Bar Association Review

2018-2019

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Persons who may wish to submit articles, notes, commentaries or reviews on pertinent legal issues to be considered for publication in subsequent issues of the Bar Association Review may do so via:

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INTRODUCTION

by Mr. Kamal Ramkarran, President of The Bar Association of Guyana


Photo Credit: Mr. Nikhil Ramkarran

We take great pleasure in welcoming you to the second edition of the Bar Association Review ('BAR') to be published in as many years. While this seems a modest accomplishment, it has not happened in more than ten years.

We hope that you enjoy the selection of articles, commentaries and other writings that appear in these pages.

We also hope that you read with your pens and pencils in your hand to make your comments in the margins and that those comments evolve into articles for publication in a future edition of the Bar Association Review.

One of the reasons we have been able to publish twice in succession is the ceaseless work of our indominable Secretary, Pauline Chase, who literally chased down articles, liaised with the printers and worked with the graphic artists and the advertisers and did many other things to bring it into being. Without her work, there would be no Review.

But her hard work has been made harder by the general reluctance from our profession to contribute to the Bar Review by writing articles or, with less effort, writing short commentaries on recent judgments affecting Guyanese lawyers.

It is our hope that the return of the Bar Review will remind lawyers that there is a place for them to interrogate the principles we receive in judicial decisions by exploring them in depth and seeking to influence the areas of law that affect us.

Carefully thinking about the issues of law we encounter daily and writing about them at leisure over the year it takes for another edition of the Bar Association Review to appear will undoubtedly see us along this path. There can be no doubt that this will help to raise the standards of practice in Guyana even higher.

We hope you enjoy this edition and look forward to your input for the next edition.

EDITORIAL - COMING IN FROM THE COLD

On May 31, 2017 Stabroek News published a scathing letter written by Mr. Christopher Ram, an Attorney-at-Law, Chartered Accountant, past President of the Bar Association and public commentator.

It was no coincidence that the letter was published on the day of the Annual General Meeting of the Bar Association at which the current leadership was elected.

Referring to the tenure of the previous Bar Council over the previous year, Mr. Ram said "had the butcher in Shakespeare's Henry VI been living in contemporary Guyana, he would not have found it necessary to advocate '…let's kill all the lawyers'. He would soon realise that the lawyers have put the profession into cold storage."

This was because, according to Mr. Ram, "the Bar Association was silent, unable or unwilling even to make a statement, let alone take legal action" in the face of legislation and executive action either to be considered bad in a democratic state or which violated the Constitution.

Over the past two years, the Bar Council has spent much of its time and resources rebuilding the Bar Association from that image as expressed by Mr. Ram, which was unfortunately, widespread both within and outside of the profession.

It has tried to foster a sense of belonging to a shared profession among its members and it has stood steadfast against State action which it considered to breach the rule of law.

Between 2017 and 2019, it issued eighteen statements on issues affecting the profession and the rule of law.

It joined in important legal proceedings to express its collective view and, from time to time, members of the Council have been involved in *pro bono* public interest litigation to protect the rule of law, in recognition of their duties as leaders of the Bar Association.

The Bar Dinner has been resurrected as the premier event of the legal year and distinguished speakers have once again been asked to deliver the Keynote Address at the dinner.

Meetings have been held with the administrators of justice including the senior members of the Judiciary; the Registrars of the Supreme Court, Deeds and Commercial Registries; and the Commissioner of Police. Important issues affecting the profession have been addressed and followed up.

Committees have been formed to assist the Bar Council with the work of improving the legal profession and their members have been drawn both from within and outside of the Bar Council.

Educational Seminars and social events have been held for members. Merchandise such as t-shirts bearing logos to encourage and foster a common identity among legal professionals have been made available to members.

A Website, a Facebook page and an Instagram account have been launched and are actively updated with information and photographs from

events. This encourages more interaction with and between members of the Bar and the public on the Bar Association's activities and work.

The Bar Office has been renovated into a clean and modern functioning space and an Administrative Assistant employed to ensure the efficient operation of the association.

The Bar Association has seen its largest membership for many years, if not since its establishment, although membership is and has always been entirely voluntary.

In short, over the past two years the Bar Council has functioned as expected of a professional body pursuing its mandate and representing the best interests of its members.

If it were needed, Mr. Ram's clarion call has clearly been heeded.

This does not mean that the work of the Bar Council is done. There is much to be done to improve the legal profession for the Bar, the Judiciary and the public. However, as has been proved in the past, complacency could easily erase all that has been achieved.

One of the things left to achieve is the recognition from the State that the appointment of Senior Counsel, which resumed in 2017 after a hiatus of twenty-one years, is an appointment to an office and not an honour, as Dr. Shahabuddeen, then Attorney General, pointed out in 1973.

Members of the Bar and the Judiciary, who have the specialist knowledge that politicians do not possess, are the only persons who can properly determine whether candidates are suitable for appointment to the Inner Bar.

The office of Senior Counsel will only resume the dignity it deserves in Guyana when there is no political interference with appointments to the Inner Bar and appointments are made on merit through clearly identified open criteria and process.

While that may be so, the persons who are appointed to the Inner Bar must also recognise and accept their duties and responsibilities to the Bar and to the profession.

As the appointment to the Inner Bar is an office and not an honour, appointees have to fulfil the duties of that office.

Senior Counsel stand as the leaders of the profession and they have a duty to protect and carry the standards and traditions of the Bar on to the next generation.

The contribution of Senior Counsel to the work of the Bar Association in its capacity as one of the leading civil society bodies is directly proportional to the weight that the public will give to the opinion of the Bar Council.

The recent actions of our colleagues at the Bar in the region, especially those in Belize and Trinidad, show us the power of a unified Bar led by distinguished Senior Counsel.

Until there is active participation and engagement in the work of the Bar Association, led by the Senior Bar and joined by all other members of the Bar, towards the improvement of the legal profession as happens elsewhere in the Caribbean, respect and dignity for the profession in Guyana will never be fully restored.

There is much work left to do to fully bring the legal profession in Guyana in from the cold, but we are confident that the work has started.

BAR ASSOCIATION NEWS 2018-2019:

FROM THE DESK OF THE SECRETARY

Ms. Pauline Chase, Attorney-at-Law, Secretary of The Bar Association of Guyana


Photo Credit: Mr. Nikhil Ramkarran

COMMITTEES

One of the first orders of business of the new Bar Council elected for the fiscal term 2018-2019, was to establish the following Committees to assist with the work of the Association:

- Criminal Bar Committee
- Publications Committee
- Civil Procedure Rules & Family Court Committee
- Legislative Committee
- Deeds & Commercial Registries Committee

A Continuing Legal Education Committee was later established in February 2019.

All Committees have been convened, are headed by a Chairperson and report to the Bar Council.

CONTINUING LEGAL EDUCATION

Prescriptive Title Seminar

On August 3, 2019 the Bar Association held a Prescriptive Title Seminar at the Herdmanston Lodge, Georgetown. The Seminar, organized and produced by the Bar Association, was conducted by Madam Nicola Pierre, Commissioner of Title. It was well attended by In-Service Students, 2018 Law School Graduates and Attorneys-at-Law. The seminar material, which included lecture notes, document specimens, cases and maps was later made available for purchase through the Association.

Practice at the Bar

This hybrid educational-social event was hosted by the Bar Council on November 2, 2018 in the Ballet Room of the Cara Lodge Hotel, Georgetown. It was born out of the recognition by the Bar Council of the need to give guidance to newly admitted Attorneys-at-Law of the customs, norms and conduct expected of them at the Bar. Mr. K. Juman Yasin, S.C., Mr. Andrew Pollard, S.C. and Mr. Teni Housty selflessly gave of their time and knowledge in leading a lively interactive panel discussion which was followed by a cocktail reception. It was well

received by our newly admitted colleagues, who were the first to benefit from this endeavour. It is the hope of the current Bar Council, that this event will be continued by future Bar Councils as an annual tradition.

Taxation of Costs Seminar

The Bar Association organized and produced a Seminar on the Taxation of Costs on May 8, 2019 at the Duke Lodge Hotel, Kingston, Georgetown. Madam Shabiki Cazabon, Master (ag). of the High Court of Trinidad and Tobago conducted the Seminar which was aimed at equipping the Bar with the requisite knowledge and skills of the new taxation regime introduced by the Civil Procedure Rules 2016 (CPR).

SOCIAL EVENTS

Wine & Cheese Mixer

The Association hosted a Wine and Cheese Mixer on September 8, 2018 at the Cara Lodge Hotel, Courtyard, Georgetown, in honour of the delegates of the Council of Legal Education (CLE) Meeting which was held in Guyana in September, 2018. It was an enjoyable evening which afforded members of the Association the opportunity to meet and interact with their colleagues from the Caribbean. The Chief Justice of Barbados, the Attorneys General of Guyana, Jamaica and Antigua attended, as well as Presidents and Secretaries of Bar Associations of sister Caricom countries. The Chairman of the CLE, Mr. Reginald Armour, S.C. along with administrative staff of the three Law Schools in the region also attended.

Bar Dinner

The 38th Annual Bar Dinner was held on November 17, 2018 at the Guyana Marriott Hotel, Georgetown. Dr. Toussant Boyce delivered a topical Keynote Address, 'Here comes the Boom! The Role of the Modern Guyanese Lawyer in the Fight Against Corruption and Money Laundering'. It was an elegant evening which began with a Cocktail Reception at 7pm and culminated with an After Party which continued until well after midnight. Attendance by the Bar was pleasing and in keeping with the previous year which saw the largest turn out in recent history, if not at all.

Christmas Social

For the second consecutive year, and what it is hoped will continue as an annual tradition, association members gathered, on the invitation of the Bar Council, to enjoy the cheer of the Christmas Season. It is encouraging that attendance grew in this second installment. A good time was had by all in the Courtyard of the Cara Lodge Hotel on December 20, 2018.

Dinner in honour of the Bar Association of French Guiana

It was a pleasure to host and welcome to dinner on April 25, 2019 at the Ballet Room of the Cara Lodge Hotel, Georgetown, the visiting representatives of The Bar Association French Guiana (Avocat au Barreau de la Guyane). The Honourable Attorney General, Mr. Basil Williams, S.C. and Madam Travise Tracey Lecante, Honourary Consul of Guyana also joined us for dinner as members of the Bar Council and Bar enjoyed the company of our visiting guests.

MEETINGS

The Bar Council met on the third Wednesday of each month.

A Special General Meeting of the Association was convened on September 1, 2018 to *inter alia* arrive at the position of the Association on a proposed law school in Guyana.

Over the past year, the Bar Council engaged with the Chancellor of the Judiciary (ag)., Registrar of the High Court, Commissioner of Police, Ministries, government agencies and various civil society groups.

The Bar Council met twice (October and November, 2018) with the Chancellor of the Judiciary (ag)., the Honourable Justice Yonette-Cummings-Edwards. Matters addressed included the delay in the granting Estates and the entering of Orders of Court, marshal service, opening and closing hours of the Registry, enforcement of the time limit for judicial decisions, court vacation, e-filing and issues arising out of the Civil Procedure Rules 2016.

Issues such as the delay in the entering of Orders of Court, marshal service, the cost of filing of estate applications and system for obtaining transcripts were raised with the Registrar and Deputy Registrar at a meeting in April, 2019. The Bar Council also once again lobbied for the closing hours of the Registry to be extended to at least 4pm, Monday to Friday in keeping with the CPR 2016. As a result of a previous meeting with the Chancellor in October 2018, the Registry no longer closes during the lunch period (11:30am-1pm).

Mr. Kamal Ramkarran and Mr. Robin Stoby S.C. represented the Bar Association at the CLE Meetings in September 2018 in Guyana and February 2019 in St. Kitts and Nevis.

At the invitation of the Ministry of Business, the Bar met with representatives of the said Ministry at Cara Lodge on November 3, 2018 to discuss a proposed Moveable Property Security Bill. Proposals were put forward by the Bar and areas of the Bill to be addressed were highlighted.

The Bar Council met with visiting teams from the Carter Center's office in Atlanta, Georgia, United States of America, in February and March, 2019 at their request and arising out of the vote on a 'No Confidence Motion' in the National Assembly on December 21, 2019.

The Bar Council lent their support to the formation of the 'Civil Society Forum'. Weekly meetings of the body were regularly attended by representatives of the Bar Council who also attended meetings of the Forum with other bodies, groups and individuals.

On April 24, 2019, the Bar Council met with three representatives of the Bar Association of French Guiana (Avocat au Barreau de la Guyane) who travelled to Guyana to discuss closer relations and Guyana's participation in a Conference to be held in October, 2019 in French Guiana under the theme 'Protection of Fundamental Rights in the Guiana Shield'. This was the first ever such meeting of the associations.

Requests have been made to meet with the Registrar of Deeds and Commerce; and it is hoped that this is done before the end of the current term.

BAR OF SORROW

The Inner Bar suffered a substantial loss of four Senior Counsel as the deaths were mourned of Mr. Shakoor Manraj, S.C. on December 13, 2018; Sir Fenton Ramsahoye, S.C. on December 27, 2018; Mr. Bernard De Santos, S.C. on March 8, 2019 and Mr. Miles Fitzpatrick, S.C. on March 12, 2019.

The Bar also mourned the loss of Mr. Dabi Dial who died on December 13, 2018 in Canada.

A Special Sitting of the Full Court of the Supreme Court of Judicature was convened by the Honourable Chief Justice (ag). in Court 1 of the Victoria Law Courts on March 13, 2019 to pay tribute to the late Sir Fenton Ramsahoye, S.C. Mr. Kamal Ramkarran, President of the Bar Association addressed the Court on the Association's behalf. The Honourable Attorney General, Mr. Basil Williams, S.C.; the Director of Public Prosecutions, Ms. Shalimar Hack; Mr. Ralph Ramkarran, S.C. and Mr. C.V. Satram also addressed the Court in tribute.

Special Full Court sittings were also convened on June 18 and 22, 2018 to pay tribute, respectively, to Mr. Richard Fields, S.C. who died on August 26, 2017 and Dr. Mohamed Shahabuddeen, S.C., former Attorney General of Guyana and Judge of the International Court of Justice who died on February 17, 2018.

The Bar welcomes the return of the tradition of Special Sittings of the Full Court of the Supreme Court to pay tribute on the death of former Justices and members of the Bar. Regrettably, many years passed without the observance of this practice. The Honourable Justices Cummings-Edwards and George, Chancellor (ag). and Chief Justice (ag)., respectively, must be recognized and credited for its reinstitution.

HERE AND THERE

Administration

Renovations are ongoing at the High Court in Demerara and Berbice. Court rooms have been remodeled and much needed parking space has been crafted in the court yard of the Victoria Law Courts, Georgetown.

Of note, library facilities and the robing room at the High Court in Berbice have been upgraded. Transcription equipment has been installed in many of the court rooms of the High Court in Demerara and Berbice and one in the Georgetown Magistrate's Court. However, the legal framework to give efficacy to this system as the Court's official record has not yet been enforced.

In keeping with the movement to upgrade facilities, the Bar Office was renovated and remodeled over the past year. It is the intention of the Council to transform the office into a usable space for association members offering amenities for ADR, mediation and tele-conferencing.

No Confidence Motion

On December 21, 2018, a 'no confidence motion' was moved in the National Assembly, declared and certified passed. The consequential elections were not held within the mandated three month period of Article 106 of the constitution. During that period, and even after, the motion engaged the attention of the Court through Actions filed. It is regrettable, if not insulting to the Guyana Bar, that particularly at the appellate levels, lead Counsel from other jurisdictions were retained to represent the Government and Opposition.

Exchange Program

Ms. Alanna Lall, Attorney-at-Law and Bar Council Member will represent the Bar at the China-Latin America and Caribbean Region Legal Professionals Exchange Program to be held in China from May 21-31, 2019. Ms. Lall is expected to present a Paper and take part in other activities of the Program. We wish her well in her representation of the Guyana Bar.

Farewell

We bid farewell to our hardworking Administrative Assistant, Ms. Diana Persaud who will be taking up alternative employment in the oil and gas sector with effect from June 1, 2019. Over the past two years, Ms. Persaud has

given dedicated service to the Bar Association, many times over and above the call of duty. We wish her well with all of her future endeavours.

We also wish the wish well to our volunteer assistant, Ms. Yogini Maharaj who will be traveling to Trinidad to read for her Certificate of Legal Education. We look forward to welcoming Ms. Maharaj to the Bar in 2021.

Lastly, the elections on May 31, 2019 will mark the end of the two consecutive term limit of the presidency of Mr. Kamal Ramkarran. Much has been achieved over the past two years under his leadership and for which he must be commended. It was a pleasure to serve as Secretary over the past two years and I thank my colleagues for the opportunity to so do. May we all continue to work together, in whatever capacity, to strengthen our profession towards the improvement of the administration of justice, as we are duty bound to so do.

ROBIN SINGH ET ANOR. v AG [2012] CCJ 2 (AJ) – A PROCRUSTEAN PARADIGM

by Justice Charles R. Ramson, S.C., O.R.

Since 2012 the legal fraternity in Guyana, in particular, and the Caribbean, in general, was treated to a judicial exegesis that is not only reflective of our expectation when the Caribbean Court of Justice was conceptualised but repositions the Court as worthy of being the acme of our Court of last resort. The Orders issued ***in Robin Singh et al v ATT-Gen. of Guyana [2012] CCJ 2 (AJ), 80 WIR 382,*** in large measure, appear to have been tailored to suit the Court's unease with the pervasive protraction of litigation post-2010. To exemplify the latter observation reference is made to para 4, which states:

> "In these very exceptional circumstances this Court considers that no Court could properly refuse an application for an extension of time for appealing that 29th Dec Order. Ord. II r. 3 paras 4 to 7 of the Court of Appeal Rules enable the Court of Appeal to grant extensions of time for appeals and under s. 3 of the Caribbean Court of Justice Act # 16 of 2004, giving effect to ART XXV.6 of the Agreement Establishing the CCJ, this Court has all the powers of the Court of Appeal. Due to the seriousness of the issues and the urgency of the matter, this Court most exceptionally exercise the powers of the Court of Appeal in the following matter."

In the interest of completeness and fairness to the compunction of the CCJ, it will be apposite to refer to its many pronouncements since 2010 for the speedier delivery of judgments in matters engaging the Guyana Court of Appeal and other member States, echoing the remonstration of ARDEN LJ in ***Bond v Dunster Properties Ltd [2011] EWCA Civ. 455*** at paras 1-2:

> "An unreasonable delay of this kind reflects adversely on the reputation and credibility of the civil justice system as a whole, and reinforces the negative images which the public can have of the way judges and lawyers perform their roles. If they were regular delays of this Order, the rule of law would be undermined."

A non-exhaustive list ought to suffice: ***Errol Campbell v Janette Narine [2016] CCJ 07 (AJ)*** at para 4:

> "We note with great dismay that the proceedings were instituted in Dec. 1996, the trial was held over 5 days in Aug and Sept 2005, with judgment delivered in June 2006. The Court of Appeal heard the Appeal in June 29, 2012 and delivered judgment on July 30, 2014. It granted leave to appeal in Dec, 2014…. In short, almost 20 years have passed since the institution of the proceedings."

Katrina Smith v Albert Anthony Peter Selby [2017] CCJ 13 (AJ) at para 4, states:

> "More than 5 years later, the Court of Appeal heard the appeal on the 14th Jan 2016. Just over a year later, it delivered judgment on the 14th Feb 2017."

Delys O'Leen Colby Dec'd by D.V.B. Colby Executor v Felix Enterprises Ltd et anor [2011] CCJ 10 (AJ) at para. 3, the CCJ bemoans the delay:

> "Unfortunately, it would be remiss of us if we did not again comment adversely upon the excessive delays in the delivery of reserved judgments. The trial Judge took over 2 years 4 months – and even then it took over eight months for his Order to be finalised – while the Court of Appeal took two years, all in the context of litigants having a constitutional right under ART 18(8) of the Constitution that their "case shall be given a fair hearing within a reasonable time". The outcome of the hearing is clearly a key part of the hearing process."

In much the same fashion that all is not lost, and in a demonstration of the adage "Hope springs eternal" the CCJ was fulsome in its adulation for the efficiency achieved in the disposal of a judicial review application in ***The Medical Council of Guyana v Jose OCAMPO TRUEBA [2018] CCJ 8 (AJ),*** at paras 36 & 37:

> [36] "Our concluding observations end these reasons for decision on a happy note. As mentioned, this case proceeded with admirable dispatch and expedition. The claim was filed on 14 Sept 2017, decided by the Chief Justice on 19 Oct 2017 and heard by the Court of Appeal on 21 Dec 2017, when it gave an oral judgment. The application for special leave to appeal was filed on 10 Jan 2018 and affidavits and written submissions were completed in time for the hearing before the CCJ on 16 Mar. 2018.
>
> [37] It is a deep pleasure to pay tribute to the judiciary, the Court administration and counsel for this remarkable achievement. This case took 6 months from start to finish."

With this discursive backdrop and, pivotal to the germane understanding of the hermeneutic process underwriting the ruling in ***Robin Singh*** by the CCJ, a closer examination of ***Re-Langhorne's Application [1969] GLR 534 and Re-Application by Gerriah Sarran[1969] GLR 518,*** which the CCJ purported to "follow", is imperative. In ***Langhorne***, the Guyana Court of Appeal considered an appeal from an *ex parte* application in which the Trial Judge refused to grant a *Nisi* Order of Certiorari to quash a decision of the Public Service Commission to dismiss a public servant, a dispenser, employed by the Ministry of Health. At the risk of some concerns for pedantry but with a view to ensuring some measure of clarity, a *verbatim* transcription of the *rationes de-cidendi* would be of some assistance at pp. 534-5:

> (i) (Cummings JA concurring) "the P.S.C. under the Constitution was required to act in a judicial manner and ART. 125(8) of the Constitution empowered the Courts to exercise a supervisory jurisdiction to ensure that the PSC acted within its jurisdiction and observed the rules of natural justice.
>
> (ii) (Cummings JA dissenting) "the appellant, who was represented by counsel had, by taking part in the enquiry without objection, waived his right to object to the late delivery of the documentary evidence. Administrative action will not be invalidated merely by reason of an ostensibly trivial departure from the rules governing procedure and form unless it is shown that the error has caused the individual affected to suffer substantial detriment."
>
> (iii) per Luckhoo C, "under the Constitution of Guyana the P.S.C has power to dismiss or impose any lesser punishment in its discretion. The Regulations: Public Hospitals merely say what should happen

when the Resident Surgeon finds it necessary to impose a fine."

In ***Gerriah Sarran*** (a ward maid employed in the Ministry of Health), a judgment delivered on the same date, comprised of the same Judges, held at p. 518:

(i) ART 128(8) of the Constitution of Guyana preserves the supervisory jurisdiction of the High Court to issue the writ of Certiorari.

(ii) proceedings relating to the removal from office in the public service are judicial in nature and Certiorari will lie in appropriate cases.

(iii) the matter should be remitted to the judge with a direction that the Order *nisi* should issue because the correspondence on the Affidavit in support does not disclose compliance with the mode of delegation provided by the Constitution and *ex facie* shows a want of jurisdiction."

In short compass and culled from the above, these two decisions revolved solely around the preservation by the Constitution of the supervisory jurisdiction of the High Court and the powers conferred upon the PSC with respect to persons employed in the public service. This critique was born out of anxious desire to fully comprehend the report that the Judgment of the CCJ in ***Robin Singh*** at p. 382 (80 WIR) "followed" ***Re-Langhorne*** and ***Sarran***. As will be demonstrated presently, the issues confronting the five Justices of the CCJ, while grudgingly tangential with respect to the judicial review importance and preservation by the 1966 Constitution of Guyana of the former decisions, were seminal and involved an unravelling of a most abstruse curial imbroglio, not remotely raised as an issue in the precedents aforementioned.

Once again, it will be helpful if a *verbatim* report from pp. 383-4 of the judgment tracing and chronicling the progress of the litigation from the High Court to the CCJ:

"By decision of 29 December 2011, Chang CJ (Ag) refused the application of Mr. Lionel Jaikarran and Mr. Chetram Singh, two trustees of the Guyana Cricket Board (the applicants), by *ex parte* motion for an order or rule *nisi* of certiorari quashing the decision of the Minister for Culture, Youth and Sport communicated by letter dated 23 December 2011 to the secretary of the GCB to install an Interim Management Committee to assume the administration of cricket nationally in lieu of the GCB. Pursuant to Ord. 46, r. 16 of the Rules of the High Court, the *ex parte* application was renewed on 30 December 2011 by way of a fresh hearing before the Full Court. On 25 January 2012 the Full Court of the Court of Appeal (sic) of Guyana ordered that the motion be dismissed. By motion dated 30 January 2012 the Court of Appeal was moved for leave to appeal against the decision of the Full Court and for the application for leave to be treated as the hearing of the substantive appeal for the making of an order *nisi* for a writ of certiorari. On 14 February 2012 the Court of Appeal summarily dismissed the motion, apparently on the ground that it had no jurisdiction to hear an appeal from an ex parte decision in the light of the wording of s 6(5)(d) of the Court of Appeal Act, Cap 3.01. On 2 March 2012 the applicants applied to the Caribbean Court of Justice (CCJ) for special leave to appeal (CCJ Appeal No CV 1 of 2012; GY Civil Appeal No 7 of 2012) against the Court of Appeal's judgment of 14 February 2012. On 12 April 2012 the CCJ granted leave to substitute the appellants, Robin Singh and Rajendra Singh, in their capacity as representatives

of the Guyana Cricket Board (GCB), for the applicants. The respondent to the appeal was the Attorney General of Guyana. The facts are set out in the judgment of the court."

Located within that configuration of the factual matrix are the polemics that would eventuate into the ultimate resolution by the CCJ, in favour of the appellants, albeit by an innovative process which included the dismissal of their appeal. It cannot be overlooked that the CCJ not only "followed" ***Langhorne*** and ***Sarran*** but "distinguished", ***Re-Williams & Salisbury*** **(1978) 26 WIR 133**, the filing of which stemmed from alleged violations of the constitutional rights of the litigants. In the former *ex parte* applications, the State's participation was merely by way of resort to the "*amicus curiae*" process. Of no less significance was that in ***Sarran***, the Guyana Court of Appeal "allowed" the appeal and remitted the case to the Trial Judge with directions to issue the Writ ni*si* of Certiorari, in contradistinction with the Order of the CCJ in the matter under review. Perhaps it may be convenient at this juncture of the current discourse that a succinct *verbatim* record be made of the decisions of the CCJ in ***Robin Singh,*** at para 38:

> "In the light of the above Court of Appeal authorities and the already discussed nature of originating *ex parte* motions for an order *nisi* for the issue of the writ of certiorari, this court concludes that an order refusing such an application is a final order within s.6(2) of the Court of Appeal Act …. Moreover, such an originating *ex parte* application falls outside the restriction in s. 6(5)(d) which is limited to *ex parte* applications made in the course of subsisting *inter partes* proceedings".

and, at para 41:

> "In these very exceptional circumstances this Court considers that no court could properly refuse an application for an extension of time for appealing (the order of Chang CJ (ag))".

Herein lies the indicia of the innovative, momentous (and, perhaps without precedent) nature and quality of the Orders of this court of last resort. The jurisprudential crosshairs created by this decision therefore need to be viewed and recalibrated from a closer scrutiny of ***Re-Williams and Salisbury*** aforementioned. Not without significant episodic content is the application of the Appellants/Applicants at p.383, letter (i) i.e. "On the 2nd Mar 2012 the applicants applied to the Caribbean Court of Justice (CCJ) for special leave … against the Court of Appeal's judgment of 14 February 2012" but did not in the light of the ruling in ***AG of Guyana v. Dipcon Engineering Co Ltd [2017] CCJ 17 (AJ)*** seek an extension of time for appealing the ruling of Chang CJ (ag), as their Lordships' final Order purported to incorporate.

<u>Re- Williams and Salisbury</u>

The Court of Appeal constituted by Haynes, C., Crane and K.S. Massiah JJA, jurists of considerable eminence held unanimously that (i) the order of the Trial Judge in the *ex parte* proceeding refusing to direct the magistrate to state a case was an interlocutory and <u>not a final order</u>, albeit it purported to decide the matter once and for all; (ii) As an appeal to the Guyana Court of Appeal lies only as of right from a final decision of the High Court under ART 19 (now 133) relating to fundamental rights and freedoms, there is no jurisdiction in the Court of Appeal to grant leave to appeal from the Trial Court's refusal to grant the order *nisi*.

