

The Role of the Caribbean Court of Justice: An Overview

The Honourable Mr. Justice Hayton¹

Dual role of the Caribbean Court of Justice

Under the Agreement establishing the Caribbean Court of Justice (“the CCJ”) dated 14th February, 2001 (“the CCJ Agreement”) and the Revised Treaty of Chaguaramas dated 5th July, 2001 (“the Treaty”), the CCJ has a dual role to play within the Caribbean Community (“CARICOM”)². Uniquely, it is both an international court with original jurisdiction over a regional international law and a final appellate court ultimately determining the domestic law of a CARICOM State. In its original exclusive jurisdiction it ensures uniform interpretation and application of the Treaty and so is the crucial centrepiece for developing a CARICOM Community law underpinning and developing the CARICOM Single Market and Economy (“the CSME”) as provided for in the Treaty. In its final appellate jurisdiction for CARICOM Member States it should further foster the development of an indigenous Caribbean jurisprudence.

¹ Of course, the views expressed herein are personal. Especially, as concerns the interpretation of the CCJ Agreement and the Treaty, the Jamaican Caribbean Court of Justice (Original Jurisdiction) Act 2005 and the impact of the Privy Council decisions in *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett* [2005] UKPC 3 and *Hinds v The Queen* [1977] AC 195, my views amount to my provisional impression in the absence of any forensic argument. “Argued law is tough law”, as Megarry J. stated in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9 at 16 when holding the law to be different from that stated in a book written by him when at the Bar. This paper was the basis for a talk given in Barbados on 3rd February 2006 (and in Toronto on 23 October 2006) and so has been updated to reflect events on 3 July 2006 as in the text to note 82.

² Comprising Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Haiti, Jamaica, Montserrat, St Lucia, St Kitts and Nevis, St Vincent and The Grenadines, Suriname and Trinidad and Tobago. However, Haiti has been suspended due to political turmoil and The Bahamas has so far refused to sign up to the CCJ and the Single Market, while Montserrat as a British Overseas Territory is constrained by its lack of independence. Twelve countries are therefore within the Single Market subject to the jurisdiction of the CCJ.

As made clear on the CCJ website (www.caribbeancourtsofjustice.org) the CCJ intends “to provide for the Caribbean Community an accessible, fair, efficient, innovative and impartial justice system built on a jurisprudence reflective of Caribbean history, values and traditions, while maintaining an inspirational, independent institution worthy of emulation by the courts of the region and the trust and confidence of its people.”

The appellate jurisdiction

Except for The Bahamas and Montserrat that did not sign the CCJ Agreement, Member States that have the British Privy Council in London as their final municipal court of appeal, have agreed to replace it with the CCJ, considering the Privy Council too remote from the realities of the legal, cultural and economic environment within independent Caribbean countries. Such countries are self-confident enough³ to want to have their own independent final appellate court determine their own future jurisprudential growth, taking advantage of the fact that a CARICOM regional court has had to be established as a key element of the CARICOM Single Market and Economy.

This court, the CCJ, has seven Justices located in offices next to each other, with five Justices normally making up the bench to hear a case, though, no doubt, all seven will sit in particularly significant cases (eg involving the doctrine of binding precedent⁴

³ See speeches made at the Inauguration of the CCJ on April 16th, 2005 and on the CCJ website.

⁴ For the Australian High Court’s approach to Privy Council decisions see *Barns v Barns* [2003] HCA 9, (2003) 114 CLR 169, [2005] WTLR 1093, paras 31, 101 and 123, indicating the the High Court will make up its own mind in the proper performance of its duties, though taking account of grounds taken into account by it when considering departing from a decision of its own (on which see *Margaret John v Federal Commissioner of Taxation* [1989] HCA 5 paras 49-55). For Guyana’s approach see *Persaud v Plantation Versailles Ltd* (1971) WIR 107 at 132.

and the consideration of some Privy Council decisions that some may consider controversial). This should lead to a consistent philosophy in the CCJ's judgments. In contrast, as Lord Hoffmann has pointed out⁵, the composition of the Judicial Committee of the Privy Council is very changeable because its five⁶ members are drawn from a large class of judges (including the Lord Chancellor, Law Lords, Lords Justices of the English Court of Appeal and former such judges if under 75 years old, together with fifteen Privy Councillors who are leading overseas judges from Commonwealth countries) so that inconsistencies can be found in the Judicial Committee's approach to some issues e.g. the amount of deference to be given to local standards reflected in the judgments appealed from⁷.

Currently, the CCJ is the final appellate court only for Barbados and Guyana. Jamaican legislation was enacted to achieve this for Jamaica but, because the legislation was passed only by an ordinary majority vote, the Privy Council⁸ struck it down. By giving power to the CCJ judges to review decisions of judges of Jamaican courts on Jamaican law when CCJ judges had different (whether better or worse) security of tenure

⁵ *Neville Lewis v At-Gen of Jamaica* [2001] 2 AC 50 at 89-90.

⁶ Five is the normal number, but seven (eg *Pratt and Morgan v Att-Gen of Jamaica* [1994] 2 AC 1) or, even, nine (e.g. *Boyce v R* [2004] UKPC 32) have sat in very significant cases where departure from precedent was to be argued, with nine in *Att-Gen for Jersey v Holley*[2005] UKPC 23 where the refusal was to follow the House of Lords in *R v Smith (Morgan)*[2001] 1 AC 146 . Four of the five are usually current or former Law Lords, there being twelve current Law Lords.

⁷ Compare *Seepersad v Persad and Capital Insurance Ltd* [2004] UKPC 19 and *Panday v Gordon* [2005] UKPC 36.

