REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2018-02726**

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 14 OF THE CONSTITUTION OF THE REPUBLIC OF TRINDAD AND TOBAGO ALLEGING THAT THE PROVISIONS OF SECTION 4 THEREOF HAVE BEEN, ARE BEING, AND ARE LIKELY TO BE ABROGATED ABRIDGED OR INFRINGED

AND

IN THE MATTER OF SECTION 15 (1) A OF THE LEGAL PROFESSION ACT CHAPTER 90:03

BETWEEN

DIANNE JHAMILLY HADEED

Applicant/Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO

First Interest Party

THE REGISTRAR OF THE SUPREME COURT OF TRINIDAD AND TOBAGO

Second Interested Party

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Tuesday 18 June 2019

Appearances:

Mr. Christopher R. Rodriguez, Ms. Raisa Ceasar, Mr. Sparkle Kirk instructed by Mr. David R. Francis, Attorneys at Law for the Claimant.

Mr. Fyard Hosein S.C. leads Ms. Rachel Thurab and Mr. Roshan Ramcharita instructed by Ms. Laura Persad, Attorneys at Law for the Defendant.
Mrs. Deborah Peake S.C. leads Mr. Ravi Heffes-Doon and Ms. Tamara Toolsie instructed by Ms. Kerlene Alfonso, Attorneys at Law for the First Interested Party.
Mr. Ian L. Benjamin S.C. leads Mr. Pierre A. Rudder instructed by Ms. Michelle Benjamin, Attorneys at law for the Second Interested Party.

JUDGMENT

"Our common origins and associations have created and are in process of moulding a people. This is shown in our way of life, our food and drink, our sport, our recreations, our arts. Our poets, novelist, playwrights, dancers, painters and sculptors are recognizably West Indian…Our differences are real. But we are not dismayed by them. Our provincial loyalties are not to be despised; loyalty must begin somewhere. Difference and diversity can enrich and stimulate. Federation is a challenge to move into a new dimension of life and thought, and to achieve a fuller and freer life as members of a wider community." -Sir Hugh Springer[1]

1. The regional integration of Caribbean countries had previously floundered on the "ragged rocks" of insularity when the then Prime Minister of Trinidad and Tobago declared so famously "one from ten leaves naught"[2] signalling the collapse of the Caribbean's experiment at regional integration through a ten member Federation[3]. The collapse of the Federation sprung from many sources. However, even in its failure, there were lessons to be learnt for this "Caribbean Project" of integration and unity. Sir Springer expressed the hope that "when next we come together we shall do so with greater respect for one another and a sounder understanding of what each and all of us will be able to contribute to the common good. If this should come about…the union we shall create will be a healthier and more propitious one"[4]. Looking past the sentimentality and romanticism of

[1] Sir Hugh Springer **"Reflections on the failure of the West Indian Federation (1962)"**
[2]Dr. Eric Williams, 1961, when Jamaica voted by referendum to withdraw from the West Indies Federation.
[3] The West Indies Federation established in 1958 comprised the ten territories of Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, the then St Kitts-Nevis-Anguilla, Saint Lucia, St Vincent and Trinidad and Tobago. It was established by the British Caribbean Federation Act of 1956 aimed at establishing a political union among its members. It endured a brief existence of four years ending in 1962.
[4] Sir Hugh Springer **"Reflections on the failure of the West Indian Federation (1962)"**

the notion of "West Indianness" or Caribbean unity, the failed experiment demonstrated that, at the very least, a sound legal infrastructure or superstructure was needed.

2. Trinidad and Tobago is a contracting party to the Revised Treaty of Chaguaramas (RTC) since 4th July 1973 which established the Caribbean Community including the Caribbean Single Market and Economy. The creation of the Caribbean Single Market Economy by the RTC is the latest and most major advance towards regional integration of Caribbean countries[5]. While the Caribbean Community consists of several sovereign jurisdictions, establishing a single economic space will require the superimposition of collective economic decisions on individual national administrations. Duke Pollard[6] observed that the CARICOM Single Market and Economy aspires to the creation of a single economic space superimposed on autonomous political jurisdictions in order to achieve in fact, if not in law, a single economy from the economies of many member states[7]. The tripod of "community rights" of the free movement of services, the right to establishment and the right to move capital are essential to the working of the Caribbean Community as it is to the benefit of Community Nationals.

3. This dispensation of the Caribbean Community so conceived under the RTC depends for much of its formal structure on the legal provisions embodied in its Treaties and agreement, the formal arrangements devised to support its systems of governance and more fundamentally a coherent development of community law by a central judicial authority. In the absence of such a central judicial authority to define, interpret and apply the RTC, the rights created by the RTC will be illusory and vacuous commitments.

4. The Caribbean Court of Justice (CCJ) established on 14th February 2001 by the Agreement Establishing the Caribbean Court of Justice is the central judicial authority with compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the RTC. The CCJ therefore plays a critical role in the development of community law inclusive of the rights envisioned for community nationals to enjoy in this expanded economic space. It represents the jurisprudential underpinnings fashioning a

[5] Owen Arthur PM of Barbados Address at the Thirteenth Distinguished Anniversary Lecture of the Caribbean Community April 23 2004

[6] **The CARICOM System: Basic Instruments**, edited by Duke Pollard

Caribbean identity and reinforces the Caribbean legal framework in which our CARICOM nations are to give reality to the concept of a single market economy, a single space and a more influential seat at the global table. While Trinidad and Tobago has not subscribed to the appellate jurisdiction of the CCJ, it has recognised the original jurisdiction of this Court to interpret the provisions of the RTC. This is an important jurisdiction as already evidenced in important decisions such as **Shanique Myrie v The State of Barbados** [2013] CCJ (OJ) and **Trinidad Cement Limited v The Caribbean Community** CCJ Application No. OA 1 of 2009 settling disputes amongst members on matters concerning the interpretation of the RTC and demarcating the boundaries of action in the dealings between CARICOM nationals.

5. The referral jurisdiction of the CCJ under Article 214 of the RTC and section 5(1) of the Caribbean Community Act Chapter 81:11 (the CARICOM Act) underpins the exclusive jurisdiction of the CCJ over these questions of Caribbean Community law and obliges the national courts to refer such questions to the CCJ. To this extent, both national courts and the CCJ are enjoined in a co-operative exercise of working out in a uniform manner community rights important for the functioning of the Caribbean Community. Such a referral mechanism recognises the need for dialogue between the national court and the CCJ to ensure a uniform approach to issues of Community law. To this extent, the expertise of the CCJ in Community law will become an invaluable resource for national courts.

6. It is the articulation of certain Community rights which the Claimant, Ms. Dianne Jhamilly Hadeed[8], a CARICOM[9] national[10], seeks to ventilate through the referral procedure. It involves the question of her inability to practice law in Trinidad and Tobago due to a qualified restriction provided for in national legislation raised in extant constitutional law proceedings which she now claims breaches her rights to inter alia, free movement and non-discrimination under the RTC.

7. Ms. Hadeed seeks admission to practice law under Section 15(1A) of the Legal Profession Act Chapter 90:03 (the LPA). This section carves out a facility only for nationals of Trinidad

[8] The Claimant
[9] The Caribbean Community
[10] Ms. Hadeed is a national of Grenada and St. Lucia

and Tobago to be admitted to practice law on obtaining certain qualifications which are not recognised by the regional agreement for legal education, the Council of Legal Education Act Chapter 39:50 (the CLE Act). The Registrar of the Supreme Court has refused to process her application to be admitted to practice law under Section 15(1A) on the basis that she is not a national of Trinidad and Tobago. Ms. Hadeed contends that this section is unconstitutional and discriminates against her as a CARICOM national.

8. In her claim for constitutional relief she seeks declarations that section 15(1A) of the LPA contravenes her constitutional rights enshrined in sections 4(a), (b) and (d) of the Constitution of Trinidad and Tobago. She contends that section 15(1A) applies and confers a benefit on nationals of Trinidad and Tobago only and has the effect of depriving her, by reason of her origin, of the those constitutional rights and accordingly is null, void and of no effect. She claims that the decision of the Registrar of the Supreme Court made by way of letter dated 10th April, 2018, that she is ineligible to apply for admission to practise law is unconstitutional, null, void and of no effect. She claims that she has been deprived of her legitimate expectation to be admitted to practise as an Attorney-at-Law in Trinidad and Tobago. She also seeks an order striking through the words "a national of Trinidad and Tobago" appearing in section 15(1A) of the LPA and replacing it with "any person."

9. She now seeks an order of the Court[11] to refer certain questions of Community law, now raised for the first time in her application for a referral, to the CCJ in its Original Jurisdiction pursuant to section 5 of the CARICOM Act and Rule 11 of the Caribbean Court of Justice (Original Jurisdiction) Rules 2006 (sic 2017) before the hearing of the main claim which is set for 3rd July 2019.

10. These questions which Ms. Hadeed seek to refer are as follows:

    (i) Whether section 15(1A) of the LPA of the Laws of Trinidad and Tobago is consistent with Articles 7, 8, 9, 37, 45, 46, 226 and 240 of the Revised Treaty of Chaguaramas (RTC)[12].

