Trinity Term
[2023] UKPC 22
Privy Council Appeal No 0007 of 2021

JUDGMENT

Ernest Hilaire (Appellant) *v* Allen Chastanet (Respondent) (Saint Lucia)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Lucia)

before

Lord Lloyd-Jones
Lord Leggatt
Lord Burrows
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
13 June 2023

Heard on 27 February 2023

Appellant
Anthony Astaphan SC
Thaddeus M Antoine
Renee T St Rose
Marie-Ange Symmonds
(Instructed by Fosters (Saint Lucia))

Respondent
Garth Patterson KC
Mark D Maragh
Taylor Laurayne
(Instructed by Amicus Legal (Saint Lucia))

LORD LLOYD-JONES AND LADY ROSE:

Introduction

1. This appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Lucia) turns on the interpretation of article 917A of the Civil Code, Chapter 4.01 of the Revised Laws of Saint Lucia ("the Civil Code") which in relevant part provides as follows:

> "(1) Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi-contracts and torts shall mutatis mutandis extend to Saint Lucia, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the 'Coutume de Paris' …
>
> …
>
> (3) Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such other statute shall prevail."

As originally enacted article 917A referred to "this Colony" and not to "Saint Lucia".

2. The central issue in these proceedings is whether the Defamation Act 2013 ("the 2013 Act") which was enacted by the Westminster Parliament is imported into the law of Saint Lucia by article 917A. In particular, we are concerned with the question whether the introduction by section 8 of the 2013 Act of the single publication rule and further provision for the time of the accrual of a cause of action means that the claim in these proceedings is largely if not completely time barred.

3. By a claim form dated 20 March 2017 the appellant, Mr Ernest Hilaire, commenced a defamation claim against the respondent, Mr Allen Chastanet, who defended the claim pleading the provisions of the 2013 Act.

4. Each party applied to strike out the other's pleadings. At the hearing of the strike out applications it was agreed that the issue of the importation of the 2013 Act into the law of Saint Lucia should be tried as a preliminary issue, as the viability of each party's pleading depended on the determination of the issue.

5. The preliminary issue was tried by Smith J in the High Court of Justice of the eastern Caribbean Supreme Court (Saint Lucia) who, in his judgment dated 29 November 2018 held that the 2013 Act is not applicable in Saint Lucia.

6. The respondent appealed to the Court of Appeal (Pereira CJ, Thom JA and Webster JA (Ag)) which, in its judgment of 16 January 2020, held that article 917A was not unconstitutional, that the 2013 Act was imported into Saint Lucia law and that there was no irreconcilable inconsistency between the provisions of 2013 Act and the provisions of article 917A except in section 8(3) which was inconsistent with article 2123 of the Civil Code. However, the inconsistency was reconciled by reference to the principle of mutatis mutandis as contained in article 917A.

7. The appellant applied for permission to appeal to the Judicial Committee of the Privy Council. By order dated 10 November 2020 the appellant was granted final leave to appeal pursuant to section 108(2)(a) of the Constitution of Saint Lucia, Chapter 1.01 of the Revised Laws of Saint Lucia, 2001.

8. On this appeal the Board has addressed the following principal issues:

(i) Issue 1: Whether article 917A is valid and currently operates to import English law into the law of Saint Lucia or whether it is invalid because it conflicts with various provisions of the Saint Lucia Constitution, in particular sections 40, 47 and 120;

(ii) Issue 2: If article 917A is not entirely invalid, whether it has the effect of importing both English common law and English statute law; and

(iii) Issue 3: If article 917A could operate to import the 2013 Act into the law of Saint Lucia, whether the provisions of the 2013 Act on which the respondent relies are not imported because of the effect of article 917A(3).

Article 917A of the Civil Code

9. The Civil Code of Saint Lucia combines elements of Quebec, French, English and indigenous law. The Custom of Paris was applied to Saint Lucia in 1681 and certain French Ordinances were also extended to the Island. There has, however, been substantial importation of English substantive law and procedure. The adoption of the Civil Code of Saint Lucia as law was first authorised by the Civil Code Ordinance, 1876. The preamble to that Civil Code Ordinance stated that the purposes of the Code were to remove uncertainty, causing serious inconvenience to the public, which had for a long time existed with respect to the law relating to many civil matters, and to consolidate and amend the civil law. The Code was "framed upon the principles of the Ancient Law of the Island, with such modifications as are conformable to the condition of modern society, or are required by existing local circumstances" (Sir Vincent Floissac, The Interpretation of the Civil Code of Saint Lucia, in *Essays on the Civil Codes of Quebec and St. Lucia*, eds Raymond Landry and Ernest Caparros, University of Ottawa Press; (1983) 14 RGD 409 at pp 410-412; *Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law* (1966), pp 858-859.)

10. Despite its title, the Civil Code was clearly not intended to be an exhaustive statement of the law applicable in Saint Lucia to the exclusion of any other legal instruments. So much was common ground between the parties on this appeal.

