

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2018/0008

**IN THE MATTER OF AN APPLICATION BY THE
ATTORNEY GENERAL OF SAINT CHRISTOPHER
AND NEVIS PURSUANT TO SECTION 36 OF THE
CONSTITUTION OF SAINT CHRISTOPHER AND
NEVIS AND TO SECTION 12 OF THE NATIONAL
ASSEMBLY ELECTIONS ACT CAP 2.01**

BETWEEN:

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Claimant

and

DR. DENZIL DOUGLAS

Defendant

Appearances:-

Mr. Douglas L. Mendes S.C. with him Mr. Michael A. A. Quamina, Ms. Leah Abdulah instructed by Ms. Talibah V. O. Byron for the Claimant.

Mr. Anthony W. Astaphan S.C., Mr. Delano Bart Q.C. with Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the Defendant.

2018: May 30
July 02

JUDGMENT

- [1] The defendant is the leader of the opposition. He was elected as the member of the National Assembly of St. Kitts and Nevis representing the constituency of St. Christopher No.6 following Federal Elections held in St. Kitts and Nevis on 15th February, 2015.

- [2] On July 30th 2015, he was issued a Diplomatic Passport by the Commonwealth of Dominica which recorded him as being a citizen of Dominica. The said passport bears an expiry date of 29th July, 2020. The defendant has travelled on this passport.
- [3] Basing itself primarily on the fact that the defendant is the holder of the said Diplomatic Passport on which he has travelled, the claimant seeks in the underlying claim, *inter alia*, a declaration that, since his election to the National Assembly on 16th February, 2015, the defendant became disqualified from being elected as a member of the National Assembly and was, accordingly, required to vacate his seat in the National Assembly by reason of his becoming a person, who, by virtue of his own act, is, in accordance with the laws of Dominica, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state, namely the Commonwealth of Dominica. The claimant further seeks a declaration that the defendant has vacated his seat and seeks an injunction restraining the defendant from taking his seat in the National Assembly and from performing his functions as a member thereof.
- [4] The defendant has filed an application to adduce expert evidence on Dominican law. It is agreed on both sides that the question whether, by reason of the foregoing matters, the defendant is by his voluntary act, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state, namely Dominica, is to be determined by the law of Dominica. The issue is whether the general principle that foreign law is a question of fact to be proved by expert evidence applies to this case.

The Claimant's Submissions

- [5] On behalf of the claimant, learned Senior Counsel, Mr. Mendes, submitted that this Court has jurisdiction not only in Saint Christopher and Nevis but also in Dominica. Accordingly, it is competent to pronounce upon the relevant law of Dominica. Expert evidence on the relevant law of Dominica is, therefore, unnecessary and inadmissible.
- [6] The claimant derives this proposition from a reading of a number of Statutory Instruments and authorities assembled below.
- [7] Mr. Mendes submitted that section 36(1)(d) of the Constitution of Saint Christopher and Nevis

vests the High Court with jurisdiction to hear and determine any question whether any member of the Assembly has vacated his seat. By section 36(6), an appeal lies as of right to the Court of Appeal from any final decision of the High Court determining any such question referred to in Subsection (1).

[8] By section 119(3)(b), references in the Constitution to the “Supreme Court, the Court of Appeal, the High Court and the Judicial and Legal Services Commission are references to the Supreme Court, the Court of Appeal, the High Court and the Judicial and Legal Services Commission established by the Supreme Court Order, namely, the West Indies Associated States Supreme Court Order 1967, No.223 of 1967 (“the Supreme Court Order”) made by her Majesty in Council pursuant to the West Indies Act.

[9] Sections 4(1)&(2) of **The Supreme Court Order** provide that there shall be a Supreme Court for the States to be styled the West Indies Associates Supreme Court comprised of a Court of Appeal and a High Court. “States” means Antigua, Dominica, Grenada, Saint Christopher Nevis and Anguilla, Saint Lucia and Saint Vincent.

