

OPENING OF THE LEGAL YEAR 2017

May it please your Lordship.

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

I would like to express a particular word of welcome to two other guests.

The **Right Honourable the Lord Mance**, who we have the privilege of having here with us today as a guest of the Gibraltar Bar Council. Only last week he was appointed Deputy President of the Supreme Court of the United Kingdom. He will be sworn in on Monday. On the day before the Opening of our Legal Year last year (14 October 2016), the High Court in London heard the application for judicial review brought by Gina Miller and others for a declaration as to whether the UK Government required the authority of an Act of Parliament in order to issue a notification under Article 50 TEU. That case went on appeal to the Supreme Court which delivered judgment on 24 January 2017 with the result that we know and, thankfully, without the Justices being branded Enemies of the People as their colleagues in the High Court had so disgracefully been described in the English press. Many of us were captivated by the live transmission of the hearing in the Supreme Court in that seminal case. It was one in which Lord Mance featured prominently and in which he formed part of the majority judgment. Of the many aspects of such a highly distinguished career, I would like to, if I may, thank Lord Mance, particularly for his significant contribution to European and International Law.

Lord Mance, on Monday you shall be joined at the Supreme Court by **Sir David Lloyd Jones** who will be sworn in as Justice. David was my pupil master many years ago and a tremendous inspiration to me. Please pass my warmest regards and congratulations to that great man and jurist.

And secondly, the **Honourable Neil Costa MP** who became our Minister of Justice on 20 October 2016. In the last 11 months, through his determination and commitment, he has driven through a remarkable amount of important Government commitments to reform the legal system and the administration of justice in Gibraltar. I would single

out the adoption of the Law Commission Act (20 July 2017) establishing a Law Commission which I am sure will create the necessary platform for the reform and consolidation of the laws of Gibraltar and other important improvements that the Chairman of the Bar will be announcing in his speech. I have particularly enjoyed our regular meetings, not least, the discussions we have had in delineating the roles and functions of our respective offices in our unique jurisdiction.

My Lord, I wish to express the regret of the Bar at the death of Sir John Fieldsend who was a member of the Court of Appeal from 1986 to 1991 and its President from 1991 to 1997, as well as Messrs Momy Levy, Charles Gaggero and Jimmy Galliano who, in addition to being three highly distinguished members of our community, also served as Justices of Peace.

This week I was meant to be in Bermuda participating in the Annual Conference of the UK and British Overseas Territories Attorneys General. That Conference was cancelled as a result of the devastation suffered in some of those territories by the catastrophic hurricanes. I would like to express, on behalf of the Gibraltar Bar, our sympathy and support to our fellow professionals and other British nationals especially in Anguilla, the British Virgin Islands and the Turks & Caicos Islands who were particularly affected by the tempests.

BREXIT.

My Lord, the cloud of Brexit loomed over us when I delivered my speech last year. And when I sat down to prepare today's speech I was dumbstruck when I realised that so much has happened and has been done since then.

As the Prime Minister sent the Article 50 letter to the European Council (29 March 2017), and **as** she has been setting out her vision for the new relationship between the UK and the EU in speeches delivered in places as diverse as Lancaster House (17 January 2017) and Florence (22 September 2017), for our part, Brexit-related work has been incessant in the last 12 months.

The Government has prepared a wide range of Heat Maps, done to Whitehall templates, containing an in-depth analysis of the implications of Brexit on the main sectors of our economy. They were completed by December of last year and covered matters such as the importance of a free flowing border to the Gibraltar economy and matters which are directly relevant to the practice of our profession notably Financial Services, Online Gaming, JHA and access to the European single market for Services.

It has also included the Chief Minister giving powerful evidence, as the leading political advocate of Gibraltar's case, before the House of Lords European Union Committee (13 December 2016), the House of Commons Select Committee on Exiting the European Union (25 January 2017) and the influential Committee on Constitutional Affairs of the European Parliament (30 January 2017). Delegations led by the Chief Minister and Deputy Chief Minister have met up with Ambassadors of 24 out of the 27 EU Member States, both in London and Brussels. And, of course, discussions with London have been relentless.

One important achievement has been the establishment of a Joint Ministerial Council ("JMC") whose remit is specifically "*to ensure Gibraltar's requirements are taken into account in the UK's preparations for the process of exiting the EU*". It met for the fourth time last Monday and is proving to be an invaluable negotiating forum. It is led by the Parliamentary Under-Secretary of State for Exiting the European Union, Robin Walker MP and by the Chief Minister. On the UK the side, the JMC includes officials from a wide range of Whitehall Departments, notably the Cabinet Office, the Department for Exiting the EU, the Foreign & Commonwealth Office, the Home Office, the Department of International Trade and Her Majesty's Treasury.

The presence of these UK Government Departments in the JMC reflects the areas which we have informed the UK Government are of particular importance to Gibraltar in Brexit. And that message has been made loud and clear by our political leaders. Because, notwithstanding the complexities of Brexit, the Gibraltar Government's Brexit strategy has been clear for a long time now. And it comes down to two basic propositions: a free flowing border with Spain and the maintenance and enhancement of trading relations with the United Kingdom.

