IN THE COURT OF APPEAL OF THE PITCAIRN ISLANDS

CA 1/2012

BETWEEN	**MICHAEL WARREN** Appellant
AND	**THE QUEEN** Respondent

Hearing:	26 June 2013 (at Auckland High Court)
Coram:	Robertson P McGechan JA Potter JA
Counsel:	T Ellis for Appellant K Raftery and S Mount for Respondent
Judgment:	12 August 2013 at 2 pm (at British High Commission, Wellington)

JUDGMENT OF THE COURT

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Introduction

[1] Following delivery of our judgment of 12 April 2013, a number of new applications were filed on behalf of Mr Warren.

[2] In the judgment we had anticipated a telephone conference between counsel and the President on Friday 28 June but in light of the new matters which had come to hand, the Judges resolved that there should be a further hearing to try and maintain a degree of timeliness in this case.

[3] On 5 June counsel were advised of the hearing date and informed that the Judges would issue a Minute which indicated those areas which the Court was of the view could be dealt with at this point. The Minute was provided to counsel on 21 June.

[4] In written submissions (and again in court), Mr Ellis protested that the Court was trying to move with too much haste. Nonetheless, we eventually had a productive hearing.

[5] The Minute identified the following issues:

(a) **Recall**

This involves the effect of s 13 of the Senior Courts Act 1981 (which was not previously raised on the application for recusal of the President) and in addition, objection by counsel for Mr Warren to some modes of expression in the April judgment.

(b) **Recusal**

This applies to all Judges because it is alleged they have demonstrated lack of objectivity and independence

(c) **Standing of Judges**

This concerns the effect of the Promissory Oaths Acts 1868 and 1871 and the position of the waiver/undertaking on behalf of Mr Warren filed in the Court on 12 March 2013.

(d) **Chief Justice**

Vacation of office by the Chief Justice and other matters raised in a memorandum of counsel for the appellant of 10 June 2013.

(e) **Permanent stay of the criminal proceedings**

(f) **Leave to appeal from the decision of 12 April 2013**

(g) **Future progress**

[6] It became common ground before us that consideration of the applications for a permanent stay of the proceedings and for leave to appeal to the Privy Council from the judgment of 12 April 2013 were not yet ready for consideration, and they have been adjourned accordingly.

[7] In the Minute we identified a further issue upon which we required to hear argument, which we expressed in this way:

> [2] There is a question as to whether there are constitutional issues raised in this case which should be determined by the Courts of the United Kingdom rather than the Courts of Pitcairn. These could include the right of self determination, the validity of various Pitcairn orders, the effect of the Bill of Rights Act 1688, conflicts within the Constitution and its lack of democracy, and the application of human rights legislation.
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> These will be dealt with by the Court at a hearing commencing at 9.30 am on 12 and 13 August 2013 in Auckland. Submissions on behalf of the appellant are to be filed and served by 15 July. Submissions in response by 5 August.

[8] We had hoped that this matter could be heard on 12 and 13 August, but there were problems for Mr Ellis. To accommodate his needs it will now be addressed in a hearing on 20 and 21 August in the High Court at Auckland. We have raised the issue of whether the Attorney General should be represented in that hearing. There is a general challenge to the entire constitutional framework of Pitcairn, as it is created in

various Orders in Council in the United Kingdom. Mr Raftery has undertaken to explore the position of the Attorney General prior to the August hearing.

[9] We also indicated that there was a need for the Court to consider and determine what outstanding issues still required attention in the Court of Appeal and/or the Supreme Court, particularly any which require further evidence. It is our intention to consider with counsel the 40 issues catalogued by Mr Ellis in a memorandum of 3 May 2013 and to make clear directions in respect of them.

[10] It is now over three years since this matter first came to official attention and more than two and a half years since Mr Warren was charged. There are many issues raised in the constitutional petition which is associated with the criminal matters and those will be dealt with in a careful and seemly manner. But there is a need for finality. If we are seen to be more anxious about time than any counsel, it is part of our overall responsibility in the delivery of justice.

Standing of the Judges sitting in this case

[11] As outlined in the judgment of 12 April 2013, during the course of the March hearing counsel furnished to the Court a document entitled "Waiver/Undertaking on behalf of Michael Warren", which is set out at paragraph [26] of the April judgment.