[10] By section 7(1) of Schedule 2 to the Saint Christopher and Nevis Constitution Order 1983 on transitional provisions, the Supreme Court established by the **Supreme Court Order** was styled the Eastern Caribbean Supreme Court. Additionally, references to the States were modified.

[11] Based on the foregoing provisions, the claimant asserts that the High Court and the Court of Appeal, in which jurisdiction is vested by section 36 of the Constitution, are the Court of Appeal and the High Court of Justice which together comprise the Eastern Caribbean Supreme Court established by the **Supreme Court Order** for Antigua and Barbuda, Dominica, Grenada, Saint Christopher and Nevis, Saint Lucia and Saint Vincent and the Grenadines.

[12] The claimant cites Section 9 of the **Supreme Court Order** as providing for the jurisdiction of the Eastern Caribbean Supreme Court in relation to the States:

“(1) The High Court shall have, in relation to a State such jurisdiction and powers as may be conferred on it by the Constitution or any other law of the State.

- (2) The Court of Appeal shall have, in relation to a State such jurisdiction to hear and determine appeals and to exercise such powers as may be conferred upon it by the Constitution or any other law of the State.
- (3) The process of the Supreme Court shall run throughout the States and any judgment of the Court shall have full force and effect and may be executed and enforced in any of the States.
- (4) The provisions of subsection (3) of this section shall be without prejudice to the provisions of the Constitution of each State relating to fundamental rights and freedoms.”

[13] Mr. Mendes therefore submitted that there is no separate Eastern Caribbean Supreme Court for St. Christopher and Nevis, and another for Dominica. There is one unified Eastern Caribbean Supreme Court for all the States. A judge sitting in Saint Kitts is sitting as a judge of the Eastern Caribbean Supreme Court, not as a judge of the Saint Kitts High Court, which does not exist. All judges of the Eastern Caribbean Supreme Court are appointed by the Judicial and Legal Services Commission and there is no provision in the **Supreme Court Order** or elsewhere for the appointment of a judge with jurisdiction limited to a particular State.

[14] In the premises, the claimant submitted that the High Court sitting in St. Kitts is competent to determine the relevant law of Dominica for the purpose of resolving the issues that arise in this case. Expert evidence is therefore irrelevant and inadmissible.

[15] Mr. Mendes buttressed these submissions by reference to a number of authorities which examined the rationale underlying the common law rule requiring foreign law to be proved by expert evidence and which he says are authorities for the proposition that where the court is the commune forum of a number of states, as here, then foreign law is a question of law of which the Court may take judicial notice. The cases of **Cooper v Cooper**¹ and **Canadian Pacific Railway Company Limited**

¹ (1887) 13 App Cas 88

v Parent² are cited, among others, as authorities for this proposition.

[16] By analogy, submitted Mr. Mendes, the Eastern Caribbean Supreme Court, consisting of the Court of Appeal and the High Court of Justice, is the 'commune forum' of all of the states falling within its jurisdiction, including Dominica and Saint Christopher and Nevis. The law of Dominica, even when it arises for determination in a case in Saint Kitts, is not a question of fact to be proved by expert evidence, but one of law of which judicial notice is to be taken because the High Court, even when sitting in St. Christopher and Nevis, has jurisdiction in relation to Dominica and is presumed to know the law of Dominica.

The Defendant's Submissions

[17] On behalf of the defendant learned Senior Counsel, Mr. Anthony Astaphan, submitted that the question of whether a person is by virtue of his own act under an acknowledgement of allegiance, obedience or adherence to a foreign power or state, namely, the Commonwealth of Dominica, is to be determined in accordance with Dominican law as established by admissible expert evidence.

[18] In reply to the two limbs on which the claimant's submissions rest, learned Senior Counsel submitted that the Court must not confine itself to the **Supreme Court Order** but is required to consider other Acts of Parliament which affect or concern the jurisdiction of the High Court or the presumption or common law principle of the territorial application of laws. In this regard, Mr. Astaphan submitted that the provisions of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act, Cap.3.11**, the **Evidence Act, 2011**, the **Evidence Act, Cap.3.12 (repealed)** and the **Reciprocal Enforcement of Judgments Act, Cap. 5.14** are all highly relevant for the reasons set out below.