[11] By Notice of Application filed 29th March 2019

[12] Articles 7, 8, 9, 37, 45, 46, 225, and 240 of the RTC states:

"**ARTICLE 7**

Non-Discrimination

1. Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality only shall be prohibited.

2. The Community Council shall, after consultation with the competent Organs, establish rules to prohibit any such discrimination.

ARTICLE 8

Most Favoured Nation Treatment

Subject to the provisions of this Treaty, each Member State shall, with respect to any rights covered by this Treaty, accord to another Member State treatment no less favourable than that accorded to:

(a) a third Member State; or

(b) third States.

ARTICLE 9

General Undertaking on Implementation

Member States shall take all appropriate measures, whether general or particular, to ensure the carrying out of obligations arising out of this Treaty or resulting from decisions taken by the Organs and Bodies of the Community. They shall facilitate the achievement of the objectives of the Community. They shall abstain from any measures which could jeopardise the attainment of the objectives of this Treaty.

ARTICLE 37

Removal of Restrictions on Provision of Services

1. Subject to the provisions of this Treaty, Member States shall abolish discriminatory restrictions on the provision of services within the Community in respect of Community nationals.

2. Subject to the approval of the Conference, COTED, in consultation with other competent Organs, shall, within one year from the entry into force of this Treaty, establish a programme for the removal of restrictions on the provision of such services in the Community by Community nationals.

3. In establishing the programme mentioned in paragraph 2 of this Article, COTED shall:

(a) accord priority to services which directly affect production costs or facilitate the trade in goods and services which generate foreign exchange earnings;

(b) require the Member States to remove administrative practices and procedures, the maintenance of which impede the exercise of the right to provide services;

(c) establish measures to ensure the abolition of restrictions on the right to provide services in respect of activities accorded priority treatment in accordance with sub-paragraph (a) of this paragraph, both in terms of conditions for the provision of services in the territories of Member States as well as the conditions governing the entry of personnel, including their spouses and immediate dependent family members, for the provision of services;

(d) take appropriate measures to ensure close collaboration among competent national authorities in order to improve their knowledge of the conditions regarding relevant activities within the Community, and

(e) require the Member States to ensure that nationals of one Member State have on a non-discriminatory basis, access to land, buildings and other property situated in the territory of another Member State for purposes directly related to the provision of services, bearing in mind the importance of agriculture for many national economies.

ARTICLE 45

Movement of Community Nationals

Member States commit themselves to the goal of free movement of their nationals within the Community.

ARTICLE 46

Movement of Skilled Community Nationals

1. Without prejudice to the rights recognised and agreed to be accorded by Member States in Articles 32, 33, 37, 38 and 40 among themselves and to Community nationals, Member States have agreed, and undertake as a first step towards achieving the goal set out in Article 45, to accord to the following categories of Community nationals the right to seek employment in their jurisdictions:

(a) University graduates;

(b) media workers;

(ii) Whether the strict enforcement of the nationality requirement in Section 15(1A) of the LPA violates Articles 9 and 37 of the RTC and serves to frustrate and prejudice the object and purpose of the RTC.

(iii) Whether section 15(1A) of the LPA is inconsistent with section 3(3) of the Immigration (Caribbean Community Skilled Nationals) Act which codifies the rights to free movement embodied in Articles 45 and 46 of the RTC.

(c) sportspersons;
(d) artistes; and
(e) musicians,
recognised as such by the competent authorities of the receiving Member States.
2. Member States shall establish appropriate legislative, administrative and procedural arrangements to:
(a) facilitate the movement of skills within the contemplation of this Article;
(b) provide for movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments, including:
(i) the elimination of the requirement for passports for Community nationals travelling to their jurisdictions;
(ii) the elimination of the requirement for work permits for Community nationals seeking approved employment in their jurisdictions;
(iii) establishment of mechanisms for certifying and establishing equivalency of degrees and for accrediting institutions;
(iv) harmonisation and transferability of social security benefits.
3. Nothing in this Treaty shall be construed as inhibiting Member States from according Community nationals unrestricted access to, and movement within, their jurisdictions subject to such conditions as the public interest may require.
4. The Conference shall keep the provisions of this Article under review in order to:
(a) enlarge, as appropriate, the classes of persons entitled to move and work freely in the Community; and
(b) monitor and secure compliance therewith.

ARTICLE 225
Security Exceptions
Nothing in this Treaty shall be construed:
(a) as requiring any Member State to furnish information, the disclosure of which it considers contrary to its essential security interests;
(b) as preventing any Member State from taking any action which it considers necessary for the protection of its essential security interests:
(i) relating to the supply of services carried out directly or indirectly for the purpose of provisioning a military establishment;
(ii) in time of war or other emergency in international relations; or
(c) as preventing any Member State from taking any action in pursuance of its obligations for the maintenance of international peace and security.

ARTICLE 240
Saving
1. Decisions of competent Organs taken under this Treaty shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States.
2. The Member States undertake to act expeditiously to give effect to decisions of competent Organs and Bodies in their municipal law.
3. COTED shall monitor and keep under review the implementation of the provisions of this Article and shall convene a review conference of Member States within five years from the entry into force of this Treaty."

(iv) Whether the State of Trinidad and Tobago is entitled to delay and/or prevent the implementation of its obligations under the RTC beyond the circumstances listed in Article 226 and/or in the absence of an express reservation.

11. There has been no reported case of a referral to the CCJ by a national court of the Caribbean Community[13]. However, this should not diminish the value of such referrals to the CCJ. In certain cases, it is important and if not essential to obtain the opinion of the CCJ on matters concerning Community law so that domestic courts can begin the process of harmonising our Caribbean jurisprudence, if not entering into a dialogue with the CCJ on the articulation of Community rights on the national landscape. While it is tempting to do so in this case for the sake of joining the chorus of the harmonisation of Caribbean Community law, the Court must not at the same time sacrifice the referral mechanism on the altar of the larger and more romantic idealism of Caribbean nationhood.

12. For the reasons set out in this judgment, the questions raised by Ms. Hadeed will not be referred to the CCJ for the following reasons:

(a) Even if this Court takes a flexible approach and does not apply the mechanistic approach as set out in **HP Bulmer Ltd and another v J Bollinger SA and others** [1974] 2 All ER 1226, these issues raised by Ms. Hadeed are an impermissible enlargement of the grounds of her claim for constitutional relief and do not legitimately form part of her case against the Defendant.

(b) To so frame such questions as the basis for a referral without a fair opportunity for the Defendant to deal with them properly in the substantive proceedings would be manifestly unfair and inconsistent with the co-operative feature of such referrals.

(c) In any event, the questions will not be necessarily determinative of the issues of constitutionality which fall for consideration in this motion. Even if such questions are to be referred to the CCJ, it still is within the remit and jurisdiction

[13] See **Lennox Linton v The Attorney General of Trinidad and Tobago** Claim No ANUHCV2007/0354 where a referral was not made because the statute incorporating the RTC was not officially brought into force.

of the national Court to determine the constitutionality of its legislative provisions.

(d) Nothing deprives the litigant from properly formulating a case for special leave to apply to the CCJ to articulate her Community rights. However, to do so through the device of the referral mechanism in the middle of the management of these constitutional law proceedings where no amendment has been sought to include such aspect of Community law into this claim would be disproportionate, inconsistent with the overriding objective and an abuse of process.

(e) There already exists sufficient facts and legal propositions to determine the questions of constitutionality properly raised by Ms. Hadeed in her claim. The issues which she now raises of her alleged breaches of Community rights can therefore be described as hypothetical and unnecessary in the main dispute between the parties.

Brief factual background

13. Ms. Hadeed can be described colloquially as a "Caribbean woman." She is a Grenadian national, holds St. Lucian citizenship and has been living in Trinidad and Tobago since 2012. She completed her Bachelor of Laws (LLB) degree from the University of London in 2015 and the Legal Practice Course (LPC) in 2017 at the University of Law in London. In April 2017, she was granted a Certificate of Recognition of Caribbean Community Skills Qualification by the Government of Trinidad and Tobago.

14. Subsequent to obtaining her LPC, she completed her six (6) month attachment at a local legal firm of Montano & Co in December 2017. She thereafter took the required steps of being admitted to practice pursuant to section 15(1A) of the LPA but her application for admission was denied based on her nationality. Briefly, section 15(1A) provides that a national of Trinidad and Tobago who has passed the Bar Vocational Course or the Legal Practice Course at an institution validated by the General Council of the Bar of England and Wales and has obtained a certificate from the head of chambers of an Attorney-at-law of

not less than ten years standing, practising in Trinidad and Tobago to the effect that the national has undergone an attachment at those chambers for a continuous period of not less than six months doing work relating to the practice of Law is entitled to practice as an attorney at law in Trinidad and Tobago. She contends that she was treated unequally solely on the basis of her nationality and was denied the opportunity to practice law in Trinidad and Tobago unlike local counterparts.