Whereas issues relating to the border need to await further progress to be made in the UK-EU negotiations, the maintenance and enhancement of trading relations with the United Kingdom is impervious to those negotiations. And, under the aegis of the JMC, we have now been able to establish inter-governmental Working Groups precisely in order to achieve that.

In particular, building upon the solid commitment given by Secretary of State Liam Fox in last year's Gibraltar Day in London (24 October 2016), where he confirmed that the UK will maintain Gibraltar's current access to the UK market in financial services and that it will seek to "*broaden our economic cooperation and increase market access*" in other sectors, we have now established Working Groups on Financial Services and Online Gaming and discussions are well under way in respect to these two vital areas of our economy. We will also soon be hosting visits from officials from the Department of International Trade to explore Gibraltar's participation in the free trade and investment agreements that the UK will be able to enter into once it recovers its sovereignty to do so after Withdrawal. Discussions have also been continuous on a large number of other issues such as the border, frontier workers, taxation, the environment, BGTW and transport.

And, of course, the Government reacted immediately to the insertion of Clause 24 in the European Council's Guidelines defining the EU's Framework for the Withdrawal Negotiations which were adopted on 29 April 2017. Clause 24 purports to give Spain a veto on the application to Gibraltar of a future EU-UK agreement. We are ready to challenge the lawfulness of Clause 24, if and when the need arises.

My Lord, Brexit has certainly occupied much of my own time in the last year. May I say that it is an honour and a privilege for me to be able to assist the Chief Minister and the Deputy Chief Minister in their invidious task of steering our nation through these historic negotiations that will no doubt have a profound impact on Gibraltar and, not least, on the practice of our profession.

The fact that I have been able to devote so much of my time to it is in no small measure thanks to the work carried out by the team of lawyers in the Government's Law Offices, who get on with the domestic and other work that needs to be done. I would like to

thank Lloyd DeVincenzi who leads the Office of Advisory Counsel, Paul Peralta, who leads the Office of Parliamentary Counsel and Ricky Rhoda QC who leads the Office of Criminal Prosecutions and Litigation, as well as their respective teams, for all the work they have carried out in the last year.

OFFICE OF ADVISORY COUNSEL

Over the past year, the Office of Advisory Counsel has continued to provide legal advice on complex and often sensitive matters to Ministers, Government departments, agencies and statutory bodies. The team's work-stream has also seen a steady expansion over the last year, including working with me in Gibraltar's first (and possibly last) preliminary reference to the European Court of Justice and making representations before the OECD plenary session on the Anti-Bribery Convention. The team has also seen its role grow in providing a de facto 'Crown Commercial Service' function.

OFFICE OF PARLIAMENTARY COUNSEL.

In the last 12 months, the Office of Parliamentary Counsel has been fully engaged in the delivery of an extremely intensive domestic legislative agenda whilst also continuing to transpose EU measures and other international obligations.

In the last 12 months, Parliament has passed a total of 19 Acts, including the Law Commission Act, the Disability Act, the Governor's Emergency Powers Act and, of course the Legal Services Act. I am sure we are all eagerly awaiting the commencement of this legislation, expected early spring 2018.

We have also legislated in the important area of tax and financial transparency ensuring that Gibraltar remains at the forefront of compliance with all EU, international and UK-led tax initiatives in this area. This has included legislation applying the OECD's Common Reporting Standard ("CRS") on automatic exchange of tax and financial information¹, legislation applying the OECD Action Plan on Base Erosion

¹ The International Co-operation (Improvement of International Tax Compliance) Regulations 2016 which entered into force on 22 December 2016.

Profit Shifting (“BEPS”) and legislation establishing a register of ultimate beneficial owners².

This last year has also seen the entry into force of the European Investigation Order Regulations 2017 (22 May 2017) which transpose an EU Directive³. They replace the former mutual legal assistance regime under the Schengen Convention and speed up and simplify the process of assistance between jurisdictions. This year we have already received 54 requests for mutual legal assistance, 4 of which have come to us under this new regime.

One lamentable situation, which I have alluded to in the past, is that the EIO regime, like other highly effective EU gateways for mutual legal assistance, does not apply between the UK and Gibraltar. The underlying reason for this was confirmed by the Grand Chamber of the European Court of Justice in a judgment delivered on 13 June 2017 in C-591/15, Gibraltar Betting and Gaming Association v HMRC. The European Court ruled that for the purposes of EU law the UK and Gibraltar form part of the same Member State. The consequence of this is that EU measures, such as the EIO Directive, do not apply between Gibraltar and the UK. Whereas Gibraltar nonetheless has taken the policy decision to apply such measures to the UK, the UK has not done so. This is largely due to the fact that the UK implements EU obligations using the power conferred by section 2(2) of the European Communities Act 1972 which only gives it vires to implement rights and obligations arising under EU law and therefore excludes Gibraltar. This means that Gibraltar has, today, better mechanisms for mutual legal assistance with, say, Bulgaria, Estonia and Latvia than with the UK. That is what is lamentable.