[19] In the first place, submitted Mr. Astaphan, section 6(1) of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act** is relevant because it confirms the Parliament's authority to make laws concerning the jurisdiction of the High Court; therefore the court must consider such Acts of Parliament that touch and concern its jurisdiction. Further, Section 7(1) provides that the

² [1917] AC 195

High Court shall have and exercise its jurisdiction within the State (*defendant's emphasis*); a clear indication that it confers a territorial jurisdiction notwithstanding that the Eastern Caribbean Supreme Court is institutionally a court common to the Organisation of Eastern Caribbean States. When read with the Interpretation Act, which states that the High Court is the High Court of Saint Christopher and Nevis, the argument for territorial jurisdiction gains further support submits Mr. Astaphan.

[20] The former and current Evidence Acts are said to be relevant in the following ways. The Evidence Act, Cap.3.12 was enacted to provide the legal framework for the admissibility of evidence in proceedings before the Courts of Saint Christopher and Nevis. Section 13 dealt specifically with the issue of judicial notice and laws. It enabled the High Court in St. Kitts to take judicial notice of laws of territories beyond its territorial borders. These territories included Dominica and other colonies or Associated States of Great Britain. This Act was enacted in 1876, amended in 1976 and 1998 before being repealed in 2011. Its existence and continued application till then is inconsistent with the notion that the High Court had the right or obligation as part of a common court to make decisions on laws from other states without the statutory requirement or authority of judicial notice. The defendant relies on **Julian Sprecher v Price Waterhouse Coopers and Others**³ where Harris J, sitting in Antigua rejected an argument that he was entitled to take judicial notice of the laws of the British Virgin Islands but felt enabled to do so by virtue of a provision similar to section 13.

[21] **The Evidence Act, Cap.3.12** was repealed and replaced by **The Evidence Act**, No. 30 of 2011 which declares that it applies to all proceedings in a court of Saint Christopher and Nevis, unless the contrary is in any case expressly provided. Section 126 of this Act specifically prescribes the matters of which judicial notice is to be taken. Senior Counsel Astaphan argued that three propositions may be derived: first, that by necessary implication proof is required for any law other than those mentioned in subsection (1) which are all matters of municipal or domestic law; secondly, proof is not required of these matters because the court can take judicial notice of laws in Saint Christopher and Nevis; and thirdly, the hitherto wide authority of the High Court to take judicial notice of laws beyond its territorial jurisdiction was repealed. Mr. Astaphan therefore

³ANUHCv2009/0514

contended that the effect of section 126 is that in Saint Christopher and Nevis proof is now required of all matters of law except those specifically mentioned in section 126(1). This means that the laws of Dominica must be established by expert evidence.

[22] The relevance of the **The Reciprocal Enforcement of Judgments Act, Cap.5.14** is said to derive from Section 6, Schedule 4 which shows that the Governor General has made an order for the reciprocal enforcement of judgments between Saint Christopher and Nevis St. Lucia, St. Vincent and Grenada notwithstanding that they are States within the Eastern Caribbean Supreme Court. Learned Senior Counsel submitted that this indicates that, notwithstanding the claimant's reliance on Section 9(3) of **The Supreme Court Order 1967**, judgments are not enforceable within the OECS without compliance with the rules or laws of the individual states. This, submitted Senior Counsel, further undermines the argument that the High Court sitting in St. Kitts has jurisdiction in relation to Dominica.

[23] As it relates to the principle of commune forum, Mr. Astaphan sought to distinguish the authorities relied on by the claimant. He submitted that they demonstrate that a 'commune court' is one which hears appeals from various courts, armed with the authority to take judicial notice of laws of all subordinate courts in different parts of the United Kingdom and Canada. None of the authorities cited applied the commune forum principle to a High Court or Court of Appeal. Indeed, they establish that in England Scots law is not judicially noticed in the High Court or Court of Appeal but must be proved as a fact by expert evidence.