15. It is only in her application for referral that she contends that the refusal of the Registrar[14] to allow her to apply to be admitted to practice law in Trinidad and Tobago based on her nationality amounts to a breach of Articles 7, 8, 9, 37, 45, 46, 255 and 240 of the RTC.[15] In this case, the law that Ms. Hadeed contends is inconsistent with Community law is the restriction of the facility in section 15(1A) of the LPA to Trinidad and Tobago nationals to circumvent the requirement of obtaining a Legal Education Certificate (LEC) from the Hugh Wooding Law School in order to be admitted to practice law in Trinidad and Tobago.

16. It is the contention of the Registrar that Ms. Hadeed did not fulfil the conditions for admission based on the information she provided since the effect of the provisions of the LPA and the Council of Legal Education Act (CLE) is that, as a CARICOM national, Ms. Hadeed could only be admitted to practice in Trinidad and Tobago if she has a LEC. The Defendant contends that while the section discriminates against her as a national of another country there are legitimate and proportionate reasons to justify such discrimination.

Submissions

17. The Court in its Bench Memo[16] invited written submissions on the application for the referral. I am grateful to the attorneys for the timely and useful submissions which I now briefly summarise. The Claimant submitted that the questions she has now raised are properly within the jurisdiction of the CCJ to answer, fairly arise from the material filed in the substantive proceedings, and the answers of the CCJ will substantially if not totally determine the litigation before this Court. The Defendant, Registrar and the Law Association

[14] The Registrar of the Supreme Court of Trinidad and Tobago, the Second Interested Party
[15] These allegations are made for the first time in her affidavit in support of her application for referral.
[16] Bench Memo emailed to the parties on 2nd May 2019

of Trinidad and Tobago (LATT) submitted that none of the questions sought to be referred to the CCJ are questions which arise in the substantive proceedings; it does not involve the interpretation or application of articles of the RTC, which are unambiguous, and resolution of the issues are not necessary for the Court to deliver judgment as it must still determine the constitutionality of section 15(1A) even if it is in breach of Community law. The LATT has further submitted that a referral at this stage is neither convenient nor desirable and not in accordance with the overriding objective. The LATT also made a submission which may sound the death knell to the CCJ's original jurisdiction. They contend that the obligation to refer contained in section 5(1) of the CARICOM Act and section 6(4) of the CCJ Act may well be unconstitutional as they were passed by a simple majority in Parliament. These provisions interfere with the constitutionally entrenched jurisdiction of the Supreme Court of this jurisdiction. A simple majority therefore does not suffice to confer such jurisdiction on the CCJ to determine finally questions of community law binding on our Supreme Court.

The "Referral Jurisdiction"

18. The jurisdiction of this Court to make a referral to the CCJ is governed by our domestic legislation as it is in the RTC, which has been incorporated into our domestic law. Article 214 of the RTC provides for the referral to the CCJ:

> "Where a national court or tribunal of a Member State is seised of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment."

19. The provisions of the RTC has been incorporated into domestic legislation in Trinidad and Tobago by the CARICOM Act. Section 3 of the CARCIOM Act provides that the RTC shall have force of law in Trinidad and Tobago and the Community shall have full juridical personality. Section 8 further provides that in the event of any inconsistencies between the provisions of the CARICOM Act and the operation of any other law, the provisions of CARICOM shall prevail to the extent of the inconsistency. The CARCIOM Act therefore in our dualist system

has incorporated and converted the RTC into domestic law. To ensure consistency in articulating Community law, the entire text of the RTC was annexed as a schedule to the Act and was not subject to any statutory modification. By the provisions of the CARICOM Act the Court is in fact interpreting domestic legislation which mirrors the provisions and tenets of the RTC. As Lord Hoffman in **R v Lyons** [2003] 1 AC 976 (HL) explains:

> "Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law."

20. As Dr. David S. Berry noted in **"Caribbean Integration Law"** such transformation converts the RTC into the fabric of local law:

> "Transformation fulfils the basic constitutional requirement because it ensures that parliament, not the executive, remains the branch of government that makes law. By transforming a treaty, parliament ensures that it remains the body that creates legal rights and duties in domestic law, not the executive or judiciary. Transformation also has the effect of making international law into domestic law: a treaty, once enacted by statute, completely changes its legal nature and ceases to be international law."[17]

21. Specifically, the referral jurisdiction has been conferred on this Court by Section 5 (1) of the CARCIOM Act and Section 6 of the Caribbean Court of Justice Act Chapter 4:02 (CCJ Act). Section 5(1) of the CARICOM Act provides:

> "5. (1) For the purposes of all legal proceedings, any question concerning the interpretation or application of the Treaty or concerning the validity, meaning or application of instruments made under the Treaty shall be treated as a question of law to be referred to the Caribbean Court of Justice where a Court or tribunal seised of an issue considers that a decision on the question is necessary for it to deliver judgment."

22. Section 6 of the CCJ Act states:

> "6. (1) The Court in the exercise of its original jurisdiction shall—

[17] **"Caribbean Integration Law",** David S. Berry, page 163

(a) have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty including—

(i) disputes between Contracting Parties;

(ii) disputes between Contracting Parties and the Caribbean Community;

(iii) referrals from national Courts[18] or tribunals of Contracting Parties; and

(iv) applications by persons in accordance with section 7;

(b) at the request of a Contracting Party or the Caribbean Community, deliver advisory opinions concerning the interpretation and application of the Treaty.

(2) In the exercise of its original jurisdiction, the Court shall apply such rules of international law as may be applicable.

(3) Matters pertaining to the exercise of the original jurisdiction of the Court shall be brought before the Court by written application, in the manner prescribed by the Rules of Court.

(4) **Where a Court or tribunal is seised of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the court or tribunal shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment.**

23. Further Rule 11.2 of the Caribbean Court of Justice Original Jurisdiction Rules 2017 provides:

"**Rule 11.2** (1) Where a national court is seised of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the court concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment."

[18] "National Courts" means the Supreme Courts of the Member States of the Caribbean Community and includes the Eastern Caribbean Supreme Court. Section 6(5) of the CCJ Act.

24. The rules set out the referral procedure. A proper reading of the rules themselves make it clear that the national Court and the CCJ are tasked with the joint exercise of clarifying these issues of Community law where they are relevant to the case before the national Court. The rules provide that:

- The referral must be in writing signed by the Registrar of the national court or the appropriate officer and be addressed to the Registrar (Rule 11.2(2)). The referral must be formulated by the Court itself upon hearing the submissions of the parties. While the parties may make the application for the referral it is the Court's duty to properly set out the basis for the referral and the questions which are to be answered. There is therefore nothing objectionable to the Court reformulating the questions identified in the application or formulating its own question after hearing the parties. As the national Court is invoking a specialised jurisdiction of the CCJ to determine questions of the interpretation and application of the RTC referred to it, the national court must as far as possible give the appropriate context for the CCJ so that its advice or opinion properly assists the national Court with the relevant issue for which it seeks the CCJ's assistance. To the extent that it may prove useful I have annexed a draft order of a referral to this judgment.[19]

- The referral must-

  (a) state the question which the Court is asked to answer;

  (b) explain how the question referred is relevant to the issues in the proceedings before the national court;

  (c) identify the parties to those proceedings and give an address for service for each of them; and

  (d) give an account of the factual and legal background essential for a full understanding of what is provided under sub-paragraphs (a) and (b). It is more appropriate that the Court formulates the agreed facts and issues which form

[19] See Appendix A

the backdrop to the claim. It would be inappropriate for the CCJ to resolve any disputes of fact which are before the national Court or issues of law which that Court is properly seised. (Rule 11.2(3)).

- Within fourteen (14) days of receipt of a referral the Registrar shall serve copies of the referral on all Member States, the Secretary General of the Community and the parties to the proceedings before the national court (Rule 11.2(4)). It would be a matter for the parties to the proceedings to decide what level of participation is warranted depending on the level of involvement of the member states.

- Where the Community or any Member State wishes to be heard on the question referred it shall so indicate in writing within six (6) weeks of being served under sub-rule (4). (Rule 11.2(5))

- The parties to the proceedings before the national court, and the Community and a Member State, if either has given notice of its desire to be heard pursuant to sub-rule (5), shall be given an opportunity to make submissions to the Court either orally or in writing or both. (Rule 11.2(6))

- Subject to sub-rule (6), the Court shall give directions for the further conduct of the matter (Rule 11.2(7)). The CCJ will manage the matter pursuant to its own rules of "case management". See Parts 19 and 20 of the CCJ Original Jurisdiction Rules. Interestingly it is entirely possible that the dispute can be amicably resolved at the CCJ through the use of the Court's dispute resolution procedures. See Part 20. No doubt mediators with specialty in international and regional law may be of profound assistance to the parties and is yet another resource offered by the CCJ.

- The ruling in answer to the question referred shall be given in writing and be sent by the Registrar to the person who signed the referral, the parties to the proceedings before the national court and any body which made submissions to the Court and shall thereafter be published by the Court. While there is no

proscription to do so the Court can publish the answer to the question in a separate document or the body of the substantive judgment. See **R v Secretary of State for Transport, ex parte Factortame ECJ** ([1990] 2 Lloyds Rep 351, (Factortame No.1) for a working example of the referral process and the use of the national court of the opinion of the regional court on a referral in the determination of the substantive dispute.