⁸ *Independent Jamaica Council for Human Rights (1998) Limited v Marshall – Burnett* [2005] UKPC 3, especially paras 16 and 21 revealing the *ratio* to concern the CCJ's power to review decisions of Jamaican judges.(Apart from the CCJ President removable by the Heads of Government on the recommendation of the independent Regional Judicial and Legal Services Commission ("RJLSC"), CCJ judges are removable only by the RJLSC if so advised by a special tribunal. Jamaican Supreme Court and Court of Appeal judges are, by entrenched provisions, removable only if the Privy Council so advises after referral to it by a special tribunal. The PC accepted that the Privy Council could be ousted from the constitution by a simple majority vote, but subjugating the entrenched Jamaican judiciary to the CCJ *instead of* the PC required a special majority).

from the constitutionally entrenched Jamaican judges, the legislation had impliedly altered entrenched provisions of the Jamaican Constitution to secure the integrity of the legal process in Jamaica: these provisions could not be altered by legislation passed merely by an ordinary majority vote. Many other Constitutions of CARICOM Member States have similar entrenched provisions⁹ which can only be circumvented by special majority votes, while a few such States¹⁰ require also a national referendum.

Not surprisingly, the need for such procedures to replace the Privy Council with the CCJ has meant that this issue has become entangled with political issues between Opposition Parties and Governments. It is to be hoped that Governments and Opposition Parties will take advantage of the fact that the CCJ already has exclusive original jurisdiction in Treaty matters to use their best endeavours to arrive at a consensus to employ the CCJ also in appellate matters, Governments in 2001 having considered this to be in the best interests of their countries¹¹. The CCJ will then be fully embedded as the promoter and guarantor of the rule of law within CARICOM.

The original jurisdiction as to contentious proceedings and advisory opinions

While the appellate jurisdiction will involve the domestic law of the jurisdiction to which the appeal relates, the original jurisdiction is not part of domestic law (unless and until incorporated by domestic legislation) but part of a regional international law binding

⁹ Trinidad & Tobago, Dominica, St Lucia, St Kitts & Nevis.

¹⁰ Antigua & Barbuda, The Bahamas, Grenada, St Vincent and the Grenadines.

¹¹ Intriguingly, the current Opposition Party in Trinidad & Tobago was the Governing Party which signed the CCJ Agreement in 2001.

only the nations that are parties to the Treaty that in Articles 211 to 222¹² reflects the original jurisdiction provisions¹³ already agreed to in the CCJ Agreement. The CCJ has compulsory, exclusive, original jurisdiction to hear and determine disputes concerning the interpretation *and* application of the Treaty, including¹⁴

- (a) disputes between Member States;
- (b) disputes between Member States and CARICOM itself;
- (c) claims by private entities with *locus standi* under Article XXIV of the CCJ Agreement or Article 222 of the Treaty where special leave is given by the CCJ because the Member State has declined to espouse the claim or has authorised the entity to espouse the claim, so long as the Court finds that the Treaty conferred a benefit on such entity directly and the enjoyment of such benefit has been prejudiced¹⁵;

¹² However, on 17 February 2005 (14 days after the Jamaican PC appeal noted in footnote 8 above) a Protocol to the Treaty hastily added 222(*bis*) to the Treaty: “The provisions regarding the original jurisdiction set out in this Chapter shall not be construed to require a Contracting Party to enact legislation that is inconsistent with its constitutional structure or the nature of its legal system”, while Art V of a 17 Feb 2005 Protocol to the *Agreement* is in identical terms except for “this Agreement” replacing “this Chapter”, though “*the Agreement*” would seem to be intended. One assumes that this wide-ranging provision itself is to be construed narrowly as an *ex abundante cautela* provision, taking account of Arts 27 and 46 of the Vienna Convention on the Law of Treaties and Art 13 of the draft UN Declaration on the Rights and Duties of States (though query whether this was necessary in view of Art 224: “Each Member State undertakes to employ its best endeavours to complete the constitutional and legislative procedures required for its participation in the regime establishing the Court as soon as possible”, indicating that a Member State would use its best endeavours to incorporate the Treaty under relevant constitutional procedures: on these see text to footnotes 67 to 69 below).

¹³ Other than Art XVIII (permitting intervention by third parties) and Art XXVI (enforcement of orders of the court).

¹⁴ CCJ Agreement Articles XII and XVI, Treaty Articles 211 and 216.

¹⁵ And finds that the interest of justice requires that the entity be allowed to espouse the claim – which would normally seem to be the case if the earlier findings are made.

(d) referrals from a Member State's court or tribunal¹⁶ where a CCJ decision on the interpretation or application of the Treaty is considered by a court or tribunal necessary to enable it to deliver its judgment under domestic law.

Correspondingly, a national court or tribunal has no jurisdiction to interpret or apply provisions of the Treaty. A consistent uniform interpretation and application will be provided exclusively by the CCJ.

The CCJ also has exclusive jurisdiction to deliver advisory opinions concerning the interpretation *and* application of the Treaty¹⁷, but only at the request of the Member States parties to a dispute or of CARICOM itself.

Article 187 indicates that disputes could involve

- (a) allegations that an actual or proposed measure of another Member State is, or would be, inconsistent with the objectives of CARICOM (set out in Article 6);
- (b) allegations of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the operation of the Single Market and Economy;
- (c) allegations that an organ or body of CARICOM has acted *ultra vires*;
- (d) allegations that the purpose or object of the Treaty is being frustrated or prejudiced.

¹⁶ Unlike Art XII of the CCJ Agreement, Art 211 of the Treaty does not expressly mention "tribunals" but it seems from Art 214 that tribunals should be included.

