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The Caribbean Court of Justice: A New Judicial Experience

DÉSIRÉE P. BERNARD*

* The Honorable Madam Justice Desiree Bernard is the first female judge of the Caribbean Court of Justice. She received the honor of the eighth CARICOM Triennial Award for Women. A lawyer by profession, she began her career in 1963 when she attained a Bachelor of Laws Degree from the University of London. By 1964 she was a qualified Solicitor and practiced in the Guyana Law Courts until 1980, when she was appointed the first female judge in the High Court of the Supreme Court of Guyana, where she had practiced since 1965.

In 1992, she was appointed the first female Justice of Appeal in the Court of Appeal of the Supreme Court of Guyana; in 1996, the first female Chief Justice; in 2001, the first female Chancellor of the Judiciary of Guyana and the Caribbean and in 2005, the first female Judge of the Caribbean Court of Justice.

She has served as a member of the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), the International Association of Women Judges and as Vice President of the International Federation of Women Lawyers. Regionally - a member of the Caribbean Council of Legal Education, President of the Organization of the Commonwealth Caribbean Bar Associations.

She has been at the forefront in the formation of the Caribbean Women's Association, the Georgetown Toastmistress Club, the Conference on the Affairs and Status of Women in Guyana (CASWIG), Guyana Consumer's Association and the Guyana Association of Women Lawyers. Her nine awards, include the Medal of Service from the Caribbean Women's Association and the Order of Roraima of Guyana, the second highest national award of Guyana and now, the 2005 CARICOM Triennial Award for Women.

Background

The inauguration of the Caribbean Court of Justice in April 2005 represented the culmination of aspirations in earlier years to establish a court of last resort for the Caribbean Region to replace the Judicial Committee of the Privy Council (The Privy Council) which was and still is for most Commonwealth Caribbean jurisdictions, the final court. These aspirations were endorsed by the legal profession through the Organisation of Commonwealth Caribbean Bar Associations (OCCBA) over thirty years ago, although the idea of such a court was not an original one having been contemplated early in the last century. The court was envisaged as a Caribbean Court of Appeal with an appellate jurisdiction hearing appeals from domestic appellate courts and an original jurisdiction to interpret regional treaties.

The year 1973 saw the emergence and adoption of the Treaty Establishing the Caribbean Community and Common Market, familiarly known as the Treaty of Chaguaramas.¹ A report from the West Indian Commission established in 1989 by the Caribbean Community (CARICOM) Heads of Government and comprising eminent persons of the Region recommended widening of the Caribbean Community and developing a Single Market and Economy (CSME) as well as the establishment of a Caribbean Supreme Court with an original jurisdiction to adjudicate disputes among Member States pertaining to the economic integration together with an appellate jurisdiction hearing appeals from domestic appellate courts. The acceptance of these recommendations led to the signing of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (The Treaty)², and provision for the establishment of a Caribbean Court of Justice (The Court). The Agreement Establishing the Court (The Agreement) preceded the Treaty³ and provided for both an original and an appellate jurisdiction⁴.

¹ Signed at Chaguaramas, Trinidad and Tobago, on 4 July, 1973.

² Signed at Nassau, The Bahamas, on 5 July, 2001.

³ Came into force on 14 February, 2001.

⁴ Article III of the Agreement.

Judicial Systems of CARICOM Member States

One of the legacies of British colonialism bequeathed to its former colonies is the judicial system based in its entirety in most instances on the English system with the same hierarchy of courts and their nomenclature. The Judicial Committee of the Privy Council in England was and still remains for all, except two⁵ of those former British Caribbean colonies, the court of final resort for appeals from domestic appellate courts. Although the common law of England became the common law of these former colonies and essentially remains so, there are some exceptions, for example, the Roman-Dutch system of land ownership in Guyana, and the French Civil Code of St. Lucia, which has resulted in a “legal mix” of common law and civil law.

Suriname’s membership of CARICOM with its civil law system exemplifies the diversity of the Community which over time may, at some future date include Cuba; prophetically the complexities which may arise will test the capabilities of the Court to deal with such a diversity of legal systems. Suriname’s Court of Justice at present remains its court of last resort.

Agreement Establishing the Court

The existence of a regional court, specifically with an appellate jurisdiction, is nothing new for the former British colonies of the Caribbean Region⁶. The achievement of independent status by the colonies led to the establishment of their own appellate courts, but with retention of the Privy Council as the final court of appeal. The Agreement Establishing the Court which preceded the signing of the Treaty represented the conviction of the Contracting Parties that the Court would have “*a determinative role in the further development of Caribbean jurisprudence through the judicial process*” and would be entrenched in their national constitutions; moreover,

⁵ Barbados and Guyana.

