

OPENING OF THE LEGAL YEAR 2016

INTRODUCTION

May it please your Lordship,

I would like to begin by welcoming our guests, His Excellency the Governor, the Chief Minister and other distinguished guests.

A particular word of welcome to His Excellency on his first attendance to the ceremony of the Opening of the Legal Year.

I would also wish to express the regret of the Bar at the death of Sir Ian Glidewell who was a member of the Court of Appeal from 1998 to 2003 and President from 2003 to 2004.

BREXIT.

My Lord, many law students, for many years past, will be familiar with the famous words of Lord Denning in the English Court of Appeal in the case of **Bulmer v Bollinger** delivered in 1974 shortly after the UK's accession to the European Economic Community.

He described the effect of the EEC Treaty as follows:

“when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back”.

Alas! Held back it will be. The foundations for the dam that will do so were laid on 23 June.

When we look back at the past Legal Year, there will clearly be a before and after 23 June. The result of the referendum on the withdrawal of the United Kingdom from the EU sent a shock wave throughout a community that voted with a massive 96% in favour of the Remain campaign on an 84% turnout. Brexit is likely to be a defining moment in our history.

There is currently uncertainty, a state of affairs that is anathema to our profession. There is uncertainty in London as UK Government Ministers and officials grapple with the enormous consequences of Brexit and on the nature of the new relationship that the UK will have with the EU.

The indications are that we may be heading towards a hard Brexit and that the negotiations with the EU will not be easy.

And uncertainty is generated on an almost daily basis. If one just looks at yesterday:

- Nicola Sturgeon, the Scottish First Minister, announced that she is to publish a draft bill next week calling for a second Scottish independence referendum in a direct challenge to Theresa May's hard-line stance on the UK leaving the EU;
- Donald Tusk, the President of the EU Council, affirmed that it would have to be hard Brexit or no Brexit at all, and he then spoke about cakes and how to eat them, or not.
- the High Court in London heard the application for judicial review brought by Gina Miller and others seeking "*a declaration that it would be unlawful for the Secretary of State for Exiting the European Union or the Prime Minister on behalf of Her Majesty's Government to issue a notification under Article 50 to withdraw the United Kingdom from the European Union without an Act of Parliament authorising such notification*".

And, closer to home, Theresa May met Mariano Rajoy to discuss Brexit and the Chief Minister, once again, took our case to Brussels and met with, among others, Guy Verhofstadt the former Prime Minister of Belgium and now the lead Brexit negotiator of the European Parliament.

For now, we, in Gibraltar, will need to live with the uncertainty Brexit has created.

We have at least the comfort of the statements that suggest that Her Majesty's Governments of Gibraltar and the United Kingdom appear to be largely in agreement on the potential for continuation of the status quo of market access between Gibraltar and the United Kingdom on a bilateral basis after Brexit happens.

Much will no doubt still have to be done in that respect and legal form will have to be given to any political arrangement that can be reached.

Additionally, whatever the new relationship between the UK and the EU may be, Spain appears adamant that Gibraltar should not form part of it.

We expect the UK Government to stand firm. In the words of the Foreign Secretary in the Foreign Affairs Committee in the House of Commons, also yesterday, there must be "*implacable, marmoreal, Rock-like resistance to Spain in relation to Gibraltar*".

Indeed, there must be.

Because, on re-reading Lord Denning's tidal metaphor, now with the cloud of Brexit looming over us, it reminded me of the no less famous words uttered by Brutus to Cassius in Julius Caesar Act 4 Scene III:

**"There is a tide in the affairs of men.
Which, taken at the flood, leads on to fortune;
Omitted, all the voyage of their life
Is bound in shallows and in miseries".**

Gibraltar has certainly taken the European tide at the flood to create prosperity and, whilst it is simply not in our collective DNA to be bound in any shallows or miseries, Brexit clearly presents us with a very significant challenge and one that we will also take at the flood.

Although we have no estuaries or rivers, EU law impregnates so many aspects of our daily lives. It is the basis upon which important sectors of our economy have flourished. It has exerted pressure on Spain to conduct its controls at the border in a proportionate manner. It has given us access to the large number of frontier workers who work in Gibraltar in virtually every sector of the economy. Indeed, approximately 40% of total employee jobs in Gibraltar are held by frontier workers. That is a very significant proportion of our workforce.

And, not least, Brexit will impact on the manner in which we exercise our very own profession. One can but wonder if, in future, European Law will still be a compulsory subject for law students in England and Wales?

Only several months before the referendum, but after 44 years of EU membership, My Lord, you made a preliminary reference to the Court of Justice of the European Union. The reference is the first one to be made by a court in Gibraltar. It may well be the last one!

In our field, we now take for granted the numerous gateways that the EU has offered us, be it by way of recognition and enforcement of judgments, mutual legal assistance, the taking of evidence in civil or commercial matters, the European Arrest Warrant, the European Investigation Order, to name but a few. All of them have been invaluable and have helped in making Gibraltar a better and safer jurisdiction.

Our law enforcement agencies, in particular, the Royal Gibraltar Police, will also face new challenges as these and other measures will possibly cease to apply and will need to be replaced.

In my speech last year I mentioned that, on 14 July, the High Court in London had referred a series of questions to the Court of Justice of the European Union in the action brought by the **Gibraltar Betting and Gaming Association (GBGA) v HMRC**. The Gibraltar Government is an intervener in that case, and we are leading on one of the questions referred, namely, whether, for the purposes of EU law, Gibraltar ought to be considered as an integral part of the Member State UK. It was an important question for our jurisdiction before the referendum. It is an even more important question now, since the answer the European Court will deliver may well have an impact on Gibraltar's own position in the Brexit negotiations. The case was heard by the Grand Chamber of the European Court ten days ago (4 October), where I appeared with Lord Pannick QC for Her Majesty's Government of Gibraltar, and the Opinion of the Advocate General will be delivered on 15 December of this year.