Issue:

[24] The issue for resolution on this application is a narrow one: whether the High Court sitting in St. Christopher and Nevis can take judicial notice of Dominican law or whether it is to be treated as a question of fact requiring proof by admissible expert evidence.

Discussion:

[25] Both the claimant and the defendant accept that the general principle is that foreign law must be

proved by admissible expert evidence. The Commonwealth of Dominica is a foreign power or State within the meaning of Section 28(1) of the Constitution of Saint Christopher and Nevis.

[26] The claimant contends, however, that the rationale underpinning the general rule that foreign law must be proved by admissible expert evidence is non-existent in this case because of the peculiar construct of the Eastern Caribbean Supreme Court. It is a commune forum for all of the member states and as such is competent to, and must, take judicial notice of the laws of Dominica. Resorting to expert evidence is irrelevant and inadmissible.

[27] The defendant asserts that in order to properly discern the jurisdiction of the Court, all Acts of Parliament that affect the Court's jurisdiction must be examined. On a proper statutory construction, the jurisdiction of the High Court in St. Kitts to take judicial notice of foreign law is limited to those matters prescribed in section 126 of the Evidence Act, 2011, namely domestic law. In the High Court sitting in St. Kitts, Dominican law is a question of fact to be proved by admissible expert evidence.

The Commune Forum exception:

[28] In order to determine the current jurisdiction of the High Court when sitting in St. Christopher and Nevis, a brief historical overview is necessary. A succinct history is documented in the book: **Eastern Caribbean Supreme Court - Model Regional Court**⁴ by Dr. Francis Alexis. The learned author states that pursuant to the West Indies Act, 1967 which provided for Her Majesty in Council to establish common courts for the Associated States, Her Majesty in Council on 22nd February 1967 made **The West Indies Associated States Supreme Court Order, 1967**⁵ which established a Supreme Court, to be styled the West Indies Associated States Supreme Court, comprising the High Court and the Court of Appeal, for the West Indies Associated States.⁶

[29] In so far as the jurisdiction of the High Court was concerned, The Supreme Court Order provided as follows at section 9:

“9.(1). The High Court shall have, in relation to a State, such jurisdiction and powers as

⁴ Francis Alexis, *Eastern Caribbean Supreme Court: Model Regional Court*, (Eastern Caribbean Supreme Court) 2007.

⁵ SI 1967 No.223.

⁶ See sections 4(1) &(2).

may be conferred on it by the Constitution or any other law of the State.”

[30] The Supreme Court Order was entrenched in subsequent Independence Constitutions of the States.⁷ Saint Christopher and Nevis moved from Associate Statehood in 1967 to sovereign independence in 1983 with its own Independence Constitution⁸. An identical provision is contained at section 9 of The West Indies Associated States Supreme Court Order, 1983. Plainly, both the Supreme Court Order 1967 and 1983 Order left it to the individual States to determine what Jurisdiction the High Court was meant to have and exercise while sitting in the State as conferred upon it by the Constitution and the law in each State.

[31] The 1967 and 1983 Orders have been superseded by **The Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act, Cap. 3.11**. The jurisdiction of the High Court is dealt with in Part II. By section 6, all jurisdiction that vested in the former Supreme Court by virtue of the Supreme Court Act, Cap.79 and other laws in force were vested in the High Court. The High Court would also have and exercise such jurisdiction as conferred by the Act itself or any other Act.

[32] Section 6(1) of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act** therefore confirms the Parliament’s authority to make laws concerning the jurisdiction of the High Court.

[33] Further, Section 7(1) provides that the High Court shall have and exercise its jurisdiction within the State. The language employed in these sections conveys that the High Court was intended to have a territorial jurisdiction notwithstanding that the Eastern Caribbean Supreme Court is a court common to the Organisation of Eastern Caribbean States. Nothing warrants the interpretation that they are meant to have extra-territorial effect, or of necessity, must be construed as having extra-territorial effect. Sections 9(1) of **The Supreme Court Orders** of 1967 and 1983 and section 7(1) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act contemplate that the particular jurisdiction of the High Court when sitting in a State was to be determined by reference to the provisions of the Constitution and Laws of that particular State. Similar provisions govern the

⁷ See Section 38 of the Saint Christopher and Nevis Constitution.

