4 Some Results So Far

The advent of the final appellate and regional courts have brought in their wake the beginnings of what is expected to be a mother lode of jurisprudential development for the particular countries and regions concerned.

New Zealand Supreme Court

In the experience of New Zealand, Justice Blanchard[82] has assessed that for many years there were no more than six cases each year making their way to the Privy Council. Most civil cases, he advised, were commercial in nature, involved substantial sums of money and had no interest to anyone other than the parties involved in the litigation.

The conclusion to be drawn from this state of affairs was that the jurisprudence at the highest level had atrophied, and in some instances had become non-existent. Conversely, following the establishment of the Supreme Court of New Zealand in 2004, a number of cases have been brought for determination before the said court, breathing new life into the system. Writing in February 2006, Justice Blanchard itemised some of them as described below.

Criminal

R v Timoti [2006] 1 NZLR 323 – The role of the provocation defence in murder.

R v Sunguwan [2006] 1NZLR 730 – Error of defence counsel requiring setting aside guilty verdict.

R v Siloata [2005] 2 NZLR 145 – Requirement for jury unanimity.

R v Condon [2007] 1 NZLR 300 – When the denial or absence of defence counsel requires the ordering of a new trial.

R v Walsh [2006] NZSC 111 – The law of forgery and its relationship to electronically transmitted documents, particularly whether an electronically copy of a forged document is itself a forgery.

Property (land)

Bahramitash v Kumar [2006] 1 NZLR 577 – When the tender of money by a purchaser is required on completion of a land sale contract.

Otago Station Estates Ltd v Parker [2005] 2 NZLR 734 – The question of a deposit being paid by a personal cheque of the purchaser.

Family law

Secretary for Justice v HJ [2006] NZSC 97 – Interpretation of the Hague Convention where the application for a child's return is made, as an exception to the general rule, a year beyond the abduction.

82 Blanchard (2006a), *Op cit.*

Human rights

Morgan v Superintendent, Rimutaka Prison [2005] 3 NZLR 1 – The question of whether a retrospective change by statute to parole conditions, after the commission of the crime but before conviction, is a prohibited change to the maximum term to which the convicted person can be sentenced.

Equity

Chirnside v Fay [2006] NZSC 68 – The fiduciary obligations of joint ventures and the calculation of damages for breach of duty.

Eastern Services Ltd v No 68 Ltd [2006] 3 NZLR 335 – The question of the application of laches for mere delay, but in an extended situation.

Environmental law

Discount Brands Ltd v Westfield (NZ) Ltd [2005] 2 NZLR 597 – Situations in which a developer can have an application for planning consent proceed without notification to potential objectors, thereby denying them participation in the process.

Civil procedure – appeal rights

Mafart v Television New Zealand Ltd [2006] 3 NZLR 18 – The question of whether an appeal lies from a decision of a judge to allow media access to a court file.

Taylor v Jones; Skelton v Jones [2006] NZSC 113 – Whether the Habeas Corpus Act 2001 allows for an appeal by someone against whom a writ of habeas corpus has been issued requiring delivery to the court of an abducted child.

Torts

Chamberlains v Lai [2006] NZSC 70 – A consideration of whether barristers have immunity from suit for negligence in connection with work undertaken in court. This case presented an opportunity to the Supreme Court of New Zealand to choose between answers given to this question by the House of Lords and the Australian High Court. This choice would not have been present in practical terms, if the appeal had found its way to the JCPC.

Justice Blanchard concluded that less than a third of such matters would have arrived before the Privy Council. The analysis is thus evident – the advent of the Supreme Court of New Zealand has brought in its wake not just an enhanced access to justice, but a growth – long overdue – in its jurisprudence[83].

This sampling over the first years of the court's existence can assuredly grant to New Zealanders a positive sense that the actualisation of their distinctive and broad jurisprudential development is well underway.

83 Decisions can be accessed at www.courtsofnz.govt.nz [accessed 18 June 2008].

The Caribbean Court of Justice

As has been discussed, the CCJ is facing challenges as member states of CARICOM have to find ways, through referenda or otherwise, to accede to the appellate jurisdiction of the court. In the interim, its two active members of the appellate jurisdiction, Barbados and Guyana, have been seeking the audience of the court. At the time of writing, the original jurisdiction of the court had not yet issued any judgments, though the appellate jurisdiction has been considerably active. The analysis of work undertaken by the CCJ thus far is commendable[84].

Leave to appeal, administrative law – damages

Barbados Rediffusion Service Ltd v Merchandani [CCJ Application No 1 of 2005] – The first case to be presented to the CCJ was in fact heard twice by the court. The initial hearing was on application for leave to appeal, and thereafter, the hearing of the appeal itself. The case established that the respective legislation passed in Barbados entitled the substitution of the right of appeal to the JCPC to be supplanted by that to the CCJ. The case also boldly applied the doctrine of proportionality, which though well established in European law, is only finding its way in some judgments of the common law. In this context, it was reiterated that an administrative measure should not be any more severe than or disproportionate to the mischief it is intended to cure.

