

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2019/0005

BETWEEN:

ALLEN CHASTANET

Appellant

and

ERNEST HILAIRE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Garth Patterson, QC and Mr. Mark Maragh for the Appellant
Ms. Renée T. St. Rose, Mr. Thaddeus Antoine and Ms. Ann-Alicia Fagan for the Respondent

2019: July 3;
2020: January 16.

Interlocutory appeal — Whether Court of Appeal has jurisdiction to deal with constitutional point raised in lower court proceedings but not addressed by trial judge — Constitutionality of article 917A of Civil Code of Saint Lucia – Civil Code of Saint Lucia – Whether article 917A of the Civil Code breaches sections 40 and 120 of the Constitution — Statutory interpretation — Whether article 917A of the Civil Code of Saint Lucia imports into Saint Lucia the statute law of England relating to contracts, quasi-contracts and torts — UK Defamation Act — Whether UK Defamation Act is imported into the laws of Saint Lucia by article 917A — Whether provisions of UK Defamation Act conflict with Civil Code provisions on defamation

The respondent, Ernest Hilaire (“Mr. Hilaire”), a former High Commissioner for Saint Lucia to the United Kingdom and a member of the House of Assembly, filed a defamation claim against the appellant, Allen Chastanet (“Mr. Chastanet”), who was then and is now the Prime Minister of Saint Lucia. Mr. Chastanet defended the claim, relying substantially on the provisions of the Defamation Act 2013 of the United Kingdom (the “Defamation Act” or

the “Act”) which he contended was imported into Saint Lucia by article 917A of the Civil Code. During the interlocutory proceedings, Mr. Chastanet applied to strike out Mr. Hilaire’s claim and Mr. Hilaire applied to strike out Mr. Chastanet’s defence. At the hearing of both applications, counsel for the parties agreed that the issue of the importation of the Act into Saint Lucia should be heard first since the viability of each party’s pleadings depended on the outcome of the issue.

Mr. Hilaire contended that in so far as article 917A purports to import English statutory law into Saint Lucia, it is repugnant to section 40 of the Constitution of Saint Lucia (the “Constitution”) and, as such, it is inconsistent with section 120 of the Constitution and is therefore void. The learned judge tried the issue of the importation of the Act into Saint Lucia as a preliminary issue and found that article 917A did not import the Act into Saint Lucia. Mr. Chastanet appealed against the judge’s decision.

At the commencement of the hearing before this Court, learned Queen’s Counsel for Mr. Chastanet raised a preliminary objection to the challenge by Mr. Hilaire to the constitutionality of article 917A for two reasons. Firstly, that Mr. Hilaire did not file a counter notice of appeal challenging the trial judge’s decision not to deal with his constitutional challenge. Secondly, that even if Mr. Hilaire had filed a counter notice of appeal, this Court would not have the power to deal with the challenge because the High Court had not made a ruling on the point and there was nothing to appeal against.

The Court reserved its decision on the preliminary objection and proceeded to hear the substantive issue on appeal, that is, whether article 917A of the Civil Code of Saint Lucia (“the Code”) imported into Saint Lucia the statute law of England relating to contracts, quasi-contracts and torts, including the Defamation Act which was enacted by the United Kingdom Parliament in 2013.

Held: allowing the appeal; setting aside the order of the trial judge; remitting the case to the trial court for dealing with the outstanding interlocutory applications including the appellant’s application to strike out the claim; awarding costs of the appeal to the appellant summarily assessed at \$5,000.00, that:

1. The general rule is that the Court of Appeal will not entertain an appeal on a constitutional point that was not raised in the lower court and that did not come to the Court of Appeal by way of an appeal. The constitutionality of article 917A was raised and argued in the High Court, but the trial judge, having found that article 917A does not permit the importation of English statute law into Saint Lucia, did not engage with the issue. The claim for a constitutional declaration is therefore not one that was raised for the first time in the Court of Appeal and it is not caught by the general rule that such claims should not be raised for the first time in proceedings before the Court of Appeal.

Section 28(1) of the **Eastern Caribbean Supreme Court (Saint Lucia) Act** Cap 2:01, Revised Laws of Saint Lucia 2015 applied; **Maycock v Commissioner of Police** [2015] 3 LRC 183 applied; **Tyson v R** [2018] 5 LRC 270 followed; **Piggott v R** (2015) 88 WIR 299 followed; **Attorney General of**

Grenada v Financial Investment & Consultancy Services Ltd. GDAHCVAP2016/0038 (delivered 18th April 2018, unreported) distinguished.

2. Article 917A was inserted into the Code in 1956. At the time, Saint Lucia was an English colony. When the country attained independence in 1979, Parliament was given the power to make laws for the new independent state. There is no reason why an existing law such as article 917A which purports to import the law of England relating to contracts, quasi-contracts and torts 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 Saint Lucia's independence legislation.
3. Parliament's power to legislate for the importation of laws made by a foreign Parliament as contained in article 917A 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. Article 917A is not inconsistent with section 40 or any other provision of the Constitution.

Ibralebbe and another v Reginam [1964] 1 All ER 251 applied; **BCB Holdings Limited and Another v The Attorney General of Belize** [2013] CCJ 5 (AJ) applied.

4. The Parliament of Saint Lucia has the power to legislate for the importation of statutes made by a foreign state. In each case, the meaning of the importing provision is a matter of interpreting the words used by the drafter to determine the extent to which the laws of the foreign state are to be imported. The effect of article 917A is 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 law. The words "for the time being" in article 917A have an ambulatory effect which means that the courts of Saint Lucia should apply the law of England from time to time and not when article 917A was enacted in 1956.

Bamgbose v Daniel and others [1954] 3 All ER 263 distinguished; **Cyril Mathurin and another v Anthony Augustin qua administrator of the Estate of Yasmin Natasha Augustin (deceased)** SLUHCVAP2007/0041 (delivered 2nd June 2008, unreported) distinguished; **The Attorney General of Saint Lucia and Francis Dariah v Donovan Isidore** Saint Lucia Civil Appeal No. 20 of 2003 (delivered 24th May 2004, unreported) distinguished; **Barras v Aberdeen Sea Trawling and Fishing Company Limited** [1933] AC 402 distinguished.

5. There is no irreconcilable inconsistency between the provisions of the Defamation Act and the provisions of the Code except in the case of the application of the time limit for bringing a claim for defamation under the

section 8(3) of the Act and the time limit prescribed by article 2123 of the Code. The inconsistency is however reconciled by reference to the principle of *mutatis mutandis* contained in article 917A, by reading section 8(3) of the Defamation Act to conform to article 2123 of the Code. Accordingly, the Defamation Act was imported into Saint Lucia in 2013 pursuant to the provisions of article 917A of the Code.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This appeal considers the important issue of whether article 917A of the **Civil Code of Saint Lucia**¹ (“the Civil Code” or “the Code”) imports into Saint Lucian law the statute law of England relating to contracts, quasi-contracts and torts.

