

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction
ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 2 of 2005
BB Civil appeal No 29 of 2004

BETWEEN

THE ATTORNEY GENERAL
SUPERINTENDENT OF PRISONS
CHIEF MARSHAL

FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT

AND

JEFFREY JOSEPH
LENNOX RICHARD BOYCE

FIRST RESPONDENT
SECOND RESPONDENT

Before The Rt Honourable
And The Honourables

Mr Justice de la Bastide, President
Mr Justice Nelson
Mr Justice Pollard
Mr Justice Saunders
Madame Justice Bernard
Mr Justice Wit
Mr Justice Hayton

SUMMARY

**of the Judgment of The Honourable Mr Justice Wit which was
delivered on November 8th 2006**

Although in this judgment heed is paid to the relevant case law, emphasis is placed on the analysis of the Barbados Constitution itself. The case law has been examined to verify whether the Court of Appeal was right in concluding that the relevant Jamaican case of *Neville Lewis v Attorney-General* was, at the time, a binding precedent for Barbados and, consequently, whether that Court was correct to follow it. The judgment concludes that *Lewis* was binding precedent in Barbados and that it was correctly followed by the Court

of Appeal. However, this does not mean that with this holding the work of the CCJ is done. On the contrary, “our task as a new court of final appeal is quite different from theirs [the Court of Appeal]. We should only follow those earlier decisions if we find them persuasive. Put differently, we are not to follow but to lead.”

The judgment holds that the interpretation of Caribbean Constitutions is “a legal activity in its own right.” The (English) common law, although occasionally useful as an interpretive tool, cannot be the point of departure or the centerpiece of Caribbean constitutional law because that common law is focused on the unwritten English Constitution which is “fundamentally different” from the Caribbean Constitutions as the latter (1) are written, (2) deal with fundamental rights and freedoms of the citizens and (3) have a supremacy clause which gives the Judiciary the power to review even statutes. Further, the realities of parliamentary democracy in the UK and constitutional democracy in the Commonwealth Caribbean, although on the outset quite similar, are not at all the same. The interpretation of the Caribbean Constitutions has to be focused on the text and structure of the Constitutions themselves. Thus, “Caribbean constitutional law will majestically and inexorably unfold as it gradually advances from one case to another.”

In the judgment the Barbados Constitution is seen as embodying and constituting a constitutional democracy, and although this Constitution “is largely concerned with seemingly formal and institutional issues, it is undoubtedly a qualitative and normative document.” Not only are there provisions for the protection of fundamental rights and freedoms of individuals, but the Constitution also embraces the principle of democracy, the rule of law and “the substantive concept of the separation of powers, which is considered to be the backbone of any constitutional democracy.”

The rule of law is a multi-layered concept that is “closely linked to, and broadly embraces concepts like the principles of natural justice, procedural and substantive ‘due process of law’ and its corollary, the protection of the law. It is obvious that the law cannot rule if it cannot protect.” The right to protection of the law requires law of sufficient quality (safeguards) and the availability of effective remedies. “These requirements are inherent

in the Barbados Constitution. Section 24 which expressly guarantees the right to an effective remedy is, therefore, merely a reflection of that fundamental right.”

The Barbados Privy Council (BPC) “discharge their functions [the exercise of mercy] under the Constitution and therefore they cannot, however eminent the members of that body may be, go unchecked by the courts. But at the same time the courts have to respect the scope of the discretion afforded to the BPC in the exercise of mercy. Both the executive acceptance of judicial scrutiny and judicial respect for executive discretion are required under the rule of law and flow from the separation of powers.” The discretion as to the exercise of mercy in a mandatory death penalty regime “would be much narrower than in cases where the courts have full discretion to tailor the punishment to fit the crime.” However broad the discretion though, the BPC “can never be discharged of their constitutional duty to be rational, reasonable or fair and to eschew improper procedures.”

As constitutional ouster clauses such as section 77(4) of the Barbados Constitution seek to relieve the executive branch or part of it from the weight of judicial scrutiny, these clauses “must of necessity be construed as narrowly and restrictively as possible.” In the final analysis, under the Constitution even the exercise of mercy is reviewable by the courts, be it within certain limits. The procedural violations of the BPC in the present case amounted to a violation of section 12 (the right to life) which, considering the normative character of the Barbados Constitution, must be construed in a normative manner. Hence, these violations rightly attracted a remedy provided by section 24 (which covers violations of sections 12-23).

The judgment deals extensively with the doctrine of the unenforceability of ratified but unincorporated treaties and suggests to “dismantle” this “judge-made doctrine” which, according to the judgment, apparently has “obtained a status comparable to that of religious dogma.” The bedrock of this doctrine and the underlying concepts are examined and are considered to be “ambiguous” and “fallacious.” Methods applied by the courts to escape from the rigidity of the doctrine are seen, on balance, as self-contradictory.

The strongest concept underlying the doctrine seems to be the separation of powers but, although this may be sufficient reason for the existence of the doctrine “in the soil and climate of the unwritten English Constitution” where the doctrine was “planted and nurtured”, it is unsuitable for the Commonwealth Caribbean in view of the fundamental differences between the respective Constitutions of the United Kingdom and the Caribbean countries and between the realities of the former compared to those of the latter. Consequently, a new doctrinal “structure should be raised on the *terra firma* of the Caribbean Constitutions themselves, making use of course of all those parts of the old structure that are still useful and in good shape.”

The judgment approaches the relation between treaty law and domestic law from the given fact that the provisions of ratified but unincorporated treaties create legal obligations for States which they have to comply with in good faith. “Like men and women, States must be as good as their word.” Some of those provisions, depending on their formulation and content, can be invoked directly by individuals. After ample examination of the Barbados Constitution, the judgment concludes that this Constitution does not, as such, prohibit treaties from having a direct effect on the domestic plane (in fact, almost all Caribbean Constitutions “maintain a deafening silence on the subject of treaties”). However, this does not mean that such direct effect will be full and abundant as it “is filtered through the ozone layer of the Constitution with its inherent values, logic and principles.” Although all three branches of government, the judiciary included, have a legal obligation “to make the treaty work”, in so doing they have to stay within their own constitutional sphere. This means that the courts can only go so far as the constitution allows them to. Considering the limitations carried by the principle of the separation of powers which forms an indissoluble part of the constitution, the possibilities of the courts in “dualist systems” are even in the suggested approach rather modest and

limited, compared to those of courts in “monist systems.” According to the judgment however, the new approach “saves ‘radical dualism’, as practiced in the Commonwealth Caribbean, from appearing to be schizophrenic.”

This is a brief statement of the main points discussed in the judgment and is not intended to be a substitute for the full text as delivered by The Hon Mr Justice Wit of the Caribbean Court of Justice on Wednesday 8th November 2006.

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