⁸ SI 1983 No.881.

jurisdiction of the Court of Appeal. See Section 9(2) of the **Supreme Court Order 1967**.

[34] Thus by sections 9(1) and 9(2), the jurisdiction of the constituent parts or divisions of the Eastern Caribbean Supreme Court is made subject to the Constitution and or laws of the States.

[35] This may be contrasted with section 9(3) of the **Supreme Court Order** which confers a regional jurisdiction in relation to the process of the Supreme Court and the enforcement of its judgments. In commenting on the significance of this provision, the Honourable Mr. Justice Adrian Saunders observed:

“For each of the States and territories the Courts Order establishing a regional jurisdiction of sorts is clearly of profound constitutional value. The problem is that at subsection 9(1) and 9(2), the Order subjects the exercise of what might otherwise have been a uniform regional jurisdiction to the terms of the Constitution or any other law of the State. The Chief Justice’s rule-making power at section 17 is also expressly given subject to the provisions of the Court’s Order and any other law in force in any of the States. These provisions suggest a clear principle. In all three respects (sections 9(1);9(2) and 17) where there is a tension between the exercise of an essentially regional and that of a territorial jurisdiction the tension must be resolved in favour of the latter. The terms of section 9(3) provide a stark exception to this principle. In section 9(3) of the Order there is every suggestion that the regional jurisdiction conferred by that sub-section is to take precedence over any territorial provision to the contrary. [Citing the provisions] What is telling about this provision is that here, the exercise of a regional jurisdiction is not qualified or made subject to the Constitution and or laws of the States save that section 9(4) provides that the provisions of section 9(3) “shall be without prejudice to the provisions of each State relating to fundamental rights and freedoms.” So the only qualification on the running of the process of the Court and the enforcement of its judgments throughout the States lies in circumstances where domestic rights and freedoms are implicated. The ineluctable consequence is that, unless fundamental rights are affected, those matters which are subsumed under section 9 (3) of the Court’s Order are to have a purely regional character, binding upon and throughout all the States for whom the Court exists; that such matters fall within a realm where a regional jurisdiction is to be exercised in preference to the exercise of territorial jurisdiction.”⁹

[36] Rawlins J.A. further opined that “the lack of clarity in relation to the ECSC’s regional jurisdiction is not helped by some of the provisions of the legal instruments that establish and support the regional court.”¹⁰ The Court is inclined to respectfully agree with his characterisation of the Court as

⁹ The Hon. Mr. Adrian Saunders , “Regional or territorial jurisdiction? Reflections on the Eastern Caribbean Supreme Court and its Civil Procedure Rules.” 70, 72.

¹⁰ Ibid, p.70.

“a hybrid institution; neither wholly regional nor wholly territorial.”¹¹

[37] Thus, the position seems to be that where the Constitution or other laws of a State prescribe for matters outside the reach of section 9(3) of the Supreme Court Order those provisions prevail to the extent that there is any tension between territorial and regional jurisdiction.

[38] Before passing on, I must address the House of Lords and Privy Council authorities relied upon by the claimant. The claimant’s reliance on **Cooper v Cooper**, with respect, is misplaced. That case held while the Courts of Scotland, England and Ireland could not take judicial notice of each other’s laws, the House of Lords, as the common forum of all three countries, was bound to take judicial notice of the laws of each country. Lord Watson stated the proposition in the following terms at page 403:

“The peculiarity of the present case, upon which the respondents strongly relied consists in this - that in the Courts of Scotland English law is treated as matter of fact, and must be proved as well as averred in order to enable the Judges to give a decision upon it. The appellant adduced no evidence as to the law of England, and was therefore not in a position to press her objection before the Court of Sessions. On the other hand, this House as the *commune forum* of the three countries, deals with such an objection as matter not of fact but of law, and gives its decision upon the legal issues raised without regard to evidence led in the court below.”

