SPEECH BY CHIEF JUSTICE, SIR MICHAEL BARNETT, TO BAHAMAS BAR ASSOCIATION ON FRIDAY, 10TH SEPTEMBER, 2010

Just over two weeks ago, on 24th August, 2010, I observed the first anniversary of my appointment as the 10th Chief Justice of the Supreme Court of an Independent Commonwealth of the Bahamas.

I survived!

The past twelve months have been a rewarding, yet learning experience for me. I learnt a lot about myself, my profession, and my country. I also obtained a greater appreciation of the challenges that face this country, as well as other countries, as we all seek to provide to persons both, natural and corporate, their constitutional right to a fair hearing within a reasonable time.

I was satisfied that we had to look at the way we conducted proceedings in the Courts. This was now the 21st Century. Surely it was necessary to determine whether the procedural rules enacted 30 to 50 years ago still met the needs of the modern Bahamas.

As a result of the previous office that I held, I was aware that the Government had retained a consultant to do a complete review of the Penal Code as well as the Criminal Procedure Code. It would be

prudent to await the results of that effort. I encourage all those who have not yet done so to make their views known to those responsible for law reform.

As Chairman of the Rules Committee, I determined that it was necessary that we should look at the Rules of the Supreme Court. These Rules were enacted in 1978, more than 30 years ago. The English Rules of Civil Procedure upon which our 1978 Rules were based, had undergone a radical change more than 10 years ago. The common law countries in our CARICOM region had themselves already reformed their Rules or were well on the way to implementing reforms. We had not yet done so.

As a result I invited a small number of attorneys to form a small committee to take a look at our Rules and make recommendations for change. All but one, who was invited, accepted the invitation. The committee was made up of Mr. Brian Moree Q.C., Mr. Charles Mackay, Mr. Milton Evans, Mrs. Diane Stewart, Mr. Damian Gomez and Miss Shirl Deveaux. The Registrar of the Supreme Court, Mrs. Donna Newton and Mrs. Jennifer Stuart-Bastian also served on the Committee.

We were also grateful to be able to obtain the services of Mr. David di Mambro of the English Bar to act as our consultant. Mr. di Mambro is a member of the English Civil Procedure Rules

Committee and the Editor of the Caribbean Civil Court Practice. He has worked extensively with the Rules Committee of Barbados, Trinidad, Guyana and the Eastern Caribbean Supreme Court in the preparation of their new Rules.

The work of the Committee has been challenging. At the beginning we had considered using the Barbados Rules as the precedent to follow with modest modifications to meet the needs of The Bahamas. The Barbados Rules were implemented in 2006. As we proceeded with our work, we realized that other common law jurisdictions had implemented new Rules after 2006. For example New Zealand and the Province of British Colombia, Canada had enacted Rules more recently and those Rules had contained provisions which went even further than that found in the Barbados Rules.

After months of work, the Committee has produced a product and has circulated for consultation and further input draft Rules of Civil Procedure for use in The Supreme Court. These Rules were published on the 13th August, 2010 and may be found on the Supreme Court's website along with a Consultation Report prepared by Mr. di Mambro, which highlights some of the major innovation in the Rules.

It is not my intention to conduct at this luncheon a seminar on the Rules. You are invited to study them and through the Bar

Association provide us with your comments. Nothing in the draft Rules is cast in stone. We will consider all recommendations and take into account all comments. Indeed, I have already noticed some matter which, I would wish to revisit There is however some urgency. We have fixed the 30th September as the deadline to receive your comments.

After receiving the recommendations and comments we will finalize the Rules. After the Rules have been finalized we will hold a series of seminars for members of the Bar and the Judiciary to educate members of the provisions. Shortly after the seminars have been completed we will bring the new rules into effect. It is my expectation that the Rules should be in effect by spring of 2011.

Although I will not conduct a seminar, I think I would be remiss in the discharge of my mandate from the President if I did not make some comment on them.

The overall objective of the Rules is put in simple and clear language. It is to secure the just speedy and inexpensive determination of any proceeding or interlocutory application before the court. You will note from a review of the draft Rules that we have attempted throughout the draft to avoid 'legalese' and use language that is easily understood.

We sought to eliminate what we considered unnecessary documents or unnecessary applications. For example, we thought that the memorandum of appearance or acknowledgement of service had only limited value. We determined that once a defendant was served with a claim there was no reason why he could not simply proceed to file his defence. A defendant need only file an Appearance if he intends to challenge jurisdiction. For the most part, there is usually no basis for challenging jurisdiction and in the majority of cases such a document need not be filed.

