

1 challenging or questioning in any way his
2 right to sit as Chief Justice, I don't know
3 why you would even ask it, in any context.
4 It is your cross-examination though.

5 289. MR. McKENZIE: Now you have lost me. I
6 am just trying to decide...we have a
7 Constitution in Barbados. There seem to be
8 two versions of it.

9 THE DEPONENT: No, sir.

10

11 BY MR. McKENZIE:

12 290. Q. Okay, that is what I am saying, this
13 is like...

14 A. One Constitution...what do you mean
15 about the age of retirement of Chief Justice...

16 291. Q. No, no. The point was, somewhere in
17 all of this there were two versions of a
18 Constitution. One said one thing and one said
19 another. I am saying...have we cleared that up now?

20 MR. SCHABAS: I don't know what you are
21 talking about.

22 THE DEPONENT: No, there is only one
23 Constitution. It is amended from time to
24 time.

25

1 BY MR. MCKENZIE:

2 292. Q. No, no, it is okay. Maybe I will
3 show it to you off the record or something, just to
4 go...

5 A. You mean the Constitution of
6 Barbados?

7 293. Q. Well, I gather there is only one.

8 A. There is only one Constitution in
9 Barbados.

10 294. Q. Okay. There seems to be two
11 versions of it...

12 A. No, sir.

13 295. Q. ...online.

14 A. No, no. Well, all kinds of things
15 have appeared online, even saying that I am sitting
16 illegally because I have gone past the age of
17 retirement. And the age of retirement of the Chief
18 Justice is 70, and he can get an extension for two
19 years, and I am only 68.

20 296. Q. So the Constitution that says
21 that...

22 A. There is no Constitution that says
23 that. That has always been so.

24 297. Q. Okay, I think that is cleared up.

25 A. Given your version of it.

1 298. Q. You have got me confused, because I
2 thought there was only one Constitution in a
3 country, not two.

4 A. I am very glad for that.

5 299. Q. Yes.

6 A. It tells me a lot.

7 300. Q. One is enough. Okay, back to...we
8 were just discussing, just to refresh your memory, I
9 just want to make sure I understood, just because,
10 again, it is...sometimes words mean different things
11 in different systems. Rules of the Court, is that
12 like a...you used to use a series of rules that were
13 published by a British publisher to be used in the
14 Courts in England, and you adopted them in Barbados?

15 A. No, no, not quite like that. There
16 is, in one volume, the Rules of the Supreme Court,
17 which are a statutory instrument published under the
18 authority of the Supreme Court of Judicature Act . I
19 think you have rules in Canada. I saw a reference
20 to them, Civil Court something.

21 MR. SCHABAS: The Rules of Civil
22 Procedure.

23 THE DEPONENT: Rules of Civil Procedure,
24 right. Now, the Rules of the Supreme Court
25 that we are currently using were based on

1 very similar rules which originated in
2 England, and all that they did was to copy
3 them virtually, or adopted them, but with
4 little variations here and there because
5 of...to make them specific and relevant to
6 Barbados. But the foundation was the
7 English...the equivalent in English Rules.

8

9 BY MR. MCKENZIE:

10 301. Q. Okay. I just want to make sure I
11 understand. So there is a...and just using the
12 example in Canada, every year they publish a book
13 which has got the Rules that we are supposed to be
14 using.

15 A. They are amended from time to time.

16 302. Q. Right, but I am just saying we all
17 have a book.

18 A. Yes. Well, we have a book here,
19 yes.

20 303. Q. You have a book, okay, and it is
21 called the?

22 A. Rules of the Supreme Court...

23 304. Q. Okay.

24 A. ...1982.

25 305. Q. Oh, 1982?

1 A. Yes.

2 306. Q. Just a minute. I am sorry, because
3 I had something like that. Only out of interest, so
4 that...it was a brown book about an inch and a half
5 thick that said "Rules of the Supreme Court" at the
6 back.

7 A. Yes.

8 307. Q. And I was just reading it now. That
9 book, 1982, is it updated every now and then?

10 A. Yes. There have been amendments
11 from time to time. I don't recall, off the top of
12 my head, amendments as to the procedure for costs.
13 Order 59, the Rules are divided...Orders and Rules.
14 So you have, like, you know, Order 59 deals with
15 appeals, and then you have Order 59, Rule 1, Rule 2,
16 Rule 3, Rule 4 and so on.

17 308. Q. I am just trying to understand,
18 okay, if I took the Rules of the Supreme Court 1982,
19 presumably they were current in 1982, and I wanted
20 now to understand, say...let's just take an example,
21 a Rule got changed between then and now. There is a
22 committee, is there, of...

23 A. There is a Rules Committee, which is
24 established under the same Supreme Court of
25 Judicature Act .

1 309. Q. Okay.

2 A. And the Rules Committee, from time
3 to time, amend those Rules.

4 310. Q. Okay, and then the Rules Committee
5 publishes something, a document to say, "Here is the
6 new version"?

7 A. Correct, of Order 12, and that has
8 to be...it has to be signed by all the members of
9 the Rules Committee, and then published in the
10 Official Gazette.

11 311. Q. So that would be...

12 A. And that is notice they were.

13 312. Q. So the Official Gazette would be the
14 official launch of the new Rule?

15 A. That is right, once they are
16 published in there, then they are official.

17 313. Q. Right, and just to be sure that we
18 have an understanding, different people may not know
19 what an Official Gazette is in Barbados, is it a
20 government...

21 A. Yes, it is a government publication
22 that comes out at least once a week, sometimes
23 twice. It is published...printed and published down
24 here at the Government Printery. You can go there
25 and get a copy of the Constitution, too. They

1 publish that.

2 314. Q. I can get an official copy from
3 there...