25. The referral jurisdiction is similar to that of the European Economic Community and Article 177 (now Article 234) of the Treaty establishing the European Economic Community (EEC Treaty) (now the European Community). Article 234 states:

> "**Article 234**
>
> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of this Treaty;
>
> (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
>
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

26. There are significant differences between the comparator section 6 and Article 234 referral jurisdiction which is discussed below. However, before I analyse the language of the text used in section 6, as in any exercise of statutory interpretation it is important to understand its context and purpose. See **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T.** Civil

Appeal No. P 075 of 2018[20].

The purpose of the referral jurisdiction

27. The CCJ as an international tribunal exercises an original and exclusive jurisdiction in respect of the interpretation and application of the RTC. To the extent that it plays a critical role in formulating rights in the Caribbean Community, legal uncertainty with respect to the interpretation of Community rights will give rise to instability of the Community's structure and frustrate the predictability of economic and social decisions. The central object of the referral system is therefore to facilitate harmonisation of decision making in the Caribbean Community. To this extent a spirit of co-operation is fostered between national courts and the CCJ, the latter contributing to the administration of justice in the national court and the former giving life to Community rights properly created by the RTC.

28. It is not different from the purpose of the Article 234 referral mechanism of the European

[20] Jamadar JA in **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** Civil Appeal No. P 075 of 2018 provided the following useful general comments on statutory interpretation:

> "4. The general purpose of statutory interpretation is to discover the purpose and meaning of a statute. This is self-evident. This interpretative undertaking is in service of the application of the provisions of a statute, to particular circumstances that arise for consideration and resolution by the courts, for the benefit of both individuals and the society. In pursuit of these objectives - interpretation and application - the courts deploy several forms of legal argumentation. Resolving the issues in this case requires the interpretation and application of both the LPA and the Constitution.
>
> 5. First, there is textual analysis. One looks to the actual language and structure used in the statute in order to ascertain meaning. If the language is plain and unambiguous, then the literal meaning of the words used is considered. One also looks at the statute as a whole, considering structure, context and the impact of different parts of the statute on the provisions that fall to be interpreted and applied. This intratextual approach can deepen understanding, and so assists in the task of statutory interpretation. Finally, one considers the hallowed 'canons of construction' that have evolved over time as guides to the discovery of meaning. Second, the intention of the makers of the statute is also an aid to interpretation and application. Textual analysis may fully reveal intent, but at times it is necessary to look elsewhere, such as to prior versions of the statute/provision, the historical background, supporting green/white papers, relevant and jurisprudentially permissible parliamentary debates, and even contemporary commentaries.
>
> 6. Third, judicial precedents which have considered, interpreted and applied the same or similar provisions, may be relevant. Here relevance is influenced by similar fact patterns, principles, values, and language/intent - what are described as analogous situations. Extrapolation that is logical and consistent with the principles/values/reasoning in the precedents considered is permissible. Fourth, policy considerations may at times be deployed and determinative. This is when one first determines the likely outcomes/consequences that flow from one interpretation/application or another - a predictive assessment; one then determines which outcome is preferable and aligned with the underlying values, purposes and intent of the law - an evaluative judgment."

Community. A review of some of the decisions of the European Court of Justice explains the purpose of their referral mechanism and its importance to giving effect to Community law equally applicable to our jurisdiction:

- The Community law imposes obligations on individuals and also intended to confer upon them rights which became part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of the obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon member states and upon institutions of the Community. **Van Gend en Loos v Nederlandse Administratie der Belastingen** (1963) Case 26/62.

- Rules of Community law must be fully and uniformly applied in all member states. Every national court must in a case within its jurisdiction apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it. **Amministrazione delle Finanze v Simmenthal SpA** [1978] ECR 629.

- The task assigned to the ECJ and its main powers under Article 177 (now Article 234) is to secure uniform interpretation and application of the EC Treaty by national courts and tribunals. Uniform application of Community law is imperative not only when a national court is faced with a rule of Community law the meaning and scope of which need to be defined, it is just as imperative when the court is confronted by a disputes as the validity of an act of the institutions. **SpA International Chemical Corporation v Amministrazione delle finanze dello Stato** [1981] ECR 1191.

- The provisions of Article 177 (now Article 234) must lead to a real and fruitful collaboration between municipal courts and the Court of Justice of the communities with mutual regard for their respective jurisdictions. “It is in this spirit that each side must solve the sometimes delicate problems which may arise in all systems of preliminary procedure..” **Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch** GmbH [1962] ECR 45 at p. 56.

- The duty of the Court of Justice under Article 177 (now Article 234) is to supply all

courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them**. Foglia v Novella** [1980] ECR 745.

29. The Commission of the European Communities went so far to say about the referral procedure:

> "The preliminary ruling procedure is undoubtedly the keystone of the Community's legal order. Forty years' experience have shown that it is the most effective means of securing the uniform application of Community law throughout the Union and that it is an exceptional factor for integration owing to the simple, direct dialogue which it establishes with national courts."[21]

30. On this side of the Atlantic there are several insightful academic observations on the purpose of the referral jurisdiction of the CCJ. In **"The Original Jurisdiction of the Caribbean Court of Justice: Ensuring the Integrity of CARICOM Law and the Stability of the Caribbean Community"** Justice Winston Anderson made the following observations on the importance of the referral action:

> "To be contrasted with direct actions in contentious cases, are the referral actions in contentious cases. There are actions started in national courts but in which a matter arises involving the interpretation or application of the Revised Treaty. The normal procedure is for those national proceedings to be stayed and for the matter to be referred to the CCJ for a ruling. The CCJ rules and transmits that ruling to the national court. The national court then applies the ruling to the facts of the case and comes to a decision. It is important to emphasize that the CCJ does not deal with the actual merits of the case. The cause of action brought for resolution in the national court or tribunal remains a matter for that forum.
>
> The importance of the referral action cannot be overstated. In similarity with its European counterpart, "the preliminary reference", the referral action is intended to

[21] **Reform of the Community Courts (additional Commission contribution to the Intergovernmental Conference on institutional reform)** COM (2000) 109, 1 March 2000.

ensure consistent and harmonious application of Community Law throughout the national legal systems of Member States. It would obviously be inimical to the cohesiveness of Community Law if each Member State was able to apply its own interpretation of that law. There would be at least 12 (and potentially 15) different interpretations, thereby undermining the confidence of Community nationals and foreign investors alike. It is therefore essential that the Treaty receives the same interpretation in all the Member States and that is what the referral action attempts to do."[22]

31. Justice Blenman in **Lennox Linton v The Attorney General of Antigua and Barbuda** CLAIM NO. ANUHCV2007/0354 of Barbuda adopted the views of Professor Anderson in her judgment and endorsed the view that for the national court to adjudicate upon Treaty rights would "completely undermine the central object of the referral system which is to facilitate harmonization of decision making in the Caricom by locating the power to interpret and apply the Revised Treaty of Chaguaramas in a single judicial entity, i.e. the CCJ"[23].

32. In **Caribbean Integration Law** by David S. Berry the learned author observed at page 408:

> "The referral jurisdiction simultaneously plays several valuable roles for Caribbean regional integration. It allows a national court to access the expertise of the CCJ regarding the interpretation of the RTC while at the same respecting the right of that national court to make the final decision about the entire case. By combining regional expertise with national judicial autonomy, this jurisdiction allows national courts and tribunals to work with the CCJ in implementing the regional integration project. In addition, since it removes the questions concerning the RTC from the jurisdiction of national courts, the referral jurisdiction also helps to preserve the exclusive competence of the CCJ to interpret and apply the RTC. It thus strikes a delicate balance. Only the CCJ can interpret and apply the RTC; but the application of the RTC in national law (or more

[22] "**The Original Jurisdiction of the Caribbean Court of Justice: Ensuring the Integrity of CARICOM Law and the Stability of the Caribbean Community"** Professor Winston Anderson PhD November 2009, page 33.
[23] **Lennox Linton v The Attorney General of Antigua and Barbuda** CLAIM NO. ANUHCV2007/0354, paragraph 84

accurately, the dis-application of inconsistent national law) may require the assistance of national tribunals. Further, in imposing the same obligation on *all* national courts of states parties to the RTC, Article 214 helps to ensure the uniformity of CARICOM law by removing the possibility of national tribunals arriving at different interpretations of the meaning of provisions of the RTC. This will be essential to the uniform and effective implementation of the CSME."

33. In **Signposts to the Development of Judicial Institutions in the Caribbean Community, The Advisory Opinion Jurisdiction and the Referral Procedure of the Agreement Establishing the Caribbean Court of Justice** by Sheldon A. McDonald it was observed:

> "According to the "The Future of the Judicial System of the European Union (European Court of Justice and Court of First Instance, 2000, p.17) "All ideas on the future of the Community's judicial system must take into account three fundamental requirements: the need to secure unity of Community law by means of a supreme court; the need to ensure that the judicial system is transparent, comprehensible and accessible to the public; and the need to dispense justice without unacceptable delay.
>
> These requirements are as fundamental for CARICOM as for the judicial system of the European Union. Indeed, it is arguably the case that there may be of greater, more primordial importance to the former, given that it is just about to begin the journey of comprehensive, coherent and cohesive legal ordering after floundering about indecisively for over the quarter century of existence."

