Proceedings to clarify the title of land, an action for trespass and to recover compensation for damage to the land

[2019]GRC012

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

A W HOLDINGS CORP	**Plaintiff**
and	
THE CONSTABLES OF THE CASTEL PARISH	**Defendants**
and	
H M PROCUREUR (as Partie Publique)	**Interveners**
and	
H M RECEIVER GENERAL (on behalf of the Crown)	

Dates of hearing: 3-5 December 2018

Judgment handed down: 25 March 2019

Before: Sir Richard Collas, Bailiff

Advocate for the Plaintiff: Advocate N J Barnes
Advocate for the Constables: Advocate MGA Dunster
Advocate for the Interveners: Advocate R Gist

Cases, Texts and Materials referred to in Judgment:

Jefcoate v Spread Trustee Company Ltd [2013 GLR 220]

Article 195 of the Coutume Reformée of 1583

Terrien Livre V, Chapitre VIII

Stephens and Another v Cannon and Another [2005] EWCA Civ 222

Verlander v Devon Waste Management and Another [2007] EWCA Civ 835

Asher v Whitlock (1865-66) L.I.I.Q.B.1.

The Lord Advocate v Lord Lovat (1880) 5 App.Cas.273.

Chesney and Chesney v Kitson (Royal Court unreported judgment 20 February 1978)

Singleton v Le Noury (Guernsey Court of Appeal 5 June 1990)

Introduction

1. Cobo Bay is a beautiful and popular beach on the west coast of Guernsey enjoyed by beach goers, swimmers and fishermen for whom the bay provides a safe anchorage during the summer months. Close by on the other side of the public road is a thriving commercial centre with shops, a sub post office and other businesses. In between lies a small strip of land which has never been built on. In the past it has been used for the drying of seaweed and storing boats during winter months. More recently it came to be used as a convenient car park close to the commercial centre. Attempts by the Constables of the Parish to surface the area with tarmac and to control its use as a car park whilst continuing to allow boats to be stored on it have been hampered by disputes as to the ownership of the land. Unable to reach agreement, the Constables took matters into their own hands and arranged for the land to be surfaced without the consent of the Plaintiff who claimed ownership of it. The Plaintiff has brought these proceedings in trespass seeking to clarify its title to the land and to recover compensation for the damage caused by surfacing the car park.

The proceedings

2. The Plaintiff commenced the proceedings by Summons against the Constables tabled in Court on 25 October 2013. On 25 July 2014 the Court ordered that Her Majesty's Procureur and Her Majesty's Receiver General be joined as interveners (respectively "HMP", "HMRG" and "Interveners"), there being issues which it would be just and convenient to determine as between all parties. HMP was joined as Partie Publique and HMRG to represent the interests of the Crown. Position statements and/or skeleton arguments were filed by all parties. I am grateful to all counsel for their written and oral submissions.

3. The principal evidence on which everyone has relied is the historic research of Dr Darryl Mark Ogier who has held the offices of Island Archivist and Archiviste de la Cour Royale since 1996. His principal report was dated 7 July 2015. He produced a second report dated 3 July 2018 in which he replied to a number of questions raised by counsel. Dr Ogier gave oral evidence in support of the contents of his reports on which he was cross-examined and had the opportunity to expand upon his written evidence. His evidence has been of considerable assistance to me. He produced an academic report from an independent point of view, as required of an expert witness assisting the Court, containing historic evidence and records relating to the issues concerned in these proceedings particularly regarding the development of the Island's feudal system, rights of wreck and rights of common. In this judgment I rely heavily upon his research and opinions. I have resisted the temptation to recite the entire contents and intend no disrespect to Dr Ogier in merely summarising those parts which are, in my view, most relevant. I urge and encourage Dr Ogier to find an opportunity to publish his evidence and I hope that HMP and HMRG who commissioned the work will give him any assistance he may need in doing so.

4. At the hearing before me, the Plaintiff was represented by Advocate Nick Barnes. Advocate Mark Dunster appeared for the Constables and Advocate Robin Gist for the Interveners.

5. There were two other witnesses. First, Mrs Gillian Davies (formerly Lenfestey), the Dame of fief Le Comte, whose first husband Mr Hugh Lenfestey, from whom she inherited the fief, was Dr Ogier's predecessor and an acknowledged expert on the island's feudal system. Mr Thomas Dominic Saxton Holroyd ("Mr Holroyd"), the beneficial owner and director of the Plaintiff, also gave evidence.

6. There are three issues for me to resolve:

    1) the ownership of the area of land in dispute (which I will refer to as the "Disputed Land") the answer to which involves ascertaining the identity of the fief on which it lies;
    2) whether the Plaintiff has sufficient rights of possession of the Disputed Land to maintain an action in trespass against the Constables; and
    3) the extent of the common rights over the Disputed Land, whether they extend to the right for the general public to park cars and the Constables' rights, if any, to manage the area.

Ownership

7. A number of possibilities were mooted:

    1) the Disputed Land belongs to the Crown by reason of it forming part of fief St. Michel, a Crown fief;

    2) the Disputed Land lies on fief de Carteret and was conveyed to the Plaintiff by conveyance dated 4 December 2007 from the Dame of the fief, Mrs Holroyd, whose son, Mr Holroyd, is the beneficial owner of the Plaintiff;

    3) the Disputed Land lies on fief Le Comte out of which fief de Carteret was created and remains an *arrière* fief, to which it owes suit of court and sends a *vavasseur* to meetings of the court of fief Le Comte;

    4) the land is in the ownership of neighbouring properties having been included in successive conveyances of those properties; and

    5) no one has established title with sufficient certainty for me to make a finding of ownership.

8. All counsel were keen to point out that the concepts of "owner" and "ownership" under Guernsey law are different from English law. They used those terms largely in the English sense, being the sense in which they would most commonly be understood.