4 A. Yes.

5 315. Q. ...instead of on the Internet.
6 Super.

7 A. I think you better do that, buy it
8 from there. It will be...

9 316. Q. Well, I am just saying, but back to
10 the Official Gazette...

11 A. Yes.

12 317. Q. ...I could go over there right now
13 and buy every Official Gazette since 1982, could I,
14 theoretically?

15 A. I couldn't tell you, they probably
16 must have these things, a permanent record. If not
17 there, they will be in the archives. The Official
18 Gazette consists of many things. Every person who
19 is permanently appointed in government, for example,
20 from time to time...if I was appointed tomorrow as
21 whatever, it would be published in the notice. When
22 a judge goes on vacation leave, or any leave, it has
23 to be published there. Justice Waterman was granted
24 five days' duty leave to attend the Commonwealth
25 Lawyers' Conference in Jamaica, you know, whatever.

1 318. Q. Okay.

2 A. And also every Bill, every Act of
3 Parliament, every statutory instrument, be it
4 Ministerial Order or whatever, has to be published
5 in that, and then they are sent out.

6 319. Q. So you said they are published,
7 perhaps as often as once a week?

8 A. No, no, I am certain once a week,
9 but sometimes more often. Sometimes they publish a
10 Special Gazette.

11 320. Q. Generally speaking, and I know you
12 are going to have reservations, it is sort of the
13 official acts of the government recorded someplace;
14 is that fair, for the country?

15 A. Not official acts of the government,
16 because what also comes up in the Official Gazette,
17 from time to time, are the Hansard reports.

18 321. Q. They are in the Official Gazette?

19 A. Oh, yes.

20 322. Q. Just to be clear, Hansard is just
21 a...

22 A. Well, I call it Hansard. It is a
23 parliamentary proceedings that proceeded in the
24 House of Assembly, proceeded in the Senate, they are
25 verbatim in there.

1 323. Q. So that all of those could be in any
2 particular Official Gazette?

3 A. Well, I think they might be a little
4 bit behind with the actual verbatim reports. So you
5 get the Gazette and as an insert to the Gazette you
6 may find in there, on any one occasion, a copy of
7 the debates of the House of Assembly for Tuesday,
8 the whatever day of whatever year. Plus you might
9 find an amendment, for example, to the Evidence Act,
10 which passed Parliament. That could be in there.
11 You could find where some Minister made an Order or
12 whatever. Various things.

13 324. Q. Okay, I think I have got the idea
14 now. I am just saying, so I could go over to
15 this...

16 A. Government Printery.

17 325. Q. ...government office and get a copy
18 of all of them, it would just be a matter of
19 ordering them. They might not have them all there,
20 but they could get them all for me?

21 A. Probably.

22 326. Q. Just write them a...make an order of
23 some kind and say, "Give them all to me"?

24 A. Certainly you can...at the end of a
25 year, they publish all of the Acts of Parliament for

1 that year. By law, they must publish an annual
2 volume of the laws of Barbados. But they are
3 falling behind, I think I have one for 2006, but not
4 2007.

5 327. Q. It is just the changes in the laws,
6 or the actual...

7 A. No, no.

8 328. Q. A whole new set?

9 A. The whole thing. So if, you
10 know...if Parliament passed 30 laws last year, you
11 would get in one volume Acts number 1 to 30. There
12 will be a variety of things.

13 329. Q. Okay, I have taken this perhaps too
14 far afield, but back to the Rules. So, in
15 principle, I could go to this government office. I
16 could get the Rules of the Supreme Court 1982. I
17 could read every Official Gazette, and I would know
18 right up to date what Rules had been changed from
19 1982?

20 A. No, you wouldn't have to rely on the
21 Official Gazette for that, because the Rules would
22 contain the amendments from time to time. If they
23 were giving you the latest version of the Rules,
24 they should give you the basic 1982, plus the
25 amendments.

1 330. Q. Sorry, this is an official body that
2 publishes the Rules?

3 A. No, I said to you that the Rules are
4 made under the authority of the Rules Committee.

5 331. Q. Okay, I am losing it just because I
6 am too used to what all the jurisdictions I deal
7 with, what I am used to, which is there is a private
8 party, Carswell or Carthy, who, once a year, gets
9 them all updated, and puts them in a package and
10 prints them for us lawyers.

11 A. Our equivalent of Carswell is the
12 Government Printery.

13 332. Q. Right, I understand that, but I am
14 saying...

15 A. But how those Rules come to be
16 amended, surely in Canada, depends upon some
17 authority that creates the amendment.

18 333. Q. I understand that. I mean,
19 somebody...

20 A. So that is our Rules Committee.

21 334. Q. I understand, the Rules Committee is
22 made up of lawyers...

23 A. All of the judges, members of...I
24 think the president of the bar, and maybe another,
25 probably two members of the bar...

1 335. Q. Okay.

2 A. ...Solicitor General, Chief
3 Parliamentary Counsel, that is all.

4 336. Q. Okay, I am sorry, I am back to...so
5 is what you said that I could go and buy one book
6 right now that would tell me what all the Rules up
7 to date are?

8 A. Of the Supreme Court.

9 337. Q. Yes.

10 A. Yes.

11 338. Q. Okay. Because that is where I lost
12 you. I thought the last publication was in 1982.

13 A. No. That was the year...that is the
14 title of the Rules, because they were published and
15 came into force in 1982.

16 339. Q. I understand, okay.

17 A. But we have new Rules, which are
18 going to replace those, which are the Rules of the
19 Supreme Court 2008, and they won't come into force
20 and effect until next year. And these are the Rules
21 that change the whole culture of practice and bring
22 in Case Management and get rid of a lot of the
23 archaic language of the old Rules and so on.

24 340. Q. Okay, these are Rules of Civil
25 Procedure?