[39] The rationale for this was explained by Lord Macnaghten at page 405:

“It is true that in the Courts below there was no evidence of what the law of Ireland was, and those Courts therefore were unable to consider the question. But there is enough upon the pleadings to raise the point, and the peculiarity of the case is that what must necessarily have been a question of fact in the Courts below becomes a question of law in your Lordship’s House. It is not competent to your Lordships on an Irish question, though involved in a Scottish appeal, to shut your eyes to the laws of Ireland, and to determine the rights of the parties in the dark, as the Courts below were compelled to do. The authorities cited by the learned counsel for the appellant seem to show conclusively that in a case like the present your Lordships cannot divest yourselves of your judicial knowledge of Irish law.”

[40] The same principle was applied in the case of **Canadian Pacific Railway Company v Parent**¹², where the Privy Council held that as the common forum of the Provinces of Canada, exercising appellate jurisdiction in relation to the provinces, the Supreme Court of Canada was bound to take

¹¹ Ibid. P.72.

¹² [1971] AC 195, 201

judicial notice of the laws of each province.

[41] Lord Mcnaghten's dicta may be apposite in relation to the jurisdiction of the Court of Appeal of the Eastern Caribbean Supreme Court. The individual States and Territories in their domestic laws have conferred jurisdiction on the Court of Appeal as their first tier appellate court. Therefore, when sitting in St. Kitts, should a matter of Dominican Law arise, the Court of Appeal cannot divest itself of its judicial knowledge of Dominican Law. Thus, in the Court of Appeal, Dominican Law is a question of law. That is the peculiar nature of the jurisdiction of an appellate tribunal to whom several states have specifically conveyed appellate jurisdiction.

[42] The commune forum principle would also apply in the case of the Privy Council on whom several countries would have conferred jurisdiction as their final appellate court. So in that sense it is a commune forum.

[43] The same does not hold for the jurisdiction of the High Court sitting in St. Kitts.

[44] This position accords with the view expressed by Dr. Francis Alexis who, in explaining the structure of the Eastern Caribbean Supreme Court writes:

"There is one Court of Appeal and one High Court comprising the Court which is accessed by the various States and colonies or territories subscribing to it. When the Court, whether the Court of Appeal or the High Court sits in a particular country, it is the Court of that Country. So for each country the Court is separate juridically from the Court for another country. So too when the Privy Council sits on a case from one country, it is a court for that country; when it sits on a case from another country, it is a court for that other Country. So it is normally with any court simultaneously serving separate sovereign states, like the Caribbean Court of Justice ("CCJ"). But it is not said ordinarily that the Privy Council or CCJ is number of 'courts'."¹³

[45] With this view, the Court is in respectful agreement. For the reasons advanced above, I cannot read the provisions of the Constitution or the Supreme Court Orders as constituting the High Court a commune forum within the meaning urged by learned Senior Counsel for the claimant. Undoubtedly, the High Court sitting in St. Kitts is part of the Eastern Caribbean Supreme Court. However, subject to section 9(3) of the Supreme Court Order, its jurisdiction is defined and limited

¹³ Alexis, Op. Cit, page 6.

by domestic law.

Statutory Judicial Notice

[46] As it relates to the law of Dominica, Learned Senior Counsel for the claimant is of course right when he says that the Court must look to the laws of St. Kitts to determine how Dominican law is to be interpreted in St. Kitts.

[47] This leads to the question: does the law of St. Kitts and Nevis, whether statutory or common law, prescribe the circumstances under which the Court may take judicial notice of foreign law? As set out above, Mr. Astaphan relies on the provisions of **The Evidence Act, Cap.3.12**, **The Evidence Act, 2011**, **The Reciprocal Enforcement of Judgments Act, Cap.5.14**. Mr. Mendes invokes the common law doctrine of “commune forum”.