Procedural Background

- [2] In March 2017, the respondent, a former High Commissioner for Saint Lucia to the United Kingdom and a member of the House of Assembly, filed a defamation claim against the appellant who was then and still is the Prime Minister of Saint Lucia. The appellant defended the claim relying substantially on the provisions of the **Defamation Act 2013**² of the United Kingdom (“the Act” or “the Defamation Act”) which he contended was imported into Saint Lucia by article 917A of the Civil Code. During the interlocutory proceedings, the appellant (as defendant) applied to strike out or summarily dismiss the respondent’s claim and the respondent (as claimant) applied to strike out the appellant’s defence. At the hearing of both applications, counsel for the parties agreed that the issue of the importation of the Act into Saint Lucia should be heard first since the viability of each party’s pleadings depended on the outcome of the issue. The learned trial judge tried the issue of the importation of the Act into Saint Lucia as a preliminary issue and found that article 917A did not import the Act into Saint Lucia. This appeal is against that decision.

¹ Cap. 4.01, Revised Laws of Saint Lucia 2015.

² 2013 c. 26.

The preliminary objection

- [3] At the commencement of the hearing before this Court lead counsel for the appellant, Mr. Garth Patterson, QC, raised a preliminary objection to one of the issues raised by the respondent in his written submissions. The issue relates to a challenge by the respondent to the constitutionality of article 917A. The Court heard the objection, reserved its decision on the point and proceeded with the hearing of the substantive issue of the interpretation of article 917A. I will deal with the preliminary objection first and then the substantive issue of the interpretation of article 917A.
- [4] The respondent contended in his written submissions opposing the appeal that if article 917A of the Code imported the Act into Saint Lucia it would be repugnant to Parliament's law-making power under section 40 of the **Constitution of Saint Lucia**³ (the "Constitution"). As such it would be inconsistent with section 120 of the Constitution and be void. The appellant's preliminary objection was that the respondent could not raise this issue on appeal. The starting point in understanding the appellant's objection is to consider article 917A and the relevant provisions of the Constitution.
- [5] Article 917A(1) of the Code provides that:

"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':..."

The respondent contended in his written submissions that when Saint Lucia became independent in 1976, the supreme and only law-making body in the State was the Parliament which, by section 40 of the Constitution, was given the power to make the laws of the State.⁴ The trial judge, having concluded that article 917A

³ Cap. 1.01, Revised Laws of Saint Lucia 2015.

⁴ Section 40 of the Constitution is set out in para. 15 below.

did not import the statute law of England into Saint Lucia, did not go on to deal with the constitutional challenge.⁵

[6] Mr. Patterson, QC submitted that the respondent cannot challenge the constitutionality of article 917A in this Court for two reasons. Firstly, the respondent did not file a counter-notice of appeal challenging the trial judge's decision not to deal with his constitutional challenge. Secondly, even if the respondent had filed a counter-notice of appeal, this Court would not have the power to deal with the challenge because the High Court had not made a ruling on the point and therefore there was nothing to appeal against.

[7] Dealing with the first point, section 28(1) of the **Eastern Caribbean Supreme Court (Saint Lucia) Act**⁶ stipulates that the powers of the Court of Appeal on the hearing of an appeal in any civil cause or matter include the power to:

“(a) confirm, vary, amend or set aside the order or make such order as the High Court might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;...”

Sub-section (2) goes on to state that:

“The powers of the Court of Appeal under this section may be exercised although no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in court or that any ground for allowing the appeal or for affirming or varying the decision of the High Court is not specified in such notice; and the Court of Appeal may make an order in such terms as the Court of Appeal thinks just to ensure the determination on the merits of the real question in controversy between the parties.”

The plain meaning of section 28 is that the Court of Appeal has the power, in appropriate cases, to deal with an issue that was raised in the proceedings in the lower court even if the party affected by the issue did not include the point in a notice of appeal or counter-notice of appeal, as the case may be.

⁵ See para. 34 of the judgment.

⁶ Cap 2.01, Revised Laws of Saint Lucia 2015.

- [8] The constitutionality of article 917A was raised and argued in the High Court and the submissions on the point are repeated in the respondent's skeleton argument filed on 18th March 2019, some 3 and a half months before the hearing of this appeal. The appellant did not file a reply to the respondent's skeleton argument or a notice of preliminary objection to the issue of the constitutionality of article 917A being raised in the appeal. This would have given the respondent an opportunity to respond to the objection in a timely manner.
- [9] I also take into consideration that the constitutionality of article 917A is an important point of law. I would not bar the respondent from arguing the point on the ground that he did not file a counter-notice of appeal.
- [10] The second point of the objection calls for an examination of the general rule that a Court of Appeal will not entertain an appeal on a constitutional point that was not raised in the lower court and therefore the point did not come to the Court of Appeal by way of an appeal. This is the effect of paragraph 37 of my judgment in the **Attorney General of Grenada v Financial Investment & Consultancy Services Ltd.**⁷ Mr. Patterson, QC submitted that this case stated the principle too widely because the Court of Appeal has power to determine any question and make declarations regarding the fundamental rights of a person if the issue arises for the first time in appeal proceedings. He referred the Court to other court of appeal decisions in support of this position. In **Maycock v Commissioner of Police**,⁸ Blackman JA writing for the majority of the Court of Appeal of the Commonwealth of The Bahamas, said at paragraph 21 of his judgment:
- “The Constitution clearly does not provide any original jurisdiction to this court to consider any questions arising in relation to the contravention of any of the provisions of arts 16 to 27 (inclusive); neither does the Court of Appeal Act or the Court of Appeal Rules contemplate or provide for the same. The jurisdiction of this court to consider questions pertaining to violation of arts 16 to 27 of the Constitution can only be exercised in two scenarios: (1) on appeal from a final decision of the Supreme Court,

⁷ GDAHCVAP2016/0038 (delivered 18th April 2018, unreported).

⁸ [2015] 3 LRC 183.

where such issues were raised for determination, and (2) where such questions arise in extant appellate proceedings.”

[11] In **Tyson v R**,⁹ this Court decided that the Court of Appeal has jurisdiction under section 37(1) of the **Virgin Islands Constitution Order**¹⁰ to entertain constitutional issues raised for the first time when these issues go to the validity of the conviction when made or the unlawfulness of the sentence when passed.¹¹ The decision of this Court in **Piggott v R**¹² is to the same effect.

[12] The common feature running through these cases is that when allegations of breaches of the claimant’s fundamental rights that are protected under the relevant section of the Constitution arise in extant proceedings in the Court of Appeal, the Court has the power to deal with them and the general statement of principle in **Attorney General of Grenada v Financial Investment & Consultancy Services Ltd** should be read subject to this exception.