1 A. Yes.

2 341. Q. All right.

3 A. Equivalent to your Civil Procedure
4 Rules.

5 342. Q. Yes. I will take a step back now.
6 So the new ones have been passed...

7 A. Approved.

8 343. Q. Approved?

9 A. Approved by the Rules Committee,
10 published in the Official Gazette for the 8th of
11 September, 2008. And they are waiting for me to
12 issue a date when they come into force.

13 344. Q. So those Rules are hopefully all of
14 the Rules of Practice with respect to how civil
15 trials are conducted?

16 A. In the High Court and Court of
17 Appeal.

18 345. Q. Correct, and they are hopefully
19 meant to streamline things, touch wood, but I may
20 have misunderstood you, but you were speaking of you
21 were using up to 1999 Rules that came from England
22 from...

23 A. No.

24 346. Q. ...Lord Woolf?

25 A. No, no. Let me just explain. These

1 new Rules that were gazetted on the 8th of September
2 this year are based on the English Civil Procedure
3 Rules that are known as CPR, which were developed by
4 Lord Woolf, the then Lord Chief Justice, in 1999 in
5 England. In other words, the model for our Rules is
6 the English Rules 1999.

7 347. Q. All right.

8 A. Does that explain it?

9 348. Q. I have it clear, and I am sorry I
10 misunderstood you before, but these new Rules that
11 you are about to decide will come in force, when you
12 do...

13 A. Yes.

14 349. Q. ...I am not going to ask you, that
15 is your prerogative presumably, will...

16 A. Early next year.

17 350. Q. Well...

18 MR. SCHABAS: He has told you, he said
19 they will be early next year.

20 351. MR. McKENZIE: Well, that is in the
21 future, shall we say? Right.

22

23 BY MR. McKENZIE:

24 352. Q. Are they contingent on the
25 successful completion of the courthouse, the new

1 courthouse, and the successful implementation of the
2 Judicial Enforcement Management Software?

3 A. All right, you put it rather high,
4 but I say yes to that.

5 353. Q. I am just saying...

6 A. I don't want to bring them before
7 the new Supreme Court is ready, because that Supreme
8 Court is going to be wired for the latest
9 technology. We have the latest technology, which is
10 the same as operates throughout the region from the
11 Caribbean Court of Justice in Trinidad to the whole
12 of the Eastern Caribbean Supreme Court, Jamaica, and
13 the Supreme Court of Trinidad.

14 354. Q. I didn't understand you, and I have
15 to apologize because I didn't know whether you
16 said...one of your words, I am not sure whether it
17 was a positive or negative word. So I am going to
18 try to ask you the question, because...

19 A. Go ahead.

20 355. Q. ...to make sure we got the answer
21 correct.

22 A. Yes.

23 356. Q. Let me try it another way. The new
24 Rules will require that the whole computer system
25 runs well; is that fair? That will streamline

1 things?

2 A. We are saying that the successful
3 operation of the new Rules depends upon
4 technological support. England complained...Lord
5 Justice Henry Brooke complained in an article in
6 Amicus a few years ago that they still had not got
7 it right because they weren't given the
8 technological support for the Woolf Rules.

9 We don't want to make that mistake. So we
10 have all the hardware here. The contract for the
11 software should be signed in November, and by
12 January the software should be here.

13 357. Q. I am just going back to something
14 you said just before the break, and I am still
15 trying to clarify what you said, which was...and,
16 again, I am just asking to clarify what you mean,
17 because I forgot to tell you, I think I know what
18 you mean...

19 A. Right.

20 358. Q. ...which is...you know, I am just
21 saying that is what happens in some of these cases,
22 which is you said "Cases progress at the pace the
23 lawyers choose".

24 A. Under the present system.

25 359. Q. Okay.

1 A. The parties and their lawyers seem
2 to be in control of the cases. And that is being
3 found from Australia, England, in many Commonwealth
4 jurisdictions, I am sure in Canada before you
5 changed to Case Management, if you are for a
6 defendant, Mr. McKenzie, and your case isn't strong,
7 you have no interest in that case getting to court,
8 let's face it.

9 So you take all the technical points and
10 under our Rules you can ask for particulars of a
11 pleading, interrogatories, and all kinds of things
12 to spin out the case, and you attack the other
13 fellow's pleading. And, you know, the thing can
14 become interminable. And it is to reduce delays in
15 the justice system that Lord Woolf set up his...the
16 government set up the committee under Lord Woolf,
17 published an interim report which formed the basis
18 for the new approach to litigation in England, and
19 we are doing the same thing, because we have similar
20 problems to those experienced in England before
21 1999. And we have to accelerate the pace of
22 delivering justice to people, and we hope that this
23 system, a new court with technology in the rooms
24 will assist us in attaining that objective.

25 360. Q. Like most places, I would imagine

1 the volume of cases keeps increasing?

2 A. No, you know, last two years there
3 has been...well, nothing spectacular, but there has
4 been an increase of 100 cases filed. I gave the
5 figures at the opening of the law term. In 2006,
6 2,386 cases were filed, ordinary civil cases in the
7 High Court, as against...exactly 100, 2,296. I
8 think divorces, they will be in addition to the
9 civil cases, because we count the civil cases and
10 then we count divorces, and there are about 464
11 divorces, which more or less level pegging with the
12 previous year. But there was a little decline, 100
13 cases, not greatly, but you can take it from me that
14 none of the 2,100 cases filed every year in...

15 361. Q. Civil?

16 A. Civil cases in High Court.

17 362. Q. Civil, not...

18 A. Not criminal.

19 363. Q. ...divorce or criminal?

20 A. Excluding divorce, yes.

21 364. Q. Criminal is a whole other category?

