THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2012/0018

IN THE MATTER OF The Attorney General's Reference (Constitutional Questions) Act Cap 17.18 of the Revised Laws of Saint Lucia

and

IN THE MATTER OF The Attorney General Referring to the Court for hearing and Consideration of important questions Relating to sections 41(2), 41(7), 107 and 108 of the Saint Lucia Constitution Order 1978

THE ATTORNEY GENERAL OF SAINT LUCIA
2nd Floor Francis Compton Bldg.
Waterfront, Castries, St. Lucia

Before:

The Hon. Mde. Janice M. Pereira	Chief Justice
The Hon. Mde. Louise E. Blenman	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan, SC, with him, Mr. Deale Lee, instructed by Mr. Raulston Glasgow, Solicitor General of Saint Lucia for the Attorney General of Saint Lucia, Mr. Hilford Deterville, QC, with him, Ms. Renee T. St. Rose, Ms. Diana M. Thomas, and Ms. Shellone Surage, appearing for some members of the Bar Association of Saint Lucia, Ms. Edith Petra Jeffrey-Nelson, with her, Ms. Esther Greene-Ernest and Ms. Lydia Faisal, for the Office of the Leader of the Opposition, Mr. Andie George, with him, Ms. Barbara Vargas, Mr. Ermin Moise and Ms. Sardia Cenac-Prospere, for the majority of the Bar Association of Saint Lucia

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2013: March 27;
May 24.

OPINION

[1] PEREIRA, CJ: The Parliament of Saint Lucia enacted the Attorney General's Reference (Constitutional Questions) Act[1] ("the Act") in 2005. This Act enables the Court,[2] on a reference made by the Attorney General ("the AG") with the approval of the Cabinet to, inter alia, interpret the Saint Lucia Constitution Order 1978 ("the Constitution") where a question arises in respect of the interpretation of any provision of the Constitution and to certify to the AG its opinion thereon. Any question so referred is deemed to be an important question. The AG has referred, pursuant to the Act, the following questions for the Court's consideration:

(1) Whether the reference in section 41(7)(a) of the Constitution should properly be to section 108 instead of section 107. If yes, was the reference to 107 an error.

(2) If the answer to question 1) is yes, whether the error may be judicially corrected merely upon the determination of this application by the Attorney General, or by an application by the Attorney General to a judge of the High Court, or, must the error be corrected by an alteration to the Constitution.

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[1] Cap 17.18, Revised Laws of Saint Lucia 2008.

[2] Defined in s. 2 of the Act as the Court of Appeal.

(3) If the answer to question 1) is yes, whether the Agreement Establishing the Caribbean Court of Justice signed on February14, 2001 and ratified by Saint Lucia on July 5, 2002 and enacted into the laws of Saint Lucia as the Caribbean Court of Justice (Agreement) Act, No. 34 of 2003 constitutes an international agreement to which Saint Lucia is a party for the purpose of the provisions of section 41(7)(b).

(4) If the answer to both questions 1) and 2) is yes, whether for the purposes of an alteration of the Constitution to replace appeals to Her Majesty in Council with appeals to the Caribbean Court of Justice, the Agreement between Saint Lucia and the United Kingdom referenced in section 41(7)(a) –

i. may validly be entered into by Saint Lucia alone or in common with one or more other States of the Organization of the Eastern Caribbean which may have similar constitutional provisions;

ii. may validly be entered into prior to the passage of the bill referred to in section 41(2);

iii. and, if the answer to question 4(ii) is no, at what point in the process of any such alteration of the Constitution pursuant to section 41 may the said international Agreement be entered into.

(5) If the answer to question 1) is no, which "Court (or Courts) having jurisdiction in Saint Lucia" is referenced by section 41(7) of the Constitution.

[2] In considering these questions the Court has been ably assisted by Senior Counsel appearing on behalf of the AG; Queen's Counsel on behalf of some

members of the Saint Lucia Bar Association who put forward a legal opinion given by Dr. Lloyd Barnett, prepared at the request of the Saint Lucia Bar Association; counsel on behalf of other members of the Saint Lucia Bar Association; counsel on behalf of the Leader of the Opposition in Saint Lucia. Also present at the hearing was Mr. Richard Williams, attorney-at-law, attending the proceedings on behalf of the Attorney General of Saint Vincent and the Grenadines, whose Constitution is said to contain a similar reference as section 41(7)(a) of Saint Lucia's Constitution. The Court is indeed grateful to all counsel for the stimulating, thought provoking and diverse views put forward. We have benefitted tremendously from the arguments advanced. The Constitution, being the supreme law of the State of Saint Lucia, there can be no doubt that these questions which touch and concern the justice system are of great general public importance.

[3] In this opinion reference to "Her Majesty in Council", the "Privy Council" and to the "Judicial Committee of the Privy Council" is a reference to the same court and variously so called in different enactments.

[4] There is general consensus as to the answers to the questions posed at 2), 3) and 4). It is in relation to question 1) that the views diverge and which drew much discussion. That question may essentially be stated thus: 'Is the reference to section "107" in section 41(7)(a) of the Constitution (instead of to 108) an error, that is, a typographical or printing error, which should be corrected, or does the section read as the framers of the Constitution intended it?' In essence, 'did Homer, in the person of the draftsman of section 41(7)(a), nod'?

[5] It is helpful to examine some general principles that are relevant to the issues that are raised. There is also general consensus that the Court is empowered to:

(1) interpret the provisions of the Constitution. This power is expressed in the Act; and

(2) that in the exercise of that power of interpretation, the Court may correct an error.

It is also accepted that the interpretation exercise must be conducted with great care. Sir Rupert Cross in his Treatise[3] had this to say:

> "The cases thus demonstrate that both today and in Lord Halsbury's time, judges have not been slow to correct mistakes which the legislature has made. Of course there must be an exceptionally strong case for the exercise of the wholly exceptional power of rectification, and of course it is essential that the courts should so far as possible stick to the ordinary meaning of statutory words, but this does not mean that they should throw their hands up in despair, not always unmingled with satisfaction, when the ordinary meaning produces a preposterous result. As often as not it is a matter of taste whether such results are avoided by the technique of necessary implication or by rectification, but avoided they should be like the plague."[4]

[6] The Civil Code of Saint Lucia,[5] enacted in the 19th Century and which has undergone many amendments over the years, contains the following articles which remain binding in Saint Lucia up to the present:

> "9. The Court or Judge cannot refuse to adjudicate under pretext of the silence, obscurity, or insufficiency of the law.
> 10. When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the Legislature and to attain the object for which it was passed."[6]

[7] In Stock v Frank Jones (Tipton) Ltd.[7] Viscount Dilhorne stated:

> "It is now fashionable to talk of a purposive construction of a statute, but it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it 'according to the intent of them that made it' (Coke 4 Inst.330)."[8]

Lord Scarman added these words at page 239:

> "If the words used by Parliament are plain, there is no room for the 'anomalies' test unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake. If words 'have been inadvertently used,' it is legitimate for the court to substitute what is apt to avoid the intention of the legislature being defeated: *per* MacKinnon L.J. in *Sutherland Publishing*

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[3] Sir Rupert Cross: Statutory Interpretation (3rd edn.,Oxford University Press).
[4] ibid at p. 105.
[5] Chap. 4.01, Revised Laws of Saint Lucia 2008.
[6] Section II, Articles 9 & 10.
[7] [1978] 1 WLR 231 (HL).
[8] At p. 234F-G.

> *Co. Ltd. v Caxton Publishing Co. Ltd.* [1938] Ch. 174, 201. This is an acceptable exception to the general rule that plain language excludes a consideration of anomalies, i.e. mischievous or absurd consequences. If a study of the statute as a whole leads inexorably to the conclusion that Parliament has erred in its choice of words, e.g. used "and" when "or" was clearly intended, the courts can, and must, eliminate the error by interpretation. But mere 'manifest absurdity' is not enough: It must be an error (of commission or omission) which in its context defeats the intention of the Act."[9]

[8] In Inco Europe Ltd. and Others v First Choice Distribution (a firm) and Others[10] Lord Nicholls of Birkenhead, in construing a section of the Arbitration Act 1996 [UK] in respect of a provision concerning rights of appeal to the Court of Appeal stated as follows:

> "… It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation*, 3rd ed. (1995), pp. 93-105. He comments, at p. 103:
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> > 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'
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> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between

[9] p. 239C-E.
[10] [2000] 1 WLR 586.

construction and legislation: see *per* Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105-106."[11]

[9] Lord Nicholls of Birkenhead returned to the question of statutory interpretation in R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd.[12] He had this to say:

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613: 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.'
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> "In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute. … The principles of interpretation include also certain presumptions. To take a familiar instance, the courts presume that a mental ingredient is an essential element in every statutory offence unless Parliament has indicated a contrary intention expressly or by necessary implication.
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> "Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents.