34. There is some assistance on the context and purpose of this referral jurisdiction in the judgments of the CCJ. In **Shanique Myrie v The State of Barbados** [2013] CCJ (OJ), it was observed at paragraphs 52, 69 and 80:

> "52…. The original jurisdiction of the Court has been established to ensure observance by the Member States of obligations voluntarily undertaken by them at the Community level. The Court is therefore entitled, if not required, to adjudicate complaints of alleged breaches of Community law even where Community law is inconsistent with domestic law. It is the obligation of each State, having consented to the creation of a Community

obligation, to ensure that its domestic law, at least in its application, reflects and supports Community law…….

69. Implementation of the very idea and concept of a Community of States necessarily entails as an exercise of sovereignty the creation of a new legal order and certain self-imposed, albeit perhaps relatively modest, limits to particular areas of State sovereignty. Community law and the limits it imposes on the Member States must take precedence over national legislation, in any event at the Community level.

……..

80… A violation of Community law is not so much caused by the existence of domestic laws that seemingly contradict it but by whether and how these laws are applied in practice. The Court observes in this respect that the domestic courts of Barbados, including this Court in its appellate jurisdiction, are constrained to interpret domestic laws so as, if possible, to render them consistent with international treaties such as the RTC."

35. Quite apart from re-enforcing the overarching responsibility of the CCJ to ensure the uniform application of the RTC at the Community level, the supremacy of Community law is a matter which is yet to be interrogated by national courts. For the very least Community law is supreme at the Community level. It may be transposed into supreme law by the incorporating legislation. However, to the extent that our Constitution still represents our supreme law[24], and the RTC incorporated into local law, the breadth of our fundamental constitutional rights ought to be wide and liberal enough to accommodate Community rights.[25]

36. The desirability of ensuring that there was a uniform interpretation and application of Caribbean Community law gave enough reason to the CCJ to comment in **Hummingbird Rice Mills Ltd v Suriname and the Caribbean Community** [2012] CCJ 1 (OJ) at paragraph 26:

[24] Section 2 of the Constitution provides:

"2. This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

[25] See the extent to which our fundamental human rights have been interpreted in the context of ratified international treaties. **Jason Jones v The Attorney General of Trinidad and Tobago CV2017-00720**

"However, the Court wishes to use this opportunity to remind national courts and tribunals of their obligations under Article 214 of the Revised Treaty which states that where resolution of an issue involves a question concerning the interpretation or application of the Treaty, that court or tribunal hearing the matter must refer the question to this Court for determination before delivering judgment, if such a court or tribunal "considers that a decision on the question is necessary to enable it to deliver judgment". A national court or tribunal has, of course, a measure of discretion in considering the necessity of a referral but that discretion is a limited one."

37. It was unclear, however, from that judgment what aspects of Community law were before the national courts.

38. Finally, it is important to appreciate the unique history of the Caribbean Project of unification and the struggle to coalesce a people of common origins into a single force onto the global stage. The Honourable Sir Dennis Byron in his address at the 16th Conference of Governors-General and Presidents of the Caribbean **"Challenges of a Changing Caribbean"** observed:

"This spirit of regionalism was fuelled by the belief that the Caribbean region would be stronger together than separately. This belief underpinned the birth of CARICOM through the Treaty of Chaguaramas in 1973. This sentiment was eloquently captured by one of the "Founding Fathers", Forbes Burnham of Guyana, speaking at the Conference of Officials of the Commonwealth Caribbean Territories in Georgetown, Guyana in August 1967, where he cautioned:

> "Either we weld ourselves into a regional grouping serving primarily Caribbean needs or, lacking a common, positive policy, have our various territories and nations drawn hither and thither into, and by, other large groupings where the peculiar problems of the Caribbean are lost and where we become the objects of neo-colonialist exploitation and achieve the pitiable status of international mendicants.""

39. In **Caribbean Integration Law** by David. S Berry, the learned author noted at page 31:

"Some of the motives guiding, or rationales underpinning, the Caribbean integration movement include: preservation of a regional Caribbean identity; strengthening the effectiveness of sovereignty through concerted regional action; increasing economic prosperity by pooling scarce resources and small economies; enhancing foreign policy and security capabilities; and increasing the potential for drawing quality leaders who will have greater political possibilities in a regional context."

40. The Honourable Mr. Justice Saunders[26] in his address to a Public Gathering in St Vincent and the Grenadines, May 2017, **"The Revised Treaty of Chaguaramas: Conflicts and Contradictions for the Island State"** observed:

"For a regional integration grouping to thrive; the largest and most influential states must show strong leadership and political commitment to the integration process……. …the idea of establishing a Single Economy among Caricom States may not be realized in the foreseeable future although the Caricom single market remains a work in progress. As long as that is so the CCJ will have its own work cut out to do in interpreting and applying the treaty…. There are obvious advantages in the CCJ being the final appellate court and simultaneously also the Court that interprets and applies the RTC. To have one tribunal perform both functions eliminates the possibility of conflicting decisions between the tribunals performing these separate functions."

41. It is against this context that the text of the referral jurisdiction must be interpreted.

<u>The interpretation of the referral jurisdiction</u>

42. The only precedent referred to the Court on interpreting our referral jurisdiction were reports of the United Kingdom and European Court of Justice. However, generally similar, there are material differences in the terms of Article 234 of the European Community Treaty and section 5 (1) of the CARICOM Act and Rule 11 of Caribbean Court of Justice Original Jurisdiction Rules. In our jurisdiction the Court (or tribunal) must be (a) "seised of an issue" which (b) is necessary to enable it to deliver judgment and (c) under those circumstances the Court **must** refer the question. In the European Community (a) if the

[26] President of the CCJ

question is raised (b) it considers necessary to enable it to give judgment (c) the Court **may** request a ruling.

43. While Article 234 gives the Court a discretionary power in relation to referrals even where the Court has concluded that a decision of the Court of Justice on the question is necessary to enable it to give judgment, section 5 of the CARICOM Act and Rule 11 of Caribbean Court of Justice (Original Jurisdiction) Rules do not. Once the Court has concluded that a decision of the CCJ is necessary for it to deliver judgment it must make the referral. The duty to refer to the CCJ, subject to a determination of the necessity to refer, is mandatory. In the European Community Treaty it is only if such a question arises before a final court, that is a court against whose decision there are no judicial remedy under national law, then the court must refer the matter to the ECJ. Such a discretion retained by the lower courts in the European Community referral system, in my view, is an important distinction between our respective referral mechanisms.

44. In our jurisdiction, the Court has a limited discretion to determine two matters (a) whether it is seised of an issue concerning the interpretation or application of the RTC or validity, meaning or application of regional instruments and (b) whether it considers a decision on that issue "necessary" to enable it to deliver judgment. In other words, textually, it means the Court must conclude that it cannot render its judgment unless there is a decision on an issue of which it is seised, concerning the interpretation or application of the RTC or its instruments. In that event, it must refer the question to the CCJ. In the European Community, the Court even after holding such a view still retains a wide discretion whether to refer the question or not.[27]

45. In **Caribbean Integration Law**[28] the learned author noted the following points on the wording of Article 214 of the RTC:

> "Firstly, issues can be referred by national courts and tribunals, including the Eastern

[27] Having said this it is noted that Jamaica has followed the EEC and departed from the CCJ treaty on the question of referrals by conferring on the national court a discretion to refer a question to the CCJ and only for advisory opinions as distinct from determination of issues.
[28] Caribbean Integration Law, David S Berry pages 407-408

Caribbean Supreme Court. Secondly, national judges may only refer questions concerning the interpretation and application of the RTC, not any other treaty. Thirdly, the national judge must be 'seised' of the issue, meaning that the issue must be properly before the court for its consideration and determination. Fourthly, the national court is compelled to refer ('shall') such questions to the CCJ. But fifthly, the national judge must refer it only when he or she 'considers that a decision on the question is necessary to enable (the judge) to deliver judgment.'"

46. The parties in this case have referred to **HP Bulmer Ltd and another v J Bollinger SA and others** [1974] 2 All ER 1226 as the leading authority to guide this Court on the exercise of its discretion in considering a referral application. Notwithstanding that the referral mechanisms in that case still confers a wide discretion to the Court to refer or not, Lord Denning MR established four guidelines regarding the circumstances in which a decision from the Court of Justice was 'necessary'. These were that:

    a) The decision on the question of Community law must be conclusive of the case;

    b) The national court could follow a previous ruling of the Court of Justice on the same point of Community law thus avoiding a reference;

    c) The national court of tribunal may consider the matter was "acte clair" (the point is reasonably clear and free from doubt and there is no need to interpret the treaty but only to apply it) and decide the case itself; and

    d) Before determining whether to refer, it was in general, best to decide the facts first.

47. On the first guideline, Lord Denning went on to comment:

    "The English court has to consider whether 'a decision of the question is *necessary* to enable it to give *judgment*'. That means judgment in the very case which is before the court. The judge must have got to the stage when he says to himself: 'This clause of the treaty is capable of two or more meanings. If it means *this*, I give judgment for the plaintiff. If it means *that*, I give judgment for the defendant.' In short, the point must be such that, whichever way the point is decided, it is conclusive of the case. Nothing more

remains but to give judgment. The Hamburg court stressed the necessity in *Re Adjustment of Tax on Petrol* ([1966] CMLR 409 at 416). In *Van Duyn v Home Office* Penycuick V-C said: 'It would be quite impossible to give judgment without such a decision.'"

