Opening of Legal Year 2017

Chairman's Speech

Friday 29th September 2017

This is my third and last speech as Chairman of the Bar Council. Until recently I thought it was my swansong. At least until I looked up the origins of the phrase and discovered that it derives from the legend that swans are mute during the rest of their lives but sing mournfully and beautifully when they die. As I have not been silent before this, the beauty of what I am about to say is doubtful and I have no intention of dying, just yet, I guess it isn't my swansong after all.

Before I turn to the rest of my speech I want to express the Bar's condolences on the passing of Charles Gaggero, Jimmy Galliano and Momy Levy all of whom worked hard as members of our justices for many years. I also want to acknowledge the work of Sir John Fieldsend who passed away this year. Sir John was a former President of the Court of Appeal and the first President I appeared before when I was called. Always charming and courteous he had had an illustrious career in Rhodesia and had during the height of the constitutional crisis of the 1960s sat on the five judge Rhodesian court that dealt with the landmark constitutional case of Madzimbamuto v Lardner-Burke which had to consider the lawfulness of the detention by Ian Smith's Government of a number of his political opponents. He was educated in South Africa, called to the Rhodesian Bar and after independence in 1980 he became Chief Justice of Zimbabwe. He was President of our Court of Appeal from 1991-1997. We are grateful for his contribution and will remember him fondly.

On a happier note I want to congratulate the new Silk appointments that were announced just after the last legal year of Guy Stagnetto and Daniel Feetham and acknowledge the presence today as a most distinguished guest of Lord Mance of the United Kingdom Supreme Court and our Privy Council.

During my time as Chairman I have received the loyal support and assistance of all members of the Bar Council for which I am very grateful. In delivering this speech I am setting out the fruit of our collective endeavour over the last 3 years since, in 2015, I set out the objectives we wanted to follow during my chairmanship of the Bar.

Any person who arrives at a post hopes to build on the work of his predecessors and to have left some legacy of albeit small cumulative steps that have improved the previous landscape. So it is that we launched a website and introduced a quarterly electronic newsletter for our members and now have a new and fairly conservative social media presence on Facebook and Twitter.

But if there is one thing I would highlight as the more lasting legacy of the last 3 years it has been our work towards the comprehensive overhaul of the regulation of legal services.

This culminated by Parliament taking the Legal Services Bill last week. What will be the Legal Services Act (once commenced) has been in the making for a long, long time. Previous efforts had floundered for a variety of reasons. It is to the credit of the present and previous Ministers for Justice that they matched the Bar Council's determination and drive to see this through with their willingness and commitment to approve its content and give it Parliamentary time so that it could be passed.

The new Legal Services Act is no short of a revolution in the way that legal services are regulated in Gibraltar. It is the most important piece of legislation in 50 years since the system of admission and discipline for Barristers and Solicitors was last overhauled in any significant way decades ago.

The Legal Services Act is also far more reaching than the current system of regulation that it replaces. It brings within its scope legal services that were previously carried out unregulated. The Act establishes a register of nine parts that set out the different categories of individual or entity that provide legal services within Gibraltar. The potential catchment area of persons that will fall within the system of regulation will, we think, likely increase by at least 30 or 40%. That can only be good from the point of view of the consumer and the consistent, fair regulation of the legal services market.

The Act establishes a Legal Services Regulatory Authority (LSRA) appointed by the Chief Justice that will have an independent role from the Bar Council that will in turn now be renamed – the Law Council. In fact I am delivering the last speech as Chairman of the Bar Council as my successor will do so as the first Chairman of the Law Council. That is not just nomenclature as we wanted to transmit clearly that we are a body that in a fused profession represents barristers, solicitors, in-house counsel, legal executives and law costs draftsmen.

The Act establishes the Law Council on a statutory footing with a clear role in the co-governance of legal services. The new Act which will apply to lawyers in private practice, Crown lawyers and in-house lawyers is innovative and a modernisation of the system of legal services that is long overdue. The regulatory functions hitherto held by the Registrar will transfer to the LSRA. We would hope that the LSRA itself will be resourced and up and running by early next year so that the actual commencement of the Act can happen during the Spring.