¹⁷ CCJ Agreement Article XIII, Treaty Article 212.

While these disputes may appear particularly appropriate to come before the CCJ, Article 188 does permit and encourage resort to good offices, mediation, conciliation or arbitration.

The law to be applied

The CCJ is to apply¹⁸ “such rules of international law as may be applicable” and may decide a case “*ex aequo et bono*” if the parties agree; it cannot refuse to give a decision “on the ground of silence or obscurity of the law”. It seems it is up to the CCJ to develop its own regional law and procedure, taking account of rules of procedure and evidence applied in similar courts like the International Court of Justice, the European Court of Justice and the Court of Justice of the Common Market of Eastern and Southern Africa. In such fashion a Caribbean Community law will be developed for the common law and civil law Member-States within CARICOM just as a European Community law has been developed by the European Court of Justice¹⁹.

Indeed, in the CCJ Rules the common law approach to discovery or disclosure of documents is eschewed in favour of the civil or international law approach. Thus, an originating application filed by a Member State or the Community itself must, at the outset, list and annex copies of all documents which support the full statement of the facts and contentions on which the claim of the Member State or Community is based²⁰. The position is the same for the proposed originating application that has to be annexed to the

¹⁸ CCJ Agreement Article XVII, Treaty Article 217.

¹⁹ Further see Justice Rolston Nelson, “The Caribbean Court of Justice and the CARICOM Single Market and Economy” on the CCJ Website.

²⁰ See Original Jurisdiction Rule 10.2.

application for special leave filed by a private entity claiming *locus standi* under Article XXIV of the CCJ Agreement or Article 222 of the Treaty, while the application itself must have annexed thereto such documents as are necessary to establish locus standi²¹. Also, any documents germane to the issue raised in a request for an advisory opinion²² are to be transmitted to the court at the time of submission of the request – or as soon as possible thereafter.

Moreover, if the CCJ grants leave to intervene to any Member State or the Community or any person having a substantial interest of a legal nature which may be affected by the Court’s decision, the intervener must file a statement satisfying certain requirements and having annexed thereto any documents on which the intervener relies²³. Similarly, any defence to an originating application must have annexed thereto copies of all documents on which the defendant relies²⁴.

In case it is alleged that there has been inadequate disclosure or discovery, the CCJ under its case management powers or upon an interlocutory application may make orders as to specific documents or classes of documents²⁵.

Binding precedent

In dealing with the original jurisdiction, Article 221 of the Treaty (like Article XXII of the CCJ Agreement) is headed “Judgment of the Court to Constitute *Stare Decisis*” and

²¹ Rule 10.4 (2).
²² Rule 11.3 (4).
²³ Rule 14.4 (2).
²⁴ Rule 16.1.
²⁵ Rules 19 and 20.

provides “Judgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219” [within six months of the discovery of some decisive fact unknown at the date of judgment and, in any event, within five years of the judgment]. Article XXII of the CCJ Agreement uses “be” instead of “constitute” (and refers to revision under Article XX).

Both Articles must be construed as ensuring that judgments are legally binding precedents for any parties to subsequent proceedings involving the same legal point and, in view of the *stare decisis* heading, as ensuring that the judgments are legally binding precedents for CCJ judges hearing subsequent proceedings.

However, there is no hierarchy within the CCJ for a higher court to overrule or bind a lower court²⁶. For courts at first instance the *stare decisis* practice is for the later court to follow the decision of an earlier court as a matter of comity unless there is good reason not to follow it e.g. because the decision was wrong due to misunderstanding or misinterpreting cases cited to it or overlooking a decisive argument. For the Court of Appeal, however, not to follow an earlier Court of Appeal decision, that decision²⁷ must (i) conflict with another Court of Appeal decision or (ii) be incapable of standing with a decision of the House of Lords²⁸ or (iii) be a decision given *per incuriam* through

²⁶ Save where a sole judge makes a decision in very limited circumstances eg involving urgency outside of Court Term and interlocutory measures: Art X1.5 of the CCJ Agreement, Rules 3.3 and 20.2

²⁷ *National Westminster Bank v Spectrum Plus Limited* [2004] EWCA Civ 670, para 58, *Davis v Johnson* [1979] AC 264, HL; *Att-Gen of St Christopher, Nevis & Anguilla v Reynolds* [1980] AC 237, PC.

²⁸ This ought to extend to the Privy Council (*Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 260, *Daraydan Holdings Ltd v Solland International Ltd* [2004] WTLR 815, paras 80-85, *National Westminster Bank v Spectrum Plus Ltd* [2005] UKHL 41, at para 163 per Baroness Hale) but, without argument (see

overlooking some provision having statutory force (and not merely some alternative argument that should have led to a different decision²⁹). In criminal matters where the liberty of persons – or even the life of persons - is concerned the Court of Appeal has more leeway not to follow an earlier decision if this is in the interests of justice³⁰.

However, when one considers that the CCJ in its original jurisdiction is the ultimate court because no appeal is possible, so that its decisions are “final”³¹, it seems that the best analogy is with the English House of Lords or the British Privy Council. The Privy Council³² and, from 1966, the House of Lords can refuse to follow their own earlier decisions, especially where a larger bench of judges than normal is convened to deal with the issue. Former decisions are normally binding but the court may depart from a previous decision³³ where it appears right to do so when too rigid an adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law as socio-economic conditions change. Of course, this power to depart from precedent must be exercised with great care and circumspection. It may even

para 163) the CA view in *Spectrum* was endorsed on appeal by Lords Scott and Walker in the Lords at paras 93 and 155.