9. There is common agreement that the Disputed Land is part of a fief. The historic evidence of the division of the ducal domain in Guernsey into separate holdings in or before the period when Robert I was Duke of Normandy (1027-1035) indicates that the Disputed Land was not excluded. It was not retained by the Duke at that time but formed part of one of the holdings that were then created. There is also agreement that, at a later date, fief de Carteret was

created out of a larger fief. For many centuries it has been (and still is) a dependency of fief Le Comte but it may not originally have been created from that fief.

10. The earliest mention of fief de Carteret that has been found is in the roll of arrears of wheat rentes owed to the Abbey of Mont St Michel for the years 1283-1308. They include a reference to the *"feodum de quartret"*. Other records from that period confirm the interest of fief St Michel in the receipt of income from fief de Carteret.

11. At some time around the year 1300, some lands over which Mont St Michel had apparently asserted domain became lands over which the de Cheney family became interested. That may have been in 1289 when disputes between them were resolved by agreement. There is evidence that by 1329 the de Cheneys possessed fiefs Le Comte and de Carteret and their possession is further evidenced in a *partage* of de Cheney estates in Guernsey of 1350.

12. Fief de Carteret remains a dependency of fief Le Comte – and that is not disputed in these proceedings. Nor was it disputed that historically fief de Carteret has not enjoyed a status matching those of fiefs St Michel and Le Comte, a fact which leads to the conclusion that it was created out of one or other of those two.

13. The late Hugh Lenfestey was firmly of the opinion that fief de Carteret was created from fief Le Comte by reason, principally, of it being a dependency of the latter. Dr Ogier disagreed. He established that fief de Carteret existed before it became associated with fief Le Comte and so, he submitted, it could not have been created out of the latter. It is more likely that it was created out of fief St. Michel and was transferred to the de Cheney family when agreement was reached to transfer territory between the two.

14. The issue is significant in this case because if fief de Carteret were created from fief St. Michel, the Disputed Land may have been retained as part of fief St Michel and it may never have been within fief de Carteret. If so, the Disputed Land is now Crown land because St Michel is a Crown fief. That is the basis of the case put forward by the Interveners.

15. It is agreed that the Disputed Land has always been part of the foreshore (using that term in the broadest sense) even though the line of the coast and the high tide mark will have changed over the centuries and the actual coast line will have moved either through erosion by the sea or as a result of fresh material having been deposited. Thus, it is probable that the Disputed Land has never generated revenue, a fact which might explain why it is not *en perchage*, i.e. it is not mentioned in a Livre de Perchage, or at least not in any of the earliest Livres (an issue to which I return later).

16. Dr Ogier suggests (correctly in my view) that the best evidence of ownership would have been evidence of a claim to wreck on the foreshore adjacent to the Disputed Land. Unfortunately, there is no evidence of any one having claimed a right to wreck.

Wreck

17. The customary law of Normandy provided that goods washed ashore remain to the lords in whose fiefs they came ashore except for certain precious goods reserved to the Duke. That has not always been the position in Guernsey. The reason for departing from the customary

law may have been because of the amount of wreck that came ashore on this island, especially on the west coast. Whatever the reason may be, it is a fact that a different arrangement was agreed.

18. Dr Ogier produced evidence from a record dating from around 1270 and from the *extente* of Crown revenues in 1331 which show that the King took one share of any wreck and the Seigneurs of fiefs St Michel and Le Comte took another, equal, share which they then shared between themselves. Laurent Carey records that by the 18th century the King no longer took a share on dependencies of fief Le Comte. I refer later to a claim made in 1835 in respect of Fief de Canelly, a fief of similar status to fief Le Comte and situate near Les Salines, Rocquaine.

19. A passage in the custumal of fief Le Comte of 1406 was open to different interpretations:

> *"A l'avant dit fief* [le Comte] *apartient la Mare de Carteret la Claire Mare la Mare Hala avecq leur pecheries et apartenance et autres terres laissees pour communes le long le rivage de la mer du depuis le Chapelle de Nostre Damme de Pulayes jusques au ruisseau de la Fontaine de St Brioc qui decoull au havre de Rocquaine en la paroisse de St Pierre du Bois les Quelles terres vaqantes ou communes une moitie apartient à l'abé de St Michel et lautre moitie au fief d'Anneville* [i.e. le Comte] *"*

20. It is most likely that the vacant and common land lies, or includes land that lies, along the coast. The site of the Chapelle de Notre Dame is no longer known but Pulias lies well to the north of the Disputed Land and the stream of St Brioc is well to the south so we know that the area of coast described in the custumal covers most of the west coast of the island and includes the Disputed Land. Dr Ogier explained that in the original record, the fief named is that of Anneville which he says should be read as "Le Comte". The de Cheney family owned both fiefs and although Anneville was the smaller of the two, they regarded it as more important than Le Comte. The inquiry to which the custumal related was into the rights, servitudes etc. of fief le Comte.

21. Dr Ogier was of the opinion that the passage established that the vacant and common lands along the coast between the Chapelle de Notre Dame de Pulias and the St Brioc stream at Rocquaine were shared half and half by the Seigneurs of fiefs St Michel and Le Comte. Advocate Barnes submitted that the reference to fief Le Comte (or Anneville) includes fief de Carteret. He said that must be so because it is known, and not disputed, that the Mare de Carteret is on fief de Carteret. He said it means that the reference to fief Anneville includes not only fief Le Comte but also its dependency, fief de Carteret. (There are earlier records describing fief de Carteret as a dependency of fief Le Comte so we know fief de Carteret was a dependency of fief Le Comte at that time.) He submitted that the passage shows that fief de Carteret had a share of the vacant and common land.

