SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 37 OF 2003

BETWEEN:

THE ATTORNEY GENERAL

Appellant

and

MARTINUS FRANCOIS

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal [Ag.]
The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan, SC for the Appellant with him Miss Jan Drysdale and Mr. Williams

Mr. Martinus Francois, with him Mr. Clarence Rambally and Dr. William Frederick for the Respondent

Mr. Anthony Mc Namara, Q.C. and Mr. Stephen Singh watching brief for the Bank

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2004: February 18;
March 29.

JUDGMENT

[1] REDHEAD, J.A. [AG.]: On 19th December 1992 Dr. the Honourable Kenny Anthony, Prime Minister of Saint Lucia and Minister of Finance entered into an agreement on behalf of the Government with Rochamel Development Company Ltd. (the Developer).

[2] Clause 1 of the agreement states:

> "UNDERTAKINGS OF THE DEVELOPER
> [10] The Developer agrees to:
> [G] Provide all necessary funding for and to carry out the construction of a first class three hundred (300) room hotel resort hereinafter called the "Hotel Resort" on 15 acres of land … and to furnish layout and fully equip the Hotel Resort as a first class hotel resort within two years from the 1st January, 1998."

[3] Clause 2.02 of the Agreement provides:

> "UNDERTAKINGS OF THE GOVERNMENT
>
> The Developer has obtained funding for the construction of the hotel resort from the Royal Merchant Bank of Trinidad & Tobago and Caribbean Banking Corporation Ltd. of Saint Lucia. A requirement of this funding is that Government enter into a guarantee and indemnity Agreement with the Royal Merchant Bank of Trinidad & Tobago and the Government agreed to do so on the following terms and conditions.
>
> (A) Debt Service Guarantee
> The Debt Service Guarantee by the Government is to be capped at a maximum liability of US $4 million.
>
> [i] The Debt Service Guarantee will provide a maximum contingent liability over a three (3) year period of initial hotel trading after which period the liability ceases.
>
> [ii] In the event that Government should be called upon to honour the Guarantee at any time, then the Government would be issued redeemable preference shares in the Hotel Company to the appropriate value, by way of security ……"

[4] On 17th December, 2002 the Prime Minister and Minister of Finance presented a resolution to the House of Assembly for approval in the following terms:

WHEREAS it is provided by Section 39[1] of the Finance (Administration) Act 1997 No. 3 that the Minister for Finance may by Resolution of Parliament borrow from any bank or other financial institution for capital or recurrent expenditure of Government.

> AND WHEREAS the Minister for Finance considers it necessary to enter into a fully under-written Fix Rate Bond facility of US $41,000,000.00 or its equivalent in Eastern Caribbean dollars at an issue price of 100% per

> value with the RBTT Merchant Bank Ltd for the purpose of financing Government's Capital works programme and for refinancing Government's obligations in respect of the former Hyatt Hotel; …
>
> Be it resolved that Parliament hereby authorizes the Minister for Finance to enter into a Fixed Rate Bond facility of US $41,000,000.00 with the RBTT Merchant Bank Ltd. for the purpose of financing Government's Capital Works Programme and for refinancing Government's obligations in respect of the former Hyatt Hotel."

[5] This resolution was unanimously approved by the Parliament of Saint Lucia.

[6] Mr. Martinus Francois, the Respondent, is an Attorney-at-Law in Saint Lucia. The learned trial Judge encapsulated his action before the High Court in the following terms:

> "[He] Seeks the assistance of the court in his capacity as a citizen, a tax payer and an elector. He brought this consolidated claim against the Attorney General alleging that there was a procedural irregularity in the Parliament of Saint Lucia authorizing the Minister of Finance to enter into a Fixed Rate Bond facility with Royal Bank of Trinidad & Tobago Merchant Bank Ltd (RBTT) for the purposes of refinancing Government's obligation in respect of the former Hyatt Hotel. He also alleges that statutory instrument No. 4 of 2003 dated 6th January, 2003 which purported to be made under the authority of Section 39 of the Finance (Administration) Act No. 3 of 1997 (the Act) is illegal, void and of no legal effect. He therefore seeks relief in accordance with Section 105(1) of the Saint Lucia Constitution Order 1978 as well as a declaration under Part 56 of CPR 2000."

[7] The learned trial Judge in granting the relief to the Respondent found that the Minister of Finance had no power under Section 39 of the Finance (Administration) Act 1997 to borrow in order to refinance the Government's obligations in respect of the former Hyatt Hotel. She also held that the Minister of Finance acted ultra vires the Act in even seeking a resolution of Parliament to borrow moneys from the consolidated fund to refinance such a project, and that Parliament acted ultra vires the Act to authorize such borrowing when it passed the resolution contained in Statutory Instrument No. 4 of 2003.

[8] The learned trial Judge said at paragraph 62 of the judgment:

> "As far as I am concerned both the actions of the Minister of Finance and Parliament in respect of refinancing the Government's obligations in respect of Hyatt Hotel are ultra vires the Act. Therefore, Parliament did not have the requisite power to authorize such borrowing under section 39."

[9] The learned trial Judge said that "the withdrawal of any moneys from the Consolidated Fund to meet Government's obligations in respect of the former Hyatt Hotel would have or has breached section 78 of the Constitution."

[10] I make this observation. With the greatest of respect to the learned trial Judge, I do not understand what is meant by "Parliament acted ultra vires the Act to authorize such borrowing when it passed the resolution contained in Statutory Instrument No. 4 of 2003."

[11] As I understand it, if Parliament enacts legislation which does not conform with previous legislation then the latter legislation repeals the former. One does not speak in terms of the latter legislation being ultra vires a subsequent legislation.

[12] Unfortunately I am of the view that that confusion was implanted in the learned trial Judge's mind when she erroneously opined at paragraph 63 of her judgment "that in matters of delegated legislation such as statutory instruments, Parliament is not Supreme …"

[13] The logical conclusion of this, in my view, is that once Parliament has passed delegated legislation Parliament cannot repeal it or at least cannot do so unless by a special procedure.

[14] The only authority which is higher than Parliament in our system is the constitution and even that Parliament can change provided that it follows, particularly in entrenched provisions, certain procedures.

[15] The Appellant is dissatisfied with the learned trial Judge's ruling and has appealed to this court.

[16] In his Notice of Appeal the Appellant filed 23 grounds of appeal. In my opinion it is not convenient or necessary to refer to all of the grounds of appeal for a resolution of this appeal.

[17] Ground 4.11 to my mind encompasses the appeal in its entirety:

> "4.11 the learned trial Judge erred in law and/or misdirected herself when she held that the Minister of Finance acted "ultra vires" in even seeking a resolution from Parliament and further that the Parliament acting (sic) "ultra vires" in approving that resolution/, presumably on the erroneous basis that the said resolution did not concern or relate to the Government's Capital or recurrent expenditure and which in any event was not pleaded by the Respondent."

[18] The case for the Respondent at trial and that which he tried to maintain on appeal is that there is a condition precedent as contained in Section 4 of the Finance (Administration) Act. This according to him, mandates the Minister of Finance before he enters into any binding contract to first obtain the approval of the Parliament of Saint Lucia.

[19] Unfortunately in my view the learned trial Judge accepted this argument without a critical analysis of the important issue e.g. what was the purpose of the guarantee e.g. was it for recurrent expenditure? Instead she classified it as a "battle of the guarantees" when she said: The Defendant argued that the issue of "guarantee" and whether or not "the guarantee" was approved by Parliament are wholly irrelevant to the case as this is a classic case of a political storm in a small judicial teacup. Rather I see the case as a battle of guarantees"

[20] It appears from the judgment of the learned trial Judge that she partially accepted the legality of the guarantee when she said:

> "It is clear from an analysis of these judicial authorities that the guarantees which were executed by the Minister of Finance on behalf of the

> Government are binding on the state. However I agree with Mr. Astaphan that the issue as to whether the guarantees are binding on the Government does not arise in the present case. But I do not agree with his reasons … As I see it this is now a moot point."

[21] I have some difficulty in appreciating that the guarantee could be binding on the Government and not on the state. I do not understand why the issue is a moot point. Is it the issue of the guarantee? Or is the issue of the Government being bound by the guarantee a moot point? If it is the former, it cannot be a moot point because it is the focal point of the dispute.

[22] The learned trial Judge in accepting the submission of learned Counsel Mr. Francois that statutory instrument No. 4 of 2003 was ultra vires Section 39 (1) of the Finance Act, said:

> "I agree entirely with the submissions advanced by Mr. Francois on this aspect of the case and I find that the Minister of Finance acted ultra vires the Act even in seeking a resolution of Parliament to borrow moneys from the consolidation Fund to refinance such a project."

[23] Section 39 (1) of the Finance Act provides as follows:

"The Minister may by resolution of Parliament, borrow from any bank or financial institution for any of the following purpose:

[a] the capital or recurrent expenditure of the government;
[b] the purchase of Securities issued by any Government agency;
[c] on lending to any statutory body or public corporation or
[d] making advances or payments to public officers as authorized by any enactment or staff orders.

[24] The Appellant's case as articulated by learned Counsel Mr. Astaphan, SC is that the guarantees entered into by the Government of Saint Lucia authorized the Minister to borrow money and withdraw from the Consolidated Fund to meet the Government's obligation in financing capital and recurrent expenditure.