[12] Mr Ellis now contends that the document is of no effect because the terms of the Promissory Oaths Acts 1868 and 1871 are mandatory and no action by counsel could waive a statutory provision. He says that he had not fully considered s 7 of the Promissory Oaths Act 1868 and now argues that the provision is a total bar to the present Judges sitting. They are to be treated as having vacated office, in his submission.

[13] Section 7 provides:

> If any Officer specified in the Schedule hereto declines or neglects, when any Oath required to be taken by him under this Act is duly tendered, to take such Oath, he shall, if he has already entered on his Office, vacate the same, and if he has not entered on the same be disqualified from entering on the same; but no Person shall be compelled, in respect of the same Appointment to the same Office, to take such Oath or make such Affirmation more Times than One.

[14] As noted by the Crown, an undertaking to the Court is to be treated as equivalent to a Court order, although release from it can be sought and obtained, *Commerce Commission v Air New Zealand Ltd.*[1]

[15] The terms of the waiver/undertaking leave no room for doubt that Mr Warren's counsel was aware of the Promissory Oaths Acts 1868 and 1871. They are specifically referred to. The Crown submits that the Court should be slow to consider a release from the undertaking.

[16] Further, it is argued for the Crown that the schedule referred to in s 7 relates to a number of English and Scottish judicial officers but does not include Justices of the High Court or Court of Appeal. It is therefore contended that the statute is not of general application and does not extend to Pitcairn.

[17] Finally, the Crown submits the provision would not apply anyway as there is no suggestion that any oath has been "duly tendered and the Judge has declined or neglected to take an oath".

[18] We have concluded that s 7 of the Promissory Oaths Act is not of general application inasmuch as it does not, by the schedule, apply to High Court or Court of Appeal Judges in the United Kingdom. We consider by analogy that it does not have application to such Judges in Pitcairn. Furthermore, there is no evidence of any unwillingness on the part of any presiding Judge to take an oath which has been tendered. On the contrary, on 14 March 2013 in the High Court at Auckland, the Judges took the oaths in accordance with a process agreed by the parties.

[19] We accordingly conclude that the waiver/undertaking in the document of 12 March 2013 remains effective and that in all future matters "arising from the present prosecutions" Mr Warren will not challenge that the President is validly appointed as such, and Justices McGechan and Potter are validly appointed as Judges of Appeal.

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1 HC AK CIV-2008-404-008352 3 November 2011.

Chief Justice

[20] In a memorandum of 10 June 2013, Mr Warren challenged the validity of the Chief Justice's appointment on several bases. We have considered only one at this stage.

[21] In a document signed by the Governor of Pitcairn on 8 June 2000, Charles Stuart Blackie was appointed Chief Justice of the Supreme Court of Pitcairn with effect from the 1st day of February 2000. It is recited that this was done in exercise of powers conferred by ss 5 and 7 of the Pitcairn Order 1970 and by (1) of s 5 of the Judicature (Courts) Ordinance 1999.

[22] The current challenge is mounted on the basis that this Order purported to be retroactive for a period of over four months and was consequently a nullity. Mr Ellis argues that the Orders and Ordinance recited do not include a power to act retrospectively and counsel submits that as the Order purported to do so, the entire appointment is a nullity and anything done by Charles Blackie at any time has no legal force or effect.

[23] The relevant provisions provide:

Pitcairn Order 1970

> **Power to make laws.**
>
> **5.**—(1) The Governor may make laws for the peace, order and good government of the Islands.
>
> (2) Without prejudice to the generality of the power conferred by subsection (1) of this section, the Governor may, by any such law, constitute courts for the Islands with such jurisdiction, and make such provisions and regulations for the proceedings in such courts and for the administration of justice, as the Governor may think fit.
>
> [(2A)[2] Subject to the provisions of any law for the time being in force in the Islands, a court established under subsection (2) shall sit in such place in the Islands as the Governor, acting in accordance with the advice of the Chief Justice, may appoint:
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> Provided that it may also sit in the United Kingdom or in such place as the Governor, acting in accordance with the advice of the Chief Justice, may appoint.

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2 2A to 2C inserted by the Pitcairn (Amendment) Order 2002.

(2B) Where a court sits, by virtue of subsection (2A) of this section, in some place other than the Islands, it may there exercise its jurisdiction and powers in like manner as if it were sitting within the Islands, but anything done there by virtue of this subsection shall have, and shall have only, the same validity and effect as if done in the Islands.

(2C) The references in subsections (2A) and (2B) of this section to a court sitting and exercising its jurisdiction and powers in any place include references to a judge or magistrate or officer of the court exercising in that place any jurisdiction or powers or other function vested in him as such by any law for the time being in force in the Islands.]