And so My Lord, in view of all of that, I feel I may have to avail myself of the British talent for the understatement to say that it will be an interesting year for us on the European front, as the seeds for the future relationship with the EU start to be sown.

LEGISLATION.

My Lord, legislative activity has continued at a steady pace during the last Legal Year.

On the domestic front, one of the more notable additions to the statute book is the Mental Health Bill 2016 which was approved by Parliament last week. It is a substantial piece of legislation that updates this important area of our laws.

Other notable Acts that have entered into force during the last Legal Year have included the Fair Trading Act (7 October 2015), the Proceeds of Crimes Act (28 January 2016) and the Employment (Amendment) Act which entered into force yesterday simplifying and speeding up the adjudication process.

Of more direct relevance to our profession, and as I am sure you will all know, the Government and the Bar Council have now jointly published a Consultation Paper for

a Legal Services Bill that will bring an overhaul of the regulation of legal services in Gibraltar. The Chairman of the Bar will address this matter in his speech.

On the EU front, the customary wave of EU measures, covering a myriad of areas, have been complied with. I am glad to report that Gibraltar continues to be at the forefront of timely and full compliance with the transposition of EU measures.

Without question the most significant Act to be adopted in the past 12 months has been the European Union (Referendum) Act 2016. This presented us with significant challenges, not least coordination with the legislation in the UK, working to tight deadlines and the ability to react to changes at short notice. The Bill was published on 24 December. It was debated in Parliament on the back of a certificate of urgency in January of this year and passed.

Hansard reflects that both sides of the House saw fit to reflect favourably on the work that was achieved. I would like to thank publicly Parliamentary Counsel Paul Peralta and Crown Counsel Nadia Sisarello-Parody for the sterling work they carried out.

Of course the result of the referendum now means that even more drafting challenges may lie ahead – in the opposite direction! Possibly starting with a Great Repeal Act which will be as necessary and relevant here in respect of our own European Communities Act as it will be in the United Kingdom. I have already discussed at length with the Chief Minister, on behalf of the Executive, what the essential aspects of such an Act are likely to be for Gibraltar and of the legislation that may have to follow shortly thereafter. The UK intends to introduce its own Act in its next parliamentary session, which starts with Her Majesty's speech next May and we will no doubt be working with colleagues in London as well as perhaps in Edinburgh, Cardiff and Belfast on what the Bills for such Acts are likely to have to contain.

On the international front, we have been working towards the extension of two of the core UN Human Rights Conventions, the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women as well as a Bill on protecting the rights of those with Disabilities. Work is also under way on a new

Extradition Act as our current legislative framework is deficient and is causing us difficulties in extending various international conventions to Gibraltar.

OCPL

My Lord, criminal litigation has occupied the majority of the time of Office of Criminal Prosecutions and Litigation. Under the Criminal Procedure and Evidence Act (CPEA) disclosure has become a big issue and the sort of case review that we now have to do is much more detailed than it was in the past.

On the plus side, the new legislation (CPEA and the Crimes Act) has meant that there is a wider array of offences to fit specific misconduct and an ability also to manage offenders to minimise risks and safeguard the public. This is quite noticeable, for example, in the area of sexual offences. We are now much better equipped, working together with the Royal Gibraltar Police, to deal with and manage serious crimes of this nature.

Recent convictions have undoubtedly increased public confidence resulting in members of the public coming forward with historical complaints. Last year alone saw a 50% increase in Orders obtained and 8 convictions for sexual offences. In terms of convictions generally we compare very favourably with the conviction rates of England and Wales.

Another new area of law which we have been involved in is advising the Royal Gibraltar Police on the Proceeds of Crimes Act and taking steps to restrain property with a view to confiscation proceedings in the future. We have also obtained Orders from the Supreme Court to retain cash which has been seized by the Royal Gibraltar Police.

As is now customary, Mr Rhoda represented Gibraltar and delivered a paper at the International Economic Crime Conference which is held annually at Jesus College, Cambridge. It is attended by ninety eight countries and our attendance in such conferences is invaluable in raising Gibraltar's profile.

GFA v FIFA

Those who know me will know that one of the convictions that drives me most in my professional life is my firm belief that Gibraltar can progress as a nation through the application of the rule of law in the courtroom. On 27 April 2016 we received an important judgment from the Court of Arbitration for Sport in Lausanne in the case brought by the **Gibraltar Football Association v FIFA**. Taking up the argument made by the GFA that there was “*no legitimate dispute*” in relation to Gibraltar, the Court, in a strongly worded passage of the judgment, held that FIFA’s “*allegation that Gibraltar is a disputed and/or sensitive territory...is legally and factually misplaced*”; that since the Treaty of Utrecht “*Gibraltar has undeniably been under the stable sovereign control of the United Kingdom, the right of self-determination of the local population even being clearly expressed in favour of the United Kingdom*” in the 1967 referendum; and that “*under public international law the sovereignty of Gibraltar is clearly British and no actual legal dispute is presently pending*”.

With steps like this, we move forward.

CONCLUSION.

My Lord, I hope I have given a reasonable overview of the more important themes that concern our jurisdiction.

It remains for me to formally move for the Opening of the Legal Year.

Michael Llamas QC
HM Attorney General for Gibraltar

14 October 2016