⁶ See the Federal Supreme Court of 1950’s, the British Caribbean Court of Appeal of 1960’s and the present Eastern Caribbean Supreme Court with both original and appellate jurisdictions comprising Anguilla, Antigua & Barbuda, British Virgin Islands, Dominica, Grenada, Montserrat, St. Kitts & Nevis, St Lucia, St. Vincent and the Grenadines.

they were well aware that “*the establishment of the Court was a further step in the deepening of the regional integration process.*”⁷

Appellate Jurisdiction

In this jurisdiction the Court operates as a court of last resort for those Member States accepting it as such, and being structurally placed at the end of the litigation process. The conceptualisers of the Court sought to fulfil two dreams for the Caribbean Region by uniting them in one judicial system – the long-sought need for a final appellate court to replace the Privy Council, a respected tribunal of colonial memory, and the establishment of an international court to ensure effective implementation of the Treaty.

In the exercise of its appellate jurisdiction the Court is a superior court of record with such jurisdiction and powers as are conferred on it by the Agreement.⁸ Appeals lie to the Court as of right from final decisions of the courts of appeal of the Contracting Parties in the following cases:

- (a) in civil proceedings where the matter in dispute is of the value of not less than \$25,000E.C. or where the appeal involves property or a right of the said value;
- (b) in proceedings for dissolution or nullity of marriage;
- (c) in any civil or other proceedings which involve a question as to the interpretation of the constitution of the Contracting Party;
- (d) in proceedings relating to redress for contravention of the provisions of the constitution of the Contracting Party;
- (e) in proceedings relating to the exercise of a jurisdiction conferred expressly on a superior court under the constitution of the Contracting Party;
- (f) such other cases as may be prescribed by any law of the Contracting Party.

Subject to the above, an appeal also lies to the Court with special leave of the Court in any civil or criminal matter. Apart from appeals to the

⁷ Preamble to the Agreement.

⁸ Article XXV.

Court as of right an appeal can be brought with leave from the court of appeal of a Contracting Party in final decisions in any civil proceedings where, in the opinion of the court of appeal, the question involved in the appeal is one of great general or public importance or otherwise ought to be submitted to the Court; also, in other cases as may be prescribed by any law of the Contracting Party.

What is more than passing strange in relation to the appellate jurisdiction is that although the Agreement was signed by nearly all of the Member States of the Community, only two of those States (Barbados and Guyana) have enacted the required domestic legislation to accord access to the Court by their nationals. Since its inauguration these two States have been utilising the Court to its fullest. The inhibiting factor in relation to the other States is the requirement in some constitutions for a referendum to de-link from the English Privy Council and hesitancy in having this done or the need for involvement of opposition political parties in enacting relevant legislation, but which in some instances is not forthcoming at present. One can only hope that over time these hurdles will be surmounted, and all of the Member States will make the appellate jurisdiction accessible to their nationals.

The following sentiments expressed by Professor Francis Jacobs in the **Journal of International Economic Law** published on 14 February, 2008⁹ are instructive:

“A supreme court of high calibre has been established in the Caribbean which would be able to take account of local values and develop a modern Caribbean jurisprudence in an international context. It is regrettable that political difficulties have obstructed acceptance of its jurisdiction and that the outdated jurisdiction of the Judicial Committee of the Privy Council survives, in often bizarre detail, for many of those States. All possible steps should be taken to encourage the Caribbean States to accept the jurisdiction of their own supreme court.”

⁹ Extracted from Professor Jacobs' book, "The Sovereignty of Law: the European Way (Cambridge; Cambridge University Press, 2007. Professor Jacobs is Professor of Law, King's College, London, and former Advocate General of the European Court of Justice.

Original Jurisdiction

The provisions of the Agreement governing the original jurisdiction of the Court are replicated in the Treaty in almost identical terms, exemplifying a synergetic relationship. Because of this, reference will be made to similar articles in both instruments when considering the relevant provisions.

My learned colleague and friend, Hon. Mr. Justice Duke Pollard, in his book, *THE CARIBBEAN COURT OF JUSTICE: CLOSING THE CIRCLE OF INDEPENDENCE*, posited that “the Court is perceived as the institutional centrepiece of the CSME which aspires to the creation of a single economic space superimposed on autonomous political jurisdictions in order to approximate in fact, if not in law, a single economy from the economies of many Member States.”