[13] This appeal does not deal with a claim for breaches of the respondent’s fundamental rights. The respondent’s contention is that in so far as article 917A purports to import English statutory law into Saint Lucia it is repugnant to section 40 of the Constitution and as such it is inconsistent with section 120 of the Constitution and is therefore void.¹³ The issue was raised, but the trial judge, having found that article 917A does not permit the importation of English statute law into Saint Lucia, did not engage with the issue. The claim for a declaration is therefore not one that was raised for the first time in the Court of Appeal and it is not caught by the rule that such claims cannot be raised for the first time in extant proceedings before the Court of Appeal. The respondent should not be in a worse position because the trial judge chose not to deal with the issue and make a decision. The proper thing for the respondent to have done was to file a counter-

⁹ [2018] 5 LRC 270.

¹⁰ S.I. No. 1678 of 2007.

¹¹ per Gonsalves JA at para.45.

¹² (2015) 88 WIR 299.

¹³ Sections 40 and 120 of the Constitution are set out in para. 15 below.

notice of appeal challenging the judge's decision not to deal with the issue. I have already dealt with this issue and decided that the respondent should not be barred from dealing with the issue in this appeal, notwithstanding his failure to file a counter-notice of appeal.

- [14] The Court reserved its decision on the preliminary objection and proceeded to hear the appeal on the constitutional ground as well as the main ground of the proper interpretation of article 917A. I would overrule the preliminary objection and proceed to deal with the respondent's constitutional challenge.

The Constitutional challenge

- [15] As stated above, the essence of the constitutional challenge is that section 40 of the Constitution vests the law-making power for Saint Lucia exclusively in Parliament and section 120 provides that any law that is inconsistent with the Constitution is void. Section 40 reads: "[s]ubject to the provisions of this Constitution Parliament may make laws for the peace, order and good government of Saint Lucia". Section 120 headed "Supreme Law" reads:

"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."

The respondent contended that the law-making function requires the judgment of the elected members of Parliament to make laws in the public interest. It is a constitutional obligation that cannot be delegated to a foreign Parliament. There cannot be two law-making bodies. Article 917A, which was an existing law when the independence Constitution became effective in 1979, must be construed in accordance with the Constitution and in so far as the article purports to import statutes made by the Parliament of a foreign state, in this case England, it is inconsistent with section 40 and is therefore void under section 120.

- [16] The appellant contended that in enacting the Defamation Act, the Parliament of the United Kingdom was not legislating for Saint Lucia. The UK Parliament did not

have in its contemplation making laws for Saint Lucia or any other country outside of the UK. It is the Parliament of Saint Lucia that chose to import the statutes of England by enacting article 917A of the Code, and similar articles. More fundamentally, it was not inconsistent with Parliament's law-making function in section 40 of the Constitution for existing laws such as article 917A, which import the relevant foreign statutes, to continue to be effective after the independence Constitution became effective. In support of this proposition Mr. Patterson, QC relied on the case of **Ibralebbe and another v Reginam**,¹⁴ a 1964 decision of the Privy Council on appeal from the Supreme Court of Ceylon. The relevant facts are that, prior to independence from England in 1947, Ceylon's final court of appeal was the Privy Council by order in council. The Board had to consider the effect of independence on the existing right of appeal to the Privy Council in the new independence constitution of Ceylon. The Board found that the right of appeal continued and was not abrogated expressly or by implication by the order in council which brought about the Ceylon constitution and the country's independence.

- [17] I note that **Ibralebbe** deals with the effect of independence on an order in council giving the right to appeal to the Privy Council, unlike the present appeal which considers the effect of independence on a local statute, the Code. Nonetheless, the decision and reasoning of their Lordships is instructive. The Board noted that there was no mention of the right of appeal to the Privy Council in the instruments leading to independence, and that no reference by implication to that right should be inferred. Viscount Radcliffe opined:

"Independence as such did not, of course, alter the existing corpus of law in Ceylon. The only question therefore can be whether the appeal was affected by some necessary implication derived from the fact that its continuance will be in plain conflict with what was actually established."¹⁵

¹⁴ [1964] 1 All ER 251.

¹⁵ Ibid, at p. 259.

This statement by Lord Radcliffe is telling. It confirms the respondent's contention that independence, per se, does not take away or alter existing laws unless the independence legislation does so expressly or by necessary implication.

[18] **Ibralebbe** has been cited with approval in several cases including the decision of the Caribbean Court of Justice in **BCB Holdings Limited and Another v The Attorney General of Belize**¹⁶ where the Court sanctioned the right of the Legislature of Belize to pass an amendment to the Arbitration Ordinance in 1980 that imported into Belize the New York Convention on the Recognition of Foreign Arbitral Awards (the "New York Convention"), not as a treaty but as a part of the domestic law. The court found that the amending ordinance passed in 1980 was saved (and therefore continued to be effective) after the enactment of the 1981 Independence Constitution when Belize attained independence. The provisions of the New York Convention, which had been imported by the 1980 Arbitration Ordinance as a part of the local law, continued to be effective.

[19] Both **Ibralebbe** and **BCB Holdings** are distinguishable on the facts but they both support the appellant's contention that pre-independence laws that import foreign laws continue to be effective after independence. In **Ibralebbe**, it was an order in council that had become part of the law of Ceylon giving the right of appeal to the Privy Council, and in **BCB Holdings** it was the amendment to the Arbitration Act that imported the provisions of the New York Convention as a part of the domestic law. 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. This Court was not referred to any case where the Parliament's right to make laws for the public good was limited or taken away by the single fact of the attainment of independence.

[20] Turning to the situation in Saint Lucia, article 917A was inserted into the Code in 1956. At the time Saint Lucia was an English colony. When the country attained

¹⁶ [2013] CCJ 5 (AJ).

independence in 1979 Parliament was given the power to make laws for the new independent state. The respondent submitted that this power cannot be delegated to the Parliament of a foreign state. 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".¹⁷ This wide power, in my opinion, includes the power to import foreign laws so long as they are not inconsistent with the Constitution.

- [21] I would dismiss the respondent's contention that the power to import the Defamation Act into Saint Lucia via article 917A was unconstitutional.

Construction of article 917A

- [22] The central issue in this appeal is the meaning and effect of article 917A of the Code. Article 917A is set out in paragraph 5 above. The appellant contended that the article imported the entire law of England, including statutes, in relation to contracts, quasi-contracts and torts. This includes the Defamation Act which was imported into Saint Lucia and forms part of the laws of the State upon enactment by the UK Parliament in 2013. Ms. Renée St. Rose who appeared for the respondent opposed this interpretation of article 917A contending that the article imported only the common law of defamation and not the Act.

¹⁷ Supra, n. 9 at p. 260.

[23] This is a point of considerable importance not only for Saint Lucia but the entire Eastern Caribbean because there are similar provisions in the laws of all other states and territories that import, in various ways, the law and practice of England. It is helpful to review at least some of these provisions.