48. Lord Denning noted other factors such as the length of time it would take to obtain a reference, the expense involved and the wishes of the parties such that, if there was an objection, it would not be appropriate to refer it. Of course, these are matters that can legitimately be taken into account by the Court as it still retains a wide discretion whether to refer a question or not even though that the Court is of the view that it is necessary to obtain the opinion on the issue for it to deliver judgment.

49. It is unfortunate that there is no Caribbean precedent that sets out the principles which should guide the Court in the exercise of its limited discretion. However, what is clear from the distinction between the two referral mechanisms and the context of our referral system outlined above is that, the **Bulmer** principles should be applied with caution.

50. In **Bulmer** two of the biggest producers of cider in England brought an action against the French producers of sparkling wine produced in the Champagne district of France claiming that they were entitled to use the expression 'champagne cider' and 'champagne perry'. The French producers counterclaimed for an injunction to stop the English producers from using the word 'champagne' in connection with any beverage not being a wine produced in the Champagne district of France. On 1st January 1973 United Kingdom entered into the European Economic Community and the French producers thereafter amended their pleadings to include a claim for a declaration that the use by English producers of the expressions 'champagne cider' and 'champagne perry' in relation to beverages other than wine produced in the Champagne district of France was contrary to EEC Regulation 816/70, art 30, and Regulation 817/70, arts 12 and 13. They also sought to refer the two following questions to the Court of Justice of the European Communities for a preliminary ruling in accordance with art 177 of the EEC Treaty (a) Whether upon the true interpretation of the Regulations or any other relevant provisions of European Community Law the use of the word "Champagne" in connection with any beverage other than champagne is a

contravention of the Regulations or other provisions of European Community law and (b) Whether upon the true interpretation of Article 177 of the Treaty a national court of a member State should where there is no earlier decision of the Court of Justice of the European Communities refer to the Court of Justice such a question as has been raised herein, even though the court is not compelled to do so. The judge refused to make the order and the French producers appealed. The appeal was dismissed.

51. It was held that a High Court judge had a discretion whether to refer any such question involving the interpretation of the treaty to the European Court or to decide it himself. The judge was only entitled to refer questions on which he considered a decision was necessary to enable him to give judgment. In considering whether to exercise his discretion in favour of referring a point, he should take account of the time that it would take to get a ruling from the European Court, the expense that would be involved, the wishes of the parties, and the difficulty and importance of the point. In addition, references should be made sparingly and only if serious problems of interpretation arose.

52. It is clear in that case, unlike Ms. Hadeed's, that what was squarely before the Court, as a result of an amended pleading, was an interpretation of Treaty provisions of the EEC. One can evince in Lord Denning's approach a clear assertion of the authority of the national court to determine its own disputes, no doubt encouraged by the wide discretion conferred on the national court whether or not to refer a question to the ECJ under Article 177 (now Article 234). That may be a sensible approach for those Courts to adopt, of countries that are far larger than Caribbean states with more developed economies, in their journey to developing a regional economic space. However, it is a matter for Courts on this side of the Atlantic, as judiciaries of societies that share a painful history of colonialism, with the background and context of the need for Caribbean unity, to determine as a matter of policy whether referrals to the CCJ by our smaller island states should fall within such a fine **Bulmer** prism. In adopting such an approach it may well dent the laudable objectives of solidifying a Caribbean union and identity, developing its people in a larger economic space than the insular geographical spaces, which on its own, finds difficulty in leveraging an identity let alone rights on a global stage.

53. Lord Denning made the robust call for national courts to take on the task of speaking and thinking of Community law of giving effect to Community rights and to learn the new system. It was noted that the task of applying a Treaty is one for the national court. The question of interpreting the Treaty was acknowledged to be no longer the sole province of the national court "the English judges are no longer the final authority. They no longer carry the law in their breasts… the supreme tribunal for *interpreting* the treaty is the ECJ."[29] However, Lord Denning made it clear that it was the House of Lords which had no discretion to refer a question of interpretation or validity of Treaty. "The House has no option"[30]. However "no other English court is bound to refer a question to the European Court at Luxembourg. Not even a question on the *interpretation* of the treaty.. In England the trial judge has complete *discretion* … He can say: 'It will be too costly', or 'It will take too long to get an answer', or 'I am well able to decide it myself' If he does decide it himself, the European Court cannot interfere. None of the parties can go off to the European Court and complain."[31] Indeed, while that is an appropriate interpretation for the European Community no such interpretation can be placed on our section 6 of the CCJ Act. For Trinidad and Tobago in the Caribbean Community, our Court must refer such questions to the CCJ.

54. Lord Denning in setting the four pronged test above clarified this condition precedent to a reference as to whether a referral was "necessary". Here there appears to be similarity in our respective provisions. Although one is left to wonder whether the wide discretion of the English court not to concede too easily its jurisdiction to the regional court may have been the philosophical moorings for Lord Denning's restrictive interpretation of "necessary". As pointed out above Lord Denning explained that a decision is necessary if the point is conclusive of the matter; if there is no body of law or ruling which can guide the court in making its own interpretation and the point is not reasonably clear and free from doubt (Acte Clair).

[29] **HP Bulmer Ltd and another v J Bollinger SA and others** [1974] 2 All ER 1226 at 1232
[30] **HP Bulmer Ltd and another v J Bollinger SA and others** [1974] 2 All ER 1226 at 1233
[31] **HP Bulmer Ltd and another v J Bollinger SA and others** [1974] 2 All ER 1226 at 1233

55. What is apparent, however, in the text of section 6 is that it is not made clear that the issue of the interpretation and application must be the **only** issue for determination. It leaves open the question whether the Court may be seised of a number of issues but one of them concerns the question of the application and interpretation of the Treaty. It would be unwise for a Court in such an instance to proceed to deliver judgment without having that issue of Community law resolved. To that extent it is "necessary", a referral becomes one "of necessity" or "important".

56. The word "necessary" certainly takes its colour from its context. According to Black's Law Dictionary "necessary" may mean "something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful and proper and of greater or lesser benefit or convenience and its force and meaning must be determined with relation to the particular object sought." Depending on its context, Lindsay J observed in **MGN Pension Trustees Ltd v Bank of America National Trust and Savings Association** [1995] 2 All ER 355 that "necessary" can carry a range of meaning between indispensable on the one hand and "useful" or "convenient" on the other.[32]

57. In **Customs and Excise Commissioners v APS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party)** [1983] 1 All ER 1042, Bingham J adopted the test laid down by Lord Denning but added with regard to conclusiveness at 1054:

> "The first of those is that the point must be conclusive. On the facts of this case, as I understand it, the answer to be given by the Court of Justice will be conclusive in this sense, that if the answers are adverse to the defendant that will admittedly be the end of its case. If the answers are given favourably to the defendant, then depending on what those answers are and which of them are favourable, there may be some short issues or a short issue to be tried, but there is, I think, no doubt that the answer which the Court of Justice will give will be substantially, if not quite totally, determinative of this litigation."

58. In **Cilfit v Ministero della Sanitá (Ministry of Health) 77/83,** the European Court of justice

[32] Words and Phrases Legally Defined, Fourth Edition

reviewed Article 177 of the EEC Treaty and stated:

> "Secondly, it follows from the relationship between the second and third paragraphs of article 177 that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case."
>
> "…if, however, those courts or tribunals consider that recourse to community law is necessary to enable them to decide a case, article 177 imposes an obligation on them to refer to the court of justice any question of interpretation which may arise."

59. **Clifit** in interpreting the 3rd paragraph of Article 177 provides valuable assistance to interpreting the mandatory nature of section 6. It will not be necessary to refer a question of Community law to the regional Court if the question raised is irrelevant, or the provision has already been interpreted by the Court of Justice or the correct application of Community law is free from any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community. Unless these conditions exist, it must refer the question.

60. A less stringent approach than **Bulmer** has been explored in **Customs and Excise Commissioners v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party)** [1983] 1 All ER 1042:

> "In endeavouring to follow and respect these guidelines I find myself in some difficulty, because it was submitted by counsel on behalf of the defendant that the issues raised by his client should be resolved by the Court of Justice as the court best fitted to do so, and I find this a consideration which does give me some pause for thought. Sitting as a judge in a national court, asked to decide questions of Community law, I am very

conscious of the advantages enjoyed by the Court of Justice. It has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve. Where questions of administrative intention and practice arise the Court of Justice can receive submissions from the Community institutions, as also where relations between the Community and non-member states are in issue. Where the interests of member states are affected they can intervene to make their views known. That is a material consideration in this case since there is some slight evidence that the practice of different member states is divergent. Where comparison falls to be made between Community texts in different languages, **all** texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could rival. The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires. These are matters which the Court of Justice is very much better placed to assess and determine than a national court."[33]

61. **Bulmer** therefore does not have the final word on the interpretation of what is necessary for a referral. The ECJ has published the following guidelines on the referral jurisdiction which deserves repeating:

    (i) Any court or tribunal of a Member State may ask the Court of Justice to interpret a rule or Community law whether contained in the Treaties or in acts of secondary law if it considers that this is necessary for it to give judgment in a case pending before it. Courts or tribunals against whose decisions there is no

[33] **Customs and Excise Commissioners v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party)** [1983] 1 All ER 1042 at 1056

judicial remedy under national law must refer questions of interpretation arising before them to the Court of Justice unless the Court has already ruled on the point or unless the correct application of the rule of Community law is obvious.