Per Haynes, C, at p. 141 (letter c):

> "However, before considering these two points, this court must determine the

objection raised to its jurisdiction to hear this appeal"; and at (i):

"First of all, was the decision at first instance interlocutory or final? Clearly, the application was not for a final order or decision"; and at letter (e) at p. 143:

"For these reasons, I think the objection of no jurisdiction to hear this appeal is a sound one and must be upheld…."

Finally at p.151 (letter f):

"All that I have said in this judgment up to this point indicates that in my opinion we have no jurisdiction to hear this appeal or to make the orders the appellants want."

Per Crane JA, at p. 157, (letter j): "The crucial question for us to decide is whether we are possessed of jurisdiction to hear and determine this appeal"; and, at p. 161, at letter j:

"But the immediate point is, have we jurisdiction to entertain an appeal from the trial judge's refusal to grant leave to issue the order *nisi*?", and at p. 163 (letter b):

"I am forced to conclude there is no jurisdiction in our Court of Appeal to make an order directing the trial judge to grant an order *nisi* and to call upon the magistrate to state a case for the opinion of the High Court."

Per Massiah JA, at p. 178 letter c:

"In the foregoing reasons it is clear that the matter is not within the cognisance of this court and I have no alternative but to decline jurisdiction".

It is therefore respectfully submitted that for the CCJ to purport to assert that this decision is "distinguished" for the purposes of the ***Robin Singh*** ruling is at best disingenuous; rather it appears to be a distinction without a serious difference in fact and, perhaps, in law. For the sake of completeness, the Guyana Court of Appeal did not gloss over or dodge but dilated with its usual forensic skills on the fundamental problem in determining whether an Order made by a Judge was final or interlocutory, an issue critical to their decision in ***Williams & Salisbury.*** At p. 141 Haynes, C. at letter (j) said "This raises the question: What is the test of a final decision?" He then proceeded to consider the authorities and cited ***Salaman v Warner [1891] 1 Q.B. 734*** where Lord Esher stated at p. 735 in relation to the nature of an Order by the trial Judge: "if a decision whichever way it is given, will, if it stands, finally dispose of the matter in dispute." Lord Alverstone CJ adopted this thought process in ***Bozson v Altrincham UDC [1903] 1 K.B 547*** at p. 549. It was applied in ***Isaacs & Sons Ltd. v Salbstein [1916] 2 K.B 139*** and by the JCPC in ***Ramchand Nanjimal v Rattan Chand (1928) 47 L.R Ind App 124***. These decisions, though arising in *inter partes* proceedings were equally applicable because the test of finality looked to the nature of the Order made.

Massiah JA treats with this issue in a not dissimilar fashion at p. 171 (letter g) to p. 172 (letter f) inclusive i.e. whether the issue was as to the content or substance of the proceedings or the nature of the order, the result is the same. A brief *verbatim* reference is required with respect to the main bone of contention before their Honours:

"They did not ask the trial judge to find that s. 72 of CAP 10:01 is ultra vires the Constitution as the trial judge appeared to think, but this apparent misconception does not stand by itself and there are other considerations to which I have already called attention which make it clear that the trial judge specifically refused the order prayed for. That was his decision and it must

not be confused with his reasons therefor. (See *Rajah Khan v Manick (1902) 30 IA 35*, decided by the Privy Council), (letters g-h). Therefore it is respectfully submitted that as a final court its integrity as a superior Court would have been enhanced by "overruling" in part Williams & Salisbury if the former's interpretation of s. 6 of the Court of Appeal Act is to be vindicated. The two rulings could not be more diametric in content and antithetical in conclusion."

The CCJ's interpretation of s. 6 appears to concentrate on the meanings to be attributed to "civil proceedings" therein, to the exclusion of "Crownside Proceedings" with respect to prerogative Writ applications. Therefore some focus must now attend for the purposes of this critique/discourse, s. 6 of the Court of Appeal Act. The relevant portion of that section is:

"(1) The Court of Appeal shall have jurisdiction to hear and determine any matter arising in any civil proceedings upon a case stated or upon a question of law reserved by the Full Court or by a judge of the High Court pursuant to any power conferred in that behalf by any Act.

(2) Subject as otherwise provided in this section, an appeal shall lie to the Court of Appeal in any cause or matter from any order of the Full Court or of a judge of the High Court (whether made before or after the date on which this Act comes into force) where such order is –

(a) final and is not –

(i) an order of a judge of the High Court made in Chambers or in a summary proceeding;
(ii) an order made with the consent of the parties;
(iii) an order as to costs;
(iv) an order referred to in paragraph (d).

(b) ….

(c) ….

(d) an order upon appeal from any other court, tribunal, body or person."

In effect, a litigant in any cause or matter may, if aggrieved, in whole or in part, with the decision of the Full Court or of a judge of the High Court in the circumstances outlined above has a right to file an appeal to the Court of Appeal without need for any assistance or leave of the aforementioned Courts.

It would appear that the CCJ has determined that an Order made by a judge in a prerogative writ application, *Ex parte*, is a final one, contrary to the ruling in ***Williams & Salisbury***. Basal to their conclusion/determination is that prerogative writs of certiorari *et al* can only be issued in Crown Side Proceedings which are not civil proceedings in nature, relying on a ruling of Bernard, C. in ***AG v Jardim (2003) 67 WIR. 100*** (See para 26 of Robin Singh).

However, as worded, the governing provision is, with respect, s. 6(2) which expressly states that an appeal as of right relates to any cause or matter where that order is final. The CCJ appears to have construed the expression "any civil proceeding" in s. 6(1) as having an interchangeable congruence with "any cause or matter" in s. 6(2). However, if the draftsperson of this piece of legislation intended this, as opposed to the more logical and broader construction, the actual language, *ipsissimis verbis*, would have been employed. Further, as will be seen momentarily, where different expressions are used in statutes, it is elementary to accord them their ordinary and natural meanings. A fortiori, where the two provisions are conceived and

designed to apply to distinctive situations. Literalism as an aid to statutory interpretation/ construction has not lost its primacy unless to apply it would lead to absurdity.

To the judicial aficionado, it may not come as a surprise that there is no paucity of native jurisprudence in this area of statutory interpretation. Confronted with an homologous and inconvenient burden created by not dissimilar procedural provisions of the Criminal Law (Procedure) Act CAP 10:01 of Guyana, Chief Justice Sir Harold B.S. Bollers in the ***State v Larry Leyton [1978-80] GLR 381*** was constrained and "compelled as I am, by the law" to quash an indictment, relying on the dictum of Lord Morris of Borthy-Gest in ***Sparks v R [1964] 1 WLR 572*** i.e. "the course of justice is best served by an adherence to the rules which have long been recognized and settled." With his customary clarity and salutary guidance he posited in unexceptionable language at p. 387:

> "It is trite that in construing a statute the literal rule or canon of construction must be applied i.e. the words used in the section under review must be given their ordinary and grammatical meaning and if the words used are not ambiguous then effect must be given to the true and exact meaning of the language used. It is only in the case where there is an ambiguity which would lead to an absurd result may the Judge move to what is termed the golden rule or mischief rule whereby he can interpret the legislation in such a way as to give it sense, and so avoid the absurdity or any inconsistency with the remaining parts of the legislation, which would arise on the application of the literal rule. In applying either rule the Judge is always seeking to discover the intention of the legislature i.e. what the legislature had in mind at the time of the passing of the particular piece of legislation, but he can only do so from the language used in the statute. It was Tindal C.J. in the *Sussex Peerage case* (1844) 11 CL and F 85 at p. 143 who said: "If the words are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the law giver.
>
> Thus that learned judge in the same case declared firmly that "the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of Parliament which passed them."

The indefinite pronoun "any" telegraphs a signification of its all-inclusive embrace of the substantive process ("cause or matter") which in itself defies any limitation in a teleological sense. According to the Oxford English Dictionary (10th Edition) "cause" includes a "lawsuit" and "matter" is described as "the reason for a problem". Furthermore it is now settled that "any criminal cause or matter" referred to in s. 6 (5)(a) from which no appeal lies under s. 6 is originating and by way of motion for prerogative writs contemplates a legal challenge to "the reason for (the) problem" arising from judicial or quasi-judicial action of an inferior court or tribunal [See ***King v AG of Guyana (1992) 47 WIR 210; Sobers v Director of Prisons (1999) 60 WIR 302; Zaman Ali v DPP (1991) 45 WIR 196***, and ***In the matter of the Fugitive Offenders Act 1988 and In the matter of an Appeal from the Full Court (in Chambers) re-Barry Dataram - Civ. Appeal # 158 of 2008***]. It would therefore appear that there is no grammatical ambiguity or semantic obscurity which would, *ex facie*, vitiate its meaning or construction. It is submitted moreover that s. 6, as a whole, contemplates more than one kind of civil cause or matter i.e. "civil proceedings" as

expressly identified in s. 6(1) and "prerogative writ applications" as a "cause or matter" in s. 6(2) and, in s. 6(5)(a), "any criminal cause or matter". It may not be without some significance that the morphological approximation of "cause or matter" must be contrasted with the etymological character of "civil proceedings" as construed by our Courts.

Bernard, C, as she then was, in ***AG v Jardim (2003-04) GLR 167***, appears to have adopted the reasoning of Bankes LJ in ***Ex parte Kynock Ltd [1918] 1 K.B. 176*** at p. 186:

> "… and the words 'action, prosecution or other proceedings' were not intended to include a prerogative writ" and Lord Scrutton L.J. at p. 188,
>
> "Clear words are necessary to impair such a right and the words of this Act, 'action, prosecution or other proceeding against any person' are no such clear words as to have that effect."

It is to be noted ***Jardim*** (supra) merely decided that the Attorney-General was not a proper party to the Appeal.

In the final analysis it may be prudent to adopt as a rule of thumb the guiding dictum of Lord Hewart CJ, at p. 43, in ***Spillers Ltd v Cardiff Assessment Committee [1931] 2 K.B. 21***:

> "It ought to be the rule and we are glad to say that it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily …"

Lord Simon of Glaisdale puts it more succinctly in ***Black-Clawson v Papierwerker [1975] A.C. 591*** at p. 649:

> "(It is) the irrebuttable ascription to Parliament of a draftsman's knowledge of the law in relation to which Parliament is legislating".

And not to be outdone by his eminent and learned colleague, Lord Hoffman posits at para [24] of ***Moyne v Sec of State for Work and Pensions [2003] 4 ALL. ER. 162***:

> "The meaning of an English word is not a question of law because it does not have any legal significance. It is the meaning to be ascribed to the intention of the national legislator in using that word which is a statement of law."

All these citations have been extracted from Bennion on Statutory Interpretation (5th Ed).

Quite rightly and, in consonance with regnant processes of analysis, their Lordships identified s. 6(5)(d) as pivotal to the determination of their decision (See paras 23 and 25). However, in so doing, it would appear contrary to its plain, ordinary and commonsense meaning, if literalism as a pervasive concept is to remain unpolluted by sentiment or subjectivity, the CCJ sought to introduce a restriction that was "implicit" in the legislative intervention. What and how could this find vindicatory legal interpretation to render nugatory an otherwise clear, unambiguous and unequivocal legislative provision? This will be addressed momentarily.

It seems that, by a surprising resort to sheer casuistry, the pillar upon which their deduction was constructed could be found in para 22 i.e. "… by applying the ruling in ***Haniff v Ali***. Thus the refusals of the two *ex parte* applications have <u>finally</u> disposed of the rights of the parties (sic) because it is clear that the reality is that no leave for the issue of a *nisi* order for certiorari will ever be granted, …." [At this stage, according

to the two parts of the process identified in para 24, only one party was before the Court!]

Let it not be forgotten that their Lordships also sought to prepare the pitch for the doorsa/ knuckle ball to play an incisive and integral part of their decision. In referring to the first application before Chang CJ (ag.) at para 9, their summary of the earlier matters, this is what they had to say:

> "No written judgment has been given, but Mr. Sanjeev Datadin, who then appeared – and still appears – as counsel for the applicants, informed this Court that Chang CJ (ag.) had applied his ruling in ***Haniff v Ali,*** regarding the claimants as having no *locus standi* ……."

Was this not sufficiently self-serving as to warrant some judicious enquiry from Chang CJ (ag.) in keeping with the protocol of judicial comity? Without any reference to ***Williams and Salisbury*** at this stage of the analytical potpourri their Lordships deduced at para 25 this most innovative conclusion:

> "At face value s. 6(5)(d) appears to oust any appeal to the Court of Appeal. It is, however, necessary to consider whether s. 6(5)(d) is implicitly restricted to interlocutory *ex parte* applications, so that it does not apply when the appellants' *ex parte* application was an originating application as in the present case."

Here is the manner of and extent to which the CCJ sought to imperatively address the stark reality of the problem on the issue of the "finality" of the Order contemplated by s. 6. Firstly, their Lordships drew a distinction between "interlocutory" *ex parte* applications and *ex parte* applications as origination applications which did not meet with the grant of a *Nisi* Order as the first of two steps in the prerogative writ applications. [See para 24]

Some support was given by referring to Megarry J's categorization of "an opposed *ex parte* motion" in ***Pickwick International Inc. (GB) Ltd. v Multiple Sound Distributors Ltd [1972] 3 ALL ER 274***. As pointed out earlier both ***Langhorne*** and ***Sarran*** in the reports of their decisions may have not gone beyond the applicants satisfying the trial judges that they were entitled to the *nisi* Orders i.e. the first in the aforementioned two-step process. The "*amicus curiae*" involvement by the State surely could not alter the "character" of the applications, as rightly pointed out by the CCJ at para 24!

However, there appears no precedent which their Lordships cited to support their view from the Courts of the Caribbean or the Commonwealth. Without being otiose it must not be overlooked that there is no Common Law right of Appeal and, by extension, as Morris LJ stated in ***Healey v Ministry of Health [1954] 3 ALL ER 449*** at p. 453:

> "There can certainly be no implication of a right of appeal … the Courts cannot invent a right of appeal where none is given. The Courts will not usurp an appellate jurisdiction where none is created."

In ***A.G v Sillem (1864) 11 E.R. 1200*** the House of Lords ruled by a majority of 4 to 2 that the right of appeal has to be granted expressly. Thus, the intention of Parliament is to be discovered only from the language of the statute under consideration and this must be given its natural and ordinary meaning. Lord Simon of Glaisdale referred to this canon of construction as a "golden rule", (see ***Lord Advocate v De Rosa [1974] 2 ALL ER 849*** at p. 862) and at p. 863 he counselled:

> "In statutory interpretation, no less than in legislation (parliamentary or judicial), hard cases are apt to make bad law."

And as pointed out by Massiah, C in ***Whitfield***

Rhyna v Transport and Harbours Dept. [1985-86] GLR 143 at p. 153:

> "A statute may not be extended to meet a *casus omissus*",

relying as he did on the Privy Council's ruling in ***Crawford v Spooner (1846) 6 MOO PCC 1*** at p. 8:

> "we cannot aid the legislature's defective phrasing of the Act; we cannot add and mend, and by construction, make up deficiencies which are left there."

More pointedly and with greater conclusive relevance to this critique he reminds us at p. 153:

> "Nor can there be any judicial statutory modification to promote a seeming depuration of the Statute Book by ridding it of what one may conceive to be superannuated law. Such an approach, pre-emptive in nature, would be tantamount to a judicial usurpation of the parliamentary function."

One may be forgiven for forming the impression that their Lordships may have by some subliminal artifice, sought to merge the deductive process à la Civil Law with the inductive medium of the Common Law thereby creating a hybrid conflation for the purpose of delivering a decision à la Solomon of scriptural legend.

CONCLUSION

It may be that Procrustes would be disinclined to concede that his instrument of compliance was designed to accommodate the challenges conceived by the Orders of their Lordships. The precedential value of their decision will undoubtedly become more vexed in the context of the uncategorised "very exceptional circumstances" in which the final Order is couched. Apart from its inherent juridical minefield aforementioned the decision may yet create the very dilemma it was intended to frontally disassemble or disaggregate. Practitioners and Judges alike are entitled to the best guidance from the CCJ so that the certainty of the law can meet their professional responsibilities to their clients and litigants, respectively. It may sub-serve both the principles of the legal process and the administration of justice, as contemplated by Lord Simon in ***Waugh v B.R. Board [1979] 2 ALL ER 1169*** at p. 1175, that the counsel of Dr. Akinola Aguda in "The Judge in Developing Countries" be borne steadfastly in mind:

> "Indeed, I am aware of the fact so eloquently put by Schwartz that the quality of justice depends more upon the men who administer the law than the content of the law they administer."

Confronted by a sea of troubles of its own making the CCJ sought refuge in a lifeboat of construction long regarded as taboo and impermissible in the rarefied space of judicial interpretation of legislation.

Our apex Court, constituted as it is, by a cadre of men and women whose curricula vitae withstood the forensic scrutiny of the relevant statutory authorities, respectively, has never laid claim to omniscience. It would therefore be reasonable to assume that their Lordships would be prepared to revisit a previous ruling should it, on mature reflection, find justification for so doing. Their colonial predecessors were wont to do so. With this in mind, *inter alia*, this author's unswerving support and

unremitting in his contribution to its creation in 2001 and inaugural establishment in 2005 are a matter of record during his erstwhile technocratic original political incarnation as Attorney-General and Minister of Legal Affairs of Guyana (1996-2001). In this capacity he is well aware that as preeminent tenets of policy the CCJ was never intended to be a supra-national body and autochthonous laws peculiar to their respective member States ought to be discretely and sedulously implemented. Some disquiet was recently expressed by Ms. Ria Mohammed-Davidson (LLM) in a refreshingly persuasive critique published in the (Guyana) Bar Association Review (2017-2018) titled 'Single Forever? Deconstructing Selby v Smith [2017] CCJ 13 (AJ).'

With this backdrop it may not be inapposite to summon the assistance of the axiom of prudence so demonstrated by one of our more distinguished Chief Justices, His Honour, Sir Anthony DeFreitas Kt. OBE. in ***Jeffrey v Mendes [1928] LRBG 43 at p. 45***, when he declared that "the doctrine of *Stare Decisis* should not be so overstated as to provoke a display of wit such as was exercised by Dean Swift when he made Gulliver say in his report on English law, that "if once English Judges go wrong they make it a rule never to come right." Should their Lordships in our apex Court regard themselves as shackled to a similar expectation?

THE NATURE AND ENFORCEMENT OF THE GUYANESE ROMAN-DUTCH MORTGAGE

by Mr. Kamal Ramkarran, Attorney-at-Law

i Introduction to mortgages

At its most basic, the concept of a mortgage is simple. A person who wants a loan enters into an agreement with a lender and undertakes that if he does not repay the loan in accordance with the agreed terms, the lender can recover the outstanding debt from the value of property owned by him, which becomes security for the loan when the mortgage is passed.[1]

The mortgage charges or encumbers the property and that charge is not released until the money is repaid or the lender recovers the debt from the value of the property in a manner permitted by the legal system where the mortgage was passed. Where there is a mortgage, the lender is described as a mortgagee and the borrower as a mortgagor.

Like other forms of security, including mortgages taken elsewhere, the Guyanese mortgage is separate from the underlying loan and is merely collateral to the debt. The creditor can proceed against the debtor on his personal undertaking only or move against the mortgaged property only, or both, to recover the debt outstanding.[2]

Mortgages often secure the repayment of debts arising out of different transactions and the repayment of a loan accorded when the mortgage was passed does not always bring a mortgage to an end and release the mortgaged land from the charge.[3]

Where a debtor, for example, has benefitted from more than one facility, like an overdraft, a residential loan, and a small business loan, each taken at a different time with a mortgage passed only when the first of those facilities is taken, the debtor may associate the charge on his land only with the facility granted when the mortgage was passed, believing the repayment

* This article is dedicated to the memory of Edgar Mortimer Duke, Mohamed Shahabuddeen and Fenton Ramsahoye, three outstanding Guyanese jurists who brought light to the dark corners of the law in Guyana.

1 The Shorter Oxford Dictionary (5th edition, 2002) Volume I, page 1836 defines 'mortgage' as "the charging of real or personal property by a debtor in favour of a creditor as security for a money debt…on the condition that the property be discharged on payment of the debt within a certain period". The Guyanese Roman-Dutch mortgage is passed and executed before the Registrar of Deeds, hence the use of the word 'passed'.

2 See H Beale, M Bridge, L Gullifer and E Lomnicka, The Law of Security and Title-Based Financing (2018) at paragraph 18.04 on page 604

3 Despite the definition set out above. In any event, the Guyanese Roman-Dutch mortgage is not discharged until it is cancelled by a deed executed before the court or a Notary Public and filed in the Deeds Registry (see section 15 of the Deeds Registry Act, Chapter 5:01); it would, of course, be a good defence to an claim on a mortgage that all sums owing were repaid, whether or not the mortgage was actually cancelled.

of the other facilities to be unsecured by the mortgage.

This may not be so, however, because mortgages sometimes contain terms that make them continuing security for all sums of money advanced thereafter to the mortgagor or his or her nominee to the extent of a specified sum.[4] When those terms are present, the mortgage attaches to the debt owing to the creditor on the loan which is disbursed when the mortgage is passed, as well as to future debts up to the sum specified.[5]

These principles are common to the Guyanese Roman-Dutch mortgage as well as to other types of mortgages elsewhere. In other important respects, however, the principles and consequences of the Guyanese Roman-Dutch mortgage are different from those which apply in other legal systems which follow the English common law.

ii A brief history of the Guyanese Roman-Dutch mortgage

In Guyana there are two types of mortgages: the Roman-Dutch mortgage, a holdover from Dutch colonialism, and the registered or Torrens mortgage[6] implemented in 1959 by the Land Registry Act.[7] The Roman-Dutch mortgage secures land held by transport[8] and the Torrens mortgage secures land held by certificate of title.

The Roman-Dutch law of mortgages began to apply in what is now Guyana when the West India Company, which had been incorporated in 1621 in the Netherlands, passed its first order on October 13, 1629. This company owned Essequibo, as well as a settlement on the Pomeroon River and one on the Demerara River.

The order passed by the West India Company in 1629 was sanctioned by the bicameral legislature of the Netherlands, known as the States General, and it provided at article 60 that mortgages were to be passed and sealed before the three members of the committee of civil justice, after which the mortgages were to be registered in a register kept by the assessor in accordance with the procedure applied in the United Provinces, also known as the Dutch Republic of the Netherlands.[9]

Two years before that the order was made, the Zeeland Chamber of the West India Company made an agreement with Abraham van Pere on July 12, 1627 concerning the settlement of the colony of Berbice. It is likely that the Roman-Dutch law of mortgages also prevailed in that colony from that time.[10]

4 See, in this regard, ***AIB Group (UK) Ltd v Martin*** [2002] 1 WLR 94

5 In this regard E M Duke said in A Treatise on the Law of Immovable Property in British Guiana (1923, Argosy) ("Duke") at page 47, relying on section 28 of the Deeds Registry Ordinance 1919, that in Guyana where it is intended for a mortgage to cover future advances or debts which accrue after the mortgage is passed, the nature of the future advances or debts must be stated and a certain sum must be named as the limit for those future advances, debts or demands. This does not appear in the current version of the Deeds Registry Act and it may be that this is no longer required.

6 While this article concentrates on principles of the Roman-Dutch mortgage, by section 88 of the Land Registry Act, the method of enforcing the Torrens mortgage is that "the provisions of any act or rule of court or of practice relating to the enforcement of any mortgage or charge shall apply mutatis mutandis to the enforcement of a mortgage or charge on registered land," which means that what is applicable to the enforcement of the Roman-Dutch mortgage is also applicable to the enforcement of the Torrens mortgage.

7 Chapter 5:02 of the Laws of Guyana

8 The old Roman-Dutch form of title to land

9 W R Bisschop, Modern Roman Dutch Law (1908) 24 LQR 157 ("Bisschop")

10 M Shahabudden, The Legal System of Guyana (1973) at page 25 ("Shahabuddeen")

In 1796, the three colonies of Essequibo, Demerara and Berbice, which now form Guyana, surrendered to the British and, although they were restored to Holland by the Treaty of Amiens in 1802, they were recaptured by the British in 1803, when Dutch occupation there ended.[11]

On the capture of the colonies by the British in 1803, the Dutch proposed Articles of Capitulation which were agreed to by the British. Among these articles were that "the laws and usages of the colony shall remain in force and be respected."[12]

Over time, however, with the expansion of British presence leading in 1831 to the colonies being combined to form British Guiana, regard for the Roman-Dutch law and practice waned, and between 1830 and 1890, the English common law started incrementally replacing Roman-Dutch law,[13] "in order to meet the needs of a community that was becoming more and more oriented to the English way of life."[14] In 1912 a Common Law Commission was established and, as a result of difficulties and misunderstandings[15] in the application of the Roman-Dutch law, it recommended systemic change in 1914.[16] This systemic change led to the passage of the Civil Law of British Guiana Ordinance 1916,[17] which became effective on January 1, 1917 and largely abolished the Roman-Dutch law, replacing it with English law.

Possibly because the existing Roman-Dutch system of conveyancing and mortgages was considered simple and convenient, some aspects of the Roman-Dutch property law were retained by the Civil Law Act.[18]

One of the aspects of the Roman-Dutch law retained by the Civil Law Act was the law and practice of mortgages. This was declared to be "the law and practice now administered in those matters by the Supreme Court."[19]

More than a hundred years later, those words, "now administered in those matters by the Supreme Court," which remain unchanged in the Civil Law Act, mean that time has stood still since January 1917. The phrase must be

11 Prof R W Lee, Roman-Dutch Law in British Guiana (1914) 14 J Soc Comp Legis (NS) 11

12 Article 1, Articles of Capitulation proposed in 1803 by the Governor General and the Court of Policy of the Colonies of Essequebo and Demerara, and the Commanding Officers of the Sea and Land Forces of the Batavian Republic in the said Colony, to their Excellencies the Commanders-in-Chief of His Brittanic Majesty's Sea and Land Forces off Demerara, with the Answers to such Articles; and Additional Articles thereto, Appendix of Legislative Enactments and Constitutional Documents printed in pursuance of section 6(2) and the First Schedule to the Law Revision Act 1972, Laws of Guyana, 1973. There were similar Articles of Capitulation for Berbice.

13 See in this regard, Prof R W Lee, The Fate of the Roman-Dutch Law in the British Colonies (1906) 7 J Soc Comp Legis (NS) 356; Prof R W Lee, Roman-Dutch Law in British Guiana (1914) 14 J Soc Comp Legis (NS) 11; J C Ledlie, Roman-Dutch Law in British Guiana and a West Indian Court of Appeal (1917) 17 J Soc Comp Legis (NS) 210; and, L C Dalton, The Passing of Roman-Dutch Law in British Guiana (1919) 36 S African LJ 4

14 Shahabudden at page 201 (The reception of English law and the abolition of Roman-Dutch law is discussed at pages 189—210)

15 See in this regard, Bisschop at pages 169—170

16 Shahabuddeen at pages 202—203. F W Ramsahoye describes the Commission as the Roman-Dutch Law Commission, constituted on 4 June 1912 at page 17 of The Development of Land Law in British Guiana (1966, Oceana Publications Inc) ("Ramsahoye")

17 Now the Civil Law of Guyana Act, Chapter 6:01 of the Laws of Guyana ("The Civil Law Act")

18 According to Ramsahoye at pages 17 and 27, the Statute Law Committee, appointed on 28 November 1914, to determine what English statutes should be adopted to effect the change from Roman-Dutch law to English law was unanimous in its disapproval of the introduction into British Guiana of the English common law of real property with its peculiar incidents.

19 Section 3(d)(ii) of the Civil Law Act

construed as it were being interpreted it the day after the Civil Law Act passed[20] and its effect is as a fixed time Act, where what is provided for is intended to be applied in the same way regardless of the passage of time unless, of course, the section is repealed.[21]

In 1919, two years after the Civil Law Act was passed, the Deeds Registry Ordinance was passed.[22] Its aim, as set out in its long title, was to amend the law relating to the execution and registration of transports, mortgages and other deeds and its effect was to partially codify the law and practice of mortgages.

While this Act set up a procedural framework for the registration of mortgages and the sale at execution of mortgaged immovable property administered by the Deeds Registry and Registrar of Deeds created by its provisions, the principles of substantive law were mostly unaffected.[23]

The Deeds Registry Act did bring one significant change and, after its passage, mortgages began to be passed and executed before the new Registrar of Deeds instead of by the court.

Since section 16(2) of the Act provided that every mortgage passed and executed before the Registrar had the same validity, force and effect as if it were passed and executed before the court, this made little difference, and the law and practice of mortgages developed and applied up to the end of 1916 remained in place when the Roman-Dutch law was abrogated.

iii Principles of the Guyanese Roman-Dutch mortgage developed by 1917

In January 1917, when the Civil Law Act came into effect and the law and practice of mortgages then administered was fixed in place, two main principles had been recognised by the judiciary of British Guiana on the substantive law of mortgages.