11. Article 917A was first introduced into the Civil Code in 1956, when Saint Lucia was still a colony, by Act 34 of 1956. This amending Act effected major revisions of the Civil Code. It was enacted by the Governor, acting on the advice of the then Legislative Council of Saint Lucia pursuant to the power conferred by the Saint Lucia (Legislative Council) Order in Council, 1951. That Order established the Legislative Council, the members of which included members nominated by the Governor and members elected in accordance with the laws as to elections made under the Order. The Legislative Council's adoption of article 917A in 1956 was a part of a process of assimilation of the Civil Code to the law of England.

12. Article 917A(1) comprises two limbs. The first limb provides that with effect from the coming into operation of the article, the law of England for the time being relating to contracts, quasi-contracts and torts shall mutatis mutandis extend to Saint Lucia. The second limb provides that the provisions of articles 918 to 989 and 991 to 1132 of the Civil Code shall as far as practicable be construed in accordance with the change effected by the first limb. The second limb further provides that articles 918 to 989 and 991 to 1132 shall cease to be construed in accordance with the law of Lower Canada or the "Coutume de Paris". Contrary to a submission on behalf of the appellant, it is clear that the second limb does not apply to articles 989A - 989S,

which were introduced into the Civil Code at the same time by Act 34 of 1956 and of which articles 989F - 989S relate specifically to the law of defamation. The new articles are not sub-articles of the existing article 989 but deal with entirely separate matters. Article 917A(3) provides that the provisions of the Civil Code or other Saint Lucia statute prevail if there is a conflict with the law of England.

Issue 1: Incompatibility with the Constitution

13. On behalf of the appellant, Mr Anthony Astaphan SC submits that article 917A is inconsistent with various provisions of the Constitution of Saint Lucia and is, therefore, invalid to the extent of that inconsistency. The current Constitution forms Schedule 1 to The Saint Lucia Constitution Order 1978 (SI 1978/1901) ("the Constitution Order"). It came into operation on 22 February 1979 upon Saint Lucia attaining "fully responsible status within the Commonwealth". It replaced the earlier Saint Lucia Constitution Order 1967, in Schedule 2, and made transitional provision to which the Board refers below. Mr Hilaire relies in particular on the following provisions of the Constitution to support his assertion that article 917A is invalid: sections 40 and 47 which both fall within Part 2 (Legislation and procedure of Parliament) of Chapter III and section 120 which falls within Chapter X (Miscellaneous). Those sections provide as follows:

> "40 POWER TO MAKE LAWS
>
> Subject to the provisions of this Constitution Parliament may make laws for the peace, order and good government of Saint Lucia.
>
> 47 MODE OF EXERCISE OF LEGISLATIVE POWER
>
> (1) The power of Parliament to make laws shall be exercised by bills passed by the Senate and the House (or in the cases mentioned in sections 49 and 50 by the House) and assented to by the Governor General.
>
> (2) When a bill is submitted to the Governor General for assent in accordance with the provisions of this Constitution he or she shall signify that he or she assents.

(3) When the Governor General assents to a bill that has been submitted to him or her in accordance with the provisions of this Constitution the bill shall become law and the Governor General shall thereupon cause it to be published in the Official Gazette as law.

(4) No law made by Parliament shall come into operation until it has been published in the Official Gazette but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect.

120. SUPREME LAW

This Constitution is the supreme law of Saint Lucia and, subject to the provisions of section 41, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

(a) Compatibility with section 40 of the Constitution

14. It is submitted on behalf of the appellant that article 917A is unconstitutional because it conflicts with the sovereign law-making power conferred on the Parliament of Saint Lucia by sections 40 and 120 of the Constitution. It is said that section 40 conferred supreme and exclusive law-making authority on the Parliament to make laws for the peace, order and good government of Saint Lucia. It is submitted that a statute made by a Parliament of a foreign State cannot properly or lawfully extend to or apply to Saint Lucia unless expressly incorporated and enacted into law by the Parliament in accordance with section 40 of the Constitution. Accordingly, it is said, to the extent that the Civil Code, a pre-existing colonial law, may permit the importation of the substantive Acts of the Westminster Parliament as part of the laws of Saint Lucia, it is manifestly inconsistent with the provisions of section 40. It is further submitted on behalf of the appellant that section 120 (and presumably paragraph 2 of Schedule 2 to the Constitution Order, considered further below) requires article 917A, an existing law, to be construed with such modifications as may be necessary to bring it, if possible, into conformity with the Constitution. In the event that it is not possible to do so, it is said that article 917A is unconstitutional and void, because it purports to create a parallel law-making authority.