[11] ibid at p. 592C-G.
[12] [2001] 2 AC 349.

> "… In interpreting statutes courts should take into account, among other matters, 'the mischief and defect for which the common law did not provide': *Heydon's Case* (1584) 3 Co Rep 7a, 7b. Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.
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> "...The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.'
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> "This constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation was enacted. This is a matter of everyday occurrence."[13]

[10] The argument has been advanced that the Constitution, being 'the supreme law of Saint Lucia'[14] ought to be accorded a different treatment to the principles applied to the interpretation of ordinary legislation. No authority has been cited for this proposition. It has long been established by many authorities to the extent that it may now be considered trite, that the provisions of a Constitution must be accorded a purposive construction.[15] This, to my mind, really means nothing more

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[13] pp. 396F-398B

[14] See section 120 of the Constitution.

[15] See Attorney-General of the Gambia v Momodou Jobe [1984] AC 689; Attorney General of Grenada v The Grenada Bar Association, Grenada High Court Civil Appeal GDAHCVAP1999/0008 (delivered 21st February

than carrying out the interpretation exercise in accordance with the well-established principles as referred to in the passages recited above from the judgments of Lord Nicholls. As early as 1995, our Court, speaking through the judgment of Sir Vincent Floissac, CJ, in Browne v Francis-Gibson and Another[16] was able to say in respect of a constitutional provision the following:

> "The question therefore arises as to whether the imperial appellate right conferred by section 99 is subject to the imperial appellate prohibition imposed by section 36(8). In that regard, section 99(6) provides that section 99 shall be subject to the provisions of section 36(7). But section 36(7) has no relation whatsoever to the imperial appellate right. It is section 36(8) which specifically relates to that right. Consequently, the reference to section 36(7) in section 99(6) must be a printer's error and must have been intended to be a reference to section 36(8). The error should therefore be corrected by judicial interpretation. The result of such judicial interpretation is that the imperial appellate right conferred by section 99 is subject to the imperial appellate prohibition imposed by section 36(8) which renders unappealable to Her Majesty in Council any decision of this court which is caught by section 36(8).
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> "The same result is attained without reference to section 99(6) of the Constitution. Section 99 is a general section governing imperial appeals generally. Section 36(8) is a specific section prohibiting imperial appeals from decisions of this court on appeal from final decisions of the High Court determining questions as to the validity or otherwise of elections and appointments to Parliament. Section 99 should therefore be read subject to section 36(8). Otherwise, there would be a conflict between section 99 and section 36(8) of the Constitution. Assuming that there is such a conflict, it must be resolved by reference to the rule of interpretation which governs such a conflict. According to that rule, the ascertained leading provision prevails over the ascertained subordinate provision."[17]

[11] The dictum of Sir Vincent was considered by Her Majesty in Council in Russell (Randolph) and Another v the Attorney-General of St. Vincent and the Grenadines and Another[18] again concerning the right of appeal to Her Majesty in Council in respect of matters arising in election petitions. The Board referred to

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2000, unreported); see also Steadroy C.O. Benjamin v The Commissioner of Police et al ; Antigua & Barbuda High Court Civil Appeal ANUHCVAP2009/0023 (delivered 19th September 2011, unreported).

[16] (1995) 50 WIR 143.

[17] ibid at p. 147.

[18] (1997) 51 WIR 110.

the decision of this Court in Browne v Francis-Gibson. Lord Mustill opined as follows:

> " … The grounds on which the petitions were struck out are immaterial, but there is significance in the reasons given by the Court of Appeal for refusing leave to appeal to Her Majesty (*Browne v Francis-Gibson (1995) 50 WIR 143*). These proceeded on the unspoken assumption that, although the complaints were made by an election petition under section 57 of the Representation of the People Act, they all fell squarely within section 36 of the Constitution. From this starting point the Court of Appeal reasoned as follows: (i) reading section 99(6) with section 36(8), and correcting a printing mistake in section 99(6), the general right of appeal to Her Majesty is excluded in cases which fall within section 36; (ii) even without section 99(6) the general right of appeal must yield to section 36(8) which, in the words of the Chief Justice (at page 148):
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> > '… is the specific and leading provision governing the question of appeals to Her Majesty in Council from decisions of this court on appeals from final decisions of the High Court determining the validity or otherwise of elections and appointments to Parliament."[19] (my emphasis)

It is to be noted that nowhere in the Privy Council's judgment is there a suggestion or hint that this approach by the Court which required the correction of a printing error by judicial interpretation was incorrect, but rather, appears to be tacitly accepted as being correct.

[12] Keeping these principles to the forefront of my mind, I turn now to consider the relevant provisions of the Constitution critical to which is section 41 which may be termed the 'amending provision' of the Constitution with which this Reference is concerned. I consider it useful however to refer to a few other provisions of the Constitution and of the Supreme Court Order as well as other Orders and enactments for the purpose of placing section 41 and other relevant sections of the Constitution into context.

[13] I begin with section 124 of the Constitution, which is the Interpretation section. It states at (3)(b) as follows:

> "references to the Supreme Court, the Court of Appeal, the High Court and the Judicial and Legal Services Commission are references to the

[19] ibid at p.118h-119c.

> Supreme Court, the Court of Appeal, the High Court and the Judicial and Legal Services Commission established by the Supreme Court Order." (my emphasis)

The Supreme Court Order[20] ("the Supreme Court Order") was enacted by Her Majesty, acting pursuant to section 6 of the West Indies Act 1967,[21] ("the West Indies Act") and came into operation on 27th February 1967. Section 4 of the Supreme Court Order established the Supreme Court. Subsection (1) states: 'There shall be a Supreme Court for the States[22] which shall be styled the Eastern Caribbean Supreme Court and shall be a superior court of record.'

Subsection (2) states: 'The Supreme Court shall consist of a Court of Appeal and a High Court of Justice.'

Section 9 of the Supreme Court Order, in effect, says that the Supreme Court has such jurisdiction and powers as 'conferred on it by the Constitution or any other law of the State.' (my emphasis). Saint Lucia, (in similar manner as the other States), passed into law "The Eastern Caribbean Supreme Court Act"[23] on 10th January 1970. It defines 'Court' as meaning 'the Eastern Caribbean Supreme Court established by the Supreme Court Order'.

[14] It is noteworthy that neither the Supreme Court Order nor the Eastern Caribbean Supreme Court Act, makes reference to appeals to Her Majesty in Council.[24] Indeed it is the Supreme Court Act (not the Supreme Court Order) which provides

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[20] See Chap. 2.01 of the Revised Laws of Saint Lucia 2008. The Supreme Court Order may also be cited as the Eastern Caribbean Supreme Court Order.

[21] The West Indies Act 1967 (enacted 16th February 1967) is an enactment of the UK which conferred the status of 'associated statehood' on the then British Colonies, namely, Antigua, Dominica, Grenada, Saint Christopher, Nevis and Anguilla, Saint Lucia and Saint Vincent. The West Indies Act 1967 provided in section 6 for Her Majesty by Order in Council to establish one or more courts in common for the former colonies. This Act also makes provision for the termination of the status of association.

[22] 'State' is defined in section 2(1) of the Supreme Court Order and includes all those States which currently make up the Organization of Eastern Caribbean States ("OECS").

[23] This Act is variously styled in each individual OECS State, by way of identifying the Act as passed by each State's parliament. For example, for Saint Lucia it is styled: 'The Eastern Caribbean Supreme Court (Saint Lucia) Act'.

[24] Also referred to as 'the Judicial Committee of the Privy Council' or simply 'the Privy Council'.

for the jurisdiction and powers of the High Court and the Court of Appeal.[25] In short then, whereas the Supreme Court Order establishes the Court, it is the Supreme Court Act passed by the Parliament of Saint Lucia, which (in addition to the Constitution or other enactment) provides for the jurisdiction and powers to be exercised by the Court. The Supreme Court Order makes no reference to:

(a) appeals from the High Court or indeed from any other court to the Court of Appeal; or

(b) appeals from the Court of Appeal (or indeed any other court) to the Privy Council.

[15] The Supreme Court Act however, in Part 2, provides for appeals from the High Court to the Court of Appeal but makes no mention anywhere therein to appeals from the Court of Appeal to the Privy Council. This, to my mind, is not surprising, since the Privy Council is not a Court established by the Supreme Court Order, which was enacted by Her Majesty as a law of the States, which at that time were gaining the status of associated statehood with the UK (formerly UK colonies) in 1967. Rather, the Privy Council is a court established by an enactment of the UK intended to serve as a final court of appeal, not only for the former UK colonies, but also for other commonwealth independent countries which provided for its retention as their final appellate court. Furthermore, it would be considered an overreach of Saint Lucia's Parliament to seek to prescribe the jurisdiction and powers of a court, which is, so to speak, extra territorial to the State of Saint Lucia. What the Constitution does, is to give to Parliament the power to 'make laws for the peace, order and good government of Saint Lucia'[26] (my emphasis). The Eastern Caribbean Supreme Court (Saint Lucia) Act ("the Supreme Court Act") is such a law enacted by the Parliament of Saint Lucia.