[24] Each state and territory of the Eastern Caribbean has a Supreme Court Act that governs the jurisdiction and power of the superior courts. In Saint Lucia, it is the **Eastern Caribbean Supreme Court (Saint Lucia) Act**. Section 11 reads:

“Practice of High Court in Civil proceedings and in probate causes

The jurisdiction vested in the High Court in civil proceedings including matrimonial causes and in probate causes shall be exercised in accordance with the provisions of this Act, the Civil Code, the Code of Civil Procedure, any other law in force in the State and rules of court, and, where no special provision is therein contained, such jurisdiction shall be exercised as nearly as may be administered for the time being in the High Court of Justice in England.”

This section, and its equivalent in the other states and territories, has been interpreted consistently by this Court as importing only the practice and procedure, and not the substantive law of England.¹⁸

[25] Article 917A is differently worded. It imports into Saint Lucia “the law of England”. On a plain reading of the article it imported the entire law of England, including statutes, relating to contracts, quasi-contracts and torts. Article 917A was considered by the Court of Appeal in **Cyril Mathurin and another v Anthony Augustin qua administrator of the Estate of Yasmin Natasha Augustin (deceased)**.¹⁹ The Court had to deal with a situation where section 4 of the Administration of Justice Act 1982 of England conflicted with article 609 of the Code. Article 609 allows the recovery of damages for the lost years but section 4 of the English Act abolished the right to recover such damages. The defendant/appellant argued that article 917A permitted the importation of the

¹⁸ See: *Panacom International Incorporated v Sunset Investments Limited et al* (1994) 47 WIR 139 per Sir Vincent Floissac CJ; *Veda Doyle v Agnes Dean* GDAHCVAP2011/0020 (delivered 16th April 2012, unreported) per Dame Janice Pereira CJ.

¹⁹ SLUHCVP2007/0041 (delivered 2nd June 2008, unreported).

English Act and therefore the claimant/respondent was not entitled to damages for the lost years. The Court of Appeal rejected this argument. The Court referred to article 917A which provides in sub-article (3) that “[w]here a conflict exists between the law of England and the express provisions of the Code, or of any other statute, the provisions of the Code or of such statute shall prevail”. Unsurprisingly, the Court of Appeal found that section 4 of the Administration of Justice Act was in direct conflict with article 609 of the Code and therefore that the English Act did not extend to Saint Lucia. The unanimous judgment of the Court was delivered by Barrow JA who examined the conflicting submissions as to the importation of English statute law by article 917A and found at paragraph 16 that:

“On that view it is unnecessary to decide which is correct of the two opposing interpretations of the phrase “the law of England for the time being”. Even if that phrase means English law as it presently stands, with its abolition of damages for the lost years in a case of death, that law does not extend to Saint Lucia because it conflicts with the express provision of the Code.”

The ratio decidendi of the decision of the Court of Appeal is that article 917A(3) does not permit the importation of a foreign statute when the statute conflicts with the Code or any other statutory provision in Saint Lucia. The Court of Appeal did not decide the issue that is directly relevant to this appeal that article 917A imported the statute law of England relating to contracts and torts into Saint Lucia and the decision should not be read as deciding this point.

- [26] The respondent also relied on the case of **The Attorney General of Saint Lucia and Francis Dariah v Donovan Isidore**²⁰ where the Court of Appeal had to consider whether article 917A imported the common law principle of *ex turpi causa non oritur actio* into Saint Lucia. The Court decided that the principle applied in Saint Lucia by virtue of having been imported into the country by article 917A. Gordon JA who delivered the unanimous judgment of the Court opined that “...[a]rticle 917A imported at the least, the law of torts as it was in 1956”.²¹ What

²⁰ Saint Lucia Civil Appeal No. 20 of 2003 (delivered 24th May 2004, unreported).

²¹ Ibid, para. 8.

the case did not decide, because it was not necessary to do so, was that article 917A imported generally the statute law of England into Saint Lucia.

[27] The Court of Appeal in more recent times came to a different conclusion in **First Caribbean International Bank (Barbados) Ltd v Sunset Village Inc. (In Liquidation)**²² (“Sunset Village”). The issue in this case was the distribution of the net assets of an insolvent company in the compulsory liquidation of the company. The trial judge decided that article 917A imported the Insolvency Act and Insolvency Rules of England into Saint Lucia, notwithstanding that article 917A *ex facie* applies only to the law of England relating to “contracts, quasi-contracts and torts”. There is no reference in article 917A to the law of insolvency. The Court of Appeal set aside the trial judge’s order, finding instead that article 917A imports only the common law and not the statutory law of England. This decision, unlike the decisions in **Mathurin v Augustin** and **Attorney General v Isidore**, involves an explicit finding by the Court of Appeal that article 917A did not import the statute law of England into Saint Lucia. The decision is a significant hurdle for the appellant to overcome in this appeal. If it binds this Court, we would be obliged to find that the Act was not imported into Saint Lucia, which is the overarching issue in this appeal.

[28] Mr. Patterson, QC did not dispute the principles of *stare decisis* in relation to the binding effect of decisions of the Court of Appeal as set out in the leading case of **Young v Bristol Aeroplane Company Ltd**.²³ However, he submitted that this Court was not bound to and should not follow **Sunset Village** because the finding that article 917A does not import English statute law was obiter and was made *per incuriam*. The learned judge found that the decision in **Sunset Village** was not made obiter, but was *per incuriam* because certain binding decisions, which I will deal with below, were not brought to the attention of the Court. He then construed

²² SLUHCVP2016/0027 (delivered 20th September 2018, unreported).

²³ [1944] 2 All ER 293.

article 917A and concluded that “[t]he phrase ‘law of England’ appearing in article 917A of the Code refers only to the common law of England and not UK Acts”.²⁴

Obiter

- [29] The issue in **Sunset Village** concerned the statutory law of insolvency relating to the distribution of the net assets of an insolvent company. It is pellucid that article 917A cannot be used to import the insolvency legislation of England into Saint Lucia. The article deals only with contracts, quasi-contracts and torts. The decision of the Court of Appeal on this issue is set out in paragraphs 23 and 24 of the judgment as follows:

“23. For his part, learned Counsel Mr. (Colin) Foster, on behalf of the interested parties, said that the judge was correct to rely on the Insolvency Act and Insolvency Rules in the absence of any provision in the Civil Code of Saint Lucia, Commercial Code and the Companies Act that addresses the circumstances in the case at bar. He therefore argued that the learned judge quite properly relied on the Insolvency Act and Insolvency Rules in resolving the issues that were before the court.