15. In his judgment in the Court of Appeal, Webster JA (Ag) drew attention to the decision of the Privy Council in *Ibralebbe v The Queen* [1964] 2 WLR 76, a case concerning the effect of the independence of Ceylon on the existing right of appeal to the Privy Council under the new independence constitution of Ceylon. The Board held that the right of appeal continued and was not abrogated expressly or by implication by the Order in Council which established the independence Constitution. Although *Ibralebbe* was not concerned with the effect of independence on a local statute, such as the Civil Code, Webster JA (Ag) found the reasoning instructive and confirmed the contention that independence, in itself, does not take away or alter existing laws unless the independence legislation does so expressly or by necessary implication. He noted that *Ibralebbe* has been cited with approval by the Caribbean Court of Justice in *BCB Holdings Ltd v Attorney General of Belize* [2013] CCJ 5 (AJ). In both cases, the independence legislation did not expressly or by implication abrogate the domestic laws, nor were the domestic laws inconsistent with the Constitution. With regard to the submission on behalf of the appellant that the power conferred by the Saint Lucia Constitution upon its Parliament could not be delegated to the Parliament of a foreign state Webster JA (Ag) stated:

> "I do not see any reason why an existing law such as article 917A which purports to import the law of England should become ineffective on the attainment of independence unless there was something in the independence legislation that expressly or by implication abrogated the article. There is no such provision in the independence legislation and, as I have found, Parliament's power to legislate for the importation of laws made by a foreign parliament is not a delegation of its law-making power. Rather it is an expression of the local sovereign Parliament's law-making power subject only to any inconsistency with any provision of the Constitution. It is not inconsistent with section 40 of the Constitution. As Viscount Radcliffe said in *Ibralebbe*: '[t]he words "peace, order and good government" connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign'. This wide power, in my opinion, includes the power to import foreign laws so long as they are not inconsistent with the Constitution." (at para 20)

16. The Board agrees with this reasoning. In 1956, when article 917A was first adopted pursuant to legislation made by the Governor, Saint Lucia was still a colony. Section 17 of the Saint Lucia (Legislative Council) Order in Council, 1951 empowered the Governor, with the advice and consent of the Legislative Council, to make laws

for the peace, order and good government of Saint Lucia - words connoting "the widest law-making powers appropriate to a Sovereign" (*Ibralebbe* at pp 88-89). It is not suggested that the enactment contravened the Colonial Laws Validity Act 1865 which provides that colonial laws may be void to the extent that they are repugnant to the provisions of an Act of Parliament extending to the colony or to orders or regulations made under such an Act. It clearly was validly enacted. Indeed, the Board does not understand the appellant to contend that article 917A was invalid at the time it was adopted.

17. There are many examples of the introduction of English law into colonies by such legislation. *R v Christian (No 2)* [2006] UKPC 47, [2007] 2 WLR 120 concerned the applicability of the Sexual Offences Act 1956, enacted by the Westminster Parliament, to the Pitcairn Islands. Section 14 of the Judicature Ordinance, 1970, which had been made by the Governor under a power to make laws for the peace, order and good government of the Pitcairn Islands conferred by the British Settlements Act 1887 and the Pitcairn Order 1970 (SI 1970/1434), provided that "the common law, the rules of equity and the statutes of general application as in force in and for England at the commencement of this Ordinance shall be in force in the Islands". The Court of Appeal of the Pitcairn Islands held that section 14 had the effect of importing the Sexual Offences Act 1956 and observed (at para 45) that extension of the laws of England in such broad terms to colonies was an effective procedure which could be traced back through centuries. On the assumption that Pitcairn was a British settlement, section 14 did no more than follow a long-established principle. Moreover, having regard to the reality of the situation in Pitcairn and the need to utilise a general provision to provide good governance, the continued application of English law with appropriate savings provisions was clearly reasonable for the peace, order and good government of Pitcairn. On appeal to the Judicial Committee of the Privy Council the decision was affirmed. In a concurring judgment Lord Woolf noted (at para 38) that the incorporation of the laws of England by a general provision of the nature of section 14 of the Judicature Ordinance 1970 had, correctly, not been challenged.

18. Furthermore, the grant of independence to Saint Lucia and the creation of a Parliament within the newly created independent sovereign State could not, without more, have the effect of rendering invalid within the new State existing laws which had previously applied within the colony (*Ibralebbe* at p 89). Webster JA (Ag) was correct in his conclusion (at para 17) that independence, of itself, does not take away or alter existing laws unless the independence legislation does so expressly or by necessary implication. Thereafter, the continuing validity of pre-independence laws is a matter for regulation by the law-making bodies of the new State.

19. In order to succeed on this ground, the appellant must establish that article 917A is inconsistent with the Constitution. There is no such inconsistency or conflict. The article provides that the law of England for the time being relating to contracts, quasi-contracts and torts shall, with suitable modifications, apply in Saint Lucia. If, as the respondent contends, this applies to both common law and statute law, there is nothing in such a provision which is repugnant to section 40 of the Constitution. The continuing operation of article 917A, post-independence, does not in any way limit or abrogate the law-making power of the Parliament of Saint Lucia. It is open to Parliament, at any time, to repeal article 917A and to enact laws relating to contract, quasi-contracts and tort, as it chooses. The article only has effect so long as the Parliament of Saint Lucia chooses to maintain it on the statute book. As it happens, the article has remained in force throughout the 44 years since independence without any legislation by the Parliament of Saint Lucia in this field.

