

Commonwealth Magistrates' and Judges' Association
Conference Jersey 25th September 2013
"Is your Latimer House in order?"
Providing objectively independent courts in small jurisdictions

Manx Judicial Oath

"By this BOOK and by the Holy Contents thereof and by the wonderful Works that GOD hath miraculously wrought in Heaven above and in the Earth beneath in Six Days and Seven Nights; I do swear that I will without respect of favour or friendship, love or gain, consanguinity or affinity, envy or malice, execute the Laws of this Isle justly betwixt Our Sovereign LADY THE QUEEN and Her Subjects within this Isle, and betwixt Party and Party as indifferently as the Herring backbone doth lie in the midst of the Fish."

That is the oath of a Deemster (a High Court Judge in the Isle of Man). The Isle of Man is an internally self-governing island in the middle of the Irish Sea of some 227 square miles of beautiful fertile land with a human population of 84,000. We are a British Crown Dependency. We are not part of the United Kingdom. We have our own Parliament (called Tynwald – the oldest continuous parliament in the world). We have our own legislature, our own executive, our own judiciary and our own legal system. The first written references to the word "Deemster" date back to the early 1400's but the office of Deemster is probably much older dating back to the Norse Kingdom and the origins of Tynwald.

The Deemster's oath is similar to judicial oaths taken worldwide with the reference to the herring backbone being a little different. The word indifferent, in the Manx judicial oath, is used in the Oxford English Dictionary historic sense of "not inclined to prefer one person or thing to another; unbiased, impartial, disinterested, fair, just, even-handed".

Objectivity, impartiality and independence

The topic I am speaking on was chosen for me by the conference organisers and I am grateful to them for thinking that I had a useful contribution to make on the topic.

I start with some general comments on objectivity, impartiality and independence which are important aspects of the judiciary. The very continuing existence of the rule of law depends on them.

Objectivity in a human context calls for special consideration.

Judges are human beings who like everyone else are the products of their upbringings, their education and their experiences of life.

We all carry with us on a daily basis in our own minds the subjective baggage of our experiences of life and our personal views. I doubt whether the courageous Chief Justice of Papua New Guinea (Salamo Injia) views politicians in exactly the same light as someone who has not had his direct and unpleasant experience of them. I found his address moving and inspiring and I thank him for that. Despite the considerable pressures upon him he kept a "cool head" as every good judge should.

When arriving at decisions or evaluating issues judges need to be aware of their own personal influences and life experiences. Judges need to be conscious that their decisions may be influenced not just by the evidence, the law and the arguments presented to them but also by their life experiences. In South African terms, as powerfully put forward by Justice Leona Theron: "judges should interrogate their own prejudices and blind-spots."

Let me refer, if I may, to a profound and insightful comment by Benjamin Cardozo who I met, on paper, when I started to study law at University many years ago now. Benjamin Cardozo in *The Nature of the Judicial Process* [1921] stated:

"We may try to see things as objectively as we please. Nonetheless, we can never see them with eyes except our own."

We must all strive to castaway any inappropriate personal baggage we possess and to act and be seen to act objectively and independently. We must all keep minds that are open to persuasion.

When dealing with public confidence in the courts perception is, on occasions, just as important as the reality. Perhaps matters of perception are more pronounced in small, compact jurisdictions. How do small, compact jurisdictions convince the public, the politicians, court users, the media and others that we provide objectively independent courts?

How do you provide objectively independent courts in small jurisdictions?

Attention should be given, I respectively suggest, to seven factors.

(1) *The judicial appointments process*

Firstly, the judicial appointments process.

The starting point would be to appoint the right people to the appropriate judicial positions and pay them a decent and competitive wage, provide them with adequate training and education to ensure, in the words quoted by Bridget Shaw, that we all go to bed each evening a little less stupid, provide them with sufficient administrative support and security of tenure. Some of these issues were touched upon in the thought provoking break out session on "*Threats to the independence of the judiciary*" chaired by Senior District Judge Howard Riddle on Monday.

In respect of security of tenure Lord Phillips in *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43 stated at paragraph 1:

"The independence of the judiciary requires that a judge should never be removed without good cause and that the question of removal be determined by an appropriate independent and impartial tribunal. The principle applies with particular force where the judge in question is a Chief Justice."