[25] These are set out in Part 1 and Part 2 of the Supreme Court Act in relation to the High Court and Court of Appeal respectively.
[26] s. 40 of the Constitution.

Appeals to the Privy Council

[16] Appeals to Her Majesty in Council are provided for by virtue of the West Indies Associated States (Appeals to Privy Council) Order 1967[27] ("the Appeals to the Privy Council Order"). This Order came into force simultaneously with the Supreme Court Order, i.e. on 27th February 1967, and was made pursuant to the Judicial Committee Act 1844 [UK]. This Order defines 'Court' as meaning 'the Court of Appeal established by the Courts Order[28]' (my emphasis). 'State' is given the meaning ascribed thereto in the Supreme Court Order. Section 3 of the Appeals to the Privy Council Order provides for appeals to Her Majesty in Council. It states:

> "An appeal shall lie to Her Majesty in Council from decisions of the Court given in any proceeding originating in a State in such cases as may be prescribed by or in pursuance of the Constitution of that State." (my emphasis).

This then clearly connotes:

(a) that appeals to the Privy Council lie only from decisions of the Court of Appeal; and

(b) that such appeals from the Court of Appeal to the Privy Council lie only in respect of such cases as may be prescribed by or as provided for by the Constitution.

The Appeals to the Privy Council Order contains no provision for appeals to the Privy Council from any other court in the State, other than the Court of Appeal established by the Supreme Court Order.

Transition from associated statehood to independence

[17] Coming into effect, more or less at the same time as the West Indies Act, the Supreme Court Order, and the Appeals to the Privy Council Order, was the Saint Lucia Constitution Order 1967[29] in keeping with its new status as an Associated

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[27] S.I. No. 224 of 1967.
[28] The "Courts Order" is defined therein as the West Indies Associated States Supreme Court Order 1967. (See section 2 of the West Indies Associated States (Appeals to Privy Council) Order 1967).
[29] S.I. No. 229 of 1967.

State. Section 36 of the 1967 Constitution was the amending provision. Interestingly, this section specifically mentions, in subsections (1), (2) and (3), not only the Supreme Court Order but also section 3 of the Appeals to the Privy Council Order.[30] Section 36 then stated, in effect, that these provisions could not be altered unless such a bill for such alteration was supported by no less than a two-thirds majority of all elected members of the House and further approved by a referendum of not less than two thirds of all votes validly cast on such referendum. Subsection (4) provided an exception to this requirement and stated in effect that the provision 36(3)(b) requiring a referendum 'shall not apply in relation to any bill in the circumstances specified in sub-paragraph (1) of paragraph 4 of Schedule 2 to the West Indies Act 1967.'

[18] Schedule 2 of the West Indies Act deals with the procedure for terminating the status of association and the introduction of a bill by the legislature of a State to terminate that status.[31] Subparagraph (1) of paragraph 4 of Schedule 2 to the West Indies Act, states as follows:

> "The provisions of this paragraph shall have effect where, before the introduction of the Bill, arrangements have been made between the Government of the state and the Government of a territory to which this paragraph applies whereby, immediately after the termination of the status of association of the state with the United Kingdom,–
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> (a) the state will enter into a federation or union or some other form of association with that territory (with or without other territories), and
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> (b) the Government resulting from that federation, union or other form of association, or the Government of that territory, will be responsible for the defence and external affairs of the state,
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> and the Bill refers to those arrangements and makes provision for giving effect to them on the part of the state."

This clearly connotes that the pre-independence 1967 Constitution of Saint Lucia contemplated a time when Saint Lucia would acquire a state of complete self-determination or full independence. This enabling provision would allow an

[30] Which provides for appeals to the Privy Council from the Court of Appeal.
[31] See section 10(1) of the West Indies Act 1967.

associated State such as Saint Lucia, to enter into an association or a union with another Commonwealth territory[32] (or territories) with the resultant effect of ensuring that the UK Government would cease to have responsibility for the defence and external affairs of that state. Where this occurred, it clearly envisaged the ability then, without the need for a referendum, for the state in such a union or association to set up its own courts and appellate processes, which could encompass a de-linking from the Privy Council in respect of appeals from the Court of Appeal.

The Independence Constitution

[19] Saint Lucia attained its independence on 22nd February 1979 on the coming into operation of its new constitution enacted by Her Majesty by Order in Council styled 'The Saint Lucia Constitution Order 1978[33]' made pursuant to the West Indies Act. This reference is concerned with this Constitution. This brings me to the consideration of section 41, the amending provision of the Constitution, which is at the heart of this reference.

Section 41 of the Constitution – the amending provision

[20] Section 41(2) states:

> "A bill to alter this section, Schedule 1 to this Constitution or any of the provisions of this Constitution specified in Part I of that Schedule or any of the provisions of the Supreme Court Order specified in Part II of that Schedule shall not be regarded as passed by the House unless … the bill is supported by the votes of not less than three quarters of all the members of the House."

Section 41(3) then goes on to state, in effect, that a bill to alter any other provision of the Constitution or any other provision of the Supreme Court Order (other than those referred in subsection (2) requires a two-thirds majority. Then subsection (6) states as follows:

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[32] As a territory within the Commonwealth for whose government Her Majesty's Government had no responsibility.

[33] The First preamble to this Order states: " Whereas the status of association of Saint Lucia with the United Kingdom is to terminate on 22nd February 1979 and it is necessary to establish a new constitution for Saint Lucia upon its attainment of fully responsible status ..."

"A bill to alter any of the provisions of this Constitution or the Supreme Court Order shall not be submitted to the Governor-General for his assent-

(a) …

(b) If the bill provides for the alteration of this section, Schedule 1 to this Constitution or any of the provisions of this Constitution or the Supreme Court Order specified in that Schedule, unless after it has been passed by the Senate and the House ... the bill has been approved on a referendum, ... by a majority of the votes validly cast on that referendum." (my emphasis)

It becomes clear on reading these subsections that care was taken to deeply entrench within the Constitution:

(a) The amending section itself;

(b) Schedule 1 to the Constitution; and

(c) The provisions specified in Schedule 1.

[21] I now turn to Schedule 1 of the Constitution. It includes among others, the entirety of Chapter I (which contains the fundamental rights and freedoms) and the avenue to the Supreme Court (the High Court and Court of Appeal), including the Privy Council by way of appeal in respect of questions regarding a breach or likely breach of any of those rights and freedoms. It also includes the entirety of Chapter VIII of the Constitution. Chapter VIII contains the "Judicial Provisions" and is made of four provisions two of which are central to this reference namely sections 107 and 108 to which I will return later in this opinion. Schedule 1 also sets out in Part II the following provisions of the Supreme Court Order:

(a) Section 4, which establishes the Supreme Court;

(b) Sections 5 and 6, which deal with the appointment of judges and acting judges respectively;

(c) Sections 8 and 11 which deal with the tenure and remuneration of judges respectively; and

(d) Sections 18, which establishes the Judicial and Legal Services Commission and section 19, which deals with the Commission's functions and procedure.

What is abundantly clear is that no attempt has been made to entrench in any manner whatsoever, the provisions of the Supreme Court Act. This in, my view, is for good reason. Parliament must be free in exercising its power under section 40 of the Constitution to establish such courts in the State with such jurisdiction and powers as it may see fit, with such avenues of appeal as it sees fit. This may very well involve an amendment to the provisions of the Supreme Court Act, where say for example, Parliament wishes to establish a Family court or an Admiralty Court with avenues of appeal other than to the Court of Appeal. This can, in my view, be accomplished by an Act of Parliament providing for such court with such jurisdiction and powers and avenues of appeal with the consequential amendments to those provisions of the Supreme Court Act, which Parliament had by the said enactment, previously given to the High Court and the Court of Appeal. This does not involve any alteration to the provisions of the Supreme Court Order which are by virtue of sections 41(2) and 41(6)(b) deeply entrenched in the Constitution. As such, an enactment of Parliament establishing a Family Court, or indeed a Commercial Court does not run afoul of section 41(6)(b) of the Constitution and as such does not attract the application of the exception provision (41(7)) at all.

Comparison of the 1967 and 1978 Constitutions

[22] I digress here to contrast the amending provision (section 36) of the 1967 pre-independence Constitution of Saint Lucia, with the amending provision (section 41), of its 1978 independence Constitution. Under the 1978 Constitution:

(a) the special majority for amendment of Schedule 1, has been increased to a three fourths majority from two thirds;

(b) the referendum required to alter Schedule 1 has also been increased to a three fourths majority;

(c) a further provision has been added for altering any other provision of the Constitution save for Schedule 1

(d) whereas there is an express reference to the Supreme Court Order, there is no reference whatsoever to the Appeals to the Privy Council Order, as compared to its express reference in the 1967 pre-independence Constitution.