24. In relation to the counter notice of appeal, learned Counsel Mr. Foster suggested that article 917A of the Civil Code of Saint Lucia provides for the importation of legislation. Ms. St. Rose quite correctly opposed this suggestion and pointed out that article 917A provides only for the importation of the common law and not English statutory provisions. I am in entire agreement with Ms. St. Rose in relation to the scope and application of article 917A of the Civil Code of Saint Lucia. It only enables the local court to import the common law of England and not the statutory provisions of England and Wales. Support for this position is obtained from the decisions of **Nelson and Others v First Caribbean International Bank (Barbados) Limited** in which it was held as follows: ‘Article 917A provides no alternative answer as it imports only the English common law in relation to obligations and not the English statutory provisions on limitation’.” (Underlining added)

- [30] One of the issues for this Court is whether the finding in **Sunset Village** that article 917A does not import the statutory provisions of the law of England is binding as being a part of the ratio decidendi of the case. The issue that the Court of Appeal had to resolve in **Sunset Village** was whether article 917A imported the insolvency legislation of England. The Court of Appeal decided that article 917A

²⁴ See para. 34 of the judgment.

imported the common law “...and not the statutory provisions of England and Wales”. In deciding that article 917A did not import English statutory law, the decision can be interpreted as going beyond what was necessary to decide the issue of the importation of the insolvency law of England. Where a court makes a decision or an observation that goes beyond what was necessary to dispose of the issue in the case, the extended part of the decision is obiter and is not binding on other courts, although it may be persuasive. A statement of the obiter principle as it relates to this type of case can be found in **Halsbury’s Laws of England** where the learned editors state:

“Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand are generally termed 'dicta'. They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of a judge are known as 'obiter dicta', whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed 'judicial dicta'. A third type of dictum may consist in a statement by a judge as to what has been done in other cases which have not been reported.”²⁵

In my opinion, the ratio decidendi of the decision in **Sunset Village** is that article 917A imported the common law of England and not the statutory law of England relating to insolvency. In so far as the decision can be interpreted as saying that the article does not import the general statute law of England, it is obiter and not binding on this Court.

Per incuriam

- [31] The per incuriam rule allows a court not to follow a decision that would otherwise be binding if the previous decision was given without reference to authorities that are binding on the court and the court would have reached a contrary decision had it been aware of the missing material. The classic formulation of the rule is by Sir John Donaldson MR in **Duke v Reliance Systems Ltd.**:

“I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it

²⁵ Halsbury’s Laws of England, vol. 3, p. at para. 26.

has to be shown that, had the court had this material, it must have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.”²⁶

The test as outlined by the Master of the Rolls is in two stages: first, the authority or the statute that was not brought to the attention of the court must be binding on the court; and second, if the authority or statute is binding, it must also be such as would compel the first court to come to a different conclusion.

[32] In this case, Mr. Patterson, QC referred to the decisions of the Court of Appeal in **Attorney General v Isidore** and the Privy Council in **Eversley Thompson v R**²⁷ as authorities that were binding on the Court of Appeal in **Sunset Village** and were not brought to the attention of the Court. I have already expressed the view that the **Isidore** case did not decide that article 917A imported English statutory law into Saint Lucia. The case may have proceeded on the assumption that article 917A had this effect, but that was not a part of the ratio decidendi of the case and the decision would not have been binding on the Court of Appeal in **Sunset Village**.

[33] **Eversley Thompson v R** is a decision of the Privy Council on appeal from this Court sitting in Saint Vincent and the Grenadines. The Court of Appeal, on direction from the Privy Council, considered the effect of section 3 of the **Evidence Act 1988**²⁸ of Saint Vincent and the Grenadines. Section 3 provides that:

“Whenever any question shall arise in any criminal or civil proceedings whatsoever in or before any court... touching the admissibility or sufficiency of any evidence, the competency or obligation of any witness to give evidence, the swearing of any witness, the form of oath or affirmation to be used by any witness, the admissibility of any question put to any witness, the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, such question shall, except as

²⁶ [1987] 2 All ER 858 at p. 860.

²⁷ [1998] AC 811.

²⁸ Cap. 158, Laws of Saint Vincent and the Grenadines.

provided in this 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 St Vincent and the Grenadines.”
(Underlining added)

The Court of Appeal decided that section 3 imported into Saint Vincent and the Grenadines the provisions of the Police and Criminal Evidence Act 1984 of England (“PACE”) governing the admissibility of confessions, and further that the common law test of voluntariness for the admission into evidence of a confession no longer applied.

[34] On appeal to the Privy Council, the Board affirmed the decision of the Court of Appeal and the case is authority for saying that the relevant statutory provisions of PACE were imported into Saint Vincent by section 3 of the Evidence Act. However, the issue for this Court is whether the decision would have been binding on the Court of Appeal in interpreting article 917A of the Code in **Sunset Village**, and, if it had been brought to the attention of the Court, would the Court have been compelled to come to a different decision in interpreting article 917A.

[35] The general rule of stare decisis regarding appeals from the Court of Appeal of the Eastern Caribbean is that each state or territory is treated as a separate jurisdiction but decisions from the Privy Council on the same point of law are treated as binding on all the courts of the Eastern Caribbean.²⁹ The point is conveniently summed up by Lord Mance in his extra-judicial work ‘Privy Council Practice’ thus:

“[D]ecisions of the JCPC [Privy Council] bind all courts in the jurisdiction from which the relevant appeal came. But they also bind all courts in any other JCPC jurisdiction in which the same point of law arises for decision. The caveat is that the point of law must be the same.”³⁰

In my opinion, Lord Mance’s caveat applies in this case. The Court of Appeal and the Privy Council in **Eversley Thompson** were concerned with the interpretation

²⁹ This paragraph of the judgment does not apply to the Commonwealth of Dominica whose final court of appeal is the Caribbean Court of Justice.

³⁰ Lord Mance and Jacob Turner, *Privy Council Practice* (Oxford University Press: 2017), p. 135 at para. 5.06.

of a statute dealing with the importation of rules relating to the admission of evidence in criminal and civil proceedings where the importation provision provides for the reception of evidence “...according to the law and practice administered for the time being in England...”. On the other hand, **Sunset Village** was concerned with the importation of the insolvency law of England under an article (917A) that is restricted to the law of contracts, quasi-contracts and torts. Although both provisions deal with the general issue of the importation of law from England, they cover different subject matters, are based on differently worded statutes, and are not on the same point of law.

[36] The appellant’s submission that **Sunset Village** was decided per incuriam because the Court’s attention was not drawn to binding authorities fails at the first hurdle because the authorities would not have been binding on the Court in **Sunset Village**.