20. Contrary to the submission on behalf of the appellant, there is no question of there being a parallel law-making authority or source of law independent of Parliament. If, as the respondent maintains, "the law of England for the time being" imported by article 917A includes statute law, amendment of the statute law of England by the Westminster Parliament will prima facie apply in Saint Lucia. However, there is built into article 917A a safeguarding mechanism in the form of article 917A(3) giving precedence to the Civil Code or other Saint Lucian statute. Furthermore, the incorporation of English law in this field can continue to operate only for so long as the law of Saint Lucia permits it.

(b) Compatibility with section 47 of the Constitution

21. The appellant seeks to advance a similar ground founded on section 47 of the Constitution. Section 47 makes provision for the manner in which the Parliament of Saint Lucia may exercise its legislative powers. It requires that the power of Parliament to make laws be exercised by Bills passed by the Senate and the House and assented to by the Governor General. It also provides that no law enacted by Parliament shall come into operation until it has been published in the Official Gazette. On behalf of the appellant, it is submitted that article 917A is unconstitutional because it permits the incorporation of Acts of the United Kingdom Parliament without compliance with the procedures stipulated in section 47.

22. The short answer to the submission is that section 47 only applies where the relevant law is made by the Parliament of Saint Lucia. It does not apply where laws are incorporated by reference under a provision of the law of Saint Lucia. To the extent that any statute law made by the United Kingdom Parliament is incorporated by article 917A, it is not law made by the Saint Lucia Parliament.

23. A very similar submission was advanced and rejected by the Board in *Christian v The Queen*. (See Lord Hoffmann at para 16, Lord Woolf at para 39, Lord Hope of Craighead at para 80).

(c) Compatibility with section 120 of the Constitution

24. Section 120 of the Constitution provides that the Constitution is the supreme Law of Saint Lucia and, subject to the provisions of section 41, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

25. In his submissions, Mr Astaphan relied upon section 120 in conjunction with section 40 and upon section 120 in conjunction with section 47. These submissions have been considered above. To the extent that Mr Astaphan relied upon section 120 as a free-standing submission, this does not take his case any further.

(d) Protection from incompatibility for existing law

26. If the appellant had been able to establish that article 917A was inconsistent with provisions of the Constitution, it would have been necessary to consider whether article 917A was an "existing law" within paragraph 2 of Schedule 2 to the Constitution Order which contains transitional provisions which afford protection to "existing laws". In view of the conclusion above that there is no inconsistency with the provisions of the Constitution, this further matter can be addressed relatively briefly.

27. Paragraph 2 of Schedule 2 to the Constitution Order provides in relevant part:

> "2. (1) The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.
>
> (2) …
>
> (3) The Governor-General may by order made at any time before 31st December 1980 make such alterations to any

> existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of the Constitution and the Supreme Court Order or otherwise for giving effect or enabling effect to be given to those provisions.
>
> (4) …
>
> (5) For the purposes of this paragraph, the expression 'existing law' means any Act, Ordinance, rule, regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as a law immediately before the commencement of the Constitution."

28. To the extent that an existing law conflicts with the Constitution, it would therefore be necessary to decide what modification is required to be made to the offending provision and to give it effect in its modified form, where this is possible (*Browne v The Queen* (1999) 54 WIR 213 per Lord Hobhouse of Woodborough at pp 217-8). In that case, which concerned an existing laws clause in the Saint Christopher and Nevis Constitution almost identical to the provision with which we are concerned, the Judicial Committee of the Privy Council was able to modify an existing law which provided for an indefinite sentence of detention during the Governor-General's pleasure, by construing the power as exercisable by the judiciary as opposed to the executive, in order to bring it into conformity with the Constitution.

29. In the present case, article 917A is an existing law within the meaning of paragraph 2 of Schedule 2 in that it is an Act "made in pursuance of or continued in force by or under the former Constitution and having effect as a law immediately before the commencement of the Constitution". The reference to "the former Constitution" is a reference to "the Constitution in force immediately before the commencement of this Order" (paragraph 12 of Schedule 2) ie the Saint Lucia Constitution Order 1967. Article 917A, first adopted in 1956, was clearly not made pursuant to the 1967 Constitution. However, it was continued in force by virtue of section 101 of the 1967 Constitution which made provision for existing laws similar to that made by paragraph 2 of Schedule 2 of the 1978 Constitution Order.

30. It appears, in any event, to be common ground between the parties that article 917A is, therefore, an existing law within paragraph 2 of Schedule 2 to the Constitution Order 1978.

31. As article 917A was an existing law at the commencement of the Constitution, if there were any inconsistency with the Constitution it would fall to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity, except where this would amount to impermissible judicial legislation. It seems that this process of construing the provision leaves a wide discretion to the court.