²⁹ *Bryers v Canadian Pacific Steamships Ltd* [1957] 1 QB 134 at 147; *Duke v Reliance Systems* [1988] 1 QB 108,113.

³⁰ *R v Gould* [1968] 2 QB at 68-69, *R v Parole Board ex p Wilson* [1992] QB 740 at 754.

³¹ Art III.2 of the CCJ Agreement

³² *Read v Bishop of London* [1892] AC 644, *Att-Gen for Ontario v Canada Temperance Federation* [1946] AC 193, *Nkambule v R(No 2)* [1950] AC 379, *Schaefer v Schuhman* [1972] AC 572, *Att-Gen of St Christopher, Nevis & Anguilla v Reynolds* [1980] AC 637 at 660, *Neville Lewis v Att-Gen of Jamaica* [2001] 2 AC 50, *Matthew v Trinidad & Tobago* [2004] UKPC 33.

³³ House of Lords Practice Direction [1966] 1WLR 1234, on which see *Jones v Sec of State for Social Services*[1972] AC 944, *The Johanna Oldendorff* [1974] AC 479. The CCJ Justices, as a much more tightly-knit group than the Privy Council, may well be less likely to depart from an earlier decision than the Privy Council.

be that the CCJ in very special circumstances may find a need to depart from precedent with prospective effect only³⁴.

The subject-matter of the original jurisdiction

Disputes may arise or advisory opinions be sought in respect of the Treaty provisions that establish the Single Market and Economy by removing restrictions³⁵ on the right to establish businesses³⁶ and on free movement of goods, services, capital and of six limited categories³⁷ of skilled persons initially, while providing a special regime³⁸ for the protection of Less Developed Countries³⁹ and “disadvantaged countries, regions and sectors”⁴⁰.

A Competition Commission⁴¹ exists to prevent anti-competitive business conduct within CARICOM and may make various orders to remedy or penalise such conduct⁴², in which event a party aggrieved by such an order may apply to the CCJ for a review of such order⁴³. On the application of a Member State the Commission can issue a negative

³⁴ On this see *National Westminster Bank v Spectrum Plus Ltd* [2005] UKHL 41.

³⁵ See Articles 30 to 50.

³⁶ Covering commercial, industrial, agricultural, professional and artisanal activities.

³⁷ University graduates, media workers, sports persons, artistes, musicians, and managers and technical and supervisory staff of companies – they need to obtain a recognition of skills certificate.

³⁸ See Chapter Seven and Article 49.

³⁹ Defined in Article 4 so as to comprise Antigua & Barbuda, Belize, Dominica, Grenada, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines. The More Developed Countries are Barbados, Guyana, Jamaica, Suriname and Trinidad & Tobago (and also The Bahamas, but it has decided not yet to participate in the SME).

⁴⁰ Defined in Article 1.A Development Fund has been established to provide financial and technical assistance for these sectors: Art 158

⁴¹ See Chapter eight.

⁴² By Art 174 para 6 Member States must pass legislation to ensure that such orders are enforceable in their jurisdictions.

⁴³ Article 175, para 12. This reviewing power over a regional body seems to be part of regional international law and not domestic law so as to fall outside the mischief of the Privy Council decision in *Independent Jamaica Council* (see footnote 8 above) concerned with CCJ judges applying Jamaican domestic law in reviewing decisions

clearance ruling to the effect that certain business conduct is not anti-competitive⁴⁴; but, on application by the Commission, the CCJ may review – and so quash - the Commission’s ruling where it was induced by deceit or improper means⁴⁵.

Fundamental principles are that there shall be no discrimination on grounds of nationality only⁴⁶; that each Member State shall, with respect to rights covered by the Treaty, accord no less than most favoured nation treatment to all other Member States⁴⁷; and that Member States shall take all appropriate measures to ensure the carrying out of obligations arising out of the Treaty or resulting from decisions taken by the Organs and Bodies of CARICOM, and shall abstain from any measures that could jeopardise the attainment of the objectives of the Treaty as set out in Article 6 thereof⁴⁸. Particular policy objectives concern industrial policy⁴⁹, agricultural policy⁵⁰, trade policy⁵¹, transport policy⁵², competition policy and consumer protection⁵³.

As the Treaty contains 240 Articles, five annexes and five schedules to constitute the Single Market and Economy and because draftspersons resort to an element of

of Jamaican judges but having different security of tenure from Jamaican judges. Domestic courts have no jurisdiction over matters exclusively reserved to the Competition Commission, so the Commission and, on review of its decisions, the CCJ seem not to be derogating from the powers of constitutionally entrenched domestic judges. Consider also the CCJ’s jurisdiction in respect of private entities with locus standi to sue under Art XXIV of the CCJ Agreement and Art 222 of the Treaty

⁴⁴ Article 180, para 1.

⁴⁵ Article 180, para 3

⁴⁶ Article 7.

⁴⁷ Article 8.

⁴⁸ Article 9.

⁴⁹ Chapter 4, Part 1.

⁵⁰ Chapter 4, Part 2.

⁵¹ Chapter 5.

⁵² Chapter 6.

⁵³ Chapter 8.

ambiguity left for later resolution in order to obtain agreement between States with diverse interests, there will be plenty of scope for interpreting the provisions of the Treaty and filling out the inevitable interstices therein, as has happened with the European Common Market, now the European Union (“EU”). The European Court of Justice and the CCJ thus have a greater burden and a greater role than domestic courts interpreting domestic legislative schemes that are generally worked out in thorough detail. No doubt, the CCJ will be faced with the citation of many EU cases as persuasive authority.

