The latest volume is the largest volume ever. The 2017 volumes comprise 1,456 pages of judgments; by comparison, 20 years ago the 1997 volume comprised 461 pages of judgments.

The fact that our law reports are becoming steadily longer is partly a function of the ever increasing number of judgments delivered but also the increased complexity of the matters before the courts, and also the length of the judgments, a topic to which I shall return shortly.

The preparation of written judgments requires an enormous amount of time and effort outside the hours spent sitting in Court. I know that I speak for the whole of the profession when I say that we are particularly grateful to our judges for the provision of these detailed reasons and their work to ensure that the requirements for judicial diligence, including the delivery of judgments, are met. The short time that usually elapses between the conclusion of a hearing and the appearance of the written reasons is commendable.

I wish to express our thanks to those local and overseas judges and practitioners who have willingly given up their valuable time to sit as acting judges of the Grand Court, Coroner's Court and Summary Court during 2018. In the Grand Court they were – Mr Justice Francis Belle, Mr Justice Roger Chapple, Mrs Marlene Carter, Dame Linda Dobbs, Mr Justice Carlisle Greaves, Mr Justice Stephen Hellman, Mrs Justice Marva McDonald-Bishop, HH Philip St John Stevens, Mr Justice Frank Williams, and Mr Michael Wood QC. In the Summary

and Coroner's Courts they comprised - Ms Angelyn Hernandez, Mrs Philippa McFarlane-Ebanks, Mr Adam Roberts and Mrs Eileen Nervik QC.

I also wish to thank the Administrator, Clerk of the Courts, the Deputy Clerks and all the administrative staff at the Court House who behind the scenes work hard and diligently to give the public and attorneys their valuable assistance and service.

Judgments are the means by which judges:

- explain decision to the parties;
- communicate the reasons for the decision to the public (including lawyers, legislators, academics, and the press - foreign and domestic); and
- provide reasons for an appeal court to consider, if there is an appeal.

A reasoned judgment enables the parties to the proceedings to understand why the court reached the decision that it did. This is especially important for the unsuccessful party. A reasoned judgment also enables reasonably intelligent members of the public to understand what the case was about, what decision was reached, and why that decision was reached. It thus informs them about what the law is and how the law is being administered by the courts. This is a necessary part of ensuring that the public has confidence in, and understanding of, the courts and the administration of justice, and thus ensure continuing public confidence in the rule of law.

I should add that considered reasons are often not necessary. Many hearings do not require detailed analysis of the facts or law. So the first question for the judge to address is whether or not it is appropriate, have regard to limited

resources, and what is proportionate in the circumstances, whether a reasoned judgment is required at all. [1]

Where the judge determines written reasons are appropriate, a judge should seek to provide an adequate and sufficient explanation.

What is adequate and sufficient depends upon the nature of the matters for resolution. The greater the complexity of the issues to be resolved, the longer the analysis is likely to be. However, one should not confuse complexity of issues to be resolved with the volume of materials or length of hearing: a great deal of material may be canvassed before the court but the actual issue for determination may be relatively narrow.

Whatever the length of the judgment, a judge should seek:

- To state the reasoning (of fact and law) in an intelligible and logical fashion;
- To be clear, precise and specific in the reasoning and the findings;
- To avoid unnecessary verbosity; and
- To avoid unnecessary brevity

Clarity of reasoning

The aim is to persuade by clarity of reasoning; a failure to do so risks - perpetuation of disputes; may leave the law uncertain; and, if too prevalent, tends to undermine the public's confidence in the rule of law.

Sir Robert Megarry VC wrote exemplary clear judgments. It has been said that his judgments were, "*'upheld', 'reversed', 'distinguished', 'approved',*

[1] Even if the court decides that no reasons are necessary, but one of the parties requests reasons (typically for the purpose of considering options for appeal) then the court will readily provide its reasons.