Both the pre-independence and independence Constitutions however, have the Chapter VIII, 'Judicial Provisions'. Sections 96 to 100 in the 1967 Constitution are repeated almost verbatim (save to make allowances for re-numbering of sections in the 1978 Constitution and for the addition in section 107 of the 1978 Constitution of a provision[34] allowing for appeals from the High Court to the Court of Appeal in respect of 'such other cases as may be prescribed by parliament.').

The 'exception' provision in the 'amending' section.

[23] I have already set out the exception provision (i.e. section 36(4)) in the amending section (i.e. section 36) of the 1967 Constitution and the circumstances there envisaged when the requirement for a referendum was not required to alter the deeply entrenched provisions[35] therein. The exception provision in the amending section of the 1978 Constitution is 41(7). It envisages circumstances wholly different to those set out in the pre-independence Constitution. It states as follows:

> "The provisions of paragraph (b) of subsection (6) of this section shall not apply in relation to any bill to alter-
>
> (a) section 107 of this Constitution in order to give effect to any agreement between Saint Lucia and the United Kingdom concerning appeals from any court having jurisdiction in Saint Lucia to Her Majesty in Council;
>
> (b) any of the provisions of the Supreme Court Order in order to give effect to any international agreement to which Saint Lucia is a party relating to the Supreme Court or any other court (…) constituted in common for Saint Lucia and for other countries also parties to the agreement." (my emphasis).

[34] See s. 107(c) of the Constitution.

[35] Namely, Schedule 1, the provisions specified in Part I of that Schedule, the provisions of the Supreme Court Order specified in Part II of that Schedule, or s. 3 of the West Indies Associated States (Appeals to Privy Council) Order 1967.

Sections 107 and 108

[24] I now return to sections 107 and 108 of the Constitution so as to understand what is meant in Section 41(7)(a). Section 107 states as follows:

> "Subject to the provisions of section 39(8)[36] of this Constitution, an appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the following cases–
>
> (a) final decisions in any civil or criminal proceedings **on questions as to the interpretation of this Constitution**;
> (b) final decisions given **in exercise of the jurisdiction conferred on the High Court by section 16** of this Constitution (which relates to the enforcement of the fundamental rights and freedoms); and
> (c) such other cases as may be prescribed by Parliament." (my emphasis)

I emphasise the words in bold type so as to make clear that this right of appeal to the Court of Appeal given by section 107 of the Constitution is not a general right or a "catch all" right of appeal to the Court of Appeal on all decisions from the High Court. Rather, the right of appeal given by Section 107 from the High Court to the Court of Appeal is just as it says – (a) on questions as to the interpretation of the Constitution where such question arises in a civil or criminal proceeding and (b), where the court is exercising its function and powers as a constitutional court under section 16 in relation to questions concerning the contravention of a fundamental right or freedom. It goes without saying that not all final decisions in criminal or civil proceedings involve the interpretation of any constitutional provision, or involve a question as to the enforcement of a fundamental right or freedom. Indeed the large bulk of matters coming before the High Court on a daily basis (civil or criminal) do not involve any such questions. The rights of appeal or avenues of appeal, save for those specifically given by the Constitution in relation to specific matters, are given either by the Supreme Court, or other Parliamentary enactments.

[36] Section 39 of the Constitution deals with questions of the validity of election of members, or appointment of persons to the House or the Senate respectively, and the election of a Speaker. Subsection (8) in essence makes the Court of Appeal the final appellate court in relation to such questions.

[25] The question then becomes: what alteration can be effected to 107 of the Constitution to give effect to any agreement between Saint Lucia and the United Kingdom concerning appeals from any court having jurisdiction in Saint Lucia to Her Majesty in Council? This question has to be addressed having regard to the context of the amending section, in particular 41(6)(b) which deeply entrenches both sections 107 and 108 all being part of Chapter VIII specified in Schedule 1 of the Constitution.

[26] It is immediately apparent that section 107 of the Constitution does not in any way deal with appeals from any court in Saint Lucia to the Privy Council. Further section 107 has nothing to do with the establishment of any courts in Saint Lucia. It does not set up courts. That is the purview of Parliament acing pursuant to section 40. As I have explained above, Parliament's power to establish courts does not impact section 41 at all unless what is sought is the abolition of the Supreme Court as established by the Supreme Court Order, and, as referred to in the Constitution, in respect of which Court, the Constitution has conferred certain specific areas of jurisdiction.

[27] All that section 107 seeks to do is to provide a right of appeal from the High Court to the Court of Appeal in respect of constitutional questions arising for determination in different circumstances. It is to be remembered that it is the Constitution, which specifically, in various provisions thereof, confer this jurisdiction on the High Court and on the Court of Appeal. This then begs the question as to what agreement can there be between Saint Lucia and the United Kingdom concerning appeals to the Privy Council *in respect of appeals from decisions of the High Court to the Court of Appeal on constitutional questions or indeed appeals from the High Court to the Court of Appeal in 'such other cases as may be prescribed by Parliament'.* Similarly, all that section 41(7)(a) seeks to achieve is to give effect to an agreement between Saint Lucia and the UK concerning appeals to the Privy Council. But section 107 does not relate to appeals from any court in Saint Lucia to the Privy Council. The provisions of the Supreme Court Order entrenched in section 41(6)(b) do not deal with appeals to

the Privy Council from any court in Saint Lucia. It is therefore inconceivable as to what agreement could possibly be contemplated between Saint Lucia and the United Kingdom regarding appeals from the High Court to the Court of Appeal (which is what section 107 concerns) which would somehow concern appeals from any court in Saint Lucia to the Privy Council. The reference to section 107 in 41(7)(a) in my view makes no sense whatsoever and leads to an absurdity in construing this provision. Section 107 bears no rational connection to appeals to the Privy Council, and similarly, an alteration of section 107, to give effect to an agreement between Saint Lucia and the UK concerning appeals to the Privy Council from a court in Saint Lucia is simply, in my view, nonsensical as section 107 simply does not deal with such appeals.

Section 108

[28] The section of the Constitution which deals with appeals to Her Majesty in Council is section 108 which is also an entrenched provision under section 41(6)(b) of the Constitution. Section 108 states as follows:

> "(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases–
>
> (a) final decisions in any civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is of the prescribed value or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the prescribed value or upwards;
>
> (b) final decisions in proceedings for the dissolution or nullity of marriage;
>
> (c) final decisions in any civil or criminal proceedings which involve a question as to the interpretation of this Constitution; and
>
> (d) such other cases as may be prescribed by Parliament.
>
> (2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases–
>
> (a) decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and

(b) such other cases as may be prescribed by Parliament.

(3) An appeal shall lie to Her Majesty in Council with the special leave of Her Majesty from any decision of the Court of Appeal in any civil or criminal matter.

(4) References in this section to decisions of the Court of Appeal shall be construed as references to decisions of the Court of appeal in exercise of the jurisdiction conferred by this Constitution or any other law.

(5) …

(6) … "(my emphasis).

This section is clearly more encompassing as it covers the wide ambit of criminal and civil proceedings (including matrimonial proceedings) without the restriction to constitutional questions as prescribed by section 107.

[29] At this juncture, it is useful to recollect section 3 of the Appeals to the Privy Council Order. Section 3, in essence, provides the avenue for appeals from decisions of the Court[37] to Her Majesty in Council, but leaves it up to the particular State in question to prescribe or to set out in its Constitution the type of cases from which an appeal will lie from the Court of Appeal to Her Majesty in Council. This is precisely the purpose served by section 108 of the Constitution. It prescribes the types of cases appealable to the Privy Council from the Court of Appeal.

[30] It then becomes clear that neither sections 107 nor 108 of the Constitution permits of a 'leap frog' (bypassing the Court of Appeal) from a lower court or High Court to the Privy Council. The Appeals to the Privy Council Order similarly does not contemplate it. It provides an avenue of appeal to Her Majesty in Council only from decisions of the Court of Appeal. The argument that section 107 as referenced in Section 41(7)(a) contemplates the setting up of a court of original jurisdiction with ability to 'leap frog' appeals therefrom directly to the Privy Council simply, in my view, flies in the face of the plain language of section 41(7)(a) read in

[37] Note that s. 2 of the West Indies Associated States (Appeals to Privy Council) Order 1967 defines "Court" as the Court of Appeal.

its proper context within the related provisions of the Constitution itself and the related enactments such as the Supreme Court Act, the Supreme Court Order and the Appeals to the Privy Council Order to which regard must be had in determining the intention of the framers of the Constitution. As stated earlier, section 107 has nothing to do with the establishment of any courts, and furthermore, has nothing to do with appeals to the Privy Council whether by way of the establishment of appeals or by way of termination of appeals to the Privy Council. I can do no better than adopt the clear and succinct expressions of Dr. Barnett: '… there is no rational relationship between section 107 and appeals to the Privy Council, the termination of those appeals or the substitution of appeals to the Privy Council'.