The first principle was that a mortgage was a 'sentence' or judgment of the court and could not be reopened by the parties since it was *res judicata* between them. The second principle was that, in enforcing a mortgage, it was necessary to obtain an order of court giving leave to the mortgagee to proceed in execution against the mortgaged property after which the property would be sold at public auction administered by the court and the proceeds applied to the mortgage debt.

On the first principle, a mortgage was considered a consent judgment of the court because of a mechanism called a willing and voluntary condemnation contained in the mortgage deed.

This mechanism was usually the second distinct element in the mortgage deed, with the first being the mortgage or charge itself. It was created by using a form of words where the mortgagor admitted in the deed that he was justly and truly indebted to the mortgagee for the repayment of the sum set out in the deed.

The mortgagor then asked the judge passing the mortgage to condemn him in the performance

20 ***The Longford*** (1889) 14 PD 34, at page 36 per Lord Esher

21 See in this regard, Oliver Jones, Bennion on Statutory Interpretation (6th edition, 2013) at pages 811—812

22 Now the Deeds Registry Act, Chapter 5:01 of the Laws of Guyana

23 See in this regard, L C Dalton, The Civil Law of British Guiana (1921) at page 15 ("Dalton")

of the conditions set out in the deed, including the repayment of the capital and interest, and indicated that he was fully consenting to that condemnation.[24]

This element of the Roman-Dutch mortgage was recognised by the Supreme Court as long ago as 1858 in ***Macaulay v Marks***[25] where a claim made on a mortgage was resisted on the ground that the defendant was deceived when the mortgage was passed.

The court, comprised of Arrindell CJ, Beete J and Alexander J, rejected the defence and held that, as a general rule, the only defence to a mortgage was payment and fraud and that the fraud alleged by the defendant was not strong enough to "induce the court to set aside so solemn an act as a mortgage judicially passed."

In its reasons, the court specifically said that a willing and voluntary condemnation was a sentence, indicating that the mortgage was already a judgment of the court.

In 1897, nearly forty years later, the question whether a mortgage was a judgment and therefore conclusive of the issues determined by it was raised again for determination in ***British Guiana Electrical Lighting Power v Conrad***.[26]

This matter arose out of a dispute between Jacob and Bernard Conrad, trading as commission agents under the name Conrad, Son and Co ("the Conrads"), and the British Guiana Electric Lighting and Power Co Ltd ("the Electric Company") in which the Electric Company alleged that the Conrads, who bought many items over a long period for it, improperly and secretly received and large sums of money as commission payments from the sellers of those items.

The Electric Company therefore claimed repayment of the sum of $3,365.25 from the Conrads together with any other sum that might be found to be due and it asked for an account of all money received by the Conrads in respect of items imported by them for the Electric Company together with particulars of trade accounts, commission drawbacks and other allowances received by or allowed to the Conrads by the manufacturers or the sellers of the items imported by the Conrads.

The Conrads responded that the items were not imported by them as agents for the Electric Company. They asserted that the items were sold by them to the Company, implying that since they were not acting as the agents of the Company, the items could have been sold by them for any price the Company was willing to pay and drawbacks or allowances received by the Conrads, if any, were irrelevant.

When the matter was called for hearing, however, the Conrads raised a new argument as preliminary issue which they contended, if upheld, would bar the Electricity Company from a large part of its claim.

This issue arose out of fact that, five years earlier, the Electric Company had passed a mortgage in favour of the Conrads to secure its debt to the Conrads on accounts stated and the debt secured by the mortgage formed part of the claim brought by the Electric Company against the Conrads.

24 Duke at page 45

25 [1855—1858] 1 LRBG 85 (OS)

26 [1897] LRBG 115 ("***Conrad***")

At the time of the action, the mortgage had been transferred by the Conrads to the Colonial Bank as security, but it was still in force and had not been cancelled.

The Conrads argued that even if all the facts alleged in the Electric Company's case were true, the Electric Company was barred from raising them because the mortgage was a judgment and the Electric Company could not reopen the facts settled by the mortgage unless the mortgage had been set aside. Once the mortgage was in force, the Conrads contended, money having been paid to the Conrads under it could not be recovered.

On November 15, 1897 before hearing the substance of the matter Atkinson CJ (ag), sitting with Sheriff J, delivered the judgment of the court on the preliminary argument. He first went through the form of the mortgage, describing it as being in the usual form, and explained that in the mortgage the Electric Company admitted that it was justly and truly indebted to the Conrads for items sold and delivered to it by the Conrads.[27]

Atkinson CJ (ag) described the willing and voluntary condemnation where the Electric Company requested that the judge condemn it in the payment of the capital sum named and interest and in the performance of the conditions in the mortgage, with the Electric Company "fully consenting to such condemnation (judgment)."

The judgment itself was then recited as stating "Wherefore His Honour the said judge hath condemned as he doth hereby condemn" the Electric Company in such payment and performance.

Atkinson CJ (ag) indicated that the mortgage need not have been passed with the willing and voluntary condemnation, in which case, the creditor would have had to sue for payment and that if there were no payment, the mortgaged property may have been declared bound and executable.

Once the mortgage was passed with a willing and voluntary condemnation, however, the creditor simply laid the sentence or judgment before the court and applied for leave to proceed in execution.[28]

In describing the effect of the mortgage, Atkinson CJ (ag) found that the sentence represented by the mortgage remained on the records of the court and had not been set aside, revoked, rescinded or annulled.[29]

This meant that the debt dealt with by the mortgage was *res judicata* and could not be reopened as that would be contrary to the system of jurisprudence.

Were the court to permit the matter to be reopened while the mortgage stood, it would be permitting litigants to bring proceedings which raised issues, whether directly or indirectly, that were already determined judicially.

Atkinson CJ (ag) therefore did not permit the Electric Company to raise questions in the action which were already determined by the mortgage since, if it were later found that a lesser sum was due to the Conrads than the

27 At page 118 of the report

28 At pages 118—119 of the report

29 At page 120 of the report

sum specified in the mortgage, the anomalous situation would arise where there were two valid sentences or judgments of the court for different sums.[30]

This, Atkinson CJ (ag) concluded, would lead to endless confusion and was not to be permitted. Before the Electric Company could re-open the accounts, it was required to have the mortgage set aside.

Eventually, after procedural arguments, the Electric Company was permitted to amend its claim to permit it to request that the mortgage be set aside.

In 1883, fourteen years before ***Conrad*** was decided, the requirement that an order of court was necessary before mortgaged property could be sold at execution by the court was discussed in ***Mendonca v Gonsalves***.[31] This was the second substantive principle developed on the Roman-Dutch mortgage by the Supreme Court by 1917.

The court, comprised of Chalmers CJ and Atkinson J, formed the opinion that the debt created by the Roman-Dutch mortgage was a movable debt and the property which was secured by it never became the property of the mortgagee.

The property could only be sold after the mortgagee obtained a court order for repayment of the money due under the mortgage as well as a sentence of foreclosure permitting the sale. The proceeds of that sale, administered by the court, would be applied to the debt.

Twenty-seven years later, James Williams writing in the Yale Law Journal, confirmed the correctness of that view when he said that a clause permitting the mortgagee to sell property in default of payment had been found invalid from early times.[32]

In 1915, R W Lee outlined the situation in greater detail by explaining that in Roman law, from which Roman-Dutch law was derived, a first mortgagee acquired a power of sale of property, which could not be excluded by express agreement. In certain cases, a mortgagee could also obtain an order of foreclosure.[33]

This was not the position in Roman-Dutch law, and unlike Roman law, those remedies were unavailable in Roman-Dutch law. Foreclosure was unknown to the Roman-Dutch law and the property could not be sold without the consent of the debtor.

Under the principles of the Roman-Dutch legal system, the means of enforcing a mortgage was to obtain a judgment of the court upon the mortgage debt and then taking out a writ of execution against the property.

In an appendix to that chapter in R W Lee's book, W J Gilchrist, a barrister and magistrate in British Guiana who later became a judge, explained the system of enforcing mortgages in that colony.[34]

30 At page 121 of the report

31 26 May 1883, unreported. A copy of this decision could not be found in the National Archives using the reference provided by Ramsahoye and his synopsis of the decision at page 238 has been used.

32 James Williams, Roman Dutch Law (1910) 19(3) Yale LJ 156, at page 158. The clause was called '*parate executie*.'

33 An Introduction to Roman-Dutch Law (Clarendon Press, 1915), at pages 180—181 (in a passage largely unchanged in the 4th edition of the book, published in 1946)

34 Appendix B, The System of Conveyancing in British Guiana, under the heading 'Enforcement of mortgages', at page 186

He said that a mortgage could only be enforced by writ of execution after a judgment of the court. He explained that if the action was brought *in rem*, that is, against the property only, the mortgagee could execute only on the mortgaged property but if the action was brought *in personam*, that is against the mortgagor on his debt, the judgment gave the mortgagee the right to execute first on the mortgaged property and secondly on the general estate of the mortgagor.

In 1915, this aspect of the Roman-Dutch mortgage was also addressed in ***British Guiana Mutual Fire Insurance Co Ltd v The Demerara Turf Club Ltd***[35] where the British Guiana Mutual Fire Insurance Co Ltd ("the Insurance Company") brought a petition for leave to institute proceedings against the Demerara Turf Club Ltd (in liquidation) ("the Turf Club") to foreclose a mortgage for the sum of $20,000 plus interest on a racecourse known as Bel Air Park.

In his judgment, Major CJ said that where a debtor failed to observe and perform the obligations agreed by him in a mortgage deed, the mortgagee had the right to bring take proceedings against the debtor to enforce the security.[36]

He described the proceedings which needed to be brought as a form of an action to ascertain the amount of the debt, where necessary, and for a decree that the mortgaged property be declared liable to be taken in execution and sold to satisfy that debt.

The mortgagees had asked for leave to 'foreclose' the mortgage bond in respect of the mortgaged property and Major CJ criticised the use of that term as being inaccurate and misleading.[37]

This was so because that term properly applied in English law to a mortgagor and his equitable interest in the mortgaged property and not to the mortgagee and his instrument of mortgage.

It was misleading because it implied that the upon the granting of the order, the mortgagee would obtain the mortgagor's equitable interest, whereas in British Guiana the remedy under a mortgage was the sale of the mortgaged property and not the acquisition, by means of an order of foreclosure, of the mortgagee's interest in the mortgaged property without sale.

Major CJ held that in British Guiana the mortgagor's interest in the mortgaged property was the ownership of that property and it could only be obtained by purchase at sale unless the mortgagor conveyed the property to the mortgagee in consideration of the existing debt or for any larger or smaller sum that could be agreed by the parties.

With those comments, Major CJ granted leave to the mortgagees to commence proceedings against the company, which was in liquidation, to enforce their security for the payment of the mortgage debt and to prosecute it until final judgment with the caveat that there would be a stay of execution of six months after the order was granted.[38]

35 [1915] LRBG 191

36 At paragraph 4 on page 193 of the report

37 At paragraph 6 on page 194 of the report

38 The fact that the company was in liquidation meant that the leave of the court to commence proceedings was necessary

In addition to the two main principles of the Guyanese mortgage, the British Guiana courts also applied the Roman-Dutch law and practice on oppositions, which prevented the passing of mortgages or transports or the carrying out of execution sales where the opposer was owed a debt.[39] The law of oppositions was also saved by the same section of the Civil Law Act which saved the law and practice of mortgages.

Oppositions and opposition actions, which were required to follow, and in which oppositions would be deemed well founded or discharged, played an integral accessory role to mortgages, transports and sales at execution.

As early as 1823, Jabez Henry, then President of the Court of Demerara and Essequibo said that mortgages were advertised three times at stated intervals in order to give simple contract creditors to oppose their passage.[40]

By 1917, therefore, the principles of the Guyanese Roman-Dutch mortgage had been under a process of refinement for nearly sixty years if ***Macaulay v Marks***, decided in 1858, is taken as the starting point. It is no wonder then that the legislature considered those principles to be sufficiently settled for it to affix them in time for perpetuity by the operation of the Civil Law Act.[41]

iv Application of the principles of the Roman-Dutch Mortgage since 1917 in Guyana

In 1918, the year after the passage of the Civil Law Act, an interesting question concerning the interplay between Roman-Dutch mortgages and the costs of recovering the debt due under that mortgage in an insolvency arose in ***Re Demerara Turf Club (In Liquidation)***.[42]

One of the two main issues to be determined was whether secured creditors were entitled to interest accrued after a winding up order. Dalton J (ag) analysed both the nature of the Roman-Dutch mortgage and the English law of insolvency, which then applied in British Guiana, to arrive at his findings.

He held that that a mortgagee in a winding up is entitled to payment of capital and interest secured under his mortgage up to the date of payment as well as to all costs properly incurred in foreclosing the mortgage, as that term was understood in the colony.[43]

In arriving at his findings, Dalton J (ag) described the nature of the mortgage and the willing and voluntary condemnation and applied the *ratio decidendi* of ***Conrad*** in holding that a mortgage was a judgment and could not be varied.

39 On the substantive law of oppositions, see Dalton at pages 16—21, Duke at pages 13—27 and Ramsahoye at pages 244—249

40 See Dalton at pages 16—20 and Duke at page 14

41 In South Africa, where the law is derived from Roman-Dutch principles, the law and practice of the mortgage continued to develop. A recent High Court decision delivered by Molopa-Sethosa J discussing those principles is ***Land and Agricultural Development Bank of South Africa v Phato Farms (Pty) Ltd and others*** (58018/10) 2015 (3) SA 100, 11 August 2014. The judgment can be found here: http://www.saflii.org/za/cases/ZAGPPHC/2014/616.html

42 [1918] LRBG 119

43 At page 123 of the report

Having made his findings on the nature of the mortgage, Dalton J (ag) expressed the view that, looking at the Guyanese Roman-Dutch mortgage through the lens of English law, it occupied a position between a mortgage, on the one hand, and an equitable charge, on the other.[44]

While Dalton J (ag) did not believe that the Roman-Dutch mortgage was as effective as the English mortgage, because the latter was a conveyance, he felt that the Guyanese mortgage afforded better security than an equitable charge or mortgage. Despite the differences in the types of mortgages, Dalton J nevertheless seemed to believe that English decisions could be useful in interpreting the law.

Dalton J (ag) also seemed to approve of the local practice of advertising the passing of mortgages in the Official Gazette, as he referred to that as notice to the world of what was done.

Soon after that, in 1921, the nature of the mortgage arose again for judicial determination by Dalton J in ***Tinne v Tebutt***,[45] which was a simple claim for summary judgment based on a debt secured by a mortgage.

Several factual defences were raised but Dalton J did not find any worthy of further consideration and he granted judgment to the mortgagee instead of leave to defend the summary proceedings to the mortgagor. One of those defences questioned the accounts upon which the mortgage was passed.

In dismissing that defence, Dalton J again applied the *ratio decidendi* of ***Conrad*** as expressing the law in the colony that a mortgage was a judgment and, until it was revoked or set aside, questions attacking the debt underlying the mortgage could not be permitted.[46]

The next year, in 1922, the Full Court comprising Major CJ, Berkeley J and Dalton J heard ***Adamson v Higgins***,[47] and in delivering the judgment of the court, Dalton J got another opportunity to address his mind to the principles of the Roman-Dutch mortgage.

In this matter, there were two mortgages on a property at Brickery on the East Bank of Demerara owned by the petitioner, Edward Higgins ("Higgins"). The first mortgage had been passed in favour of the British Guiana Building Society Ltd ("the Building Society") and the second mortgage was in favour of Sarah Adamson ("Adamson").

Adamson, the second mortgagee, sued Higgins on the mortgage debt and proceeded in execution against the property after judgment. The property was then sold at execution to James Mitchell ("Mitchell").

Before a judicial sale transport could be passed, a dispute arose as to which mortgagee was entitled to priority in payment of the mortgage debt and whether, instead of paying the first mortgagee from the balance of the proceeds, as it was the second mortgagee who sued and executed on the property, the transport with the first mortgage annotated on it should pass to Mitchell.

Higgins sought an order of the court for the transport to be passed with the first mortgage

44 At page 121 of the report

45 [1921] LRBG 84 ("***Tinne***")

46 At page 85 of the report

47 [1922] LRBG 24

and that the surplus of the sale, which was substantial, be paid over to him. This was opposed both by the Building Society and Mitchell.

Dalton J held that Adamson was entitled, without consulting the Building Society, to have the mortgaged property declared executable, as she did, and then proceed to a sale at execution of the property, as she also did, when it was bought by Mitchell.[48]

At that time, however, the debt owed under the first mortgage had matured and Higgins was in default of payment to the Building Society. It had required the mortgage to be paid and was also entitled to foreclose on it when Adamson did so.

After the property was sold at execution at the instance of Adamson and purchased by Mitchell who made payments on the purchase, the Building Society then lodged its claim with the Registrar with a request for payment on its first mortgage, which had priority over the second mortgage passed in favour of Adamson.

Dalton J found that by doing so, the Building Society was following an old, well recognised, and correct practice. It was correct because the mortgage bond was a form of judgment and the mortgaged property was already in the custody of the court under Adamson's writ of execution.

The Building Society was therefore entitled to be paid the full amount of its claim in preference to Adamson's claim, after the costs of the sale were paid. Fortunately, the property was sold for enough money to pay the claims of both the Building Society and Adamson.[49]

Ten years later, in 1932, another aspect of the mortgage came up for consideration in ***Charlestown Sawmills Ltd v Husbands***.[50] This was an appeal from the Magistrates' Court to the Full Court, comprising Savary CJ (ag) and McDowell J (ag), and concerned the entitlement of the mortgagee to the surplus of funds after a building and the unexpired term of a lease had been sold at execution at the instance of the mortgagee.

When the property was sold at execution at the instance of Charlestown Sawmills Ltd ("the Sawmill"), which also bought the property at the sale, the sum of $55.57 remained as a surplus of the sale. Since the Sawmill did not fully recover its debt from the sale, it applied to the Magistrate to be paid the surplus.

The Magistrate found that the mortgage and mortgage debt were extinguished on the sale of the property to the Sawmill and it was therefore not entitled to the surplus. This ruling was appealed to the Full Court.

Savary CJ (ag), who delivered the judgment of the Full Court, agreed with the submission made on behalf of the Sawmill that the Roman-Dutch mortgage was comprised of two parts which were the charge and the debt and he found that, although the purchase had the effect of extinguishing the charge, it did not necessarily follow that the debt was also extinguished.[51]

48 At page 27 of the report

49 Sir Llewelyn Chisholm Dalton (1880—1945), who appears throughout this article and makes his last appearance here, wrote legal articles, a monograph and a digest of law, all on the law of British Guiana, and he was the Editor of the Law Reports of British Guiana. In British Guiana, between 1910 and 1919, he was Registrar and a Judge from 1919 to 1923, acting for a period as Chief Justice. Between 1923 and 1925, he was a Judge in Ghana and from then to 1936, a Judge in Sri Lanka. He ended his career after serving as Chief Justice of Tanzania from 1936 to 1940.

50 [1932] LRBG 92

51 At page 94 of the report

He also accepted the explanation given on behalf of the Sawmill that the practice of the Supreme Court preserved by the Civil Law Act in 1917 was that after the costs of a sale had been paid, the mortgagee was permitted any balance of the proceeds of sale not exceeding the amount due on his mortgage in priority to any payment to the debtor and this was so even where the mortgagee bought the property.

The Full Court therefore found that the debt due under the mortgage had not been extinguished by the sale at execution and that the Sawmill was entitled to the surplus from the sale.

In 1942, despite being settled time and again, issues concerning the status of a mortgage of immovable property in British Guiana and whether the mortgagor could resist its legal consequences by impeaching the original transactions on which it was based were again raised before Stafford J (ag) in ***Demerara Storage Company Ltd v Demerara Wharf and Storage Co Ltd***.[52]

Stafford J (ag) went through the history of the statutory enactments on mortgages from the earliest that he could find dating to 1774 to hold that it had always been the law in the colony, as in Holland in the days of the Republic and before, that a conventional mortgage of immovable property had to be passed before a competent court.[53]

Even where the Registrar had been empowered to pass mortgages, Stafford J (ag) recognised that, in order to do so, the Registrar had been clothed by the legislature with the jurisdiction to exercise the same powers as a judge in that regard.

Having so found, Stafford J (ag) restated and applied the principles set out in ***Conrad*** to find that mortgages were, by their nature, consent judgments and could only be set aside by a fresh action for that purpose.[54] The mortgages could not therefore be impeached by attacking the underlying transactions.

In 1965, proceedings were brought in ***Jaigobin v Dias***[55] to set aside a judgment, levy and the sale at execution of property at Spaarendaam on the East Coast of Demerara in default of payment on a mortgage passed by Jaigobin in favour of Charles Dias.

This was an unusual case and it arose out of a series of procedural errors which happened in the earlier proceedings on the mortgage. The property sold at execution was apparently movable and not immovable property. It was comprised of a building on a piece of land and the rights in an apparent lease of that land.

Bollers J found that this amounted simply to a licence held by Jaigbobin permitting him to go on the land and, for this reason, after making the distinction between proceedings *in rem* brought against the property itself and proceedings brought personally against the mortgagor to recover on the mortgage, he held that it was inappropriate to bring proceedings *in rem* to against movable property.

Proceedings *in rem* were described by Bollers J as proceedings against property only, in which the defendant's name was not given. In those proceedings, the defendant was merely described as the owner or representative of the land and the proceedings were served, according to the procedural rules of court, by affixing a

52 [1942] LRBG 82

53 At pages 103—104 of the report

54 At pages 104—105 of the report

55 [1965] LRBG 530

copy to the principal building upon the land or plantation or, if there was no building, to any railing, tree or other conspicuous place on the land or plantation. In those proceedings, the mortgagee could only look to the proceeds of sale for the recovery of his debt.

Proceedings brought against the mortgagor were served personally, Bollers J explained, and the mortgagee was free to proceed against any other property of the mortgagor, in addition to the mortgaged land, if the proceeds of sale after judgment and sale at execution were insufficient to satisfy the debt owed to the mortgagee.

Interestingly, Bollers J held that the word 'practice' in the phrase "the law and practice now administered in those matters by the Supreme Court" by which the Roman-Dutch law of mortgages was retained in Guyana, meant the principles of substantive law rather than procedural law set out in rules of court on how things were to be done.[56]

On this finding, Bollers J was able to hold that the Rules in force at the time excluded the type of property in issue in the proceedings from an action brought *in rem* since the Rules referred to 'a lot of land or plantation' and movable property was neither.

If the Roman-Dutch practice did not mean the manner of doing things, reliance could properly be placed on the strict wording of the Rules then in force to limit the type of property which could be the subject of proceedings brought *in rem* against it.

In arriving at this conclusion, Bollers J found that earlier judicial decisions in which proceedings were brought *in rem* against movable property could hardly establish a practice and must have been clearly wrong.

The decisions in ***Adamson v Higgins*** and ***Charlestown Sawmills Ltd v Husbands*** were both discussed by Bollers J but he found that they considered the practice of the Supreme Court and did not consider any question of procedure or manner of proceedings, which he felt were distinct concepts, against the mortgaged property.

Bollers J's comments on the nature of the Roman-Dutch mortgage and his distinction between proceedings brought *in rem* against the land and proceedings brought against the mortgagor directly were undoubtedly correct.

His interpretation of the word 'practice' to justify his eventual ruling in the matter, on the contrary, should however be limited to that decision. The comments made in the earlier decisions rendered much closer to 1917, at a time when Roman-Dutch law was more familiar, made it clear that 'practice' was synonymous with the word 'procedure'.

In 1979, the principles outlined by Atkinson CJ in ***Conrad*** and restated by Dalton J in ***Tinne*** were applied without question as accurately reflecting the law of mortgages in ***Persaud v Ogle***,[57] by Crane CJ sitting with Massiah JA and Vieira J in the Court of Appeal.[58]

Similarly, in 1996, in ***Vansluytman v New Building Society***,[59] the Court of Appeal comprising Bishop C, Bernard JA and Perry JA, in a judgment delivered by Bernard JA, applied the principles of enforcing a Roman-Dutch

56 At pages 536—537 of the report

57 (1979) 27 WIR 160

58 At pages 168—169 of the report

59 (1996) 54 WIR 270

mortgage set out by Major CJ in ***British Guiana Mutual Fire Insurance Co Ltd v The Demerara Turf Club Ltd.***[60]

In 2002 the law of the Guyanese Roman-Dutch mortgage was restated by the Court of Appeal in ***Dhanraj v National Bank of Industry and Commerce Ltd***[61] where the mortgagee obtained judgment against the mortgagor in the High Court when he defaulted on payment.

The mortgagor appealed that judgment and applied to a single judge of the Court of Appeal for a stay of execution. The application was refused and he renewed it before the full bench of the Court of Appeal.

The application was heard by Bernard C, Singh JA and Kissoon JA, who refused the stay of execution and, treating the application as the hearing of the appeal, dismissed the appeal, which the court felt had no prospect of success.

Bernard C, who delivered the judgment of the Court of Appeal restated the principles laid down in the earlier decisions and discussed by the textbook writers, Duke and Ramsahoye, to find that neither a lack of independent legal advice nor the equitable doctrine of undue influence could be relied upon to reopen the facts settled by the mortgages, which were akin to consent judgments.[62]

In 2009, in ***LOP Investments v Demerara Bank (No 2)***,[63] the Roman-Dutch law of mortgages was raised briefly and peripherally in the only case in which it has been considered by the Caribbean Court of Justice.

The matter was heard by de la Bastide P, Nelson J, Saunders J, Bernard J, Wit J and Hayton J and the judgment was delivered by Hayton J, who applied the law set out in ***Conrad*** as restated by Dalton J in ***Tinne*** and found that the express consent by the mortgagor to a willing and voluntary condemnation being adjudged against him resulted in a money judgment in favour of the mortgagee.[64]

Hayton J found that any default on the part of the mortgagor of the terms of the mortgage enabled the mortgagee to foreclose on the mortgagor's interest in the mortgaged property through proceedings in court which would result in the property being sold through judicial process to recover the money owed to the mortgagee.

Between 1917 and 2009, therefore, a period of more than ninety years, the principles established before 1917 have been restated, applied and developed interstitially by courts considering the nature and enforcement of the Guyanese Roman-Dutch mortgage.

v Distinguishing the English mortgage from the Guyanese Roman-Dutch mortgage

If the old Roman-Dutch law had not been retained in 1917, the English law of mortgages is likely to have applied in Guyana, as it does in other parts of the Commonwealth.

The English mortgage is an equitable assignment to the mortgagee by the mortgagor of his interest in the mortgaged property. It gives immediate real rights over the property to the mortgagee.

60 At page 274 of the report

61 [2001-2002] GLR 189

62 At pages 192—193 of the report

63 (2009) 75 WIR 312

64 At paragraph 3 on page 315 of the report

Unlike the Guyanese Roman-Dutch mortgage, the English mortgage is a transfer by the mortgagor of his rights over the property to the mortgagee. In 1899, therefore, it was defined as "a conveyance of land…as a security for the payment of a debt or the discharge of some other obligation for which it is given".[65]

Although the equity of redemption essential to an English mortgage is outside the scope of this article,[66] the English mortgage gives such rights to the mortgagee as permitting him to sue the mortgagor on his personal covenant to repay the debt and interest outstanding, or permitting entry into possession of the mortgaged premises, or permitting him to exercise the power to appoint a receiver to manage the income of the mortgaged property, or permitting him to exercise the power to sell and foreclose on the property.[67]

In Trinidad & Tobago, for instance, where the law of English mortgages applies by virtue of section 32 of the Conveyancing and Law of Property Act,[68] some of those powers, such as the power to sell and the power to appoint a receiver, are statutorily permissible by section 39(1) of that Act where the mortgage is by deed.

Unlike the English mortgage, there is no such equitable assignment or power of sale in the Guyanese Roman-Dutch mortgage where the only remedy for the mortgagor is to go to court and obtain judgment and to execute on that judgment as in an ordinary money judgment.

In 1923, Duke discussed the differences between the meaning of 'foreclosure' in the English mortgage and in the Roman-Dutch mortgage by explaining that to foreclose a mortgage in England meant to destroy the equity of redemption still existing in the mortgage whereas in British Guiana, no such estate as an equity of redemption was known to the law, and the legal estate is never conveyed to the mortgagee as is done in England.[69]

vi The procedural enforcement of a Guyanese Roman-Dutch mortgage

Before the Roman-Dutch law was abrogated in 1917, there was often tension as to whether English law or Roman-Dutch law should apply in various circumstances.[70]

While the Roman-Dutch law was waning, similar discord arose when procedural rules based on English practice were grafted on to existing Roman-Dutch practice, which affected the enforcement of mortgages.[71]

This was because the applicable principles of Roman-Dutch law could only be carried out through procedural rules giving effect to those principles and English rules of practice often did not recognise the forms of procedure necessary to give effect to Roman-Dutch principles.