However, it is most important to note that while those resident within the EU have their EU rights as part of their domestic law, the rights of those resident⁵⁴ within CARICOM are only rights under a regional international law unless incorporated into domestic legislation, though, even then, it is crucially emphasised that domestic courts are to have no jurisdiction to hear and determine matters concerning the interpretation and application of the Treaty, such being the exclusive preserve of the CCJ under Articles 211 and 216 of the Treaty.

The position of private persons

Generally, the common law (as opposed to civil law) position is that private persons have to work via their nations to have provisions of international agreements enforced because “a ratified but unincorporated treaty, though it creates obligations for the state under international law, does not in the ordinary way create rights for

⁵⁴ See note 58 below.

individuals enforceable in domestic courts”⁵⁵. However, under the Treaty they have a special right⁵⁶, if aggrieved by a determination of the Competition Commission, to have that determination reviewed by the CCJ.

While private persons have no right to seek an advisory opinion⁵⁷, they can initiate proceedings with the special leave of the CCJ. Such leave will only be granted⁵⁸ if (a) the Treaty intended a benefit conferred on a Contracting Party to enure for the benefit of such persons directly (eg free movement of certain categories of persons)⁵⁹ (b) such persons have been prejudiced in the enjoyment of that benefit, (c) the Contracting Party entitled to espouse the claim has declined to espouse the claim in proceedings before the CCJ or expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party, and (d) the CCJ finds the interest of justice requires that the persons be allowed to espouse the claim.

However, if a person - or a Member State or the Community - considers he, she or it has a substantial interest of a legal nature which may be affected by a decision of the CCJ in existing legal proceedings, he, she or it may apply to the CCJ to intervene⁶⁰. One assumes that the CCJ will allow this if the applicant does have such substantial interest which may be affected by the CCJ’s decision.

⁵⁵ *Neville Lewis v Att-Gen of Jamaica* [2001] 2 AC 50 at 84 per Lord Slynn.

⁵⁶ Article 175, para 12, and see footnote 43.

⁵⁷ Article 212.

⁵⁸ Under Article 222 of the Treaty leave can be granted to “Persons, natural or juridical, of a Contracting Party” so, presumably, covering residents, while under Article XXIV of the CCJ Agreement leave can be granted to “Nationals of a Contracting Party”. See broad definition of a “national” in Jamaica’s Caribbean Court of Justice (Original Jurisdiction) Act 2005, s. 2.

⁵⁹ Cp *Van Duyn v Home Office* (No 2) [1975] 3 All ER 190.

⁶⁰ Article XVIII of the CCJ Agreement, with no corresponding provision in the Treaty.

The CCJ has no apparatus for enforcing its orders but Article XXVI (a) of the CCJ Agreement states “The Contracting Parties agree to take all necessary steps including the enactment of legislation to ensure that all authorities of Contracting Party act in aid of the Court and that any judgment, decree, order or sentence of the Court given in the exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party.”

Once domestic legislation has been enacted (via the appropriate constitutional process) for the enforcement of CCJ judgments, it seems private persons should be in a strong position to influence implementation of the Treaty by Member-States. It seems likely that such persons will be able to claim damages against a State if suffering loss from a failure to implement a particular provision of the Treaty, taking account of Article 9 thereof and the principles appearing from the analogous EU case, *Francovich*.⁶¹ This possibility should encourage States to implement their Treaty obligations in timely fashion.

Private persons and domestic litigation involving referrals to the CCJ for interpretation or application of the Treaty

If a person brings proceedings in a domestic court or tribunal which considers that they cannot be resolved without the interpretation or application of a provision in the

⁶¹ Joined cases C-6/90 and C-9/90, [1991] ECR-I 5357.

Treaty, then it is necessary for the court or tribunal to refer the Treaty issue to the CCJ⁶², which has exclusive jurisdiction to deliver judgment upon matters concerning the interpretation and application⁶³ of the Treaty. Upon receiving the “decision” or “determination”⁶⁴ of the CCJ on this point of regional international law, the domestic court or tribunal must then act in accordance with such decision or determination⁶⁵ in giving its judgment enforceable under domestic law like all other domestic judgments.

Provisions of the CCJ Agreement and the Treaty are not part of domestic law unless enacted by the domestic legislature⁶⁶, so domestic courts cannot be involved in making referrals to the CCJ without domestic legislation conferring such jurisdiction. Once such legislation incorporates provisions of the CCJ Agreement and/or the Treaty so that (1) the CCJ has exclusive jurisdiction to apply a regional international law in the interpretation and application of the Treaty and (2) a domestic court, seised of an issue whose resolution involves the interpretation or application of the Treaty, must, if it considers the CCJ’s decision is necessary to enable it to give judgment, refer the matter to the CCJ for determination, then this Treaty interpretation and application area of regional international law reserved exclusively to the CCJ, though technically brought about by

⁶² Articles 211.1 (c) and 214 of Treaty and XII.1(c) and XIV of the CCJ Agreement.

⁶³ The CCJ function is not just to interpret the Treaty: it is also to apply the interpretation in the particular factual circumstances presented to it. The ECJ’s function is narrower, so its conclusions can be disregarded by the domestic judge in so far as based on a factual background inconsistent with that found by that judge: *Arsenal Football Club PLC v Reed (No 2)* [2003] EWCA Civ 696, [2003] All ER 865.

⁶⁴ See Art XIV of the CCJ Agreement and Art 214 of the Treaty.

⁶⁵ A domestic court has no jurisdiction itself to interpret or apply a ratified but unincorporated treaty (*JH Rayner (Mincing Lane) Ltd* [1990] 2 AC 419), while if the Treaty or the CCJ Agreement is incorporated, it expressly reserves exclusive jurisdiction to the CCJ.