The appointments should be by open advertised competition and on merit taking into account the need for diversity and transformation as passionately and persuasively touched upon by Justice Theron. The appointment process should be transparent. The positions to be occupied should be described as should the person specification dealing with essential attributes, qualifications, experience, knowledge and skills and personal qualities such as integrity and independence, fairness and impartiality. The need for a diversified and flexible judiciary in a small jurisdiction should also be taken into account.

In the Isle of Man we have open competitions for all our judicial positions including the Deemsters, Bailiffs and Deputy High Bailiffs, judicial officers and lay magistrates.

In addition to the full time judiciary we also have a panel of about 30 part-time Deemsters made up of leading lawyers from the local community and also leading lawyers from off island who are frequently deputy judges from England who can

assist us where necessary. There is an ability to grant temporary advocate's licences to lawyers in the British Isles subject to the relevant statutory criteria being met.

There should also be the ability within the judiciary of small jurisdictions, as indeed there is in the Isle of Man, to bring in "outsiders" if necessary remembering always however the wise words of Beverley McLachlin (now the Chief Justice of Canada) in "*The Role of Judges in Modern Commonwealth Society*" Vol 110 LQR 260 April 1994 "[Judges] must be in touch with the society in which they work, understanding its values and its tensions." Detachment in judicial decision making is useful but so is knowledge of local values, local tensions and sensitivity to local concerns.

(2) *A Judicial Code of Conduct and a transparent complaints process*

Secondly, a Judicial Code of Conduct and a procedure which effectively and fairly deals with complaints against judicial officers including senior judges. Such Codes of Conduct and procedures should be publicly available and accessible free of charge including via the internet.

In the Isle of Man we have a Judicial Code of Conduct based on the Bangalore Principles of Judicial Conduct and we have a procedure whereby complaints can be made against members of the judiciary and dealt with openly and transparently. Our Judicial Code of Conduct is based on the six *Bangalore Principles of Judicial Conduct* which are well recognised internationally and which are concerned with (1) judicial independence, (2) impartiality, (3) integrity, (4) propriety, (5) equality of treatment and (6) competence and diligence.

Our Judicial Code of Conduct expressly requires members of the judiciary to uphold the integrity and independence of the judiciary and to perform their duties with competence, diligence and dedication.

The Code requires members of the judiciary to carry out their duties according to their oaths, their terms and conditions of service and the dictates of their conscience objectively and without fear, favour or partiality and in keeping with the laws and customs of the island. Judges are required to decide cases objectively and solely on their legal and factual merits.

(3) *An effective appeal system*

Thirdly, an effective appeal system.

In the Isle of Man we have an Appeal Division which as its name suggests does exactly what it says on the tin. It deals with appeals. From the Appeal Division an appeal lies with leave to the Judicial Committee of the Privy Council which provides additional objectivity and independence. We are grateful to them for the services they provide to the Island.

(4) *A robust law on recusal*

Fourthly, it is also important to have a robust law on judicial recusals. This is of particular importance in small jurisdictions where judges are perhaps closer to the local community than might otherwise be the case in larger jurisdictions.

Our Judicial Code of Conduct, reflecting the position at common law, provides that members of the judiciary shall not sit in a case where they have a financial interest or where the circumstances are such that a fair minded observer, having considered the facts, would conclude that there was a real possibility that the judge was biased: in all other cases they are bound not to abstain from their duty to sit.

The Judicial Committee of the Privy Council in *Grant v The Teachers Appeal Tribunal* (7th December 2006) and *Belize Bank Limited v AG* [2011] UKPC 36 were mindful of the problems which face judges in small jurisdictions when dealing with recusal applications. Care, of course, should be taken to discourage “judge shopping” whereby a party presents a recusal application not founded on strong grounds but merely in an attempt to persuade a judge, who he perceives to be against him, to recuse and thereafter shops around for a judge the party perceives is more likely to decide the case in that party’s favour. Small jurisdictions need robust law on recusals which takes into account local circumstances.