[25] Mr. Astaphan, SC argued that the test as to whether the expenditure is of a capital or recurrent nature is to look, not at the form of the expenditure, but the purpose for which the expenditure is undertaken. He contended that expenditure by the

Government in promoting tourism and employment, as is this case, Hyatt Hotel, must be regarded as a public purpose.

[26] Moreover, as I see it the members of the Parliament of Saint Lucia must have known what they were voting on. The Resolution was before them. The Resolution speaks quite clearly of borrowing to finance capital and recurrent expenditure and also for financing Government's capital works programme. The members of Parliament must be taken to understand what are capital and recurrent expenditures and what is capital works programme. If the members of Parliament did understand and, in my view, they must have, then when they voted unanimously on the Resolution they were passing a resolution for Government to borrow to finance capital and recurrent expenditure and for financing Government's capital works programme.

[27] Mr. Astaphan in his submission argued that although this case does not concern expenditure in the field of taxation some guidance may be obtained from tax cases in which the court considered the question as to whether expenditure by a taxpayer was a capital or recurrent expenditure.

[28] Mr. Astaphan contended that the cases show that expenditure is either capital or recurrent and that in order to determine whether the expenditure is capital or recurrent, the court has to look beyond the form or legalism of the transaction or financial agreement and ascertain the purpose of the expenditure. I agree.

[29] In Commissioner of Inland Revenue v Wattie[1] Lord Nolan said at page 536:

> "It is well settled that in considering whether a particular item of receipt or expenditure is of capital or revenue nature the approach to be adopted should be that described by Dixon J in Hallstroms Pty Ltd. Federal Commissioner of Taxation[2] where he said that the answer to the question:

[1] (1999) 1 N LR 529 (P.C)
[2] (1946) 72 CLR 634 at P648

> "…….depends upon what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights if any, secured, employed or exhausted in the process."

[32] See also B.P. Australia Ltd. v Commissioner of Taxation of the Commonwealth of Australia.[3]

[33] I am firmly of the view that having regard to what I have said and in view of the authorities the Guarantee was for the funding of, or providing for the means by which finance could be obtained for the financing of capital for recurrent expenditure.

[34] I now turn to what I consider to be the most vexed question of this appeal. That is whether the contract of guarantee by the Prime Minister/ Minister of Finance on behalf of the Government on 11th December 1997 before the agreement received Parliamentary approval is valid

[35] Mr. Martinus Francois, Learned Counsel, strenuously argued before us and evidently before the Court below that the agreement by the Minister of Finance was null and void, and not worth the paper it was written on, not having received Parliamentary approval.

[36] At paragraph 20 of his written submission Mr. Francois argued that:

> " where there is a statutory condition precedent to be satisfied, observed or complied with [such as in this case, [Section 41 of the Finance Act] Before the making of such a government contract the "contract" shall not be valid or binding on the Government if the condition precedent is not satisfied, observed or complied with and that such a contract is ultra vires- not worth the paper it is written on."

[3] 1966 A.C. 224

[37] The learned trial Judge agreed with this argument when she said, Mr. Francois argued that under section 41 “no guarantee ” shall be binding upon Government UNLESS that guarantee is approved by resolution of Parliament. The learned trial Judge then went on to say:

> “ His argument, stripped of its bare essentials is that the Minister of Finance lacked the capacity to contract when he entered into these agreements because he did not have Parliamentary approval.”

[38] Later on in her judgment at paragraph 50 she said:

> “ It is trite law that the Crown has the power of a natural person to enter into contracts, it is a fundamental Constitutional principle that all expenditures of public funds must be authorized by statute. “The requirement of a legislative appropriation applies to an expenditure by the crown to perform a contract no less than an expenditure for any other “purpose.”

[39] I am of the opinion that is where the learned trial Judge fell into error when she said:

> “ The requirement of a legislative appropriation applies to an expenditure by the Crown to perform a contract no less than an expenditure for any other “purpose” because in my judgment, as the authorities show the Minister can enter into a contract which involves expenditure from the Consolidated Fund without legislative appropriation. What the authorities clearly state and establish is that if the Minister enters into such a contract without Parliamentary Appropriation, when it comes to the performance of the contract if by then the contract is not ratified by Parliament it is unenforceable. Because in order to satisfy or perform the contract payment must be made, and payment cannot be made from the Consolidated Fund unless approved by Parliament.”

Unfortunately the learned trial Judge failed to distinguish the difference between the ability of the Executive in entering into a contract and the performance of that contract which requires Parliamentary approval because in order to perform the contract, monies would have to be withdrawn from the consolidated fund for which there must be Parliamentary approval.

[40] In my opinion that is why S41 of the Finance Act is couched in those terms.

[41] The learned trial Judge continuing went on to say:

> "Therefore when a payment under a contract falls due, there must be an appropriation of funds in place to authorize the payment. If there is no appropriation then the payment cannot be made, then the Crown will be in breach of its contractual obligation. Despite some dicta to the contrary it is now well established that the absence of an appropriation does not excuse the Crown, from performance. On the contrary the Crown's failure to make the contracted payment will be a breach of contract New South Wales v Bardolph.[4]
>
> It is clear from an analysis of these judicial authorities that the guarantees which were executed by the Minister of Finance, on behalf of the Government are binding on the State. However, I agree with Mr. Astaphan that the issue as to whether the guarantees are binding on the Government does not arise in the present case. But I do not agree with the reasons. I say so against the background that the Minister of Finance himself stated at paragraph 22 of his affidavit in reply: I see this is a now moot. "

[42] After reviewing all the authorities the learned trial Judge found:.

> " I agree entirely with the submissions advanced by Mr. Francois on this aspect of the case and I find that the Minister of Finance acted ultra vires the Act in even seeking a resolution of Parliament to borrow moneys from the Consolidated Fund to refinance such a project.
>
> The Defendant's contention is that Parliament has the power to authorize such borrowing under Section 39. Section 41 does not impose any Statutory fetter on Parliament's power under Section 39 to approve a resolution submitted by the Minister of Finance.
>
> Parliament has the power to approve a resolution submitted to it by a Minister independently of the cause or source of the financial obligation incurred by the Government once it is satisfied that the resolution [is] related to one of the purposes specified under section 39 (1) (a) to (d) of the Act.
>
> I believe that this issue is somewhat duplicitous bearing in mind the issue which was just raised. As far as I am concerned both the actions of the Minister of Finance and Parliament in respect of refinancing the Government's obligations in respect of Hyatt Hotel are ultra vires the Act. Therefore Parliament did not have the requisite power to authorize such borrowing under Section 39.

[4] 1934 54 CLR 455

> I will end on this note that in matters of delegated legislation such as statutory instruments Parliament is not supreme. The enabling Act is supreme and the Constitution."

[43] Unfortunately the above quoted passages reveal a lot of confusion in the learned trial Judge's mind. My understanding of constitutional law is that the only authority which places a fetter on Parliamentary Legislative Authority is the Constitution. In that any legislation which conflicts with any constitutional provision, the legislation is void to the extent of the conflict and the Constitution prevails. That is why the Constitution is regarded as being supreme. Delegated legislation, in my judgment could never be superior to Parliamentary, Legislative power. So it is not correct to say in matters of delegated legislation Parliament is not supreme. To say that is to elevate delegated legislation to status of the Constitution.

[44] To take that argument to its logical conclusion it must mean that once Parliament passes delegated legislation, Parliament cannot repeal it or at least can only do so by special procedure. I know of no such protection afforded to delegated legislation. I also have great difficulty in appreciating how and in what sense Parliament could act ultra vires with respect to a previous Act passed by Parliament. As I understand it if Parliament passes legislation which conflicts with a previous Act, the subsequent Act, may, by implication overrule the former Act, if there is a conflict in the provisions of the two Acts.

[45] I now look at the Finance (Administration) Act No. 3 of 1997 Section 38 [1] provides;

> "The Minister may, by resolution of Parliament, borrow money from a Bank or other financial institution by means of advances to an amount not exceeding on aggregate the sum specified for the purpose in the resolution, to meet current requirements, and such resolution shall not have effect for any period exceeding six months.
>
> (2) where, by resolution in accordance with this section or pursuant to any enactment, power to borrow money by means of advances from a bank is conferred on the Minister that may be exercised by means of a fluctuating draft.

39(1) The Minister may by resolution of Parliament, borrow from any Bank or other financial institution for any of the following purposes:

a. The capital or recurrent expenditure of Government;
b. The purchase of securities issued by any Government or Government Agency;
c. on-lending to any statutory body or public corporation
d. making advances or payment to public officers as authorized by any enactment or the staff orders.

39(2) The Minister may, in writing authorize the Director of Finance or Head of a Foreign Mission to sign on his or her behalf any loan agreement or guarantee make under Section 38 or 39.

S41 No guarantee involving any financial liability shall be binding upon the Government unless that guarantee is given in accordance with an enactment or unless approved by resolution of Parliament

S42(1) There shall be charged upon and paid out of the Consolidated Fund all debt charges for which Government is liable

For the purposes of this section, debt charges include interest, sinking fund charges and other charges related to repayment or amortization of loans and advances or in satisfaction of any obligation arising from a guarantee given in accordance with Section 41".

[46] Mr. Francois argued that statutory Instrument No. 4 authorising the Minister of Finance to raise the funds to finance the project was ultra vires section 39 of the Finance Act. He argued that statutory instruments No. 4 refers to two purposes, "financing Governments capital works programme and refinancing Government's obligations in respect of the former Hyatt Hotel."