(3) All laws made by the Governor in exercise of the powers conferred by this Order shall be published in such manner and at such place or places in the Islands as the Governor may from time to time direct.

(4) Every such law shall come into operation on the date on which it is published in accordance with the provisions of subsection (3) of this section unless it is provided, either in such law or in some other enactment, that it shall come into operation on some other date, in which case it shall come into operation on that date.

Governor authorised to appoint officers.

7. The Governor may constitute all such offices as he may consider necessary for the purposes of this Order and may make appointments to any office so constituted, and any person so appointed, unless otherwise provided by law, shall hold his office during Her Majesty's pleasure.

Judicature (Courts) Ordinance 1999

5. (1) The Supreme Court shall consist of the Chief Justice and such other judge or judges as the Governor shall from time to time appoint by instrument under the Official Seal in accordance with any instructions given by Her Majesty through a Secretary of State.

[24] While none of these include a specific power to make retroactive orders, equally there is no prohibition. A Court will not readily enforce provisions which are retrospective, but no authority is advanced for the proposition that even if words are clear and unambiguous, primary or secondary legislation is a total nullity if it involves any retroactivity.

[25] It is not contended that anything which occurred between 1 February and 8 June 2000 (or more importantly, the date upon which the Chief Justice took the oaths of office) is of any materiality in this case. If that were the case, an approach would be to consider the appointment as effective only from its date and the consequential taking of

the oaths and not giving it force or effect during the prior period. That position is theoretical only on the facts in this case.

[26] We are satisfied that Chief Justice Blackie was appointed by the document of 8 June 2000 and has been in office from the time that he swore the oaths of office. The generalised challenge to his holding office because it was expressed as including a retroactive aspect is unsustainable.

[27] It is one thing for a Court to view retroactivity as undesirable but quite another to conclude that an authorisation which in part is expressed to have retroactive effect is consequently of no force or effect and an absolute nullity. This argument is not the "king hit" which Mr Ellis contemplated.

Recusal

Introduction

[28] The appellant filed an application on 3 May 2013 seeking orders for recusal of Robertson P, McGechan and Potter JJA (Coram 12 April 2013) from further involvement in this prosecution on the following grounds (restated where necessary for clarity).

(a) The judgment of 12 April 2013 "makes improper comments on the actions or submissions of [the appellant] or his counsel showing bias or pre-judgment or its appearance".

(b) The proceedings to date have been a nullity.

(c) The decision as to precedence in the Court of Appeal when the Chief Justice and President both sit was made in the absence of complete argument, that is, citation of s 13 Senior Courts Act 1981 (UK), an error which should be corrected with the original recusal of Robertson P reconsidered.

(d) References in the judgment to the lack of experience of the Chief Justice and the experience of the President are "a breach of judicial independence and impartiality and otherwise inappropriate, thereby making an application for [the recusal of ?] Robertson P impossible before an unbiased Court or one having that appearance".

[29] We examine these grounds seriatim, remembering also to consider any cumulative effect.

(a) Improper comments showing bias

[30] Paragraph [49] of the judgment states (bold and italics added):

> [49] The appellant opens with a submission that **the President appeared to have little experience or training in constitutional law, and to lack an at least passing knowledge of the constitutional and legislative framework for appeals**. Against that asserted background, the appellant submits that the President **blindly followed the Crown's submission** (referring to ss 15E and 15F) – or at least would have appeared to such an observer to do so. We do not accept that argument. There is no factual basis on which the appellant can assert such intellectual deficiencies before us except the President's conduct in these proceedings. That is quite insufficient. It would not be an impression harboured by a well informed impartial observer. There is not anything like sufficient evidence of a so called blind following, improbable in any event in an experienced and respected trial and appellate Judge. *The appellant's assertions are unfortunate and bordering on contemptuous.* It cannot be said the decision contains no reasons. The President says the decision is discretionary, and he considered it "appropriate". That is spartan but it is an explanation.

[31] The appellant submits the italicised words require recusal for actual or apparent bias, and breach of counsel's and appellant's freedom of expression. The latter asserted breach goes beyond grounds stated in the Notice of Application, but we will consider it. The submission describes the phrase italicised as "regrettable" and as being "an unfortunate use of judicial intimidation or harassment, or colloquially, bullying". Contempt under Pitcairn law, it is said, could only be criminal, with the implication that the conduct bordered on the criminal. Complaint is made that no advance warnings, or hearing in open court, were given. It is said there was insufficient specificity as to the words concerned. The submission adds that an observation elsewhere in the judgment (paragraph [1]) that the litigation has a "long and tortuous history" was "unwarranted"

and "was an alert for possible bias". We consider this later in connection with recall, where it is raised explicitly.

