

Offshore: Arresting Development

By David Kessaram and Stephen Notman

In the keynote address to the Legal Week Trust & Estates Litigation Forum recently Lord Hoffman spoke about the need for the offshore jurisdictions to focus on the judicial infrastructure supporting their respective legal systems. He cited examples of certain mishaps — some of which have already been much commented on, others not so well known.

Few would dispute that such criticism as there has been of, for example, what occurred in the Thyssen case was justified. Neither could there be any doubt about the importance of a properly functioning judicial system in promoting a domicile as a place to conduct international business or in building a reputation for excellence. Boasting about the Privy Council being the ultimate court of appeal might be a good selling point in promoting an offshore jurisdiction, but would it not be better to be able to say that you will probably never need to go that far to obtain justice?

Had Lord Hoffman asked what Bermuda has done about improving its legal system (including its judiciary), Bermuda would have been able to respond with some positive developments.

The Commercial Court

On 1 January, 2006, as part of a host of major changes to the rules of the Supreme Court, Bermuda established a commercial court, making it possibly the first offshore financial centre to provide a specialist court of this kind. The express mandate of the court is to hear “any claim or counterclaim arising out of the transaction of trade or commerce”.

The court consists of a permanent panel of three experienced judges with a background in civil law and proficient in dealing with complex commercial cases. The court has, in its short history, demonstrated its

readiness and ability to deal with such cases with acumen, expedition and an appreciation of the needs of the parties involved.

The Rules of Court

At the same time as the commercial court was founded, the rules of the Supreme Court were significantly updated to the state of the pre-Woolf UK rules. The changes wrought by the new rules may be viewed as a first step towards the full introduction of the Woolf reforms.

This first step was achieved by grafting on to the updated rules the overriding objective requiring the Supreme Court (in exercising its powers under or in interpreting the rules) to have regard to those matters that are considered essential for the just handling of civil proceedings; for example, ensuring that a party that is weaker financially is not overborne by a party with a bigger fighting fund, making sure cases are dealt with expeditiously, and so on. Judging by the number of times the overriding objective is mentioned in the judgments coming out of the Supreme Court since its introduction, it is clear it is something the judges are fully conscious of and keen to implement.

Another important change to the rules was effected when a new costs regime was put in place. Previously, successful applicants could hope to recover only about 30%-40% of their actual legal costs due to outdated and unrealistic fee schedules that required the pigeonholing of all work on the case for which costs were recoverable.

Now the rules have provided the standard and indemnity bases for the recovery of costs whereby the variables in assessing the amount recoverable from the losing side are the reasonableness of the amount

claimed and whether the work in question was reasonably necessary to achieve justice — the main difference between the two bases being the incidence of the burden of proof in establishing the reasonableness or unreasonableness of the amount claimed.

The Judiciary

Without skilled judges, however, the new rules would be merely an empty shell. In this regard, Bermuda has learned its lesson from Thyssen and other mistakes of the past. The example given by Lord Hoffman in his speech of a judgment having been delivered five years after the hearing concluded was an example (albeit a very extreme one) of the sort of problems that used to plague the judicial system. But this is no longer the case. Judges of the Supreme Court have been directed that judgments should be delivered within six weeks of the end of the hearing. In the commercial court, judgments are usually delivered a lot sooner.

It is also important that the judgments are reasoned and thorough in their treatment of the issues. Maintaining this standard requires that those responsible for the appointment of the judiciary fully appreciate the importance of the judge's role, both socially and economically. As time passes and judges come and go it is hoped that the culture of professionalism and skill that has grown up in recent years will continue to be the hallmark of the judicial system in Bermuda.

If the buildings and amenities of the courts matched the amounts at stake in the proceedings carried on within, the confidence of lay and professional clients would be enhanced. Currently, Bermuda's higher-level courts are located in three separate buildings in the city of Hamilton, but only one of these appears to have been purpose-built. However, the Government does have plans for new magistrates courts and is sympathetic to the need for the Supreme Court to be properly housed. It is to be hoped that the need for adequate housing for the higher courts will not go unfulfilled for long.