(ii) The Court of Justice has jurisdiction to rule on the validity of acts of the Community institutions. National Courts or tribunals may reject a plea challenging the validity of such an act. But where national court (even one whose decision is still subject to appeal) intends to question the validity of a Community Act, it must refer that question to the Court of Justice.

Where, however, a national court or tribunal has serious doubts about the validity of a Community Act on which a national measure is based, it may, in exceptional cases, temporarily suspend application of the latter measure or grant interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers that the Community Act is not valid.

(iii) Questions referred for a preliminary ruling must be limited to the interpretation or validity of a provision of Community law, since the Court of Justice does not have jurisdiction to interpret national law or assess its validity. It is for the referring court or tribunal to apply the relevant rule of Community law in the specific case pending before it.

(iv) The order of the national court or tribunal referring a question to the Court of justice for a preliminary ruling may be in any form allowed by national procedural Law. Reference of a question or questions to the Court of Justice generally involves stay of the national proceedings until the Court has given its ruling but the decision to stay proceedings is one which it is for the national court alone to take in accordance with its own national law.

(v) The order for reference should contain a statement of reasons which is succinct but sufficiently complete to give the Court and those to whom it must be notified (the Member States, the Commission and in certain cases the Council

and the European Parliament) a clear understanding of the factual and legal context of the main proceedings. In particular, it should include:

- A statement of the facts which are essential to a full understanding of the legal significance of the main proceedings;
- An exposition of the national law which may be applicable;
- A statement of the reasons which have prompted the national court to refer the question or questions to the Court of Justice; and
- Where appropriate, a summary of the arguments of the parties.

(vi) A national court or tribunal may refer a question to the Court of Justice as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment. It must be stressed, however, that it is not for the Court of Justice to decide issues of fact or to resolve disputes as to the interpretation or application of rules of national law. It is therefore desirable that a decision to refer should not be taken until the national proceedings have reached a stage where the national court is able to define, if only as a working hypothesis, the factual and legal context of the question; on any view, the administration of justice is likely to be best served if the reference is not made until both sides have been heard.[34]

62. Lord Denning's interpretation of "necessary" as carrying the meaning of urgency or indispensable, a high threshold, is certainly representative of that national Court's robust approach of not ceding its jurisdiction too readily to the regional Court of Luxembourg (the European Court of Justice). However, what is necessary for our Court to deliver judgment on a question of Community law in the Caribbean is to be answered by Trinbagonians, West Indians and a Caribbean people. We ought not to look to answers in London nor in the Palais building of Luxembourg. To determine whether the referral is necessary given the context of the section discussed in this judgment, the Court should simply be satisfied that it is reasonable, proper, useful, or of great benefit to it. I have no doubt that so long as a Court

[34] **Cases and Materials on EU Law** by Stephen Weatherill, 6th Edition

is properly seised of such a question, deferring to the CCJ would be rationally connected to the object of ensuring uniformity of Community law and of great benefit to the Court in the delivery of its final judgment.

63. Of course, it must be understood that the issue must bear a correlation to the relief sought and the main dispute between the parties. It cannot be a hypothetical exercise or a Court asking an academic question. But I do not understand Lord Denning to be restricting our interpretation of section 6 that it must be the only issue in the case which will determine the outcome. It can be one of many others but its resolution is important for the outcome of the dispute. Indeed Stephenson LJ makes the point that even if such a question arises if the Court feels competent to deliver judgment without answering the question "they need not and indeed must not trouble the European Court by requesting a ruling."[35]

64. In my view, the only condition precedent for a referral is the determination by our Court that it is necessary to refer an issue concerning the interpretation or application of the RTC or relevant community instrument to the CCJ as without such a resolution of that issue it would not be able to deliver its final judgment. There is no residuary discretion to refuse to refer such a question once this condition precedent is satisfied. The philosophical underpinnings of having a central judicial authority rule on these questions remain intact in our referral system. I summarise my own views on the interpretation of the referral mechanism as follows:

    a) The Court must first be properly seised of an issue concerning the interpretation or application of the RTC in the main dispute.

    b) There is no discretion inherent in our Court not to refer a question of Community law to the CCJ once the condition precedent of necessity is satisfied.

    c) The mandatory obligation to refer, subject to the condition precedent, serves to fulfil the purpose of the referral mechanism of ensuring uniformity in our approach to Community law by utilising the expertise of the CCJ as the Community's central

[35] **HP Bulmer Ltd and another v J Bollinger SA and others** [1974] 2 All ER 1226 at 1239

judicial authority.

d) A deference to the CCJ on such questions is consistent with the "Caribbean project" on a single community which the RTC serves to implement.

e) The Court retains a wide discretion to determine what is necessary. The question for resolution must, however, be a live issue. It must not be irrelevant, hypothetical, academic or one the answer to which will not assist in the disposition of the case. The Court must be of the view that a referral is reasonable, proper or would be of material benefit to it in rendering its decision.

f) The applicant's use of the referral system must be a bona fide use of the Court's process. Indeed, there are three mechanisms open to receive the ruling of the CCJ on the interpretation and application of the RTC. A direct application by special leave, the referral mechanism and an advisory opinion by a member state. It would be wrong to use the referral mechanism as some dress rehearsal for a full blown application for special leave.

g) Inherent in the question of necessity would be the Court's case management powers of determining whether such a question fulfils the overriding objective of dealing with cases justly on the principles of equality, economy and proportionality.

h) The Court will not consider it necessary to refer the question if the provision is the subject of prior CCJ interpretation or it is reasonably free from doubt. In such an instance, however, the Court should still exercise caution in considering the referral unnecessary and too easily depriving itself of the specialised body of knowledge of the CCJ.

65. There is no need for local courts to fully embrace the task of interpreting and applying the RTC without the benefit of the expertise of the CCJ. Notwithstanding this view, I have applied both this liberal interpretation of "necessity" and that of **Bulmer** in the resolution of Ms. Hadeed's referral application.

The "Referral Issues" are not in issue in this case

66. The first difficulty I have with Ms. Hadeed's application is that the issues now being canvassed are not live issues in the constitutional motion as framed by her. The primary question whether this Court is seised of a question of Community law must be answered in the negative. Ms. Hadeed's substantive claim does not seek any relief for any alleged breaches of the RTC. This case concerns the admission requirements to practice law in Trinidad and Tobago under section 15(1A) of the LPA which engages the broader regime for admission to practice which is not only governed by the LPA but by the Council of Legal Education Act (CLE Act) and the Agreement Establishing the Council of Legal Education. While Ms. Hadeed has not raised any breaches by Trinidad and Tobago of the CLE agreement, the Defendant is correct that the point is relevant to the exercise of the referral jurisdiction to the extent that any consideration of section 15(1A) of the LPA by the CCJ entails a consideration of the CLE agreement to which the CCJ has no jurisdiction.[36]

67. Simply put, in the absence of "pleadings" by Ms. Hadeed of potential breaches of the RTC and an amendment to the pleadings to reflect same, the questions for referral do not arise from the constitutional dispute before this Court so as to require a determination by the CCJ. It is to be noted that in all the authorities referred to this Court on the question of referral, the question of a breach of Community law or the interpretation of a Treaty provision or instrument was squarely raised on the pleading of the parties or constituted the main dispute framed by them. This is not the case for Ms. Hadeed.

68. I understand Ms. Hadeed to be saying that she has established enough of a factual matrix to raise these issues of community law. She refers to the authority of **Capital and Merchant Bank Limited v The Real Estate Board; The Real Estate Board v Jennifer Messado and Co** [2013] JMCA Civ 29 and **Kersales (Harrow) Ltd v Wallis** [1956] 1 WLR 936, 941. However, in **Capital and Merchant Bank Limited** it was clear that the main issues were clearly articulated in the claim to allow for the Claimant to seek the relief even though it was not strictly pleaded. That is an uncontroversial proposition of law. However, this is not the case

[36] See **Jason Jones v Council of Legal Education** [2018] CCJ 2 (OJ)

here of the Claimant raising issues of breach of her community law rights to buttress her claim for constitutional law relief in either her Fixed Date Claim or affidavit in support. I had raised the question whether any Community rights will impact her articulation of the right to the protection of the law. However, on reflecting on her case as framed no issue of Community law comes into play.

69. It is unfair to the Defendant therefore to launch on the eve of the trial what is in fact a new case of alleged breaches of several articles of the RTC. Relevant in answer to such a case would include the Defendant's evidence that it has not breached the provisions of the RTC or the extent to which it has sought to comply with it or other regional instruments. A referral is simply unworkable if the parties have not had a fair opportunity to advance their full case.