65 ***Santley v Wilde*** [1899] 2 Ch 474, per Lindley MR

66 See, for example, E H Burn, Cheshire and Burn's Modern Law of Real Property (15th edition, 1994) ("Cheshire and Burn's") at chapter 21 for an overview of the law relating to English mortgages

67 Cheshire and Burn's at page 689

68 Chapter 56:01 of the Laws of Trinidad and Tobago

69 Duke at page 46

70 See in this regard, Shahabuddeen at pages 190—201

71 See Shahabuddeen at pages 275—280 for a discussion of the tension on the procedure applying to the two types of legal systems

In 1897, this was clearly seen in ***Henriques v Henriques***,[72] heard by Atkinson CJ (ag) and Sheriff J. Atkinson CJ (ag) delivered the decision and said that for nearly forty years, from 1855 to 1893, the practice and procedure in the civil courts was regulated by the Amended Manner of Proceeding 1855,[73] a few short sets of rules, and the works of the Roman-Dutch writers who discussed the subject.[74]

Although this created a system of practice of considerable complexity, he said that the effect of rules of civil procedure enacted in 1893, which largely implemented English procedure, was to add a new law and an elaborate system of new rules to the old act, the old rules and the text-writers.[75]

Atkinson CJ (ag) believed that, instead of simplifying practice, this new system greatly complicated matters as questions constantly arose on which system was to apply and, in some cases like oppositions, resort was necessary to be made to both systems.

In 1897 the system became further complicated, Atkinson CJ (ag) said, when a new ordinance was passed.[76] Where the rules were silent, this ordinance required the practice in like matters in England to apply and, where none was applicable, the practice and procedure followed in British Guiana when the ordinance came into operation was applicable instead.

This over-complication of the legal system did not sit well with Atkinson CJ (ag) and he ridiculed the ordinance by saying that it was "as nice a combination of complications of different systems as could be desired, even by the lawyers".

Atkinson CJ (ag) said that if the rules were silent, practitioners were required to wade through the multitudinous and complex English rules to see that there was nothing applicable.

Since the rules only applied as far as may be applied in like matters in England, in addition to having to parse the English rules to see if they applied, a lawyer might also be placed in the position in a matter of having to partially apply the English practice and then, when some difference arose, having to fall back on the old manner of procedure.

Atkinson CJ (ag) thought the new rules created a serious problem because no provisions were made in them for sales at execution. This, Atkinson CJ (ag) believed, could result in every sale at execution carried out in accordance with the old procedure, which had been revoked, being illegal and would cause every transport passed after a sale at execution to be vitiated.

Atkinson CJ (ag) roundly castigated the legislature, which he described as teeming with lawyers, by saying "not one of them grasped the effect of or pointed out the consequences that would flow from this particular piece of legislation."

72 [1897] LRBG 101. Atkinson CJ (Ag) also left two notes, dated 17 and 22 November 1897 respectively, in the minutes of the court on the framing of the 1893 Rules and those notes are contained in Appendix A published in the Law Reports of British Guiana for 1897 at pages 145—149

73 Ordinance No 5 of 1855. This ordinance can be found in the 1895 Edition of the Laws of British Guiana published by H Hart at page 439 of volume 1

74 At pages 104—106 of the report.

75 The 1893 Rules of the Supreme Court were made under section 58 of the Supreme Court Ordinance 1893. They were not published in the 1895 edition of the Laws of British Guiana nor, as Shahabuddeen notes at footnote 85 on page 275, in the Official Gazette and they have likely been lost to history.

76 Ordinance No 1 of 1897

He concluded by saying that the colony would have benefitted if the legislature "in recent years had been acquainted with or borne in mind the maxim '*Omnis innovatio plus novitate perturbat quam utilitate prodest*.'"[77]

Atkinson CJ (ag)'s comments turned out to be to the benefit of Roman-Dutch law and practice and, after his decision, the 1897 ordinance was repealed and the Roman-Dutch law restored as the residual body of law regulating practice and procedure[78] and subsequent procedural rules, even after the abrogation of the Roman-Dutch law, followed the Roman-Dutch practice on execution.[79]

In 1900, new rules of procedure were brought into force in by the Rules of the Supreme Court 1900, which were amended in 1910, 1916, 1920, 1925, 1932, 1947, 1948 and 1954 and then revoked by Rules made in 1955.[80] Those 1955 rules remained in force for about sixty-two years when, in February 2017, the Civil Procedure Rules 2016 came into force.

A fundamental aspect of enforcing a mortgage is the sale of property at execution, and the temporary abolition of those sales clearly caused much anguish to Atkinson CJ (ag). It is fundamental because it is the only remedy given to a mortgagee to recover the debt outstanding to him by a mortgagor.

The principle of Roman-Dutch law that the remedy of the mortgagee is to recover the debt from the proceeds of a sale carried out by the court at public auction must be reflected in rules of procedure permitting this.

To recover the outstanding debt, the mortgagee is required to bring legal proceedings to tender his judgment and, if necessary, to provide an account of the sum remaining outstanding. He then seeks the court's leave to proceed in execution against the mortgaged property by sale at execution to recover the outstanding debt.

For more than a hundred and sixty-two years, between the Amended Manner of Proceeding 1855, in force from 1855 to 1900, and the Rules of the High Court 1955, in force from 1955 to 2016, the procedure required to sell immovable property at execution has evolved from Roman-Dutch principles and not many substantive changes have been made to the process.[81]

It has been suggested that it has always been the established practice in Guyana to interpret

77 A motion of censure was proposed in the legislature for Atkinson CJ (ag)'s criticisms, which were described as 'caustic' by Shahabuddeen. See Shahabuddeen at footnote 95 page 279. The maxim is translated as 'Every innovation occasions more harm by its novelty than benefit by its utility': Wharton's Law Lexicon (9th edition, 1892) at page 528

78 Shahabuddeen at page 280.

79 Nicholas Atkinson (1834—1916), whose decision in ***Conrad*** delivered a hundred and twenty-two years ago, remains the standard on the Guyanese Roman-Dutch mortgage and, who clearly played a large role in the development of the law of the Roman-Dutch mortgage in British Guiana, was according to The Law Journal of 23 August 1886 at page 499, the Solicitor General of British Guiana from 1874 to 1886 and then a Puisne Judge from 1886, although Ramsahoye says that he was part of the decision in ***Mendonca v Gonsalves*** in 1883 which cannot now be located. He was never appointed the substantive Chief Justice of British Guiana and would have retired around 1899 as first Puisne Judge (of two).

80 Shahahbudeen at page 283

81 No copy of the Rules of the Supreme Court 1900 can be found in Guyana (or on the internet) despite searches made at the National Archives, the Supreme Court library, the Court of Appeal library, the library at the Attorney General's Chambers, the Caribbean Research Library at the University of Guyana, and the libraries of lawyers in private practice. The practice for the enforcement of mortgages by sale at execution was, nevertheless, under those rules substantially the same as before them under the Manner of Proceeding 1855 and after them under the Rules of the High Court 1955, as can be seen in ***Mangal v Haniff*** [1943] LRBG 9 at page 19 per Duke J

the rules of court governing execution under Roman-Dutch principles.[82] This must necessarily be so because the substantive Roman-Dutch law governing sales at execution goes hand in hand with the substantive Roman-Dutch law of mortgages and, for this to be effective, there must be procedural law which recognises these principles and gives effect to them.

In February 2017, as in 1897 a hundred and twenty years earlier, this came to an end when the Civil Procedure Rules 2016 were brought into force. These rules made fundamental changes to the Roman-Dutch practice essential for the enforcement of mortgages in Guyana.

In the first place, there are no provisions for service of proceedings brought *in rem* against mortgaged property.[83] In addition, what was a quick and administrative process to levy upon and then sell property at execution to recover a mortgage debt has now become a lengthy and tedious process.

In the Manner of Proceeding 1855, a sentence of the court became executable within 14 days providing there was no appeal.[84]

The Marshal would then serve an act of summation on the judgment debtor at his address or last known address demanding compliance with the sentence within 72 hours. Once the 72 hours expired and the order was not complied with, the plaintiff lodged the summation and the Marshal's return of service with the Registrar who obtained an order for execution from the Chief Justice.

This order would then be used by the Marshal to take the property into execution, in the case of a money judgment, on movable property first and then immovable property if the movable property was, in the Marshal's opinion, insufficient.

In the case of a mortgage, the judgment creditor would necessarily be entitled to move straight to immovable property, although the Manner of Proceeding is silent on this issue. Immovable property levied upon would then be sold at public auction by the Marshal assisted by the Registrar after advertisement of the sale in three successive Saturday editions of the Official Gazette.

In the Rules of the Supreme Court 1955, this process was not much different. A party was required to file a request for the issuance of a writ of execution with the Registrar which contained the requisite information about the action including the names of the parties, the date of judgment, the title of the action and the order.[85] A writ of execution would then be sealed with the seal of the court and deemed to be issued.[86]

In the case of mortgaged property, as in the earlier rules of procedure, the Marshal would sell the property levied upon at public auction after the issuance of the writ of execution and an

82 ***Incorporated Trustees of the Church in the Diocese of Guiana v McLean*** [1939] LRBG 182, at pages 190—191 per Langley J

83 The Amended Manner of Proceeding 1855 set out the procedure for proceeding against property *in rem* at sections 12 and 25. It was not necessary to name the proprietor or representative the proceedings could be served by affixing them to the principal building or, if there was no building, to any railing, bridge or tree most likely to attract notice. This was largely replicated in the Rules of the High Court 1955 at Order 7, rule 14, which also added the requirement of publication in a Sunday edition of a daily newspaper.

84 The process of execution and sale at execution is set out sections 139, 143, 144 and 149

85 Order 36, rule 17

86 Order 36, rule 18

advertisement of the sale signed by the Registrar published in three successive Saturday editions of the Official Gazette.[87]

There was also a procedure for opposing sales at execution, required to be followed by legal proceedings to deem the oppositions well founded, and this procedure is almost identical in the Manner of Proceeding 1855 and the Rules of the High Court 1955,[88] clearly showing that the Roman-Dutch principles of execution and opposition continued well into the twenty-first century.

The Civil Procedure Rules 2016, however, brought into force in February 2017, just a hundred years and a month after the Roman-Dutch law was abrogated, has made fundamental changes to these principles.

What was once a relatively quick administrative process made to the Registrar without notice to the judgment debtor has now changed entirely in character.[89] In order to obtain what is now called a writ of seizure and sale, an application must now be made to the court on notice to any person who is in possession of the property which is the subject of the writ.[90]

A mortgagee who has a judgment entitling him to execute on immovable property to satisfy his debt, which was already a consent judgment before that, needs to find out who is in possession of the mortgaged property, although that person may not be the mortgagor, and then serve the application on him.

Before issuing the writ, the court must be satisfied that the person in possession of the property received notice of the proceedings in which the judgment was obtained.[91]

If a bank sues on a mortgage, therefore, it must take steps to determine if anyone other than the mortgagor is in possession of the mortgaged property and it must bring those proceedings to the attention of the person in possession of the property, otherwise it may not be entitled to execute to recover the debt owing to it.

In addition, a judgment creditor cannot take any steps to sell land under a writ of seizure and sale until 3 months after the writ has been issued and no sale may be held until 6 months after the writ is issued.[92]

Not including the time taken during court proceedings to obtain judgment on the mortgage, in which stays of execution of several months may be granted, nor including proceedings on notice to obtain a writ of seizure and sale, which can be defended, no sale can take place for 9 months after a writ is issued.

Oppositions to sales at execution remain but the procedural rules governing them have been compressed and do not include rules for the bringing of an opposition action to deem the

87 Order 36, rule 51

88 Section 225 of the Manner of Proceeding 1855 and Order 36, rule 52 of the Rules of the High Court 1955

89 See ***Mangal v Haniff*** [1943] LRBG 9 at page 19 per Duke J

90 Rule 48.01(2)

91 Rule 48.01(3)

92 Rule 48.04(1) and (2)

opposition well founded. It is unclear, therefore, how an opposition to a sale at execution can be removed unless it is implied that proceedings must follow. [93]

Since the Civil Law Act specifies that the law and practice of mortgages administered in 1917 by the Supreme Court remained the law, the Civil Procedure Rules 2016 could not lawfully amend that position and must therefore be *ultra vires* the Civil Law Act and are unlawful so far as they attempt to modify the substantive Roman-Dutch law of mortgages.

Like in 1897, without justification, the Civil Procedure Rules 2016 seem to have re-abrogated the Roman-Dutch law and practice, this time on mortgages, although the Roman-Dutch law of mortgages must go together with the Roman-Dutch law of sales at execution[94] and subsidiary legislation, like procedural rules, are incapable of altering the provisions of substantive law.[95]

The quick administrative process of recovery, now removed from the law, was necessary because, in order to be effective, the remedy to recover a debt owing on a mortgage must be quick. People who need loans usually need them quickly and people who have debts usually want to recover them quickly.

When banks and building societies cannot easily recover their depositors' money lent to mortgagors on the security of their property, interest rates necessarily rise.

A system of delay affects the availability of loans for prospective borrowers since not everyone who needs a loan can pay high interest rates and even people with property to secure their debts will be deprived of loans if the system permits delays.

It is to be hoped that, as in 1897, the deleterious effect on the economy by the new and unlawful practice on the recovery of mortgages is recognised and the Roman-Dutch law and practice of mortgages is quickly returned to the rightful place it earned in Guyana's legal system.

93 Rule 48.06

94 The substantive Roman-Dutch law on sales at execution can be found in the writings of Matthaeus in De Auctionibus, published in Utrecht in 1653, which dealt with judicial or involuntary sales. See in this regard, Demerara Turf Club Ltd v Wight [1918] AC 605, at pages 611—612 per Sir Walter Phillimore

95 See Shahabuddeen at pages 276—277

IS THE DECISION OF A MAGISTRATE OVERRULING A NO CASE SUBMISSION IN A SUMMARY TRIAL SUBJECT TO JUDICIAL REVIEW: THE CASE OF GUYANA

by Mohabir Anil Nandlall, MP, Attorney-at-Law

EDITORIAL NOTE:

Mr. Mohabir Anil Nandlall is a sitting Member of Parliament and former Attorney General of Guyana (2011-2015). On April 27, 2017, Mr. Nandlall was charged with the offence of 'Larceny by a Bailee contrary to Section 165 of the Criminal Law Offences Act, Chapter 8:01'. On November 23, 2018, the presiding Magistrate overruled a no case submission made for and on behalf of Mr. Nandlall on the close of the Prosecution's case. Mr. Nandlall challenged the Magistrate's ruling by way of Fixed Date Application to the High Court. The Honourable Chief Justice George (ag). dismissed the said application on January 21, 2019. Mr. Nandlall has appealed that decision to the Court of Appeal; which is pending.

Origin and historical evolution

It is settled law that the High Court of the Supreme Court of Judicature is a superior court of record with inherent and unlimited jurisdiction. It owes this jurisdiction to the High Court of England (King or Queen's Bench) which it received through **Section 3(2)** of the **Supreme Court Ordinance 1893**, which vested the Court with "*all the authorities, powers and functions belonging to or incident to such a court according to the law of England*".[1] For over two centuries, the High Court of England has been exercising a supervisory jurisdiction over inferior tribunals and public officers of the Crown in ensuring that they act lawfully, within their powers, observe the rules of natural justice and take into account relevant considerations. The ancient prerogative remedies have been the controlling mechanism used to achieve this purpose.[2]

The learned authors Wade and Forsyth in their text Administrative Law[3] give this very informative historical survey:

> *"When in the seventeenth century certiorari was first used to control statutory powers, its primary object was to call up the record of the proceedings into the Court of King's*

1 Section 17, High Court Act, Chapter 3:02

2 R v University of Cambridge (1723), Administrative Law (10th ed.) by H.W.R Wade and C.F. Forsyth at pages 405-418

3 Administrative Law (10th ed.) by H.W.R. Wade and C.F. Forsyth at page 226

Bench; and if the record displayed error, the decision was quashed…Review of the record was therefore the original system of judicial control adopted when the Court of King's Bench took over the work of supervising inferior tribunals and administrative bodies, such as Justices of the Peace and Commissioners of Sewers, after the Star Chamber and the conciliar courts had been abolished."

More recently, our Court's supervisory jurisdiction was restated by Bernard CJ in the matter of an ***Application by Aubrey Norton [1996-1998] GLR 373***, at pg. 378 thus:

"The discretionary remedies of certiorari and prohibition were employed primarily for the control of inferior courts, tribunals and administrative or other public authorities. It was a form of judicial review whereby the acts of these courts, tribunals or public authorities could be quashed if it was found that they had acted outside of their mandate or unfairly even within their mandate or jurisdiction. Over the years, judicial review has undergone tremendous changes particularly in England where nearly every tribunal or authority which exercises administrative functions in one form or another is subject to judicial review. These functions are no longer confined to judicial or quasi-judicial functions, and the decisions of Ministers have often been brought before the Courts to be quashed. Whereas we are lagging far behind in this branch of administrative law the English Rules of Court expressly provide for judicial review, and lay down the procedure to be followed. The writs of Certiorari and Prohibition in their old forms are still available in our legal system, Certiorari is used to bring before the High Court the decision of some inferior court or tribunal in order that it may be investigated. Over the years a body of precedent has been building up where the decisions of some administrative authorities have been the subject of judicial review. I refer primarily to the trilogy of cases – Re Sarran (1969) 14 WIR 361, Re Langhorne (1969) 14 WIR, 353, Evelyn v Chichester (1970) 15 WIR 410, which engaged the attention of our Court of Appeal. Since these cases were decided several other decisions involving the statutory commissions (Public, Police, Teaching and Judicial Services) as well as other statutory tribunals have been the subject of judicial review."

Speaking of the nature of the jurisdiction of the Jamaican Supreme Court which enjoys identical historical evolution and status as ours, Lord Diplock in ***Hinds v The Queen (1975) 24 WIR 326***, at pg. 337-338, posited thus:

"The three kinds of jurisdiction that are characteristic of a Supreme Court where appellate jurisdiction is vested in a separate court are: unlimited original jurisdiction in all substantial civil cases; unlimited original jurisdiction in all serious criminal offences; and supervisory jurisdiction over the proceedings of inferior courts (viz of the kind which owes its origin to the prerogative writs of certiorari, mandamus and prohibition)."

There can be no doubt that the High Court of Guyana possesses and indeed has been exercising the identical jurisdictional trilogy adumbrated by Lord Diplock above. It is equally clear that a Magistrate's Court is one of the inferior courts over which the High Court exercises a supervisory jurisdiction referred to by Lord Diplock in (iii) above. The High Court of Guyana has long been exercising this supervisory jurisdiction through the

ancient prerogative remedies. Dr. Mohamed Shahabuddeen in his treatise, The Legal System of Guyana, at page 214, cites ***Ex-Parte Surujballi [1948] LRBG 1***, as the first recorded case in which the power to issue prerogative writs was clearly assumed by the High Court. In that case, a Writ of Mandamus was directed to a Magistrate. Since then, the High Court has issued prerogative writs in enumerable reported and unreported cases directed to public officers, public authorities, statutory bodies, public corporations, inferior tribunals, including of course, the Magistrate's Court.

Indeed, over the years, arguments have arisen questioning the existence of judicial review in Guyana having regard to the absence of statutory interventions similar to those that were promulgated in England. Our courts have repeatedly rejected these arguments asserting the supervisory jurisdiction of the High Court to judicially review acts, omissions, rulings and decisions of public officers, public authorities, statutory bodies, public corporations, inferior tribunals and the Magistrate's Court via the prerogative remedies.[4]

An examination of the relevant authorities clearly establishes a long history of cases where the High Court of Guyana has consistently exercised a supervisory jurisdiction over Magistrate's Court proceedings, both in the civil and criminal arena in accordance with established administrative law and public law principles. The Court has issued the appropriate prerogative remedies whenever a case is made out that a Magistrate has acted contrary to the rules of natural justice, acted in excess of or without jurisdiction, *ultra vires*, acted unreasonably, that is, in a manner that no competent Magistrate would have acted in the circumstances, or has committed an error of law or has acted without evidence.[5] It is therefore a fitting proposition that Magistrate's Court proceedings are subject to be judicially reviewable by the High Court.

In this regard, the position in Guyana is analogous to what obtains in England and the Commonwealth, including of course, the Caribbean.

The current law

A modern statement of this supervisory jurisdiction of the High Court can be found in Halsbury's Laws of England: Criminal Procedure (2015) Volume 27, paragraph 653, where the learned authors stated:

> *"The proceedings of justices when sitting as a magistrates' court (or when otherwise acting judicially) are subject to scrutiny by the High Court by means of judicial review. Remedies for judicial review are by mandatory, prohibiting, or quashing orders."*

The rationale for this centuries-old supervisory jurisdiction was recently restated by Lord Bingham of Cornhill, CJ (as he then was) in ***R v Hereford Magistrates' Court Ex parte Rowlands [1998] QB 110 at 111***, as follows:

> *"that, having regard to the central role performed by magistrates' courts in administering the criminal justice system and to the absence of any supervisory jurisdiction by the Crown Court over their proceedings, it was the more important to retain the Divisional Court's supervisory jurisdiction over magistrates' courts* ***to***

4 *See Coghlan v Vieira [1958] LRBG 100, Re Application by GT&T Limited [1996-1998] GLR 31 and Attorney General v Jardim (2003) 67 WIR 100*

5 *Luck v Sharples [1957] LRBG 15; Ex-Parte Surujballi 1948 [LRBG] 1; R v Hussain ex parte DPP 8 WIR 65; Re Paul Rodrigues GY 2016 HC 7* and *Application by Ray Bacchus (unreported)*

ensure the maintenance of high standards of procedural impartiality and fairness; that where a party complained of procedural irregularity or bias he should not, by the denial of leave to move for judicial review, be required to pursue such rights as he might have in the Crown Court; and that, accordingly, the existence of a right of appeal to the Crown Court, particularly if unexercised, should not ordinarily weigh against the grant of leave to move or of substantive relief."

Constitutional underpinning of judicial review

Having regard to the constitutional architecture of the legal system in the Commonwealth Caribbean, judicial review owes its genesis in the constitution and indeed, it is a facet of constitutional supremacy. Such a jurisdiction, being fundamentally constitutional, no statutory provision can detract or restrict its use. Primacy must therefore be given to the judicial review process to the exclusion of the statutory appeal process and vice versa. Professor Albert Fiadjoe proposes the argument that:

"…administrative law is, after all, not a branch of law by itself ***but rather forms part of constitutional law.*** *As Dr. Anthony has rightly observed: '…the boundary between constitutional law and administrative law is not at all clear' and professor Wade has argued the whole of administrative law, and indeed, maybe be treated as a branch of constitutional law since it follows directly from the constitutional principles of the rule of law…"*[6]

Professor Fiadjoe further notes that Professor Sonia Richards sees the issue in the same light:

"Dr. Sonia Richards has addressed the issue from a rather interesting angle. Arguing that in Hinds v R, the Privy Council held that the characteristic jurisdictions of the High Court are entrenched she said, 'the characteristic jurisdiction include the supervisory jurisdiction of the High Court, namely judicial review. Therefore, one may assume that the law relating to the prerogative writs and, in particular, the writ of certiorari is also entrenched. ***This means that citizens have a constitutional right to certiorari to quash the decision of an inferior Tribunal if the Court commits an error of law that either leads to a jurisdictional defect or appears on the face of the record.*** *It follows that no form of words in ordinary legislation can deny access to the High Court for review of fundamental jurisdictional defects, or error on the face of the record. Ordinary legislation which purports to do so would be unconstitutional having infringed the characteristic supervisory jurisdiction.'"* [7]

Professor Fiadjoe also found support for his argument as follows:

"As stated by Tracey Robinson, judicial review also established a clear nexus with the supremacy of the Constitution, in addition to placing a grave duty and responsibility on the Court to ensure the supremacy of the Constitution. Judicial review and supremacy of the Constitution is both a power and a duty given to the Courts to ensure supremacy of the Constitution. Judicial review is an incident of supremacy and supremacy is assumed by judicial review."[8]

6 Commonwealth Caribbean Public Law 3rd ed. at page 11

7 Hinds v R (1977) AC 195 and Farrell v AG of Antigua (1979) 27WIR 377, Commonwealth Caribbean Public Law 3rd ed. at page 78

8 See also Professor Ventose's Administrative Law at pages 1-2, Commonwealth Caribbean Public Law 3rd ed. at page 15

Professor Fiadjoe named the conferment of judicial review as among the non-British features of Commonwealth Caribbean Constitution. He stated that:

> *"Among non-British features maybe listed the following: the Doctrine of Constitutional Supremacy; and the conferment of the power of judicial review."*[9]

In light of the *dicta* of Lord Steyn and Lord Hope, in the House of Lords cases of ***Jackson v AG [2006] 1 AC 262*** and ***Axa General Insurance Limited v Lord Advocate [2011] UKSC 46***, Professor Fiadjoe's description of the conferment of the power of judicial review as a non-British feature of Commonwealth Caribbean Constitution is open to query. It does appear that judicial review, as a prerequisite to the rule of law, has always been a basic characteristic of the British unwritten Constitution. Paradoxically, but regrettably, many a Court whose primary duty is indubitably to uphold the rule of law has strayed away from their sacred path and have sacrificed judicial review, a feature of both the British and Commonwealth Caribbean Constitution, at the altar of statutory appeal processes. Ordinary legislation cannot trump the Constitution. Rather the reverse is true and section 9 of the Judicial Review Act Cap 3:06, is directed to scotching this constitutional heresy, which has grown wings. A statutory right of appeal can no longer be used to preclude judicial review. In fact in Guyana, the Judicial Review Act has liberated the Courts from the strictures of alternative remedies, that is to say, in the United Kingdom and the other Caribbean countries where there is an alternative remedy, the courts in those jurisdictions, as a matter of discretion coupled with the statutory mandate will ordinarily refuse a remedy. There is no such similar provision in the Guyana Judicial Review Act.

However, Chancellor JOF Haynes, forty years before the Judicial Review Act, enunciated the approach of the Guyanese Courts to judicial review. In recognition of the constitutional foundation from which the Court's jurisdiction springs in administering the prerogative remedies, as far back as 1978, in ***Amerally and Bentham v The Attorney General [1978] 25 WIR***, at page 313, Chancellor Haynes opined thus:

> *"I think the point to bear in mind is that a prerogative writ must not be refused merely because of the availability either in the High Court or the subordinate court of an adequate alternative remedy. In every case, there must be the exercise of a judicial discretion in the granting or the refusal to grant it."*

Statutory right of judicial review

Section 9 of the Judicial Review Act 2010, provides:

> *"The Court shall not refuse judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision."*

In principle, it is now arguable that all the cases in the United Kingdom and the Caribbean, which contain that never-ending debate as to whether a particular decision or ruling should be judicially reviewed, appealed or challenged by case stated have been rendered irrelevant by the unequivocal and plain language of Section 9 of the Act. Having regard to Sections 1, 2, 3 and 4 and indeed the entire Act, it cannot be doubted that any decision or any ruling in a Magistrate's Court is subject to judicial review. There is nothing in the Act that restricts the Court's jurisdiction in relation to the type of decisions that are reviewable and the stage at

9 Commonwealth Caribbean Public Law 3rd ed. at page 11

which a proceeding in an inferior tribunal can be challenged by way of judicial review.

Further, to read-in such restrictions into the clear language of the Act would be to place an undue fetter on the Court's jurisdiction in judicial review proceedings not contemplated nor provided for by the legislature. I am fortified in this contention by the wide expanse of grounds upon which a judicial review application can be predicated as set out in Section 5 of the Act. Section 5 lists almost every ground known to public law as the basis for a judicial review application and further permits additional grounds once set out in the application. They include: (i) any act or omission contrary to law; (ii) in excess of jurisdiction; (iii) error of law, whether or not apparent on the face of the record; (iv) absence of evidence on which a finding or inference of fact could reasonably be based; (v) error of fact.

Of course, since this Act is brand new, having only been brought into force less than twelve months, it would be impossible to find case law in Guyana to support the wide breath of judicial review contemplated by the Act. This will be developed by judicial decisions on a case by case basis as the Act continues to be interpreted. But what we should refrain from doing is restricting the scope of the Act. Since the jurisdiction in judicial review is both an inherent, unlimited and constitutional one in nature, now buttressed by a modern liberal statute, it would be plainly wrong in principle to now circumscribe judicial review.