In its original jurisdiction the Agreement, subject to the Treaty, confers on the Court exclusive jurisdiction to hear and deliver judgment on:

- (a) disputes between Contracting Parties;
- (b) disputes between any Contracting Parties and the Community;
- (c) referrals from national courts or tribunals of Contracting Parties;
- (d) applications by nationals concerning the interpretation and application of the Treaty.¹⁰

The Court’s exclusive jurisdiction also embraces delivery of advisory opinions concerning the interpretation and application of the Treaty given only at the request of Member States parties to a dispute or the Community.¹¹

Both instruments recognise the sovereignty of the dualist Member States of the Community, and a natural consequence of this is that each Member State could interpret and apply the Treaty as it sees fit. Of necessity, this would lead to varied interpretations and differences of opinion. With the establishment of the Court certainty and uniformity of interpretation of the terms of the Treaty are guaranteed, thereby avoiding fragmentation if left to individual domestic courts. It is beyond dispute that certainty of an important international instrument, such as the Treaty, is a *sine qua non* in attracting

¹⁰ Article XII of the Agreement, Article 211 of the Treaty.

¹¹ Article XIII of the Agreement, Article 212 of the Treaty.

investment to the Region, and it follows that uncertainty and unpredictability of judicial decisions on economic issues will become a disincentive to potential investors.

As a consequence when a national court or tribunal is seised of an issue involving interpretation or application of the Treaty, and which is necessary to enable it to deliver judgment, that court or tribunal must refer the question of such interpretation or application to the Court for determination;¹² this is the sole prerogative of the Court. Similar provisions are to be found in the instruments of the European Union, and were intended as those in our Treaty, to secure uniformity. It is expected that this provision will have a significant impact on the work of the Court with the referral procedure being utilised by domestic courts when faced with matters requiring interpretation of the Treaty.

It would be a futile exercise and totally meaningless to the parties involved if Member States, the organs and bodies of the Community as well as the Community itself were to ignore or refuse to comply with judgments of the Court, and for this reason both instruments provide that the Court's judgments must be complied with promptly by Member States and entities of the Community as well as any persons to whom a judgment applies.¹³

The original jurisdiction of the Court is recognised as being compulsory, *ipso facto*, and without special agreement¹⁴, an important provision if the Court is to execute its functions effectively.

Being essential for the successful operation of the CSME whose birth reflected a “*commitment to deepen regional economic integration in order to achieve sustained economic development based on international competitiveness*”, with objectives similar to the European Union, the Court as an international court is empowered under both instruments to apply such rules of international law as may be applicable, and may not decline to make a finding on the ground of obscurity of the law. However, these provisions will not prejudice the power of the Court to decide a dispute *ex aequo et bono* if the parties so agree.¹⁵

¹² Article XIV of the Agreement, Article 214 of the Treaty.

¹³ Article XV of the Agreement, Article 215 of the Treaty.

¹⁴ Article XVI of the Agreement, Article 216 of the Treaty.

¹⁵ Article XVII of the Agreement; Article 217 of the Treaty.

Much reliance will be placed and assistance gleaned from international tribunals such as the European Court of Justice and the Court of Justice of the Common Market for Eastern and Southern Africa which are courts established with a similar function to interpret and apply the relevant instruments.

After proceedings are instituted before the Court either between Member States or between a national and another Member State, a third party may wish to intervene to protect an interest. In this regard the Agreement permits intervention if the intended intervener, whether Member State, the Community or a person, establishes that it has a substantial interest of a legal nature which may be affected by a decision of the Court.¹⁶

If circumstances arise after a judgment of the Court has been handed down and which may adversely affect the parties, a request for the judgment to be revised can be made. Such a request may be considered by the Court if an application is made within six months of the discovery of a fact which was not known at the date of the judgment and which may have been a decisive factor provided such an application is made not more than five years from the date of judgment.¹⁷

Queries have often been raised about the Court's powers in enforcing its judgments. Enforcement of judgments of domestic courts is usually provided for by legislation of the particular state. In like manner Contracting Parties (Member States) agree to take all necessary steps, including the enactment of legislation, to ensure that all authorities in the State act in aid of the Court, and that any judgment or order of the Court be enforced by all courts and authorities of a Contracting Party in the same way as any judgment or order of a superior domestic court of that State.¹⁸ This provision applies to both jurisdictions of the Court as does Article III of the Agreement which provides that the decisions of the Court shall be final.

The perception of the average Caribbean citizen is that the Treaty came into being mainly for the regulation of trade and maintaining a sound economic environment for Member States, and only incidentally for the benefit of individuals. Nothing could be further from the truth. There are several provisions in the Treaty which have a direct bearing on the every day life of persons in the Caribbean Region, for example, the movement of skilled

¹⁶ Article XVIII; there is no similar provision in the Treaty.

¹⁷ Article XX of the Agreement, Article 219 of the Treaty.