⁶⁶ “Treaties form no part of the domestic law unless enacted by the legislature” as Lord Hoffmann pointed out in *Higgs v Minister of National Security* [2000] 2 AC 228 at 241.

domestic legislation, falls outside the domestic law which is to be applied by domestic judges in their own exclusive jurisdiction.

It thus seems that the CCJ's exclusive new domestic jurisdiction of an international character in Treaty matters is separate from the pre-existing jurisdiction of domestic judges with their entrenched constitutional protection in exercising such jurisdiction. Moreover, domestic judges are incapable of delivering any judgments on the interpretation and application of the Treaty that could be capable of review by superior CCJ judges. Thus there would appear to be no need for the referral provisions of the Treaty or the CCJ Agreement to be implemented by domestic legislation having to comply with any entrenched provisions procedures as dealt with in the *Independent Jamaica Council* case⁶⁷, which only concerned the CCJ in its role as the supreme appellate body applying purely domestic Jamaican law in reviewing domestic Jamaican decisions.

However, there is an earlier case, *Hinds v The Queen*⁶⁸, where the Privy Council held void Jamaican legislation that established a new purely domestic court, the Gun Court, comprising three resident magistrates with a criminal jurisdiction as extensive as that previously held by Supreme Court Judges, but the magistrates did not have the same constitutional security of tenure as Supreme Court judges. The magistrates had been given a domestic jurisdiction previously exercisable by Supreme Court judges, so such jurisdiction had to continue to be vested in persons with the same security of tenure as

⁶⁷ See footnotes 8 and 43 above.

⁶⁸ [1977] AC 195

previously unless the relevant legislation was enacted by a special majority, as had not been done.

It would appear that this case can be distinguished. The CCJ has been established by an international Agreement to apply a new regional international law for countries parties to the Treaty and the CCJ Agreement dealing with original jurisdiction. This is a brand new legal jurisdiction not previously exercised by any domestic courts. Thus, to implement the Treaty and the CCJ Agreement, so that this new law can have domestic effect, domestic legislation has to be enacted. However, the pre-existing domestic courts have not – and never had – any jurisdiction to interpret and apply the Treaty, which is reserved exclusively to the CCJ as an international or supranational court⁶⁹ applying an international regional law as a special new part of domestic law that the domestic courts have no jurisdiction to apply. Thus it would seem to be unnecessary for CCJ judges to need to have the same constitutionally entrenched security of tenure as Jamaican Supreme court judges, not having taken over any jurisdiction previously exercisable by Jamaican judges.

However, very cautiously and in the light of the Protocol to the CCJ Agreement of 17th February 2005⁷⁰, Jamaica has legislated via ordinary majority voting to incorporate into domestic law the original jurisdiction of the CCJ under the CCJ Agreement⁷¹ (not the Treaty) *other than* the CCJ's jurisdiction over referrals from domestic courts or

⁶⁹ Though having legal personality under domestic law:s.3 of the 2005 Act incorporating the 4th July 2003 Protocol to the CCJ Agreement. Note *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114 (an international treaty cannot confer legal personality on an international body, such body needing to have legal personality conferred by the domestic law if to have locus standi to sue or be sued in domestic courts, but it is one body in international law even if incorporated in twenty States).

⁷⁰ See footnote 12 above.

⁷¹ Section 3 of the Caribbean Court of Justice (Original Jurisdiction) Act 2005 Act.

tribunals. Section 7(1) of Jamaica’s Caribbean Court of Justice (Original Jurisdiction) Act 2005 (“the 2005 Act”) states, “Where a court or tribunal is seized⁷² of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the court or tribunal concerned may, before delivery of its judgment in the matter, in writing request the designated authority to refer the question to the Court [CCJ] for an *advisory opinion* to be given..” By section 7(2) the designated authority is “the public officer or authority designated by the Minister responsible for justice, for the purpose of making referrals under this section.”

It would appear that the intention is for an advisory opinion sought by the designated officer to be an advisory opinion requested by a Contracting Party under the exclusive original jurisdiction conferred on the CCJ by section 6(1)(b) of the 2005 Act “to deliver *advisory opinions* at the request of a Contracting *Party* or the Community” as if a sole Contracting Party could unilaterally request an advisory opinion just as the Caribbean Community itself can. However, the CCJ does not appear to have jurisdiction under the Treaty or the CCJ Agreement to accept unilateral requests from a State. Article 212 of the Treaty states “Advisory opinions shall be delivered only at the request of the Member States *parties to a dispute* or the Community”, which makes clear what appears to be intended by the use of the plural in Article XIII of the CCJ Agreement (incorporated by section 3 of the 2005 Act) which provides, “Advisory opinions shall be delivered only at the request of Contracting *Parties* or the Community.” One therefore needs either to interpret section 6 restrictively in line with those Articles or accept that the legislation is

⁷² “Seised” is meant.

intended to force upon the CCJ a domestic Jamaican jurisdiction that the CCJ does not possess under the CCJ Agreement or the Treaty.