[47] Mr. Francois contended that the second purpose cannot be capital works because the first would be superfluous, and it refers to a guarantee which is given to a private company by Government.

[48] I do not understand what Mr. Francois meant when he said that the second purpose cannot be capital works because the first would be superfluous. Because in my opinion, both can be independent of each other. The question is whether they are for capital works programme. Counsel's second point seems to me to be based on the fact that because the guarantee is given to a private company, which undertakes the development, it cannot be classified as capital works programme because it is not undertaken by Government.

[49] In Spencer v Attorney General[5] Dennis Byron C.J. said at page 16:

> "When one applies the principles to the instant case not only is it abundantly clear that the stated purpose of the development of Tourism in Antigua & Barbuda is a public purpose but the principle has already received Judicial approval.
>
> In Williams v Government[6] Sir Garfield Barwick at page 186 giving the judgment of the Privy Council said:
>
> > "That the promotion of tourism can be a public purpose in the island of Saint Lucia can scarcely be denied……."
> >
> > The other criticism that obtaining the proposed tourist development through a private entrepreneur whose motive is personal profit and gain cannot be a public purpose, is not only logically untenable but has also been judicially rejected.
> >
> > A public purpose maybe achieved through private enterprise at the instance of a private entrepreneur whose sole aim may be to make a profit. The matter was well expressed in the Indian case of Narayan Singh v Biher[7]."

[50] Although the authorities to which I make reference deal with the issue of public purpose, in my judgment, the same reasoning is applicable in an analysis in determining whether or not moneys which are said to be used for development purposes where should the emphasis be placed on by whom the development is undertaken or for the purpose of the development. In my judgment the emphasis must be on the latter. That is for what purpose is the expenditure designed to

[5] 199 3 LRC 1 at page 16
[6] (1978) A1R 136 at 138
[7] (1978) A1R 136 AT 138

achieve. If it is designed to provide employment or promote tourism then it may be regarded as a capital expenditure. If it is a capital expenditure it falls squarely within the provision of section 39(1) (a) of the Finance (Administration) Act 1997and it matters not that it was undertaken through the agency of a private company.

[51] It was with Section 41 on which Mr. Francois placed the greatest reliance to uphold the judgment of the learned trial Judge. In his written submission he, at paragraph 20 argued:

> "…the pith and strength of the Respondent's case is that where there is statutory condition PRECEDENT to be satisfied observed or complied with (SUCH AS IN THIS CASE SECTION 41of the Finance Act]. Before the making of A Government contract the "contract" shall not be valid or BINDING ON THE Government if the condition Precedent is not satisfied, observed or complied with AND THAT such in ULTRA VIRES-NOT WORTH THE PAPER IT IS WRITTEN ON"

[52] In support of this submission Learned Counsel relied on the following authorities among others.

Churchward v The Queen[8]
Commercial Cable Co. v Government of Newfoundland[9]
Mackey v Attorney General for British Columbia[10]
Auckland Harbour Board v The Leing[11]
Attorney General v Great Southern & Western Railway Co. of Ireland[12]
New South Wales v Bardolph[13]

[53] Mr. Francois' argument is that there was a condition precedent before the Minister of Finance could enter into a contract of guarantee. That is, Parliament must approve the contract of guarantee before it is executed by the Minister of Finance if not it is invalid.

[8] (1865) LR 1.B 173
[9] (1916) AC 610
[10] (1922) A.C. 457
[11] (1924) A.C. 318
[12] (1928) A.C. 754
[13] (1934) 52 LIR 455

[54] His argument is that the Minister of Finance has no power to enter into a contract of guarantee unless it receives prior approval of Parliament. S. 41 of the Finance Act contains no such pre condition. It seems to me that the learned trial Judge fell into error in apparently agreeing with this argument. I say apparently, because to me it is not quite clear (see paragraphs 51 and 52 of the judgment).

[55] S41 In my considered opinion is in very clear and unambiguous terms. "No guarantee involving any financial liability shall be binding upon the Government." It is instrumental that Parliament uses the word " binding" it did not say that the guarantee shall be void. To say shall be binding presupposes that there is an agreement in existence but it shall not be binding...and so far as is material for the purpose of this case, "unless approved by a resolution of Parliament". It also says … "no financial liability shall be binding upon the Government".

[56] Mr. Francois' argument that the Minister of Finance cannot enter into a contract of guarantee unless he first obtains prior Parliamentary approval, is not supported by authority.

[57] What is quite clear in my view and there is an abundance of legal authority to support this proposition, no moneys can be withdrawn from the Consolidated Fund without Parliamentary approval. This is why in my view Section 41 of the Finance Act mandates that: "no guarantee involving any financial liability shall be binding upon the Government unless approved by resolution of Parliament." It does not prevent the making of the contract but it forbids the paying out of money on the contract. In my Judgment that makes good legal sense because if all debt charges for which the Government is liable shall be charged upon and paid out of the Consolidated Fund (S 42 (1) Finance Act) then it means for any money to be paid out on the guarantee there must be Parliamentary approval. This also confirms with Section 78 of the Saint Lucia Constitution:

> "S78 (1) No moneys shall be withdrawn from the Consolidated Fund except to meet expenditure that is charged upon the Fund by this Constitution or by any law enacted by Parliament or….."

[58] In Kidman v The Commonwealth[14] the head note reads:

> "Contracts made by the Prime Minister on behalf of the Commonwealth which involves the expenditure of public moneys are not void, but merely unenforceable until funds to answer them are provided by Parliament."

[59] In the State of New South Wales v Bardolph (supra) at page 509 Dixon J. said:

> "It is a function of the Executive not of Parliament to make contracts on behalf of the Crown. The Crown's advisers are answerable politically to Parliament for their acts in making contracts. Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of control over the expenditure of public moneys. But the principle of responsible Government do not disable the Executive from acting without the prior approval of Parliament, not from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available.
>
> Some confusion has been occasioned by the terms in which the conditional nature of the contract of the Crown from time to time has been described, terms rather for the sake of emphasis than of technical accuracy, in my opinion, the manner in which the doctrine was enunciated by Isaac C.J. when he last had the occasion to state it, gives a correct as well as clear exposition of it. In Australia Railways Union v Victorian Railways Commissioners[15] he said:
>
> "It is true that every contract with any responsible Government of His Majesty, whether it be one of a mercantible character or one of service, is subject to the condition that before payment is made out of the Public Consolidated Fund Parliament must appropriate the necessary sum. But subject to that condition, unless some competent statute properly construed makes the appropriation a condition precedent, a contract by the Government otherwise within its authority is binding. Notwithstanding expressions capable of a contrary interpretation which have occasionally been used, the prior provision of funds by Parliament is not a condition preliminary to the obligation of the contract."

[60] I agree with Mr. Astaphan S.C. that not one of the authorities referred to by Mr. Francois supports the proposition that the Minister of Finance must receive Parliamentary approval before he can enter into a contract of guarantee in order to give validity to that contract.

[14] The Augus Law Reports 1
[15] 14 1930 44 CLR at 353

[61] Mr. Astaphan S.C. argued that the respondent relies on a dictum in Commercial Cable Co. v Government of Newfoundland (supra) Vicount Haldane at page 617 said:.

> "For all grants of money, either direct or by way of prospective remission of duties imposed by the Legislature and where the system is one of responsible Government, there is no contract unless that discretion can be taken to have been exercised in some sufficient fashion."
>
> This dictum was explained in a later case by Vicount Haldane in Kidman (supra) at page 2 he said:
>
> > " In that case- Commercial Cable (supra) was distinctly laid down (In a judgment which I think I delivered) that the Governor General as representing the Crown could enter into contracts as much a he liked……. But he was presumed only to bind the funds which might or might not be appropriated by Parliament to answer the contract and if they were not that did not make the contract null and ultra vires, it made it not enforceable because there was no res against which to enforce it."

[62] The term "no contract" was also explained by Dixon J. in Bardolph supra at pp.512–513 he explained:

> " In Rayner v The Kings[16] Adams J, speaking for the New Zealand Court of Appeal pointed out that the words there is "no contract" meant no contract to pay. But I think it is certain that His Lordship did not mean that no contract of the Crown was actionable under the Crown Remedies legislation of the Dominions and Colonies unless and until money was appropriated to answer is, and this indeed his subsequent utterances make clear."

[63] In my judgment the above authorities put beyond dispute the notion that there is a condition precedent to be satisfied or to be observed or complied with before the Minister of Finance enters into a contract of guarantee with another party. It should also put beyond dispute the notion that the Executive must seek Parliamentary approval before entering into a contract in order that the contract may be a valid contract. Section 41 of the Finance (Administration) Act does not mandate such a course. What is clear, however, in my judgment, is that the

[16] (19300 N.2. L. R. at p.458

Executive cannot withdraw any funds from the Consolidated Fund in fulfillment of that contractual obligation without Parliamentary approval.

[64] I now turn to deal with the question of locus standi. I agree that the learned trial Judge approached that question at the appropriate time. She said now that Mr. Francois had succeeded on all issues, the only issue remaining was that of locus standi which was hotly debated.

[65] The learned trial Judge held that Mr. Francois did not have a "relevant" interest under Section 105 of the Constitution as, according to the Judge, he was unable to identify which of his fundamental rights have been or are being contravened.