¹⁸ Article XXVI of the Agreement.

persons and of nationals without harassment, as well as the elimination of the requirement for passports, to name a few¹⁹. This is an important aspect of the Court's jurisdiction and provision is made for hearing and determining disputes involving persons or legal entities (such as companies) of a Contracting Party concerning interpretation or application of the Treaty.²⁰ It can only be invoked with special leave of the Court if it determines that the Treaty intended that a right or benefit conferred on a Contracting Party was to enure to the benefit of the persons or entities directly. In its application to the Court the persons or entities have to establish that they have been prejudiced in respect of the enjoyment of the right or benefit, and that the Contracting Party who is entitled to espouse the claim has omitted or declined to do so or has expressly agreed to the persons or entities doing so in its stead. The Court ultimately has to find that the interest of justice requires that the persons or entities be allowed to espouse the claim. The Court in its first case in the original jurisdiction is at present in the process of determining issues in relation to this provision of the Treaty in proceedings between two companies and a Member State.

In any court binding judicial precedent is desirable (the doctrine of *stare decisis*) if stability and predictability are to be maintained particularly in a court entrusted with the jurisdiction of interpretation of a treaty essential for the successful operation of a single market and economy aimed at attracting investment. Both the Agreement and the Treaty provide that judgments of the Court shall be legally binding precedents for parties in proceedings before it²¹ taking into account revision of a judgment. It is acceptable that judgments of the Court should be legally binding precedents for parties involved in proceedings before the Court; what is yet to be decided by the Court is whether it will consider itself bound by its own decisions. The Privy Council has never regarded itself bound by its own decisions which sometimes have led to inconsistency and unpredictability particularly when the liberty of persons is involved. It is too early to forecast what course the Court will take having been in existence for a relatively short period of time with appeals in its appellate jurisdiction coming from only two Member States, and only now beginning to hear matters in its original jurisdiction.

One of the concerns of the Community reflected in the Treaty was that "*the benefits expected from the establishment of the CSME were not*

¹⁹ Article 46.

²⁰ Article XXIV of the Agreement, Article 222 of the Treaty.

²¹ Article XXII of the Agreement; Article 221 of the Treaty.

frustrated by anti-competitive business conduct".²² To avoid and monitor such practices provision is made for the establishment of a regional competition commission to be appointed by the Regional Judicial and Legal Services Commission²³ (functions of which will be discussed later). In carrying out its duties the Competition Commission may seek the Court's intervention when necessary, and any party aggrieved by a determination of the Commission may apply to the Court for a review of that determination.²⁴

Anti-competitive business conduct may be prohibited by a Member State, and examples of such conduct are enumerated in the Treaty,²⁵ such as the direct or indirect fixing of purchase or selling prices or the artificial dividing up of markets or restriction of supply sources. Of course, the list is not exhaustive, and where a Member State is uncertain whether a particular business conduct is prohibited under the Treaty, the State may apply to the Commission for a ruling on the matter. The Court's jurisdiction may also be invoked by the Commission to review its own decision if it is found or felt that such a decision was induced by deceit or improper means.²⁶

Notwithstanding the compulsory and exclusive jurisdiction accorded to the Court to hear and determine disputes between Member States concerning the interpretation and application of the Treaty, elaborate provisions are stipulated in the Treaty for the settlement of disputes without recourse to the Court²⁷, for example, where allegations arise that an actual or proposed measure of a Member State is or would be inconsistent with the objectives of the Community or there are allegations that the purpose or object of the Treaty is being frustrated or prejudiced. A perusal of the relevant articles of the Treaty suggests that every effort should be made and all procedures exhausted in settling disputes between Member States and between organs and bodies of the Community before the jurisdiction of the Court is invoked in contentious proceedings. Alternative disputes settlements are to be encouraged by Member States to the maximum extent possible in relation to private commercial disputes among Community nationals as well as among Community nationals and nationals of third States.²⁸ The Agreement also enjoins Contracting Parties to do the same.²⁹ This being so,

²² Preamble to the Treaty.

²³ Article 172.

²⁴ Article 175.

²⁵ Article 171.

²⁶ Article 180.

²⁷ Articles 187 – 210.

²⁸ Article 223.

²⁹ Article XXIII.

proceedings instituted by private persons and entities may be the vehicle to drive the Court forward in making an impact as “*the institutional centrepiece of the CSME.*”

Judgments of the Court

Since its inauguration in April 2005, and until very recently the Court’s judgments have been handed down exclusively in its appellate jurisdiction in mainly civil matters with a few criminal and family law appeals. To date over forty (40) matters have been filed in the Court, with only two in the original jurisdiction. Within the appellate jurisdiction several applications for special leave to appeal as a poor person were granted. These applications vindicate the establishment of the Court as providing access to justice to those who cannot afford the expense of legal representation to the Privy Council located thousands of miles away from the Region; similarly the frequent use of audio-conferencing which further reduces travelling costs to litigants. Following are a few of the Court’s judgments.