On the other hand, one might construe section 7 as providing a referral process much diluted from the referral process provided for in the CCJ Agreement (and the Treaty). Under the 2005 Act, the CCJ has no jurisdiction to give legally binding determinations concerning Treaty matters on referrals⁷³, and the domestic courts and tribunals are under no mandatory duty to refer interpretation or application of Treaty matters to the CCJ. Instead, the court or tribunal concerned *may* request an independent designated authority to refer the matter to the CCJ⁷⁴, which necessarily now has jurisdiction under Jamaican domestic law to give non-legally-binding advice. Upon the designated authority receiving such advice from the CCJ, it will communicate it to the domestic court or tribunal as a mere “advisory opinion”⁷⁵ for it to take into account in delivering its own judgment⁷⁶, involving itself interpreting and applying the Treaty incorporated into domestic law by the Caribbean Community Act 2004 (No 15 of 2004). The idea is to ensure that it is only Jamaican judges, with their tenure entrenched under

⁷³ See s. 3 of the 2005 Act, incorporating the CCJ Agreement but, *inter alia*, ousting Arts XII.1 (c) and XIV of the CCJ agreement, and ss.5 and 6 conferring exclusive jurisdiction on the CCJ on Treaty matters other than referrals under the said Articles.

⁷⁴ It appears that the legislation enacted by a simple majority vote could come under attack if the designated authority, who may reject the court’s request in a judicial area where Jamaican Supreme Court judges have constitutionally entrenched tenure, is not a similarly protected member of the judiciary, taking account of *Hinds v The Queen* [1977] AC 195 and the *Independent Jamaica Council* case [2005] UKPC 5. However if the words “request the designated authority to” were to be struck out of section 7, the section could remain effective.

⁷⁵ See preceding paragraph of the text.

⁷⁶ S. 3 of the above 2005 Act (reflected in s.6(1)(a)) ousts the jurisdiction of the CCJ under Art XII.1 (c), but it does not oust Art XXVI (a), requiring States to make provision for the enforcement of CCJ “judgments” (as done in s.9 of the 2005 Act), though it would appear that any so-called “judgments” on referrals concerning interpretation and application of Treaty provisions would not rank as such in the absence of the CCJ having jurisdiction under Jamaican law to make legally binding judgments on referrals, due to the ouster of jurisdiction in s.3 coupled with the restrictively defined CCJ original jurisdiction in ss.5 and 6. Indeed, the definition of “judgments” in s.2 does not extend to advisory opinions.

the Jamaican Constitution, who deliver judgments applying relevant law in Jamaica and who cannot be regarded as subordinated in any way to CCJ judges having different security of tenure, so that there can be no doubt that the domestic legislation is valid.

However, this Jamaican approach creates problems for the CCJ and for the development of a uniform CARICOM law throughout the CARICOM region. On the face of it, the CCJ is being asked to support Jamaica in breaching its international obligations⁷⁷ in enacting legislation incompatible with the CCJ Agreement and the Treaty that confer exclusive jurisdiction in matters of Treaty interpretation and application upon the CCJ, *not* the Jamaican domestic courts and tribunals. Can and, if it can, should, the CCJ accept the jurisdiction conferred on it by Jamaican legislation? How far should the CCJ go in trying to make the CCJ Agreement and the Treaty work, taking account of its decisions being “final” even where the dispute is as to whether it has jurisdiction.⁷⁸ The problem for the Caribbean Community is that the Jamaican approach leaves its domestic courts and tribunals able to interpret and apply the Treaty as they choose, whether by refusing to refer matters to the CCJ or by taking a different view from the CCJ’s non-legally-binding opinions.

However, the CCJ will, no doubt, consider sections 6 and 9 of the Jamaican Caribbean Community Act 2004 and the principle that statutes need to be construed so as to conform with implemented Treaty obligations. Section 6 states “Where in any legal

⁷⁷ Article XVI of the CCJ Agreement (accepting as compulsory all the original jurisdiction in Art XII) oddly is not ousted by s.3 of the 2005 Act when ousting the compulsory referral jurisdiction. It may be that the 17 February Protocol 2005 does not help Jamaica. As explained in the text, a good case can be made for the original jurisdiction to be capable of being incorporated by a simple majority vote, while it is open, anyhow, to Jamaica to enact implementing legislation by a special majority vote which would not be “inconsistent with its constitutional structure or the nature of its legal system” as per the Protocol.

⁷⁸ Arts III.2, XV and XVI.2 of the CCJ Agreement and Arts 215 and 216.2 of the Treaty.

proceedings, the court or tribunal considers that a decision on any question concerning (a) the interpretation or application of the Treaty, or (b) the validity, meaning or application of instruments made under the Treaty, is necessary for it to deliver judgment, the question *shall* be referred to the Caribbean Court of Justice.” Section 9, however, provides “In the event of any inconsistency between the provisions of this Act and the operation of any other law, *other than the Constitution of Jamaica*, the provisions of this Act shall prevail,” thereby raising the issues discussed above in distinguishing *Hinds v The Queen*.

Fortunately, other Member States, most with a Jamaican-like Constitution⁷⁹, that have so far passed legislation have not followed Jamaica’s nervous approach to the scope of *Hinds v The Queen*. Antigua and Barbuda, Belize, Grenada, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines and Trinidad and Tobago have fully implemented the original jurisdiction in the CCJ Agreement, thereby leaving it to the CCJ to create a uniform, predictively certain Community law - as the European Court of Justice has done for the EU in its key role under Art 177 of the Rome Treaty, now Article 234 of the consolidated Treaty after the Treaties of Maastricht and Amsterdam.

One will have to wait and see whether the Jamaican legislation may be regarded as cleverly crafted to produce a *de facto* rather than a *de iure* uniformity within the Caribbean Community. Nonetheless, it is hoped that those Member States with Jamaican-like Constitutions that have not yet enacted legislation to confer original jurisdiction upon

⁷⁹ Not Barbados, Guyana and Suriname which are thus in a position to pass legislation fully implementing the CCJ Agreement

the CCJ will give serious consideration to the merits of the argument (canvassed earlier in this section) that the whole of the original jurisdiction (including the exclusive jurisdiction of the CCJ over the interpretation and application of the Treaty on referrals from domestic courts) can be incorporated into domestic law by a simple majority vote because this involves no review by CCJ judges of matters within the jurisdiction of domestic judges and no fulfilling by the CCJ of a role previously fulfilled by domestic judges⁸⁰.