32. In the present case the appellant argues for the modification of article 917A but does not suggest the form of modification which should be made. Moreover, the point is made on behalf of the respondent that, given the longevity of article 917A and the absence of any comprehensive, home-grown body of law relating to contract, quasi-contracts and torts, it is difficult to conceive of the form that any such modification would take. However, as the Board has come to the clear conclusion that there is no conflict between article 917A and the provisions of the Constitution on which the appellant relies, it is not necessary to pursue this matter any further.

Issue 2: Importation of English common law and English statute law by article 917A

33. The first limb of article 917A provides that subject to the provision of that article, from and after the coming into operation of that article "the law of England for the time being relating to contracts, quasi-contracts and torts shall mutatis mutandis extend to [Saint Lucia]". On behalf of the appellant, it is submitted that this provision refers only to the common law of England and that, as a result, the defamation laws applicable to Saint Lucia cannot, under the second limb, be construed in accordance with the provisions of an English statute such as the 2013 Act.

34. However, the words "the law of England" in their natural meaning are sufficiently wide to include both the common law and Acts of Parliament in force in England. The Board can see no sound reason why the words should be given the limited interpretation for which the appellant contends. The wider reading, which would include English statute law, is moreover supported by judicial authority and by academic writing.

35. *Eversley Thompson v The Queen* [1998] AC 811 was an appeal to the Judicial Committee of the Privy Council from the Court of Appeal of Saint Vincent and the Grenadines. Section 3 of the Evidence Act 1988 (Saint Vincent and the Grenadines) provided that questions touching the admissibility or sufficiency of any evidence should, except as provided for in that Act, "be decided according to the law and practice administered for the time being in England with such modifications as may be applicable and necessary in Saint Vincent and the Grenadines". The Court of

Appeal concluded that, by virtue of section 3, sections 76 and 78 of the Police and Criminal Evidence Act 1984, an Act of the Westminster Parliament, had been specifically imported into Saint Vincent and the Grenadines. The decision on this point was upheld by the Judicial Committee (at pp 825-826).

36. In *Hunte v The Queen* HCRAP 2006/012, 19 January 2011, the Court of Appeal of Saint Lucia referred (at para 16) to the effect of section 948 of the Criminal Code 1992 which provided that "the law of evidence administered in the Court shall be the same as the law of evidence in criminal causes and matters administered for the time being in the High Court of Justice … in England, so far as such practice and procedure are applicable to the circumstance of this State". The Court of Appeal explained that, as a consequence, the Police and Criminal Evidence Act 1984 was applied in Saint Lucia up to 1 November 2005 when the Saint Lucia Evidence Act of 2002 came into force.

37. In another Saint Lucia case, *Mathurin v Augustin* HCVAP 2007/041, 2 June 2008, the issue was whether the estate of the deceased was entitled to recover damages for the deceased's loss of future earnings during the years of life lost to her because of the defendants' negligence. Under the Law Reform (Miscellaneous Provisions) Act 1934 of England and Wales and under article 609 of the Civil Code of Saint Lucia, damages for the lost years were recoverable. However, it was argued that the Administration of Justice Act 1982, section 4, which had abolished the right to recover damages for the lost years in England and Wales, had effect in Saint Lucia by virtue of article 917A of the Civil Code. The Court of Appeal rejected the submission. The amendment effected by the 1982 Act did not extend to Saint Lucia because article 917A(1) of the Civil Code is qualified by article 917A(3) so that the Civil Code provision prevailed. The significance of the case for present purposes, however, is that at no point was it suggested that article 917A(1) was incapable of having the effect of importing an English statute.

38. Sir Vincent Floissac was also of the view that article 917A(1) had the effect of importing English statute law into the law of Saint Lucia. Referring to a series of articles of the Saint Lucia Civil Code including article 917A, and relying upon the decision of the Judicial Committee of the Privy Council in *Bashir v Comr of Lands* [1960] 1 All ER 117, Sir Vincent concluded that "the language of all the articles under consideration is adequate to engender an importation of the relevant English statues which were in force on the 30th June 1957 when these articles themselves came into force." He also considered that article 917A(1) was of ambulatory effect. (Sir Vincent Floissac, The Interpretation of the Civil Code of Saint Lucia, in *Essays on the Civil Codes of Quebec and St. Lucia*, (1983) 14 RGD 409 at pp 427-428.)

39. In the course of his submissions, Mr Astaphan drew our attention to the observation of Lord Hodge, sitting in the Judicial Committee of the Privy Council in *Nelson v First Caribbean International Bank (Barbados) Ltd* [2014] UKPC 30 where he stated at para 20 that "article 917A … imports only the English common law in relation to obligations and not the English statutory provisions on limitation". It is apparent, however, that Lord Hodge was there concerned only with a distinction between English law concerning limitation and English law concerning obligations. He should not, therefore, be taken to have intended to exclude substantive English statutory provisions relating to contracts, quasi-contracts and torts, a matter which was not under consideration or fully argued in that case.