The landmark judgment of the Court in *Attorney General of Barbados v Joseph & Boyce* defined the Court’s jurisprudence on the effect of an unincorporated human rights treaty ratified by the Executive on the international plane and sought to be enforced on the domestic plane in death penalty cases.³⁰ Several other issues fell to be determined with judgments written by all of the judges of the Court. This case was the first major test of the Court on the deeply-sensitive issue of the death penalty particularly as it was perceived within the Caribbean Region and predicted to be a “hanging court,” based on the false assumption that the judges would comply with the wishes of the political directorate who in some instances had been dissatisfied with judgments of the Privy Council allowing appeals of persons convicted of murder.

Following is a short summary of the facts of the case. Two men were convicted of the offence of murder by the courts in Barbados, and exhausted all of their remedies up to the Privy Council. Death warrants were read to them by decision of the local Privy Council (a committee on the prerogative of mercy) while awaiting hearing of their petitions to the Inter American Commission on Human Rights based on Barbados’ ratification of the Inter American Convention on Human Rights which had not been incorporated into the domestic law by legislation. The condemned men sought unsuccessfully to postpone their executions by instituting proceedings in the High Court, and

³⁰ (2006) 69 WIR 106.

later appealed to the local Court of Appeal which commuted their sentences to life imprisonment. The Attorney General appealed to the Caribbean Court of Justice.

As mentioned earlier several other issues arose which time does not permit to mention, but with regard to the effect of unincorporated international treaties on a condemned person's right to the protection of the law, the Court held that the respondents had a legitimate expectation that they would be allowed a reasonable time within which to complete the process initiated by petitioning the Inter American Commission on Human Rights, and for the State to attempt to execute them before that process was completed was a denial of their right to the protection of the law. Legitimate expectation, simpliciter, was expressed to be procedural and vulnerable to frustration by a change of official conduct according to one of the judges who posited that international acts by the Executive must be accompanied by "treaty-compliant" conduct on the municipal plane in dualist jurisdictions in order to engender such an expectation to which municipal courts may accord protection. The conduct in this case regarded as being compliant with the treaty was the Barbados Government's stated position that it was its practice to permit condemned persons an opportunity to have petitions to international human rights bodies processed before execution of their sentences in keeping with its commitment to honour its international obligations. This was the main factor giving rise to a legitimate expectation, and one queries whether, absent such conduct, an unincorporated treaty ratified by the Executive on the international plane can provide an effective remedy for a national on the domestic plane.

What makes this issue in the judgment interesting is the judgment of one of the judges from a civil law jurisdiction with its monist approach to the incorporation of international treaties into domestic law. He opined that the strongest concept underlying the doctrine of unenforceability of ratified treaties was the separation of powers, and expressed the view that although this may be sufficient reason for the existence of the doctrine in the unwritten English Constitution it was unsuitable for the Commonwealth Caribbean with written Constitutions. An in-depth analysis of the judgments is recommended to appreciate the advantages of diversity of opinion in the Court's quest to create a Caribbean jurisprudence.

Another appeal of interest is the case of *The Queen v Mitchell Ken O'Neal Lewis*³¹ concerned primarily with issues of procedure under Section

³¹ (2007) 79 WIR, 75.

6(c) of the Caribbean Court of Justice Act of Barbados. The Section provides for an appeal to lie to the Court from decisions of the court of appeal as of right in any civil or criminal proceedings which involve a question as to the interpretation of the Constitution. The preliminary issue which fell to be determined was whether the Crown can appeal as of right to the Court by virtue of Section 6(c). This arose in circumstances where an accused was convicted of murder and sentenced to death. On appeal to the court of appeal the conviction was quashed and a new trial ordered on the ground that prejudicial material had been introduced in the presence of the jury and this rendered the trial unfair. The Crown through the Director of Public Prosecutions submitted that the court of appeal's conclusion was based on an erroneous interpretation of the "fair hearing" provision in the Constitution of Barbados which is the usual provision found in all constitutions based on the Westminster model – a fair hearing within a reasonable time by an independent and impartial court, and for this reason the Crown had an appeal as of right to the Court.

All of the judges of the Court agreed that the right of appeal created by Section 6(c) of the Caribbean Court of Justice Act of Barbados is available to the Crown provided that the case involves a question concerning the interpretation of the Constitution, and the question whether in this case the accused received a fair hearing was a question not of interpretation of the relevant section of the Constitution, but of the application of it to the facts, and accordingly the Crown was not entitled in this case to appeal as of right to the Court. The appeal was dismissed, but the order for a retrial was left intact.

One of the judges delivered a judgment on the susceptibility of the term "fair hearing" to judicial interpretation, which has the effect of enhancing the rich pool of judicial opinions available from the Court.