It is worth looking at the judgments in *Grant* and *Belize Bank Limited* in some more detail. They provide useful assistance to judges in small, compact jurisdictions. In *Grant* (an appeal from Jamaica) Lord Carswell delivered the judgment of the Lords of the Judicial Committee of the Privy Council (which also included Lord Bingham, Lord Rodger, Baroness Hale and Lord Mance):-

“36. The final issue is that of the allegation of bias on the part of Cooke J in the Supreme Court. It may be said at once that no question has been raised of actual bias or of any pecuniary or proprietary interest on the part of the judge. The complaint was rather of what one might term apparent or perceived bias. This was based upon the proposition that because of his friendship with the family of the Chairman of the Board there was a real possibility that the fair-minded and informed observer would conclude that the judge was biased: see the discussion by Lord Hope of Craighead of the applicable principles in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, paras 99-103.

37. The Court of Appeal in the earlier case of *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 gave consideration to the circumstances in which a judge should recuse himself on the ground that bias of this type might be thought by the fair-minded and informed observer to exist. In paragraph 25 of his judgment Lord Bingham of Cornhill CJ pointed out that it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias, as everything will depend on the facts, which will include the nature of the issue to be decided. He did, however, go on to point to some factors which were unlikely and others which were likely to give rise to a soundly based objection. Among the latter he enumerated personal friendship between the judge and any member of the public involved in the case, or if the judge were closely acquainted with any member of the public involved in the case.

38. It is necessary to bear in mind that these remarks of Lord Bingham were intended as guidelines for judges in other cases and not as a comprehensive definition of the circumstances in which bias might properly be thought to exist. The facts of each case are of prime importance, as he pointed out. Their Lordships are mindful of the problems which may face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. In such communities it is commonly found that many of the parties and witnesses who are concerned in cases in the courts are known, and not infrequently well known, to the judge assigned to sit. It is incumbent on the judge to apply a careful and sensitive judgment to the question whether he is a close enough friend of the person concerned to make it undesirable for him to sit on the case. If he errs on the side of caution by too much, he may make it impracticable for him to carry out his judicial duties as effectively as he should. If, on the other hand, he is not ready enough to recuse himself, however unbiased and impartial his approach may in fact be, he will

leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality. In this connection it is relevant to take into account the issues in the proceedings. As Lord Bingham pointed out in the *Locabail* case, if the credibility of the judge's friend or acquaintance is an issue to be decided by him, he should be readier to recuse himself.

39. If the judge and the Chairman of the Board had been close family friends who saw each other frequently, or if they had been regular golfing partners, it would no doubt be much more likely that the real possibility of bias could be thought to exist. As it is, the judge has stated to the Court of Appeal that there was no special relationship between the Chairman and his family and that he "may have encountered him no more than ten times over the last twenty years". The issues in the appeal did not involve any assessment of the veracity or credibility of the Chairman's evidence and the issues to be decided did not affect his personal position as distinct from that of the Board which he chaired. Their Lordships do not consider that such a degree of acquaintance in these circumstances would have caused the fair-minded and informed observer in Jamaica to conclude that there was a real possibility or danger of bias."

In *Locabail* Lord Bingham (whose mother's family were Manx) stated the following in the context of a jurisdiction the size of England and Wales:

"25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger [now possibility] of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see *K.F.T.C.I.C. v Icori Estero S.p.A* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6,

8/91)). By contrast, a real danger [now possibility] of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger [now possibility] of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

In the *Belize Bank* case (an appeal from the Court of Appeal of Belize) Lord Kerr delivered the judgment of the Judicial Committee of the Privy Council (which on this occasion included Lord Phillips, Lord Brown, Lord Dyson and Sir Patrick Coghlin). Lord Kerr stated:

"34. The leading authority on the issue of apparent bias in this jurisdiction is still *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357. The essential principle is best expressed by Lord Hope of Craighead in para 103 of his opinion where he said:

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

35. This formulation has been followed by the Judicial Committee of the Privy Council in, for instance, *Attorney General of the Cayman Islands v Tibbetts* [2010] UKPC 8 [2010] 3 A11 ER 95, at para 3 and *Prince Jefri and others v The State of Brunei* [2007] UKPC 62 at para 15.