22 A. Yes. Criminal cases in the...the
23 bulk of the criminal cases are dealt with in
24 Magistrates Courts. In the High Court, there are
25 probably about 160 that are filed. These are people

1 on indictment who come to be tried by judge and
2 jury.

3 365. Q. How many judges are there in the
4 High Court in 2008?

5 A. We have 13 judges, including the
6 Chief Justice, eight of which sit in the High Court.

7 366. Q. Have I missed something here? So
8 you have eight, that means five are...

9 A. No, the Supreme Court consists of
10 the High Court and the Court of Appeal.

11 367. Q. Right.

12 A. I said we have 13, including myself.
13 Eight judges are assigned to the High Court, four
14 plus myself sit in the Court of Appeal.

15 368. Q. So they are charged
16 with...Magistrate is a completely different
17 department, that is the lower...

18 A. The lower jurisdiction, yes.

19 369. Q. ...jurisdiction.

20 A. Smaller cases.

21 370. Q. Yes.

22 A. Yes, definitely.

23 371. Q. And you have done a remarkable job,
24 actually, holding the number of cases that were
25 started. To make this simple, are there some kind

1 of reports that you get that have the numbers for
2 the...

3 A. Yes, yes. I started it since I
4 became Chief Justice, because I thought that the
5 judiciary should be accountable to the public. And
6 every year the Judicial Counsel publishes an annual
7 report, and all the statistical data is there.

8 372. Q. That is where you got the numbers
9 you are citing to me?

10 A. Yes.

11 373. Q. Does that report also...

12 A. Two thousand and seven isn't ready
13 yet, 2006 is the year for which we...the latest year
14 for which we have a report. Two thousand and seven
15 is being prepared now.

16 374. Q. I understand that, but I am
17 just...in this flow, in other words, that you know
18 how many cases are starting, you know how many cases
19 are ending, so you know whether you are catching up
20 or falling further behind, is that all in these
21 studies?

22 A. The Registration Department keeps a
23 record of every case that is filed. That is an easy
24 thing at the end of a year, when I am preparing my
25 speech for the opening of the law term, I just call

1 up the person who does it, Mrs. Thompson, say,
2 "Well, Mrs. Thompson, can you give me the figures
3 for last year?" And she knows what I want, and she
4 gives me a printout of everything.

5 375. Q. You said the Registration
6 Department, that is the Court Registrar?

7 A. Yes, the Registration Office, but
8 Mrs. Thompson is the person who keeps the statistics
9 on computer.

10 376. Q. Right. And does she also give you a
11 report about what I will call aging of the cases,
12 like when they started and when they finished?

13 A. No. No, no.

14 377. Q. That statistic is not available?

15 A. No. Under the new system, the JEMS
16 Judicial Enforcement Management Software, a lot of
17 this information will be generated. In fact, we
18 have specifically told the software suppliers that
19 we want this kind of information.

20 378. Q. All right, JEMS is an acronym?

21 A. Yes, J-E-M-S, Judicial Enforcement
22 Management Software.

23 379. Q. I understand. The reporter has to
24 write these things down.

25 A. Yes.

1 380. Q. And does that apply...again, when I
2 am talking about cases, I am really talking about
3 cases that the High Court judges handle. So you
4 said they handle civil, divorce, criminal. Just to
5 be sure, there is no aging of cases in any of those
6 three categories?

7 A. No. There will be, yes, of course.
8 What do you mean by "aging"? Cases from previous
9 years coming forward into a particular year?

10 381. Q. I am not using a good terminology.
11 So what I said was, I guess, in the worst case, it
12 is when the file is opened by the Registrar, to when
13 it is closed by the Registrar, presumably when it is
14 closed all of the legal procedures are finished?

15 A. That is right.

16 382. Q. And the judicial system has handled
17 it. So that is what I meant by "aging". So
18 remember I said before, start date to end date...

19 A. Oh, you mean how long does...you
20 want to know how long it takes for a case to get to
21 trial or whatever? If you file your Statement of
22 Claim today, in our system it is a writ.

23 383. Q. It is a what?

24 A. A Writ of Summons here. So you file
25 your Writ of Summons, and that begins the case.

1 384. Q. All right.

2 A. And I would say that, on average,
3 well, I have to say if the lawyers are diligent,
4 that case can be heard by the trial judge within 18
5 months, if the lawyers are diligent. But as we are
6 seeing in this case, there are a number of Motions
7 and preliminary steps that can be taken, and so you
8 never get to the main trial because the lawyers are
9 skirmishing. But if everybody is reasonable and
10 wants that case to progress, that case can be before
11 the court in 18 months.

12 385. Q. Yes, what I was asking was, and I
13 was using the word "aging", and that might not be
14 the word you use, but I am saying you had
15 statistics...I am asking you this, I don't mean that
16 I am telling you this...but I am asking you, do you
17 have statistics as to...you said 18 months, that is
18 an average.

19 A. Yes.

20 386. Q. So may I suggest to you that you
21 know the figures, you know when cases started and
22 when they ended and how many?

23 A. We did an exercise about two years
24 ago, because we were trying to clean the system up,
25 to have it ready for the new technology, and that

1 required us to deal with backlog. We had an ad hoc
2 committee that I set up called the Backlog Reduction
3 Committee.

4 387. Q. Right.

5 A. And it told a story, a very unhappy
6 story about the lawyers. That is why I said the
7 cases progress at the pace of the lawyers.

8 388. Q. Excuse me, sir, did you say an
9 "unhappy story" or a "happy story"?

10 A. No, no, no, an unhappy story.

11 389. Q. Okay. I just didn't understand
12 your...