22. Dr Ogier said the passage in the custumal is evidence that some arrangement had been reached between the two Seigneurs of fiefs St Michel and Le Comte. The sharing of ownership between the two fiefs is consistent with the sharing of the right to wreck between the same fiefs.

23. Advocate Barnes placed reliance on a *partage* of 28 January 1629 concerning fief de Carteret and fief de Bruniaux. The *partage* includes "*varec"* in the list of rights attaching to the two fiefs. Dr Ogier noted in his first report that the word *"varec"* had been interlined and, for that reason, he was suspicious of the accuracy of it. In his second report, Dr Ogier advised that a further *"lettre sous sceau"* of the *partage* had come to light in which the word *"varec"* was not interlined. He therefore concluded that it was authentically included in the original document.

24. He had a second reason to be suspicious of the *partage* which was that the reference to *"varec"* might have been applied to fief de Carteret by reference to the description of the other fief transferred under the same instrument. Dr Ogier reiterated that possibility under cross-examination from Advocate Barnes who asserted that the instrument confirmed that both fiefs claimed a right to varec.

25. Dr Ogier also has suspicions about a deed of 1510 which concerned fief Le Comte and its dependencies, including fief de Carteret. It included wreck in a long list of rights and other things. He said that the mention of wreck may refer to fief de Carteret or it may refer to one or more of the other fiefs included in the deed. There was also mention of *"courts leet", "tythings", "heriots"* and *"hundreds"* which were, and are, unknown in this island. In his expert opinion, the mention of those rights and of wreck might be formulaic as the document had all the appearances of a clause standard in conveyances of English manors in the period.

26. Other conveyances of the fief of 1525, 1535, 1615 (bis), 1897 and 2004 do not make any direct reference to wreck. So the two documents of 1510 and 1629 are out of the ordinary and are outnumbered by the other documents.

27. If the fief did not have a right to wreck, the reason may be that the fief did not extend to the foreshore. Hence, the Disputed Land may not have been on the fief.

28. A Livre de Perchage was prepared for each fief, normally once in every generation or so, in order to describe the areas of land included in a fief and the revenue that was owed to the fief. Land might be entered as *"communes"* or common land. Or, where the land had no economic value, it might be omitted.

29. The late Hugh Lenfestey carried out a detailed study based on Livres de Perchage covering the whole island. He had acquired or copied 676 Livres and by using them he had mapped all the fiefs on the island. His collection included various Livres de Perchage of fief de Carteret from 1551 to 1951 given to him by Col. Bean, a former Seigneur of the fief. Each Livre contains a statement that it describes the extent of the fief. The Disputed Land was not mentioned in any of his Livres de Perchage of any fief other than fief De Carteret. It is also not mentioned in any Livre de Perchage of fief De Carteret prior to 1878 when the following wording was put at the end of the Livre de Perchage above the signature of the Douzeniers:

"LE FIEF DE CARTERET s'étend de long du Rivage de la Mer depuis le Douit Pellé, qui est au sud des Bordages de Daniel Jean Mahy, en allant vers le nord jusq'à la rue de la Mare de Carteret. "

30. The same wording appears in subsequent Livres. Dr Ogier observed that 1878 may not have been the first time the wording appeared. It is likely that a Livre was prepared between 1819 and 1878 which has now been lost and there are no known copies.

31. There is no explanation of the additional the wording in 1878. We do not know what evidence was available to support it and do not know whether it was correct. The inclusion of the wording of the Livre de Perchage in 1878 is appears to have led other people to state that the Disputed Land is on fief de Carteret and is heavily relied upon by the Plaintiff. I have to consider whether it is correct.

Other, More Recent, Activities

32. A road and sea wall were constructed in the nineteenth century, details of which are to be found in Billets d'État and in a petition of the States to the Crown.

33. The Duke of Richmond map of 1787 shows no road but Cochrane's map of 1832 and an early photograph of unknown date show a road. A petition of the States of Guernsey to the Crown of 1813 describes erosion of the area and the need for improved sea defences. There were no seigneurial or proprietorial interests noted in the documents and it would appear that no objections were raised to the works subsequently carried out by the States. Had there been approval sought from a seigneur, the evidence might be conclusive as to the ownership of the Disputed Land.

34. Advocate Barnes attached great weight to correspondence in the post Second World War period which has involved the fief, States' departments, the parish authorities, successive Law Officers and a number of Advocates in private practice. Those distinguished legal luminaries, as Advocate Barnes described them, regarded the Disputed Land as being on fief de Carteret, almost without exception until doubts were raised around the time of the conveyance of the Disputed Land to the Plaintiff.

35. A special focus for the Plaintiff is an agreement prepared by advocates acting for the Castel Constables in 1987. No signed copy has been found. The copy in the Trial Bundle, produced by the Plaintiff, has been signed only by the two Constables. I refer to it as the "1987 Agreement". The named parties were the Constables, the then Seigneur and Dame of the fief (who had inherited it from their mother who in turn had inherited from her father, Colonel Bean) and the owners of six businesses in the neighbourhood. The businesses would have benefited from the Constables' plan to tidy up the Disputed Land by laying tarmac and creating a controlled car park.

36. The significance of the 1987 Agreement is that it contained a recital declaring: (i) that the Disputed Land is *"common land which forms part of the Fief Les Carterets";* and ii) that the Seigneur and Dame as joint owners were agreeing to allow the proposed works of

improvement to be carried out to the Disputed Land. No fully signed copy has been found but Advocate Barnes relied on certain references in later documents that, he said, appear to show that the 1987 Agreement was fully entered into.

37. One of the references was in a report prepared by the late Hugh Lenfestey entitled *"Les Dunes du Long Port"* dated 25 October 2008 wherein he wrote that the agreement had been made. Unfortunately, he did not say who had told him that, or whether he had seen a signed copy.