36. The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker would be biased. In considering how the notional observer would approach this task, one should recall Lord Steyn's approval in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 A11 ER 187 of Kirby J's comment in *Johnson v Johnson* (2000) 201 CLR 488 at 509 that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

37. On the question of the state of knowledge that the fair-minded observer should be presumed to have, Lord Hope said in *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2, [2006] 1 WLR 781 at para 17:

"The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

38. Of course, one needs to be alert to the danger of transforming the observer from his essential condition of disinterested yet informed neutrality to that of someone who, by dint of his engagement in the system that has generated the challenge, has acquired something of an insider's status. This theme was taken up by Baroness Hale of Richmond in *Gillies* when she said at para 39:

"The 'fair-minded and informed observer' is probably not an insider (i.e. another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in *Johnson v Johnson* 201 CLR 488, para 53, 'neither complacent nor unduly sensitive or suspicious'."

39. It might be supposed that if the observer is provided with a surfeit of information, his or her detached status would be affected and the essential component of public confidence in the lack of bias in the decision-making process would be imperilled. One can understand that it is necessary that the objectivity of the notional observer should not be compromised by being drawn too deeply into a familiarity with the procedures, if that would make him or her too ready to overlook an appearance of bias, but I do not consider that either Lord Hope or Lady Hale was suggesting that the amount of information available to the observer should necessarily be restricted to that which was instantly available to a member of the public. The phrase "capable of being known" from Lord Hope's formulation holds the key, in my opinion. This does not signify a need to restrict the material to that which is immediately in the public domain. It acknowledges that the observer must have such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment. As Lord Bingham put it in the *Prince Jefri* case at para 16:

"The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done."

Lord Dyson at paragraph 65 of his judgment in the *Belize Bank* case stated that:

"... The unspoken assumption is that there is a single universal answer to this question [of apparent bias], whether it is being determined in an English court or any other court and regardless of where that other court might be and regardless of the traditions and culture of the country in which the court operates. I do not think this is a correct assumption to make..."

At paragraph 72 he added:

"Ultimately, it is a matter of impression and assessment whether the test of apparent bias is satisfied on the facts of any particular case... These are not easy cases."

At paragraph 73 he stressed that:

"... the application of the test for apparent bias is intensely fact-sensitive..."

At paragraph 74 he added:

"I would accept that the question whether there has been apparent bias raises a point of law which is a matter for the court to decide: see per Lord Mance in *Helow* at para 39. It is an aspect of procedural fairness which is always a matter for the court to decide. But it is a fact-sensitive issue of law and one on which (as evidenced by the fact that the Board is divided as to how this appeal should be decided) different judges within the same jurisdiction and (of particular importance in the present case) courts in different jurisdictions can hold different views."

At paragraphs 75 and 76 Lord Dyson continued:

"75. Lord Brown has quoted from the lecture given by Lord Rodger (the Sultan Azlan Shah Law Lecture 2010) entitled *Bias and Conflicts of Interests – Challenges for Today's Decision-makers*. Lord Rodger says at p 21 in relation to apparent bias that the court should "adopt a course that can be expected to command the assent and respect of the general public". A little later, he continues:

"Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters. In addition, what may be acceptable, or at least tolerable, in a small jurisdiction where substitute judges cannot readily be found, may be unacceptable in a larger jurisdiction where that problem does not arise."

76. I agree with Lord Rodger's salutary words. They are apposite in the present appeal. The issue is whether the fair-minded and informed Belizean would conclude that there was a real possibility that the Appeal Board would be biased. In determining this question, the Board should recognise that the judges of Belize are better equipped than we are to assess how the fair-minded and informed Belizean would view matters, also bearing in mind that Belize is a small country with a small pool of persons who would be likely to satisfy the statutory criteria for appointment as lay members of the Appeal Board."

Lord Brown at paragraph 113 of his dissenting judgment in the *Belize Bank* case stated:

“113. Lord Dyson suggests (at para 76) that “the Board should recognise that the judges of Belize are better equipped than we are to assess how the fair-minded and informed Belizean would view matters.” With the best will in the world, that seems to me to come close to urging an abnegation of this Board’s proper role in so politically fraught a case as this (ironically the very last Belizean appeal to come before us). I had always understood that role to carry with it the responsibility for ensuring, to the benefit of Belizeans themselves and of their standing in the wider international community, that the highest international standards of justice are maintained in that country. On the issue of apparent bias there can certainly be no stronger case for deference to the Belizean judges than the Strasbourg Court would afford our judges on a complaint originating in the UK. I do not believe that the Strasbourg Court would reject a challenge to the UK in a comparable case.”