13 A. Yes, yes. No, no, no, not a
14 pleasant story at all. For example, we found that
15 there were 3,000 cases filed between 1990, which was
16 the base year, and two thousand and...don't hold me
17 to this, I think it is 2005, maybe 2004, but
18 definitely from 1990, 3,000 cases in which the only
19 documents on the file were the writ, which began the
20 case, and an acknowledgement of service. When you
21 file a writ and you serve it on the defendant, he
22 takes it to his lawyer and the lawyer signs up that
23 he is going to act for him, and that has to be filed
24 in the Registry. Nothing more beyond that, 3,000.

25 390. Q. Okay. I am sort of sitting here

1 thinking, "Well, okay, so the lawyers"...

2 A. That shows that the lawyers never
3 got those cases on the road.

4 391. Q. The lawyers, or the parties
5 themselves, had decided not to take another step; is
6 that fair?

7 A. Well, I...all right, I am going to
8 accept that, the lawyers or the parties.

9 392. Q. So they were still on the books as
10 lawsuits.

11 A. They are still there as pending
12 cases.

13 393. Q. Right. So that is a category. Did
14 it also tell a story of cases that were proceeding
15 ahead, but...

16 A. Yes, the system...

17 394. Q. Sorry...

18 A. Yes, we found...I can't remember the
19 figure now. We found a number of other cases, it
20 may have been 2,000, where there was substantially
21 more progress on the file. For example, you will
22 find the writ, the acknowledgement of service, the
23 defence, perhaps the reply, and then go on the next
24 step and apply to set the case down for hearing,
25 because you should go from reply to Summons for

1 Directions, where you apply to the Registrar and you
2 say, "Well, this case is expected to last so many
3 days, and we want discovery of documents".

4 We don't have oral discovery here. We have
5 discovery of documents, and the dates are set. And
6 once that is done, the case is ready for hearing,
7 but in a large number of those cases no progress had
8 been made to get the case before the Court. And I
9 say it is for the lawyer who is for the plaintiff to
10 apply to request a hearing. There is a form, and
11 they never did it.

12 So under the new system...you can't blame
13 the judicial system for that. It is the lawyers.
14 Under the new system, the judge will control and
15 manage that case.

16 395. Q. We have dealt with the lawyers, but
17 may I suggest there is sometimes a category when
18 everybody is ready to go, but the court is not ready
19 to go? There is no courtroom, there is no clerk,
20 the judge is missing, something like that. In other
21 words, that is another category of delay?

22 A. No, sir. No, sir. That is not
23 true. If you say to me that the judicial attitude
24 to adjournments has perhaps been too liberal, I
25 would agree. And I have gone public on it and said

1 that you have to reduce the number of applications
2 for adjournments. Don't let people profiteer on the
3 basis of applications for adjournments. But to say
4 that a judge was unprepared to do a case, that is
5 not true.

6 Under the new Rules, you will see less
7 adjournments than in the past. I have to tell you
8 that I have spared no pains and no expense in having
9 the judges properly trained to manage cases. Each
10 year we have sent two judges to England from the
11 High Court to sit with High Court judges and Masters
12 in the High Court to observe case management and the
13 operation of the new Rules in practice.

14 I have got film from the Judicial Studies
15 Board in England showing how these Rules are to
16 operate. The judges have trained, we have brought
17 judges here, we have trained the bar and the bench,
18 as most recently as the 22nd of September this year,
19 or 20th, whatever it was.

20 396. Q. What I had asked you, just to be
21 clear, and I am not sure you answered me, was when
22 this backlog management took place...

23 A. Backlog reduction committee.

24 397. Q. Reduction committee, right, so they
25 found that there was no instance, that there was no

1 responsibility that cases had been slowed down or
2 adjourned, except...

3 A. Not by the Court.

4 398. Q. Well, I just want to be clear on
5 this, this is what I don't understand, except when
6 you said perhaps judges had been lax in allowing
7 adjournments too easily; is that fair?

8 A. Yes.

9 399. Q. All right. And we are talking here
10 about civil cases?

11 A. Civil cases.

12 400. Q. And criminal cases?

13 A. Well, there isn't a lot of scope for
14 adjournment of criminal cases where people are
15 before a judge and jury. They can get adjournments,
16 yes, you can get adjournments, and you get what they
17 call "traversals".

18 You used to get them before we had
19 continuous court trials, when we had the system of
20 assizes, but a lot of that is cut out now. We have
21 cleaned up the criminal side. We are getting a lot
22 more cases done since we abolished the system of
23 assizes.

24 401. Q. Criminal cases take priority over
25 civil cases?

1 A. Yes, but there is a separate
2 jurisdiction. We tend to do criminal cases now
3 continuously throughout the year, and two judges
4 preside. In other words, we use two courts for
5 judge and jury, and they go on continuously
6 throughout the year. Before 2006, when I abolished
7 the system of assizes, we used to have criminal
8 cases heard in four months, in January, April, July
9 and October. That is all gone.

10 402. Q. I am not 100 percent sure I
11 understand you, but it can be said, then, that
12 criminal cases and the judges that hear them are
13 constantly busy...

14 A. They are busy...

15 403. Q. ...day in, day out?

16 A. The judges are busy for about eight
17 weeks at a time. I don't ask the judge to do
18 criminal work for more than eight weeks. He sits
19 two months, then he comes off, then another judge
20 replaces him.

21 404. Q. But one at a time. I take it you
22 said that are a certain number of judges. How many
23 are assigned...

24 A. Two.

25 405. Q. ...at any one...

1 A. Two. Two. I tell you two criminal
2 courts work throughout the year. They are staffed
3 by different judges, and when those judges sit, they
4 sit for two months at a time.

5 406. Q. Right, and is it the same with
6 divorce? In other words...

7 A. No, we don't have...no, divorce is
8 rotated among all the judges, except those who are
9 doing the criminal cases. I am writing a book on
10 the judicial system of Barbados when I am finished.