40. The obiter dictum of Lord Hodge in *Nelson* was relied upon by Blenman JA in *First Caribbean International Bank (Barbados) Ltd v Sunset Village (in liquidation)* SLUHCVAP 2016/0027, 20 September 2018. In rejecting a submission that the judge had correctly relied upon the English Insolvency Act and the English Insolvency Code, she stated (at para 24) that article 917A "only enables the local court to import the common law of England and not the statutory provisions of England and Wales". However, once again the court was not concerned with substantive statute law relating to contracts, quasi-contracts and torts but with the question whether the substantive law of insolvency had been imported.

41. The Board notes that in the present proceedings the Court of Appeal (Webster JA (Ag) at para 30) considered that insofar as *Sunset Village* can be interpreted as saying that article 917A does not import the general statute law of England it is obiter. The Board agrees with the Court of Appeal in the present proceedings that that Court was free to come to its own conclusion on the interpretation of article 917A. It seems to the Board, moreover, that on their plain meaning the words of article 917A clearly import statutory provisions which relate to the substantive subject matter within that article. The Court of Appeal in the present case was correct in its refusal to follow *Sunset Village* in this regard. The Board agrees with the conclusion of Webster JA (Ag) in the Court of Appeal in these proceedings (at para 44):

> "I am satisfied that article 917A means what it says and that it imports into Saint Lucia the law of England relating to contracts, quasi-contracts and torts, which includes the statutes of England relating to these areas of the law."

42. It would, moreover, be surprising if article 917A had been intended to have the effect of importing into Saint Lucia English common law but not English statute law. The introduction of legislation concerning a particular aspect of contracts, quasi-

contracts and torts in England and Wales could normally be expected to bring to a halt or at least impede the further development of the common law in that field. In such a situation a nation adopting only English common law might find that its adopted law had become fossilised at the point at which the Westminster Parliament chose to enact statutory provisions. This would create considerable uncertainty as to the effect, if any, that any subsequent case law construing or applying the statutory provisions would have in Saint Lucia. In any event, the Board is satisfied that there is nothing in the wording of article 917A which suggests that such a result was intended.

43. Further, article 917A(1) is clearly intended to have ambulatory effect rather than simply importing English law as it existed in 1956. It imports into the law of Saint Lucia "the law of England for the time being relating to contracts, quasi-contracts and torts". In *Eversley Thompson v R*, 21 July 1997, a decision of the Court of Appeal of Saint Vincent and the Grenadines on the similar language of section 3 of the Evidence Act 1988 (Saint Vincent and the Grenadines), Sir Dennis Byron CJ (Ag) observed (at pp 5-6):

> "There are two possible meanings of the phrase 'the law of England for the time being': the first that it refers to the law of England as it stood when section 3 of the Evidence Act 1988 took effect; the second or ambulatory meaning that it refers to the law of England as it stands whenever the court is asked to apply the relevant provision.
>
> In an article in the Caribbean Law Review entitled 'The Courts and the Inter-relation of the Civil Code in a mixed Legal System: St. Lucia Revisited' Dr Kenny Anthony discussed the importation of English law through the Civil Code. His researches revealed that in the case law throughout the Commonwealth the second meaning has been generally accepted."

He had no hesitation in adopting the ambulatory meaning.

44. In *Mathurin v Augustin* the Court of Appeal (at para 16) left open the question whether the words "the law of England for the time being" meant English law as it presently stands. However, the Board has no hesitation in agreeing with Webster JA (Ag) in the Court of Appeal in the present proceedings that the words "for the time being" give the provision an ambulatory effect. This is the clear meaning of the

words used. It is also the view expressed by Sir Vincent Floissac in relation to article 917A(1) (see para 38 above).

45. Article 917A(1) provides that "… the law of England for the time being relating to contracts, quasi-contracts and torts shall mutatis mutandis extend to Saint Lucia…". The use of the expression "mutatis mutandis" indicates that English common law and statute law is to extend to Saint Lucia with the necessary changes in points of detail. In particular, when applying an English statute in Saint Lucia by virtue of article 917A(1) it will be necessary to make such adaptations as may be necessary to permit its application as part of the law of Saint Lucia.

46. Finally in this regard, it is necessary to return to article 917A(3) which expressly provides that where a conflict exists between the law of England and the express provisions of the Civil Code or of any other statute, the provisions of the Civil Code or of such statute shall prevail. The result is, as Mr Patterson KC submits on behalf of the respondent, that:

> (i) A court that is considering the state of the relevant law in England is bound to consider not only the common law but also the relevant provisions of the Acts of Parliament that are in force in England at the time that the matter is tried.
>
> (ii) The framers of the Civil Code intended that the laws of Saint Lucia relating to torts should mirror the development from time to time of tort law in England and that, except where English law conflicts with the express provisions of the Civil Code or any other statute, the tort law of England for the time being should apply to Saint Lucia.
>
> (iii) A conflict between an English statute and the common law in force in Saint Lucia will not bring into operation article 917A(3).