At paragraph 98 Lord Brown referred to Lord Steyn’s comment in *Lawal v Northern Spirit Ltd* [2003] UKHL 35 at para 14:

“Public perception of the possibility of unconscious bias is the key.”

Sir Michael Birt (the well regarded Bailiff/Chief Justice of Jersey) in his scene setting and helpful key-note address delivered on Monday made reference to a relatively recent and interesting judgment delivered by the Jersey Court of Appeal in *Pitman v Jersey Evening Post Limited* [2013] JCA 149. In that case Judge of Appeal Beloff stated:

“8. As to (iii) i.e. the merits of the grounds of Appeal I recognize how important it is that justice not only be done but be seen to be done; and that the appearance is nowadays as vital as the actuality of justice. Hence the fact by itself that a member of a court has by some appropriate formula sworn to administer justice impartially or is subject to a Code of Conduct indicating the circumstances for recusal (see in Jersey the Code of Conduct paragraph 15) or indeed has been appointed – as are Jurats – by an electoral college on the basis of his or her integrity and ability cannot be dispositive. The modern test is that set out by Lord Hope in Porter v Magill [2002] 2 AC 357 at (103) “*whether a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal*

was biased." It was applied in this jurisdiction in Syvret v Chief Minister [2011] JLR 343 and I shall follow it.

9. In the Bailiwick the chances that persons (Jurats, jurors or judges) may have encountered someone involved in proceedings before them will be greater than in other larger territories; see Drew v Attorney-General [1994] JLR 1 at para 33 cf, Barette v AG [2006] JCA 128 at paras 53-61. This reality may require, if not disapplication, at any rate adaptation in application of the general principle, but in any event I do not consider that the single fact that someone has served as a Jurat at the same time as someone involved in proceedings before him or her can by itself be a basis for recusal; otherwise it might on occasion be impossible to find anyone eligible to sit on a case where a Jurat was involved as a party or key witness, see Fordham Judicial Review 6th ed para 6.1.37 (apparent bias and function/necessity/reality) and the cases there cited. Nor indeed do the Applicants appear to rely merely upon the fact that both Jurat Le Breton and Jurat Le Brocq held that important office for overlapping periods, Jurat Le Brocq retiring in 2010. In a helpful letter addressed to me on 25th July 2013 the Applicants explained that objection made to the sitting of particular Jurats in advance of the hearing was based on matters other than, indeed over and above, their tenure of that office, and noted that other Jurats were putatively eligible to sit."

(5) *Adherence to the fundamental principle of open justice*

Fifthly, adherence to the fundamental principle of open justice.

Confidence in the objectivity and independence of the judiciary will be increased if we conduct our work openly and give publicly available reasons for our decisions.

Derogations from open justice can only properly be made when, and to the extent that, they are strictly necessary in order to secure the proper administration of justice.

Lord Atkinson in *Scott v Scott* [1913] AC 417 stated at page 463:

"... in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."

In *Taylor and Neale* in a judgment delivered on the 21st March 2012 the Manx Appeal Division referred at paragraph 97 to the “overriding requirement for open justice and transparency.”

Bayley J in *Daubney v Cooper* [1829] 109 ER 438 stated:

“... it is one of the essential qualities of a Court of Justice that its proceedings should be in public and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, - provided they do not interrupt the proceedings and provided there is no specific reason why they should be removed – have the right to be present for the purpose of hearing what is going on.”

Lord Judge C J in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 stated:

“38. Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exception to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspaper or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.”

Lord Neuberger at paragraph 176 stated:

“... the central point [is] that the court should administer justice in public, which means that all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary. This principle is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public.”

The importance of the fundamental principle of open justice was recently reiterated by the Supreme Court of the United Kingdom in *Bank Mellat v Her Majesty's Treasury* (No. 1) [2013] UKSC 38.