The Act envisages that a number of protocols or codes will be prescribed by the LSRA. The key first code is a Code of Conduct for Gibraltar to replace the existing codes imported from other jurisdictions which do not have a fused profession. A draft Code of Conduct based on the New Zealand Code went to consultation during the Summer. The sub-committee that produced the draft code were keen to use a model that catered for the special intricacies of providing legal services in a fused legal environment.

That consultation process is now at an end and the representations submitted will soon be considered. I would envisage that the Code of Conduct for Gibraltar will also be introduced at the same time that the Act is commenced.

As I look forward to the next few months beyond my tenure my successor will still have work to do on the regulatory front in conjunction with the Chief Justice and the Minister on the establishment of the LSRA, the prescribing of regulatory fees and the development of work protocols in a number of areas.

Also on the regulatory front I need to acknowledge the work an *ad hoc* sub-committee of practitioners I established close to Christmas last year undertook on draft Anti-Money Laundering Guidance Notes that the National Coordinator (the Attorney General) will be issuing. Dealing seriously with the urgent request for assistance received from Government those practitioners made time over Christmas and New Year to give detailed comment on a complex set of guidance notes that will be introduced. I would urge law firms to review their internal protocols once those guidance notes are introduced.

One of the specific issues that concern me is the growing phenomenon of English solicitors arriving in Gibraltar to provide legal services on Gibraltar law and effectively run Gibraltar proceedings in a way that can potentially run a coach and horses through the consumer protection objectives of our regulatory system.

The Gibraltar legal market has always conducted multi-jurisdictional work and local lawyers are well-used to being instructed by solicitors firms in a number of countries (especially in England). We have a long history of cooperation in legal services. Recently however there have been a spate of cases where traditional lines of cooperation are being crossed and Gibraltar lawyers are being relegated to a sometimes nominal role and being replaced by unregulated lawyers physically present in Gibraltar for Gibraltar cases on Gibraltar law. English Counsel get called to the Gibraltar Bar and submit to our Code of Conduct. English Solicitors however do not and the Supreme Court Act is clear that the provision of legal services to members of the public in or from within Gibraltar by persons not called to the Gibraltar Bar or admitted as a solicitor here is an offence. There is, at the moment a tension between that section and provisions that allow European lawyers to provide services in conjunction with local lawyers. But looking forward in a post-BREXIT situation we need to consider the implications for the profession of allowing unregulated encroachment into the legal services market. It is important to ensure a level playing field when Gibraltar registered law firms and practitioners are paying registration fees, submitting to heavier regulation and taking out professional indemnity cover. This is not a plea for protectionism but for equality and reciprocity.

It is important for the litigation Bar to develop and compete against English Counsel that are briefed in cases on Gibraltar. That is positive from the perspective of ensuring the continual professional development of local advocates. There is sometimes a need for specialist counsel to be instructed. This is not always the case and I support the calls that have been made previously by Sir Paul Kennedy when he was President of the Court of Appeal that local counsel be briefed more often (even by other firms) in cases that merit it. It was therefore a matter of regret and of some controversy to the Bar in the case of **Marrache .v. Parole Board No. 4** when a party had decided to instruct an eminent English counsel to appear on

his behalf on an appeal and the court was directing the appointment of an amicus that the learned Judge remarked that if that particular English Counsel was instructed "then the amicus should be English Queen's Counsel specialising in public law and human rights law. If local counsel is the sole leader then likewise Gibraltarian Queen's Counsel should be instructed." Those comments implied that Gibraltar Counsel were unequal to the task of competition with English Counsel. Like everything in life it depended on the identity of the individual and the issue to hand. That case engaged an uncontested and straightforward issue of statutory interpretation.

One can only speculate how such comments would have gone down in an Edinburgh or Belfast Court. For those of us who belief that the ability of counsel does not depend on national origin those comments were deeply regrettable although we make the allowance that such an effect may have been unintended.