[66] Section 105 of the Constitution does not deal with fundamental rights. The fundamental rights are contained in chapter 1 of the Constitution. Section 105 deals with relevant interest, if anyone alleges that any provision of the Constitution other than a provision of Chapter 1- the fundamental rights Chapter 1- has been or is being contravened may apply to the High Court for a declaration. S105 – A person shall be regarded as having a relevant interest for the purpose of an application under this section only if the contravention of this Constitution alleged by him is such as to affect his interest. (105 (5))

[67] Therein lies the test in the above subsection. Mr. Francois was not alleging a breach of S78 of the Constitution as such. What he was alleging was failure by the Minister of Finance to obtain Parliamentary approval before entering into the contract of guarantee.

[68] Even if he was alleging a breach of S78 of the Constitution he must fail in my view because he will be unable to show that a contravention of that section affects his interest.

[69] The learned trial Judge having found that the respondent did not qualify under S.105 held that he had a 'sufficient' interest under Part 56. 13 of the Civil Procedure Code.

Hearing of Application for Administrative Order

> "At the hearing of the application the judge may allow any person or body which appears to have a sufficient interest in the subject matter of the claim to make submissions whether or not served with the claim form"

[70] The learned trial Judge held that the respondent had a sufficient interest in the subject matter as a citizen, as a taxpayer and contributor to the Consolidated Fund.

[71] Mr. Astaphan S.C. argued that Rules of Court do not change the substantive law. R v Re ExParte National Federation of self employed and Small Businesses Ltd[17]. Accordingly, part 56 of CPR 2000 did not change the substantive law relating to standing law or the requirements for standing in relation to declarations.

[72] He contended that Part (2) of CPR 2000 gives an inclusive definition of sufficient interest. Mr. Astaphan submitted that it is inconceivable that a person like the respondent who admits that he has not been adversely affected by the resolution or expenditure could have a "sufficient interest " under Part 56.2.

[73] Learned Counsel contended that in order to satisfy the criterion of a person adversely affected by the decision the respondent must go on and plead and lead evidence to show that he is adversely affected by the decision of the Minister of Finance, this the Appellant has failed to do.

[74] I agree entirely. I do not think that merely because one is a taxpayer or contributor to the Consolidated Fund could give one sufficient interest to bring an action. If that were the case, imagine what could be the result every taxpayer who is dissatisfied with a decision taken by the Minister of Finance would have the right to

[17] (1982) AC 617 at p 647 & 648

bring an action to the High Court to challenge that decision. Think about the multiplicity of actions that would result. Certainly that could not be the policy of the law.

[75] For the foregoing reasons the appeal is allowed.

[76] The judgment of the learned trial Judge is set aside. The order for costs made in favour of the respondent is hereby set aside. I also agree with the order as to costs as proposed by Rawlins, JA [Ag.].

Albert Redhead
Justice of Appeal [Ag.]

[78] SAUNDERS, J.A.: I agree that this appeal must be allowed for the reasons given by my learned brothers Redhead and Rawlins, JJ.A [Ag.]. However, this matter has generated such public comment on matters of law that I believe I should briefly add a few remarks of my own on the substantive issues raised by the suit.

[79] The facts and circumstances giving rise to the case are undisputed and have been recounted in the other judgments. There is no need for me to recite them. The controversy really lies in an interpretation of the Finance (Administration) Act 1997 (which I refer to as "the Act") and in an understanding of how the guarantee executed by the Prime Minister and the resolution passed by Parliament relate to that Act. Mr. Francois submitted that the guarantee was unlawful because, in his view, section 41 of the Act stipulated that prior approval of Parliament should have been granted before the Prime Minister could have executed it. Secondly, he argued that the Prime Minister could not avail himself of section 39 of the Act because the funds, approved by Parliament to help complete the former Hyatt Hotel, did not fall within the scope of capital or recurrent expenditure of Government. In each of these respects, in my view, Mr. Francois was wrong. I will examine each section in turn.

Section 41

[80] Section 41 of the Act states:

> "No guarantee involving any financial liability shall be binding upon the Government unless that guarantee is given in accordance with an enactment or unless approved by resolution of parliament."

What does that section mean? The key phrase in the section is "shall be binding". The section is saying that guarantees may exist but, if those guarantees involve any financial liability, they can only *bind* the Government if one of two conditions is satisfied, namely, they must either be given in accordance with an Act of Parliament or they must be approved by a resolution of Parliament. When therefore the Prime Minister gave the guarantee, he was doing nothing wrong or unlawful. He was perfectly entitled to do so. However, because that guarantee involved a financial liability, Parliamentary approval was required before it could be made binding on the Government.

[81] In a constitutional democracy such as obtains in Saint Lucia, the executive authority conceives and executes policy but Parliament has control of the purse strings of the State. Representatives of the executive authority (the Governor General, the Prime Minister, Ministers of Government and their subordinates) invariably enter into contracts from time to time. But no funds can be taken out of the Consolidated Fund to meet any liabilities incurred in connection with those contracts unless such funds are approved by Parliament. Such approval may be granted at any time before a charge is made upon the Consolidated Fund to satisfy any liabilities thereby incurred. The smooth running of Government would be entirely frustrated if, for example, each time the Prime Minister, or a Government Minister, sought to enter into a contract, it was first necessary to convene a meeting of Parliament in order to seek and obtain approval. The

principle involved here is an old and well established one and was re-stated in Spencer v A.G. of Antigua[18] when I noted that:

> A Government contract is not unconstitutional because it provides for payments to be made at some future date and at the time the contract is entered into Parliament has not yet approved the required expenditure. Invalidity would only arise if Parliamentary approval had not been obtained by the time the monies were due and payable. For this purpose an express appropriation is not required. See New South Wales vs. Bardolph (1933-34) 52 C.L.R. 455.

Section 41 must be seen in the same context. The section re-affirms the principle with respect to guarantees, contracts of a particular kind.

[82] On 17th December, 2002, the Saint Lucia Parliament unanimously approved the borrowing of US$41 million for purposes that included "refinancing Government's obligations in respect of the former Hyatt Hotel". True, the resolution was made pursuant, not to section 41 but rather to section 39 of the Act. What is important though is that the monies, approved by Parliament to be borrowed, were to be used, in part, for the same purpose as the subject matter of the guarantee previously given by the Prime Minister. This resolution therefore constituted sufficient approval by Parliament of the Prime Minister's previously given guarantee. It is no use getting caught up in the issue of whether Parliament should have made its resolution pursuant to section 41 instead of section 39. That was a matter going to Parliament's control over its own procedure. Since no hint of unconstitutionality arises, the courts will not interfere in such an issue. The suit should therefore have been dismissed on this ground.

Section 39

[83] There is another reason why this appeal must be allowed. Quite apart from the matter of guarantees, and whether approval for the same must be prior or could be granted after the event, the resolution passed was, as indicated above, made

[18] Antigua High Court Civil Suit Nos. 295 & 384 of 1997(unreported)@ page 27

pursuant to section 39(1)(a) of the Act. That section is free standing. It bears no relationship to section 41. It states:

> "The Minister may, by resolution of Parliament, borrow from any bank or other financial institution for any of the following purposes:
>
> [a] the capital or recurrent expenditure of Government
>
> [b]
>
> [c]
>
> [d]

[84] Mr. Francois seemed to be of the view that the phrase "the capital or recurrent expenditure of Government" pertained only to monies expended on such matters as roads, schools, hospitals, payment of civil servants, and the like. In other words, he construed that phrase narrowly, restricting its range to expenditure on employees of the State, or to works engaged in or projects conceived or owned by the State. He appeared not to appreciate that expenditure on the "refinancing of Government's obligations in respect of the former Hyatt Hotel" could be embraced within the scope of capital or recurrent expenditure of Government.

[85] There is abundant case law to support the view that the development of tourism and the generation of employment and revenue are legitimate public purposes. See: Williams v. Attorney General[19], Spencer v. Attorney General[20] and The Cabinet of Antigua & Barbuda v. H.M.B. Holdings Limited[21]. Government is not obliged or required by law, itself, to develop tourism or generate employment or revenue. Legitimate Government expenditure for these purposes, far from being confined to assets owned by Government, may extend to works or projects conceived, owned or engaged in by private parties.

[86] In order for the court to determine whether expenditure falls within section 39(1)(a), it is necessary to have regard to the declared purpose for which the funds are required and the provision of funds for the realization or completion of the former Hyatt Hotel was a legitimate public purpose in light of the undoubted

[19] *(1964) 14 W.I.R. 177*
[20] *(1999) 3 L.R.C. 1*
[21] *Antigua Civil Appeal No. 16 of 2001*

boost to St. Lucia's tourist industry thereby intended. In my view, monies borrowed for and expended on that purpose were embraced by the phrase "capital or recurrent expenditure of Government". As such, the Minister of Finance was entitled to seek parliamentary approval for the provision of such funds. Once that approval had been granted, disputes about the need to have obtained prior approval for the giving of the guarantee became entirely otiose and the case should have been dismissed on this ground as well.

The Constitution

[87] Section 78(1)(a) of the Constitution states that no moneys shall be withdrawn from the Consolidated Fund except to meet expenditure that is charged upon the Fund by the Constitution or by any law enacted by Parliament. The Resolution that was unanimously approved by Parliament was gazetted as Statutory Instrument No. 4 of 2003. When gazetted, that Statutory Instrument was "a law enacted by Parliament". One may regard that law as subsequent approval of the previously given guarantee. Or one might see it as approval that was entirely independent of the guarantee. In either case, it constituted compliance with section 78 of the Constitution.

Conclusion

[88] I agree that this appeal must be allowed and I also agree, for the reasons given by him, with the order as to costs proposed by Rawlins, JA [Ag.].

Adrian Saunders
Justice of Appeal

[89] RAWLINS, J.A. [AG.]: This appeal raises the question whether the Prime Minister and Minister of Finance of St. Lucia ("the Minister"), acting on behalf of the Government, could legally execute a contract of guarantee without first

obtaining the approval of Parliament. Secondarily, it raises the issue whether the Minister acted *ultra vires* when he subsequently submitted a Resolution to Parliament, which, in effect, authorized him to borrow money to meet financial obligations that arose under that guarantee. In the third place, this appeal raises the question whether those aspects of the Resolution, and of the Statutory Instrument that gazetted it, are void and of no effect. The fourth issue is whether these proceedings constitute an abuse of the process of the court for which costs should be awarded against the Respondent. A summary of the challenge and the decision of the High Court, the grounds of appeal and a brief background of the case are given as precursors in this Judgment.

Summary of the Challenge and the Decision

[90] The Respondent, Mr. Francois, challenged the legality of a guarantee that was executed by the Minister and the Royal Merchant Bank of Trinidad and Tobago (RBTT). The guarantee was given to cover cost over-run and debt servicing arrangements that related to the construction of the former Hyatt Hotel ("the Hotel"). He also challenged those aspects of the Resolution and Statutory Instrument No. 4 of 2003 that gazetted the Resolution. He sought constitutional redress. He urged the court to find that the Resolution and the Statutory Instrument were unconstitutional, void and of no effect to the extent that they purported to give approval to the Government to refinance its financial obligations under the guarantee. One ground that he stated for this was that the guarantee was not given in accordance with section 41 of the 1997 Act. He also contended that any withdrawal of moneys from the Consolidated Fund to meet this obligation has or would be in breach of section 78 of the Constitution.

[91] Mr. Francois also applied under Part 56.7(1)(a) of the Rules, for a declaration that the Statutory Instrument was void, illegal or contrary to law insofar as it purports to authorize the Minister of Finance to enter into the Bond Facility to refinance government's obligations in respect of the Hotel. Essentially, this is an application

for a declaration under an area that straddles that private/public law dichotomy of procedural and substantive principles. The essential principles fall under Administrative Law, public law *ultra vires* or illegality.

[92] The learned trial Judge dismissed the constitutional motion on the ground that Mr. Francois did not have the "relevant interest" to give him *locus standi* under section 105(1) of the Constitution. Mr. Francois has not appealed against that decision. It was held, however, that he had "sufficient interest" as a citizen, a voter and a public-spirited taxpayer to bring the claims for declaration outside of the Constitution.

[93] In her Judgment, the learned trial Judge found that the guarantee was executed before Parliament approved it by Resolution, and the subsequent Resolution did not have retroactive effect. She however found that the guarantee was binding on the State on the authority of common law principles. She found, however, that although the Government could borrow money under section 39 of the Finance (Administration) Act, No. 3 of 1997 ("the 1997 Act"), this provision does not permit the Minister to borrow to refinance Government's financial obligations incurred in relation to the Hotel. This was because the purpose for which the obligation was incurred did not fall within the purposes for which the Government could borrow under the section. The Court therefore declared the Minister's action that sought the Resolution to permit the borrowing for that purpose, *ultra vires*.

[94] Consequently, the Court held that Parliament could not authorize the borrowing under section 39 of the 1997 Act. It held, further, that Parliament acted *ultra vires* by passing the Resolution to authorize the borrowing. Concomitantly, it held that any withdrawal of moneys from the Consolidated Fund to meet the obligations in respect of the Hotel would have or has breached section 78(1)(a) of the Constitution. The Court therefore declared that the aspect of the Resolution and of the Statutory Instrument, which sought to authorize the Minister of Finance to borrow for the purpose of refinancing the obligations under the guarantee void,

illegal and contrary to law. It was also held that the institution of the claims was not an abuse of the process of the Court. The State was ordered to pay costs to Mr. Francois in the sum of $20,000.00.

The Grounds of Appeal

[95] The Appellant asked this Court to quash the decision of the High Court. The main ground is that the unanimous approval of the resolution that the Minister submitted under section 39 of the 1997 Act is fatal to the claim. The Appellant therefore urged us to find that the approval of this Resolution gave constitutional and statutory authority to the Minister to borrow and expend money from the Consolidated Fund to meet the capital expenditure of the Government. The Appellant has contended that either directly or by implication, the Resolution also approved the guarantee for the purpose of section 41 of the 1997 Act. The Appellant has also contended that when Parliament approved the Resolution, it legally authorized the withdrawal of moneys from the Consolidated Fund to meet the financial obligations under the guarantee. The Appellant also urged us to find that the claim constitutes an abuse of the process of the court, for which costs should be awarded against Mr. Francois.

[96] Mr. Francois defended the decision of the learned trial Judge. However, he insisted that the guarantee was not validly executed, because section 41 of the 1997 Act creates a statutory condition precedent to the making of a valid guarantee by the Minister. He insisted that a valid guarantee under the section requires parliamentary approval by way of an enactment or a Resolution by Parliament prior to its executed.

The Basic Facts

[97] The Government of St. Lucia entered into agreements that related to the construction of the Hotel in the island. One was a Development and Construction

agreement. This agreement was dated 17th December 1997. It was made between the Government, A Rochamel Development Company Limited ("Rochamel Development"), Pigeon Point Hotel Limited, Hyatt Hotels of St. Lucia Limited and Rochamel Construction Company Limited ("Rochamel Construction").

[98] In this agreement, Rochamel Development (the developer) undertook to create a phased touristy development at Rodney Bay, Gros Islet. This undertaking included the finding and constructing of an up-market Hotel resort by January 2000. The construction was to be undertaken by Rochamel Construction. Hyatt Hotels, the Management Company, agreed to manage the development. In consideration of the undertakings given by the other contracting parties, the Government granted various concessions to them. These include tax concessions.

[99] The agreement stated that the developer had obtained funding for the construction of the Hotel Resort from RBTT and the Caribbean Banking Corporation Ltd. of St. Lucia (CBCS). It provided, as a requirement of funding, that the Government should enter into a Guarantee and Indemnity Agreement with RBTT (the guarantee). It set out the terms and conditions under which the Government agreed to enter into the guarantee.

[100] Basically, the Government agreed to guarantee debt servicing of the funding at a maximum contingent liability of US$4 million over a period of 3 years of initial hotel trading. The Government also agreed to guarantee cost over-run capped at US$8.75 million. This was a last resort guarantee. The Government was to meet obligations under it only after the substantial contingency that was provided by the developer was exhausted. If the Government had to honour either of these guarantee provisions, it was to be issued with redeemable preference shares in the Hotel Company.

[101] The Minister executed the Deeds of Guarantee with RBTT on 13th February 1998 and 13th September 1999. These parties also signed related Put Option Agreements on 17th December 1999 and 30th June 2000. The put Options provide for the events that would activate the Government's promise on the guarantees. The debt service guarantee in terms of the last Put Option was actually activated in 2000 to enable RBTT to provide additional capital for the project.

[102] In December 2002, both Houses of the Parliament of St. Lucia approved a Resolution that was submitted to them by the Minister under section 39 of the Finance (Administration) Act, No. 3 of 1997. The Resolution authorized the Minister to enter into a Fixed Rate Bond facility ("the Bond Facility") with RBTT for the purpose of financing the Government's capital works programme and to refinance the Government's obligations with respect to the Hotel. The Government thereupon entered into the Bond Facility with RBTT. The Resolution was published in the gazette on 6th January 2003 as Statutory Instrument No. 4 of 2003. In effect, it permitted the Government to borrow from RBTT to finance Government's capital works and its financial obligations that arose under the guarantee.

[103] In passing, it might be noted that the construction of the hotel was completed. The hotel became operational but fell upon hard financial times, apparently as a result of the events of September 11th 2001. The hotel company was put into receivership in December 2001. It was sold to Sandals in March 2003 and is now fully operational as the Sandals Grande.

Is the Guarantee Valid?

[104] The legal bases on which a State executes contracts, particularly contracts of guarantee, are outlined as a background against which this issue is considered.

The State's power to contract

[105] It is trite principle that in the governance of a State, a Government has common law or executive powers to do many acts for public purposes and in the public interest. A Government is required to provide services that entail entering into contacts. By entering into contracts of guarantee, the Government, in essence, promises to meet the contractual obligations of a primary party in the event of default or miscarriage. In the administration of Government, the responsibility for financial affairs falls upon the Minister of Finance, as the member of the Cabinet under whose portfolio this subject falls.

[106] It will be noted that section 59(1) of the Constitution vests the executive authority of St. Lucia in Her Majesty. Section 59(2) of the Constitution empowers the Governor-General to exercise the executive authority on behalf of Her Majesty either directly or through officers subordinate to him. Section 60 of the Constitution provides for the appointment of the Prime Minister and other Ministers of Government. Section 61(1) of the Constitution provides for the Cabinet that is constituted by the Prime Minister and the other Ministers. Section 61(3) of the Constitution provides for the functions of the Cabinet. It is to advise the Governor-General in the government of St. Lucia. This provision also charges the Cabinet with collective responsibility to Parliament for any advice that it gives to the Governor-General under its general authority. The Cabinet is also collectively responsible to Parliament for all things that are done by or under the authority of any Minister in the execution of his or her office.

[107] Section 62 of the Constitution provides for the assignment of portfolios to the Prime Minister and other Ministers. It empowers the Governor-General, acting on the advice of the Prime Minister, to confer on them responsibility for the administration of ministries and departments. Each minister is individually responsible for the good and legal governance of the departments that fall under their purview, and the Cabinet is collectively responsible to Parliament for all of its decisions, actions and omissions. In a real and practical sense, under our

Westminster Model Constitutions, the Cabinet is the center of executive action, although the executive authority is vested in Her Majesty. In the main, executive functions of the State are actually exercised by the Ministers who form the Cabinet and the Government.

[108] Now, if Mr. Francois' claims sought to impugn actions of the Minister or the Government that were based solely upon executive power, the separation of powers doctrine might have precluded this court from entertaining them. This court would be very loath, for example, to entertain a challenge to a decision or action of the Cabinet. However, in C.O. Williams Construction Company Limited v The Attorney General of Barbados (1992) 44 WIR 52 (H'Ct); (1994) 45 WIR 97 (PC), the High Court of Barbados, and ultimately, the Privy Council, indicated that even a decision or action of the Cabinet may be reviewed by the court in certain circumstances. This may occur where the Cabinet takes an action or makes a decision that is *ultra vires* a power that is conferred on it by statute.

[109] In this case, although the authority of Government to enter into contracts is the exercise of executive power, some aspects that relate to the power to borrow and to execute a guarantee are provided by statute. These are particularly encompassed in sections 38 to 42 of the 1997 Act. Any action or decision that a Minister or any other person or body takes that is not in accordance with these provisions may be declared illegal, void and of no effect. The 1997 Act and the Constitution also speak to the procedures by which moneys may be expended from the Consolidated Fund. A court may therefore declare any action that is not in keeping with these provisions unconstitutional, illegal, and void and of no effect.

[110] The essential legal imperative for this purview of the court is that any power that is granted by the Constitution or any statute must be observed. This is central to the rule of law, the sovereignty of Parliament and the supremacy of our Constitutions. The last mentioned notion is enshrined expressly by section 120 of the Constitution and impliedly by other provisions including section 40 of the

Constitution. This latter provision creates Parliament and confers upon it sovereign law making power. The Court will uphold the Supremacy of the Constitution and ensure that the sovereign law making power of Parliament remains inviolate.

Section 41 and the validity of the guarantee

[111] It might be helpful to put the guarantee of which we speak into perspective. In the Judgment, the learned trial Judge considered the legal definitions and characteristics of a guarantee. She seemed to have agreed that the Development and Concession Agreement, the Put Options and the Deeds of Guarantee and Indemnity were all a part of "the guarantees" into which the Government had entered. She found that these were guarantees within the meaning of section 41 of the 1997 Act. The terms under which the Government entered into the guarantee with RBTT were stated in Clause 2 of the Development and Concession Agreement. However, I think that the terms and thus the guarantees are really encompassed in the Put Options and the Deeds of Guarantee, which are intricately entwined.

[112] Section 41 of the 1997 Act is under the rubric "Restrictions on guarantees". It states:

> "41. No guarantee involving any financial liability shall be binding upon government unless that guarantee is given in accordance with an enactment or unless approved by resolution of Parliament."

This modified the common law power relating to guarantees. The question, however, is whether this section required the Minister to obtain parliamentary approval prior to the execution of the guarantees.

Submissions by Mr. Francois

[113] Mr. Francois submitted that the critical words in this section are "any financial liability". He submitted that once the Minister executed the guarantee it

immediately created a financial liability upon the Consolidated Fund. He referred, *inter alia*, to Articles 1828 and 1852 of the Civil Code of St. Lucia. Under the Code, suretyship is akin to guarantee. Article 1828 of the Code provides, in part, that suretyship can only be for the fulfillment of a valid obligation.

[114] Mr. Francois submitted, further, that even if the financial obligations that arise under a guarantee are contingent at the time of the execution of the guarantee, the reality is that it binds the government immediately. However, he said, because of section 41 of the Act, the Minister cannot fix the government with that financial obligation unless the guarantee was first approved by Parliament by Resolution. This, he submitted, is because this section creates a statutory condition precedent to the making of a guarantee. The result is that the Minister would have acted *ultra vires* the section when he executed the guarantee without prior parliamentary approval.

[115] Mr. Francois cited as authorities Churchward v The Queen [1865] L R 1 Q B 173; Commercial Cable Company v Government of Newfoundland [1916] 2 AC 610 (PC); Mackay v Attorney General for British Columbia [1922] 1 A C 457 (PC); Auckland Harbour Board v The King [1924] A C 318 (PC); Attorney-General v Great Southern and Western Railway Company of Ireland [1925] A C 754 (HL); The State of New South Wales v Bardolph [1934] 52 C.L.R. 455 and Credit Suisse v Allendale Borough Council [1995] 1 Lloyds Rep. 315; [1996] 3 W L R 894.

[116] Mr. Francois submitted that, on the other hand, where there is no statutory condition precedent that requires a Resolution to approve a guarantee, the guarantee is binding on the Crown, but only subject to Parliament providing sufficient funds to meet performance under the guarantee. He said that a contract or guarantee that is made under these circumstances contain an implied condition that payments under it by the Crown would be made only from monies that Parliament lawfully made available. He submitted that such a condition does not

go to the validity of the contract or guarantee and it may be sued on whether or not sufficient moneys have been appropriated.

[117] In support of these statements, Mr. Francois cited Kidman and Others v The Commonwealth of Australia [1926] "The Argus" Law Reports 1; the Bardolph case, supra; J. E. Verreault & Fils Ltee v Attorney General for Quebec [1975] 57 D L R (3rd) 403 and Baldwin Spencer v The Attorney General of Antigua & Barbuda and Others (High Court, Antigua, Suits Nos. 295 and 348 of 1997). He also referred to Articles 1828 and 1852 of the Civil Code of St. Lucia.

Submissions by Mr. Astaphan

[118] Mr. Astaphan, SC, submitted that section 41 of the Act does not impose any legal obligation upon the Minister to submit agreements or guarantees to Parliament for approval prior to execution. He submitted, further, that the absence of parliamentary approval at the time that a contract or guarantee is made goes to enforceability, but does not affect their formation, legality or validity. He insisted that this is the central issue that is established in the authorities that Mr. Francois cited.

The Principles

[119] In many instances, the cases that were cited involved constitutional or statutory provisions that are to be considered in our present case. Whether the guarantees are valid, and, in fact, whether Mr. Francois prevails in this case, will turn on the interpretation of the provisions that are relevant to this case. We may draw on the case law only to the extent that it elucidates the construction of these provisions.

[120] In the Bardolph case, an officer in the Department of the Premier of New South Wales placed advertisements that related to various government departments on the authority of the Premier as a matter of government policy. He contracted with Bardolph to insert advertisements into his (Bardolph's) newspaper for a period of

more than one financial year. The contract did not have the approval of the Legislature. Shortly after the contract was made, government changed. The new administration decided not to put any further advertisements into Bardolph's newspaper or to pay for them. Bardolph continued to insert the advertisement into the space to the end of the contract period although payments by the government ceased.

[121] The High Court of Australia held that the officer who placed the advertisements (made the contract) with Bardolph had specific and definitive authority to make it. It also held that the agreement bound the Crown, acting through the Ministry of the day, by virtue of collective responsibility. It further held that the contract still subsisted because Bardolph had not accepted the implied offer to rescind it. The contract was therefore held to be valid and enforceable against the State, subject to Parliament making funds available to the executive to discharge the liabilities to Bardolph under the contract. Bardolph was granted a declaration that he was entitled to the outstanding sums under the contract.

[122] This case and the other cases that were cited are not on 'all fours' with our case. In the first place, the Bardolph case did not involve a provision that is similar to section 41 of the 1997 Act, which must be considered in our case. Second, the Bardolph case did not involve *ultra vires* issues. It was essentially a private law action for a declaration that the contract for the advertisement was valid and binding on the Crown and that Bardolph was entitled to the outstanding sums on it. In our case, Mr. Francois' claims are essentially under public law. They seek declarations to impugn the actions of the Minister to execute the guarantees. They also seek to impugn subsequent actions, to wit, the presentation and approval of the Resolution and Statutory Instrument. They seek to impeach the aspects of the Resolution and the Statutory Instrument that relate to the refinancing of the financial obligations under the Guarantee.

[123] However, the Bardolph case and kindred cases are not altogether unhelpful. This is because of essential principles that may be distilled from them. There are pronouncements that present pointers to the perspective from which our constitutional and statutory provisions may be interpreted. This is what Saunders J., as he then was, did in the Spencer case. (See, particularly, page 27 of the Judgment.). The principles indicate, for example, that generally, Ministers of Government and officers of Crown or State, who have the necessary authority, may enter into contracts, including contracts of guarantee, which validly bind the government, without prior parliamentary approval. The authority to do these springs from the common law.

[124] The principles also indicate that prior parliamentary approval is not generally required to make a guarantee a valid contract upon which a party may sue. Parliament, however, retains control over the expenditure of funds to meet the financial obligations that arise under them. Parliament's refusal to provide funds to make payment for the financial obligations incurred does not invalidate them, but may render them unenforceable. Parliamentary approval of such contracts is not a condition precedent to their validity unless this is expressly stated in the guarantee. Constitutional provisions or statute may also stipulate conditions for validity. This is the basis for distinguishing the Bardolph case and the Churchward case. Constitutional provisions and statutory enactments may provide the bases by which Parliament may adopt or ratify a guarantee or appropriate funds to meet expenditure for its performance.

[125] The following extract from the Bardolph case, at page 502 is instructive. It states:

> "… no money can be withdrawn from the public funds without a distinct authorization of Parliament itself. The Crown is dependent upon the supply granted to it by Parliament, and there is an express or implied term in its contracts that payment shall be made out of moneys so provided. But the existence of the contract is not conditional upon Parliamentary authority, or upon provision of funds by Parliament for the performance of the contract. The view that it is so conditional is entirely contrary to English practice, and to a long line of cases … Moreover, it is in opposition to the statement of the Judicial Committee in *R. v Fisher* (3).

[126] The passage continues:

> Constitutional practice, as in the *Commerical Cable Case* (4), or statutory provisions, as in *Churchward's Case* (5) or *Mackay's Case* (6), may prescribe conditions precedent to the making of contracts with the Crown, and so far as these conditions exist they must be observed. But otherwise contracts made on behalf of the Crown by its officers or servants in the established course of their authority and duty are Crown contracts, and as such bind the Crown."

Applying the principles

[127] Whether the Minister legally executed the guarantees in question in this case is primarily a function of the interpretation of section 41 of the 1997 Act in the light of these principles. Nothing in the section limits the common law power of the Government to execute guarantees that are in the public interest and for public purposes. Executive power must be exercised in the public interest and for public purposes. It is clear from the affidavit of the Minister that the development that involved the construction of the Hotel was for a public purpose and in the public interest. It was intended to expand the development of tourism, which is a major sector of the economy of the State.

[128] I think that the common law power of the State to contract is enshrined in the separation of powers. The executive is entrusted with the power to make and execute policy. However, the expenditure of Government moneys must be approved by Parliament. A limitation of the power of a Minister to enter into contracts or to execute guarantees can only be achieved by clear words. The words of section 41 of the 1997 Act are clear. There is nothing ambiguous about it that requires us to go outside of it in order to determine its purport. It contains no formula that states that prior parliamentary approval is required before the Government could execute a valid guarantee.

[129] Section 41 of the 1997 Act does not contain any clear words that require a Resolution as a condition precedent to the execution of a valid guarantee by a Minister. It simply states that any financial liability that arises from the guarantee will not be binding unless the guarantee is given in accordance with any enactment. There are no statutory provisions that I am aware of that regulate the execution of a guarantee by Government so as to create a condition precedent to the validity of the guarantee. The section also states that the financial liability will not be binding unless the guarantee is approved by Resolution. This does not require parliamentary approval of a guarantee as a condition precedent to its execution. The guarantees were not therefore invalid. Financial liability was created because one of the events that precipitated the contingency under the guarantee arose. One result that flows from section 41 of the 1997 Act is that the liability cannot be enforced until Parliament approves the guarantees by Resolution.

Did the Minister act ultra vires by presenting the Resolution to Parliament?

[130] This basically considers whether the Minister could have legally sought approval to borrow in order to finance the obligation that arose on the guarantees. We shall look first at the applicable statutory provisions, second, the submissions that were made on behalf of the Parties, and, third, the findings on this issue.

The applicable statutory provisions

[131] Sections 38 to 42 of the 1997 Act fall under Part VIII of the Act. Section 38 deals with borrowing by means of advances to meet Government's current requirements. It is not important to this case, except that it stipulates that the Minister may borrow for this purpose by resolution of Parliament.

[132] Section 39(1) is germane to this case. It provides that the Minister may borrow from a financial institution, by resolution of parliament, for the purpose of the capital or recurrent expenditure of the Government, among other purposes. It

seems clear that a Resolution is a condition precedent to borrowing for any of these purposes. It's also clear that the liability under the guarantee was incurred for the purpose of the Governments capital expenditure for the development of tourism infrastructure.

[133] Section 42 of the 1997 Act provides the authority for charging any financial liability that arises under a guarantee that the Minister executes on the Consolidated Fund. Thus, section 42(1) of the 1997 Act provides that all debt charges for which the Government is liable shall be charged upon and paid out of the Consolidated Fund. According to section 42(2) of the 1997 Act, debt charges include any arising from a guarantee given in accordance with section 41 of the 1997 Act. These obligations in turn fall within the remit of section 8(a) of the 1997 Act. This sub-section prohibits expenditure from the Consolidated Fund, except where the expenditure is permitted, inter alia, by the Constitution or any enactment. It is apparent that the essential purposes of the requirement for Resolutions in sections 39 and 41 of the 1997 Act are to maintain parliamentary control over expenditure of moneys from the Consolidated Fund.

The submissions

[134] Although it has not been clearly stated, I think that the gravamen of Mr. Francois' complaint is that the Minister should have specifically presented the Resolution for the guarantee to Parliament for approval before presenting the Resolution to facilitate the borrowing of money to refinance the liability that arose on the guarantees. Inasmuch as the Minister did not first present the Resolution on the guarantee he could not legally seek the approval of Parliament to refinance the liability. The Minister therefore acted *ultra vires* section 39 of the 1997 Act when he submitted the Resolution to Parliament.

[135] Mr. Astaphan, SC, submitted that the Minister did not act ultra vires when he sent the Resolution for parliamentary approval. He stated the reasons for this submission thus: Section 41 of the 1997 Act does not impose an obligation on the

minister to seek parliamentary approval to execute or provide a guarantee, neither does this section preclude the operation of sections 38 and 39 of the 1997 Act. This last section is concerned with the ability of the government to borrow moneys with the approval of parliament. Section 41 concerns guarantee, which involve financial liability that stand as authority to pay from the Consolidated Fund. Therefore, parliamentary approval of a Resolution to borrow under section 39(1) of the 1997 Act to meet a financial liability incurred under a guarantee under section 41 is sufficient to satisfy the approval of the guarantee as well as give authority to borrow under section 39 to meet that liability.

Findings

[136] It is my view that the presentation of a Resolution under section 41 of the 1997 Act would have made for procedural neatness. It would perhaps have obviated the uncertainty and the impasse that the present case has occasioned. I commend it as a desirable procedure. However, it is my view that it is not a mandatory pre-requisite to a Resolution to facilitate borrowing to meet the financial liability that arises under a guarantee.

[137] In this case, the Resolution to borrow relates to the obligation with respect to the Hotel. Mr. Francois complains that it is too vague in that it does not specify the relative sums allocated to capital works and those that are to meet the obligations that arose under the guarantees in respect of the Hotel.

[138] The Minister explains the reason for the absence of this specificity in his affidavit that was filed herein on 19th September 2003. He said that the Resolution did not mention a specific sum in the Resolution for the obligation on the guarantees because there was a difference of opinion between the Government and RBTT over the rate of interest that was payable by the Government. In the second place, the Minister said that it was decided that proceeds that were garnered from the hotel accommodation tax were to be tapped to pay the debt under the guarantees. He said that these matters had to be resolved before a specific sum

for the obligation could be known and mentioned, but the Resolution permitted him to enter into the Bond Facility in an amount that was sufficient to cover the costs of the capital projects, and to meet the obligations under the guarantees. These were capped at specific amounts.

[139] Specificity is perhaps desirable, but there will be excepting circumstances. In any case, this was a matter that came before Parliament. It approved the Resolution by the unanimous vote of both Houses. This matter falls within the purview of Parliament. The Members of Parliament were no doubt aware that there are financial procedures and public accounting mechanisms to ensure the integrity of the expenditure of the funds that are to be provided from the Consolidated Fund to meet the obligation under the guarantee.

[140] Parliament still retains control and oversight of expenditure through its Public Accounts Committee and the Report of the Audit Department, which should be laid in Parliament. In the circumstances, I agree with the basic submission that Mr. Astaphan made that the Resolution was sufficient for the purpose of approving the guarantee so as to render it enforceable under section 41 of the 1997 Act. By that Resolution, Parliament also legally approved the borrowing under section 39(1) of the 1997 Act to refinance the financial obligations that arose under the guarantees.

[141] In the premises, the Minister did not act *ultra vires* when he presented the Resolution to Parliament for approval. By extension, Parliament did not act illegally when it approved the Resolution by the unanimous vote of both Houses. The result is that neither that aspect of the Resolution nor of the Statutory Instrument that relate to the refinancing of the financial obligations under the guarantee are illegal, void and of no effect.

Was Section 78 of the Constitution Breached?

[142] Section 78(1)(a) of the Constitution provides that no moneys shall be withdrawn from the Consolidated Fund, except to meet expenditure that is charged upon that Fund by the Constitution or any law enacted by Parliament. Section 42 of the 1997 Act provides that moneys to meet financial obligations for guarantees under section 41 are to be met from the Consolidated Fund. This satisfies the requirements of section 8(1) of the 1997 Act as well as section 78 of the Constitution for the withdrawal of moneys from the Consolidated Fund. Both of these sections require parliamentary approval by way of an enactment. Since the Resolution and the Statutory Instrument were not void as they relate to the provisions that they contain for the refinancing of the obligations under the guarantees, the withdrawal of moneys from the Consolidated Fund to meet those obligations will not be in breach of section 78 of the Constitution.

Locus Standi

[143] Mr. Francois brought the claims on the ground that he is a citizen of St. Lucia, a taxpayer and a person who is entitled to vote in St. Lucia. We have seen that his claim for constitutional redress was dismissed on the ground that he did not have the requisite *locus standi*. Mr. Francois has not appealed. We have only to consider, therefore, whether he has a sufficient interest to give him the necessary nexus with the subject of the claim for declaratory relief outside of the constitution. To do this we look, briefly, at the case law, the requirement in claims for declaratory relief, and the relevant provisions in our rules.

The case law

[144] Historically, *locus standi* has been a threshold issue that was determined before the substantive issues in public law cases. Recent years have seen inexorable changes that have sometimes resulted in the determination of substantive issues before *locus standi* is considered. This was the approach that this Court took in

Re Blake (1994) 47 WIR 174. In this case, this Court canvassed the merits of an application that challenged the appointment of a Prime Minister after inconclusive general elections. It found that the application was unmeritorious. The Court therefore decided that it was unnecessary to consider whether the applicant had *locus standi*, either by way of sufficient interest or relevant interest, in the subject matter of the application. In Spencer v The Attorney General of Antigua and Barbuda (1999) L.R.C. 1, through the Judgment that was delivered by Sir Dennis Byron, C.J., (Ag.), as he then was, confirmed and commended this approach.

[145] The applications in Spencer were for declarations under the Constitution. However, it is my view that the approach that was used and recommended in that case is also referable to claims for judicial review and for declarations outside of the Constitution. Lord Denning, MR, applied it in Blackman v A.G. [1971] 1 WLR 1037, in which a private citizen sought an order declaring that it was unconstitutional for the United Kingdom to submit to the Treaty of Rome. In that case he found that the claim was unmeritorious and did not therefore consider whether the applicant had *locus standi*.

[146] This approach that was recommended in Spencer accords with good law and reason. An applicant for a declaration can have no *locus standi* in an unmeritorious claim. On the other hand, in a meritorious case, it must be necessary to canvass the issues and the facts in order to determine whether there is sufficient nexus between an applicant and the subject matter of the claim to give him or her *locus standi*.

Locus standi for declaratory relief

[147] It will be recalled, of course, that a person who applies for a declaration must have a personal legal right or interest which the alleged illegal action or decision infringes or threatens to infringe. The rationale for this is in the private nature of declaratory relief. It is a private law relief that was adapted to public law procedures. Lord Diplock expressed the rationale for the requirement of a

personal legal right or interest in Gouriet v Union of Post Office Workers [1978] A.C. 435, at page 501. He stated:

> "But the jurisdiction of the Court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of any one else.'

It is this that explains the difference in the approach of the Courts to standing in cases involving declaratory and injunctive relief, and cases that involve the strict prerogative remedies of prohibition, certiorari and mandamus.

[148] In the case Augustin Lionel v The Honourable Attorney General (High Court Suit No. 357 of 1995), the applicant applied for an order to prohibit the holding of a commission of inquiry. He stated that he was a taxpayer, a public-spirited citizen of St. Lucia and a voter. He said that he believed that the matter was of public importance and that it was of utmost public importance that a fair and impartial tribunal should be appointed to look into the matter. Matthew, J., as he then was, found that the applicant had locus standi to bring the action. He said that he did not wish to discourage public-spirited citizens from approaching the court on matters of national importance in the public interest. Although he dismissed the application, he made no order as to costs. (See, particularly, pages 2 and 30 of the Judgment). This however was not an action for declaratory or injunctive relief.

The 2000 Rules

[149] It is obvious that our 2000 Rules kept the distinction as it relates to declarations. Part 56.1(7) of the Rules requires an applicant for an administrative order to state whether he or she is applying for a declaration, judicial review, and relief under the Constitution or some other order. Under Part 56.3 of the Rules, a person who applies for judicial review must first obtain leave. Part 56.1(3) defines "judicial review' to include the prerogative remedies, certiorari, mandamus and prohibition. Obviously, this would only include other remedies in the nature of the prerogatives,

the relator action, for example. It certainly does not include the declaration in the light of Part 56.1 (7) of the Rules.

[150] It is noteworthy that Part 56.1(4) of the Rules empowers the Court, on an application for an administrative order, to grant an injunction, an order for the return of property or an order for restitution or damages instead of an administrative order without requiring the issue of further proceedings. It is clear that the intention is to keep some distinctions between the prerogatives and the private remedies, while facilitating the issue of private remedies in applications for judicial review.

[151] Part 56.2 of the Rules then provides very liberal and relaxed rules of standing for application for judicial review. These, as we have seen, relate to applications for the prerogative orders. Interest groups and bodies are particularly facilitated. There is still a requirement that the person or body should be "adversely affected" by the decision. Interestingly, Part 56.2(d) of the Rules confers standing on a body or group that can show that the matter that is complained of is of public interest, and the body or group possesses expertise in the subject matter of the application.

This case

[152] In this case Mr. Francois does not have locus standi because I have found the claim to be unmeritorious. Even outside of this, he would have perhaps encountered some difficulty on the test of standing for declarations that comes out of the Gouriet case. It might have been open to the court to use the factors adumbrated in R. v. Secretary for Foreign Affairs, ex p. World Development Movements Ltd. [1995] 1 ALL E.R. 611 if the claims were meritorious.

[153] It is noteworthy that the Supreme Court of Canada modified the requirement for declaratory relief in Thorson v A.G. of Canada (No.2) (1974) 43 DLR (3d) 1. It said that the rule that requires personal standing applies to legislation of a

regulatory character that affects particular persons or classes of persons. It said, however, that outside of this, in a suitable case, where the issue is justiciable, the court may, in its discretion, grant relief to any citizen.

Abuse of Process and Costs

[154] The High Court awarded costs to Mr. Francois by virtue of Part 56.13(4) and (5) of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 ("the Rules). These costs were assessed under Part 65.11 and 65.12 of the Rules at $20,000.00. In awarding this quantum, the Court took judicial notice of an oral Judgment that was given by this Court in Martinus Francois v The Attorney General of St. Lucia, Civil Appeal No. 8 of 2002.

[155] In proceedings such as this, Part 57.13(4) of the Rules permits the Court to make any order as to costs as appears just. However, Part 56.13(6) of the Rules states that no order as to costs may be made against an applicant unless the court thinks that the applicant has acted unreasonably in making the application or in the conduct of the proceedings. This mirrors the prior practice of our courts in these cases, as is evidenced, for example, in the Augustin Lionel case, supra. It also mirrors the statement of this Court in the Spencer case, that this is the acceptable practice that our courts have observed in relation to a private citizen seeking to enforce Constitutional rights.

[156] It is noteworthy, however, that the applicant in the Spencer case was condemned in the costs. This was because this Court was of the view that the proceedings in that case constituted an abuse of the process of the court. In that case, the Court found that the case was very highly unmeritorious. It also thought that the applicant, who was a Member of Parliament, had instituted therein a case that was mainly political, thus substituting the court for parliamentary debate. It was also found that the statement of claim included unparticularized allegations of a

scandalous nature. These allegations included fraud, public mischief and conspiracy.

[157] In Spencer, this Court was also concerned that the Prime Minister and the Attorney General were sued not only in their representative capacities but, unnecessarily, in their personal capacities as well. The investor was also sued and allegations of a scandalous nature, which were not particularized, were leveled at them. It was found that the case was politically motivated, and the undue and unnecessary length of the arguments embarrassed the Court and increased the costs of the hearing to the Respondents. In these circumstances, those proceedings were held to have constituted an abuse of the process of the court and the applicant was ordered to pay costs.

[158] In this case, I am concerned that Mr. Francois raised allegations of fraud in his affidavits. I am not of the view that these were properly particularized. He also alleged that the Minister made fraudulent misrepresentations, acted in bad faith, committed misfeasance in office and refused to make full and frank disclosure of the nature and extent of the quantum of the Government's financial obligations to RBTT with respect to the guarantee. The affidavits contain overtones that are clearly political, and statements that are rather unnecessarily acerbic. They blur the lines between assertiveness, over-enthusiasm and impropriety.

[159] Notwithstanding these concerns, and without condoning them as proper or necessary in the litigation process, I do not think that this case crossed the boundaries into an abuse of the process of the court. This is mainly because it raised an issue that is of some legal and public importance, which tested legality of action and procedures that lead ultimately to expenditure by the government from the Consolidated Fund. The challenge was unmeritorious, but not spurious. I do not think that Mr. Francois acted so unreasonably in making the application or in the conduct of the case, that it took the case outside of the general rule stated in Part 56.13(6) of the Rules. I therefore make no order as to costs.

Order

[160] In the foregoing premises, I will allow the appeal and set aside the decision of the High Court, including the award of costs to Mr. Francois in that Court. I shall make no order as to costs in the proceedings before this Court.

[Sgd.]
Hugh A. Rawlins
Justice of Appeal [Ag.]