Another aspect of open justice which needs focusing upon is easily understood judgments, written insofar as is possible in plain and simple language. A point well made by Justice Christopher Blackman of the Court of Appeal of the Bahamas during one of our breakout sessions influenced no doubt by Lord Neuberger's powerful first annual BAILII Lecture *No Judgment – No Justice* in November 2012 and Lady Justice Arden's stimulating article *Judgment Writing : Are Shorter Judgments Achievable?* [2012] 128 LQR 516.

Judgments should generally be public documents easily accessible and easily understandable and kept as short as possible. They should generally be freely available on the internet as indeed the vast majority of Manx judgments are. With some of the more complicated judgments, we also provide short judgment summaries for ease of reference. That idea was inspired by my youngest son Ferghus who I was driving home from band practice one night a few years ago now. He noticed in the back of the car a draft 42 page judgment I had been working on that evening whilst he had been blowing his trumpet. With the youthful frankness of a 13 year old he commented "if you had any real intelligence Dad you'd reduce it to one side of A4". I think he had a point.

(6) *A free, responsible and enthusiastic media*

Sixthly, and this is connected with open justice, a free, responsible and enthusiastic media which understands the need to fairly and accurately report court proceedings and legal affairs. This was helpfully touched upon by Michael Beloff and Cheryl Dorall (Commonwealth Journalists Association) in the illuminating and entertaining session on "*Judges and Journalists – Uncomfortable Bedfellows*"

As Jeremy Bentham put it all those years ago now:

"Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity".

The media has a very important part to play in a modern democracy which respects the rule of law. The judiciary and court administration should do everything they legitimately can to assist the media in fulfilling their important role. Members of court administration should be specifically charged with liaising with representatives of the media to assist them in the provision of information which should properly be

in the public domain and the accuracy of that information. Anything that can legitimately be done to assist the media in their difficult role and to ensure fair and accurate reporting of court proceedings and to maintain and enhance confidence in the administration of justice should be done. There should be constructive engagement between the judiciary and the media together with mutual respect for their separate roles in a modern democracy.

The media must also continue to recognise the need for responsible reporting and the very real damage that can be done if they act irresponsibly. Fortunately on the Isle of Man we have a generally responsible media and I am not aware of any personalised attacks on individual judges in the recent past. There should, of course, be healthy, open and constructive debate on the legal issues of the day but the media should play the ball rather than the individual.

The media in the Isle of Man provide prominent coverage of the criminal cases before the courts but do not seem to have the appetite or the resources to cover the significant civil litigation before the Manx courts. Perhaps they think that such matters are not of sufficient interest to their readers, listeners, viewers or advertisers. For example, the Financial Times on the 29th May 2013 covered the *Bitel* proceedings but there was little, if any, mention of such proceedings in the local media.

The media have an important role to play and have a significant influence on the perception of their audience and the local community. The media's coverage of the courts is of relevance to the perception of objectively independent courts in small jurisdictions. They need to continue to appreciate the responsible role they have to play in small compact jurisdictions where their impact can be significant.

(7) *The separation of powers and the promotion of the rule of law and democratic values*

Seventhly, understanding and respect for the separation of powers between the legislature, the executive and the judiciary and the promotion of the rule of law and democratic values. I agree with the point made by other speakers during this excellent conference namely that judges have a real role to play in educating and informing others in respect of the importance of the separation of powers and judicial independence not for the personal benefit of individual judges but for the

benefit of the society of which the judges are servants. I pause to record my thanks to Dr Karen Brewer and Miss Debbie Le Mottée for all their hard work in ensuring the smooth running and success of this conference.

I turn now back to some law on the important constitutional principle of the separation of powers. In *Hinds v The Queen* [1977] AC 195 the Judicial Committee of the Privy Council at pages 225-226 recognised that implicit in the constitution was “the basic principle of separation of legislative, executive and judicial powers.” This basic principle of the separation of powers and judicial independence could be reinforced in small jurisdictions by express legislative or constitutional provisions. For an example see in England section 3 of the Constitutional Reform Act 2005 (Act of Parliament) which places an express obligation on all Government Ministers and all those with responsibility for matters relating to the judiciary or otherwise to the administration of justice to uphold the continued independence of the judiciary. See also the Judiciary and Courts (Scotland) Act 2008.