The whole concept of adverse possession of immovable property was discussed in the recent Guyanese appeal of *Toolsie Persaud Ltd v Andrew James Investments Ltd and Others*³² which concerned certain lands originally owned by two of the respondents, but compulsorily acquired by the Government of Guyana and later sold to the appellant who went into possession under the agreement of sale. Several years later upon a constitutional motion filed in court by the first respondent the compulsory acquisition orders were declared null and void. The appellant company while still in possession of the lands later applied to the court for prescriptive title. Three issues arose for consideration – (a) did the State have the necessary

³² CCJ Appeal No. CV 1 of 2007.

intention for its possession to be adverse when that possession was based on the belief that it was the owner under a compulsory acquisition order subsequently declared to be invalid, (b) was it possible for the State to acquire land by adverse possession, and (c) did a landowner's right of action to recover land acquired from him by the State under an invalid compulsory acquisition order only arise when the order was declared to be invalid by a court upon a constitutional motion brought by the landowner?

In relation to (a) the Court held that physical occupation and use of land with the intention and effect of excluding everyone else, amounts to adverse possession, whether the occupier acts in good faith believing himself to be the owner, or in bad faith knowing that someone else is the owner. With regard to (b) the Court held that a landowner's constitutional right to prevent the State from positively taking his land from him against his will, was completely consistent with a landowner losing his title if for twelve years he failed to take any action against someone who was occupying his land and excluding him from it. In answer to (c) the Court held that a landowner's right of action to recover his land arises as soon as he can bring an action in which he can claim recovery of title and possession; thereafter time runs against him. Passing of possession from the State to the appellant was seamless, and possession pursuant to a contractual right could be added to the State's earlier adverse possession.

As mentioned earlier in this presentation Guyana's law of immovable property is based in large measure on the Roman-Dutch system of land ownership, and this arose for consideration in a recent appeal from the Court of Appeal of Guyana in the case of *Harrinauth Ramdass v Salim Jairam and Others*³³ which originated from an agreement of sale of land between the appellant and his sister, who was deceased at the date of hearing of an action brought by the appellant against her. After the appellant entered into possession of the land in accordance with the agreement, the sister sold and passed title for a portion of land to another purchaser at a higher price. The appellant filed proceedings against the vendor and the new purchaser for specific performance of the agreement and revocation of the title of the purchaser.

The appellant alleged in his pleadings that the vendor and the purchaser had conspired to defraud him of the property, but gave no particulars of the alleged fraud and the allegation was later withdrawn. However, he sought to persuade the court that he acquired an equitable

³³ CCJ Appeal No. CV 3 of 2006.

interest in the land. The trial judge held that equitable interests in immovable property are not recognized in Guyana, and refused the order for specific performance as well as the claim for the revocation of the purchaser's title.

An appeal to the Court of Appeal of Guyana was dismissed. In an appeal to the Caribbean Court of Justice the main issue concerned the ongoing debate of whether equitable interests in land in Guyana are recognized or can be acquired having regard to the development of the law of immovable property in Guyana inherited from the Roman Dutch system, particularly in relation to a purchaser who is put in possession under an agreement of sale. The majority view reflected in Guyanese cases and the independent analysis of the Court indicate an acceptance of the conclusion that equitable interests in land are not recognized in Guyana although statutory provisions permit the application of equitable remedies. Accordingly the appellant acquired no equitable interest in the land purchased from his sister. He, however, was entitled to seek from her an order for specific performance of the agreement of sale which in fact he sought, but only after she had passed title to the other purchaser who acquired an indefeasible title subject only to a possibility of it being declared void for fraud which was abandoned at the hearing of the action in the lower court.

In relation to the grant of leave to appeal as a poor person the case of *Elizabeth Ross v Coreen Sinclair*³⁴ exemplifies the Court's efforts to afford access to justice by all. Leave to appeal as a poor person had been refused by the Court of Appeal of Guyana, and the applicant was ordered to lodge security for costs in the sum of \$100,000G within ninety (90) days failing which the appeal would stand dismissed. She sought leave from the CCJ to appeal as a poor person being blind and virtually penniless. The case involved ownership of a condominium in which she had resided for several years as a tenant of a deceased resident, but owned by a housing authority. The administratrix of the deceased resident, the respondent, was in no better financial position. The appeal involved issues about the rightful owner of the condominium, and which the Court considered had reasonable prospects of success.