Another example is the need to apply for leave to serve out of the jurisdiction. We determined that the ex parte application for leave was really unnecessary. If the matter fell within the terms of what is now Order 11 Rule 1, a plaintiff/claimant can issue the claim and serve it out of the jurisdiction without first applying for leave. Of course if the defendant wishes to challenge the propriety of the issue and service of the claim, he can do so on an inter partes application without the need to submit to the jurisdiction of the court.

The generally indorsed writ will become a relic of the past. Actions are commenced by filing a detailed statement of claim and where the claim is based upon a written agreement; copies of the document(s) that constitute the agreement must accompany the statement of claim.

General and uninformative defences are unacceptable. A defendant must respond to each allegation in the statement of claim. If a defendant denies an allegation he must state his reasons for the denial and if he intends to put forward a different version of events from that given by the Plaintiff he must in his defence state his version of the events.

The upshot of these changes is that it will be imperative that attorneys are fully instructed and briefed before they commence an action or before they file their defence. Lawyers will have to do much more work at the beginning stages of an action. The habit of getting to know your case just before the trial will be a habit lawyers will have to abandon fairly quickly.

Case Management comes immediately after the close of pleadings. The wide powers given to the judge have been retained. Witness statements standing as evidence in chief will be standard. We will insist that the statement satisfies the rules of evidence and the habit of putting in brief witness statements and seeking leave to supplement at the trial by more complete oral evidence will cease.

The utility of Alternative Dispute Resolution has not been ignored. The draft Rules provide that at the Case Management Conference

" ***The court may make an order that any party who is not prepared to mediate must within 28 days of the date of the case management***

***conference specify by letter written to all other parties why he is not willing to mediate at that time; such letter shall be admissible on the question of costs at any time if the court so directs*".**

The judge will not be affected before or during the trial by whether or not or why a party is not prepared to mediate but when the conduct of the parties is taken into account the issue of costs an unreasonable and unjustified refusal to mediate will be highly relevant. This simple procedure will, at the case management stage, crystallize the reasons for such refusal.

Order 14 like summary judgment will be available to both a plaintiff as well as a defendant on the whole or a part of a claim and the test is that the other party *"has no real prospect of succeeding on or of successfully defending the claim or a particular issue".* This is different from the present Order 14 which is only available to a Plaintiff and where the present test is that there is "no defence" to the claim or part of such claim.

The provision relative to security for cost has been revised. I set out the new Rule in its entirety:

> ***"The court may, on an application by the defendant or respondent in a proceeding who can show that he has a defence with a reasonable prospect of success, make such order for security for costs as is just where it appears that:***

(a) the plaintiff or applicant is ordinarily resident outside The Bahamas;

(b) the plaintiff or applicant has another proceeding for the same relief pending in The Bahamas or elsewhere;

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding which are assessed and payable but which remain unpaid in whole or in part;

(d) there is good reason to believe that the plaintiff or applicant has insufficient assets in The Bahamas to pay the costs of the defendant or respondent; or

(e) a statute entitles the defendant or respondent to security for costs.

On the issue of costs, summary assessment of cost by the presiding judge will be the norm. If the costs are not summarily assessed, the Rules still provide for detailed assessment by a Registrar. Such an application for assessment must be made within 6 weeks not 3 months of the Order for costs; and the present provisions which allow you to go back to the Registrar for a review of his own assessment has been eliminated. A right of appeal to a Judge from

an assessment by the Registrar has been retained; but must be exercised within 7 days of the Registrar's decision.

Orders for costs must be paid within 14 days of the date upon which they become due.

Members of the legal profession and litigants ought to be alive to the consequence of making meritless interlocutory applications. The new cost rules more readily enable cost orders to be enforced upon their pronouncement by either staying the action until payment of the costs in the case of an unsuccessful Claimant or the striking out of a defence in the case of the unsuccessful defendant. Judges will be encouraged to require that orders for cost made in interlocutory proceedings be assessed immediately.

Members of the profession should also be alive to their personal exposure for costs which arise from personal failings of attorneys to ensure that claims which they have certified as being sustainable are in fact sustainable.

The new Rules also contain new provisions as to the enforcement of judgments including the ability to obtain information from a judgment debtor.

As I said at the beginning, it is not my intent to conduct this afternoon a seminar on the draft Rules. They are still draft Rules.

We encourage you to study them and make such representations as you consider appropriate.

However, the success of the reformation of the Rules of Civil Procedure will depend upon the cooperation of the legal profession, litigants and the personnel within the Supreme Court system. It is to that cooperation that I now turn.

One of the most striking aspects of litigation that I have realized over the past 12 months is the unwillingness of lawyers to talk to each other about their clients matters. Far too often, matters come before me for hearing when lawyers have not spoken to each other before the hearing. Indeed, there have been cases when one lawyer does not know which lawyer in the firm of lawyers representing the other party has the carriage of a matter!