The relationship between the judiciary and the legislative and executive branches of government should be one of mutual respect, each recognising the proper role of the others. Members of the judiciary should not normally enter the political arena. Members of the judiciary should always take care that their comments and conduct do not undermine or appear to undermine their institutional or individual independence. Except in areas which may have an adverse impact upon the rule of law including fundamental human rights, the separation of powers, the independence of the judiciary, access to justice and the adequate resourcing of the legal system and the jurisdiction’s international obligations and reputation, members of the judiciary should always be reluctant to get involved in matters of political controversy or matters which may lead to political controversy.

But as Lord Neuberger has succinctly said: “7. Mutual respect also requires that the three branches should not intrude onto one another’s patch. This does not mean that the Judiciary should have no policy role... And the Judiciary has a limited right, indeed an obligation, to speak out on matters concerning the rule of law.” (*Judges and Policy: A Delicate Balance* 18th June 2013).

It is of particular importance in a small, compact jurisdiction that judicial independence and impartiality and the perception of the same is carefully safeguarded. Having said that, on occasion, it is appropriate for there to be a

constructive dialogue between the various branches of government respecting always the different role of each branch. The Chief Justice should, especially in a small jurisdiction, take great care in his comments and should not, of course, be seen as a source of legal advice. Moreover he should not put himself in a position where he may be perceived as too close to the “political establishment”. We all need to appreciate the importance of the separation of powers not only to the rule of law but also to the economic health of a jurisdiction, especially a jurisdiction whose economy has a vibrant international business sector.

Max Beloff in *An Historian in the Twentieth Century* at pages 35-36 stated:

“The separation of the judicial from the executive role of the monarch, which came early in medieval England, has been equally essential to the country’s ability to prosper. Only when the boundaries of the permitted are clear and no arbitrary act of the executive can alter them can people safely invest in agriculture, industry or commerce. As long as there exists the possibility of an arbitrary invasion of their rights and an absence of any court to which they can safely appeal for redress, no one is going to undertake the risks inherent in all enterprises... Until one has a legal system enabling property to be defined and protected and contracts to be made and honoured, whether between persons or between persons and the state, economic progress whether based on internal or external investment is not possible.”

Lord Neuberger on the 20th January 2012 in a paper delivered to the Chancery Bar Association conference in London entitled *Developing equity – a view from the Court of Appeal* stated at paragraph 5:

“A successful capitalist economy, as Adam Smith pointed out, depends on a trusted and effective legal system. This is particularly true of an economy with an emphasis on financial and associated services... The threat to the British economy if we cease to be pre-eminent in the commercial legal world is self-evident.”

Michael Todd QC Chairman Bar Council of England and Wales in a presentation delivered in Grand Court No. 1 Cayman Islands March 2012 (reported in the *Commonwealth Judicial Journal* Vol. 20 No. 1 June 2012) referred to essential

investments in the justice system, court accommodation and judicial services. He added:

“If we want justice systems which are the envy of the world, which attract inward investment and instil confidence in those looking to do business in our respective jurisdictions, and which command respect, we must make that investment in access to justice, in the Rule of Law. A jurisdiction which does not exude its support for the Rule of Law, its investment in the equality and integrity of its judicial system, of its Judiciary, and of its legal practitioners, cannot, and will not, prosper.”

I concur.

Summary

So in short summary I suggest that we provide objectively independent courts in small jurisdictions by focusing on seven factors:

- (1) an open and transparent appointments process on merit taking into account the need for diversity and flexibility in small and compact jurisdictions together with a competent and well educated, adequately resourced judiciary with security of tenure, and judges being conscious of the fact that they are all the products of their life experiences;
- (2) a Judicial Code of Conduct and a transparent complaints procedure;
- (3) an effective appeal system;
- (4) a robust law on recusal;
- (5) adherence to the fundamental principle of open justice;
- (6) a free, responsible and enthusiastic media; and
- (7) the separation of powers and the promotion of the rule of law and democratic values.

These are, I respectfully suggest, the seven main factors which underpin objectively independent courts in small jurisdictions.

Above all we must stay loyal to our judicial oaths and keep our integrity.

I wish you all well in achieving the provision and perception of objectively independent courts in your home jurisdictions.

[David Doyle
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