As in previous years I want to acknowledge the efforts of the staff of the Court Service in facilitating our work not just during court proceedings but at all levels of our interaction with the public service. Practitioners are conscious that allocating sufficient human and technical resources to the Court Service is crucial in ensuring the proper administration of justice.

Mr Justice Jack ended his 3 year term as a Supreme Court Judge in August this year. On behalf of the Bar we are grateful for his work and his contribution to the administration of justice and the jurisdiction. He was always diligent, hard-working and zealous in ensuring the progress of litigation to a judicial determination.

During the late Summer a number of public comments were made on the issue of the fourth judge and the decision of Government not to provide funding for the post right now. This culminated in the Chief Justice issuing a statement which (as he pointed out himself) was unprecedented in his 10 years in office. On behalf of the Bar we associate ourselves and indeed support the comments made by the Chief Justice in late August. As we stated then and reiterate now it is a matter of regret that we were not consulted by the Government on the issue of whether the state of litigation is such that the proper administration of justice no longer requires the resources of a fourth Supreme Court Judge. We are of the view as the Chief Justice stated that the Government should reconsider this matter and that a fourth judge should be appointed.

Numbers of cases are only a small and not decisive indicator of the need for judicial resources nowadays. When I started practice, nearly 30 years ago, there was more volume of cases but the cases were less complex and involved far less paper. The lower numbers of cases that hit the courts are also significantly more complex both in terms of the issues that they raise and in terms of the volume of paper that they generate. That requires resources. In a jurisdiction with 3 or 4 Supreme Court Judges it is easy to see that the emergence of a couple of complex trust matters or a long criminal matter can, in effect, put a judge out of action for a long time.

It has been the aspiration and call of successive Chairmen of the Bar Council that the area of legal assistance be reformed in Gibraltar.

I am pleased to say that following discussions with the present Minister for Justice the Bar Council has reached an in principle agreement on a package of reforms to this area that will shortly go to consultation. The package of reforms will, if introduced, significantly increase the pool of eligible applicants for legal assistance in a way that once again is a radical overhaul of this area not seen for several decades. It will increase access to justice and redress the erosion of incomes that caused a legal disenfranchisement of hundreds of families. We are grateful to the current Minister for Justice for his commitment to these reforms. We have not had any struggle to persuade him to the merits of the argument. Indeed he has put access to justice at the forefront of his objectives and it is to his credit that the discussions with the Bar Council have concluded successfully. The culmination of these discussions will also in tandem unblock the introduction of a Duty Solicitor Scheme. We would expect to make an announcement on both issues in coming days.

Last year I said it was too early to predict how matters would evolve in the post BREXIT world. I regret that 12 months later matters are not much clearer with the UK embroiled in painfully slow negotiations with the EU. I said then that it was within our gift to maintain rights for EU citizens like it was in our gift to advance them in 1985. That way it might make reciprocal treatment towards Gibraltar easier to achieve. It is for Government to consider how best to secure a European agreement for Gibraltar.

We had a snapshot of the complexities that will be faced by legislators and the courts in a post BREXIT world when, during a visit by the Masters of the Middle and Inner Temples, a lecture was organised on the process of disentanglement of domestic law and EU law. We would do well to establish a Commission under the auspices of the Attorney General to supervise the process of sifting through laws to decide whether and to what extent EU sourced laws will be kept within our local legal framework. As was pointed out in a recent article by Tom De La Mare QC when commenting on the so-called Great Repeal Bill "it is hardly satisfactory that such an important, indeed fundamental, choice ….be left to the Courts as a matter of interpretation."

Finally it has been the practice of previous Chairman to look beyond issues of legal interest and comment on matters of public interest during speeches at the Opening of the Legal Year. I will not do so this year as I would not wish to be criticised for using this as a platform for other things that may happen in the not too immediate future in another place.

My lord, I too move the opening of the legal year.

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