Anisminic errors

Error of law was always a ground upon which the decision of an inferior tribunal can be challenged and quashed by way of judicial review. Since the landmark decision of House of Lords in ***Anisminic Limited v Foreign Compensation Commission [1969] 2 AC 147***, it is now settled law that every error of law made by a tribunal is now jurisdictional and therefore, reviewable. This simply means that any error of law made by a tribunal, if material to its decision, may render the decision *ultra vires* and without jurisdiction. According to Professor Wade on Administrative Law (10th ed.) at page 223:

> *"A tribunal had now, in effect, no power to decide any question of law incorrectly: any error of law would render its decision liable to be quashed as ultra vires."*

In ***Pearlman v Harrow School Governors [1979] QB 56***, Denning MR, speaking about the distinction between errors of law which go to jurisdiction and errors of law which do not, said:

> *"I would suggest that this distinction should now be discarded…**The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to quash it."***

Similarly, in ***Boddington v British Transport Police [1992] 2 AC 143***, Lord Irvine of Lairg, LC said that ***Anisminic***:

> *"made obsolete the historic distinction between error of law on the face of the record and other errors of law. It did so by extending the doctrine of ultra vires **so that any misdirection in law would render the decision ultra vires and a nullity."***

In the ***Council of Civil Service Unions v Minister for Civil Service [1985] AC 374, at 410***, Lord Diplock said that unless the decision maker understood the law correctly and gave effect to it, the Court would review for illegality.

Loss of jurisdiction and its consequences

From the above authorities, it is pellucid that any decision of a Magistrate which is infected by an error of law is not only reviewable by way of judicial review and liable to be quashed but such a Magistrate also acts *ultra vires*, and loses jurisdiction, rendering not only that decision a nullity but everything that flows therefrom a nullity- *ex nihilo nihil fit*. *Ergo*, if by overruling a no case submission in a summary trial, the Magistrate committed an error of law, then that Magistrate would have not only acted *ultra vires* but would have lost jurisdiction and calling upon the Defendant to lead a defence and everything which flows thereafter would constitute a nullity. Put another way, once the Magistrate commits an error of law in overruling the no case submission, that Magistrate would have lost jurisdiction and therefore, has no jurisdiction to call upon the Defendant to lead a defence. As a matter of law, it was an error of law, an illegality and therefore a nullity, which the constitutional/administrative court can set right by quashing the Magistrate's decision.

When the power (jurisdiction) of a court or tribunal depends on a determination of any fact or law (jurisdictional issue of fact or law), the court or tribunal cannot confer upon itself such power (jurisdiction) by making an erroneous finding of fact or law.[10]

In ***Pearlman v Harrow School of Governors***[11], following ***Anisminic v Foreign Compensation Commission***[12], Lord Denning, with his usual clarity, opined thus:

> *"The way to set things right is to hold thus: no Court or Tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it does so outside of its jurisdiction and certiorari will lie to correct it."*

It must be remembered that Magistrates' Courts are inferior courts of limited jurisdiction and must act within the four corners of the statute creating them; they exercise limited jurisdiction as conferred by statute. If they veer off course, they then become autocratic and consequently reviewable by the High Court. Authority for this proposition can be found in the famous *dicta* of Farrell LJ in ***R v Shoreditch Assessment Committee ex parte Morgan [1910] 2KB 859***, at pg. 880 that:

> *"No tribunal can by its own decision finally determine on the question of existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior Tribunal either to usurp a jurisdiction which it does not possess… or to refuse to exercise a jurisdiction which it has… subjection in this respect to the High Court is a necessary and inseparable incident of all tribunals of limited jurisdiction: for it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure –* ***such a tribunal will be autocratic not limited*** *– and it is i immaterial whether the decision of the inferior tribunal on the question of the existence of its own jurisdiction is founded on fact or law."*

This *dicta* was approved by the House of Lords in the ***Anisminic case***. There can therefore, be no doubt that a Magistrate's Court is a court of inferior jurisdiction (a tribunal of inferior jurisdiction) and its decision as to whether or not the Prosecution has established a *prima*

10 see Administrative Law by Wade & Forsyth 11 ed pg. 210-224

11 supra

12 supra

facie case is a question of law. This is precisely why in a trial by Judge and jury, a no case submission must be made in the absence of a jury, the ruling is rendered in the jury's absence, and the Judge cannot inform the jury of what submissions were made in their absence and his ruling thereon.

It follows that if a "no case submission" is correctly upheld by a Magistrate in committal proceedings, the Magistrate would have no jurisdiction to make a committal order. The Magistrate can only discharge the accused. Further, no Magistrate can confer upon himself or herself the jurisdiction to make a committal order on the basis of an erroneous ruling on a no case submission that there is evidence to support a charge, when, as a matter of law, there is no such evidence. The absence of evidence goes to jurisdiction or lack thereof. In such a case, that erroneous legal ruling and the committal order would be liable to be quashed in judicial review proceedings by way of certiorari.[13]

Similarly, in trials before a Magistrate, a Magistrate cannot erroneously rule that the Prosecution has established a *prima facie* case where there is no evidence in support of the charge brought by the Prosecution and thereby unlawfully conferring upon him/herself the power (jurisdiction) to call for a defence. The absence of evidence strikes at the heart of our system of justice and is fundamental to jurisdiction- no evidence = no case to answer. In such a case, both the erroneous ruling and the decision to call for a defence are subject to the judicial review processes and liable to be quashed by certiorari for want of jurisdiction. If a no case submission is correctly upheld, then the Prosecution's case must be dismissed. No useful purpose can be served by calling for a defence when there is no evidence to support a charge at the close of a Prosecution's case. Since as has been held, in several cases, evidence adduced by the defence cannot be used in favour of the Prosecution when there is an erroneous legal ruling that there is a *prima facie* case.

It should be noted that in Administrative Law (10th ed.) at page 227, it is stated:

> *"'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence taken as a whole is not reasonably capable of supporting the finding (Allison v General Medical Council [1894] 1QB 750 at pg. 763). Or where, in other words, no Tribunal could reasonably reach that conclusion on that evidence (R v Roberts [1908] 1KB 407 at pg. 423). This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorized and ultra vires. It also has some affinity with the substantive evidence rule of American law which requires that the finding be supported by substantial evidence on the record as a whole."*

It can readily be seen that the '*no evidence*' rule also has a close affinity with the '*irrationality rule*' enunciated in ***Associated Provincial Picture House Limited v Wednesbury Corporation [1948] 1KB 223***.

All evidence favourable to the defence, which comes from the mouth of the Prosecution witnesses, even under cross-examination, is part and parcel of the evidence for the Prosecution.[14]

13 *R v.* Bedwellty Justices ex parte Williams [1997] AC 225, relying on Anisminic on the no jurisdiction principle

14 R v Bellmarsh MC *ex parte* Gilligan (1998) 1 CAR 14

Unlawful conduct on the part of an inferior tribunal must be stopped in its tracks as soon as it rears its ugly head and the victim of such unlawful ruling and unlawful act or decision in a criminal hearing before a Magistrate is entitled to act promptly to put an end to such unlawful conduct. He or she needs not wait to see whether or not there will be a conviction and then appeal if available. He or she can seek to quash the unlawful *ultra vires* act, decision or ruling as soon as it occurs by way of judicial review.

In any event, under Section 9 of the Judicial Review Act, a statutory right of appeal cannot stand in the way of one's right to judicial review.

> *"In principle they ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the Court as soon as it is taken or threatened. There should be no need to pursue any administrative procedure in order to see whether the action will in the end be taken or not."* [15]

> *"If the order is one for which the Applicant is entitled* ***for any reason to have quashed as a matter of law,*** *it is pointless to require him to first pursue an administrative appeal on the merits."* [16]

> *"But to allow unlawful action to stand, merely because it has been appealed against on its merits is indefensible."* [17]

Thus, as section 9 of the Judicial Review Act now mandates, a statutory appellate procedure (statutory jurisdiction) cannot stand in the way of judicial review, which has its genesis in the inherent unlimited jurisdiction of the High Court (a constitutional jurisdiction according to the celebrated cases of ***Hinds v R [1977] AC 195*** and ***Farrell 27 WIR 377***). After referring to the case of ***R v Peter Borough Magistrate Court, ex parte Dowler [1997] QB 911***, in which judicial review was denied in favour of an appeal in the case of a motorist, who was convicted in the Magistrate's Court – despite the citation of a dozen precedent in favour of judicial review, the learned authors[18] observed:

> *"Numerous decisions going back to 1924, showed that judicial review had constantly been allowed for quashing convictions vitiated by unlawfulness, bias or procedural irregularities, rights of appeal notwithstanding."*

They concluded that:

> *"The long line of decisions bring out what the dicta ignored, namely, that appeal and judicial review exist for different purposes, the first concerning merits and the second concerning legality and that review of legality is the primary mechanism for enforcing the rule of law under the inherent jurisdiction of the Court. If an Applicant can show illegality, it is wrong in principle to require him to exercise a right of appeal. Illegal actions should be stopped in its tracks as soon as it is shown.* ***For this purpose, there should be no relevant difference between civil and criminal cases. Nor should the much extended scope of judicial review be allow to restrict its use as a matter of principle."***

15 Administrative Law by Wade & Forsyth 11 ed pg. 600

16 supra pg. 601

17 supra pg. 602

18 Administrative Law (supra)

In ***R v Hereford Magistrate's Court ex parte Rowlands [1998] QB 110***, the reasoning of the Court in ***R v Peter Borough Magistrate's Court ex parte Dowler***[19] was roundly rejected and an irregular conviction was quashed on judicial review despite the existence of the right of appeal to the Crown Court.

If a submission of no case to answer is wrongly rejected as a matter of law, then it follows that any ensuing conviction will be quashed in any later appellate proceedings. The authorities speak with one voice **that a defendant is not obliged to await the outcome of the criminal proceedings, to see whether he or she will be convicted but rather he or she should challenge the illegality as soon as it rears its ugly head and to stop such illegalities in its tracks.** A magistrate sitting in his or her limited criminal jurisdiction cannot confer upon him or herself the power to call for a defence by an erroneous ruling that the Prosecution has established a *prima facie* case. No error of fact or law can give rise to such jurisdiction. ***Anisminic*** establishes that all errors of law are *ultra vires* and without jurisdiction and that there is no such thing as an error of law committed within jurisdiction, since no Tribunal has the jurisdiction to commit an error of law.

In ***Sugaman v Pengerek Subak (2001) LRC***, the Malaysian Court of Appeal cited with approval the decision of ***Syaribat v Transport Workers Union (1995) 2MLR 317***, in which it was stated at pg. 342:

> *"An inferior Tribunal has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not.* ***If the inferior Tribunal does make an error of law then he exceeds his jurisdiction… since the inferior Tribunal has no jurisdiction to make an error of law, its decision will not be immunized by an ouster clause, however, widely drafted."***

Instances of judicial review of Magistrates' decisions

The case law illustrates an almost infinite number of instances where judicial review has been employed in challenging the validity of decisions and/or rulings in the Magistrate's Court. It is impossible to list every instance. Professor Clive Lewis in his text Judicial Remedies in Public Law 5th ed. at page 142, enumerates the following instances where Magistrates' decisions have been the subject of judicial review in reported decisions. It will be noted that in almost each instance the decisions challenged were interlocutory decisions.

a. refusing to hold separate trials for different defendants [***R v Epsom Justices Ex p. Gibbons*** *[1984] QB 574*];

b. lifting, or refusing to lift reporting restrictions in hearings [***R v Leeds Justices Ex p. Sykes [1983] 1 WLR 132***], [***R v Horsham Justices Ex p. Farquhars on and West Sussex County Times [1982] QB 762***];

c. prohibiting the publication of the name and address of a defendant [***R v Arundel Justices Ex p. Westminster Press [1986] 1 WLR 676***];

d. imposing bail conditions [***R v Mansfield Justices Ex p. Sharkey [1985] QB 613***];

19 supra

e. determining whether a matter was triable summarily [***R v Blyth Valley Magistrates' Court Ex p. Dobson [1988] Crim. LR 381***];

f. refusing to allow a defendant to change a plea [***R v South Tameside Magistrates' Court Ex p. Rowland [1983] 3 ALL ER 689***];

g. re-elect for trial by jury [***R v Birmingham Justices Ex p. Hodgson [1985] QB 1131***];

h. determining whether to transfer a case to another court [***R v Wareham Magistrates' Court Ex p. Seldon [1988] 1 WLR 825***];

i. issuing summonses [***R v Horseferry Road Justices Ex p. Independent Broadcasting Authority [1987] QB 54***];

j. committing a person for trial [***R v Bedwellty Justices Ex p. Williams [1966] 2 WLR 361***], [***Neill v North Antrim Magistrates' Court [1992] 1 WLR 1220***], [***R v Oxford City Justices Ex p. Berry [1988] QB 507***];

k. refusing an interim care order [***R v Birmingham City Juvenile Court Ex p. Birmingham City Council [1988] 1 WLR 337***];

l. refusing to admit certain evidence [***R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Noncyp Ltd [1989] 3 WLR 337***];

m. to hold a *voir dire* [***R v Liverpool Juvenile Court Ex p. R [1988] QB 1***];

n. refusing or granting a witness summons [***R v Bradford Justices Ex p. Wilkinson [1990] 2 ALL ER 833***], [***R v B County Council Ex p. P. [1991] 1 WLR 221***], [***R v Reading Justices Ex p. Berkshire CC [1995] COD 385***];

o. refusing to allow a witness to give evidence from behind a screen to avoid identification [***R v HM Coroner for Newcastle Upon Tyne Ex p. A [1998] COD 163***];

p. refusing or permitting the giving of evidence by live video link [***R (Director of Public Prosecutions) v Redbridge Youth Court; R (L) v Bicester Youth Court [2001] 1 WLR 2403***].

Judicial review remains one of the most dynamic and fastest growing areas of the law. For example, fifty years ago a challenge by way of judicial review to a committal to stand trial was not a practice embarked upon, although in principle, the jurisdiction to do so always existed. The matter came to fore in the House of Lords decision of ***Williams v Bedwellty Justices [1996] 3 ALL ER 737***, and the restrictive practice was put to rest. In the Divisional Court, a long line of established authorities was cited to contend that committal proceedings were not in practice the subject of judicial review. The House of Lords decided to break ranks with those authorities and chose instead to follow the then recently decided case of ***Neill v North Antrim Magistrates' Court [1992] 4 All ER 846***. Their Lordships examined and assessed the evidence adduced in the Magistrate's Court. In the course of the judgment, Lord Cooke [1996] 3 All ER 737, at 744 adumbrated thus:

> ***"To convict or commit for trial without any admissible evidence of guilt is to fall into an error of law. As to the availability***

of certiorari to quash a committal for such an error, I understood at the end of the arguments that all your Lordships were satisfied that in principle the remedy is available and that the only issue presenting any difficulty relates to the exercise of the court's discretion. This conclusion about principle reflects the position now reached in the development of the modern law of judicial review in England through a sequence of cases beginning with R v Northumberland Compensation Appeal Tribunal, ex p Shaw [1952] 1 All ER 122, [1952] 1 KB 338 and extending by way most notably of Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208, [1969] 2 AC 147 to (at present) Page v Hull University Visitor [1993] 1 All ER 97, [1993] AC 682*. The path of the authorities is traced in such leading textbooks as Wade and Forsyth Administrative Law (7th edn, 1994) pp 301-311 and de Smith Woolf and Jowell Judicial Review of Administrative Action (5th edn, 1995) pp 237-256. To attempt to repeat the exercise here would be surplus age. It is enough to take Page's case as stating the developed law."*

His Lordship concludes at [1996] 3 All ER 737,746-747 in the following terms:

*"**My Lords, in my respectful opinion it would be both illogical and unsatisfactory to hold that the law of judicial review should distinguish in principle between a committal based solely on inadmissible evidence and a committal based solely on evidence not reasonably capable of supporting it. In each case there is in truth no evidence to support the committal and the committal is therefore open to quashing on judicial review."***

At the time when this decision was delivered, it was indeed ground-breaking as it was the first time apart from extradition cases where evidence led before a Magistrate was being examined and assessed in judicial review proceedings. Not unexpectedly, the quashing of committal proceedings is now a regular and permanent feature of judicial review and rightly so.

Similarly, in the local case of ***Clarke v Vieira (1960) LRBG 201***, Luckhoo CJ, ruled that certiorari would not lie to quash a committal order of a Magistrate. The learned Chief Justice held that the decision to commit an accused person for trial involves a judicial act, which is not recorded or required by statute to be recorded and cannot therefore be brought up to be quashed. That decision was plainly wrong as is demonstrated by modern and forward thinking authorities. In ***Cecil Abrahams v Attorney General (1996-1998) GLR 1***, after reviewing ***Clark v Vieira, Carl Singh J*** (as he then was), observed at page 4:

"But since Clarke v Vieira (supra), the availability of certiorari to quash a committal has been accepted by the Courts. In R v Gee, R v Bibby, R v Dunscombe [1936] 2 ALL ER 89, a committal was quashed by certiorari, having been deemed a nullity by the Divisional Court. In R v Coleshill JJ ex p Davies et Anor [1971] 3 ALL ER 928 a committal was quashed where two young offenders were committed to stand trial purely on the contents of written statements (as is provided for in England) without any prior consideration of the evidence to determine whether it was sufficient to put them on trial. See also the cases of (R v Epping and Harlow JJ ex p Massaro [1973] 1 ALL ER 1011, R v Colchester JJ ex p. North Essex Building Co. Ltd. [1977] 3 ALL ER 567, R v Horseferry Road Magistrate's Court ex p. Adams (1977) July, 6, Law Society's Gazette, Vol. 74, No. 24.)

It seems therefore that certiorari will go to quash a committal whether made without jurisdiction or in excess of it."

Further, at page 9, Singh J quoted Chancellor Haynes in ***Ameerally and Bentham v Attorney General etc (1978) 25 WIR 272***, where at page 278 he reviewed a number of authorities where certiorari had been used in England to quash committal for trials and at page 279, Chancellor Haynes observed:

> *"In all these cases, the court treated the committals as made without jurisdiction or in excess of it.* ***The courts did not allow technicalities of procedure to bar the use of this remedy, such as whether there was a formal record or not or a final adjudication or not. To do justice, they examined the entire proceedings in the inferior court, evidence and all."***

In the ***Cecil Abraham's case***, Singh J**.** had no difficulty in reviewing a committal order in a constitutional motion, in which the applicant invoked his constitutional right to due process and protection of the law and quashing same on the basis of insufficiency of evidence. In so doing, Justice Singh reviewed the evidence adduced before the learned Magistrate. There is, therefore, no bar to High Court reviewing the evidence as so eloquently adumbrated by Haynes C several decades ago.

One cannot dispute the similarity between a committal proceeding and a summary trial in the Magistrate's Court after the prosecution closes its case. A *prima facie* case does not change, whether in Committal Proceedings or a Summary trial- the test is the same. *Ergo*, the Magistrate is required to perform the almost identical task of analysing the evidence in order to determine whether the prosecution has made out a case for the defence to answer. If decisions of Magistrates in committal proceedings are now reviewable as a matter of regular practice, in principle, logic and common sense, there can be no rationale or legal basis to exclude a Magistrate's overruling of a no case submission in a Summary trial from judicial review. When one takes into account the constitutional underpinning of judicial review and the express provisions of our *Judicial Review Act*, the contention becomes even more unsurmountable.

Against the aforesaid jurisprudential tapestry, the sentiments expressed by Lord Mustill in ***Neil v North Antrim Magistrate's Court and Another [1992] 4 ALL ER 846*** at page 858, are irresistible:

> *"For the moment,* ***I am unwilling to go further than to doubt*** *whether in a case where it is quite obvious that the committal materials disclose no offence,* ***the court is powerless to protect the defendant from the stress, labour and expense (not to speak of the possible loss of liberty) entailed by having to wait until the end of the prosecution's case at the trial, before the obvious conclusion is drawn."***

In the Jamaican case of ***Gorstew Limited v Her Hon. Mrs Lorna Shelly-Williams [2016] JMSC Full 8***, the Full Court of the Supreme Court of Jamaica comprising of three (3) Judges, had no difficulty in hearing an application for leave to review a Magistrate's decision who upheld a No Case Submission. The Court embarked upon a detailed examination of the evidence as well as the law in relation to no case submissions. Although in the end, leave for judicial review was refused, it was not refused on the ground that the ruling of the Magistrate was not reviewable *but on the ground that a case was not made out for leave to be granted for judicial review.*

In the unreported Trinidadian case of ***An Application by Vishnudath Rooplal v His Worship Magistrate George Hislop and the Director of Public Prosecutions No. 929 of 1992***, Justice Lucky, sitting in the High Court of Trinidad and Tobago, found no difficulty whatsoever in entertaining an application for judicial review of a Magistrate's ruling in an ongoing preliminary enquiry, *inter alia*, on the grounds that the Learned Magistrate acted in excess of jurisdiction when he made a ruling to the effect that there was sufficient evidence to commit the Applicant for trial. It is to be noted, that the Learned Magistrate granted an adjournment of the enquiry pending the determination of the judicial review challenge.

Also in the case of the ***Queen on the application Of Crown Prosecution Service v Norwich Magistrates Court [2011] EWHC 82 (Admin)***, a decision of a Magistrate upholding a no case submission was judicially reviewed by the Administrative Law Division of the High Court of England and Wales and the decision was quashed. *Again, no question arose regarding the courts power to review a magistrate's ruling on a no case submission.*

Again, it may be pertinent to ask, not rhetorically but demonstrably, that if a decision to uphold a no case submission is reviewable, on what principle is a decision of a magistrate overruling a no case submission not reviewable? In the Journal of Criminal Law Volume 26, issue 4, page 311-317, the learned author makes these seminal observations:

> *"Submissions of no case to answer are common in summary trials, so that it is important that magistrates should apply the correct principle when considering them and not continue a trial to "hear the accused's explanation" or to "hear both sides".* ***If a defence submission of "no case" is entitled to succeed, then the accused has the undoubted right to have the case dismissed at that stage, and not be required to make a defence (and possibly convict himself), and no amount of directions or suggestions from the Divisional Court that it is better for lay magistrates to hear the whole case before arriving at their conclusion should be allowed to interfere with that right."***

It is now settled law that at the close of the Prosecution's case, if there is no evidence that an accused person committed the offence with which he is charged and a submission of no case is rejected by the trial Judge that decision is a wrong decision in point of law and the defendant/accused is entitled to have his conviction set aside.[20] In this case, the Court of Criminal Appeal (UK) had no difficulty in setting aside a conviction in those circumstances. This case was followed by the Bahamian Court of Appeal in ***Cooper v Commissioner of Police [2011] 1 LRC page 377***, where the Court of Appeal after citing ***Abbott***[21] stated that:

> *"So, too, in this case, at the close of the case for the prosecution in the trial before the learned magistrate, there was no evidence linking the appellant to the illegal landing of the ten Asian persons.* ***The evidence relied on by the learned magistrate to link the appellant to that landing only came in the evidence of the defence witness, Ms Deveaux. The decision overruling the submission made on behalf of the appellant that there was no case to answer on the charge of assisting the illegal landing of those persons was, therefore, wrong in***

20 See R v Abbott [1955] 2 ALL ER page 899

21 supra

law; that is a sufficient reason for allowing the appellant's appeal and quashing the conviction and sentence."

While it would readily be conceded that in both cases the appellate procedure was used, once the decision of the magistrate constitutes an error of law, or is wrong in law, there is no need to await the appellate process. Judicial review can properly be employed to stop the unlawfulness in its tracks, as explained by Professors Wade and Forsythe in Administrative Law (11 Edition) at page 600.

> *"In principle they ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the Court as soon as it is taken or threatened. There should be no need to pursue any administrative procedure in order to see whether the action will in the end be taken or not."*

Further, page 601 states that: *"If the order is one for which the Applicant is entitled* ***for any reason to have quashed as a matter of law,*** *it is pointless to require him to first pursue an administrative appeal on the merits."*

While page 602 states that: *"But to allow unlawful action to stand, merely because it has been appealed against on its merits is indefensible."*

The position in Guyana is *a fortiori* because *section 9 of the JRA* eschews the whole concept of alternative remedies; the availability of an alternative remedy does not provide a jurisdictional bar to the constitutional/ administrative court in granting appropriate relief. The argument becomes more compelling when one takes into account the constitutional underpinning, which inheres in judicial review in Guyana's legal architecture and that such an unlawful ruling by a Magistrate, can deprive a Defendant, not only, of his fundamental right and freedom and the twin pillars of the common law as enshrined in the Constitution, namely, the presumption of innocence, and he who alleges must prove (and prove beyond reasonable doubt - ***Woolmington v the DPP)*** but his right to a fair trial, as well as, his right to be protected from an unlawful conviction, all of which are guaranteed to him by the Constitution. As Harper, JA, in ***Attorney General v Mohamed Ali (1987) 41 WIR 176***, said at page 231 that:

> *"In my view, a citizen whose constitutional rights are allegedly trampled upon, must not be turned away from the Courts by procedural hiccups. Once his complaint is arguable, a way must be found to accommodate him, so that other citizens become knowledgeable of their rights."*

In ***Cecil Abrahams v Attorney General of Guyana [1996-1998] GLR page 1***, Carl Singh J, after citing Harper JA's *dicta* with approval, opined thus:

> ***"The Courts are expected to be vigilant and ever watchful guardian and protector of the fundamental rights and freedoms guaranteed to the citizens of Guyana under its Constitution and ought never to be seen to be remiss in its duty to deal firmly and fearlessly with anyone or any authority found to be in wilful transgression of the peoples' rights.*** *In the Indian case of Nilabati Bahera v State of Orissa^[1993] CLJ 2899, Anand, J, at page 2912, observed:*
>
> *"The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the Courts too much as protector and guarantor of the indefeasible*

rights of the citizens. The courts have to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. ***The purpose of public law is not only to civilise public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights."***

Upon this juridical canvas, one must paint, the clear mandate of the legislature expressed in the Judicial Review Act, which mandates the Judiciary not to refuse judicial review on account of the availability of an alternative process. Indeed, the letter, spirit, intendment and scheme of the Act harbour no restriction whatsoever on the Court's jurisdiction to judicially review the decisions and actions of inferior tribunals. It is instructive to note that ours is an Act, which is cast in a markedly different mould from her counterparts in both the Caribbean and the United Kingdom (UK). In the legislation in those jurisdictions, (i) *there is a leave requirement*, (ii) *an alternative remedy provision*, (iii) *a time limit for the application*, as well as, the added burden that at the leave stage the Applicant must show good prospect of success. These procedural or jurisprudential hurdles are absent in the Guyana Judicial Review Act. This is not coincidental or a mere omission, but it is by design. The objective of the legislature is clear: to promulgate a liberal statutory framework in order to imbue our Courts with an almost unfettered freedom to entertain judicial review. Our Courts have been liberated as compared with the Courts in the Caribbean and the UK, for example. Any attempt to place the clear intentions of its framers. It would be in breach of the Separation of Powers Doctrine, which is implicit in all West Indian Constitutions.

R v Rochford Justices, ex p Buck

It is against the aforesaid philosophical and juridical landscape that one must examine the English case of ***R v Rochford Justices, ex parte Buck [1979] 68 CAR 114***. Having regard to the above, this case cannot be applied to Guyana. It flies in the face of the constitutionally enshrined unlimited supervisory jurisdiction of the High Court and moreover, the express language, spirit, intendment and scheme of the Judicial Review Act, more particularly, Sections 5 and 9. No reading of the clear language of these two sections lend themselves to the restriction imposed by ***Ex parte Buck***.

Ex parte Buck is not discussed or even mentioned in many of the leading texts on administrative/public law, particularly, De Smith Judicial Review and Administrative Law, Wade and Forsyth. Indeed, the only text that discusses Buck at length is Criminal Judicial Review by Piers Von Burg and in this text, the author at page 283, paragraph 6-26, expressed the desire for a comprehensive review of the authorities because the administrative court has entertained many challenges to interlocutory decision since ***Ex parte Buck*** was decided four decades ago.

Indeed, there are no reported Guyanese or West Indian cases, which even considered, more so followed, ***Ex parte Buck***. Neither is it mentioned by any of the academic writers since it was decided some forty years ago.