47. Having concluded, therefore, that article 917A is valid and that in principle it imports both English statute law and English common law into St Lucia, the Board turns to consider the appellant's case that such importation is precluded by inconsistencies between specific aspects of English defamation law and the law of Saint Lucia.

__Issue 3: Conflicts between the Civil Code and the 2013 Act__

48. The provisions inserted by Act 34 of 1956 between articles 989 and 990 of the Civil Code cover a range of topics. Article 989A deals with the liability of the owner of a dog for injury done to any cattle or poultry by that dog. Article 989B deals with the abolition of the doctrine of common employment which precluded employees from bringing an action against their employer for injury caused by the negligence of a fellow employee. The provisions relating to libel and slander are articles 989F to 989S. Several of those articles reproduce the provisions of the Defamation Act 1952. That Act was described in the long title as an Act "to amend the law relating to libel and slander and other malicious falsehoods". The 1952 Act therefore supplemented rather than codifying defamation law which had developed as a matter of common law over many years. For example, section 1 provided that "for the purposes of the law of libel and slander" broadcasting was to be treated as publication in permanent form. The section did not otherwise enact for what purposes the permanence or impermanence of publication might be relevant.

49. The Explanatory Notes to the 2013 Act state that the Act reforms aspects of the law of defamation: "The civil law on defamation has developed through the common law over a number of years, periodically being supplemented by statute…". The 2013 Act did not replace the earlier Act in its entirety and some of the provisions in articles 989F-989S of the Civil Code which mirror provisions of the Defamation Act 1952 may be unaffected by the changes made in 2013. For example, article 989P deals with agreements to indemnify a person against civil liability for libel in similar terms to section 11 of the 1952 Act, which remains in force.

(a) The limitation period: section 8 and article 2123

50. The provision of the 2013 Act which would have the greatest effect on the course of these proceedings is the truncation of the limitation period brought about by section 8(3) of that Act.

51. Section 8 of the 2013 Act provides:

> "**8 Single publication rule**
>
> (1) This section applies if a person—

(a) publishes a statement to the public ('the first publication'), and

(b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) 'publication to the public' includes publication to a section of the public.

(3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

(a) the level of prominence that a statement is given;

(b) the extent of the subsequent publication.

(6) Where this section applies—

(a) it does not affect the court's discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and

(b) the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section."

52. Section 4A of the Limitation Act 1980 (substituted by the Defamation Act 1996 section 5) provides that no action for libel or slander shall be brought after the expiration of one year from the date on which the cause of action accrued. This is subject to the court's discretion in section 32A of the 1980 Act to disapply section 4A and allow an action to proceed having regard to all the circumstances of the case and to the degree to which the claimant would be prejudiced by the application of that time limit and the degree to which the defendant would be prejudiced by its disapplication.

53. The effect of section 8 of the 2013 Act in English law is therefore that a claimant has one year from the first publication of the libel to bring proceedings, however many times the libel is later repeated. This changed the common law position, according to which each publication of a libel gave rise to a separate cause of action with its own one year limitation period: see *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 1805, [2002] QB 783, para 57.

54. Mr Hilaire lodged his claim against Mr Chastanet on 20 March 2017. The statement of claim alleges that the libel was contained in a letter sent by Mr Chastanet on or about 21 March 2016. A passage of that letter, set out in the statement of claim, referred back to an earlier letter of 16 December 2015 in which the same allegations had been made by Mr Chastanet. The pleading also sets out, as Particulars in support of the innuendo meanings alleged, statements Mr Chastanet made in an interview on a talk show in November 2015, at a meeting in December 2015 and in online newspaper articles in December 2015. All of those occurred more than one year prior to the commencement of these proceedings.

55. The Amended Defence served by Mr Chastanet pleads various defences: that the statements are substantially true, that publication was a matter of public interest, that each of the occasions of publication was an occasion of qualified privilege and that the statements were statements of honest opinion. At para 14, the Amended Defence asserts that the words complained of were first published in November or December 2015 and so the claim is statute barred by virtue of article 2123 of the Civil Code and/or section 8 of the 2013 Act.

56. Mr Hilaire argues that the introduction of the first publication rule as it affects the limitation period under English law conflicts with article 2123 of the Civil Code

which, although it does not expressly say so, assumes the existence of the multiple publication rule. Article 2123 provides:

> "2123. The following actions are prescribed by one year:
>
> 1. For slander or libel, reckoning from the day that it came to the knowledge of the party aggrieved."

57. Webster JA (Ag) in the Court of Appeal held that the answer to this submission lay in the requirement in article 917A that the imported English law extends to Saint Lucia *mutatis mutandis*. The adaptation to be made is that the limitation period in section 8(3) read together with article 2123 of the Code results in a limitation period of one year from the date when the first publication of the defamatory material came to the knowledge of the claimant.

