

CONSIDERING A CARIBBEAN COMMERCIAL COURT*

by

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Introduction

[Protocols.]

I must begin by expressing my sincere gratitude to the organisers of the 2013 STEP Caribbean Conference for the invitation to speak here tonight. It is a privilege to be among this impressive group of practitioners from across the region and further afield; and it gives me great pride to speak to you this year in my home country.

I am also pleased to address you this evening in my capacity as President of the Caribbean Court of Justice. Many of the 70 judgments already delivered by the Caribbean Court of Justice in its 8-year history have involved issues of trusts and trust companies, both onshore and international, as well as issues of estate management that are relevant to the priorities of the STEP organisation.

I want also to extend congratulations to all the winners of tonight's Awards. As I will later discuss, there is increasingly great competition among the regional practitioners in this field. So the victories are no mean feat.

Lastly, I must congratulate Ms. Helene Lewis, Ms. Elizabeth Harper, and the Committee of the STEP Caribbean Conference for their hard work and organisation of this prestigious event.

In preparing my address for this evening, I considered my audience: a room full of trust and estate practitioners from across the Caribbean and beyond. There are many qualities that you share: your interests, your concerns, your desire to see thoughtful development of the trust and estate practice throughout the Caribbean. These are topics, no doubt, that will be addressed through the course of the conference. But, there are also qualities that distinguish you from each

other, and it is amongst those differences that I selected my topic. Namely, I decided that the question I want to ask tonight is, somewhat provocatively phrased, does size matter? Size of jurisdiction? Size of service provider? Size of judicial institution? Specifically, is the potential of the trust and estate industry in some way limited by the size and capacity – both literal and logistical – of the Caribbean islands? Is it like the proverbial fish in a fishbowl, wherein the fish only grows so large as to comfortably fit within its tank? This is, as I have gathered, a burning question with regard to the trust and estate sector in this region. Though I do not necessarily intend to answer this question tonight, I hope that by merely posing it, I can help initiate a new – or renewed – conversation.

Size of jurisdictions

It has been said that good things come in small packages.

Today's biggest players in the area of trusts, onshore and international, are some of the smallest territories in the world. The British Virgin Islands, with a population of less than 25,000 people, has many times that in registered offshore trust entities. The Cayman Islands and Bermuda, also with very small populations, have booming financial services industries as well. We can take Nevis, which is said by some modest local practitioners to be only a 'fledgling' industry, but which already has five registered offshore trust companies for every inhabitant on the island; and growing. A simple Google search for Nevis offshore trusts generates 670,000 results in 0.34 seconds.

So, does size matter? If so, in what ways?

Size of service providers

There is also the question of the size of firms and service providers in these jurisdictions. With regard to the Bar, the small size of our territories has meant that, traditionally, firms have tended to take on a general practice in broad areas of the law. But with the recent significant growth in the sector of offshore trusts, the small firm or sole practitioner model may not be sustainable for those looking to offer services in the sector. The question again is, does size matter?

The nominees for tonight's awards are all large, multinational firms and several other large multinational service providers are represented here tonight. In territories with a small local Bar, it may be difficult for the firms with traditional general practices to garner the expertise required to compete against specialist service providers for the multi-national work that is increasingly common in the region. Healthy competition is important. Survival is also important. I note that proactive partnerships and collaborations are emerging between smaller local firms and larger offshore firms. For the small-firm model to continue to compete, some evolution may be needed to thrive in today's global market.

Size of judicial institution

Let's consider the size of the judicial institutions in our small Caribbean islands. In small jurisdictions such as the Nevis Circuit where there is only one Resident Judge assigned to deal with all types of matters – criminal, civil, constitutional, matrimonial, and commercial – the question of access to the courts arises.

Are small jurisdictions where few judges with limited staff and resources must cope with all matters of general litigation handicapped by specialist or massive commercial litigation? Perhaps, 'handicapped' isn't the right word. Perhaps, the question is more accurately asked: do these small jurisdictions – despite the quality of their judges and court services – physically and logistically capable of handling commercial litigation that often spans months and amount to millions? And, can these courts accomplish this feat at the same time that they process the more rote matters of general litigation in an efficient manner that guarantees access to justice to the average person?

I suggest that the honest answers to these questions force us to consider whether the time is ripe for specialised commercial courts to become a general feature of the Caribbean landscape in justice administration. It is not a critique of smaller jurisdictions or the judges who work in them to acknowledge truthfully that these judicial institutions were simply never designed to handle the onus of large-scale commercial litigation. And there must be realism that the court system is fundamental to economic development and social stability. A highly functioning and efficient judicial institution will attract investment and undoubtedly encourage consumer trust and

confidence. So, it seems that if our existing courts do not have the capacity to handle such cases, a specialised court serving the region could be an answer.

Did the OECS model of establishing a commercial court in the BVI work as a best practice for the idea of regional courts? And if we are to take the model to its logical conclusion, isn't the time right to consider the value of a Caribbean-wide specialised commercial court – staffed by the judges with expertise in this area from the region and serving the region as a whole? Wouldn't everyone benefit? I do not doubt that the question of resources is an issue here. But given the importance of the financial services industry to the GDP of these territories, surely investment in this area should be a priority. Does the fact that the jurisdictions are competing with each other undermine the value of a cooperative approach to institutional efficiency and effectiveness? After all, isn't substantial investment in a high-quality product necessary to protect the existing industry and to continue to attract clients?

Conclusion

Who should advocate for reform? The issues that are involved in reform affect a key branch of the economy and a much specialised area of professionalism. It would seem that a powerful body of professionals would be best-equipped to play a leading role. These are areas which will benefit the service providers and the region as a whole. Maybe a call from an august organisation such as this may assist in pointing to an appropriate direction to move in, and be a catalyst to reform and development in this area. While healthy competition is important, perhaps consideration might be paid to the idea of uniting for the common good of improving the existing landscape for service providers.

I hope that my questions provoke some dialogue among you. Thank you all.



The Right Honourable Sir Dennis Byron