38. A second reference is in a letter written by David E Chester, who held the office of Constable of the Castel in 2004-2005 and subsequently became a Douzenier. The undated letter is addressed to *"Readers Letters, The Editor, The Guernsey Evening Press."* In it, he described meeting Mr Holroyd at sittings of the court of fief Le Comte which he attended as Constable. He described the 1987 Agreement as a *"pragmatic way of ticking a bureaucratic box"* namely that in the absence of a *"definitive owner"*, the then Seigneur and Dame could tick the box as *"owners"* to apply for planning permission for the work.

39. I do not read Mr Chester's letter as an admission on the part of the Constables that the 1987 Agreement was fully signed up. He did not expressly say so and the letter can be read as not containing such an admission. In any event Mr Chester was not Constable when he wrote and could not have made an admission binding on the parties. He was not involved as a parish official in 1987. The letter is, at best, hearsay and, in my judgment deserves only little or no weight.

40. The most conclusive proof that the 1987 Agreement was never concluded is in a letter from the President of the States of Guernsey Post Office Board dated 19 March 1987 signed by Deputy (and Advocate) R A Perrot who has, sadly, passed away recently. The Board was one of the named parties in the 1987 Agreement. Deputy Perrot wrote that his Board had just received advice from the Law Officers that it would be wrong to be involved in the Agreement. He said there must be considerable doubts about the statements as to title in the Agreement.

41. The Senior Constable replied to the President of the Post Office Board on 24 March 1987 saying the parish was unable to go ahead with the projected car park refurbishment. She cited a number of reasons including a *"problem relating to the legal ownership of what is considered to be 'common land'"*. The decision not to go ahead was announced in a public statement made that day by the Senior Constable.

42. In my judgment, that is conclusive proof that the 1987 Agreement was not signed at that time. It has not been signed subsequently and indeed the problems of ownership have not yet been resolved.

43. On 19 January 2007, Mr Holroyd wrote on behalf of his mother as Dame of the fief giving notice to the Constables terminating the 1987 Agreement on 22 January 2008. (One year's period of notice was provided for in the 1987 Agreement.)

44. On the third day of the hearing Advocate Barnes sought leave to amend the cause to plead prescriptive title. I declined the amendment for reasons I delivered at the time. I applied the legal principles set out by me in Jefcoate v Spread Trustee Co Ltd. The claim relied upon 20 years of possession from 31 December 1987 on the assumption that the 1987 Agreement was signed before the end of 1987. I held that there was no prospect of success in circumstances where the 1987 Agreement was never signed and because the reasons for not completing it included doubts as to the ownership of the Disputed Land. A second reason I gave was that the prescriptive claim was an attempt to defeat the Crown's claim that the land lies on fief St Michel but prescription does not run against the Crown. A third reason was that prior to the hearing Advocate Barnes had said in response to an enquiry from Advocate Dunster that the Plaintiff was not relying on prescription; the amendment would have been a complete U-turn and could not be made so late in the proceedings.

The Plaintiff's Evidence

45. Mr Holroyd gave written and oral evidence. He is the sole director of the Plaintiff and the son of the Dame of fief de Carteret. His mother purchased the fief by conveyance registered on 20 January 2004 and the Plaintiff acquired the Disputed Land from his mother by conveyance registered on 4 December 2007.

46. Mr Holroyd had a firm and unshakeable belief that the Plaintiff had good title. He relied on a number of pieces of evidence including:

    1) recent Livres de Perchage;
    2) the titles to neighbouring properties which are on fief de Carteret;
    3) many assertions made by successive Law Officers, a former holder of the office of Her Majesty's Receiver-General, successive Constables and their Advocates who have at different times and on many occasions asserted that the Disputed Land is on fief de Carteret and have on occasion requested the Seigneur or Dame of the fief to carry out work to maintain the Disputed Land; they have also told him to accept liability for injuries caused to members of the public who have fallen on the Disputed Land;
    4) a conversation he recalled having with the late Mr Hugh Lenfestey;
    5) maps which he believed were prepared by the late Mr Hugh Lenfestey which show the Disputed Land and adjacent foreshore as being on fief de Carteret;
    6) any land which might have been reclaimed from the sea would belong to the fief as it would have extended to and included the foreshore; and
    7) repeated assertions by previous owners of the fief that they were the owners of the Disputed Land, subject to common rights enjoyed over it.

47. Mr Holroyd acknowledged and accepted there were common rights namely the right to dry seaweed and the right to lay up boats during the winter months. He could not say when the rights were first exercised. There was some photographic evidence suggesting the latter right might be more recent, and may possibly have begun only in the 20th century.

48. The recent use of the land as a car park was not an ancient customary right. A former H M Procureur may have given that advice in writing but the letter is no longer available.

49. Mr Holroyd had objected to the work carried out on the Disputed Land by the Constables without permission of the owner, hence he had instituted the present proceedings.

50. He was cross-examined about the advice he received from his Advocates when the Plaintiff purchased the Disputed Land. The conveyance states that the vendor gave no guarantee of title and the description of the premises is *"all such right, title and interest that [Mrs Holroyd]* ***may*** *have in the Property"* (emphasis added).

51. Despite those words of qualification in the conveyance, Mr Holroyd denied that he had been told there were doubts as to the title. He also denied knowledge of receiving advice to that effect, advice that was recorded in a file note of a conversation with Advocate Nettleship who was responsible for preparing the conveyance on his behalf.

52. In summary, Mr Holroyd's evidence relied heavily upon the documents and his own inexpert opinion as to what they showed. He held an unshakeable belief in his company's title but he gave me the impression that he was recalling what he had wanted to be told and to hear, rather than what he was in fact told.