58. The Board agrees with the conclusion of the Court of Appeal in this regard. The Civil Code specifies the period of limitation and the point at which it accrues, namely on the date of knowledge of the person aggrieved rather than on the date of publication. In circumstances where the date of knowledge is later than the date of publication, article 2123 operates to extend the limitation period beyond that which would apply on a straight-forward application of section 8. The apparent difference in the resulting position in English law under section 4A of the Limitation Act 1980 and under St Lucia law resulting from the importation of section 8 of the 2013 Act is mitigated by the circumstances specified in section 32A of the Limitation Act 1980 as being relevant to the English court's discretion to extend the time limit set by section 4A where the claimant has delayed in bringing proceedings. One relevant circumstance is whether "the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A": see section 32A(2)(b) of the 1980 Act.

59. The test of whether a subsequent publication is materially different from the manner of the first publication would apply to the present proceedings since it is the whole of section 8 which is imported, subject to the adaptation proposed by the Court of Appeal. Article 917A(3) does not mandate that the single publication rule is disapplied.

(b) Serious harm: Article 989H and section 1

60. Section 1 of the 2013 Act provides:

> "**1. Serious harm**
>
> (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss."

61. Mr Hilaire submits that this conflicts with article 989H of the Civil Code which provides:

> "989H. In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business."

62. The Board concludes that article 989H is dealing with a different point from the point addressed by section 1 of the 2013 Act. Section 1(1) is setting a threshold for when a potentially defamatory statement becomes actionable. Unless there is likely to be harm above that threshold then no action will lie. Subsection (2) is addressing the kinds of harm that can be relied on by a body that trades for profit. By contrast article 989H is dealing with the harm that can be relied on by a person who occupies a particular office etc making him particularly vulnerable to damage if he is disparaged. The Board agrees with the reasoning of the Court of Appeal that there is no basis for holding that article 917A(3) precludes the imposition of a minimum threshold of harm: para 57.

(c) Abolition of common law defences of justification and fair comment

63. Section 2 of the 2013 Act abolishes the defence of justification at common law and replaces it with a defence that the imputation conveyed by the statement is substantially true. Section 2 provides:

> "**2. Truth**
>
> (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
>
> (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
>
> (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.
>
> (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed."

64. Mr Hilaire argues that this conflicts with article 989K of the Civil Code:

> "989K. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

65. Mr Hilaire argues that article 989K at the least assumes that the common law defence of justification still exists and supplements it by this provision that in effect enacts section 5 of the Defamation Act 1952 which was in very similar terms.

66. On this point we agree with the respondent’s submissions and with the conclusion of the Court of Appeal at para 50. Article 989K does not itself contain the defence of justification. Properly construed, article 989K supplements the common law defence of justification so that the defence could succeed even if the claimant could show that some part of the statement was untrue. Both the defence and that supplemental provision are now encapsulated in the new statutory defence of truth in section 2. The abolition of the common law defence is not therefore in conflict with the Civil Code. That article remains on the statute book but is, as the Court of Appeal held, now redundant because a defendant to a claim of defamation must now rely on the defences set out in the 2013 Act.

67. The Board has arrived at the same conclusion as regards the abolition of the common law defence of fair comment by section 3(8) of the 2013 Act. That section replaces the common law defence with the statutory defence of honest opinion. The defence of honest opinion is available if four conditions are met, broadly that the statement was a statement of opinion, that it indicated the basis of the opinion, that an honest person could have held that opinion on the basis of any fact or anything asserted to be fact in a privileged statement. Finally, the defence is defeated if the defendant did not actually hold that opinion.

68. Mr Hilaire submits that this is in conflict with article 989L of the Code which follows the wording of section 6 of the Defamation Act 1952:

> “989L. In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”

69. Mr Hilaire says that this provision assumes the existence of the defence of fair comment and the abolition of that defence by section 3 is in conflict with that. The Board’s judgment on this point is the same as with regard to the previous point about justification. It is true that article 989L is no longer needed because the common law defence of fair comment as supplemented by that article has now been replaced by the new statutory defence of honest opinion. That does not generate a conflict of the kind referred to in article 917A(3). Further, we agree with the respondent’s submission that the *Vagliano* principle does not apply here. Under that principle, derived from *Bank of England v Vagliano Bros* [1891] AC 107, where a statute is intended to embody a particular branch of the law into a code the ability to

rely on case law predating the codification is limited. That principle does not apply here because articles 989F-989S were not a codification of defamation law.

(d) Public interest defence and section 4 of the 2013 Act

70. Mr Hilaire also makes submissions as regards the operation of the defence in section 4 of the 2013 Act and provisions in the Civil Code which reflect what was formerly known as the *Reynolds* defence (after the case of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127). He argues that the extension of the qualified privilege defence to peer-reviewed statements in scientific journals conflicts with the Civil Code as do the provisions introduced in the 2013 Act as to qualified privilege. None of these points is sufficient to establish a conflict which requires to be resolved. He has not pointed to any aspect of Mr Chastanet's defence which would need to be addressed differently depending on whether the provisions of the Code or the provisions of the 2013 Act apply.

Conclusion

71. In the light of the reasons set out above, the Board will humbly advise His Majesty that the appeal should be dismissed.