Alternatively, the facts of ***Ex Parte Buck*** are quite peculiar and highly distinguishable. In ***Ex Parte Buck***, it was the Prosecution who approached the Court for judicial review. This is the first point of note. Owing to the constitutionally enshrined fundamental right of the presumption of innocence, a whole body of law has developed around the protection of

this presumption and the ensuing guarantee of a fair trial to a person charged. In ***Ex Parte Buck,*** the Prosecution moved for judicial review because the defendant objected to five charges being tried together under the Customs and Excise Act 1952. As a result, of the defence's objection, one charge was heard first. The Prosecution's evidence in respect of that charge was weak and did not even identify the defendant. He was identified by documents. To overcome this hurdle, the Prosecution sought to introduce evidence relating to the other four charges as similar fact evidence and collaboration. The Justices ruled that the evidence was inadmissible. The Prosecution then moved for judicial review of the justices' ruling. It was held by the Divisional Court that the Prosecutions should have continued with the case to its end and then if necessary come to the Divisional Court on a case stated; that there was no jurisdiction in the Divisional Court to interfere with the justices' decision that not having being reached by termination of the proceedings below.

One can immediately see that this case should not apply to cases, where the impugned decision of the Magistrate, terminates the proceedings in the Summary Court, if it is set aside. Thus, it has been applied in cases where, if the judicial review process has resulted in the Magisterial ruling under challenge being quashed, the matter would still have to be remitted to the Magistrate for continuation.[22] On the contrary, if the challenge to the Magistrate's court decision to reject the no case submission was successful, the quashing of that decision to reject the no case submission would bring the entire criminal proceedings in the Magistrate's court to an end.

In ***R (Singh) v Stratford Magistrates' Court (2007) EWHC 1582***, the Court, while drawing attention to the rule in ***Ex Parte Buck*** (*supra)*, recognised that there can be good reasons for accepting jurisdiction. The Court referred to the cases of ***R (Watson) v Dartford Magistrate's Court (2005) EWHC 905*** and ***Essen v. DPP***. **Watson** concerned the grant of an adjournment on the morning of the trial. The Prosecution, relying on ***Ex Parte Buck***, contended that the Application was premature. Mitting J, with whom Sedley LJ agreed, rejected that submission. He stated:

> *"In such a case, such as this, where the issue is straight forward and the principle clear, I do not see that there is any fetter on this Court intervening."*

In Judicial Review: Law and Practice by Frances Patterson, QC, at page 258, the learned authors disagreed with the decision of the Divisional Court in ***R (K) v Bow Street Magistrates Court (2005),***[23] following ***Ex Parte Buck*** and declining jurisdiction. They posit,

> *"It does appear to be difficult to see why there should not be jurisdiction given that, in general, there is jurisdiction to challenge decisions of magistrates."*

And at page 259, the authors stated that, *"In addition, the High Court is more likely to exercise its discretion to quash an interim decision where quashing that decision is likely to result in the final determination of that matter."*

The learning which emerges from the above cases, clearly postulates that the High Court

22 See R v Rushford Justices, ex parte Buck (1979) 68 CAR page 14, in the case of R (Hoar-Stevens) v Richmond, ex parte Thames Magistrate's Court (2003) EWHC 2660

23 supra

can exercise its judicial review powers over interlocutory decisions of Magistrates in criminal trials when:

(a) a successful challenge would have the effect of terminating or is dispositive of the criminal proceedings in the Magistrate's Court;

(b) there are no jurisdictional factual issues to be determined in the judicial review proceedings;

(c) the issues to be determined are purely legal and goes to the jurisdiction of the Magistrate;

(d) the Application for judicial review has been made in a timely manner without any unreasonable delay.

CONCLUSION

In conclusion, it is reiterated that cases of the genre of ***Ex parte Buck*** is of little or no relevance to Guyanese jurisprudence, having regard to the constitutional nature of the High Court's unlimited supervisory jurisdiction over the Magistrate's Court, coupled with the *Judicial Review Act*. They certainly cannot stand in the way of the protection of the constitutional rights of the citizenry, which are always in jeopardy, when a person is charged with a criminal offense. Guyana's High Court has a constitutional duty to hear and determine the complaint of the citizen, rather than expose him to the dangers of an unlawful conviction. The approach of Courts when fundamental rights, infringements are alleged has always been an approach to protect and vindicate those rights, rather than restrict and render them illusory.

I conclude with the hereunder passage from the Judgment of Justice Witt of the Caribbean Court of Justice (CCJ) in ***Sharmella Inderjali v The Director of Public Prosecutions [2019] CCJ 4 (AJ)***, and am satisfied that the judicial wind is blowing in the right direction:

> *"Although it is trite law that any issue as to the sufficiency of evidence is a matter to be determined in committal proceedings, this does not prohibit the courts from reviewing the actions of the prosecuting authority in laying a charge or proceeding with it. On the contrary, the rule of law requires that much of the judicial branch. In a constitutional democracy, nobody is above the law. There is a growing body of case law confirming this approach. It would appear that in the last decades the scope of review has cautiously and gradually been widened. This Court is in full support of this jurisprudential trend. After all, judicial review needs to be meaningful, real and practical. In any event, the scope of review is certainly not limited to procedural grounds but also covers substantive grounds of review necessary to verify whether the Prosecution has complied with its constitutional duty to act rationally, reasonably and fairly."*

SOLID FOUNDATIONS FOR OUR HOUSING SCHEMES

by Ms. Nicola Pierre, Commissioner of Title

INTRODUCTION

This essay examines the way housing scheme areas are being brought into the Land Registry System. I look at the Land Registry Act 5:02, and the process and documents used to convert specific areas, to explore the rectitude and efficacy of the process, and suggest improvements.

The Department of Public Information[1] reports that 'during the period 2011-2015, thirty-eight (housing) schemes[2] were developed at the cost of approximately $13 billion and yielded approximately 20,000 house lots', and that in 'the past three years, the administration has spent over $1 billion on consolidating' those schemes and will be developing 'nine new housing schemes in 2019'.[3]

Two recently created housing schemes are located at La Parfait Harmonie on the west bank of the Demerara River and at Enmore on the east coast of Demerara. Recipients of house lots in these schemes were issued Certificates of Title under the Land Registry System, but neither of these schemes are located in designated land registry areas, in fact, the land on which they exist was held under the Transport system by the Government of Guyana or derivative agencies.

Land Registration areas are created by way of a 'designating' Order by the responsible Minister which is published in the Gazette. No such Order ever appeared in the Official Gazette in relation to these areas at Parfait Harmonie and Enmore. This fact begged the question - what process was used to establish land registry administered housing schemes in localities that are not designated land registration areas?

This essay examines the methods used to establish our housing schemes and suggests alternative ways of bringing them into the Land Registry System.

Land titling in Guyana

In the mid to late 1500's the Dutch came to the lands now known as Guyana, displaced the resident Amerindians, and controlled the territory as a colony until 1814 when they ceded it to the British Crown[4]. Under Dutch control the system of land titling in the colony was a Roman-Dutch System, under which land could be owned absolutely by private individuals and

1 Department of Public Information, a division of the Office of the Prime Minister of Guyana, <https://dpi.gov.gy/about-us/>,accessed 10 January 2019.

2 In Guyana an area of land containing a group of house lots developed and sold by the Government at a subsidy to citizens.

3 'Nine new housing schemes planned for 2019' <https://dpi.gov.gy/nine-new-housing-schemes-planned-for-2019/> accessed 10 January 2019.

4 'Guyana: History' <http://thecommonwealth.org/our-member-countries/guyana/history> accessed 10 January 2019.

corporations. In this system absolute ownership of portions of land may be conveyed to, and among, private individuals, those transactions or conveyances evidenced by a title document called a 'Transport'.

Ownership of lands in Guyana remained subject to a Roman Dutch system of law from 1629, and even after cession to the British in 1814, until 1917 when principles of English movable property law were grafted onto it. Since 1917 the ownership of, and transactions concerning land, is governed by a mixture of Roman-Dutch Law applicable to immovable property and the English Law applicable to *movable* property, both of which recognized absolute ownership in citizens independent of superior title in the crown, unlike the English law applicable to land.

Since 1828 the transactions affecting ownership of land have been recorded, and that recording of titles, and of transactions affecting title, is now governed by the Deeds Registry Act[5]. Under that Act private ownership of land is evidenced by a 'grosse' or official copy of a *Transport* which contains amongst other things a description of the property, the value of the property, the names of the current and previous owner, and the mode of acquisition of the land.

Notice of dealings with land in the Roman Dutch/ Deeds Registry regime must be published in the Official *Gazette*. Transports are issued after a publication process, by the Registrar of Deeds, who is the person responsible for advertising dealings with lands governed by that system, registering conveyances[6], and who keeps the original transport preserved at the Deeds Registry. [7] The Registrar of Deeds presides at the Deeds Registry which is currently located at the Victoria Law Courts in Georgetown.

The Land Registry Act

Up to 1959 the Roman Dutch Transport/Deeds system remained the main titling system under which private citizens held and dealt with land. The Land Registry Act no. 18 of 1959 introduced another system of land titling in Guyana, implemented "to simplify the title to land and facilitate dealing therewith and to secure indefeasibility of title to all registered proprietors."[8]

The Land Registry System is administered by the Registrar of Lands, who governs the Land Registry located at lot 1 Avenue of the Republic, Georgetown. The Land Registry system runs parallel to and concurrent with the transport system. One advantage of it is that it does not require publication of transfers of title, so theoretically title to land may be transferred in one day without the statutory publication and two week wait period required in the Transport system.

The two systems intermingle because although an area is designated a land registration area there may still be within that area lands held by Transport. Existing Transport deeds to land in an area are not automatically converted to Certificates of Title when the area is newly designated a land registration area. Those Transport deeds existing at the date of designation remain effective title if the owners don't seek their conversion, but the Transport numbers are recorded in the land register and the parcel numbers are recorded on the

5 Deeds Registry Act Chapter 5:01 Laws of Guyana.

6 Deeds Registry Act Chapter 5:01 s7.

7 Deeds Registry Act Chapter 5:01 s14.

8 Land Registry Act Chapter 5:02 s4.

Transports, so that all interested persons have notice and every subsequent dealing with that land is required to be noted and updated in the records of both systems.[9]

There are therefore now two main titling systems in Guyana. The Transport system now administered under the Deeds Registry Act, with records and transactions recorded by the Deeds Registry and Transports being the document of title, and the Land Registration system administered under the Land Registry Act, with transactions and dealings recorded by the Land Registry, and Certificates of Title issued as proof of ownership of lands. Whether the Land Registration system applies depends on whether or not the area has been designated a land registration area.

How is land brought into the Land Registry System?

- Under section 6 of the Act the responsible Minster may divide Guyana into land registration districts distinguishable by name or number. Pursuant to these statutory powers this 'dividing' of several areas of land was done and a number of districts identified and allocated 'zone' names based on geographical location. These zones were further divided into blocks which were given numerical labels. *Some* of the blocks were surveyed and divided into individually numbered parcels, and plans prepared showing the proposed divisions. Properties under the land registry system are therefore identified by a threefold identification system. The zone number for the larger geographical area, block number for the immediate neighbourhood, parcel number for specific lots.

The identified zones and their numbered blocks within each county are –

County of Demerara:

East Coast Demerara – blocks I to CXVII
West Bank Mahaica River – blocks I to III
East Bank Mahaica River – blocks I to III
West Bank Mahaicony River – blocks I to III
East Bank Mahaicony River – blocks I to II
West Bank Abary River – block I
West Coast Demerara – block I to XXV
West Bank Demerara – blocks I to LXV
East Bank Demerara River – blocks I to XLIV

County of Berbice:

West Coast Berbice – block I to XLI
Berbice River West – blocks I to XX
East Bank Berbice River – blocks I to X
East Bank Canje River – blocks I to IV
West Bank Canje River – blocks I to IV
East Coast Berbice – blocks I to XVIII
Corentyne Coast Berbice – blocks XIX to LXXII
Corentyne River – blocks I to XX

County of Essequibo:

East Bank Essequibo River - blocks I to XIV
West Bank Essequibo River – blocks I to XVIII
Essequibo Coast – blocks I to XLV
Essequibo River Wakeenam Island – blocks I to V
Essequibo River Leguan Island – block I to IV
Left Bank Pomeroon River – blocks I to V
Right Bank Pomeroon River – blocks I to VII

Those geographical areas or zones listed above,

9 Land Registry Act 5:02 s30 s 33. These sections are completely ignored in practice and this intermingling has created confusion.

although identified and divided into blocks are not all land registration areas administered under the Land Registry Act. For example, of the 117 blocks identified in the East Coast Demerara zone, only six are designated land registration areas - Calcutta, Cambridge, Betterverwagting, Buxton, Friendship and Bachelor's Adventure. No other east coast localities were ever designated land registration areas despite having been assigned block numbers.

Under the Land Registry Act there are eight ways in which to bring 'unregistered land' which includes land held by Transport, into the land registration system administered under the Act -

i. section 17(1) by which the Minister may by order "designate any area of land defined in the order as a registration area;"
ii. section 37, when the Government wishes to make a grant of State Land on a Certificate of Title;
iii. section 38 by way of an application to the Commissioner of Title for a declaration of title;
iv. section 43 in a 'conversion' process by which 'any document of title may be brought under the operation of this Act by passing Transport thereof to any person as registered proprietor';
v. section 44 by way of a Judgment or Order of the Land Court;
vi. section 45 when property is sold at execution;
vii. Section 46 when property is being vested by statute; and
viii. Section 47 when land is partitioned.

A delayed commencement clause causes confusion

- The Land Registry Act came into operation on January 4, 1960. Section 1(2) of the Act provides that 'The minister shall appoint the day or days on which this Act or any parts or provisions thereof shall come into force in Guyana or any portion thereof and may restrict or extend the application of any parts or provisions of this Act to any portion of Guyana in such manner as he thinks fit.'

Sections 1-37 inclusive and 47 to 164 inclusive were commenced throughout Guyana. Sections 38, 39, 40, 41, 42 were not commenced. Sections 43 to 46 were commenced 'in such portion of Guyana as from time to time designated a registration area'.

Section 43 of the Act which provides 'any document of title may be brought under the operation of this Act by passing Transport thereof to any person as registered proprietor', was commenced with very limited scope[10] and in law may only be used to bring lands already situate in a section 17 designated land registration area into the land registration system.

The Housing Scheme Data – systemic transgression

The 'Map of Guyana showing Government of Guyana Housing Schemes'[11] informs that there are 73 Government housing schemes in the county of Demerara. Only 7 of those schemes are located in designated land registration areas, namely Bachelors Adventure, Bare Root, Stewartville, Belle Vue, Ruimveldt, Eccles, and Amelia's Ward.

10 Order 24 of 1968 extended its application to an area known as Block A on the East Bank of Demerara which is in fact part of South Ruimveldt (subsequently made a land registration area by O.90/1970), and a 46.02 acre plot of land at Vrymans Erven, New Amsterdam, Berbice.

11 CHPA webpage < http://www.chpa.gov.gy> accessed 21 January 2019.

Thirty-three of those listed schemes are located in lands that were held by the Government of Guyana or CHPA by transport in areas subject to the Transport/Deeds System. In creating the schemes section 43 of the act was used to 'convert' those lands to the Land Registry system by passing transport from the Government or CHPA, to CHPA 'as registered proprietor'.[12]

One of those schemes is Parfait Harmonie located on the west bank of the Demerara River. In 2002 CHPA became the owner by Transport No. 3381/2002 of Block K, Plantation La Parfait Harmonie, land held under the Deeds system. In 2009 by Transport No. 1393/2009 passed before the Registrar of Deeds pursuant to section 43 of the Land Registry Act, CHPA conveyed to itself 'CHPA…as the Registered Proprietor under the Land Registry Act' 'Parcel (1) Land Registration Block XXXIII, Plantation La Parfait Harmonie …formerly Block Lettered K' and thereby obtained a Certificate of Title for those lands.

Although assigned a zone (West Bank Demerara) and block number (XXXIII) La Parfait Harmonie was not designated a Land Registration area under section 17 of the Act, therefore the method used to 'convert' La Parfait Harmonie into registered land was *ultra vires* the convertor's powers because section 43 of the Act is commenced only 'in such portion of Guyana as from time to time designated a registration area.'

A similar situation occurred in the formation of a housing scheme at Enmore on the East Coast of Demerara. The land referred to as 'Parcel 149 (formerly Plot 'A') Plantation Enmore or Area other than Land Registration Area, Block XXXVIII, Zone: East Coast Demerara, Republic of Guyana' was passed by CHPA to itself as registered proprietor. The inclusion of the words 'Area other than Land Registration Area' in the description is ironic because the section used to effect the conveyance is prohibited for use in areas that are not land registration areas. That Transport on the face of it is *ultra vires* the powers granted in the commenced provisions of the Act.

The creation of pockets of registered land using a transport/deeds process, in areas which are not land registration areas, is not only irregular, but creates uncertainty in the land administration system. There is not one record, entity or map, from which may be obtained, a complete and accurate list of land registration areas.

In the Parfait Harmonie transaction "Block lettered K portion of Plantation La Plantation Harmonie" became parcel: 1 of block: XXXIII. The Certificates of Title actually issued in the Parfait Harmonie Housing Scheme are for parcels 2727 to 2872. Are the parcels 2 to 2726 areas Land Registry administered or Deeds Registry administered? And how do we identify whether transported land or registered land engages our attention when there is no available Plan showing the boundaries of the three differently defined spaces, La Parfait Harmonie and block XXXIII and parcel 1, in relation to each other? We cannot, and the result is that one piece of land may become the subject of duplicate titles, have more than one owner, and be pledged as security by more than one person, in each of the land titling systems.

12 CHPA, 'GOG lands Administered by CHPA converted to Land Registration System' and 'CHPA Lands Converted to Land Registration System' 2 July 2015.

CONCLUSION

A comparison of the process prescribed by the Act and the process actually now being used establishes that there are housing schemes now administered under the Land Registry Act which were brought into the system using a provision in the Act that has not been commenced. They remain under the system irrespective of the *ultra vires* process of conversion because land once made subject to the Act cannot be withdrawn,[13] but we have a duty under the rule of law and morally[14], to be more careful in administering our lands.

The results of ad hoc creation of pockets of registered lands outside of registration areas creates uncertainty in land administration. It results in the registries, courts, corporate and private citizens acting in ignorance of the legal rules governing administration and ownership of specific lots/parcels of land engaging their attention, which in turn results in decisions in excess of jurisdiction and lacking prudence. One piece of land may, by inadvertence or otherwise, become the subject of duplicate titles and owners, and be pledged as security by more than one person, subverting the objective 'to simplify the title to land and facilitate dealing therewith and to secure indefeasibility of title to all registered proprietors.[15]

There are simple ways to avoid these conundra. To ensure legality, commence section 43 for use throughout Guyana and the current process is no longer *ultra vires*. To ensure efficient and efficacious conversion, use the provisions enacted specifically for bringing areas into the system, the first registration process set out in Part IV of the Act. To ensure certainty, follow the boundaries of the zones and blocks identified[16] and published 50 years ago, by which all already existing land registration areas are identified. To avoid duplicate titles, ensure that both the Registrar of Deeds and Registrar of Lands are involved in the process, are aware of the converted areas, and have maps delineating the areas *and* siting them in the larger locale.

It is inadvisable to create pockets of registered lands outside of registration areas because it creates uncertainty and undermines the titling systems. That is the reason section 43 was commenced only 'in such portion of Guyana as from time to time designated a registration area' instead of throughout Guyana.

13 Land Registry Act 5:02 s 5.

14 Hitzig v Canada, 2003 CanLII 30796 (ON CA) <http://canlii.ca/t/5291> accessed 9 January 2019 - The rule of law is a principle 'that means politicians govern within their powers, the law applies equally to all and that the law is certain' and 'Because it obeys and honours the law, the state can assume the moral high ground, which justifies state prosecution and punishment of individuals who break the law'.

15 Land Registry Act 5:02 s 4.

16 We have also inexplicably begun using a second unrelated block and zone numbering classification in the same land registry system which causes further disorder.

AUTOBIOGRAPHICAL REFLECTIONS OF DR. MOHAMED SHAHABUDDEEN

EDITORIAL NOTE:

Dr. Mohamed Shahabuddeen S.C., who was born on October 7, 1931 and died on February 17, 2018, was Solicitor General of Guyana from 1962 to 1973 and Attorney General from 1973 to 1987.

Between 1983 and 1987 he also served as Minister of Justice and acting Minister of Foreign Affairs and was Deputy Prime Minister and Vice President of Guyana.

From 1988 to 1997, Dr. Shahabuddeen was a Judge of the International Court of Justice, the first person from the Commonwealth Caribbean to hold that appointment. Between 1997 and 2005, he was a Judge of the International Criminal Tribunal for the former Yugoslavia.

He was Vice-President of the Tribunal between 1997 and 1999 and 2001 and 2003 as well as a Judge of the International Criminal Tribunal for Rwanda between 1997 and 2005.

In 1998 he was also appointed a Judge of the Permanent Court of Arbitration.

In January 2009, Dr. Shahabuddeen was elected for a nine-year term as a Judge of the International Criminal Court but he resigned in February 2009 and never assumed his role there.

In his later years, Dr. Shahabuddeen lectured and tutored students of the Department of Law at the University of Guyana.

Dr. Shahabuddeen was called to the Bar in 1954 and appointed Queen's Counsel in 1966. In 1973 he wrote a book titled The Legal System of Guyana. In 1978, he followed that up with another book on Constitutional Development in Guyana 1621—1978 and in 1996 he wrote Precedent in the World Court.

He was awarded the Cacique's Crown of Honour in 1970, the Order of Roraima in 1980, and the Order of Excellence, Guyana's highest national award, in 1988.

On June 22, 2018 his remarkable life and work were celebrated by the legal profession in Guyana at a special sitting of the Full Court comprising the Chancellor, the Chief Justice and all the sitting Justices of the Supreme Court of Judicature.

The sitting was attended by members of the Bar Council and of the Inner and Outer Bar, members of the public and by relatives of Dr. Shahabuddeen.

At the sitting, short extracts from Dr. Shahabuddeen's unpublished autobiographical writings, composed at the age of seventy-five, were read by his son, Mr. Sieyf Shahabuddeen who is an Attorney-at-Law now living in Canada.

Those autobiographical fragments read in Court on June 22, 2018 illustrate, by his own reckoning, Dr. Shahabuddeen's beginnings in law and his assessment of what was to be a stellar, and perhaps unsurpassed, career in the legal profession in Guyana and having rose to great heights in the international circuit; as well as his reflections on life and religion.

This great man's humility, obvious from his private writings, despite his unequalled achievements and intellect is surely nothing less than an ideal for us in the profession to follow.

Mr. Sieyf Shahabuddeen at the Full Court sitting, said that the writings from which the extracts were read were essentially private and would never be published. Nonetheless, on request, he has kindly allowed us to publish the extracts, which are reproduced *verbatim.* Nothing has been altered, added or subtracted and the words below are those of Dr. Shahabuddeen as he wrote them and as they were read in Court.

'Floating'around

When I passed the Bar Finals in May 1952, I said to myself that I was too young to be credible as a lawyer. But I was really too frightened to stand up in court; physically, I was a stripling and simply did not look the part. I did not appear in any court in England. And I did not see any opening for working in chambers. I thought I could "float" around for awhile but I knew that before long I would be old.

When I left England in July 1954, there was talk of missiles and possible atomic war. I was seen off at King's Cross railway station by a German friend, Heine. He was an expert in setting up machines to fabricate knitted vests. Regrettably, I have not seen him again. From Liverpool, I came away by a Blue Star ship. We stopped at Madeira, and then at Barbados and Trinidad. In Trinidad, we disembarked, the ship going on to the Amazon. I found a cheap hotel in Marine Square, Port of Spain. Too cheap perhaps: people were always fighting in the next room. I was afraid. Nevertheless, I had to spend a few days there. But I was running out of money. I lived on jam and bread which I recall eating one day in Red Square.

From a Port of Spain shipping agency called "Furness" something, I got a passage on a cargo boat bound for British Guiana; it was a "Booker" coastal boat. I did not know what I was getting into. The sea occasionally swept over the middle of the little vessel, which then appeared to be in two parts. The ship was tossing; I was sea-sick. Besides I must have been very hungry, and it showed. An African sailor who was about to eat took pity on me. He gave me his food; it was good. His gesture will always live gratefully in my memory as indicative of the humanity which binds us all together.

Legal appointments

In the early months of 1959, the Chief Justice offered me a magistracy. In those days that kind of offer was prized. I told him that unfortunately I had to do part II of the final examination for the BSc (Econ) in May 1959. It was agreed that the day after I completed the examination I should take the oath. I took it before the then Chief Secretary. The next day I went off to Berbice as a magistrate. At Rossignol "stelling" an old East Indian woman discreetly motioned in my direction; I overheard her asking whether they now made such little children magistrates. I felt put in my place.

In fact, I did not much enjoy being a magistrate. In July 1959, Mr. Ramphal was acting AG. He invited me to take up a post of Crown Counsel. I did so in August 1959. When the substantive AG, Mr. Anthony Austin, returned from England (where he had been), he found that I had been doing a few prosecutions (prosecutions were then within the responsibility of the AG). He rebuked me, saying that criminal experience had nothing to do with my advancement and that he preferred that I concentrated on civil matters. I respected his preference. Later I discovered that, before leaving the service of British Guiana in 1961, he had recommended me for "acceleration promotion", to use the words of his note as I recall them.

General Assessment

I did not have a brilliant private practice. *Inter alia*, I lacked the necessary confidence, not to speak of a certain self-assertiveness. I probably did better in the public service. There I learnt that hard work can go a long way. Especially, if you have luck and good health. I have been lessed with both of these.

As to luck, there were times when I could say that there, but for the grace of God, go I. Not only did I escape unfortunate things, but good things also came my way. As to health, I have seldom taken a day off; my present blood pressure is 140 over 80, which the doctor tells me is good. These two things – luck and health – permitted me to view work as playing with the missing pieces of a jig-saw puzzle. The law became a detective story. It gave me job satisfaction.

At the same time, I learnt – and appreciated – the rules against self-advertisement. If you were not a fighter – I am not – it really is better to accept your limitations and not to invite attention to yourself. To be lionised is pleasant, but it could be costly. If you are no good, you will soon be found out. If you are any good, it is best that you leave that for others to judge. Even if in the end you are completely overlooked, so be it; the alternative could be worse. This awareness is not the mark of a great man: it is common sense. All wise books have spoken to that end.

I would add two things. The first is what I daresay can be collected from other disciplines as well. We must cultivate a preparedness to give up our view in favour of a better one, from whomsoever it comes. I know that that is easier said than done, for it is with difficulty that we relinquish an idea which fascinates us. There is general fun about the "two handed" individual who cannot decide anything. Says he, on the one hand this, on the other hand that, and ends up sitting on the fence. But a familiar emblem of the law is the scale and weight: we are trained to weigh competing considerations. Of course, if, when we have listened to and carefully considered an opposing argument, we are not convinced, we must have the courage to say so, declaring with the French, "ni vaincu, ni convaincu".[1] We must decide.

1 Neither vanquished nor convinced

The second is this: Of course we have able lawyers at home. But, because we are a small and somewhat isolated society, there is probably a risk that we tend to delude ourselves into thinking that our lawyers are the best in the world. I believe that we have much to learn from others.

As to where all of this has taken me, I recognise that there is a certain permanence in the international community. Historically international law has always turned on power; it tends to be on the side of the powerful as interpreted by the powerful. Not only that: a citizen of a powerful state walks taller than his counterpart from a powerless state. As remarked above, ours is a very small state; lamentably, it is also not in good shape. There is such a thing as the "glass ceiling"; it is only penetrated by someone from a small state when (for one reason or another) penetration is in the interest of the real repositories of power.

However, I am glad to recognise that, but for the decolonisation process and the consequential restructuring of the international community, I could not have been an international judge. At home, both Governments have supported me. I am grateful to them and to our people for the opportunity to serve. For, despite all the shortcomings, the cause is good. As St. Augustine remarked in his *City of God*, "Set justice aside, and what are kingdoms but robber-bands writ large?"[2]

Closing observations

There is the question of my place in the cosmos. I am by birth a Muslim. I am not an orthodox Muslim. I realise that most people just happen to inherit the practice of their forebears. Few have the courage to question their beliefs on the basis of first principles. Besides, even if I could find the courage, I could not be sure that my conclusion was not being influenced, one way or another, by the current global situation. All I can say is that in principle my mind is open.

I acknowledge that there is a superior force. Dogs and horses hear physical sounds which humans cannot hear, and they react in ways which we regard as mysterious. The simple truth is that our senses cannot even grasp the fulness of physical reality. It is possible also that there is a non-physical reality which we cannot know – whether our senses are aided or not. What it is and how it works are beyond me.

When I think of the sufferings of innocents through uncorrected wrongs and natural tragedies, I hope to be forgiven for wondering about the interest of the divinity in human affairs: it is probably pursuing a purpose the validity of which is to be judged by standards which we cannot comprehend. I however commune with it by the style of my religion, believing that other religions provide an equally acceptable approach to the ultimate question.