Reading section "107" *as* "108" in section 41(7)(a)

[31] Section 108 of the Constitution provides a right of appeal to Her Majesty in Council in consonance with section 3 of the Appeals to the Privy Council Order. Reading "108" in place of "107", section 41(7)(a) reads as follows:

> "The provisions of paragraph (b) of subsection (6) of this section shall not apply in relation to any bill to alter-
> (a) section 108 of this Constitution in order to give effect to any agreement between Saint Lucia and the United Kingdom concerning appeals from any court having jurisdiction in Saint Lucia to Her Majesty in Council;"

In my view, substituting "108" for "107" makes perfect sense and accords meaning to section 41(7)(a). The current state of things is that by virtue of section 3 of the Appeals to the Privy Council Order the avenue of Appeals to the Privy Council from decisions of the Court of Appeal is provided. The framers of the Constitution, by virtue of section 108, have prescribed the basis on which that avenue is to be utilised. In as much as the UK can no longer legislate for the sovereign State of Saint Lucia, section 41(7)(a) clearly contemplates that a change in the avenue of appeals from the Court of Appeal to Her Majesty in Council would require an agreement with the United Kingdom in that regard. It is the attainment of this objective that the exception provision (section 41(7)(a)) seeks to achieve in relation to Appeals from the Court of Appeal to Her Majesty in Council. It is this

circumstance which section 41(7)(a) seeks to except or exempt from the otherwise entrenched provision (section 108) dealing with appeals to the Privy Council. There is no constitutional provision, enactment of Parliament, Order in Council or other Statutory Instrument applying to Saint Lucia, in existence, which provides for any appeals to the Privy Council from any court in Saint Lucia, other than those providing for appeals from decisions of the Court of Appeal. Section 41(7)(a) can only be read as relating to a state of things as they currently exist and cannot be read to relate to a state of things which do not or which we may desire it to be at some future date. To read the plain language of section 41(7)(a) to envisage the setting up of courts of original jurisdiction with a 'leap- frog' appeal to the Privy Council simply does not fit snugly into section 107 (as has been sought to be suggested by counsel for the Bar Association) for the reasons which I have already given. To cause section 107 to fit within the context of 41(7)(a) would call for a considerable straining of the language and the making of a series of hypotheses which find no place at all in section 41(7)(a). This would amount to a corruption of the clear and ordinary language of the provision within its natural context and thereby defeat the clear intention of the framers of the Constitution.

Constitutional comparisons

[32] Some of the constitutions of other States which were Associated States under the West Indies Act, and which thereafter moved to full sovereignty warrants a look; in particular, those constitutions which contain an 'exception provision' in the amending section of their constitution. This however, is not strictly necessary for the purpose of interpreting section 41(7)(a) but I do so merely by way of completeness.

[33] The independence constitution of Saint Christopher and Nevis took effect on 19th September 1983. Its amending section is 38. Similar to Saint Lucia's Constitution, it has entrenched the provisions of the Constitution specified in Part I of Schedule 1 as well as the provisions of the Supreme Court Order set out in Part II of

Schedule I.[38] The Judicial provisions contained in Chapter IX are listed in Schedule 1 Part I. The Judicial provisions in like manner deal with appeals from the High Court to the Court of Appeal (section 98) and appeals from the Court of Appeal to Her Majesty in Council (section 99). The amending section (section 38(4)) also contains an "exception provision" (section 38(4)) in substantially the same terms as Saint Lucia's 41(7). However, the reference in 38(4)(a) is to the alteration of section 99 which deals with appeals to Her Majesty in Council unlike Saint Lucia's reference in section 41(7)(a) to section 107 which in Saint Lucia's Constitution, deals with appeals from the High Court to the Court of Appeal.

[34] The independence constitution of the Commonwealth of Dominica came into effect on 3rd November 1978. That constitution also contains an amending section (section 42 which entrenched the provisions contained in Schedule 1. Schedule 1 similarly contained Chapter VIII which are the Judicial Provisions providing inter alia, for appeals from the High Court to the Court of Appeal and for appeals from the Court of Appeal to the Privy Council. The amending section also has an "exception provision" namely section 42(4). The reference in section 42(4)(a) is in every material respect similar to Saint Lucia's 41(7) (a), save that the reference in 42(4)(a) of Dominica's is to section 106 which in Dominica's constitution, deals with appeals to the Privy Council.[39]

[35] Saint Lucia's independence constitution came into effect approximately three months (on 22nd February 1979) following the Commonwealth of Dominica. I think it worthwhile therefore to refer to the Report of the Saint Lucia Constitutional Conference.[40] At paragraph 18 of that Report, the following is recorded:

> "Section 36 which relates to alteration of the Constitution and certain other laws should be amended on the lines of Section 42 of the Dominica Independence Constitution so as to facilitate amendments relating to the West Indies Associated States Supreme Court."

[38] See s. 38(2) and (3).
[39] Called the 'Judicial Committee' rather than 'Her Majesty in Council'.
[40] London (July 1978).

Saint Lucia's exception provision, in its amending section (41(7)), is a replica of Dominica's 42(4) in every material respect save for Saint Lucia's reference in 41(7)(a) to section 107 (concerning appeals from the High Court to the Court of Appeal) instead of to section 108 (relating to appeals from the Court of Appeal to the Privy Council).

Did Homer nod?

[36] For the reasons, which I have given above, it is quite clear in my view that 'Homer, in the person of the draftsman or printer, nodded'. It is clear that the reference to section 107 in section 41(7)(a) of the Constitution is no more than a typographical error and should be read as a reference to section 108. This would give effect to the intention of the framers of the Constitution and in so doing achieve the object and purpose of the provision of 41(7)(a) within the context of the Constitution. For the reasons which I have given, the reference to section 107 renders the provision devoid of any rational meaning. As I have sought to make clear, section 107 has nothing to do whatsoever with appeals to the Privy Council. Further, as I have been at pains to explain, section 41(7)(a) has nothing to do with the establishment of any courts in Saint Lucia. Parliament has the power to do this under section 40 of the Constitution and establish avenues of appeal in respect of certain subject matters which may not touch or concern at all those matters addressed in section 107. But there is nothing in section 107 of the Constitution, as currently drafted, which permits it to be extended by section 41(7)(a) to relate to appeals to Her Majesty in Council. The only section of the Constitution, which specifically provides the avenue of appeals to the Privy Council, is section 108. It is this provision which would require alteration to provide either:

(a) some other avenue of appeal (say from the Court of Appeal to some other court), which would require at least the agreement of the UK given the application of the Appeals to the Privy Council Order to Saint Lucia ; or

(b) a 'leap- frog' appeal from an original court established by Parliament directly to the Privy Council provided the UK consents to such a

> course and either amends the Appeals to the Privy Council Order or puts in place, with the consent of Saint. Lucia, some other imperial law to effect this.

Either way, the provision of the constitution, which would require alteration to give effect to such an arrangement is not section 107 of the Constitution, but section 108 if section 41(7)(a) is to have any rational meaning or its object attainable. Saint Lucia would not need an agreement with the UK in order to effect changes in respect of appeals from the High Court to the Court of Appeal. I am fully satisfied that the reference to section "107" in section 41(7)(a) is '**an error ... of commission ... which in its context defeats the intention of the Act.**'[41] *The draftsman slipped up*.

[37] In the circumstances, it is the duty of the court to correct what is clearly an obvious typographical error or slip by the draftsman. "Section 107" in section 41(7)(a) therefore ought to be read as "section 108." This correction by way of interpretation, squarely meets the three-fold test set out in **Inco Europe Ltd**. I repeat them for completeness:

> "(1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed."

This does not involve, as explained above, the imposition of any requirement for a referendum where none currently exists and the removal of such a requirement where such existed, as has been argued by the Bar Association. Neither does it do violence to section 106 of the Constitution as the reference in that section to 'Her Majesty in Council' is clearly in recognition of the avenue of appeal to Her Majesty in Council given in section 108. It produces no 'odd result' whatsoever, but merely gives effect to precisely what is intended by the 'exception provision' (section 41(7)), within the context and framework of the Constitution.

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[41] As said by Lord Scarman in Stock v Frank Jones (Tipton) Ltd.