Parties have come before me on case management conferences where they have not had any discussion with the other side as to what directions may be necessary, how many witnesses they are likely to have and how long a trial is likely to last.

This cannot be correct.

It is a disservice to the clients, to the profession and to the administration of justice. We are advocates. It is not a sign of weakness to talk to the other side and narrow the differences.

The personal animosity and hostility toward each other that I have observed among some attorneys is really inexcusable and unprofessional. Some hardly speak to each other and their body language does not disguise the contempt they have for the other lawyer. Believe it or not, I have heard a lawyer in court say to me "I am tired of that nasty lawyer and their nasty ways"! I was stunned and immediately demanded a withdrawal and an apology.

This really must stop!

Too many attorneys come to Court unprepared. They have not familiarized themselves with the facts of the case they have come to argue. I have seen cases in applications for ancillary relief where lawyers could not answer when asked how long the parties were married. What is the point of applying for a property adjustment order where there is no evidence as to the value of the various properties in question or the amount outstanding on any mortgage debt.

Believe it or not, I have seen a lawyer appear on an application for leave to enforce an Order and when asked to produce a copy of the order sought to be enforced, he could not do so and upon a review of the file at the hearing it was discovered that, the Order was never made. To be fair to the lawyer, he was very junior and the file was

given to him by his boss for the first time the night before the application was to be made.

At the last call to the Bar, I mentioned how a lawyer permitted a photograph to be included in a bundle when it was obviously a mistake. When the mistake was discovered, the lawyer did not bring it to the attention of the other side. Worse still, he permitted the other side to question a witness about the photo mistakenly included only to establish that it was a mistake. The whole episode could have been avoided if the lawyer simply picked up the telephone and advised the other side that the wrong photo was included in error and send them a copy of the correct photo.

More recently, an action was brought whereby a daughter claimed title to land on the basis that she inherited from her mother who died intestate. In the Plaintiff evidence at the trial it was discovered that at the time of the mother's death, she had a brother and two sisters alive. It was obvious that the daughter could not have inherited the land from her mother. The old rules of inheritance which applied would have given title to her brother. Surprisingly, none of the lawyers were aware of this information before. Had they made this inquiry, much time and expense could have been avoided.

These true examples are obviously in the extreme, but they illustrate my point that much time, energy and expense can be avoided if

lawyers better prepared themselves and cooperated more with each other.

I have often told young lawyers who have served their pupilage with me that very few matters that they have to consider have not been the subject of judicial analysis at some time in the past. Our judicial system is based upon consistency and development from one case to another.

I am always perturbed when lawyers appear before me without citing any authority that has considered the issue which the court is now being asked to decide. Too often I have had to do my own research and have discovered authorities that have considered the issue I am being asked to determine. In some cases directly on point!

The search engines today make research less difficult than it was when I first came to the Bar. I urge you to use your talents and do not, in search of fees, forget the need for scholarship in your work.

However the problems are not only with the Bar. I do accept that there are weaknesses in the system and that we judges are not blameless. We must find a more effectual way of ensuring that documents that are filed in the Registry are placed in the Court files shortly after they are filed. The Court Reporting Services must be strengthened to ensure the more timely delivery of transcripts. As judges we must maintain a greater control of the cases before us and

move them along diligently; and yes, we must make a greater effort to reduce the length of time to deliver our decisions.

But I have spoken for too long.

Nuff said!

I am grateful for the support that you have given me over the past year. There is much to be done, but I am convinced that none of our problems are insurmountable. There is much talent at the Bar. Though I have cited a few bad examples to drive home a point may I say that the majority of you take your responsibilities seriously.

These are exciting times.

A new Magistrates Court Complex is about to be completed. Work has already begun on the renovation to the Supreme Court in the old Hansard Building. Ansbacher House has been acquired by the Government and work has commenced on creating two courts on the ground floor of that building which are capable of accommodating a criminal trial. Plans are advanced for the establishment of five civil courts in Ansbacher House. Renovations to the main Supreme Court Building will commence after the completion of the courts in the Hansard Building and the two criminal courts in Ansbacher House. The Penal Code and Criminal Procedure Code are being revised. A new Probate and Administration Bill and a new Coroners Bill have been tabled in

Parliament. A new Magistrate Bill is being prepared in Law Reform. After these new draft Rules of Civil Procedure have been finalized, we will look at the Winding Up Rules and the Rules related to Matrimonial Causes including adoptions.

These are truly exciting times. With your cooperation, we can and will truly transform the administration of justice in The Bahamas.

Thank you for your attention.