11 407. Q. There is one in every judicial
12 system to be written, I am sure, or more than one.

13 A. Yes.

14 408. Q. So in this backlog management or in
15 any report, is there a record of adjournments; in
16 other words, where civil cases are put over for any
17 reason? I mean, is that...

18 A. No, the backlog reduction committee
19 would not have been aware of the number of
20 adjournments a case had. You see, because, as I
21 said to you, those cases never reach the court.
22 They were almost ready, but no request had been
23 made...all pleadings were what we call "closed".

24 409. Q. So ready for trial?

25 A. Ready for trial, but the lawyers

1 never applied to have them set down for trial. The
2 Court can't set them down on its own Motion. There
3 has to be an application by whoever has carriage of
4 the case.

5 410. Q. Okay, so that is one category. Then
6 cases that are set down for trial, do you have
7 statistics on it has been set down for trial on day
8 one, it went to trial on another time?

9 A. No, we don't have statistics for the
10 cases heard and disposed of in the High Court. And
11 we don't have statistics for the number of times a
12 case came before the Court before it was actually
13 heard. The only part of the Supreme Court for which
14 we have statistics like that is the Court of Appeal,
15 maybe because we are dealing with less cases. We
16 can tell you that 80 something appeals were heard in
17 a particular year, and a lawyer for some to come
18 forward from the previous year. Ninety decisions
19 were rendered, or whatever. It is all in the
20 Judicial Council Report.

21 411. Q. But not the statistic that I am
22 asking you about, which is...

23 A. Not for the High Court.

24 412. Q. ...it was set down, ready to go for
25 trial, everybody wanted it to go to trial, and the

1 Court heard it...

2 A. No.

3 413. Q. ...on a specific date...

4 A. Right. No, we don't have statistics
5 for that.

6 414. Q. Okay, and just to finish that topic,
7 because a lot of cases are decided or resolved by
8 Motions, right? In other words, I think you might
9 call them applications here?

10 A. Yes, Motions...we have a Notice of
11 Motion, too...

12 415. Q. Well, whatever...

13 A. ...or summons, or...

14 416. Q. Okay, not the trial, but the...well,
15 maybe I am confusing myself, because you said
16 something before...I keep thinking about the way we
17 do stuff in various jurisdictions in the U.S. I
18 operate. So I am just saying, you said there is
19 document discovery...

20 A. Yes, discovery of documents.

21 417. Q. ...but no...

22 A. No oral...I believe in some
23 jurisdictions, not in the Caribbean, but elsewhere,
24 they have something called "oral discovery".

25 418. Q. Okay, I better just...

1 A. I think I saw that in one of your
2 volumes.

3 419. Q. I am sure there is lots there, but
4 there is not much we didn't...

5 A. I am not familiar with it.

6 420. Q. Okay, I am just going to go, just to
7 make sure that we understand, because the Rules are
8 so close that sometimes you think they are the same
9 and they are not. Oral discovery is sitting a
10 person down, not before a judge, and asking
11 questions under oath. Would that be acceptable as a
12 description?

13 MR. SCHABAS: Well, he...

14 THE DEPONENT: We don't have it.

15 MR. SCHABAS: He said they don't have it
16 here.

17 421. MR. MCKENZIE: I want to understand what
18 he is saying they don't have, though.

19

20 BY MR. MCKENZIE:

21 422. Q. Like, oral discovery to you
22 is...what I just...help me out here. I am just
23 saying we have a discovery system in Canada which is
24 like this...

25 A. Our discovery system is to find out

1 what documents are or have been in the custody,
2 power and possession of a party.

3 423. Q. Okay, can I...

4 A. Do you want it?

5 424. Q. No, go ahead.

6 A. To read it?

7 425. Q. No, no. I was just...

8 A. Discovery of...the procedure known
9 as discovery of documents requires both parties to a
10 civil action to disclose, on affidavit, what
11 documents they have, or have had, in their custody,
12 power or possession in their various schedules. If
13 you have, you have to say what you have. If you
14 had, but no longer have, you also have to say.

15 But there is no oral, that as much as you
16 have to do. And then, of course, you find that you
17 have inspection of documents where the parties...the
18 lawyers attend at each other's offices and examine
19 what documents have been disclosed, and copies are
20 made and you take, and then you...gradually that
21 helps to create the bundle of documents for the
22 trial.

23 426. Q. Okay, so let me just make sure,
24 again, I understand. I am back to what I was asking
25 about oral discovery. So let's try this another

1 way, which is if two lawyers are on opposite sides,
2 what you are saying is they will exchange...

3 A. Documents.

4 427. Q. ...a document...

5 A. They exchange a list...

6 428. Q. A list?

7 A. ...an exhibit list, saying, "I have
8 these documents".

9 429. Q. Okay, but I am saying that is for
10 the lawyer to disclose, or the client?

11 A. No, the lawyer. Well, the lawyer,
12 in preparing that list, will consult with the client
13 and say, "Now, what documents do you have concerning
14 this thing?" And he says, "Well, I don't have any.
15 You have all" or, "I have at home". So he would
16 say, "Bring them and look at them. We have to
17 disclose them".

18 430. Q. Yes. So in the disclosure process,
19 the client swears that is all the documents they
20 have?

21 A. Yes.

22 431. Q. Yes?

23 A. Yes.

24 432. Q. Okay. Because the lawyer doesn't
25 know.

1 A. No, no, the client swears.

2 433. Q. Yes, okay. Now, to get to the oral
3 discovery, which is there is no process here?

4 A. No, I wonder if you are...do you
5 have anything in Canada called "interrogatories"?

6 434. Q. Yes, we have all sorts of things,
7 but maybe we can...Mr. Schabas can discuss with you.
8 But I am just trying to get what we have here. In
9 other words...