However, the main issue centred around the procedural point of whether the Court could grant leave to appeal as a poor person when such leave had been refused by the Court of Appeal which under the Appellate Jurisdiction Rules of the CCJ was the court empowered to grant such leave; this would have the effect of reversing the decision of the court below and the

³⁴ CCJ Appeal No. CV 13 of 2007.

appearance of the Court sitting as a court of review. The Rules make no provision for this. After hearing arguments both written and oral from Counsel for the parties who appeared pro bono, the Court granted leave to the applicant to appeal as a poor person by utilising Rule 1.3 of the CCJ Rules which defines the overriding objective as being “to enable the Court to deal with cases fairly and expeditiously so as to ensure a just result.” The reasoning was that the fact that the Rules conferred on the court of appeal the power to grant leave to appeal as a poor person, does not mean that a refusal of such leave disables the Court, if it considers that the interest of justice so requires, from making an order of its own granting such leave, particularly if the appeal is considered to have merit.³⁵

As stated earlier two cases have been filed recently in the original jurisdiction, and are in the process of hearing. It is hoped that now that the ice has been broken there will be a steady flow particularly from natural and juridical persons within the Region.

Administration

(a) Appointment of Judges

The unique feature of the Court is not confined only to its peculiar dual jurisdiction. Being an international court with jurisdiction to apply and interpret a Treaty subscribed to by Member States of an economic union, one would expect that appointment of the judges of the Court would be influenced by the Member States who may field candidates for appointment either in an individual capacity or as representing a State. This form of judicial appointment to international courts and tribunals is frequently the norm, for example, appointments to the European Court of Justice (ECJ) on which member states of the European Union are represented, the International Court of Justice (ICJ), and other international tribunals appointments to which are made by the United Nations states parties. In contrast the judges of the Caribbean Court are appointed by a Regional Judicial and Legal Services Commission (RJLSC)³⁶ comprising representatives of regional bar associations, civil society and academic institutions, totally independent of political influence and of which the President of the Court is the Chairman. The establishment of this Commission sought to allay deep-seated fears (real or perceived) within the Caribbean Region about political interference in the

³⁵ The full texts of all of the judgments can be accessed by visiting the Court’s website at www.caribbeancourtofjustice.org.

³⁶ Article V of the Agreement.

judgments of the Court due to some alleged unfortunate instances of perceived interference within the domestic courts of the Region.

In a recent work titled *THE INTERNATIONAL JUDGE*, the authors³⁷ expressed the view that “in general one cannot apply to become an international judge,”³⁸ and that “national governments have total control over who will be put forward for an international judicial position and who will not.”³⁹ To avoid such a situation the appointment procedure for the Court involved advertisements in the media and online, which attracted applications both from the Caribbean Region and the international community. Interviews followed and short lists compiled from which the final six judges were selected with no consideration being given to equitable geographical distribution; judges were chosen solely for their individual expertise. Incidentally two of the judges appointed do not belong to any CARICOM Member State. The Agreement provides for the composition of the Court to be the President and nine other judges.⁴⁰

The judges of the Court are chosen and appointed solely by the Commission. The Agreement provides for the appointment of the President to be made by the qualified majority vote of three-quarters of the Contracting Parties.⁴¹ However, this can only be done on an affirmative recommendation of the Commission.

Criteria for appointment as a judge of the Court laid down in the Agreement include judicial experience for a period of not less than five years in a common law or civil law jurisdiction or engagement in the practice or teaching of law for a period of not less than fifteen years. Regard will also be had to high moral character, intellectual and analytical ability, sound judgment, integrity and understanding of people and society.⁴² With such criteria the judges of Court will be assessed ultimately by the quality of the judgments emanating from the Court.

³⁷ Daniel Terris, Cesare P.R. Romano, Leigh Swigart, Brandeis University Press 2007.

³⁸ The footnote to this was that a notable exception is the Caribbean Court of Justice; whether or not governments put forward suggestions for candidates, it should be noted that the CCJ has recently accepted applications from all interested parties regardless of origin.

³⁹ Terris, et. al, *supra*.

⁴⁰ Article IV.

⁴¹ Article IV(6).

⁴² Article IV(II).

(b) Tenure of Office of the Judges

The majority of judges serving on international courts do so for specified term limits, seven or nine years, and because they are elected they can be re-elected for a further specified term. In relation to the Court the Agreement provides for length of tenure tied to the attainment of a fixed age of retirement rather than a term limit. The Agreement stipulates a retirement age of seventy-two years⁴³ with a discretion recently given to the RJLSC to grant an extension of an additional three years upon request and if the services of the judge are deemed necessary for the work of the Court. The President is mandated to serve as President for a non-renewable term of seven years.

Concerns have surfaced that the judges of the Court do not enjoy the same security of tenure as judges of domestic courts whose appointments are entrenched in the domestic constitutions of Member States; in fact this issue was litigated in the Jamaican courts all the way to the Privy Council⁴⁴ which held that the judges of the Court did not enjoy the same security of tenure under the Constitution as the judges of the higher Jamaican domestic court, and deemed the legislation which sought to implement the Court to be unconstitutional. To ensure security of tenure of the judges of the Court Member States must honour not only the undertaking enshrined in the Treaty to employ their best endeavours in completing the constitutional and legislative procedures required for their participation in establishing the Court,⁴⁵ but also the desirability of entrenching the Court in their national constitutions in accordance with the Preamble to the Agreement; to this one may add entrenchment on the same terms as the judges of their domestic courts.