Evidence of Mrs Gillian Davies, Dame of Fief Le Comte

53. Mrs Gillian Mollie Davies made an affidavit and gave oral evidence. She is the Dame of fief Le Comte which she acquired by inheritance on the death of her first husband, John Hugh Lenfestey under a Will of Realty dated 10 October 2011 and following his death on 21 February 2012. Mrs Davies has since remarried. Mr Lenfestey had owned the fief since 1987 when he bought it from his cousin Brian Walter Langlois who, in turn, had inherited it from his mother who had acquired it on the death of her first husband Advocate W H Langlois who purchased it in 1951.

54. Mrs Davies gave a detailed account of the history and operation of the court of fief Le Comte. She exhibited to her affidavit a paper prepared by Mr Hugh Lenfestey dated December 1988 which was compiled from two copies prepared by Thomas Fouaschin in the 16th century (described as old and inexact) detailing the fief. It stated there were eight vavasseurs who each held property from the Seigneur of fief Le Comte. One of them, John Blondel, was the Seigneur of fief de Carteret. The record confirms that, at the end of the 16th century, fief de Carteret was a dependency of fief Le Comte.

55. Mrs Davies also described Mr Hugh Lenfestey's passionate interest in the feudal system and the thorough, meticulous and way in which he set about producing a complete set of maps of all the feudal holdings in Guernsey.

56. In her evidence, Mrs Davies said she was quite sure that the Disputed Land was not on fief de Carteret. As further evidence of that, she said that in about 1735, Eleazar Le Marchant, the Seigneur of an adjoining fief wanted to buy part of the dunes. The people from all over the

island who used it to dry their seaweed objected and appealed to the Court. The Court ordered that a wall be built to demarcate the extent of fief De Carteret. The wall, or the remains of it, are still evident and it shows that the Disputed Land does not lie on the fief.

57. Mrs Davies said that the Disputed Land should be part of fief Le Comte of which fief De Carteret formed part but successive Seigneurs have not claimed the Disputed Land over a long period of time.

58. She also said that Mr Hugh Lenfestey compared the extent of the feudal holding of fief de Carteret between the earliest Livre de Perchage of 1551 and those of 1922 and 1951. He found that the feudal holding had changed neither shape nor size over that period of four centuries.

The Constables' Case

59. The Constables, through Advocate Dunster, were not advancing a positive case of title and were not claiming title for themselves. They submitted that the Plaintiff had failed to discharge the burden of proving, on the balance of probabilities, its title to the Disputed Land. If that submission failed, they sought to establish that the Disputed Property is subject to certain ancient and inalienable common rights under the management of the Constables.

60. As part of their submission that the Plaintiff had not provided good title, they contended that owners of contiguous land might have acquired title pursuant to the Norman customary law provisions relating to alluvial land. Article 195 of the Coutume Reformée of 1583 stated that "*Les terres d'alluvion accroissent aux proprietaries des heritages coutiguz, à la charge de les bailler, par adveu au Seigneur du fief, & en payer les droits seigneuriaux, comme des autres heritages adjacens, s'il n'y a titre, possession ou convenant au contraire."*

61. The *"aveu"* was an acknowledgement made by a tenant to his Seigneur at a sitting of the Seigneurial court followed by payment of the customary sum (5 sol tournois) in relief of normal feudal dues. Under the customary law, alluvial lands could include lands *"saved from the sea"*. (Terrien Livre V, Chapitre VIII). The Disputed Land could have become alluvial land following the works carried out in the early 19th century to construct a sea wall and to give protection from storms and large tides.

62. There is no record of any *"aveu"* having been made to the Seigneur of fief de Carteret or any other fief so there is no evidence that any Seigneur accepted the Disputed Land as an accretion to any of the contiguous properties. Even if the property owners had acquired it in that manner, it would not have defaulted to the ownership of the fief.

63. Advocate Dunster's title researches showed that in a number of conveyances the contiguous properties lying to the east of the Disputed Land have laid claim to the Disputed Land. The line of title starts with a conveyance from Leopold Davis Le Brun to Daniel Jean Mahy dated 11 May 1871 describing the premises therein conveyed as lying to the east of the Banque du Long Port. Mr Mahy's subsequent sale to Baron de Saumarez of 9 January 1892 said the premises lay to the east of the Banque du Long Port with the main road between.

64. The conveyance from Baron de Saumarez to Cecil Stonelake of 13 August 1932 was amended by a note recorded in the margin which declared that the premises included all rights vested in the vendor in *"les Dunes"*. Similar language appears in subsequent conveyances describing the western boundary of the contiguous premises by references to Les Dunes du Long Port, including when the original field was subdivided and most recently a conveyance of the supermarket.

65. None of the owners of those premises were party to these proceedings.

Ownership – Discussion

66. Having summarised the evidence put forward in support of the competing claims and possibilities, it falls to me to consider whether the burden of proof has been discharged. The only party claiming any relief in these proceedings is the Plaintiff whose claim will fail if it has not established either that it owns the Disputed Land or has sufficient possession of it to bring the action. Whilst HMP and HMRG assert that it is more likely that the Disputed Land is on fief St Michel they are not seeking any declaration.

67. If I were not satisfied the burden of proof has been discharged by the Plaintiff, I could simply dismiss the action. However, it is incumbent upon me to say on which fief it is more probable that the Disputed Land lies. The arguments over the Disputed Land have been on-going for several decades and they have taken up a considerable amount of the time and energy of those volunteers who have held office as Constables of Castel during that time. It has occupied successive Law Officers and their staff. In addition the States Archivist has compiled a substantial report in which he has brought together, in a thorough academic report, all the available ancient records and evidence. In short, the Disputed Land has received considerable attention and substantial resources from many public servants. It is unlikely that any further historic documents will become known that could help to shed light on the problem. I am as well placed as anyone has ever been, or is likely to be, to reach a decision.

68. Advocate Dunster drew my attention to the decision of the Court of Appeal in Stephens and Another v Cannon and Another [2005] EWCA Civ 222:

> *"(a) The situation in which the court finds itself before it can despatch a dispute issue by resort to the burden of proof had to be exceptional.*
>
> *(b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following inquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.*

(c) *The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.*

(d) *A court which resorts to the burden of proof must ensure that others can discern that it had striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.*

(e) *In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary."*

69. The meaning of *"exceptional"* was clarified by the Court of Appeal in Verlander v Devon Waste Management and Another [2007] EWCA Civ 835:

> *"When this court in Stephens v Cannon used the word 'exceptional' as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence, conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his case. The burden of proof remains part of our law and practice – and a respectable and useful part at that – where a tribunal cannot on the state of the evidence before it rationally decide one way or the other."*

70. Whilst those decisions are not directly on point, I accept the encouragement and indeed the duty to try to bring clarity to a confused and vexed problem.

71. The Plaintiff has established beyond doubt that over a long period of time successive Seigneurs and Dames of fief de Carteret have asserted a claim that the Disputed Land lies on their fief. Whilst successive Law Officers, Advocates, Constables and others did not then dispute that claim, that is not sufficient to establish that the Disputed Land is lawfully situate on fief de Carteret. Some of those who have accepted the assertion have not carried out their own research but merely accepted what they have been told by others. In some cases, they have relied upon the modern Livres de Perchage beginning with the one published in 1878. Earlier Livres de Perchage up to and including 1819 did not make the same claim. If both series of Livres de Perchage are correct, something must have happened between those dates to transfer the land to fief de Carteret from whichever fief it had previously been part of. The Plaintiff has not been able to produce any instrument of transfer of that period. The Plaintiff does not rely upon the possibility that it might have been alluvial land saved from the sea, even if he did, the customary law cited by Advocate Dunster (quoted above) would have had

the effect of adding the land to the contiguous properties, not to the ownership of the Seigneur.

72. I ruled that the Plaintiff could not pursue a claim of acquisitive prescription based on a long period of possession because he did not initially rely upon it in these proceedings and when he attempted, late in the day, to amend his pleadings, I held that he was too late. More significantly, if the land had previously formed part of fief St Michel as Dr Ogier believes is most likely, it would have been within the domain of the Crown against whom a claim in prescription does not run.

73. There are many unknowns in this case. The reason for changing the wording of the Livre de Perchage in 1878 (or one generation earlier if the change had been made at that time and the livre subsequently lost) is one of the unknowns.

74. Another unknown is what happened in the 13th, 14th and/or 15th centuries when arrangements were made and agreements reached between successive Monarchs and members of the de Cheney family.

75. Early records of the Vale Priory and the Abbey of Mont St Michel including the roll of arrears for the years 1283 to 1308 and another undated roll from that period together with the Priory accounts for the year 1314 show that the Abbey was in receipt of income from fief de Carteret. I accept the conclusion of Dr Ogier that those records establish both that fief de Carteret existed and that it was a dependency of fief St Michel. Later records from 1329 onwards including the *partage* of de Cheney estates in Guernsey of 1350 show that fief de Carteret had by that time become a dependency of fief Le Comte. The reason why, and the manner in which, it came to be transferred from one to the other can no longer be established with certainty although A H Ewen's explanation of the discord between the Abbot of Mont St Michel and the de Cheney family which concluded in 1289 is a plausible explanation but does not explain why 30 pounds was paid to the Priory from *"salineles et Quartrahit"* in 1314. At around the same period and possibly as part of the same settlement, an agreement or arrangement was made between the King, the Abbot of Mont St Michel and the de Cheneys to depart from the provisions of Norman customary law regarding the right to wreck coming ashore on their respective fiefs on the west coast of Guernsey. The rocks off the west coast are notoriously dangerous and the goods washed ashore from those wrecks will have provided a valuable source of revenue for each of them. The arrangement reached between them is described in the *extente* of Crown Revenues of 1331. The King had one share and the Abbot of Mont St Michel and the de Cheneys shared equally between themselves another share equal to that of the King. Fief de Carteret is not mentioned.

76. The custumal of 1406 describing the extent of fief Le Comte including its dependencies included the vacant and common lands as belonging half to the Abbot of Mont St Michel and the other half to the fief Le Comte. Whilst it does not mention fief de Carteret, La Mare de Carteret is mentioned and that, it is accepted, is on fief de Carteret.

77. Counsel left it to me to determine the meaning of *"le rivage de la Mer"*. This I have done by reference to a dictionary in the Bailiff's Chambers entitled "A New Dictionary of the French

and English Languages" by E-C Clifton and Adrian Grimaux published in London by Hachette and Company. The date of publication is not recorded but I believe it dates from the latter part of the 19th century. It defines *"rivage"* as *"shore: a) land bordering on the sea, and washed by the waves; beach, strand, sea-shore; coast, sea-side, side".*

78. Accepting that definition, I conclude that the area of vacant and common lands described in the custumal extends to the beach and therefore extends beyond the Disputed Land. I accept that the reference to fief Le Comte includes its dependencies such as fief de Carteret. But the custumal does not say whether the Disputed Land lay within the boundaries of fief St Michel or within the boundaries of a fief belonging to the de Cheneys whether fief de Carteret or fief Le Comte.

79. When Laurent Carey was writing in the mid-18th century, arrangements had changed and the King no longer claimed his share of wreck on minor fiefs. The Seigneurs had the rights of any wreck washed ashore on their respective territories.

80. There is no record of any claim to wreck on the Banque du Long Port. We do not know who would have claimed the right to any wreck. If there were a record of such claim, it might well have been conclusive evidence as Dr Ogier suggested. Instead, it is just another unknown.

81. The Seigneur of fief Canelly, a fief of similar status to fief de Carteret laid a claim to wreck near Les Salines, Rocquaine in 1835. Without knowing how or why he came to possess that right, it cannot be assumed that the Seigneur of fief de Carteret enjoyed the same rights in respect of the foreshore adjacent to his fief.

82. The *partage* of fief de Carteret and fief de Bruniaux of 28 January 1629 mentions *"varec"*. Dr Ogier has identified two copies of the document – one in which that word is interlined and one in which it is not. I accept his opinion that the authentic version contained the word *"varec"* in the original. However, he was suspicious of the claim for another reason. It is unclear whether the reference is to the other fief included in the *partage* and not fief de Carteret. A conveyance of the fief of 1510 is formulaic according to Dr Ogier and thus unreliable. A greater number of conveyances in 1525, 1535 and 1615 (bis), 1897 and 2004 do not make any direct reference to wreck. Advocate Barnes cited an antiquarian report published by La Société Guernesiaise in its Report and Transactions of 1962 prepared by the honorary secretary, T F Priaulx. As with many other opinions around that time, it is not based on the same detail of research as Dr Ogier has been able to produce in his report and cannot be considered to outweigh the evidence that supports Dr Ogier's opinion.

83. The works carried out by the States of Guernsey to improve the sea defences and build a sea wall in the early 19th century did not involve any Seigneurial consent which might be an indication that the land involved was not claimed by a local Seigneur.

Ownership – Conclusion

84. In summary, the earliest records available contain no reference to fief de Carteret having rights over the foreshore. Although there are some references to rights to wreck in

subsequent documents, they are outnumbered by other documents in which no such rights are claimed and in any event are of dubious accuracy. Thus it is more likely than not that the Livre de Perchage of 1819 (along with the earlier Livres de Perchage which did not mention the foreshore or vacant or common lands adjacent thereto) is accurate.

85. In the absence of any contemporaneous explanation for the change in the wording of the Livre de Perchage and in the absence of any document showing a transfer of the Disputed Land between that date and 1878, Advocate Barnes has been unable to show on the balance of probabilities that the Livre de Perchage of 1878 is correct. If the Livre de Perchage is incorrect, all the later opinions and advices given by eminent and distinguished people who based their opinion on it are also incorrect.

86. For the reasons I have given, the Plaintiff has not discharged the burden of proof of establishing that the Disputed Land is on fief de Carteret.

87. I could leave the matter there but I will go further and consider who is most likely to have the best claim to title.

88. The late Hugh Lenfestey is held in the highest regard for his knowledge of the Guernsey feudal system and his mapping of the island's fiefs. It is with reluctance that I disagree with his opinion and it is a matter of deep regret that he is no longer with us and unable to defend his view. However, I accept the reasoning of Dr Ogier.

89. Fief de Carteret existed before it became a dependency of fief Le Comte and therefore could not have been created out of fief Le Comte. It must have been created out of fief St Michel. It is more likely than not that the Disputed Land is not on fief Le Comte. On the evidence before me, I conclude it is more likely that the Disputed Land lies on fief St Michel. Whilst it might seem improbable that the Abbot of Mont St Michel would have wished to retain a narrow strip of land between fief de Carteret and the sea, we know from the early records that the vacant and common lands also had value, probably because of the importance of wreck and the revenue it generated to the Seigneur; if those lands were not valuable, the Seigneurs would not have agreed to share them. That gives a plausible reason to explain why the Seigneur of fief St Michel might have retained the Banque du Long Port and retained it (including the Disputed Land) in fief St Michel when he created fief de Carteret.

The Plaintiff's claim based on possession

90. An alternative basis upon which the Plaintiff rests its claim relies upon an English authority Asher v Whitlock (1865-66) L.I.I.Q.B.1. and a decision of the House of Lords on appeal from the Second Division of the Court of Session in Scotland, The Lord Advocate v Lord Lovat (1880) 5 App.Cas.273. Advocate Barnes submitted that Guernsey law would follow the same legal principles. In my view that is a bold assertion which may not be correct. But, for reasons that will become clear, I do not need to decide the question in this judgment.

91. The principle he asserted is that the Constables cannot show a good title to the Disputed Land but the Plaintiff's action could succeed against the Constables if the Court were satisfied that

the Plaintiff has possession of the Disputed Land. In his closing submissions, Advocate Barnes acknowledged that the only sort of possession available to the Plaintiff under those principles is possession pursuant to the 1987 Agreement. He relied upon the evidence I have cited earlier in this judgment to show that the agreement had been fully completed and that the Constables had acknowledged that to be so. I have rejected that evidence and reached the conclusion that the 1987 Agreement was never fully completed, in part because of concerns over the statements therein concerning the Plaintiff's title claim.

92. The evidence of physical possession relied upon in Asher was the enclosing of a piece of land by the side of the highway, an open and visible act of taking possession of the land in question. In Lovat, the acts involved fishing rights on a stretch of a river in Inverness-shire.

93. In the present case, physical evidence of possession by the Plaintiff is more difficult to establish in view of the exercising of common rights of *Sechage* and the right to lay up boats by members of the public on the Disputed Land. So, the only act of possession relied upon is the 1987 Agreement.

94. In conclusion, the Plaintiff has not established sufficient evidence of possession to found an action in trespass against the Constables based purely on possession, even if Guernsey law follows the legal principles relied upon by the Plaintiff.