The Agreement establishing the Caribbean Court of Justice ("CCJ")

[38] There is general consensus that the agreement establishing the CCJ to which Saint Lucia is a party, is such an international agreement as contemplated under subsection 41(7)(b) of the Constitution and thus falls within the ambit of this provision. Counsel for the Leader of the Opposition however does not agree. The Leader of the Opposition posits that the provisions of the Agreement relating to the appellate jurisdiction of the Court will be void if given effect without compliance with the requirements of section 41 of the Constitution. This argument fails to appreciate, in my view, that section 41 is the very section which creates the exception provision (subsection 7) to the deeply entrenched provisions to achieve the purposes set out in section 41(7)(b). This provision clearly contemplates and provides the freedom to Saint Lucia to establish a court in common with other states or countries – in essence, a common court(s) between participating states in much the same way as the currently established Eastern Caribbean Supreme Court. Such an agreement may very well impact the Eastern Caribbean Supreme Court and thus for this purpose only, falling within the exception provision in section 41 of the Constitution. Section 41(7)(b) being broad in scope would clearly encompass an agreement such as the Agreement establishing the CCJ.

[39] Section 41(7)(b) is broad enough to allow Saint Lucia to enter into such an agreement with other states[42] or countries alone. In short, Saint Lucia does not require the concurrence of other states or countries for entering into an agreement with another state, states or countries for the purpose intended by this provision.

[40] Similarly, it follows that such an agreement must necessarily pre-date the presentation of the bill to alter the Constitution the purpose of which is to give effect to the agreement.

[42] Such as other states comprising the OECS.

The Answers to the Questions

[41] Having considered the questions, for the reasons given, I would certify my opinion to the Attorney General in answering the questions as follows:

Question 1) Whether the reference in section 41(7)(a) of the Constitution should properly be to section 108 instead of 107. If yes, was the reference to 107 an error;

Answer: Yes.

Question 2) If the answer to question 1 is yes, whether the error may be judicially corrected merely upon the determination of this application, or by an application by the Attorney General to a judge of the High Court, or, must the error be corrected by an alteration to the Constitution.

Answer: Yes. The Constitution ought to be read and construed as if 'section 107' in section 41(7)(a) were deleted and 'section 108' substituted. There is no need for further application to the High Court (which in any event has no jurisdiction to determine the question) for an order, the power to interpret such a question having been given by Parliament to the Court of Appeal by virtue of the Act.

Question 3) If the answer to question 1 is yes, whether the Agreement Establishing the Caribbean Court of Justice signed on February 14th, 2001 and ratified by Saint Lucia on July 5th 2002 and enacted into the laws of Saint Lucia as the Caribbean Court of Justice (Agreement) Act, No. 34 of 2003 constitutes an international agreement to which Saint Lucia is a party for the purpose of the provisions of section 41(7)(b);

Answer: Yes.

Question 4) If the answer to both Questions 1) and 2) is yes, whether for the purposes of an alteration of the Constitution to replace appeals to

Her Majesty in Council with appeals to the Caribbean Court of Justice, the Agreement between Saint Lucia and the United Kingdom referenced in section 41(7)(a)–

i. may validly be entered into by Saint Lucia alone or in common with one or more other States of the Organization of Eastern Caribbean States which may have similar constitutional provisions;

ii. may validly be entered into prior to the passage of the bill referred to in section 41(2);

Answer: Yes. Such an agreement must pre-date the presentation of the bill to alter the Constitution to give effect to the agreement.

Having answered the prior questions in the affirmative, the questions posed at 4) iii and 5) do not arise for determination.

Dame Janice M. Pereira
Chief Justice

[42] I have had the advantage of reading the Opinions prepared by Chief Justice the Hon. Dame Janice Pereira and Justice of Appeal the Hon. Mr. Don Mitchell. I fully agree with Chief Justice Pereira's reasons and conclusions.

Louise E. Blenman
Justice of Appeal

OPINION

[43] MITCHELL JA (AG): The Attorney General of Saint Lucia ("the AG") seeks the opinion of the Court of Appeal on a question of the interpretation of a section of

the Constitution.[43] The question the AG asks is essentially whether there is a typographical or printing error in section 41(7)(a) of the Saint Lucia Constitution Order 1978 ("the Constitution").[44] Is the mention of section 107 in that section an error? Should section 41(7)(a) have instead mentioned section 108? Or, does the section read just as the framers of the Constitution intended it to read? The AG asks several other consequential questions. But, this first one is the one that is in dispute.

The Submissions

[44] Counsel for the AG, Mr Anthony Astaphan, SC, is of the view that there is an error. He is joined in this view by some members of the Bar Association of Saint Lucia, who through Mr. Deterville, QC put forward a written opinion of Dr. Lloyd Barnett OJ. The Leader of the Opposition appeared by counsel, and was of the opposite view. His contrary view is supported by the majority of the members of the Bar Association. So, there are before me four different written submissions, together with responses in writing and oral submissions made at the hearing in open court.

[45] The question is one of great constitutional significance. If the Court of Appeal were to find that section 41(7)(a) of the Constitution erroneously refers to section 107, when the reference should instead be to section 108, as urged by the AG, then a referendum will not be necessary to replace Her Majesty in Council ("the Privy Council") with the Caribbean Court of Justice. If it is not an error, then a referendum is required.

[46] The exercise of giving an opinion or answer to the question put by the AG must begin with a look at the relevant provisions of the Constitution, and an understanding of what they say and what they mean. The Constitution was adopted at independence in the year 1978. Saint Lucia is a monarchy, with a Governor General representing the Queen as Head of State. The Constitution makes provision for the establishment of the Legislature of Saint Lucia. It also

[43] Under section 3 of The Attorney General's Reference (Constitutional Questions) Act, Cap 17.18 of the Revised Laws of Saint Lucia, 2006.
[44] Constitution of Saint Lucia, Chap. 1.01 of the Revised Edition of the Laws of Saint Lucia, 2008.

makes provision for the Executive of Saint Lucia. It does not make provision for the establishment of the Judiciary of Saint Lucia. The Judiciary of Saint Lucia is the Eastern Caribbean Supreme Court. This Court is a federal court, serving all the nine states and territories of the Eastern Caribbean. The Court was originally set up during the colonial period by a British Statutory Instrument known as the West Indies Associated States Supreme Court Order 1967 ("the Courts Order").[45] Saint Lucia, as with the other nine states and territories which use the Court, has no provision in its Constitution to provide for its own Supreme Court. The independent states of the Eastern Caribbean, including Saint Lucia, have adopted and inherited this earlier, pre-existing court. The Court is now re-styled, as a result of international agreement between the states and territories, and the passing of the relevant legislation in each of them, "the Eastern Caribbean Supreme Court". This is the Court which provides the High Courts of all our states and territories, and the Court of Appeal which has appellate jurisdiction over all of them.

[47] The Constitution, as befits the constitution of an independent state, now provides the authority for the Eastern Caribbean Supreme Court to be the Supreme Court for Saint Lucia. Chapter VII of the Constitution contains the judicial provisions of the Constitution. The Chapter starts with section 105 which sets out the original jurisdiction of the High Court in constitutional questions.[46] The section provides that if a constitutional issue arises in any court other than the High Court or the Court of Appeal, that court must refer the constitutional question to the High Court.[47] The Constitution next provides at section 107 the jurisdiction for appeals from the High Court to the Court of Appeal.[48] And, section 108 provides for appeals to go from the Court of Appeal to the Privy Council.[49]

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[45] S.I. No. 223 of 1967.

[46] 105. Original Jurisdiction of High Court in Constitutional Questions

... any person who alleges that any provision of this Constitution (other than a provision of Chapter I thereof) has been or is being contravened may, if he or she has a relevant interest, apply to the High Court for a declaration and for relief under this section.

[47] 106. Reference of Constitutional Questions to High Court

[48] 107. Appeals to Court of Appeal

Subject to the provisions of section 39(8), an appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the following cases –

[48] The Constitution is the highest law of the land, and the Courts Order rests alongside it. The provisions both of the Constitution and the Courts Order cannot be changed or amended by any simple law passed by the House of Assembly. The Constitution sets out the ways in which its different sections and provisions and those of the Courts Order can be amended. They are not all to be amended in the same way.

[49] Section 41 of the Constitution is the section which sets out the rules for amending the Constitution.[50] The section provides that Parliament may alter any of the

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(a) final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution;
(b) final decisions given in exercise of the jurisdiction conferred on the High Court by section 16 (which relates to the enforcement of the fundamental rights and freedoms); and
such other cases as may be prescribed by Parliament.