Only very recently this issue came to the fore, when we received a Letter of Request from the Crown Prosecution Service in the UK in criminal proceedings involving charges of murder, arson and burglary. We were not able to assist them, when we would have been able to do so with any other EU Member State under the EIO regime.

² The Register of Ultimate Beneficial Owners Regulations 2017, entered into force 26 June 2017.

³ Directive 2014/41/EU regarding the European Investigation Order in criminal matters.

It is perhaps one of the **opportunities** of Brexit. Notably, to the extent that the UK can and does retain in its domestic law EU gateways for mutual legal assistance, it would now do so as a matter of English law and not EU law nor pursuant to section 2(2) ECA 1972 which will be repealed. Therefore, it would be able to extend such legislation to Gibraltar. This could cover the EIO regime as well as Brussels I⁴ and Brussels II⁵ which are particularly important to our jurisdiction.

OFFICE OF CRIMINAL PROSECUTION AND LITIGATION

My Lord, important amendments have also been made in the last year to our criminal legislation.

This has included a series of amendments to the Proceeds of Crime Act (“POCA”) such as the implementation of the 4th. EU Money Laundering Directive, the extension of the requirement of enhanced due diligence, the ability to obtain restraint and charging orders at the investigation stage and the creation of a statutory basis for the Gibraltar Financial Intelligence Unit (“GFIU”).

The OCPL has continued to work very closely with the Money Laundering Investigation Unit of the Royal Gibraltar Police as well with the Financial Investigation arm of HM Customs. Members of the Office also have weekly meetings with the GFIU as well as monthly meetings with all agencies involved in law enforcement.

Since the introduction of POCA, and particularly its amendments, there are some 40 matters which have an element of money laundering and are either under active investigation or the suspects have been charged and are awaiting appearances before the courts. Four Crown Counsel are now providing input into this growth area of crime.

A considerable amount of preparatory work has also been undertaken in readiness for the Moneyval evaluation that will be assessing our compliance with the principal international standards to counter money laundering and the financing of terrorism. The evaluation is due to take place at the end of 2018.

⁴ On jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁵ Concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters.

OTHER EVENTS OF THE LAST YEAR.

My Lord, of the other events of the last year I would like to mention Mr Rhoda's now traditional attendance at the Cambridge Symposium on Economic Crime and Mr Peralta's attendance at the Conference on Legislative Drafting organised by Commonwealth Association in Melbourne. We are grateful to them both for representing Gibraltar in those important fora.

In December 2016, the Child Protection Committee ("CPC") was restructured and revised. This Committee was created under the Children Act 2009, with the purpose of bringing together key agencies to ensure that local safeguarding arrangements and child protection procedures are effective. In February 2017, it commissioned Julie Dugdale from Barnardo's UK to deliver a very well attended three day training event.

The Head of Children's Services has met recently with the CEO in the Court Service, Ms Hazel Cumbo and the Registrar, Mr Liam Yeats, to discuss Children and Family advisory support service⁶, care proceedings and new developments in this area.

In the summer we saw the departure of Mr Justice Jack who, like Mr Justice Black before him, came to Gibraltar on a fixed term contract to attend to the short term needs of the judiciary. We are grateful to him for the work done. My Lord, I noted from your public statement last August that, in the period 2010 to 2016, there has been a very significant decrease in the number of originating applications in civil ordinary actions coming before our courts. It seems to me that this fact of itself vindicates the current system of fixed term contracts that provides the flexibility to recruit or retain additional puisne judges when there is a need to do so.

⁶ CAFCASS stands for Children and Family Court Advisory and Support Service. CAFCASS represents children in family court cases e.g. in divorce and separation, care proceedings and adoption. They are independent of the courts, social services, education and health authorities and all similar agencies.

GOVERNOR.

Finally, my Lord, one area of development in my work in the last year has been this.

One of the peculiarities of the role of Attorney General in a British Overseas Territory is that the Attorney acts as legal adviser to both the elected Government and the Governor. In his book "British Overseas Territories Law" Ian Hendry describes this dual advisory role as one that can place the Attorney in a "*slightly uncomfortable position*".

During the course of the last year I have had the privilege to work closely and productively with HE the Governor. Although he says he is a man more of the field than the law books, I can confirm that he is a natural in matters of the law and it has been an education for me to share thoughts with him and to find pragmatic solutions to the various issues that have come our way.

HE plays a leading role in the Gibraltar Contingency Council which he now co-chairs with the Chief Minister and which led to the table-top exercise held only last week (Thursday 21 September 2017) where we rehearsed the action to be taken in the event of a terrorist incident in Gibraltar. We are also working closely on the ongoing drafting of security-related legislation, notably, on counter-terrorism, interception powers, extradition, immigration and the armed forces. All, unfortunately, vital legislation in the world in which we live in today.

CONCLUSION.

My Lord, it remains for me to formally move for the Opening of the Legal Year.

**Michael Llamas QC
HM Attorney General for Gibraltar
29 September 2017**