Griffith v Guyana Revenue Authority et al [CCJ Application No 1 of 2006] – Questions as to whether the CCJ had jurisdiction to hear the matter, since it was neither civil nor criminal; if there was sufficient merit to warrant leave; and if the applicant was entitled to special leave to appeal as a poor person – *in forma pauperis*. The CCJ granted leave cautioning that such was an act of grace. The areas of public and private law were examined.

Cadogan v The Queen [CCJ Application No 6 of 2006] – The question of leave to appeal against a decision of the Court of Appeal was refused on the ground that it lacked merit.

Nauth v The Attorney-General of Guyana et al [CCJ Application No 7 of 2006] – An application for special leave pursuant to the Constitution of Guyana was refused by the CCJ. The applicant had failed to appeal within the prescribed time, alleging ignorance of the inauguration of the CCJ. The appeal was distinguished from *Griffith v Guyana Revenue Authority et al*.

Property (land)

Watson v Fernandes [CCJ Application No 2 of 2006] – Questions whether an attorney-at-law who is not 'on the record' is entitled to sign a notice of appeal on behalf of his client.

Criminal law

Boyce v Joseph [CCJ Application No 2 of 2005] – A landmark ruling thus far in the work of the CCJ. It reviewed the prerogative of mercy of the Barbados Privy Council, the effect of international human rights instruments. The CCJ ruled that the prerogative of mercy was reviewable, and that the failure of the Barbados Privy Council to await the conclusion of

84 See the CCJ cases at www.caribbeancourtofjustice.org [accessed 18 June 2008].

the proceedings in the Inter-American system was in contravention of the respondents' right to protection under the law. Therefore the order, which was issued by the Barbados Privy Council for the execution of the respondents after they had sought proceedings before the Inter-American system, was deemed to be a contravention of the law by the CCJ. The CCJ was assertive in expressing its departure from reasonings of the JCPC in the prior case of *Lewis v The Attorney-General of Jamaica,* which the CCJ viewed as flawed and preferably focused on the doctrine of legitimate expectation.

The case also sent the message that presumptions in certain quarters of the *raison d'être* of the CCJ being a 'hanging court' to ensure the application of the death penalty are now to be rebutted.

R v Lewis [CCJ Application No 1 of 2006] – A respondent convicted of murder had his conviction quashed by the Court of Appeal of Barbados. The Court of Appeal of Barbados in turn raises questions as to whether the Crown has an appeal as of right to the CCJ and if such a right exists, can the Crown obtain relief, including the restoration of the conviction of the respondent.

Thomas v The State [CCJ Application No 3 of 2006] – An appeal from convictions of buggery and sentence to ten years imprisonment. Appeal being allowed and conviction in turn quashed. Focus was placed on the misdirection of the Judge of the Court of Appeal to the jury.

As has been seen earlier in this book, the types of appeals that found their way to the JCPC were essentially limited to criminal matters, or civil matters invariably involving wealthy sums. Further, it has been explained that the number of appeals has been declining over the years. Since the inauguration of the CCJ, it is most impressive that even with just two members states sending appeals, there is such activity. The stage is thus set for community law to be enriched as a broader spectrum of matters is presented to the CCJ, thus fuelling the steady growth of regional jurisprudence.

The challenges for the CCJ now will not only be for the other members to accede to its appellate jurisdiction, but for the original jurisdiction to be truly activated in order to reach its potential of fostering an area of special and unique Caribbean international/regional legal identity.

The COMESA Court of Justice

The COMESA Court of Justice seeks to establish itself as the tribunal for matters relating to the regional treaty of association and its relevant organs. Its place in community law thus requires opportunities to cement this role, as illustrated by the case below.

Eastern and Southern African Trade and Development Bank (PTA Bank) v The Republic of Burundi Represented by the Minister of Justice of the Republic of Burundi [Application Nos 1 and 2 of 2006] – This matter exemplified the jurisdiction of the regional court to adjudicate on relations between institutions of individual partner states, *vis à vis* institutions of the regional association. The Eastern and Southern African Trade and Development (PTA) Bank, an organ of COMESA, was set up in Burundi; it was moved when civil war broke out in that country in 1994, and relocated to Nairobi, Kenya. In 2001, when

a truce was called between the warring factions in Burundi, that government called for the reinstatement of the bank to its country. The bank has resisted such a move on the grounds that peace has not been effectively restored, and its conducive investment climate would in fact be undermined should it relocate to Burundi. In the interim, while the debate continued for the bank's return to Burundi, the bank proceeded to lease a building, which formerly housed its headquarters in Burundi's capital Bunjumbura, to the United Nations Development Programme (UNDP). By 2004, suspicious that this act strengthened the bank's reluctance to return to Burundi, the Government of Burundi forbade the lease to proceed and the bank considered this interference in its business. In 2006, the bank sought the COMESA Court to have the actions of the Burundi government declared illegal, while simultaneously asking for an injunction to stop that government from interfering in the management and control of the building. The court dismissed the application, citing *inter alia,* the non-exhaustion of local remedies mandated by the COMESA treaty.