[48] I start with the proposition that the general common law principle is that foreign law is a question of fact which is required to be proved by expert evidence. As Mr. Mendes clearly accepts in his supplemental written submissions, among the exceptions to this principle is where statute permits the Court to take judicial notice of foreign law.

[49] Section 13 of **The Evidence Act, Cap.3.12** was captioned “Facts of which judicial notice is to be taken.” The facts listed at 13 (a) - (d) related to foreign law. As such, in relation to the foreign states listed therein, including Dominica, the section regarded the laws of those countries as questions of fact. Section 13 therefore provided an exception to the general common law principle that foreign law had to be proved by expert evidence. It provided that judicial notice could be taken of such laws. This provision, while applicable to Dominica at a time when it was a British colony ceased to have effect in relation to Dominica on its gaining independence.

[50] In my view, it seems clear that while Section 13 remained in force and while Dominica remained a territory to which the section applied, Dominican law was regarded as a question of fact of which judicial notice could be taken. Upon gaining independence, Dominican Law did not alter its character as a question of fact; the only change was that judicial notice could no longer be taken of

it by the Court in St. Kitts.

[51] Mr. Mendes correctly submitted that by the time of the repeal of section 13(1) in 2011 it had long ceased to apply to any of the jurisdictions of the Eastern Caribbean Supreme Court. Mr. Mendes further submitted that when Dominica and the other territories, save the British Virgin Islands and Montserrat, attained independence, Section 13 ceased to have effect and the common law “reasserted itself in its fullness to govern judicial notice of their laws.

[52] Mr. Mendes submitted that the general principle requiring proof of expert evidence and the commune exception were the law of Saint Kitts and Nevis when section 13(1) was repealed and section 126 of the Evidence Act was enacted. Mr. Mendes urged caution when considering whether section 126 abolished the commune forum principle, citing the normal canon of construction against construing an enactment as abolishing the common law.

[53] As the court sees it, with the repeal of Section 13 and the enactment of **The Evidence Act, 2011**, the question of judicial notice of matters of law was put on a statutory footing. Section 126 expressly dealt with the question of judicial notice. It provides:

“Matters of which judicial notice may be taken.

(1) Proof shall not be required about matters of law, including the provisions and coming into operation, in whole or in part, of

(a) an Act;

(b) an instrument of a legislative character, including regulations, rules, notices, orders and by-laws, made or issued under or by authority of such an Act, being an instrument

(i) that is required by or under an enactment to be published in the gazette

(ii) the making or issuing of which is so required to be notified in the gazette.

(2) The court may inform itself about matters referred to in subsection (1) in any manner that the court thinks fit.”

[54] Mr. Mendes is plainly right when he submits that the application of section 126 is dependent on the view the court takes as to whether Dominican law is a question of fact or law. For the reasons

discussed above the court is of the view that prior to the enactment of section 126, Dominican law was regarded as a question of fact, and continues so to be, so that neither the commune forum exception nor section 126 applies.

[55] Even if the court were to accept the claimant's submission that prior to the enactment of section 126, Dominican Law was a question of law under the commune forum exception, section 126 of the Evidence Act now prescribes the matters of law for which proof is not required. It does not exempt Dominican from the requirement of proof. Indeed the section does not exempt any foreign law.

[56] The court is therefore driven to the conclusion that I may only have regard to those matters of law prescribed in section 126. Since these matters pertain only to domestic law, Dominican law is excluded under section 126.

[57] Accordingly, the authority of **Green et al v Saint Jean et al**¹⁴ is applicable. In the premises, the court is satisfied that when sitting as the High Court in St. Kitts, Dominican law is a question of fact to be proved by expert evidence.

[58] Leave is therefore granted to the defendant to adduce expert evidence on the law of Dominica.

[59] The claimant is at liberty to apply to adduce expert evidence on the law of Dominica.

[60] The Court expresses its immense gratitude to Counsel on both sides for the very comprehensive and thorough oral and written submissions which assisted the Court in great measure.

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar

¹⁴ DOMHCCVAP2012/0001