

## **Address on the Judicial Committee of the Privy Council at the Commonwealth Law Conference in Malta 10 April 2025**

I am grateful for the opportunity to contribute to your discussion on the role of the Judicial Committee of the Privy Council as the final court of appeal of modern independent democratic states in the Commonwealth.

### **What is the position of the JCPC on serving overseas Commonwealth jurisdictions?**

We are very happy to provide the service and are honoured by the trust which jurisdictions place in us.

We recognise that it is for the democratic judgment of sovereign independent states whether they wish to retain the Board as their apex court or want to adopt some other arrangement. It is not for the JCPC to advocate that independent countries should retain us as a final court of appeal. Our long-term position has been and remains that we are very happy to provide the service but we adopt a neutral stance on whether a jurisdiction stays with us.

It is within the power of sovereign states, within the terms of their Constitutions, to set out and amend the circumstances in which their citizens can appeal to the JCPC, such as the financial threshold for an appeal as of right in civil cases, whether the appeal has to raise a point of law of general public importance, or whether they favour a more generous right of appeal.

Independent sovereign states, which have a historical connection with the United Kingdom, are free to make a pragmatic judgment on whether they derive benefit from what the JCPC has to offer them.

I am not speaking today to sell the JCPC to you. I will simply describe what we do and leave it to you to make your own judgment.

### **A brief description of who we are and what we do**

The historical role of JCPC was as the apex court for over one quarter of the world. It is just as well that we are not now, given the prodigious growth in litigation globally.

We now serve 29 overseas jurisdictions. The larger ones are Jamaica, Trinidad and Tobago and Mauritius which have populations ranging from 1.2 million to 2.5 million; the smaller ones include major offshore financial services and corporate centres which punch far above their size in international commerce. They include Bermuda, the Cayman Islands, the British Virgin Islands, Gibraltar, Jersey, Guernsey and Isle of Man.

Several independent jurisdictions have retained HM the King as their Head of State, as of course do the British Overseas Territories and the three Crown dependencies of Jersey, Guernsey and the Isle of Man. But the Board also serves three republics: Trinidad and Tobago, Mauritius and Kiribati and issues judgments as their final court of appeal. The Board also hears appeals to HM the Sultan of Brunei although those have been few and far between.

In recent years the Board's work has included very significant commercial litigation with a high international profile, as I will explain.

Our role has changed over time. So has the world. We now live in an age in which there are politicians, including senior politicians, and not only in autocracies, openly attack judges and lawyers if they think that their political aims are being thwarted. The discussions at this Conference have shown such concerns within the Commonwealth. While most politicians respect and uphold the rule of law, some are far too ready to attribute political motives to judges who are deciding cases according to the law, and to lawyers, who are doing their professional duty in representing the interests of their clients. Senior courts in the democratic world must continue to push back against such challenges to the rule of law on which our societies depend.

As a long-established court with an international profile, and with its overlapping membership formerly with the Law Lords of the House of Lords and now with the Justices of the UK Supreme Court, the judges of the JCPC are ready to uphold the rule of law.

### **Composition of the Board**

The judges of the JCPC are principally senior UK judges who are Justices of the UKSC. But we are also assisted in hearing and determining appeals by judges from the courts of appeal from each of the UK jurisdictions. More recently, in a very welcome development, Dame Janice Pereira (formerly Chief Justice of the Eastern

Caribbean Supreme Court) and Sir Anthony Smellie (formerly Chief Justice of the Cayman Islands) have taken up office as our colleagues on the JCPC.

The UK judges who serve on the JCPC are recruited from senior echelons of the legal profession in the UK. They have a depth of knowledge and experience in public law and commercial law. That experience has been gained both at the Bar, principally but not exclusively in London, and in the administrative and commercial courts, the Court of Appeal and the UK Supreme Court.

There is a long tradition of judicial independence and of the independence of the legal profession in the UK; it is an in-built professional culture.

**The advantage for small jurisdictions in having appellate courts composed of judges from outside the local community:**

Before becoming a judge in my home jurisdiction of Scotland, I served as a judge of the courts of appeal of Jersey and Guernsey. Since 1964 both Jersey and Guernsey have had courts of appeal whose judges were senior counsel from the mainland UK jurisdictions in order to get round the problems which small communities face from everyone knowing everyone else in the legal profession and in their political realm. Other jurisdictions such as the Cayman Islands and Brunei also recruit judges to their appellate courts from outside their jurisdiction.

And the Court of Final Appeal in Hong Kong, which has since 1997 had judges from Commonwealth jurisdictions among its members, has long enjoyed a high reputation as a very significant international commercial court.

Increasingly, in recent years the JCPC has handled appeals in major commercial disputes arising in offshore financial services and corporate centres. Having a final court of appeal with international standing determining disputes of international significance helps to underpin the economic development of those centres.

If I may give just three examples of cases in which I have been involved recently from the Cayman Islands:

*Primeo Fund*<sup>1</sup> : a case arising out of the unwise investment by fund managers of \$2 billion of clients' funds in Bernie Madoff's Ponzi scheme. The legal issues included the doctrine of reflective loss in company law, the principle of finality in

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<sup>1</sup> *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22 and [2023] UKPC 40.

litigation, questions of limitation, and the place of the defence of contributory negligence in a contractual claim.

*Family Mart*:<sup>2</sup> a dispute between an established Japanese supermarket chain and a Chinese group of companies in which the allegation, which led to an application to wind up a joint venture company, was that the Chinese group had taken the Japanese know how and then diverted the profits away from the joint venture company. The principal legal issue was the boundary between matters which were to be referred to arbitration and matters which only the winding up court could handle.