*'considered', 'overruled', 'disapproved', even 'doubted', but that he had 'never, but never, had the indignity of being 'explained'".*

Lord Denning was also remarkable for the clarity and brevity of his reasoning. Few judges can, or should, emulate him. But, he shows how it can be done. The well-known "*Bluebell time in Kent*" judgment[2] concerns the recovery of damages in negligence for nervous shock. He gave the leading judgment. The opening 300 words succinctly identify the basic facts, the claim, and the issue to be resolved by the court. With a mere 700 words more he analysed the issue and gave his conclusion.[3] There are, unfortunately, other examples of judgments that are anything but a model of clarity, brevity or simplicity. I shall spare judicial blushes by not naming names[4].

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[2] Hinz v. Berry [1970] 2 QB 40.

[3] "*It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child."*

"*On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr. Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr. Hinz and the children. Mr. Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs. Hinz, hearing the crash, turned round and saw this disaster. She ran across the road and did all she could. Her husband was beyond recall. But the children recovered."*

"*An action has been brought on her behalf and on behalf of the children for damages against Mr. Berry, the defendant. The injuries to the children have been settled by various sums being paid. The pecuniary loss to Mrs. Hinz by reason of the loss of her husband has been found by the judge to be some £15,000; but there remains the question of the damages payable to her for her nervous shock - the shock which she suffered by seeing her husband lying in the road dying, and the children strewn about.*"

The other two concurring judgments were similarly succinct and to the point.

[4] The Guardian, 20 April 2017, referred to an egregious example from India. On an appeal to the Supreme Court it found that the judgment below was so "*incomprehensible*" that it had to set it aside and order a re-trial. It quoted:

Precision

As to precision, this goes hand-in-glove with clarity and certainty. Precisely framed judgments inform the parties and the public of the points in dispute and what the court actually decided or did not decide.

Length of judgments

Excessive brevity is rarely a problem nowadays.

However, the same cannot be said about overly long judgments. Ideally, a judgment should be no longer, and no shorter, than is required.

Unfortunately, there is a noticeable trend of increasing length in judgments. That trend has several causes. Parties and lawyers, have access to, and too often refer to evidence, pleadings, arguments, and case law, to a degree not warranted by the issue which the court must determine. Online research is much easier and it tempts counsel to cite too many authorities; the ease of word-processing enables counsel and judges to 'cut-and-paste' rather than extract and digest. Some judges are prone to writing judgments in anticipation that they might be subject to harsh scrutiny on appeal, despite, as Sir John Chadwick used to remind us, "*The Court of Appeal proceeds on the basis that the court below was correct, unless we are persuaded otherwise*."[5]

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"[The]...*tenant in the demised premises stands aggrieved by the pronouncement made by the learned Executing Court upon his objections constituted therebefore ... wherewithin the apposite unfoldments qua his resistance to the execution of the decree stood discountenanced by the learned Executing Court*."

*"However, the learned counsel ... cannot derive the fullest succour from the aforesaid acquiesence ... given its sinew suffering partial dissipation from an imminent display occurring in the impunged pronouncement hereat wherewithin unravelments are held qua the rendition recorded by the learned Rent Controller*..."

[5] And some appeal courts may be too quick to admonish lower courts for having failed to realise that an incidental issue which was dealt with briefly would in fact be the central point in an appeal.

Finally, there is the pressure of time. A greater volume of materials before the court tends to increase preparation time prior to the hearing, increases the length of hearings, and increases the length of time it takes a judge to deliver the judgment. Judicial resources are finite, and those resources have to be allocated fairly and proportionately to all the matters before the courts. Judges may exercise some control over the volume of the materials and the length of hearings, but that control must be applied so as not to deprive a litigant with a proper opportunity to advance his case.

It has often been said that a shorter document takes longer to write than a longer one[6]. That is also true of judgments. And therefore proper time must be allocated to judges to prepare for hearings and to write judgments. Otherwise judgments tend to be longer than needed. Judgments that are excessively long are less likely to be persuasive of the matters they decide, either to the losing party, to an appeal court, or to the public at large. From a law-reporter's perspective, it is more time consuming to produce the law reports. That delays production of law reports. It also increases costs, which end up being passed on to the profession and, indirectly, to their clients.

Having spent the time making remarks about the importance of brevity, I ought therefore to take my own advice, and draw this Address to a close.

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

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[6] Apparently coined as long ago as 1657 by Blaise Pascal.

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

**Colin McKie Q.C.** 16 January 2019