10 A. Well, there is something that we
11 have in our Rules called "interrogatories"...

12 435. Q. Well, okay.

13 A. ...where you can administer
14 questions to a party, who then has to answer them on
15 oath.

16 436. Q. Okay, so I think we have three
17 categories of discovery that you have just told us
18 about now. One is oral...excuse me, I got it wrong.
19 Document discovery, interrogatories, but not oral
20 discovery?

21 A. No, interrogatories are really not
22 document discovery. Interrogatories are evidence,
23 and interrogatories go to the pleadings. So you
24 plead, as you have, that somebody...one of the
25 defendants conspired...take myself...

1 437. Q. To do something.

2 A. ...that I conspired with First
3 Caribbean by PricewaterHouse, Mrs. Knox, all the
4 people you list as defendants...

5 438. Q. Right.

6 A. ...to expropriate her property or
7 whatever. If that case were tried in Barbados, we
8 would ask a set of questions in relation to that
9 pleading. Who was present? What date, where, who
10 was present, what was said, giving the exact words
11 or narrative, and attack your pleading like that to
12 flesh out the details, at which time, once they
13 answer, I don't know if they become evidence.

14 439. Q. That is a Rule of practice that this
15 procedure is available?

16 A. That procedure is available, to
17 question a pleading, yes.

18 440. Q. In the new system or the old one?

19 A. No, in the old system. But, you
20 see, England had it, you can look it up later on.
21 And we had it, and most of the...all of the
22 countries of the Caribbean, but it is...it causes
23 delay, because, you know, you answer and then they
24 say, "Well, that answer is no good". You have to go
25 back to the judge again and get the judge to make a

1 further Order that you give further and better
2 particulars of that particular answer. So all these
3 are things that spin out a case.

4 441. Q. Sure. I am just going to go back
5 now and I want to just make it clear what we are
6 talking about when you say "oral discovery". So I
7 am going to tell you how it works in Canada,
8 generally, which is the party can be questioned,
9 live, in front of a court reporter, but not in front
10 of the judge, to get discovery. That doesn't occur
11 here?

12 A. No, that doesn't occur here. No, it
13 is...

14 MR. SCHABAS: I don't think there has
15 ever been any dispute about any of this,
16 Mr. McKenzie.

17 THE DEPONENT: Not known to the
18 English...

19 MR. SCHABAS: If I may, and I am not
20 objecting, you can conduct your
21 cross-examination whatever way you want,
22 but you have been on this issue of the
23 Rules and the discovery process for almost
24 an hour. We have a limited amount of time,
25 and I just want to put that down, that we

1 have spent a lot of time on something that
2 I don't really think there is any issue
3 about. But you conduct your
4 cross-examination the way you want it, you
5 know, but we are moving along. It is
6 almost lunch time.

7 442. MR. MCKENZIE: Thanks for the advice,
8 Counsel. I will think about it over lunch,
9 but maybe I can just finish this.

10

11 BY MR. MCKENZIE:

12 443. Q. If what I just said is what you
13 understand to be oral discovery, then you say it is
14 not available in Barbados. Okay. And the
15 interrogatories, the document discovery you have
16 told me about, which is there is an obligation on
17 the client, the party, to provide a...

18 A. A list of documents.

19 444. Q. ...list of documents, that they
20 swear under oath that it is...

21 A. That they have or have had.

22 445. Q. Disclosed, blah, blah, blah, that
23 are relevant to the case?

24 A. Yes, of course.

25 446. Q. Okay, right. And then the choice of

1 relevance, of what is relevant to the case, is made
2 by the party's lawyer, because the parties...

3 A. No, it is not relevant that the...I
4 suppose the basis for discovery is so wide that the
5 question of relevance will be determined by the
6 judge at the trial. But really the Rule says all
7 documents which bear on the issues and which are in
8 the possession of a party, or which have been in the
9 possession of the party, but he no longer has, that
10 is all I can tell you.

11 447. Q. But that is the operative words,
12 though, "bear on the issues", and I am saying...

13 A. Yes, yes.

14 448. Q. ...the lawyer for the party makes
15 that determination, and could be right, could be
16 wrong. If wrong, it will be taken up at trial?

17 A. Yes, or if you are not satisfied and
18 your client says, "But he must have such and such a
19 document"...

20 449. Q. Right.

21 A. ...then you can go back to the Court
22 and try to get it by another application, it is a
23 sub-application, a summons and affidavit in
24 chambers, no affidavit. And chamber applications in
25 Barbados for interlocutory things are very speedy

1 now since I introduced a new procedure, you can
2 be...I am not talking about urgent applications.
3 The ordinary application, if you...you have the
4 system of particulars in England...in Canada?

5 450. Q. Yes.

6 A. Or requests for further and better
7 information, as some people call it?

8 451. Q. You have got to be careful, because
9 words don't always mean what words...

10 A. Right.

11 452. Q. ...mean in the legal systems.

12 A. Right.

13 453. Q. You have to take that from me, I
14 operate in a lot of systems, and you have got to be
15 careful. Let's talk about what you just said about
16 particulars, because you...

17 A. I said something and you want to put
18 it...

19 454. Q. I just want to make this clear, sir,
20 just to help us both, which is: When you were
21 talking about interrogatories, you started to talk
22 about particulars, and I thought, "I wonder if those
23 are different things"...

24 A. No, interrogatories are answers on
25 oath.

1 455. Q. Okay, so can we just pin down what
2 that means?

3 A. The interrogatories?

4 456. Q. An interrogatory is one party...

5 A. A question administered to the other
6 party whose answers must be on oath...

7 457. Q. Okay, written...

8 A. ...relating to the matters pleaded.

9 458. Q. Okay, and now you want to talk
10 about...are particulars the same thing as
11 interrogatories?