With regard to removal of a judge from office, this can only be achieved by inability to perform the functions of the office, whether due to illness or for misbehaviour, with a procedure for such removal being invoked by the RJLSC.⁴⁶ Accountability of the holders of judicial office is essential in inspiring public confidence, and in this regard self-regulation of judicial conduct must be a priority. To ensure this a code of judicial conduct has been formulated.

⁴³ Article IX.

⁴⁴ *Independent Jamaica Council for Human Rights Ltd –v- Hon. Syringa Marshall-Burnett & Attorney General of Jamaica* (2005) PC 3; 65 WIR 268.

⁴⁵ Article 224.

⁴⁶ Article IX of the Agreement.

(c) Financial Provisions

One incidence of judicial independence is that the judiciary considered to be the third branch of a State, must be provided with sufficient and sustainable funding by the other two branches – the Executive and the Legislature – for the performance of its functions to the highest standards. This is one of the Guidelines for preserving judicial independence reflected in the COMMONWEALTH PRINCIPLES ON THE ACCOUNTABILITY OF AND THE RELATIONSHIP BETWEEN THE THREE BRANCHES OF GOVERNMENT.⁴⁷ In this regard the expenses associated with the Court including maintenance of the seat of the Court (based in Trinidad and Tobago) under the Agreement are to be borne by the Contracting Parties.⁴⁸

Based on past experiences of States' tardiness in honouring regional financial commitments and in order to guarantee the Court some measure of financial autonomy from regional governments, a Trust Fund was created by the Member States with capital of US\$100 million which was raised through international financial markets by the Caribbean Development Bank. The said sum was transferred to a Board of Trustees of reputable persons with the requisite skills who are responsible for its management and disbursement to the administrators of the Court for its management. It was lent to the Member States at low rates of interest and repayable over a period of fifteen to twenty years.

This arrangement for financing an international court has been commended by experts knowledgeable about the operations of international courts. It is certainly a novel arrangement, and again another feature of the Court's uniqueness.

Potential Issues for the Court's Determination

With the birth of the CSME in 2001 the Court in its original jurisdiction was regarded as being essential for its successful operation. To date only the "Single Market" aspect has been implemented with the "Economy" being deferred to some opportune future date. In the present dispensation Member States resolve "to establish conditions to facilitate access by their nationals to the collective resources of the Region on a non-

⁴⁷ Agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003.

⁴⁸ Article XXVIII of the Agreement.

discriminatory basis,”⁴⁹ and which is reflected in the Treaty.⁵⁰ It provides that “within the scope of application of the Treaty and without prejudice to any special provisions . . . , any discrimination on grounds of nationality only shall be prohibited.”⁵¹

I posit that this Article of the Treaty is fundamental to the success of the Single Market involving as it does persons (natural and juridical) of the Region. It is the people of the Region from the collective Member States who will ensure success; divisiveness will ensure failure. In this regard the Court’s role will be pivotal in resolving issues that will inevitably arise among nationals of one Member State residing or employed in another Member State amid allegations of perceived discrimination. Being cognisant of the tendency of nationals of one Member State to view those born in another Member State as foreigners, it is expected that allegations of discriminatory treatment will lead to recourse to the Court for an interpretation of the Treaty.

Another aspect of the Treaty with which the Court will have to grapple is the prohibition of new restrictions by Member States relating to the right of establishment of nationals of other Member States except as otherwise provided in the Treaty.⁵² The right of establishment within the meaning of that part of the Treaty includes the right to engage in any non-wage-earning activities of a commercial, industrial, agricultural, professional or artisanal nature, or to create and manage economic enterprises which include any type of organisation for the production of or trade in goods or the provision of services. Again, because of the same perceptions of nationals of one Member State against others, the Court will play a decisive role in determining issues concerning the right of establishment.

Laudably, Member States undertake to “take all appropriate measures, whether general or particular, to ensure the carrying out of obligations arising out of the Treaty or resulting from decisions taken by the Organs and Bodies of the Community,” and to “facilitate the objectives of the Community” as well as “abstain from any measures which could jeopardise the attainment of the Treaty.”⁵³ The question arises – will the Court ever be called upon to interpret or apply this important provision of the Treaty? Maybe, the answer lies in the hands of the peoples of the Caribbean Region.

⁴⁹ Preamble to the Treaty.

⁵⁰ Article 7.

⁵¹ *Id.*

⁵² Article 32.

⁵³ Article 9.