[37] The per incuriam rule was also debated on the alternative basis that a court is not bound by a previous decision of another equal or superior court if the decision was based on a legal principle that was not disputed by the parties before the first court and was assumed by that court to be correct.³¹ Applied to this appeal it was submitted that the Court of Appeal in **Sunset Village** relied on a statement by Lord Hodge in the Privy Council case of **Nelson and Others v First Caribbean International Bank (Barbados) Limited**³² in coming to its decision and the statement by Lord Hodge was obiter and was assumed to be correct. The Court of Appeal’s reasoning and the reference to the **Nelson** case are set out in paragraph 29 above. The learned judge in the court below referred to and relied on the principle in **Re Hetherington**,³³ but it is not clear what decision he made on the specific issue. At paragraph 26 of the judgment, he decided that he was not bound by the reasoning in **Hetherington** and found that **Sunset Village** was decided per incuriam.

³¹ See: In *Re Hetherington* [1989] 2 WLR 1094.

³² [2014] UKPC 30.

³³ [1989] 2 WLR 1094.

[38] I do not share the learned judge's conclusion. I have read the Court of Appeal's judgment in **Sunset Village** and I am satisfied that the Court came to its conclusion on article 917A independently of Lord Hodge's statement in **Nelson**. The Court of Appeal only referred to Lord Hodge to support the decision that was already made about the article. The principle in **Hetherington** does not apply.

[39] My conclusion on per incuriam and obiter principles are that the Court in **Sunset Village** was not bound by the decisions in **Mathurin** and **Thompson** and the per incuriam rule did not apply. However, the part of the decision in **Sunset Village** that decided that article 917A does not import the statutory provisions of the law of England (generally) was obiter. This Court is not bound to follow it and can come to its own conclusion on the interpretation of article 917A. This paves the way for this Court to consider whether article 917A has the effect of importing the statute law of England into Saint Lucia.

Importing foreign statutes

[40] The first issue that I dealt with in this judgment was the preliminary objection raised by the appellant to the respondent's submission that if the Defamation Act was imported into Saint Lucia by article 917A, then article 917A was unconstitutional. In overruling the objection and addressing the constitutionality of article 917A, I found that the Parliament of Saint Lucia has the power to legislate for the importation of statutes made by a foreign state, and that generally such importation is not unconstitutional.

[41] In fact, I think it is much too late to question the ability of the legislatures of the Eastern Caribbean to pass laws importing foreign statutes. This procedure has been approved by this Court in several cases. In **Eversley Thompson v R**, which is discussed above, both the Court of Appeal and the Privy Council approved the importation into Saint Vincent and the Grenadines of certain provisions of PACE by section 3 of the **Evidence Act 1988** of Saint Vincent and the Grenadines. Similarly, in 1993 the Court of Appeal approved the importation of the provisions of

the Criminal Justice Act 1998 (UK) into the Virgin Islands by section 3(1) of the Virgin Islands **Evidence Act 2006**³⁴ in **Gregory Forbes v R.**³⁵ In **Desmond Devaux v Richard Johnson and Gerard Bergasse**³⁶ Belle J had to consider article 916A(3) of the Code which provides that the law of England for the time being governing the rights, duties and powers of trustees and beneficiaries under a trust extend to and apply in Saint Lucia. Belle J relied on article 916A to import and apply provisions of the UK Trustee Act 2000 relating to the standards that trustees must observe when investing trust monies. Gordon JA expressed a similar view of article 916A in **Dorina Joseph and Richard Frederick v Nora St. Louis**³⁷ when he said “[i]n 1956 when a revision of the Civil Code was undertaken by Sir Allen Lewis, former Chief Justice of this court, there was added Article 916A which imported wholesale the concept and laws of trust from the laws of England”. The use of the word “wholesale” by the learned judge could only mean that both the statutory and common law of trusts of England were imported.

- [42] There are other cases that make the point. In each case, it was a matter of interpreting the words used by the drafter to determine whether the intention was to import the statutory law of the foreign state. What is clear is that whenever the relevant statute uses the words “the laws of England” the courts have interpreted the section to mean the entire law of England (statutory and common law) on the specified issue. But I emphasise that each case must be decided according to the language used in the provision importing the foreign law.

The Barras principle

- [43] Mr. Patterson, QC also relied on the Barras principle to interpret the words “law of England” to mean and include the statutory law of England. The Barras principle derives from case of **Barras v Aberdeen Sea Trawling and Fishing Company**

³⁴ Act No. 15 of 2006, Laws of the Virgin Islands.

³⁵ Territory of the Virgin Islands Criminal Appeal No. 2 of 1992 (delivered 21st June 1993, unreported).

³⁶ SLUHCV2010/0783 (delivered 22nd March 2012, unreported).

³⁷ SLUHCVAP2008/025 (delivered 6th July 2009, unreported).

Limited³⁸ and is summed up by the editors of **Bennion on Statutory Interpretation** as follows:

“Under the **Barras** principle, where an Act uses a form of words with the previous legal history, this may be relevant in the interpretation. The question is always whether or not Parliament intended to use the term in the sense given by this earlier history.”³⁹

In order to benefit from this principle Mr. Patterson, QC had to establish that the words “law of England” appearing in article 917A, which was enacted in 1956, were in an earlier statute and were previously interpreted by the courts as meaning the statutory law of England. Mr. Patterson did not shrink from this challenge and relied on the case of **Bamgbose v Daniel and others**,⁴⁰ a 1954 decision of the Privy Council on appeal from the colony of Lagos. The case considered the meaning of the words “...the provisions of the law of England” appearing in section 41 of the Marriage Ordinance of 1884. It is not surprising that the Board interpreted the words as including the statutory law of England – the use of the words “provisions of” is a clear indication that the drafter of the Marriage Ordinance intended to rely on the statutory law of England. The words “provisions of” do not appear in article 917A which makes it very different from section 41 of the Marriage Ordinance and little, if any, reliance should be placed on the **Bamgbose** case. This Court was not referred to any other case decided prior to the enactment of article 917A in 1956 that interpreted the meaning of the expression “law of England”. I find that there is no basis for presuming that the phrase “law of England” in article 917A has a meaning ascribed to it by any decision of a superior court in the Eastern Caribbean or elsewhere prior to 1956. Accordingly, I will not apply the **Barras** principle in interpreting article 917A.

[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.

³⁸ [1933] AC 402.

³⁹ Francis Bennion, *Bennion on Statutory Interpretation*, 6th edn., (LexisNexis: 2013) p.549 at S. 210(3).

⁴⁰ [1954] 3 All ER 263.

“For the time being”

- [45] The parties also debated the meaning of the expression “for the time being” in article 917A. I accept the appellant’s submission that the words have an ambulatory effect and mean that the courts of Saint Lucia should apply the law of England from time to time and not when article 917A was enacted in 1956. In doing so I am guided the former Chief Justice, Sir Dennis Byron in the **Eversley Thompson** case, where he interpreted the identical words in section 3 of the Evidence Act of Saint Vincent as requiring “...the application of the current law and practice administered in England, including PACE”.⁴¹

Inconsistencies between the Defamation Act and the Civil Code

- [46] Having decided that article 917A allows the importation into Saint Lucia of relevant statutes, the next issue is whether the Defamation Act was actually imported into the State. In this regard, paragraph (3) of article 917A is of crucial importance. Paragraph (3) states that:

“Where a conflict exists between the law of England and the express provisions of this code or any other statute, the provisions of the Code or of such statute shall prevail.”