[32] Appellant's counsel referred us to a range of authority: *Kyprianou v Cyprus*;[3] the Bangalore Principles para 59; an Interrights Manual "Freedom of Expression under the European Convention of Human Rights" Article 10; *Nikula v Finland*;[4] The Basic Principles of the Role of Lawyers (Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders) paragraph 20; the Report of the Special Rapporteur on the Independence of Judges and Lawyers 2009; *Miller v New Zealand Parole Board*[5] (noted as the only case in which appellant's counsel had asserted he had been intimidated and harassed); and (even) a legal journalist's piece in the Botswana Sunday Standard dated 4 April 2013. We have read these authorities so far as quoted or made available.

[33] This ground is hopeless. One has only to read the words concerned (in bold at paragraph [30] above). To state, in terms, that a Judge appeared to have little experience or training in an area of law, and to lack at least passing knowledge of an aspect of that area and blindly followed a submission, is a plain insult. It has the real or potential effect of lowering the Judge (and with that the Court) in the esteem of the public, and with that doing damage to the administration of justice. It is not a question of a Judge's personal feelings. Experienced Judges learn to treat unfortunate remarks with weary resignation at a personal level, and are unaffected. It is a matter of the protection of the public interest.

[34] This does not ignore the right to freedom of speech, and within that the important right (indeed, obligation) of counsel to advance a client's cause, fearlessly where necessary. However, as appellant's authorities overall (to say nothing of the common law) well recognise, that freedom is not untrammelled. It is subject to domestic law, and in the case of counsel to professional standards, and to proper balance by other rights and public interests.

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3 No 73797/01, 15 December 2005, ECHR (GC).
4 No 31611/96 ECHR 2002/11.
5 [2010] NZCA 600.

[35] The complaint that no warning was given of the view taken, and no opportunity given to respond, raises an issue of some practical difficulty. Every hearing has its own dynamics, including questions of time pressures, personalities, and the like. Experienced Judges know that sometimes a quiet (or sharp) word during the course of the hearing when boundaries have been transgressed will be effective, and that at other times a time wasting and unseemly dispute will break out with nothing achieved. As a matter of judicial judgment, it can be thought better, if the matter cannot be ignored, to leave over a warning to the calm of later comment or a later judgment. That course was taken here. If no notice is taken of such a warning, then future repetition may need to be treated differently. It would be surprising if counsel preferred no warning at all to a delayed warning. The course taken is considered proper in the circumstances.

[36] The appellant complains that the Court's words may have a "chilling" effect. The word "chilling" implies an improper degree of restraint. We accept the words could, indeed should, promote a degree of restraint. We do not accept that degree exceeds the proper and necessary. The words cannot be described as "chilling".

[37] The complaint as to specificity has no foundation. The criticism plainly is directed at the appellant's assertion of intellectual deficiencies, and a blind following of Crown's submissions.

[38] This ground is not made out.

(b) Proceedings a nullity

[39] This submission is considered on its merits elsewhere. It is a somewhat odd inclusion as a ground for recusal. If the proceedings are a nullity, then recusal hardly is necessary. If it is a recusal in anticipation of any recommenced proceeding which is sought, then that must await the vehicle of that recommenced proceeding, rather than be attempted as part of a nullity argument. This ground is not made out.

(c) Precedence in the Court of Appeal

[40] The Court of Appeal sat on a bail appeal on 21 September 2011 in the order of precedence Robertson P, Blackie CJ and McGechan JA. Specifically, Robertson P presided. Appellant's counsel submitted this was an unlawful "usurpation" by Robertson P (we will have more to say as to that word), and taken with the absence of public explanation showed disregard of the law to such an extent as to demonstrate apparent bias.