[49] 108. Appeals to Her Majesty in Council
(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases –
(a) final decisions in any civil proceedings ...
(b) final decisions in proceedings for dissolution or nullity of marriage;
(c) final decisions in any civil or criminal proceedings which involve a question as to the interpretation of this Constitution; and
(d) such other cases as may be prescribed by Parliament;
(2) ...
(3) ... et cetera

[50] 41. Alteration of Constitution and Supreme Court Order
(1) Parliament may alter any of the provisions of this Constitution or of the Supreme Court Order in the manner specified in the following provisions of this section.
(2) A bill to alter this section, Schedule 1 to this Constitution or any of the provisions of this Constitution specified in Part I of that Schedule or any of the provisions of the Supreme Court Order specified in Part II of that Schedule shall not be regarded as being passed by the House unless on its final reading in the House the bill is supported by the votes of not less than ¾ of all the members of the House.
(3) A bill to alter any of the provisions of this Constitution or, as the case may be, of the Supreme Court Order other than those referred to in subsection (2) shall not be regarded as being passed by the House unless on its final reading in the House the bill is supported by the votes of not less than 2/3 of all the members of the House.
(4) ... [provision for proceedings in the Senate]
(5) .. [provision for proceedings in the Senate]
(6) A bill to alter any of the provisions of this Constitution or the Supreme Court Order shall not be submitted to the Governor General for his or her assent –
(a) unless there has been an interval of not less than 90 days between the introduction of the bill in the House and the beginning of the proceedings in the House on the second reading of the bill; and
(b) if the bill provides for the alteration of this section, Schedule 1 to this Constitution or any of the provisions of this Constitution or the Supreme Court Order specified in that Schedule, unless after it has been passed by the Senate and the House, or, in the case of a bill to which section 50 applies, after its rejection by the Senate for the second time, the bill has been approved on a

provisions of the Constitution or of the Courts Order in the manner specified. There are different rules for different matters. The first rule is that if a Bill is introduced in the House to alter section 41 itself, or Schedule 1, or any of the provisions specified in Part I, or any of the provisions of the Courts Order specified in Part II of the Schedule, it must pass the House with a ¾ majority.[51] A Bill to amend any other section of the Constitution or any provision of the Courts Order, other than those specified above, must pass the House with a ¾ majority.[52] A Bill to amend any provision of the Constitution or the Courts Order shall not be submitted to the Governor General unless 90 days have passed between the first and second readings.[53] These provisions of the Constitution and the Courts Order are said to be 'entrenched'. The principle of entrenchment was explained by Lord Diplock in the majority advice of the Privy Council in the Jamaican Gun Court case of Moses Hinds and Others v The Queen:[54]

> "One final general observation: where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for 'entrenchment' is to ensure that

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referendum, held in accordance with such provision as may be made in that behalf by Parliament, by a majority of the votes validly cast on that referendum.

(7) The provisions of subsection (6)(b) shall not apply in relation to any bill to alter –

(a) section 107 in order to give effect to any agreement between Saint Lucia and the United Kingdom concerning appeals from any court having jurisdiction in Saint Lucia to Her Majesty in Council;

(b) any of the provisions of the Supreme Court Order in order to give effect to any international agreement to which Saint Lucia is a party relating to the Supreme Court or any other court (or any officer or authority having functions in respect of any such court) constituted in common for Saint Lucia and for other countries also parties to the agreement.

(8) ...

(9) ... et cetera

[51] Section 41(2) above.

[52] Section 41(3) above.

[53] Section 41(6)(a) above.

[54] [1976] 2 WLR 366, at 374.

> those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws."

[50] The effect of section 41(7)(a) as presently worded is that if a Bill is introduced, the purpose of which is to amend this section 41, or Schedule 1, or any of the provisions of the Constitution or the Courts Order specified in the Schedule, it must duly pass through the House and the Senate and also, further, be approved by a majority of votes cast at a referendum.[55] These provisions have been described by Lord Bingham of Cornhill as being 'deeply entrenched'.[56] As presently worded, the above requirement for a referendum does not apply to a Bill to amend section 107 to give effect to an agreement with the United Kingdom government for appeals from any court to the Privy Council.[57] No referendum is necessary to approve a Bill to alter the provision of the Courts Order to give effect to an international agreement affecting the Supreme Court or any other court constituted in common for Saint Lucia and other countries.[58]

[51] As section 41 is presently worded, section 107, dealing with the jurisdiction of the High Court, is deeply entrenched, save for one exception. Where a Bill is introduced in the Saint Lucia legislature to alter section 107 to give effect to an agreement with the UK concerning appeals from a court in Saint Lucia to the Privy Council no referendum is needed. Nor is a referendum necessary if the Bill will alter the Courts Order to give effect to an international agreement between Saint Lucia and other countries relating to the Supreme Court or any other court. Section 108, dealing with the jurisdiction of the Court of Appeal, however, is deeply entrenched without exception. As section 41 is presently worded, a Bill to amend section 108, which provides for appeals to go from the Court of Appeal to

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[55] Section 41(6)(b).
[56] Independent Jamaica Council for Human Rights (1998) Limited and Others v Hon. Syringa Marshall-Burnett & Another [2005] UKPC 3, per Lord Bingham of Cornhill, at paragraph 10.
[57] Section 41(7)(a).
[58] Section 41(7)(b).

the Privy Council, or to amend some of the provisions of the Courts Order, must be subjected to popular approval in a referendum.

[52] The gist of the Attorney General's submission is that under the Constitution there is only one court from which appeals lie to the Privy Council, and that is the Court of Appeal. It is clear, he submits, that section 41(7)(a) was intended to apply to any agreement concerning appeals from the Court of Appeal to the Privy Council. Section 107 cannot be the correct section since that section applies to appeals from the High Court to the Eastern Caribbean Court of Appeal. Section 41(7)(a) was not intended to apply to appeals from the High Court to the Eastern Caribbean Court of Appeal. Section 108 is the provision which deals with appeals to the Privy Council from the Eastern Caribbean Court of Appeal. When, therefore, section 41(7)(a) requires a referendum to amend section 107 'in order to give effect to any agreement between Saint Lucia and the United Kingdom concerning appeals from any court having jurisdiction in Saint Lucia to Her Majesty in Council' this reference to section 107 must be an error. It is a typographical error which can be remedied by the Court of Appeal by judicial construction. Mr Astaphan, SC is bolstered in this view in that in the Constitution of the Commonwealth of Dominica, the relevant provisions provide for there to be no referendum to approve a Bill to de-link from the Privy Council. The provision in the Constitution of the Federation of Saint Christopher and Nevis, he submits, is identical to that of Dominica.

[53] The Attorney General is supported in his view by eminent constitutional counsel Dr Lloyd Barnett OJ, whose opinion has been put before me by some members of the Bar Association. Dr Barnett pointed out that it was consistent with the pattern of the constitutional provisions dealing with the judiciary in most Caribbean Countries for section 107 of the Constitution to deal with the first tier appeal from the High Court to the Court of Appeal, and for section 108 to deal with the second tier appeal from the Court of Appeal to the Privy Council. Accordingly, an arrangement to give effect to an agreement between Saint Lucia and the United Kingdom concerning appeals to the Privy Council, he submits, would require an

amendment to section 108 and not section 107. He urged that when the Bill for abolition of appeals to the Privy Council is passed through the legislature and assented to, Saint Lucia will then be in a position to signify its accession to the appellate jurisdiction of the Caribbean Court of Justice as was done by Barbados and Belize.

[54] The Leader of the Opposition and the majority of the Bar Association take issue with the Attorney General's views and those of Dr. Barnett. They submit that section 41(7)(a) was not intended to apply to an agreement between Saint Lucia and the United Kingdom concerning appeals from the Court of Appeal to Her Majesty in Council. Section 108 already deals with appeals from the Court of Appeal to the Privy Council. What section 41(7)(a) was intended to do was to permit the legislature of Saint Lucia, sovereign under the Constitution, to amend the jurisdiction of the High Court to cut out some part of it and to vest it in a different court, with the right of appeal to the Privy Council, subject to the agreement of the British Government. The Saint Lucia legislature cannot unilaterally create a new jurisdiction for the Privy Council. The Privy Council is an organ of the United Kingdom government, and the agreement of that government is essential before this can be done.

[55] Ms. Edith Petra Jeffrey-Nelson, lead counsel for the Leader of the Opposition, submitted that section 107, as presently worded, which provides for appeals from the High Court, does not require any agreement with the United Kingdom since it does not involve the Privy Council. It only involves dealings within the jurisdiction of Saint Lucia. The referendum provision does not therefore apply to a Bill to alter section 107. The reference in section 41(7)(a) to any agreement, must be to any future agreement that may be entered into between Saint Lucia and the United Kingdom regarding appeals from any court having jurisdiction in Saint Lucia to appeal to the Privy Council. The thrust of the provision is to allow for alterations to section 107 to broaden the scope or jurisdiction of the courts as well as to establish new courts, which may from time to time be necessary for the 'peace,

order and good government of Saint Lucia'.[59] As presently worded, section 41(7)(a) permits the creation of a 'leap-frog' situation from any court in Saint Lucia directly to Her Majesty in Council. If section 108 were to be substituted for section 107, it would make a mockery of the Constitution and the principle of entrenchment, in that, while there would be no need for a referendum to alter the section dealing with appeals from the highest tier court in Saint Lucia, the Court of Appeal, there would need to be a referendum to alter the less fundamental provisions of section 107, dealing with appeals from the High Court. The referendum requirement was deliberately inserted to preserve and protect the rights of the citizen to appeal to the Judicial Committee of the Privy Council, which right cannot be taken away by a simple majority of the legislature. The reference to section 107 is, therefore, counsel urged, not an error obvious or otherwise as is being proposed by the Attorney General. On the argument by reference to the Constitutions of Dominica and Saint Christopher and Nevis, counsel points out three things. One, Dominica is a republic, and it is not to be a surprise that the provision for delinking a republic from the Privy Council was not deeply entrenched. Two, no two constitutions are identical as they all result from different negotiations with the UK government. Three, the Constitution of Saint Christopher and Nevis was the last providing for independence in the sub-region, and probably simply followed the precedent set in the earlier version taken from Dominica.