That question is not what is the "big bang" of modern theory, but what is its cause: what is the origin of existence itself? May it be that, as

2 *De civitate Dei*, cited in Manfred Lachs, *The Teacher in International Law, Teachings and Teaching*, 2nd revised ed. (Dordrecht, 1987), p 40. Of course there are several translations. One reads, "In the absence of justice, what is sovereignty but organised brigandage?" See St Augustine, *City of God* (The Catholic University of America, Washington DC, 1950), book IV, chapter 4, p 195

said in the ancient text of the *Rig Veda*, perhaps even God does not know how he began?[3] The impenetrable mystery of the thing commands humble recognition that, being ourselves within the system, we cannot see the system from outside and therefore cannot know how it came about.

There is in consequence the more manageable question of one's place in society. I believe this turns on a view that we are complementary units in a system. That view enjoins willingness to advance the common welfare in whatever way we can. We must always try to make a contribution, starting of course with our families, but not ending there.

Finally, I shall not pretend that my life has been a triumph. I cannot even lay claim to the loser's glory in coming through bloodied but unbowed. The case is that I have been blessed with luck in my career and satisfaction in work. I hope that I have not spoiled my good fortune. If I have, I ask forgiveness from the Lord; if I have not, I give Him praise.

The Hague
The Netherlands
October 2, 2006

Mr. Sieyf Shahabuddeen addressing the Full Court on June 22, 2018 in which the excerpts extracted above were read. (Photograph, taken with permission, courtesy of Mr. Sieyf Shahabudden)

3 J Muir, tr, RG, X 129, stating the insoluble problem of creation thus:[The universe was originally]
A self-supporting mass beneath, and energy above.
Who knows, whoever told, from whence this vast creation arose?
No gods had then been born – who can e'er the truth disclose?
Whence sprang this world, and whether framed by hand divine or no –
Its Lord in Heaven alone can tell – if even he can show.

The eternal mystery is gathered up in the last five words. They are rendered, "or perhaps he does not know", in Wendy Doniger, The Rig Veda, An Anthology (London, 1981), p 26, a copy of which was given to me by my granddaughter Shivana on 25 August 2006.

ADDRESS BY MR. C.V. SATRAM, ATTORNEY-AT-LAW AT THE SPECIAL SITTING OF THE FULL COURT OF THE SUPREME COURT OF JUDICATURE TO PAY TRIBUTE TO SIR FENTON RAMSAHOYE, S.C.

EDITORIAL NOTE:

On March 13, 2019, the Bench and Bar gathered in Court 1 of the Victoria Law Courts at a Special Sitting of the Full Court of the Supreme Court of Judicature, convened by the Honourable Chief Justice (ag) to pay tribute to the life and work of Sir Fenton Ramsahoye, S.C.

The death of Sir Fenton, as he was popularly called, on December 27, 2018 at the age of 89 was a great loss to the legal profession and Guyana. As captured in the Address published below, Sir Fenton over his lifetime led an illustrious legal career within Guyana, regionally and internationally, which brought pride to Guyana and set the standard to follow in the legal profession.

Your Honours, Sir Fenton Ramsahoye S.C. always had the aptitude for work in the higher judiciary. He was called to the Bar in February 1953. His first reported case is ***Re: In the Estate of Roberts (1955) LRBG.*** He was lead counsel in the appeal before the West Indian Court of Appeal. The case concerned the construction of a Will and the other lawyers involved were Stafford Q.C. and B.O Adams Q.C. He embraced challenges at a very early stage in his career.

By the time he left Guyana to give service to the Hugh Wooding Law School around 1972 he had appeared in at least 75 cases reported in the LRBG and the GLR. He had dominated the practice of property law in the local courts and was on the other side of almost all the major cases in the field. He had no doubt gained tremendous acclaim in the field because of his scholarly work in comparative land law.

Your Honours, Sir Fenton was an international competitor. He distinguished himself regionally and internationally. He went on to make the largest number of appearances before the Judicial Committee of the Privy Council and he did not rely on English lawyers. He was lead counsel in at least 78 appeals before the Board. There is another dimension to this number. There are very few English lawyers who did as many cases before the House of Lords (now

the Supreme Court of England and Wales). My research shows that only Lord Pannick Q.C. has argued more cases than Sir Fenton before their Lordships. His first reported appearance before the Board was in 1964 in ***British Guiana Credit Corporation v Da Silva [1965] 1 WLR 248***. He was led in the appeal by Sir Milner Holland Q.C.

He was lead counsel in ***Jaundoo v The Attorney General of Guyana [1971] 3 WLR 13,*** a case which dealt with access to constitutional redress. He went on to argue many transformative cases dealing with constitutional remedies. He is credited with developing the jurisprudence in the area. In ***Thakur Persaud Jaroo v AG (2002) 59 WIR 519*** he argued against the Constitutional remedy being relegated to an alternative remedy.

In ***AG v Ramanoop (2005) 66 WIR 334*** he convinced the Privy Council that a litigant who suffered a constitutional wrong was entitled to an additional award of damages over and above ordinary common law damages. Constitutional rights were given primacy above other rights.

Your Honours, Sir Fenton also has the distinction of being the most reported lawyer in the region. More than 250 of his cases were reported in the major law reports. The highest number among us practicing at the Bar today is about 50. In preparation for this presentation, I downloaded his reported cases and the collection exceeds 10,000 pages. Needless to say, Your Honours, I didn't get through them.

Sir Fenton was prolific. He argued cases in all areas of the law including the criminal law. He did three (3) major commercial cases in the Caribbean Court of Justice ***(GFM Ltd v Ramcharran 80 WIR 397, CIBC v Gypsy 88 WIR 23*** and ***Sheermohamed v SA Nabi & Sons 78 WIR 364***). He was counsel in two of the largest commercial arbitration disputes ever to have arisen in Trinidad & Tobago and Barbados. He and I did a major mining arbitration before the London Court of International Arbitration in London in December, 2017.

He did pioneering work in the field of Public Law. In ***Maharaj v AG (1978) 30 WIR 310*** he was able to secure constitutional compensation for the unconstitutional conduct of a judicial officer. Such a challenge was inconceivable at the time.

In ***Ramjohn v Permanent Secretary, Ministry of Foreign Affairs; Kissoon v Manning [2011] UKPC 20*** he successfully challenged the decision of the Prime Minister of Trinidad & Tobago to veto the appointment of public officers.

In the ***Sanatan Dharma Maha Sabha v AG (2009) 76 WIR 378,*** the Privy Council, reversing the two courts below, declared the Order of the Trinity Cross discriminatory. The award offended the conscience of many non-Christians and Sir Fenton being a Christian himself was considerate enough to raise and persist with a skillful challenge to it.

In ***Sharma v AG of Trinidad [2007] 1 WLR 2223*** he secured parliamentary remuneration for members of the House of Representatives in Trinidad after both courts below refused to declare their entitlement.

In the ***Central Broadcasting Services v AG [2006] 1 WLR 2891*** the Privy Council, reversing the courts below, compelled the issuance of a radio licence to the Hindu community in Trinidad after the State had refused their application. Sir Fenton was never deterred by the likelihood of success of the challenges he mounted. He fought for what his sense of justice told him was right.

In ***Ramsarran v AG [2005] 2 AC 614***, Sir Fenton successfully challenged the decision of the Trinidad & Tobago Court of Appeal that a person arrested on a warrant of committal was not entitled to access legal representation.

In ***Hector v AG of Antigua [1990] 2 AC 312*** he represented a journalist who had been charged for the offence of printing a false statement in a newspaper which was likely to undermine public confidence in the conduct of public affairs. The Privy Council reversed the Eastern Caribbean Court of Appeal and declared the offence creating section unconstitutional.

Between 2008-2009 he won six (6) consecutive appeals before the Privy Council. Sir Fenton did not always win but he handled defeat and victory with equanimity. He was unaffected by defeat. He fought each case with the same vigour.

He functioned best at the highest levels. It brought out his true genius. His arguments and ideas have laid the foundation for many advances in the law.

He was drawn to legal complexities and he unraveled them with ease. His understanding of the law and of legal concepts was deep and fundamentally sound.

I remember in 2008 when I appeared with him in the Trinidad & Tobago Court of Appeal in the case of ***Ramroop v Ishmael [2010] UKPC 14***. He tried to convince the three Justices of Appeal that his client who resided in a flat of a building, initially as a tenant, had acquired a title to that part of the house by prescription. I couldn't make sense of the argument and the three Judges didn't agree with him. In the Privy Council, Lord Walker who wrote the Judgment of the Board agreed with him that his client could have acquired an interest by prescription to a part of the house. Lord Walker, who incidentally led Sir Fenton in a case before the Privy Council, conceded that there was little authority on the point but that the argument was correct in principle. The point is that Sir Fenton had conceptual clarity.

Sir Fenton was a pioneer in higher legal education in the region. He was the first person from the region to have obtained a doctorate in law in 1959 when he was just about 30 years old. He completed his doctoral thesis in two years. The research was painstaking. His analysis of the material was rigorous and scholarly. Sir David Hughes Parry who was also the head of the Institute of Advanced Legal Studies was his supervisor. Sir Fenton told me that he rarely got to discuss his research with him. The truth, Your Honours, is that there was no one there at the LSE who could have offered assistance to him in his field of research. At his viva (oral examination) his supervisors did not ask him a single question. They greeted him, congratulated him on an outstanding piece of work and invited him to have tea with them.

Sir Fenton was held in very high esteem by their Lordships. It is not customary for their Lordships to hold special sittings in honour of deceased lawyers. They did so for Sir Fenton. We know of no other instance where it was done and there are more than 1600 Q.C.s in England. Lord Bingham of Cornhill had openly thanked him for the assistance he rendered to the Board on matters of Constitutional law. English lawyers have never had to contend with a supreme written constitution. He was the ablest Constitutional Lawyer from the region. Lady Hale aptly echoed sentiments, expressed throughout the region, that he was the grandfather of West Indian Constitutional Law.

Sir Fenton had a fascinating ability to think and generate original thought. He was simple in his ways but he was possessed of a most sophisticated intellect.

He was always willing to render assistance to the poor. I don't know of any instance where he turned away persons who were too poor to secure representation. He took their cases without fee. He made most of his money on costs and on a contingency basis. It was unlike him to let injustice pass. He was courageous and fought mostly on the side of the poor even when the law was against him.

He dedicated his life to that cause. His focus was singular. His approach to the practice of law was disciplined and he worked tirelessly. He has never once in the 12 years I have worked with him craved the indulgence of any court for an extension of time. He deplored indiscipline which he felt was responsible for the delays which had overrun the judiciaries in the Caribbean. He was extremely demanding. He expected all assigned work to be completed overnight. Sleep was not a factor.

He mentored many and he shared his learning freely. He will be missed. His work will serve as inspiration to many. He was a good example to us all. His name and good work will, as it must, live on.

I thank Your Honours for this opportunity to pay tribute to a most accomplished lawyer and a distinguished son of the soil.

DIGITAL ACCESS TO THE GUYANA LAW REPORTS

by Ms. Nicola Pierre, Commissioner of Title

In January 2013 the Laws of Guyana and the Guyana Law Reports ("GLR") became available free online in a searchable, printable, reproducible digital format. By October 2013 that access was restricted because it is reported 'lawyers are not buying the books' (the hard copies) and that the license fee to Lexum which hosts the digital version at US$10,450 a year is not 'cheap'.[1]

The exercise to create digital versions of the GLR and Laws of Guyana was a part of a Justice Sector Reform project funded with an International Development Bank Loan.[2] The project objective was to achieve a better investment climate and citizen rights enforcement in Guyana through improved public sector governance by … (iii) improving access to justice,[3] which was defined as including 'enhancing citizen awareness of their rights and responsibilities, as well as provision of services to court users to facilitate legal advice and representation, and access to information'.[4]

Access to justice was to be enabled by spending 1.1 million United States dollars to, amongst other things, offer '(iii) support to MLA[5] for updating of Guyana Law Reports, drafting of Legal Practitioners Act, ADR[6] Act, and to the Law Revision Commission for updating and consolidating the Laws of Guyana'.[7]

The GLR for the period 1977 to 2007 were produced in print (200 sets of 14 volumes)[8] and digital form, and a Guyana case reports index for 1930 through 2007, in printed form. The

Laws of Guyana were updated to include amendments up to 2010.[9]

On January 23, 2013, the print and online versions of the GLR were launched and the website 'www.official.net.gov.gy' gave access to the digitized GLR[10] 'to revolutionise access to literature that will influence expeditious and timely resolution of court cases,' and lend support to the judiciary in performing its duties

1 Latoya Giles, 'Lawyers not buying Law Reports from Legal Affairs Ministry' *Kaieteur News* (Guyana 13 October 2013).

2 'Project Concept Document - Modernization of the Justice Administration System GY-L1009', <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=707419> accessed 26 December, 2018.

3 Ibid

4 Ibid

5 Ministry of Legal Affairs

6 Alternative Dispute Resolution

7 Ibid

8 'Print Online Guyana Law Reports Launched' *Guyana Chronicle* (Guyana 24 January, 2013).

9 'Modernization of the Justice Administration System ends' *Kaieteur News* (Guyana 29 October, 2013).

10 'Print Online' (n.6)

and the work of researchers, particularly law students.[11] The updated Laws of Guyana were accessible on the Ministry of Legal Affairs website in a searchable format and they could be printed, copied and pasted.

By October 2013 access to the online version of the GLR was revoked and the format of the Laws of Guyana available online changed from one that was searchable in its entirety and could be printed, copied and pasted, to collection of chapters in .pdf files.

The revocation of online access to the GLR means that there can be no keyword search of local cases and there is no access to local case reports unless the volumes are purchased. The restriction of access to the Laws of Guyana means that legislation must be downloaded to be accessed, can only be searched in chapters, and cannot be copied or pasted, but must be re-typed to be referenced.

In illustration, to find out about liability for dangerous driving[12] one must know the name and chapter of the Act in which it is made a crime, and if a layperson, must consult a lawyer who can access the GLR volumes to learn of the penalties likely imposed by the court.

Access to justice can be improved by Government providing open free digital access to the GLR and all primary legal materials, which include 'laws, orders, decisions, or regulations issued by a governmental entity or official, such as a court, legislature, or executive agency …'.[13]

Digitized laws and case reports are valuable resources that help improve efficiency in legal systems, and should not lie unused. The revocation of free access to them is regressive. Free access to them is a right, a tool to enable rights, the goal of a project, and it is strongly believed will benefit the efficacy and efficiency of the legal system.

Providing free access to judgments of the court is part of Government fulfilling its obligations under the social contract, that agreement of the people to relinquish some rights to the Government they elect in exchange for non-discriminatory protection for all. The social contract in modern democratic society is embodied in the rules defining the rights and duties of each party. Those rules are made by Parliament, the elected representatives of the people, are set out in the constitution and legislation, and are enforced by the Executive subject to judicial oversight.

The people have a right to know what rules Parliament has made, how they are being enforced by the Executive, and how the Judiciary is interpreting those rules to ensure just enforcement. The Government, consisting of the Parliament, the Executive and the Judiciary, has a corresponding duty to publish the laws and the decisions of the court interpreting the laws and overseeing executive action.

Open justice which demands public access to information about court activities provides a safeguard that judges act in accordance with the law and evidence, and links what happens in the courts to current issues of democratic

11 Ibid

12 Motor Vehicles and Road Traffic Act Chapter 51:02.

13 Law Library of Congress <https://www.loc.gov/law/help/secondary-rsrcs.php> accessed 26 December 2018

governance and adherence to the rule of law.[14] The court is the check on parliamentary and executive power and therefore a key source of public information about their activities.[15]

Constitutional court proceedings are of national interest and the pronouncement of the court of national importance. Unfortunately, the content of the proceedings and the court rulings are usually delivered to the public second-hand, through the press, who summarise and interpret what transpired.[16] That summary and interpretation is sometimes not an accurate, full or true reflection of what the court has ruled. There ought to be full fair and accurate reporting of court proceedings, especially on matters of constitutional importance and that is best done by providing free, widely accessible and contemporaneous access to the judgments of the court.

Law reports exist to inform of precedent because in common law countries the real meaning of law is contained in judgments of the court which interpret and clarify statutes and sometimes make law - 'legislation can be interpreted in a number of ways'[17] and higher courts bind lower ones. An example of interpretation is section 73 of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 2 of 1988, which provides for shorter than the statutory mandatory periods of imprisonment be imposed in 'special circumstances' but does not define what those are, leaving it to the Court to define.[18] The decision of Barlow J explaining 'special circumstances' is only accessible online in the version of a second hand report in Kaieteur News.

The principle of legal certainty which underpins the rule of law, requires that laws and their interpretation by the Judiciary be predictable and decisions made public.[19] Being certain of the law 'should not require a Gold Card'.[20] The concept of paying to know what rules must be followed is especially unfair because the laws and case reports are public data created by public officials using public funds which come from taxing the people now denied free access.

Citizens having access to justice is recognised as important internationally. The United Nations General Assembly adopted the statement: 'We emphasize the right of equal access to justice for all … and the importance of awareness-raising concerning legal rights, … we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.'[21]

Access to justice means that citizens are able to use justice institutions to obtain solutions to their common justice problems. Six elements impacting that ability are the Legal Framework, Legal Knowledge, Advice and Representation,

14 Emma Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) 40 *Fed L Rev* 385.

15 Ibid p. 389

16 An example is the reporting of proceedings on the no confidence motions filed in January 2019, disputing the validity of the carried parliamentary motion on the ground that the "yes" vote of member Charandass Persaud was invalid and/or insufficient.

17 P Leith and Fellows 'BAILII, Legal Education and Open Access to Law' (*European Journal of Law and Technology,* 4(1)).

18 Case in point - A newspaper article is the only free online reference to the decision of Barlow J which explains "special circumstances" *Kaieteur News* (Guyana 18 March 2018)..

19 James R Maxeiner , 'Some realism about legal certainty in globalization of the rule of law' (*Houston Journal of International Law* 2008) .

20 Carl Malamud 'Publicresource.org' <https://public.resource.org/edicts/>, accessed 18 January 2019

21 'Resolution adopted by the General Assembly, 67/1.' <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>, accessed 9 December, 2018

Access to a Justice Institution, Fair Procedure, and Enforceable Solution. [22]

Legal knowledge, advice and representation, is not limited to legal aid providing lawyers services for litigation. Recent studies suggest that access to legal information and education can have more of an impact on access to justice than civil legal aid, in terms of efficiency and efficacy.[23] Legal empowerment should be the focus, helping citizens understand and use the law to advance their rights and interests. [24]

Citizens 'rely on non-professional sources of advice and generally available information'[25] to avoid consultation fees, maintain privacy or for lack of opportunity. What's available to them? "It's ok if you're a judge or studying at a top law school, you can go to the library and look up case law for every state, but for the average person, there's no way you're going to be able to find out what the law thinks of any situation you may have. That has to be wrong."[26] Charging a fee to access case law is unfair - 'the law of the land and the way it is interpreted by a judge should be free for all citizens to access.'[27] Open access to the laws and case reports allows citizens to find the law and see how its interpreted without going through an intermediary.

The fee system for law reports is discriminatory because not all laypeople or legal professionals can afford print or online law reports.[28] Access to the West Indian Law Reports on Lexis Nexis costs USD$109 dollars per month.[29] Even the courts recognise this as pricing out some of the Bar –'The judiciary is not insensitive to the need for a level playing field that provides 'access to all, free of charge, to our caselaw and statutes and other publicly available legal materials'.[30] The solution is to adopt an open access model which 'eliminates both price and permission barriers. In the tradition of a public library.'[31]

Free access is important because effective access to justice is impacted by the cost of justice and 'proper' legal assistance. [32] 'Proper' legal representation is such an access to justice issue that a ground of appeal is incompetent counsel- ***Lashley & Campayne v Det. Cpl. 17995 Winston Singh***.[33]

Quality of legal representation is affected by lawyers access to legal materials. 'Access to

22 American Bar Association, 'Access to Justice Assessment Tool' <https://www.americanbar.org/content/dam/aba/directories/roli/misc/aba_roli_access_to_justice_assessment_manual_2012.authcheckdam.pdf> accessed 15 January 2019

23 Maurits Barendrecht, 'Legal Aid, Accessible Courts or Legal Information? Three Access to Justice Strategies Compared' (*Global Jurist*: Vol. 11: Iss. 1 (Topics), Article 6.)

24 Opening justice (n.18)

25 Understanding Effective Access to Justice – OECD – Organization of Economic Development workshop 2016

26 'How open data helps citizens to know the law' <https://www.theguardian.com/media-network/2016/aug/11/open-data-empowers-citizen-know-the-law., accessed 15January 2019.

27 Ibid

28 See also Brooke LJ re the haves and the have nots , 'Publishing the courts: Judgments and public information on the Internet', Commonwealth Law Conference – Melbourne, 15 April 2003, <https://www.iclr.co.uk/archive/publishing-the-courts-judgments-and-public-information-on-the-internet-lord-justice-brooke-2003/>, accessed 17 Janaury 2019 .

29 <https://www.lexisnexis.com/en-us/products/lexis-advance.page>, accessed 17 January 2019.

30 Publishing the courts (n 28)

31 Legal Education and Open Access to Law (n.14) 9

32 Effective Access to Justice - Nathy Rass-Masson (Milieu) Virginie Rouas (Milieu) http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596818/IPOL_STU(2017)596818_EN.pdf> accessed 26 december 2018

33 [2014] CCJ 11 (Aj)

justice doesn't just mean access to a lawyer. It's about being able to enforce legitimately held legal rights. Frankly, the lawyer can be the problem. . .'[34] but 'New lawyers can't be blamed for being unaware of things they don't know'. I suggest that what lawyers know is directly linked to what's available to them, which may not include a subscription to the West Indian Reports. For true access to justice 'providing additional support to lawyers and paralegals who provide essential services to low and middle income people is essential'.[35]

The Free Access to Law Movement (FALM) an affiliation of legal information institutes including Bailii, Canlii, Austlii, says that humanity has a right to free public legal information because access promotes justice and the rule of law.[36] Those non-profit non-governmental free legal portals are well used. In 2012, Bailii was accessed by more than 58000 users per week, a number which must have increased along with the public's increased access to technology. But access to justice can be affected most by government policy and its implementation.[37] Some Governments agree and provide free access - the Kenya Law Reports, Legifrance (France) and FINLEX (Finland).[38]

Not only lay people and lawyers benefit from free access to case reports. Courts needs free, open and current access to the decisions of other courts, to ensure consistency in application of the law, and therefore legal certainty, an issue that applies particularly to sentencing in Guyana[39].

A relevant consideration in contemplating the grant of free online access to digitized versions of the Laws of Guyana and the GLR is that the purpose of the project that funded their digitization is defeated by restricting access to them -

> c. Subcomponent 3: Improvement of access to justice (US$1.1 million)
>
> 2.9 Improving access to justice in Guyana includes enhancing citizen awareness of their rights and responsibilities, as well as provision of services to court users to facilitate legal advice and representation, and access to information, courts and alternative dispute resolution mechanisms. To achieve these aims, activities to be financed under this subcomponent will include technical assistance for: (i) expansion of legal aid services, community ADR, and specialized community outreach initiatives targeted at disadvantaged groups; (ii) development and implementation of a public legal awareness strategy, action plan and campaigns (and support for related public consultations); and (iii) support to MLA for updating of Guyana Law Reports, drafting of Legal Practitioners Act, ADR Act, and to the Law Revision Commission for updating and consolidating the Laws of Guyana.[40]

34 'Quality of legal aid is as important as access to a lawyer', Jon Robbins, https://www.theguardian.com/law/2010/sep/17/quality-legal-advice-lawyer

35 Understanding Effective Access to Justice (n 25)

36 Legal information institutes meeting in Montreal 2002 <https://www.canlii.org/en/info/mtldeclaration.html> accessed 16.1.2019

37 https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-dunn-2012-access-to-justice.pdf

38 Graham Greenleaf, 'Legal Information Institutes and the Free Access to Law Movement' <http://www.nyulawglobal.org/globalex/Legal_Information_Institutes.html> accessed 16.1.2019

39 Harris Smith 'Judge's sentencing policy comes under scrutiny during murder convict's appeal' *Stabroek News*, (Guyana December 12, 2018). 9

40 PCD Modernization of the justice administration system (n 2).

It is commonly believed that free online access will benefit the entire legal system, most especially Government. I conducted field research on local research habits using Surveymonkey to ask questions of legal professionals about the amount of their legal work time spent in research, their use of online legal resources, and their opinion about free access to primary legal materials.

The population contacted comprised most of the local judiciary and the 320 active members of the Bar Association of Guyana. 39 of 320 (12%) active members of the Bar Association of Guyana and 6 of the approximately 42 (14%) judicial officers contacted participated in the voluntary survey. Internal surveys average a 30-40% response rate and external surveys 10-15%. This survey was distributed to a fairly closed group, so the 10-15 % rate shows a low motivation level.[41] But the small sample had clear and interesting opinions - 100% of the respondents felt that free access to the GLR would improve court time and judicial performance, and 95% felt it would improve performance at the Bar. Their opinion is therefore that Government would most benefit from free access.

67% of the respondents spend more than 20% of legal work time on research, 30% spend more than half their work time. More than 50% of respondents were litigators and 13% judicial, so the amount of legal work time spent on research is high, considering time spent on the bench, at court, taking instructions, drafting. The respondents are therefore highly motivated researchers.

More than 61% frequently start their research by checking the Laws of Guyana online as opposed to 40% checking the volumes. This indicates a preference for online access to the laws, more so because any check for the non-digitized statutory instruments requires referring to the volumes.

The other frequently used research starting points are also online, Google 50%, WIR online 44%, other paid online law reports 49%, exceeded only by referring to previous work product - 67%.

During the research process 61.9 % of respondents frequently accessed the Laws of Guyana online and 51% paid law reports online. Only 36% frequently referred to the LRBG or GLR volumes. Online access is preferable to hard copy searches, and/or there is limited access to hard copies of the LRBG and GLR.

Of available online resources 54% frequently access the Ministry of Legal Affairs website which hosts the laws of Guyana .pdf files. More than 94% of respondents visit the Caribbean Court of Justice (CCJ) website[42] which publishes the CCJ appeal decisions from Guyana. 52% frequently access paid and 38% free, online reports. The fact that 94% make use of the only free online source of judicial decisions on Guyanese law strongly suggests that the population would make frequent use of the digitized GLR.

Accessing local case reports is a difficult task, even for highly motivated researchers. 51% do not have access to the Law Reports of British Guiana, 66% do not have access to

41 'Survey Response Rates' <https://www.surveygizmo.com/resources/blog/survey-response-rates/> accessed 16 January 2019.

42 http://www.ccj.org/judgments-proceedings/appellate-jurisdiction-judgments/ publishes the CCJ decisions on appeals from Guyana

the GLR, 52% do not have access to the West Indian Reports at work or at home. Access to the Supreme Court Law library where these resources are available is limited to Monday to Friday, 8.30 am -4.30 pm, when respondents may be occupied in court.

Using local laws in work product is a difficult task. Foreign laws are more accessible than local laws as more than 70% can copy and paste foreign laws but have read only access to the laws of Guyana. 88% believe laws should be available online with the option of copying and pasting sections but no editing text.

Respondents believed that free online access to the GLR will improve efficacy and efficiency. 100% believe that it will improve judicial performance and save court time. 95% believe that online access to the GLR will improve the Bar and this belief is so strong 71% are willing to pay for it.

CONCLUSION

Access to justice can be improved by open free digital access to the GLR and Laws of Guyana. Access to justice through access to legal information is the purpose of the digitized version of the Laws of Guyana and the GLR, and denying access defeats that purpose.

Jurisprudence recognises providing access to legal information as a fundamental part of upholding the rule of law. Free access enables justice - it empowers citizens to use the law to advance their rights, helps level the playing field in legal representation, and gives Judges notice of decisions of other courts enabling consistent and predictable enforcement. Legal professionals strongly believe that free online access to the GLR will improve the performance of the Bar and Bench and save court time.

A NOTE ON TRADE MARK REFORM

by Ms. Jamela Ali, LLB (Hons), LLM (UWI), MCIArb., Attorney-at-Law, Intellectual Property Agent & Mediator

"Successful reform is not an event. It is a sustainable process that will build on its own successes – a virtuous cycle of change."
Abdullah II of Jordan[1]

INTRODUCTION

Intellectual Property Rights

Intellectual Property Rights (IPRs) are exclusive rights given to persons over the use of their creations. They include Trade Marks, Patents and Designs, Trade Secrets, Copyright and Geographical Indications. This article highlights the need for reform of IPRs laws and focuses primarily on Trade Marks relating to services marks, priority rights and classification of marks. It also makes recommendations.