[41] The judgment of 12 April 2013 observes:

> [70] Mr Ellis did not cite authority for the proposition that under common law the Chief Justice must preside. When questioned, his response was that there was no authority to the contrary. The only authority advanced for the constitutional convention was a group of statutory provisions, said to be examples, in New Zealand, Western Australia, New South Wales, Singapore and Mauritius. We do not see these as establishing a constitutional convention. Indeed, while they might be viewed as exemplifying a constitutional convention, it equally may be said they would not be needed if such a constitutional convention existed.
>
> [71] Undoubtedly there is a usual practice, at least in Commonwealth countries, that a Chief Justice, if sitting, will preside over the court concerned, including courts of appeal. We cannot ourselves recall an occasion, apart from this present, where that has not occurred. However, we consider it is no more than a practice. In the absence of statutory provisions, it is not a rule of law. As it is no more than a practice, there can be lawful departures.
>
> [72] There is no common law or statutory requirement for judges to discuss, announce or explain any change in precedence in open court. It is a matter of judicial administration, not decision making, and, with no disrespect to Chief Justices, not one of particular importance. The presiding judge does not have a casting vote, or any superior influence on decisions ultimately reached. His or her functions are to act as spokesperson for the bench and to regulate procedure in the court room, invariably in consultation with fellow judges. It is not a matter properly of concern to parties. Indeed, Mr Ellis did not suggest his case would have been better served if the Chief Justice had presided, carefully saying he did not know. He did not put the matter higher than one of principle.

[42] Counsel for the appellant now refers the Court to s 13 of the Senior Courts Act 1981 (UK). That section provides (so far as relevant):

> 13 Precedence of Judges of Senior Courts
>
> (1) When sitting in the Court of Appeal –
>
> (a) The Lord Chief Justice and the Master of the Rolls shall rank in that order;

[43] Section 13 is to be read together with s 42 of the Pitcairn Constitution, which provides that English statutes of general application shall be in force in Pitcairn so far as local circumstances permit and with necessary changes as to names, courts, and otherwise. The appellant submits that the combination amounts to a law of Pitcairn that when sitting in the Court of Appeal of Pitcairn the Chief Justice must preside.

[44] The submission has a superficial simplicity. However, there are difficulties:

(1) The implications of s 150(3) of the Senior Courts Act 1981 (UK).

(2) Whether the direction "shall rank" precludes the Chief Justice from allowing another Judge to preside at hearing.

[45] Section 150 is headed "Admiralty jurisdiction: provisions as to Channel Islands, Isle of Man, colonies etc". Subsection (1) permits Orders in Council extending ss 20 to 24 to the Channel Islands and the Isle of Man, and subs (2) permits Orders in Council applying the Colonial Courts of Admiralty Act 1890 to particular courts or territories. Section 150(3) then provides:

> (3) Her Majesty may by Order in Council direct that any of the provisions of sections 21 to 24 shall extend, with such exceptions, adaptations and modifications as may be specified in the Order, to any colony or to any country outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the government of the United Kingdom.

[46] Sections 21 to 24 follow after s 20 which confers a general Admiralty jurisdiction. They relate to the mode of exercise of Admiralty jurisdiction, certain restrictions on its exercise, and certain supplementary provisions.

[47] The Crown points to this section as showing the framers of the legislation turned their minds to the question whether it should apply outside England, and intended it should not. For it to apply elsewhere, special provision, such as in s 150, was needed.

[48] This point has some force, but is not conclusive. It might be said that if Parliament intended there be no operation at all outside England, subject to any contrary Order in Council, it would have made the Order in Council provisions of s 150

in general terms, not restricted, with the exception of ss 21 to 24. Parliament, it might be said, intended this Act to have effect beyond England, for example, in colonies which incorporate English law, unless it said otherwise (vide ss 153(4) and (5)), but saw a need for specific provision in the special Admiralty context, whether in its own right or as a matter of caution. Further, there may well be a question whether a matter of implication from s 150(3) as to Parliamentary intention should be regarded as displacing the clear words of the Pitcairn Constitution.

[49] These are points of some difficulty which have not been fully argued before us. The effect of s 13, and lawfulness, are left open.

[50] Assuming without deciding that s 13 Senior Courts Act 1981 (UK) is applicable with all necessary changes to Pitcairn, then its effect is that when sitting in the Court of Appeal the Chief Justice "shall rank" ahead of the President of the Court of Appeal. The Chief Justice ranks the higher. Does that provision as to "rank" necessarily preclude the Chief Justice from, of his or her own choice, directing or agreeing that another Judge is to preside for the purposes of a particular hearing? Must the Chief Justice therefore preside, like it or not? It is possible to view the intention of s 13 as no more than to prevent uncertainty and the possibility of petty disputes as to rank (from which the judiciary unfortunately is not immune), and not to inhibit otherwise sensible ad hoc arrangements. It could well be that, without surrendering "rank", a Chief Justice might prefer another member of the Court to preside over a particular hearing, for example, where there were specialist or procedural aspects in which that other Judge was better versed. It is not unknown for a presiding Chief Justice to state in court that the judgment, or the first judgment, will be delivered by one of the other Judges sitting with him or her. There is some analogy. The section does not say "shall rank ahead of the President and shall preside". We do not see a need to read it as doing so.