It is, however, possible to argue that if the CCJ is not merely interpreting the Treaty but actually applying it to the factual context presented by the domestic court, then in a significant number of domestic cases it will, in substance, be coming to a decision also involving the application of previously existing domestic law and so, to that extent, be taking over a jurisdiction previously exercised by domestic judges with constitutionally entrenched security of tenure different from that of CCJ judges. Thus, under *Hinds v The Queen*, more than a simple majority vote is needed to enact the relevant legislation. The answer to this appears to be that if the old domestic law was “X” and this has been affected by Treaty law “Y”, so that the new law is either pure “Y” or a mongrel “Z”, then the CCJ is not applying any previously subsisting law⁸¹ that was the province of domestic judges with constitutionally entrenched tenure.

Of course, if the CCJ Agreement and Treaty were both to be unanimously amended so that a referral ruling of the CCJ was only binding as to interpretation, and not

⁸⁰ See text to footnotes 8, 67 and 68; and footnote 43 on the Competition Commission and the CCJ.

⁸¹ If the pre-existing law “X” is not affected by the Treaty, then the CCJ merely holds that the Treaty has no application, so the domestic court is left to apply its own domestic law.

as to application to the facts presented by the domestic court, it would surely be very clear that the CCJ could not be seen to be usurping any role of the domestic courts. However, contentious provisions of a Treaty or of any legislation cannot normally be interpreted except in relation to a specific factual context and, if the interpreting court applies its interpretation to the factual context presented to it, it prevents any possibility of the domestic court misunderstanding the interpretation: it is up to the domestic referring court to make the factual context sufficiently clear for it not to be misunderstood by the interpreting court (which, of course, can always seek clarification of the factual background before giving its interpretation). There is thus much to be said for the CCJ having the inter-related functions of interpreting and applying the Treaty as accepted in the legislation of Antigua and Barbuda, Barbados, Belize, Grenada, Guyana, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname and Trinidad and Tobago.

THE FUTURE

The major role that the CCJ is destined to play in the CARICOM Single Market and Economy and in developing an indigenous Caribbean jurisprudence has been delayed by the repercussions of the Privy Council decisions in the *Independent Jamaican Council* case and *Hinds v The Queen*, while the Single Market component of the CSME commenced on 1st January 2006 only for Barbados, Belize, Guyana, Jamaica, Suriname and Trinidad & Tobago until on 3rd July 2006 the six Less Developed Countries⁸² also

⁸² See footnote 38 for these. The Single Market *and* Economy is hoped to come into operation by the end of 2008. Further see speeches (on website of CARICOM) at the Inauguration of the Single Market in Jamaica on 30 January 2006

signed up to implementation of the Single Market having been reassured over the provision of the Development Fund for their assistance.

However, this delay needs to be put in context. Back in September 1947 the Montego Bay Conference had indicated that a Single Market and Economy was the way ahead, while the British Caribbean Federation Act of 1956 had called for a Customs Union embodying internal free trade as soon as possible. In 1958 the West Indies Federation was established before collapsing in 1962.

Meanwhile, in 1958 the European Economic Community was established and (re-named the European Union) it is now a thriving well-integrated colossus of an economy covering twenty-five (25) States, with economically stronger States helping economically weaker states to strengthen their economies.

With Caribbean countries becoming independent States in the 1960s, their natural focus on their independence diminished interest in economic integration (movement between the States becoming much more restricted than in the days when the States were British colonies). However, the focus on independence led in 1970 to the question of replacing the Privy Council being placed on the agenda of the Sixth Conference of Heads of Government. In 1989, in Grand Anse at the Tenth Meeting of the Conference of Heads of Government, there was agreement in principle to establish a Caribbean Court of Appeal to replace the Privy Council. In 2001 the CCJ Agreement was signed for the CCJ to replace the Privy Council as the final appellate court and to have original jurisdiction over the CARICOM Single Market and Economy. Thus, the independent Caribbean States have almost completed their journey to full independence by repatriating their final

appellate court to the Caribbean, but subject to appropriate constitutional procedures being utilised.

Back in the 1970s it was realised that economic regional integration would contribute significantly to economic growth and would, indeed, be necessary to prevent economic stagnation or decline in many economically weak States. The fledgling Treaty of Chaguaramas in 1973 created CARICOM (to replace the Caribbean Free Trade Association set up in 1965) and, with its Common Market Annexe (not signed by The Bahamas), provided the basis for introducing a Single Market and Economy which was dealt with fully in 2001 in the Revised Treaty of Chaguaramas, following upon the work of an inter-governmental task-force inspired by the 1992 “Time for Action – the Report of the West Indian Commission.”

In this era of globalization and liberalisation there is surely little reason to doubt that regional economic co-operation and integration must be the way ahead for CARICOM States and that the original jurisdiction role of the CCJ is crucial for efficiently furthering the objectives of the Treaty. It is hoped that the CCJ will be seen to perform this role well and also its appellate role for a limited number of States, so that Governments and Opposition Parties and their electorates (realising that the States have already provided US \$100 million for the CCJ Trust Fund to provide independence for the CCJ) come to appreciate how appropriate it is for the CCJ to fulfil the role of the final appellate court for all CARICOM States. This will then be made possible by legislation satisfying the relevant constitutional procedures for legislation affecting entrenched rights.

The CCJ is open for business, and we Justices are looking forward to an increasing workload and an increasing jurisdiction.