Definition of Trade Mark

A mark and trade mark have been defined in the Guyana Trade Marks Act, Chapter 90:01 to include "a device, brand, heading, label, ticket, name, signature, word, letter, numeral …" used in relation to goods to indicate a connection in the course of a trade between the goods and the person or company registered as the proprietor of the goods. Modern legislation includes sound, scents and even three-dimensional shapes. The American historian Daniel J. Boorstin described a trademark or design image as "a studiously crafted personality profile of an individual, institution, corporation, product or service".[2]

International Intellectual Property Rights Obligations

Guyana became a member of the World International Property Organization (WIPO) in 1994 and the World Trade Organisation (WTO) in 1995. Guyana is also a signatory to the Protection of Industrial Property (Paris Convention) since 1994 and the Trade Related Aspects of International Property Rights (TRIPS). TRIPS is intended to give reciprocal protection of Intellectual Property Rights between countries.

Guyana also signed on to the Berne Convention for the Protection of Literary and Artistic Works in 1994 and the Universal Copyright Convention.

1 Remarks made at Georgetown University, Washington, DC on the 21 March 2005.

2 "The Image: Or, What Happened to the American Dream", Atheneum (1962) at p. 186.

However, despite being a signatory to several international conventions, Guyana has failed to take the requisite steps to give effect thereto. Revised IPRs laws have not been enacted to reflect the technological advances made by those agreements.

Principal Intellectual Property Rights laws

The IPRs laws remain at pre-independence status. The Trade Marks Act, Chapter 90:01 and Rules are dated 1956 with one amendment in 1972 based on the United Kingdom Trade Marks Act of 1938.

The Merchandise Marks Act, Chapter 90:04 is dated 1888 and was last amended in 1972. It relates to fraudulent marks on merchandise and carries offences and fines which bear no relevance to the present time.

The Patents and Designs Act, Chapter 90:03 is also dated 1938 and was last amended in 1972. There are also Regulations.

The Copyright Act (Cap. 74) dated 1956 is also archaic and offers little or no protection in today's modern world to authors, musicians, artists, designers, film-makers and software developers.

There has been piecemeal legislative improvement in the form of a new Geographical Indications Act No. 15 of 2005 which states that it provides for the protection of geographical indications to fulfill Guyana's obligations under TRIPS and WTO. This Act which became law in 2008 was used by DDL in 2016 to become the proprietors of Demerara Rum, Demerara Sugar and Demerara Molasses.

Both the Geographical Indications and Copyright Acts have been omitted from the current 2012 'purple volumes' of the Laws of Guyana.

Service Marks

With regard to marks relating to services, the Guyana Trade Marks Act does not permit registration unless previously registered in the United Kingdom and a certificate issued by the United Kingdom Patent Office. This is an insult to our own Guyanese citizens who have never been able to register services marks, while UK services marks enjoy superiority. This legislative restriction of not allowing independent registration of services is a vestige of colonialism and one would have thought that more than 53 years after independence, the IPRs laws would not have remained stagnant. Other Caribbean jurisdictions including Trinidad & Tobago, Barbados, Jamaica, Anguilla, Belize and St. Kitts & Nevis have been progressive and updated their laws to permit independent applications for service marks.

Priority Rights

International priority is another area that requires change as set out in the Paris Convention. A priority right applies when a proprietor who has registered a trademark out of Guyana and subsequently wishes to register the same mark in Guyana is permitted to do so effective from the date of filing the first application. This is permitted in several Caribbean jurisdictions including Barbados, Trinidad & Tobago, Jamaica, Anguilla, Bahamas, Belize, Dominica, Grenada and St. Kitts & Nevis.

Guyana offers re-registration of United Kingdom trade marks, but does not extend this privilege to other countries. In this modern age, with Guyana being an independent nation, there can be no good reason why re-registration of trade marks ought not to be extended to the European Union, United States of America, Caribbean and other countries.

Classification of Marks

In relation to the registration of marks, the Guyana Trade Marks Act has its own Schedule of Classification of Goods. However, the Nice Agreement 1957 which established the Nice Classification System assigning goods from Classes 1 to 34 and services from Classes 35 to 45, is applied. The Nice Classification was developed in an era when the paper catalogue index reigned. This classification of goods still presents uniformity of goods challenges where the separation of goods otherwise considered to be in a group can lead to multiple applications. For example, Protex and Dial soaps strictly fall into Class 5 as they are labelled antibacterial soaps considered as medicated, while soaps such as Dove and Irish Spring fall in Class 3 as they are antiperspirant and deodorant soaps. Beer, though it contains alcohol, is not included in Class 33 that lists alcoholic beverages since it is characterised as an alternative to a soft drink beverage. This anomaly is inconsistent with local culture.

Deeds and Commercial Registries Authority

Since the creation of the commercial arm of the new Deeds and Commercial Registries Authority (DCRA) which administers Trade Marks, Patents and Designs, there has been some improvement in the administration of applications filed. The backlog of Trade Mark applications for registration has been cleared and processing time for applications, renewals, assignments and related services has been substantially reduced. Although, there is still room for improvement to bring it in line with processing times in other jurisdictions.

Although the international IPRs agreements have not been incorporated into the Laws of Guyana, the DCRA uses the WIPO database and their Industrial Property Administration System (IPAS) software to support its operations. It is of interest that on April 2, 2019, WIPO announced that searches on their Global Brand Database for figurative marks will be carried out using new AI-based technology for classification. The WIPO database does not cover all international registered trade marks, however it is available to all users free of charge.

Recommendations

A Commission comprising of persons qualified in intellectual property rights law, legal knowledge, legislative drafting techniques and information technology skills ought to be established to recommend policies, balancing Guyana's culture and traditions with international obligations, to draft and implement new laws. With regard to trade marks, this ought to include services marks, expand priority rights, consider different ways in which the Nice Classification can be implemented and other matters, including colour marks. There are trade mark offences and outdated fines in both the Trade Marks and Merchandise Marks Acts. New offenses and penalties must be considered and consolidated. A cut and paste slavish approach to legislative drafting ought not to be the standard.

With the development of computer programs and software, new ideas can be generated. In this modern digital age, the use of blockchain technology can be considered for the registration of property rights. The goal is to establish an intellectual property rights algorithm so as to create the protections needed and to uplift Guyana from this pre-independence hangover.

The DCRA website ought to be updated and improved to include a database of all registered marks from which the public can carry out user friendly searches.

Finally, in order to complement the development

of innovation and technological advancement, training is essential along with the development of maintenance capability.

Law Reform and Economic progress

Guyana is again in the international limelight with the discovery of gigantic quantities of oil with production slated to commence in 2020. This discovery has attracted businesses worldwide. The emergence of the oil industry makes it even more imperative not only for general law reform in many areas but for improvement of IPR laws. This will have the effect of demonstrating the commitment to a positive commercial environment by recognising the importance of IPRs in the form of law reform and change. The legislative gap is a disservice to our image. The protection of trade marks, designs and patent will encourage commerce and can only lead to promoting economic efficiency.

CONCLUSION

Notwithstanding previous draft legislation, it would be to Guyana's benefit to take legislative steps to permit service marks and expand priority rights to protect the foreign registered rights of investors in addition to those from the United Kingdom. In today's global business environment, other proprietors will undoubtedly want their registered logos and words associated with the special use of their brand to be protected. The creation of a more business friendly environment would certainly be welcomed by those doing business in Guyana.

It was Winston Churchill who said "to improve is to change"[3]. It is time to act now and make the changes.

3 *His complete speeches*, 1897-1963, edited by Robert Rhodes James, Chelsea House ed., vol.4 (1922-1928), p. 3706 (23 June 1925)

HERE COMES THE BOOM: THE ROLE OF THE MODERN GUYANESE LAWYER IN THE FIGHT AGAINST CORRUPTION AND MONEY LAUNDERING

by Dr. Toussant Boyce

EDITORIAL NOTE:

Dr. Toussant Boyce is a son of Guyana who has distinguished himself in the field of law.

After completing his High School education at President's College, he went on to obtain his LL.B. from the University of Guyana, graduating with distinction, earning both the Pro Chancellor's Gold Medal and Vice Chancellor's Gold Medal. At the Hugh Wooding Law School he was a joint winner of the Sellier Prize for Trial Advocacy.

His impressive academic success continued at the ABA Stonier School of Banking at Georgetown University where he graduated with a distinction in Banking.

At the University of Cambridge, which he attended as a Chevening Scholar, he earned a Master of Laws Degree in Commercial Law with Starred First Class Honours. While there he also won the Queens' Prize and he was a Cambridge Foundation Scholar. He also earned a Master of Laws Degree in International Finance from Harvard Law School where he was awarded best thesis in the finance concentration.

He holds a Doctorate of Philosophy Degree from the University of Cambridge in International Financial Law and Regulation where he was a Cambridge International Scholar.

In addition to his stellar academic career, Dr. Boyce also has a high level of experience in the area of Financial Law. He is admitted to practice at the Bar in Guyana, Trinidad and Tobago and in the State of New York, United States of America.

He has been General Counsel/Manager of Legal Services at Republic Bank Ltd in Guyana; Manager, Corporate Finance at Republic Bank Ltd in Trinidad; a Finance Attorney-at-Law at Freshfields Bruckhaus Deringer in New York; and Special Counsel and Consultant (Financial Crisis Resolution) at the Central Bank of Trinidad and Tobago. He is now the Head of the Office of Compliance, Integrity and Accountability at the Caribbean Development Bank, where he is also an Advisor to the Vice President.

In addition to the aforesaid, Dr. Boyce is a Certified Anti-Money Laundering Specialist.

He delivered the following topical Keynote Address at the 38th Annual Bar Dinner of The Bar Association of Guyana held on November 17, 2018 at the Guyana Marriott Hotel, Georgetown.

A. HERE COMES THE BOOM

Good evening,
President and members of the Bar Council, members of the Bar, old and new, distinguished guests. It is an honour to be here this evening. Thank you for inviting me to have this conversation with you.

The title of this address is long. To avoid making this short speech sound like an intellectually boring academic lecture, I will spice it up a bit. I will share ten points to ponder about love and the word 'boom.' In the end, it will all make sense, trust me.

1. Urgency

My watch will help me keep track of time here at the podium but this watch annoys some people because if you are fairly quiet while around me, you can hear it tick. To me, this cheap watch is sensory gold. It is a reminder to my senses of the need to value every second of life.

I almost died in an accident in 2013 and since then I approach life with a profound sense of urgency.

It reminds me to be generous with my time for others. It also reminds me of the need to live in the present, with as few regrets as possible. The same sense of urgency that ticks through my watch is the same sense of urgency I invite you to have, tonight and long after tonight, about the next nine issues.

2. Love

We have all encountered the idea of love in the legal community since our first year as law students when we read Lord Atkin in the 1932 case of ***Donoghue v Stevenson;*** about the need to take reasonable care to avoid reasonably foreseeable acts or omissions likely to injure our neighbour.

There are about six unscientific types of love we should each have in life. For me, in order of priority they are: an unconditional love for **God**; love for my **family**; love for **self**; love for **country**; love for **community**; and love for **company**. Most of my next eight points will deal with those six types of love, particularly **love of country**.

3. Boom

The word Boom can mean something good or bad. The etymology of "boom" suggests that it is of Dutch origin with usage from around 1627. "Boom" can mean a sound or a period of sudden economic growth. Like trading boom or an oil boom, a time of prosperity, the opposite of which is a "bust."

A less familiar usage of the word "boom" is that a "boom" is a long movable pole on a sail boat to which the sail is attached. Sailors talk about lowering the boom and to beware when the boom is being lowered. To 'lower the boom' can mean to encounter adversity and that is the applicable context here tonight.

In my view, Guyana is about to face an unprecedented 'lowering of the boom' and the legal profession will be in the middle of it.

Now is a fascinating time for you to be a member of the legal profession in Guyana. Just as one type of boom is on the horizon, another type of boom is being lowered and you will be caught in the middle.

You will be riding simultaneously the wave of evolution of standards to combat financial crimes and also riding the wave of all manner of impacts from imminent oil-related financial inflows to our country.

The real point I want to make here is that soon our courage and our loves: of God; of family; of self; of country; of community; and of company, are all about to be more severely tested than ever before.

It is my belief that the rapidly evolving global framework to combat financial crimes is becoming increasingly dependent on lawyers like you to bear certain responsibilities and to play certain roles for which you are not prepared.

4. Guyana; living history

For love of country I would like the new lawyers here tonight to know that the recent evolution of the fight against corruption and money laundering is for you both a lesson and a guide. You have no excuse if you fail to grasp the urgency and importance of these issues.

As much a guide as the living history you have experienced while on your pursuit to join this noble profession.

When most of you embarked on your journey to join the legal profession, the world was a very different place.

Long before you started your law degree, a global policy making standard setter called the Financial Action task Force (FATF) issued a slew of new money laundering standards to countries called *Recommendations*. Recommendations are soft law.

In 2012, those Recommendations were revised just before most of you started your law degree at the University of Guyana.

The Recommendations provide guidance on how to avoid engaging, assisting or facilitating money laundering as criminal activity.

Recommendations create minimum standards. Thus, instead of blindly copying laws each country can go beyond those minimum standards to create their own standards culturally tailored and appropriate to their risks and needs which may exceed the FATF's minimum standards. In 2013, I named this process '*Super Compliance'*.

Recommendations 22 and 23 articulate standards applicable to lawyers who are classified as "Designated Non-Financial Business and Professions' or DNFBPs.

For instance, the Recommendation 22 applies certain other Recommendations to all lawyers particularly the need for lawyers to conduct due diligence and apply recording keeping requirements when conducting the high risk activities mentioned earlier. This is a major issue; a lowering of the boom.

The Interpretive Note to Recommendations 22 and 23 says that countries do not need to issue special laws exclusively for lawyers. It is sufficient if they are included in laws or other enforceable means covering their underlying activities. The modern lawyer is fully captured by these standards.

To you, the new lawyers here today, you are living the history of Guyana's dance with AML/CFT. Your cohort of lawyers; your generation of students have had the best opportunity to live a party of history that will change our profession forever.

In 2013 when you started your law degree, the FATF issued their '*Methodology for 'Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems'*.

Today the focus of the Recommendations and Methodology is not just technical compliance but also effectiveness of the money laundering regime and the extent to which money laundering laws effectively cover risks like those presented by lawyers.

Lawyers will have a major role to play for Guyana to achieve effectiveness of its AML/CFT regime.

In 2014 while you were in the second year of your law degree, more precisely, on May 29, 2014 the Caribbean Financial Action Task Force (CFATF) listed Guyana as a country with strategic deficiencies and referred us to the FATF. This move again called for countries to take countermeasures when doing business with, for example, Guyanese financial institutions.

Countermeasures are seriously bad business. The damage is immeasurable and not well understood. Countermeasures could include enhanced due diligence of transactional traffic from Guyana, of persons and institutions; enhanced reporting requirements; refusal by banks to establish subsidiaries, branches or other offices and limiting business relationships or types of financial transactions they can conduct with Guyana.

Countermeasures provided a basis for countries to treat us differently and for their regulators and banks to pile on the pressure. To date, Guyana is still suffering from some of the effects of those countermeasures in ways that we often cannot recognize much less acknowledge.

The opportunity for countries to impose countermeasures on us, even for anti-competitive reasons together with ignorance and suspicion left Guyana in a very vulnerable place.

In 2015 when you were in the final year of your law degree Guyana was referred to the International Co-operation Review Group (ICRG) which analysed Guyana's deficiencies and made recommendations for development of our action plan to address the deficiencies.

In 2016 when you commenced your studies at the Hugh Wooding Law School, Guyana was declared by the FATF to be no longer subject to the CFATF-ICRG review process.

For those more experienced lawyers you have also lived some key history as well. In the last decade a slew of new statutes have been enacted in Guyana to combat corruption, terrorist financing and money laundering; They are intended to help ensure that Guyana is AML compliant and dealing with corruption. Whether those laws are successful or not will depend partially on local legal profession.

B. RESPONSIBILITY

What worries me most about our profession is how little the real impact of money laundering and corruption is understood by lawyers or so it sometimes appears. My particular concern is how easy it is for lawyers to become unwittingly involved in financial crimes which brings me to my fifth point.

5. Unwitting involvement

Some lawyers are sitting ducks. A study done a few years ago in the USA found that about 15% of lawyers had unwittingly committed money laundering crimes and had suffered the consequences of a combination of jail and/or disciplinary action through suspension or disbarment. The cases are too many to mention in detail.

In one case in 2014, a lawyer in Georgia who had committed such a crime voluntarily surrendered his Bar licence which in the opinion of the court was "*tantamount to disbarment*".

I am worried that many Guyanese lawyers are well intentioned but ignorant of the way that sophisticated clients can mislead and use them to commit money laundering and corruption.

Which leads me to my sixth point - that your first responsibility is to educate yourself.

6. Educate yourself

Each lawyer has the responsibility to learn about money laundering, terrorist financing and corruption. Same applies to the Bar.

My hope is that in the face of the coming booms, Guyanese lawyers will not become intentionally involved in financial crimes neither will they become unwittingly involved in financial crimes.

There is a huge role for the Bar Association in helping to ensuring that local lawyers are well educated particularly about modern money laundering and corruption examples which we call typologies. The focus should be on both unwitting involvement in crimes focused particularly on lawyers who undertake the high risk categories for money laundering like real estate matters, trusts and estates, international commercial matters, and corporate formation and management.

The Bar can provide continuing legal education through entrance exams, seminars, handbooks, its website, articles, Guidance Notes, etc.

The University and Law Schools should do the same within the context of teaching legal ethics and far beyond.

Every Guyanese lawyer graduating from the University of Guyana should been taught at least one course on the role of lawyers in financial crimes.

While at Law School, every law student should be educated on how to undertake a risk based approach to assessing clients for financial crimes risks the same way that we evaluate clients for conflicts of interest prior to engagement. Students should learn about how to avoid being dazzled by the dollar, when and how to undertake due diligence and enhanced due diligence for high risk clients and when to decline or terminate the representation.

The reason why this is important provides an opportunity for me to talk a bit about your roles.

C. ROLES

There are many roles I can mention but, in the interest of time, I wish to focus on two roles that define the modern lawyer when it comes to corruption money laundering and terrorist financing.

One is your role as a gatekeeper and the other is your role as a leader.

7. Lawyer as Gatekeeper

Compared to other professions, lawyers are being identified as financial intermediaries and thus are at risk of being disproportionately impacted by the evolving global architecture of hard and soft laws to combat corruption and money laundering.

One likely big impact is that the scope of what constitutes corruption and money laundering are being more broadly defined in statutes, thus placing tremendous pressure on the role of Attorneys-at-Law and the traditional attorney-client relationship.

The outcomes of successful *anti-corruption cases* against companies will continue to focus on professional ethics of lawyers themselves and their legal obligations to their clients.

Here are some starling statistics. The World Economic Forum estimates that corruption costs at least $2.6 trillion annually and the World Bank estimates that businesses and individuals pay more than $1 trillion in bribes each year. Lawyers are always accused of playing a role in how and why these are statistics are so staggeringly high.

Money laundering is at its simplest, the process of placement, layering and integration of criminal proceeds; illegitimate proceeds into legitimate assets in a form acceptable to the financial system. Think about it as the 3Cs - convert, conceal and create. It involves conversion of proceeds of crime into a less suspicious form the concealment or its criminal origins and ownership and the creation of legitimate explanation of its source. At every stage of the process lawyers are involved and thus a major argument is that lawyers are gatekeeper of the financial system.

In the context of money laundering, as mentioned above, lawyers fall within a category called 'Designated Non-Financial Business of Professions' or DNFBPs.

Two key pillars of lawyers' obligations related to money laundering are:

(a) our professional ethical obligations as lawyers to not engage in support or facilitate crimes usually described as 'soft law', found in Codes, Practice Notes and other Guidance from the Bar and Bench; and

(b) the 'hard' laws of the land or to sound a bit more sophisticated, the national legislative and regulatory architecture.

At every stage of the process lawyers ought to know that our role is to do the right thing but the modern standards are demanding that fundamentally we must act as gatekeepers to the financial system. However, many lawyers do not see it that way and still struggle with a form of identity crisis.

There is a story about two police officers who pull over a car for a traffic stop. One officer walks to the driver's side while his partner stands behind the car. As the first officer approaches, the driver rolls down the window and leans out, shaking his fist. "Do you know who I am? Do you know who I am!?" The second officer hears the ruckus and calls out, "Is there a problem here?" And the first officer replies, "Yes, it seems that this fellow doesn't know who he is."

Lawyers need to know who we are. The long arc of legal history says that we are the guardians of the rule of law, a concept fundamental to human liberty. However, the modern laws and standards for finance have assigned us an additional and somewhat different role, as gatekeepers to block the entry into the financial system of illegitimate money.

We are conscripted to act in accordance with the laws of the land for the prevention of money laundering and corruption, to identify and report suspicious transactions and other potentially tainted financial activity and above all keep whatever they are doing secret.

Lawyers often get this wrong. Lawyers are not immune to the consequences of engaging in criminality. This is when the boom is properly lowered against us. In various countries lawyers have been charged, or suspended from practice.

On the other hand we are also bound to act on the enforcement side as defenders of the accused in line with the hard laws of the land and Code of Ethics of the Bar.

Each of you is a pillar in the AML and anti-corruption architecture and when enough of us fail to recognize this, there are countermeasures and other consequences at the national level. Consequences like de-risking.

De-risking and love of country

Imagine if your bank called you in for a meeting and told you that they no longer needed your business. Regardless of how honourable and wealthy you think you are, they are simply not interested in your business. They cut a cheque equivalent to the balance of your account and mail it to you anyway.

Now imagine if that happened to your bank. That is called de-risking and that is what recently happened to the banks of many countries in the Caribbean including, or I should say, particularly Guyana. Correspondent banking services were cut based primarily on money laundering risks.

The role of the modern lawyer is not to contribute to de-risking but rather to understand that stereotypes stick, including that lawyers are mostly liars and facilitators of crime. Too much de-risking has happened due to stereotyping and mis-perceptions including about the ability of the legal profession to act as a Gatekeeper.

It is helpful to remember the story of the six blind men and the elephant. Each felt one part of the elephant and described it based on their perception. One felt the side of the elephant and thought it was a wall; another felt a leg and thought it was a tree trunk or pillar; another felt the trunk and thought it was a hose or tree branch; another felt the tail and thought it was a rope; another felt the tusk and thought it was a pipe; and another felt the ear and thought it was a big hand fan. The six blind men argued until one wise man who had sight stopped and told each of them that they were each right but were describing different parts of the same animal. Well lawyers alone are never to be blamed for de-risking but we are considered as part of that elephant.

The challenge then is simply this - can we as key Gatekeepers to Guyana's financial system do what is necessary for love of country?

8. The Lawyer as a Leader

You, the modern lawyer are not a bystander in the fight against money laundering and terrorist financing. You are a leader in the fight to combat corruption and money laundering.

Your duty as a modern lawyer is not to fear the boom but to perceive it and change it sensibly for the better; for the sake of love of country.

The scourge of corruption and money laundering are too compelling to ignore.

You must do your part to use your legal skills to sharpen and enhance the evolving AML and anticorruption framework and to provide leadership sufficient to ensure balance between the evolving AML and anti-corruption

framework on one hand and the role of lawyers in the administration of justice and fundamental tenets of the legal profession on the other hand.

A good example is the extent to which the evolving fight against corruption and money laundering is becoming increasingly intrusive and dismissive of the attorney-client relationship.

AML and anti-corruption laws are significantly impacting both legal professional privilege and confidentiality.

Privilege and confidentiality are not the same. Confidentiality is an ethical duty you owe to the client. Privilege is a common law evidentiary rule that protects your communication with your client who can waive it.

The confidentiality of documents can be compromised by a corruption or AML investigation and thus lose privilege. Privilege does not protect communications to an attorney with a view to further criminal intention like money laundering and corruption.

FATF soft law standards do not require lawyers to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege. However, it is for each country to determine by legislation, the matters that are to be classified as legal professional privilege.

So too the FATF standards state that countries may allow lawyers to send their suspicious transaction reports to self-regulatory organizations like the Bar Associations; provided that there are appropriate forms of cooperation between those organisations and the Financial Intelligence Units. This subject has been a battleground in countries all over the world.

Lawyers and Bar Associations in countries like Jamaica and Canada have pushed back on attempts to pass anti-money laundering and proceeds of crimes laws that they perceived to have interfered with their rights.

Another battle ground for lawyers has been the reporting of suspicious transactions.

In Japan, the Japan Federation of Bar Associations drafted its own comprehensive rules to enable all lawyers to conduct due diligence on clients but they have rejected successfully the attempts by the government to pass laws that require lawyers to report suspicious transactions. In essence Japanese lawyers are exempt from having to blow the whistle on their clients.

I must say that the risks, the historical, cultural and other aspects of the Canadian and Japanese experience are arguably in some ways fundamentally different from our experience here in Guyana.

Nevertheless, the lesson for you the modern lawyer in Guyana is that you need not fear the coming boom if you can act strategically and craft your own rules aimed at achieving a fair balance between the combat of the scourge of money laundering and corruption and preservation of the fundamental tenets of our legal profession.

The boom is being lowered. Instead of being dragged by the nose kicking and screaming into having laws that undermine issues of real concern to lawyers (like the extent to which money laundering standards can impact legal privilege and the duty of confidentiality, and

duty to report) the Bar must lead its members and help the legislature by designing, advocating, and enforcing proactively a workable AML framework for lawyers or risk watching its independence and role being devoured by unworkable legislation.

In an environment seemly scripted to focus on political battles, the question is whether as lawyers we can look beyond the sound and fury of politics; beyond the bluster of the political cycle and beyond personal glory to do the right thing for love of self and love of country.

9. Intellectual Curiosity – for new lawyers

One of the best attributes of the most successful young lawyers (or perhaps I should say lawyers who are new to the profession) is a profound intellectual curiosity.

Intellectual curiosity will lead you to the law and then beyond the law.

Intellectual curiosity that will allow you to hone your skills with humility and conscientiously; to broaden your mind and to drive your relentless pursuit of excellence in your practice and ultimately to success in life.

Use your individual brand of intellectual curiosity however derived to make the most of your legal career and do it with a sense of urgency, with a sense of purpose and a propriety that none can question your integrity and character.

Paying keen attention to stay on the right side of ethical conduct for lawyers and the points I made earlier about money laundering and corruption is a great place to start.

Personally, it is a matter of great disappointment that the public image and positive light of Guyanese lawyers is sometimes dimmed by the actions of one person or of a tiny minority.

However, I am an eternal optimist, hopeful that our generation will defy the odds of negative perception and deal in equal measure with the booms coming our way.

Our country needs us to be great at what we do. The lower the boom, the greater the need for awesome well respected lawyers and for the Bar Association to provide leadership.

Some of you will step up in good and bad ways. Each of you can make a huge difference. For the sake of love of country, Guyana needs you.

When the boom is lowered to its lowest. Guyana wants you to be chin up and at your best.

10. Courage

Some of you may be worried that with the nature of pace and change on the horizon that we are leaping into the unknown. I'm not worried a bit, as long as you are able to find the courage to leap forward and be prepared to do things you have never done before.

Leaping forward into the unknown is nothing new for us in Guyana. We must never be paralyzed by fear. We have always found the time and courage to confront our challenges with resilience, innovativeness and creativity, and now is no different.

Finding the balance will be key. The Bar will sometimes be accused of not finding balance and of doing the extremes well, of exercising extreme tightness on the matters of trifling importance and great laxity on the ones that really do matter.

Corruption and money laundering are matters

of real importance to you. Ignore them and the world will change and leave you behind, quickly. You will have to find yourself doing things you have never done before and with courage. That's life, get on with it. As Lord Denning said in 1953 in **Packer v Packer**:

> "If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both."

My loud ticking watch tells me that it is time to finish this speech.

D. CONCLUSION

It is a pleasure speaking to you. I commend the Bar Association for hosting this event and I wish each of you a blessed, long and healthy life.

To the recently admitted lawyers, I saw go forth and seize the day!

If everything else fails, let your love of God, love of family, love of self, love for Guyana, love for your legal community and love of your own company guide you to making the right choices about the role you can play as a lawyer in modern Guyana.

-END-

ERRATUM

The following typographical errors in the published 2017-2018 edition of the Bar Association Review ('BAR') are corrected as hereinafter set out:

page 10: under the heading 'Senior Counsel', line 3, 'Joesphine' should be 'Josephine'.

page 71: under the heading 'Congratulations', line 1, 'Kamal' should be 'Kalam'.

page 127: line 7, the words '& Judge of the Land Court' are deleted.

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