The plain meaning of paragraph (3) as it applies to this case is that even if the Act can be imported into Saint Lucia, if its provisions are inconsistent with the provisions of the Code or any other local statute, the importation will be barred by paragraph (3). However, this restriction does not apply to common law principles. If the provisions of the Act are inconsistent with the common law, the effect of the importation is that the common law principle will be abolished and the imported statutory provision will prevail.

- [47] Ms. St. Rose argued forcefully in her written and oral submissions that articles 989F to 989O (nine articles) of the Code establish a comprehensive codified legislative framework for the law of libel and slander in Saint Lucia and that there are provisions in the Defamation Act that are inconsistent with some of these provisions. Learned counsel identified several areas of conflict, namely:

⁴¹ Supra, at p.6.

- (a) section 2 of the Act, which abolished the common law defence of justification and introduced the statutory defence of truth, is inconsistent with the defence of justification in article 989K of the Civil Code;
- (b) section 3 of the Act, which abolished the common law defence of fair comment and introduced the statutory defence of honest opinion, is inconsistent with the defence of fair comment in article 989L of the Code;
- (c) the single publication rule in section 8 of the Act is inconsistent with the multiple publication rule in Saint Lucia and the limitation period of one year from the date of the first publication for bringing defamation claims in section 4A is inconsistent with article 2123 of the Code;
- (d) the serious harm test in section 1 of the Act is inconsistent with the test of “materially injure” in article 989K of the Code; and
- (e) the abolition of the Reynolds defence by section 4 of the Act is contrary to Saint Lucian law.

I will deal with each of the alleged inconsistencies.

Areas of conflict (a) and (b) – Sections 2 and 3 (justification and fair comment)

[48] Ms. St. Rose submitted that the defences of justification and fair comment have always been a part of the law of Saint Lucia and that they are also contained in articles 989K and 989L respectively of the Code. Article 989K (justification) reads:

“In an action for libel or slander in respect of words containing 2 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.”

Article 989L (fair comment) reads:

“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.”

- [49] Ms. St. Rose continued that these articles are a codification of the defences of justification and fair comment. As such they are statutory defences. Further, sections 2 and 3 of the Act are also statutory defences. The sections, in so far as they are material to this appeal, provide as follows:

Section 2

“(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.”

Section 3

“It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

(b) anything asserted to be a fact in a privileged statement published before the statement complained of.

...

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.”

[50] Learned counsel submitted that the statutory defences in sections 2 and 3 of the Act conflict with the statutory defences in articles 989K and 989L. Sections 2 and 3 are therefore caught by paragraph (3) of article 917A and cannot be imported into Saint Lucia. It would appear that the learned judge also held this view because at paragraph 40 of the judgment he found that “[i]t would appear, from the above provisions, that the Code expressly provides for the defences of justification and fair comment, while the 2013 Act has abolished the defences”. Respectfully, I do not agree. I prefer Mr. Patterson’s submission that articles 989K and 989L do not contain the defences of justification and fair comment. Properly construed, they are extensions of the common law defences in situations where the defendant can prove that the words complained of are not entirely true, but are only substantially true. If the drafters of article 989K and 989L had wished to include the defences of justification and fair comment in these articles it would have been very simple to add appropriate wording to the effect that they are defences to a claim for defamation. This in fact is what was done by sections 2 and 3 of the Defamation Act.⁴² The result is that when the Act was imported into Saint Lucia in 2013 there were no statutory defences of justification and fair comment. These defences existed at common law only and were abolished by sections 2(4) and 3(8) respectively of the Act and were replaced by sections 2 and 3 of the Act.

[51] To sum up, I find that article 917A was effective in importing the Defamation Act into Saint Lucia and abolished the common law defences of justification and fair comment which no longer exist in Saint Lucia. A defendant to a claim for defamation must now rely on the defences set out in the Act.

[52] There still remains the resolution of the status of articles 989K and 989L. As stated above these articles contain extensions to the common law defences of justification and fair comment. They continue to be a part of the Code even after the Act was imported in 2013. Mr. Patterson’s answer to this issue is as follows.

⁴² The relevant provisions of the Defamation Act are set out in para. 48 above.

The provisions in the Code are attached to the common law defences and these defences were repealed by sections 2(4) and 3(8) of the Act. While the repeal of the defences cannot have the effect of removing the extensions to the defences in the articles, these extensions no longer have defences to attach themselves to. They remain on the statute books but they cannot be relied on. Reliance must now be placed on the equivalent provision in the Act. Having found that the Act was imported into Saint Lucia and that the common law defences have been abolished, I accept Mr. Patterson's submission that the extensions of the defences of justification and fair comment in articles 989K and 989L are no longer attached to defences that are available in Saint Lucia and they no longer serve any useful purpose. They remain on the statute books but they have become redundant.

Area of conflict (c) – Section 8 (the single publication rule)

- [53] Prior to the enactment of the Act in England the common law principle was that each publication of defamatory material gave rise to a separate cause of action that is subject to its own limitation period (the "multiple publication rule"). Section 8 of the Act introduced a single publication rule with a limitation period of one year from the date of the first publication of the defamatory material.
- [54] The first consequence of the importation of section 8 is that it abolished the multiple publication rule that existed at common law. More importantly, section 8(3) incorporates the limitation periods in section 4A of the UK Limitation Act. The relevant limitation period in section 4A is one year from the date of the first publication of the defamatory material. This conflicts with article 2123 of the Code which provides that a claim for libel or slander is prescribed by one year "...from the date that it came to the knowledge of the party aggrieved". The two provisions cannot coexist and based on the wording of article 917A(3), the limitation provision in section 8 must yield to the provisions of article 2123. Mr. Patterson, QC submitted that the resolution of this conflict is to be found in article 917A itself. The article provides that imported English law for the time being extends to Saint Lucia *mutatis mutandis*. The relevant part of the imported section 8 reads:

“(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.”

What I understand Mr. Patterson, QC to be saying is that the limitation period of one year from the date of the first publication in section 8 (via section 4A of the Limitation Act) must be modified, applying the *mutatis mutandis* principle, to bring it into conformity with article 2123. Thus, section 8 must be read by replacing the reference in section 4A of the Limitation Act with a reference to article 2123 of the Code, resulting in a limitation period for bringing a claim in defamation of one year from the date that the defamatory material came to the knowledge of the party aggrieved, not the date of first publication as in England. The result is that Saint Lucia now has a single publication rule, but the limitation period of one year does not start to run until the person aggrieved becomes aware of the publication.