12 A. No, particulars of a pleading would
13 be where you said, for example, that...you plead
14 very generally and the opposite party wants some
15 more detail about what you have pleaded. In other
16 words, you say, "In October, 2008 I asked David
17 Simmons about", whatever. My lawyer would say, "I
18 want to know what date in October, where he asked
19 David Simmons". So we ask for further and better
20 particulars of that pleading, that part of the
21 pleading.

22 459. Q. But that answer of a particular is
23 not given under oath?

24 A. Not given under oath, no.
25 Interrogatories...that is just...you will reply by

1 letter. If you don't reply, then you can go to
2 Court by summons and get it. What I will say to
3 you, if you have to go to Court to get the other
4 side to give particulars of pleading, and it is not
5 of exceptional urgency, that matter would be heard
6 within four weeks of the date of the application.
7 That is the point I was trying to make to you.
8 Ordinary interlocutory applications are now being
9 heard within four weeks of the date of filing what
10 we call a summons.

11 460. Q. Okay. Now, moving forward, so we
12 have now, I think, covered all the methods of
13 production and discovery of documents and evidence,
14 and then trials, we get to the trial. There has
15 been no oral discovery. Witnesses then give their
16 evidence orally before the judge under oath?

17 A. Oh, yes. Yes, yes. I don't think
18 this is very different from what you have in Canada.

19 461. Q. And we are talking about civil
20 trials here?

21 A. Civil trials, yes.

22 462. Q. All civil trials are done by the
23 witnesses giving evidence orally before the judge,
24 under oath; is that correct?

25 A. Yes.

1 463. Q. If you say "m'hmm"...

2 A. All right, yes, yes.

3 464. Q. ...it doesn't translate into...

4 A. Yes, yes, yes, yes.

5 465. Q. Okay, thank you. I do it all the
6 time, so...

7 A. Under the new Rules, which will come
8 into force next year, that will change. Because we
9 have provision for detailed witness statements, and
10 the witness statements generally will be used by way
11 of evidence in-chief.

12 So you have your detailed witness
13 statements. You put the witness on the stand and
14 say, "Did you sign that statement on the blank day
15 of blank?" "Yes." "Do you stand by it, everything
16 true?" "Yes, My Lord." Evidence in-chief, and then
17 you can cross-examination. Shorten it up so the
18 witness doesn't have...right now, as has been
19 traditional in the Commonwealth, the witness comes
20 and you lead him, he is your witness, you lead him.
21 I don't mean answer your questions, you lead his
22 evidence or adduce his evidence in-chief by a series
23 of questions. Then the other side cross-examines,
24 and then there is re-examination.

25 It is here, and it is in Canada. There is

1 no difference really between our systems.

2 466. Q. Just to finish this topic, you said
3 writ of summons, there is also another form, an
4 application, which is all done...

5 A. Let me just...no. We have various
6 ways of commencing civil litigation in Barbados.
7 Again, based on the Rules of England, that worked in
8 England until 1999, you can come by Writ of Summons,
9 originating summons, Notice of Motion, in company
10 cases petition.

11 467. Q. Okay, I am just trying to simplify
12 it from my point of view, which is some matters can
13 be dealt with just on affidavit evidence?

14 A. Oh, dear.

15 468. Q. What I am trying to do is say, I see
16 two formats, perhaps I am wrong, one is the
17 witnesses take the stand and give their evidence
18 before the judge.

19 A. M'hmm.

20 469. Q. Or the other is there are affidavits
21 in front of the judge, competing in fact, perhaps...

22 A. No, no. No. Let me explain to you.
23 The originating summons procedure, which as it says
24 is a summons that originates litigation, is
25 supported by affidavit evidence, but is limited in

1 its use to cases where there is no dispute as to the
2 facts, or it is anticipated that there will be
3 little dispute, so that it is used, for example, for
4 the interpretation of documents or a statute.

5 If we wanted to have the Court determine
6 the meaning, force and effect of particular language
7 in a statute, we go by originating summons
8 procedure. But where there is going to be a contest
9 as to the facts, better to use the writ where you
10 issue a Writ Statement of Claim, and then the
11 defendant pleads his defence. You reply, the
12 pleadings are closed.

13 470. Q. I think we are just a few minutes
14 from taking a lunch break. I just wanted to ask you
15 quickly about the appeal from the Court of Appeal in
16 Barbados is now assigned to...the final Court of
17 Appeal is the Caribbean Court of Justice?

18 A. Yes.

19 471. Q. Which operates in...

20 A. Trinidad.

21 472. Q. ...Trinidad, and there are two
22 countries, Barbados and Guyana, that have signed
23 up...

24 A. For the appellate jurisdiction.

25 473. Q. For the final appellate

1 jurisdiction...

2 A. That is right.

3 474. Q. ...and that is no longer...for
4 Barbados, no longer...you can no longer appeal to
5 the...

6 A. Privy Council, absolutely right.

7 475. Q. You were part of the body that set
8 up this Court, the Caribbean Court of Justice, were
9 you not?

10 A. Yes. In fact, I have been called
11 the architect of the Caribbean Court of Justice, and
12 I am not ashamed of the role I played in setting
13 that Court up. The heads of government of all the
14 Caribbean countries appointed me in 1999 to be
15 chairman of the committee that established that
16 Court, and in 2003, July, I think it was July, 2003,
17 when I was Chief Justice, they appointed me as
18 chairman to oversee the inauguration of that Court,
19 which I did in April, 2005.

20 And I was a member of the Regional Judicial
21 Legal Services Commission that appointed the seven
22 judges to that Court. And we advertised in all 54
23 countries of the Commonwealth for judges. We had an
24 applicant from Canada called Murphy who had sat in
25 the Cayman Islands. Are you aware?