70. Ms. Hadeed has presented for this Court simply to determine the question whether section 15(1A) has breached her right not to be deprived of property and liberty except by due process of law; the right to equality before the law; the right to equality of treatment before any public authority. There is nothing in her motion to suggest that her right to protection of the law was buttressed upon a breach of any international or regional obligations of the RTC. Insofar as her constitutional right of equal treatment is concerned, our Courts have already established an uncontroversial proposition, consistent with Community law. See **Annissa Webster v The Attorney General of Trinidad and Tobago** [2015] UKPC 10.

71. Insofar as other regional instruments such as the CLE Agreement may impact on her, **Jason Jones v Council of Legal Education** [2018] CCJ 2 (OJ) the CCJ determined that it does not have jurisdiction over the Council of Legal Education and the agreement which establishes it[37]:

> "As hinted in paragraph [2] above, the root of the problem for Mr. Jones and the many other persons in a similar position, according to the papers laid before the Court, of whom the Court must be mindful, is that the Agreement rather than the Treaty governs the matters they wish to alter. The Agreement Establishing the Council of Legal

[37] **Jason Jones v Council of Legal Education** [2018] CCJ 2 (OJ), paragraph 18

Education is as much a treaty as is the Revised Treaty of Chaguaramas. It is not suggested that the Treaty overrides the Agreement or that the Agreement has been terminated or its operation suspended by implication under Article 59 of the Vienna Convention on the Law of Treaties ("VCLT"). Therefore, this Court must accept, the Caricom States which are parties to the Agreement must in principle continue to give full force to the Agreement, and the provisions of the Agreement which govern admission to the law schools. Thus, Article 3 of the Agreement, which provides that the Council shall give automatic admission into the law schools of UWI LL B degree holders, is not a matter of policy that the Council or the law schools can change. Article 3 would have to, and can only, be altered by the parties to the Agreement not by the Council or anyone else for that matter."

72. In her claim as framed, there is no Treaty that is the subject of interpretation, no issue of a breach of Community rights as set out in her case. The Court is therefore not seised of any issue concerning a breach of Community law due to the manner in which the Claimant adopted to present its case.

Other avenue to articulate Community rights

73. Ms. Hadeed is not without remedy as she can still approach the CCJ in its original jurisdiction to articulate her grievance on Community rights. However, it would be impermissible to now dress up her constitutional motion as a claim for breach of provisions of the RTC.

It is not necessary

74. In determining whether it is necessary to make a referral, adopting the **Bulmer** test it is not necessary to make the referral. First, there is no particular article of the RTC cited by the Claimant which are capable of two or more meanings. Further, an interpretation which gives effect for either of those meanings is not conclusive of the case. If the articles were interpreted by the CCJ, this Court would still have to determine whether the discrimination in Section 15(1A) can be justified or is unconstitutional.

75. While the CCJ can only find if there has been breaches of Treaty law, the Constitutional

court would still have to apply and determine whether any treaty violation also amounts to a constitutional breach or is objectively justifiable. The determination of such issue does not cross the threshold of necessity and is not an essential element of the Court's determination of constitutionality.

76. Adopting the more liberal approach, the referral cannot be reasonable, proper nor of any material benefit to this Court in delivering a judgment on what has been cast as the breach of Ms. Hadeed's right to equal treatment and protection of the law under our Constitution on the premise that she has been denied the facility of section 15(1A) on the basis of her nationality. Community law in the context in which Ms. Hadeed has framed her case are hypothetical and academic and at best are riders, side issues and not determinative of the main dispute.

The overriding objective

77. The Court must still manage these proceedings by exercising its case management powers in granting or refusing a stay. In the context of the live issue for determination, a referral which would stay the proceedings which has been on trial footing on the eve of the trial is not necessary nor is it proportionate nor does it give effect to the overriding objective.

78. For the reasons set out in this judgment the referral application is dismissed. However, I deal almost by way of postscript the question of the constitutionality of the referral jurisdiction.

Unconstitutionality of the referral jurisdiction-The death of the CCJ?

79. Trinidad and Tobago has already suffered the ignominy of being the headquarters of the CCJ yet not subscribing to it as our final Court of Appeal. The LATT adds further salt to our regional wounds by questioning the validity or constitutionality of the obligation to refer contained in section 5(1) of the CARICOM Act and section 6(4) of the CCJ Act. Of course, as we work through the Caribbean Project it is proper that these questions be interrogated and the Court must robustly defend our Constitution. Both of these Acts were passed by way of a simple majority in Parliament and the RTC has been incorporated into domestic law by section 3 of the CARICOM Act, and section 8 has purported to make other legislation

subject of the CARICOM Act and the RTC.[38]

80. The LATT contends that in Trinidad and Tobago, the provisions on judicial independence are entrenched by section 54(2)(a) of the Constitution which requires that at the final vote in each House on any such Bill, it must be supported by the votes of not less than two-thirds of all the members of each House and therefore simply majority does not suffice.

81. It is not necessary for this Court to make a determination of this issue having regard to the disposition of the Mr. Hadeed's application for a referral. It is, however, a question which deserves anxious scrutiny and much fuller argument. In my view, our Constitution remains the supreme law. There is nothing inconsistent with our Court referring questions to other bodies for their determination with the constitutional duty to adjudicate on disputes. As part of our case management powers the Court routinely leaves questions of fact to be determined by experts, or the entire resolution of cases to ADR processes. Regardless of the absence of a special majority, a question may well arise whether the passage of the Act satisfies the test of proportionality as espoused by Lady Hale in **Suratt and others v The Attorney General of Trinidad and Tobago** [2007] 71 WIR 391 as adopted by the Court of Appeal in the majority decision of **Barry Francis v The State** Criminal Appeals Nos. 5 & 6 of 2010. There is force in the argument that a legitimate aim is served in having the national court refer questions of Community law to the central judicial body of the CCJ as a measure of ensuring uniformity in the application of the Community law and Community rights. It is an important asset in the creation and functions of the Caribbean Community as described earlier in this judgment. To do otherwise would be to encourage national courts to create a patchwork of jurisprudence on Community rights which may not be altogether coherent or consistent. The final answer to this is best left for another time.

82. If there is no logic in having the CCJ define for national courts in the Caribbean the full panoply of Community rights, then the hope of fashioning a uniform, seamless, whole and inseparable Caribbean may become lost again on the ragged rocks as it did so many years ago.

[38] No such contention has been made by the State.

"As 'West Indians,' we have always faced a basic contradiction of oneness and otherness, a basic paradox of kinship and alienation. Much of our history is the interplay of these contrarieties. But they are not of equal weight. The very notion of being West Indian speaks of identity, of oneness. That identity is the product of centuries of living together and is itself a triumph over the divisive geography of an archipelago which speaks to otherness. Today, CARICOM and all it connotes, is the hallmark of that triumph, and it is well to remember the processes which forged it – lest we forget, and lose it…. Each generation of West Indians has an obligation to advance the process of regional development and the evolution of an ethos of unity. Ours is endeavouring to do so; but we shall fail utterly if we ignore these fundamental attributes of our West Indian condition and, assuming without warrant the inevitability of our oneness, become casual, neglectful, indifferent or undisciplined in sustaining that process and that evolution."- Sir Shridath Ramphal.[39]

Vasheist Kokaram

Judge

[39] **"Is the West Indies West Indian?"** Eleventh Sir Archibald Nedd Memorial Lecture by Sir Shiridath Ramphal.

APPENDIX A

DRAFT REFERRAL ORDER

Before the **Honourable**

Dated the

UPON this matter coming up for hearing at a PTR.

AND UPON HEARING the Attorney at Law for the Claimant, the Attorney at Law for the Defendant and the Attorneys at Law for the First and Second Interested Parties.

AND UPON READING the Notice of Application the supporting Affidavit dated and filed herein on the.

IT IS HEREBY ORDERED that:

1. Pursuant to section 5 of the Caribbean Communities Act Chapter 81:11, Section 6 of the Caribbean Court of Justice Act Chapter 4:02 and Rule 11 of the Caribbean Court of Justice (Original Jurisdiction) Rules 2017 and Rules 26.1 (1) (u) and (w) of the Civil Proceeding Rules, the questions in the attached referral concerning the interpretation and/or application of the Revised Treaty of Chaguaramas (hereinafter referred to as "the RTC") for which it considers that a decision of the Caribbean Court of Justice on the question is necessary for it to deliver judgment are hereby referred to the Caribbean Court of Justice in its Original Jurisdiction for its determination.
2. The agreed facts, issues and background to the questions are set out in the attached referral.
3. The proceedings in the High Court are stayed pursuant to Rules 26.1(1)(f) and 26.1(1)(w) of the Civil Proceeding Rules pending the determination of the said referral by the Caribbean Court of Justice.

4. Upon receipt of the answer to the questions in the referral by the Caribbean Court of Justice the Registrar shall cause same to be published and the stay shall be lifted.

5. The Court shall relist the matter for hearing for further directions including the filing of further submissions on the effect of the Caribbean Court of Justice's determination on the relief sought in these proceedings.

6. That Costs be in the cause.

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High Court Judge

Supreme Court