[51] We do not see s 13 (regrettably not previously cited) as increasing the appearance of bias to a degree such that the previous decision as to recusal of the President should be revisited. It stands.

(d) References to the lack of experience of the Chief Justice and experience of the President

[52] Paragraph [73] of the judgment of 12 April 2013 states:

> [73] In our view, it is not shown that the well informed independent observer would regard this change in presiding judge as showing disregard for the law. It was not a breach of the law. The observer would regard it as unusual, but knowing the President had considerably greater appellate experience than the Chief Justice, and that the Chief Justice might in due course be the trial judge sitting alone, would regard it as understandable. He would not suspect impropriety reflecting on the President or anyone else.

[53] This, self evidently, is an attempt to assess how a "well informed independent observer" would weigh an unusual situation. It states, necessarily, facts which would be known to the observer. We do not accept that a statement of those matters could be viewed as a breach of judicial independence, or impartiality, or as otherwise inappropriate, let alone as somehow showing a biased Court or the appearance of bias bearing on the appellant. This ground is misconceived. It cannot succeed.

[54] The application for recusal must be dismissed.

Recall

Introduction

[55] The appellant seeks orders that the judgment of 12 April 2013 be recalled on grounds:

(a) References to submissions being "unfortunate bordering on contempt" and proceedings being "tortuous" are improper, and should be removed.

(b) References to the word "usurper" as being pejorative are unfounded, it being a legal term of art with no such undertones (sic), used properly in accordance with its legal meaning, and should be removed.

(c) The decision as to precedence in the Court of Appeal where the Chief Justice and President both sit was made in the absence of complete

argument, that is, reference to s 13 Senior Courts Act 1981 (UK), resulting in error which should be corrected.

(d) References to "the lack of experience of the Chief Justice, the experience of the President" (sic) are a breach of judicial independence and impartiality and otherwise inappropriate. (No specific remedy is sought as to this last.)

(a) Improper comments

[56] The references in the judgment to submissions being "unfortunate and bordering on contempt" have been evaluated already. Nothing more need be said.

[57] There is reference in paragraph [1] of the judgment to "this litigation having a long and tortuous history". The complaint is as to the word "tortuous". We will not prolong this judgment with a chronology of what has taken place so far. It is on record. It is plain that a straightforward prosecution for possession of indecent material, indeed one where both the possession and indecent character are seen not to be much in contest, has become a multi faceted and complicated constitutional challenge extending over a period and destined to so continue. The word "tortuous" is apt.

(b) "Usurper"

[58] The word "usurper" in its plain meaning in ordinary speech is pejorative. It carries overtones of a wrongful seizure of office against the will of the rightful holder. It is strong language to a point where counsel was challenged as to whether its full import was indeed intended, and accepted a redefinition to a more neutral "taking of office to which there was no entitlement", that is, improper mutual agreement rather than a coup. (Counsel now seeks to resile from that redefinition, claiming to have been intimidated. We are unimpressed by that, but will consider the word in its fullest import.)

[59] The appellant submits the word is a "legal term of art". It is put as being "an apparently common term in the de jure – de facto – usurper literature". Two North

American publications were cited.[6] The tenor of the latter is that a de facto judge has colour of right, whereas a usurper does not. This approach does not assist the appellant. It requires that the person taking office does not have honest belief in entitlement. Robertson P plainly did. The word "usurper" was seriously inappropriate. There are no grounds for removal of the passage in the judgment concerned.

(c) Precedence

[60] This matter has been canvassed under the heading of Recusal, and nothing more need be said. It is not a ground for recall.

(d) References to experience of President and Chief Justice

[61] This matter has been canvassed under the heading of Recusal, and nothing further need be said. It is not a ground for recall.

Conclusion

[62] Each of the challenges raised by Mr Warren and his counsel and covered in this judgment are accordingly dismissed.

Robertson P

[6] F M Brookfield "The Courts Kelsen and the Rhodesian Revolution" 19U of Toronto LJ 326 (1969) and http:definitions.uslegal.com/d/de-facto-judge/.

Mc Gechan JA

Potter JA