[55] I agree with Mr. Patterson, QC that this is an appropriate case for the application of the *mutatis mutandis* principle and the way that he proposes that the principle be applied. Having determined that the Act was imported into Saint Lucia, the limitation period in section 8(3) of the Act is subject to article 2123 of the Code which results in a limitation period of one year from the date that the defamatory material came into the knowledge of the party aggrieved.

[56] It also follows from my previous findings that the multiple publication rule in Saint Lucia, being a creature of the common law, was abolished by section 8 of the Act.

Area of conflict (d) – Serious Harm

[57] Article 989K, in dealing with what I have described as the substantial truth aspect of the common law defence of justification, states that the defence will not fail if the words that are not proved to be true do not “materially injure” the claimant. Section 2 of the Act uses a different test to determine whether a statement is defamatory. The test in section 2 is whether the words complained of caused “serious harm” to the claimant. Further, in section 2(3), which has its parallel in

article 989K, the expression used is “seriously harm” as opposed to “materially injure” as in 989K. Ms. St. Rose submitted that this is an irreconcilable conflict and further proof that the Act is inconsistent with the provisions of the Code and it should not be imported into Saint Lucia. This submission would carry some weight but for the fact that the earlier finding of this Court is that article 989K is redundant.⁴³ Being redundant, it is no longer necessary to have regard to the provisions of the article and the test to be applied in determining what is defamatory matter and whether the plea in section 2(3) is available. In other words, there is no need to reconcile an apparent inconsistency between section 2(3) of the Act and a redundant provision of the Code.

Area of conflict (e) – the Reynolds Defence

- [58] I will be very brief on this issue. The Reynolds defence existed in Saint Lucia as a part of the common law. It had no statutory basis. The defence was abolished by section 4(6) of the Act which introduced the new defence of publication on a matter of public interest. The statutory defence now applies.
- [59] Having considered the claims for inconsistencies between the Act and the provisions of the Code, I am satisfied that there is no inconsistency between the Act and the relevant provisions of the Code except in the case of the application of the time limit for bringing a claim for defamation under the Act and the time limit prescribed by article 2123 of the Code.⁴⁴ However, the inconsistency is reconciled by reference to the principle of *mutatis mutandis* as contained in article 917A.
- [60] In my opinion, there is no irreconcilable inconsistency between the provisions of the Act and the provisions of articles 988K and 989L of the Code, and, subject to the modification of section 8(3) of the Act to conform to article 2123, I find that the Act was imported into Saint Lucia in 2013 pursuant to article 917A of the Code.

⁴³ See para. 52 above.

⁴⁴ See paras. 53 to 56 above under the heading “The single publication rule”.

Effect of importing the Act

- [61] The learned judge was obviously concerned about the effect on Saint Lucian law of importing the Act into the State. He expressed his concerns at paragraph 33 of the judgment when he said:

“If, despite having their own sovereign legislature, Saint Lucians must look to the UK Parliament to discover the latest amendment to the UK defamation law, that is repugnant to the notion of accessibility of the law. The 2013 Act, if applicable, would have had the effect, in my opinion, of repealing articles 989K and 989L from 2014 without the sanction of the sovereign legislature of this jurisdiction. This subverts the notion of predictability of the law. I am therefore obliged to avoid an interpretation that undermines the rule of law and to prefer an interpretation that promotes certainty and predictability of law.”

I have addressed some of the concerns raised by the learned judge in paragraph 33 above when I dealt with the constitutional challenge. I made the point that Parliament is free to legislate for importing the law of a foreign state and this does not derogate from its primary and exclusive duty of passing laws in the public interest. I also do not share the learned judge’s concern on the fact that importing the Act means that Saint Lucians will now have to keep abreast of the developments in the defamation law of England. This does not cause uncertainty and unpredictability in the local law. It means that Saint Lucians, and the people of any country that imports foreign law, will have to go an additional step in ensuring that they are up to date with the latest developments in the relevant statute in the exporting country. This is not unusual. Lawyers and judges have been carrying out a similar exercise with the common law, which, I would think, requires more effort to keep abreast of than statutory developments.

- [62] The learned judge also relied on the obiter dictum of the learned Chief Justice in the case of **Veda Doyle v Agnes Dean**⁴⁵ where the Chief Justice commented on section 11 of the **West Indies Associated States Supreme Court (Grenada)**

⁴⁵ GDAHCVAP2011/0020 (delivered 16th April 2012, unreported).

Act.⁴⁶ The Chief Justice, having decided that section 11 did not import the statute law of England, went on to say:

“Furthermore, the notion that all Member States are subject to the importation of English substantive law by virtue of section 11 would leave much to be desired in any sovereign State not to mention the state of uncertainty as to what laws a citizen of the State may be subject at any given point in time and without regard to its own parliament which is charged with the making of laws for the State as it may deem necessary for that State's good governance. Section 11 certainly could not have been intended to have this effect.”⁴⁷

It is apparent that section 11 deals with the much wider subject of the importation of English practice and procedure when Saint Lucian law is silent, and it does not import English substantive statutory law into Saint Lucia. In essence, resort may be had to the law and practice of England in respect of procedure where Saint Lucian law is silent in this regard. I regard this as settled law in the Eastern Caribbean. The section and the Chief Justice's comments are not relevant to this Court's consideration of article 917A.

[63] The Court in this case was charged with interpreting article 917A of the Code, and, as with all statutory interpretation exercises, the overriding consideration was to ascertain the intention of Parliament by reference to the words used in the Code. Parliament's intention in enacting article 917A was to import into Saint Lucia the law of England relating to contracts, quasi-contracts and torts. That law, as I have found, means and includes the statute law of England in the specified areas. If the importation of English law under article 917A creates uncertainty or in any way diminishes Parliament's law-making power, Parliament is free to change that situation.

[64] Finally, I note that the learned judge, having found that the Act was not imported into Saint Lucia, struck out the part of the appellant's application seeking to strike out the claim. That decision must now be reversed.

⁴⁶ Cap. 336, Laws of Grenada.

⁴⁷ Supra at para. 9.

Conclusion

- [65] In conclusion I would make the following findings:
- (a) article 917A of the Code is not unconstitutional;
 - (b) the Defamation Act was imported into Saint Lucia pursuant to article 917A of the Code; and
 - (c) the Defamation Act is not inconsistent with the Code except in section 8(3) which is inconsistent with article 2123. That inconsistency is reconciled by applying the principle of *mutatis mutandis* and reading section 8(3) of the Defamation Act to conform to article 2123 of the Code.

Order

- [66] I would allow the appeal, set aside the order of the learned judge, remit the case to the trial court for dealing with the outstanding interlocutory applications including the appellant's application to strike out the claim, and award the costs of the appeal to the appellant summarily assessed at \$5,000.00.
- [67] The assistance of lead counsel and those assisting them is gratefully acknowledged.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar