THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV2017/0190

BETWEEN:

ERNEST HILAIRE

Claimant

and

ALLEN CHASTANET

Defendant

APPEARANCES:

Mr. Anthony Astaphan SC, Mr. Peter Foster QC, Ms. Renee St. Rose and Ms. Ann-Alicia Fagan for the Claimant
Mr. Garth Patterson QC and Mr. Mark Maragh for the Defendant

2018: October 3rd, 9th
November 29th

DECISION

[1] SMITH J: This is an interlocutory application, in defamation proceedings, in which the defendant seeks orders that: (1) the claimant's statement of claim be struck out; (2) the words complained of as being defamatory of the claimant are not capable of bearing the meaning attributed to them; (3) the claimant's claim be summarily dismissed pursuant to section 8 of the United Kingdom Defamation Act 2013 ("the 2013 Act"); (4) the defendant be given leave to further amend the amended defence and file further witness statements; (5) case management timelines be extended and that there be specific disclosure; and (6) that the claimant admit certain facts.

[2] The claimant has also applied to strike out the defendant's defence on the basis that it discloses no reasonable defence to the claim as the defence is predicated on the 2013 Act which has no

application to Saint Lucia in view of articles 2123.1, 989E to 989S and Parts I and II of the Civil Code of Saint Lucia ("the Code").

[3] At the hearing of these applications, both Mr. Patterson and Mr. Astaphan agreed that the issue as to the applicability of the 2013 Act should be taken separately since the viability of each party's pleadings rested on the outcome of that issue. The Court therefore heard extensive arguments on the applicability of the 2013 Act. This is the decision of the Court on that singular question.

[4] At the outset, the defendant took a preliminary objection that the claimant's submissions on the applicability of the 2013 Act raised substantive points of law which had not been pleaded and therefore he could not rely on them by virtue of the Rule 8.7 A of the Civil Procedure Rules ("the CPR").

Issues

[5] The issues that arise for the determination of the Court are as follows:

(1) Must substantive law be pleaded?

(2) Is the 2013 Act applicable to Saint Lucia?

(3) Is Article 917A of the Code unconstitutional?

(4) Are sections 2 and 3 of the 2013 Act in conflict with articles 989K and 989L of the Code?

Must Substantive Law be Pleaded?

[6] A useful starting point is a consideration of Rule 8.7 which states:

> "8.7 **Claimant's duty to set out** case
> (1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.
> …
> EC CPR 8.7A
> 8.7 A Permission to rely on allegation or factual argument
> The Claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission or the parties agree."

[7] Mr. Patterson submitted that CPR 8.7A introduced a requirement to plead allegations of law. He relied on the judgment in Loveridge & Loveridge v Healey[1] in which Buxton LJ stated:

> "First, this case does not determine the issue, which troubled the judge, as to whether there is an obligation to plead to allegations of law. A beneficial effect of the Civil Procedure Rules is that by CPR PD 16 para 13.3(1) it is now made clear, as under the Rules of the Supreme Court it was not, that a party in his pleading may "refer" to any proposition of law on which his case is based. It will often be valuable that he should do so, because parties, and the court, should not be left to speculate upon the relevance in law of a purely factual narrative. At the same time, however, the judge was, with respect, plainly right in the doubt that he expressed in paragraph 23 of his judgment as to whether, if an averment of law does appear in a pleading, the full rigour of CPR 16.5(5) applies to it. That is because of the well-worn principle that the parties cannot, and certainly cannot within the confines of particular litigation, by agreement withdraw from the court the decision of a question of law: see e.g. Alderson B in *Scott v Avery* (1856) 5 HL Cas 811 at p 845, cited by Denning LJ in *Lee v Showmans Guild* [1952] 2 QB 329 at 342; and a fortiori that cannot be done by the "agreement" that arises from a failure to plead to an allegation. What the parties can do, and as Mr. Blohm demonstrated they are to be taken to have done in this case, is actually or inferentially so to agree the facts that the law when applied to them yields only one answer."

[8] I do not think that Loveridge supports the defendant's contention and I say so for the following reasons:

(1) The opening sentence of the cited passage states "…this case does not determine the issue, which troubled the judge, as to whether there is an obligation to plead to allegations of law."

(2) As the case itself stated, under the UK Rules of the Supreme Court a party may refer to any proposition of law on which his case is based. Two observations flow from this: (a) permission to "refer" to a proposition of law cannot be equated to an obligation to plead law; (b) the proposition of law relied on by the claimant in the instant case is not one on which his case is based; it is one being used to attack the defendant's pleading.

(3) As the case itself stated, parties cannot within the confines of a particular litigation, by agreement, withdraw from the court the decision of a question of law.

(4) An objection to jurisdiction, for example, which goes to the heart of a party's case, can be raised at any stage of the trial even though not pleaded and may even be raised, for the first time, on appeal.

---

[1] [2004] EWCA Civ 173.

(5) If a party, after the close of pleadings, raises a settled point of law, it would mean, on the defendant's argument, that a Court could not take account of it and would be obliged to render a flawed decision. This plainly could not have been the intention behind CPR 8.7A.

[9] In any event, the judgment of the Court of Appeal of the Eastern Caribbean in Dominica Agricultural and Industrial Development Bank and Mavis Williams[2] appears to have settled the matter. In that judgment, Barrow JA, in delivering the judgment of the Court, stated at paragraph 41:-

> "In such a case the pleader should state the facts that enable the court to supply the absent term. In that case, if such facts are not denied they are deemed to be admitted, under the rule for which counsel for the respondent contended. But if no fact is pleaded, to what can there be deemed to be an admission? A corollary of the rule that facts must be pleaded is that there is no obligation to plead matters of law. There can be no sanction, therefore, against a party who fails to plead to a matter of law."

[10] I am therefore obliged to overrule the defendant's preliminary objection and turn now to the issue of the applicability of the UK Act.

Is the 2013 Act Applicable?

[11] The answer to this question depends on the interpretation that is to be given to article 917A of the Code which provides as follows:

> "917A. (Ad. 34-1956).
> (1) Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi-contracts and torts shall mutatis mutandis extend to this Colony, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the Coutume de Paris "…

[12] I adopt Mr. Patterson's useful approach of deconstructing article 917A into its constituent phrases, and then attempting to resolve the meaning that should be given to each:

(i) "from and after the coming into operation of this Article";

(ii) "the law of England";

(iii) "for the time being"; and

(iv) "mutatis mutandis extend to the colony"

---

[2] Commonwealth of Dominica, Civil Appeal No. 20 of 2005.

"*From and after coming into operation of this Article*"

[13] I do not think there is any dispute as to the interpretation of this phrase. I take the phrase to mean that from the time of the enactment of Act No 34 of 1956 (which introduced Article 917A) and from that point onward, Article 917A takes effect as part of the law of Saint Lucia.

"*the law of England*"

[14] The claimant contends that this phrase cannot be interpreted to include Acts of the United Kingdom Parliament ("UK Acts"), while the defendant contends that it does. In addressing the issue of whether UK Acts are imported into the laws of Saint Lucia by virtue of article 917A of the Code, Mr. Patterson relied on the cases of Cyril Mathurin and Anthony Augustin,[3] and Eversley Thompson and The Queen.[4] Mr. Astaphan, on the other hand, relied on the cases of Attorney General of St. Lucia and Donavan Isidore[5] and First Caribbean International Bank (Barbados) Limited and Sunset Village Inc. (in Liquidation) which appear to be at variance with the cases to which Mr. Patterson referred.[6] I will treat with the authorities in turn, examining first those which suggest that UK Acts are imported.

[15] In the 2007 judgment of Cyril Mathurin, although the specific issue of whether the phrase "law of England" included UK Acts did not arise, it is clear that the Court of Appeal treated English statutes as being applicable when considering the effect of article 917A. This is borne out by the following statement from Barrow JA who delivered the judgment of the Court:

> "[11] The 1982 Act made the law of England directly the opposite of what it had been before and, hence, the opposite of article 609 of the Code …
>
> [12] After the 1982 Act, English law and Saint Lucian law conflicted. In that situation of conflict article 917A (3) of the Code prevented English law from taking effect in Saint Lucia, because that provision of the Code made Article 609 prevail over the 1982 Act."

---

[3] HCVAP 2007/041
[4] Saint Vincent and Grenadines, 21st July 1997.
[5] Saint Lucia, Civil Appeal No. 2003/0020
[6] SLUHCVAP 2016/0027

[16] From the above passage, it seems clear that there could be no question of the Code preventing the 1982 English Act from taking effect if Acts were not included in the phrase "law of England". In other words, there would have been no need to pray in aid article 917 (3) (which gives the Code primacy over the law of England in case of conflict) if the 1982 was not imported into the laws of Saint Lucia through Article 917A.

[17] In the 1997 judgment of Eversley Thompson, the Court of Appeal considered section 3 of the Evidence Act 1988 of Saint Vincent and the Grenadines which provided that "… such question shall, except as provided in this Act, be decided according to the law and practice administered for the time being in England with such modifications as may be applicable and necessary in St. Vincent and the Grenadines."

[18] In considering the phrase "law and practice" this is what Byron CJ stated: -

> "I do not think it necessary to go through the argument in support of the clear and obvious conclusion that the words law and practice administered in England must be taken to include Acts of the United Kingdom Parliament for the time being in force."

[19] On appeal[7], the Privy Council effectively upheld that finding by holding that the English Police and Criminal Evidence Act 1984 ("PACE") applied to Saint Vincent and Grenadines by virtue of section 3 of the Evidence Act 1988 of Saint Vincent and Grenadines. Mr. Astaphan sought to distinguish Eversley by submitting that Saint Vincent and the Grenadines had enacted the Application of English Law Act 1989 which specifically provided for the importation in that jurisdiction of English Acts of Parliament. While that is true, I accept Mr. Patterson's argument that the Privy Council in Eversley held that the Application of English Law Act "confirmed" that the English PACE Act applied to Saint Vincent and the Grenadines by virtue of section 3 of the Evidence Act of that jurisdiction.

[20] Mr. Astaphan countered by relying on Attorney General of St. Lucia and Donavan Isidore in which the Court of Appeal, in considering whether the maxim *ex turpi causa non oritur actio* applied to Saint Lucia, stated:

---

[7] Eversley v The Queen [1988] 2 WLR 927.

> "The origin of the doctrine ex turpi causa non oritur action, to give the phrase its full value, can be found in the judgment of Lord Mansfield CJ in the case of Holman Johnson and is a part f the Common Law. This segues into the issue of Article 917A and the importation of the English law of torts. I believe that there can be little debate that Article 917A imported, at the least, the law of torts as it was in 1956."

[21] Donavan Isadore appears to be clear authority for the proposition that article 917A imports the English common law, but I do not think that it can be relied upon as authority that it is only the common law that is imported as opposed to UK Acts. The Court of Appeal did not consider the question of whether English statutes were also imported in Saint Lucia by virtue of Article 917A. This decision therefore does not afford much assistance.

[22] Mr. Astaphan also relied on 2018 judgment of First Caribbean International Bank (Barbados) Limited and Sunset Village Inc. (in Liquidation) in which Blenman JA, in delivering the judgment of the Court, stated at paragraph 24:

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

[23] First Caribbean therefore appears to be clear and recent authority for the proposition that article 917A imports only the common law of England. Mr. Patterson vigorously opposed this notion. This Court, he submitted, should not consider itself bound by First Caribbean, notwithstanding that it is a judgment of the Court of Appeal, for the following reasons: (1) the statement by Blenman JA in First Caribbean was made *obiter*; (2) Cyril Mathurin and Eversley Thompson had not been brought to the Court's attention therefore its decision had been made *per incuriam*; (3) the dicta of Blenman J.A., was itself based on dicta of the Privy Council in Nelson and Others v First Caribbean International Bank (Barbados) Limited;[8] and (4) to the extent that the opinion of

[8] [2014] UKPC 30.

Blenman JA was meant to represent a definitive statement interpreting the scope of article 917A, it was made both *obiter* and *per incuriam*. These arguments will now be examined more closely.

[24] Mr. Patterson submitted that the statement was *obiter* because that case involved the question of priorities of creditors in the distribution of assets of a company in liquidation and that it is obvious that article 917A had no application to the issues on appeal since that article is limited to applying law "relating to contracts, quasi-contracts and torts." It could therefore never be relied upon as the basis for importing the insolvency laws of England.

[25] In relation to the principle of *stare decisis*, he submitted that the English case of In re Hetherington, Decd.[9] supports the proposition that a High Court is not bound by a decision of the Court of Appeal that had been made *per incuriam*. In Hetherington, Sir Nicholas Browne-Wilkinson VC had to consider whether the English High Court was bound by a particular aspect of the decision of the House of Lords in Bourne v. Keane,[10] where the House of Lords had simply assumed the point in question to be the law without the benefit of hearing argument. This is what Browne-Wilkinson VC had to say on that point:

> "In my judgment, I am not so bound. In Baker v The Queen [1975] A.C. 774, Lord Diplock, after mentioning that the Judicial Committee of the Privy Council does not normally allow parties to raise for the first time on appeal a point of law not argued in the court below, said, at p. 788:
>
> > "A consequence of this practice is that in its opinions delivered on an appeal the Board may have assumed, without itself deciding, that a proposition of law which was not disputed by the parties in the court from which the appeal is brought is correct. The proposition of law so assumed to be correct may be incorporated, whether expressly or by implication, in the ratio decidendi of the particular appeal; but because it does not bear the authority of an opinion reached by the Board itself it does not create a precedent for use in the decision of other cases."
>
> That decision was applied in Barrs v. Bethell [1982] Ch. 294, where after quoting the passage I have read from Lord Diplock, Warner J. continued, at p. 308:
>
> > "In my judgment, the principle that, where a court assumes a proposition of law to be correct without addressing its mind to it, the decision of that court is not binding authority for that proposition, applies generally. It is not confined to decisions of the Judicial Committee of the Privy Council."

[9] [1990] Ch. 1
[10] [1919] AC 815.

That approach coincides with some words of May L.J. in the recent Court of Appeal case of Ashville Investments Ltd. v. Elmer Contractors Ltd. Q.B. 488, 494, where he said:

> "In my opinion the doctrine of precedent only involves this: that when a case has been decided in a court it is only the legal principle or principles upon which that court has so decided that binds courts of concurrent or lower jurisdictions and require them to follow and adopt them when they are relevant to the decision in later cases before those courts. The ratio decidendi of a prior case, the reason why it was decided as it was, is in my view only to be understood in this somewhat limited sense."

In my judgment the authorities therefore clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense. So therefore, in my judgment, Bourne v. Keane [1919] A.C. 815 is not decisive of the case before me."

[26] Mr. Patterson invited this Court to conclude that since the Court of Appeal in First Caribbean had not considered Cynthia Mathurin and Eversley Thompson, and had relied on a statement in Nelson which was itself expressed *obiter*, this Court is not bound by First Caribbean based on the reasoning in Hetherington.

[27] I agree that First Caribbean did involve the question of priorities consequent on an insolvency. But central to resolving that issue was whether the Insolvency Act 1986 and the Insolvency Rules of England and Wales were imported into Saint Lucia. In the course of that appeal, arguments were presented that English statues were imported into Saint Lucia via article 917A of the Code on which the Court of Appeal ruled as in set out in paragraph 23 above. In that context, the ruling by Blenman JA was part of the *ratio decidendi* of the judgment. It was a finding on an issue on which there had been opposing arguments and which decided the outcome of the appeal. I therefore cannot agree that the finding was made *obiter*.

[28] In Nelson, the treatment of article 917A by the Privy Council was limited to the observation of Lord Hodge that:

> "*Article 917A provides no alternative answer as it imports only the English common law in relation to obligations and not the English statutory provisions on limitation*."

[29] From a careful reading of Nelson, it does not appear that the issue of the scope and application of article 917A was argued before the Privy Council. I therefore agree with Mr. Patterson that the Privy Council was focused on the limited question of prescription and did not intend to make any

authoritative statement on the full scope of article 917A. For the reasons stated above, however, this does not diminish my conclusion that the finding on article 917A in First Caribbean was not made obiter.

[30] In relation to whether First Caribbean was decided *per incuriam*, it appears that the decisions in Cynthia Mathurin and Eversley Thompson were not put before the Court. In these circumstances, this Court is not bound by the decision in First Caribbean. I, nevertheless, consider that the finding in First Caribbean on the scope of article 917A is correct.

[31] The approach I intend to take was foreshadowed in the dicta of Pereira JA, as she then was, in Doyle and Dean[11] which concerned the scope of section 11 of the West Indies Associated States Supreme Court (Grenada) Act.[12] Section 11 of that Act stated that where there was no special provision for the exercise of the jurisdiction of the High Court in civil proceedings, such jurisdiction shall be exercised in conformity with the "law and practice for the time being in force in the High Court of Justice in England." The question was whether that phrase was a reference to procedural as distinct from substantive law. This is what Pereira JA said:

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

[32] I appreciate that Dean and Doyle dealt with a provision that was different from Article 917A, but I think that the first principles extractable from the dicta of Pereira JA can be applied to the circumstances of this case.

[33] The rule of law is a foundational pillar of our legal system. One of its central tenets is that the law must be accessible, clear, certain and predictable if citizens are expected to follow it. If Saint Lucians must look to the United Kingdom to ascertain the law of defamation in Saint Lucia, in addition to their own local statutes, that would lead to confusion. The rule of law strives for certainty and abhors

---

[11] Grenada, HCVAP 2011/020

[12] Cap. 336, Revised Laws of Grenada 2010.

confusion. If, despite having their own sovereign legislature, Saint Lucians must look to the UK parliament to discover the latest amendment to the UK defamation law, that is repugnant to the notion of accessibility of the law. The 2013 Act, if applicable, would have had the effect, in my view, of repealing articles 989K and 989L from 2014 without the sanction of the sovereign legislature of this jurisdiction. This subverts the notion of predictability of law. I am therefore obliged to avoid an interpretation that undermines the rule of law and to prefer an interpretation that promotes certainty and predictability of law. The confusion is illustrated by the fact that the defendant initially based his strike out application on the UK Defamation Act 1996, later changing this to the 2013 Act. Indeed an entire day was spent on whether the 2013 Act or the Code represented the defamation law in Saint Lucia.

[34] I therefore find that the phrase "law of England" appearing in article 917A of the Code refers only to the common law of England and not to UK Acts. In light of this conclusion, it is unnecessary to go on to consider the next issue of the constitutionality of article 917A or whether it should be adapted with such modifications or adaptations to bring it into conformity with the Constitution of Saint Lucia, a point which Mr. Patterson contends cannot be taken in private law proceedings where the State is not a party to the claim. It is also unnecessary to consider the meaning of the phrases "for the time being" and "mutatis mutandis". In the event that I am wrong in my conclusion, I go on to consider whether the 2013 Act, if applicable to Saint Lucia, conflicts with the Code.

Is the UK Act in Conflict with the Code?

[35] Mr. Astaphan submitted that the UK Act does not apply since sections 2 and 3 conflict with articles 989K and 989L which establish a comprehensive code on the common law defences of justification and fair comment. He contends that sections 2 and 3 of the UK Act introduced in England new statutory defences and that since the defences of justification and fair comment have been codified by articles 989K and 989L, the articles of the Code must prevail. It is therefore necessary to juxtapose the relevant provisions of the UK Act with those of the Code to see whether there is a conflict and, if so, what is the consequence of such conflict.

[36] Sections 2 and 3 of the UK Act abolished the common law defences of justification and fair comment as shown below:

"2 Truth

(1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.

(2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.

(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.

(4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

3 Honest opinion

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

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

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

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

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

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

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

(7) For the purposes of subsection (4)(b) a statement is a "privileged statement" if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—

(a) a defence under section 4 (publication on matter of public interest);

(b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);

(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);

(d) a defence under section 15 of that Act (other reports protected by qualified privilege).

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

[37] Articles 2123.1 of the Code provides that:

"For slander and libel, reckoning from the day that it came to the knowledge of the party aggrieved."

[38] The relevant provisions of article 989 provide as follows:

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

989K. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only the truth of every charge is not proved if the words not proved to be true do not

materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

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

989N.

(1) Subject to the provisions of this article, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Chapter shall be privileged unless the publication is proved to be made with malice.

(2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Chapter, the provisions of this article shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.

(3) Nothing in this article shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.

(4) Nothing in this article shall be construed as limiting or abridging any privilege subsisting immediately before the commencement of this article.

(5) In this article the expression "newspaper" means any paper containing public news or observations thereon, or consisting wholly or mainly of advertisements, which is printed for sale and is published in the Colony either periodically or in parts or numbers at intervals not exceeding thirty-six days.

9890. A defamatory statement published by or on behalf of a candidate in any election to a local government authority or to the Legislature shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the person by whom it is published is qualified to vote at the election.

[39] Article 917A (3) provides that:

> "(3) Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail."

[40] It would appear, from the above provisions, that the Code expressly provides for the defences of justification and fair comment, while the 2013 Act has abolished the defences. Mr. Patterson contends, however, that the effect of articles 989K and 989L was not to codify the common law defences of justification and fair comment. His argument is that the addition of articles 989F to 989S to the Code in 1956, which mirrored the provisions of the UK Defamation Act 1952 ("the 1952 Act")

were enacted with the object of extending the common law principles relating to the common law defences of justification and fair comment. These articles, he submitted, did not purport to codify the common law defences of justification and fair comment but rather amplified or supplemented by preserving them in certain prescribed circumstances. Sections 5 and 6 of the 1952 Act, he contended, could not have had a codifying effect since sections 2 (4) and 3 (8), respectively, of the 2013 Act declare those common law defences abolished. If sections 5 and 6 of the 1952 Act had a codifying effect, then those common law defences would not have been in existence in 2013 and could not, therefore, have been abolished. By the same token, he argues, those defences formed part of the common law of Saint Lucia since they were extended by the provisions of articles 989K and 989, until the 2013 Act came into force. He concluded by submitting that since the common law defences of justification and fair comment were not "express provisions" of the Code, article 917A (3) is not engaged so as to prevent the importation of the revisions enacted by the 2013 Act and that articles 989K and 989L are superseded by sections 2 and 3 of the 2013 Act.

[41] When matters of the interpretation of the Code have arisen in this jurisdiction, the courts have routinely referred to the "The Interpretation of the Civil Code of Saint Lucia", an article by Sir Vincent Floissac. I find the following passages instructive on the effect of codification:

> "The cardinal rule of interpretation of our Civil Code must be the Vagliano Rule – the rule which was expounded in Bank of England v Vagliano Brothers, [1891] AC 107 (Vagliano's Case). The Vagliano Rule is based on the presumption that a Code such as ours is intended to be an adequate and accurate summary of the law it expresses. According to the Vagliano Rule, unless there is a valid and cogent reason for going beyond a Code, it should be interpreted internally or by reference to the language contained therein, without additions thereto or subtractions therefrom, without enquiring into the previous state of the law or otherwise resorting to external aids to its construction."

[42] Sir Vincent cited the following statement from Lord Herschell in Vagliano:

> "If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions …"

[43] He also referred to the learning in Despatie v Tremblay[13] in which Lord Moulton stated:

> "The essence of a code, whether it relates only to a particular subject or is of a more general character, is that it is a new departure. The codifiers have no doubt the task of examining the various authorities on each point in order to come to a right conclusion from the conflicting decisions as to what is the law upon the subject and their duty is to embody the result in the corresponding clause of the code they are framing. But when they have done this and the code has become a statute, the question whether they were right or wrong in their conclusion becomes immaterial. From thenceforth the law is determined by what is found in the code and not by a consideration of the conclusions which ought to have been drawn from the materials from which it has been framed. The language used by Lord Herschell in the case of the *Bank of England v Vagliano Bros.* has always been accepted as expressing the object of codification."

[44] Based on the passages above, I am left in no doubt that when the codifiers introduced articles 989K and 989L into the Code their intention was to codify those articles, not to amplify or supplement the common law defences. Mr. Patterson invited this Court to consider the 1952 Act and the case of Moore v News of the World,[14] which he said explained section 5 of the 1952 Act, in order to see that, by extension, articles 989K and 989L of the Code did not have a codifying effect. He also invited this Court to refer to the explanatory notes to the 2013 Act and the case of Lachaux v Independent Print Ltd[15] to see that there is no conflict but rather that those articles have been superseded by sections 2 and 3 of the 2013 Act. The difficulty with this argument is that it invites the Court to do precisely what the learning warns against when interpreting a code. It frustrates the very object of codification. I am therefore obliged to conclude that articles 989K and 989L had the effect of codifying the common law defences of justification and fair comment and that article 917A (3) is therefore engaged.

[45] Having examined the provisions of the 2013 Act, I find that they are irreconcilably in conflict with the Code. Firstly, article 2123.1 of the Code creates a prescription period for libel and slander which conflicts with section 8 of the 2013 Act. Secondly, the serious harm test introduced by the 2013 Act conflicts with article 989H of the Code. Thirdly, the abolition of the defence of justification under the 2013 Act conflicts with article 989K of the Code. Fourthly, the abolition of the defence of fair comment similarly conflicts with the Code. Fifthly, the single publication rule providing for a one year limitation

[13] (1921) 1 AC 702.
[14] [1972] 1 All ER 915.
[15] [2016] QB 402.

period introduced by section 8 of the 2013 Act conflicts with articles 2123.1, 989K and 989R of the Code.

[46] I accept, however, that the Code does not appear to contain any express provisions that codify the "Reynolds defence". Mr. Patterson contends that, under such circumstances, the new "public interest" defence introduced by the 2013 Act cannot be in conflict with the Code. This is true, but it underscores the reason why article 917A could not, properly construed, include UK Acts. It leads to an uncomfortable situation, as in this case, where bits of the Code apply to the law of defamation of Saint Lucia simultaneously with bits of the 2013 Act. Both then have to be cobbled together to construct the applicable law of Saint Lucia. This, as I have stated, runs counter to the concept of the rule of law, with the result that 2013 Act cannot be interpreted, under article 917A, as being applicable to Saint Lucia.

Conclusion

[47] For these reasons, I conclude that the 2013 Act is not applicable to Saint Lucia. That part of the defendant's application seeking to strike out the claimant's claim is therefore dismissed.

Godfrey P Smith SC
High Court Judge

By the Court

Registrar