*Tianrui*:<sup>3</sup> A dispute between the three largest cement manufacturers in the People's Republic of China which had entered into a joint venture. The allegation was that two had sought to dilute the voting power of the third in the joint venture company by the issue of shares for an improper purpose. The principal question was whether the aggrieved claimant shareholder had a personal right of action against the company arising out of the issue of the shares, which, it was asserted, was targeted against the claimant. Again, it was a case of international significance in company law.

There is an advantage to smaller jurisdictions which seek inward investment or aspire to be offshore financial centres to have access to a final court of appeal which commands international respect. It gives assurance to domestic businesses and international investors that the rule of law will be upheld.

David Doyle, a judge of the Financial Services Division of the Grand Court of the Cayman Islands in a recent paper stated:

"The fact that the JCPC is the final appeal court of the Cayman Islands increases international investor confidence in the Cayman Islands and assists in its economic development ... The JCPC continues to inspire international investors to have confidence in Cayman as a place for doing business and using corporate and trust structures to facilitate international investment."

Also, the JCPC has long experience in constitutional law. For many years it has provided rulings on the meaning of constitutions of the jurisdictions which we serve while being immune from political pressures which may exist within those jurisdictions.

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<sup>2</sup> *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33.

<sup>3</sup> *Tianrui (international) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] UKPC 36.

## **Applying local law faithfully while having an intimate connection with English law**

Almost 100 years ago Viscount Haldane said that the JCPC was not a body with any location and was not an English body in any exclusive sense. That was true then and is certainly true now. The Board upholds the terms of the Constitutions of the jurisdictions which it serves and respects the practices and rules of a particular jurisdiction.

As Lord Diplock explained in *Broome v Cassel & Co Ltd No 1* and in *De Lasala v De Lasala* the common law has been developed by judges and adapted to the needs of contemporary society, including adaptations which are appropriate for the circumstances of a particular jurisdiction. The Board is alive to that insight. It sees its role as a partnership, allowing space for local institutions including the judiciary and the Board to work together to develop a legal system which reflects the specific culture and needs of each jurisdiction.

This is evident, for example, in the Board's jurisprudence in relation to Mauritius which has a Civil Code derived from its time as a colony of France. The Board is careful to respect the relevant jurisprudence relating to the Code, including French authorities so far as they are relevant. It is, I think, helpful to the Board that it has two Scots lawyers who are trained in the Roman law tradition, to explicate the principles underlying the code.

For most of the jurisdictions it is the common law which predominates and in recent years the jurisprudence of the JCPC has exerted an increasing influence over English law. In the first of the famous constitutional cases concerning Brexit, often referred to as *Gina Miller No 1*, The UK Supreme Court cited JCPC cases for the propositions, first, that the exercise of the Crown's administrative powers must be compatible with legislation and the common law and, secondly, that courts will not directly enforce political or constitutional conventions.

In 2016 in *Willers v Joyce No 2* Lord Neuberger pointed out that the Board's decisions, while not binding in England and Wales, were of great weight and persuasive value and that courts in England and Wales can normally be expected to follow a decision of the JCPC unless there was a decision of a superior domestic court to the contrary effect. This was because the JCPC was usually ruling on the common law and all or almost all of its judges were also Justices of the UK Supreme Court. He went further and said that where the JCPC is addressing a point of English law, it can rule that the UK Supreme Court or the Court of Appeal

was wrong and direct that the courts of England and Wales should treat the decision of the JCPC as representing the binding law of England and Wales. The JCPC exercised that power last year in an appeal from the Virgin Islands – *Sian Participation Corporation* – to overturn a decision of the English Court of Appeal on a question of the law of corporate insolvency and arbitration.

We are part of a family of common law jurisdictions or in some cases, such as Mauritius, mixed jurisdictions in which the common law has a strong influence.

### **The question of cost**

Before concluding, I should address the question, which is sometimes raised, of the cost of appealing to the JCPC.

Civil litigation, in particular, is expensive. But it need not be prohibitive and we are taking steps to curb excessive costs by making available modern technology to people who appeal to the Board. Since the onset of the pandemic, the UK Supreme Court and the JCPC have developed their technology massively. Before the pandemic the JCPC was offering remote hearings by computer link to JCPC jurisdictions. That offer was not often taken up. But remote hearings became the only hearing on offer during the pandemic. It is a facility which remains available so that you can conduct an appeal from within your jurisdiction and so reduce the cost to your clients.

Further, in December last year we launched our Case Management Portal and new website. The Portal is a two-way online site with features such as a case tracker, electronic service of documents, correspondence and e-payment. Users wherever they may be can interact with the court administration through the portal at a time which suits them, regardless of the time difference between your jurisdiction and London. You can file court documents digitally, track the progress of your case, pay such fees as are due, and be notified of any updates as they happen, all through the Portal. The days of a long trip by sea to London are long gone. Flights also are now optional.

### **Conclusion**

I believe that smaller jurisdictions can obtain help in support of the rule of law in their territories, resisting political pressures and gaining economic benefits by drawing on wider judicial resources in the common law world. It does not have to be the JCPC which provides this help. It can be a regional appellate court and there

are benefits in involving judges from other jurisdictions in appellate courts within a jurisdiction.

As I said at the start of this brief address, it is for the individual jurisdiction to take a pragmatic view of where their interests are best served in the world as it now is.

The JCPC is happy and honoured to provide the service which it does. But the decision whether to retain those services is, as it should be, for the individual jurisdiction.