[56] Ms. Barbara Vargas presented the arguments for the majority of the Bar Association in opposition to the submissions of the Attorney General and those of some members of the Bar Association. Her principal submission was that a finding that there is a typographical error is beyond the judicial function of statutory interpretation. The authorities, she urged, establish that the function of the Court in statutory interpretation is to look for the objective intention of the lawmaker, not what it is alleged, rightly or wrongly, that the lawmaker desired to write. The Court has to start with, and to interpret, the words used. She submitted that the legal meaning of the word and number "section 107" is plain. The words in section

[59] Section 40 of the Constitution.

41(7)(a) mean that Parliament can amend section 107 without the need for a referendum if the amendment is to give effect to an agreement between the United Kingdom and Saint Lucia, and if the agreement concerns appeals from any court having jurisdiction in Saint Lucia to the Privy Council. She argued that this would permit a leap-frog appeal from the High Court directly to the Privy Council similar to that under sections 12 to 15 of the Administration of Justice Act 1969 of the United Kingdom. Section 107 deals with appeals from courts other than the Court of Appeal to the Court of Appeal so that an amendment that deals with appeals from these same courts to the Privy Council can fit snugly into section 107. Section 108 deals with appeals from the Court of Appeal to the Privy Council, so that no harm is done to it, she submits, if another section deals with appeals from other courts to the Privy Council.

Analysis

[57] I have considered all the submissions made to me, both written and oral. The authorities both binding and persuasive indicate that the court's jurisdiction to correct an error in a statute by an exercise of statutory interpretation exists but must be exercised with care. That such a jurisdiction exists there is no doubt. In the words of Sir Rupert Cross,[60]

> "The cases thus demonstrate that both today and in Lord Halsbury's time, judges have not been slow to correct mistakes which the legislature has made. Of course there must be an exceptionally strong case for the exercise of the wholly exceptional power of rectification, and of course it is essential that the courts should so far as possible stick to the ordinary meaning of statutory words, but this does not mean that they should throw their hands up in despair, not always unmingled with satisfaction, when the ordinary meaning produces a preposterous result. As often as not it is a matter of taste whether such results are avoided by the technique of necessary implication or by rectification, but avoided they should be like the plague."[61]

[58] A judge or court must generally be very reluctant to find that the legislature made a mistake in the wording of a section of an Act unless it is clear that the ordinary

[60] Sir Rupert Cross: Statutory Interpretation (3rd edn.,Oxford University Press).
[61] ibid at p. 105.

meaning produces a preposterous result. There is guidance in the words of Lord Nicholls of Birkenhead in the House of Lords in Inco Europe Ltd. and Others v First Choice Distribution (a firm) and Others,[62]

> "The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation …"

[59] As Lord Nicholls of Birkenhead advised in his judgment in the House of Lords in R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd,[63]

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House ... Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

[60] In the words of Viscount Dilhorne in the House of Lords in Stock v Frank Jones (Tipton) Ltd.,[64]

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[62] [2000] 1 WLR 586 at 592E.
[63] [2001] 2 AC 349 at 396F, in the House of Lords.
[64] [1978] 1 WLR 231 at 234F.

> "It is now fashionable to talk of a purposive construction of a statute, but it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it 'according to the intent of them that made it' (Coke 4 Inst. 330).
>
> "If it were the case that it appeared that an Act might have been better drafted, or that amendment to it might be less productive of anomalies, it is not open to the court to remedy the defect. That must be left to the Legislature."

And, as Lord Simon of Glaisdale said in his judgment in the same case,[65]

> "... a court would only be justified in departing from the plain words of the statute were it satisfied that: (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such an anomaly, could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly."[66]

[61] One must be doubly reluctant to make a finding of an anomaly in a provision in a written Constitution. In my view, the reins tighten when the request is to find an error in a constitutional provision requiring democratic participation by a referendum to correct it to say that the provision merely requires approval by the legislature, and not by the people.

[62] The legislature of Saint Lucia is sovereign in making laws for the good government of Saint Lucia, subject only to the Constitution. Part of that law-making power is the power to legislate to establish courts. At present, other than the courts of summary jurisdiction, the existing High Court and the Court of Appeal provided for by the Courts Order are the only courts of Saint Lucia. The Constitution is not static, dealing only with the situation as existed at the time the Constitution was adopted, or even with the situation as it exists today. The Constitution is prospective, and is intended to deal with the issues both of today and that will arise tomorrow. There is nothing to say that one day the legislature may not find it

[65] At p. 235.
[66] p. 237.

appropriate to set up a court system that is not presently contemplated, required or provided for under the Courts Order.

[63] It may, for example, one day be thought appropriate to set up a Court to deal with mental health issues which court is to be staffed by persons of psychiatric qualification and who do not have the security of tenure and protection of the present court system provided for by the Courts Order. Or the legislature may deem it appropriate to set up a Gun Court staffed with persons qualified appropriately, but who similarly are not guaranteed judicial independence. Such a new court might have both a first instance and an appellate tier. Section 107 will then necessarily have to be amended to cut out of the High Court's present jurisdiction the power to deal with mental health cases or gun cases and transfer them by the proposed new law to the new court. Without such a constitutional amendment, the Bill setting up the new court will likely be unconstitutional. And, in this respect, I cannot agree with the Bar Association that section 107 is not deeply entrenched and does not require a referendum to alter it. Section 41(7)(a) does not exempt a Bill to amend section 107 to set up such a new court from the need for a referendum. The jurisdiction of the High Court in section 107, as with the jurisdiction of the Court of Appeal in section 108, is generally deeply entrenched by the present wording of section 41(7)(a).

[64] It is only a Bill to alter section 107 to give effect to an agreement with the UK concerning appeals from such a new court, or from any other court including the High Court, to the Privy Council that would be exempted from a referendum. If the legislature of Saint Lucia should be minded to set up such a new court, and if the United Kingdom government should think it fit to approve appeals from the proposed new court to the Privy Council, section 41(7)(a) as presently worded would permit that new court to be established, with appeal to the Privy Council, without the need for a referendum.

[65] As section 41(7)(a) is presently worded it would appear that the framers of the Constitution envisaged that some other court might have jurisdiction in time to

come that would require the amendment of the wide general jurisdiction presently vested in the High Court. While it might appear anomalous that the Constitution of an independent Caribbean state should contemplate the government negotiating with the UK government over appeals from some new court of its own to the Privy Council and, having reached agreement with the UK government, then to introduce a Bill to set up the new court without the need for a referendum, this is nevertheless what the framers of the Constitution appear to have provided for in section 41(7)(a).

[66] It seems to me that there is one other flaw in the AG's submissions. There is no other court in Saint Lucia but the Court of Appeal from which appeals lie to the Privy Council. If section 41(7)(a) was intended by the framers of the Constitution to apply to appeals from the Court of Appeal to the Privy Council then it is passing strange that they did not specifically mention the Court of Appeal by name. The need to mention it specifically instead of "any court", if the section was intended to apply to it, should have been obvious.

[67] There will be no need for an agreement with the UK government concerning access from any court, other than the Court of Appeal, to the Privy Council until Saint Lucia plans to create some new court that did not exist in colonial times and to carve out some of the jurisdiction of the High Court in section 107; or until Saint Lucia wishes to amend section 107 to give litigants in some particular type of case the power to leap-frog the Court of Appeal by going directly from the High Court to the Privy Council, if the UK government could be persuaded to agree to that. In either case, no referendum will be necessary. If Saint Lucia wishes to amend section 108 to de-link from the Privy Council, then such a Constitutional amendment will need to be subjected to popular approval in a referendum. That would appear to have been the intention of the framers of the Constitution.

Conclusion

[68] It is therefore with some humility and temerity that I respectfully disagree with the opinions of my learned sisters, the Chief Justice and Justice Blenman above, as well as the Attorney General, Dr. Lloyd Barnett, Mr. Anthony Astaphan, SC and Mr. Hilford Deterville, QC, and find that the reference in section 41(7)(a) of the Constitution is properly a reference to section 107, and was not intended to be a reference to section 108.

Don Mitchell
Justice of Appeal [Ag.]