The rights of common

95. The third issue on which the Plaintiff had to succeed concerned the extent of the common rights exercisable over the Disputed Land and whether the Constables had any role in managing those rights over the land on behalf of parishioners. These are matters of customary law. The judgment of Frossard, DB, in Chesney and Chesney v Kitson (Royal Court unreported judgment 20 February 1978) defined the essence of customary law:

> *"Coûtume est un droit non écrit, un droit municipal de quelque lieu, de quelque ville, de quelque contrée et de quelque pays, introduit par l'usage, du tacite consentement de ceaux qui s'y font volontairement soumis ; et cet usage, après avoir été observé pendant un temps considérable, a force et autorité de Loi.*
>
> *Pour qu'une Coûtume soit valablement introduite, plusieurs conditions sont requises :*
>
> 1. *Le tacite consentement de ceux qui sont demeurans dans le lieu ou elle s'est introduite.*
> 2. *Qu'elle soit conforme à la raison.*
> 3. *Qu'elle ait été obervée pendant un temps raisonable, c'est-à-dire pendant quadrant and, selon quelques Interprètes ; mais je (Ferrière) crois que c'est une chose qui depend dela prudence du Juge."*

96. The two maxims cited by Frossard, DB in the same judgment are also applicable.

"1. La Coûtume fait la Loi et la meilleure loi est la coûtume du pays ;

2. l'usage du pays est la meilleure interpretation d'une loi. "

97. Advocate Barnes made a bold submission that the Constables have no duty or right to manage privately owned land without the consent of the owner. In his reply to the skeleton arguments of the Constables and the Interveners, he went further and said *"the Plaintiff is unaware of any right of the Constables to carry out works to, alter and control the use of land which they do not own in respect of which they do not have the owner's permission, whether that land is in public or private ownership. These so called rights are fictional and appear to have been invented for the purpose of these proceedings."*

98. Those views were strongly challenged by the other parties and, in my judgment, they were correct to do so. I will deal with customary rights briefly without setting out in detail the historical evidence on which the parties relied. It is not the purpose of this judgment to be attempting to write a historical monograph, however interesting that would be.

99. Dr Ogier gave a number of examples of instances where parish constables manage land, including land which is in private ownership. They include the administration of L'Ancresse Common which is governed by an Ordinance of the Royal Court of 17 December 1823 (made permanent by another of 11 March 1826) although in his opinion custom involving the Constables and Douzaine would have prevailed prior to then. A second example was land at La Grande Mielle to the north of the Disputed Land which was described by the late Peter Girard in an article published in the Transactions of La Société Guernesiaise for the year 1958 entitled *"Enclosures – Grand Rocque – D"*. He referred to work having been authorised by Acts of Court dated 1769. An example in St Peter Port is the maintenance of the streets in the Commercial Arcade and various steps and alleyways of that parish. Dr Ogier also cited evidence of the Constables managing land at Les Dunes, Vazon belonging to the heirs of J E B Tetley. A further example involved an application to the Royal Court on 26 November 1748 concerning common land in St Martins.

100. Advocate Barnes' reply to those examples was that in each of them the Constables were acting pursuant to legislation or under the authority of an Act of Court or with the consent of the land owner.

101. Advocate Gist challenged that view. In his submission, the Constables have the rights and powers necessary to manage land. The Ordinances relied on by Advocate Barnes could not alter the customary or superior law; they merely declare how the law is to be applied in individual instances.

102. I accept Advocate Gist's submissions and Dr Ogier's analysis of the historic position. As he said, the Constables are the executive officers of the parish douzaines. They and the douzaines are elected by the parishioners they represent. Where land is being used in common by a group of parishioners or inhabitants, it is inevitable that some management of the land will be needed and regulations may have to be issued governing the use of the land.

The historic research demonstrates that parish constables have fulfilled the necessary managerial role in different parts of the island. Doing so is entirely consistent with their functions and the purposes for which they are elected and appointed. Where the land is in private ownership but subject to common rights, the Constables would have regard to the interests of the private owner. They might therefore act with the agreement of the owner and, if there were disagreement, they might apply to the Royal Court to confirm their powers and to approve their actions. In some instances such as L'Ancresse Common, it is understandable that, given the extent of the land and the number of private owners owning individual sections of it, it would have been considered convenient to have legislation establishing the extent of their respective rights and obligations. The question of whether the parish constables could act against the wishes of a private owner is an issue that I do not need to consider in this judgment.

103. The Plaintiff claimed that use of the Disputed Land as a car park is not consistent with the established rights to dry seaweed and to lay up boats but is a right of a totally different nature. Singleton v Le Noury (Guernsey Court of Appeal 5 June 1990) is authority for the proposition that a right of way over land is not implicitly limited to such purpose as may have existed at the time of the grant and that such right will be construed as widely as possible. That decision dealt with servitudes but I see no reason why the same principle should not apply to common rights.

104. If the Plaintiff had established good title to the land, subject to common rights, those rights would be limited to the right to dry seaweed and the right to lay up boats during the winter. Those uses are connected with the sea; with man gathering seaweed and fish, products of the sea. The use of a car park on the Disputed Land to enable persons to go shopping in the immediate neighbourhood is, in my judgement, use of a fundamentally different nature.

105. However, the Disputed Land is not in private ownership. It is vacant land of fief St Michel, a fief of the Crown, which has been managed by the Constables of the Parish for many centuries for the benefit of inhabitants. It is not for me to say that the land could not be used as a car park if that is what the Constables have decided is the best use of it in the interests of parishioners and others. It might be for the Crown to object to such use but it has not done so. The use of the Disputed Land as a car park has continued for a number of years, exercised in a way which did not preclude the laying up of boats on part of the Disputed Land. The Crown has not objected and, in my judgment, it was within the powers of the Constables to take such steps as they thought were in the public interests to improve the land and manage it in such manner as they considered appropriate, after having obtained planning permission.

The conveyance of 4 December 2007

106. If the Disputed Land had lain on fief de Carteret, I had some concerns as to whether the terms of the conveyance to the Plaintiff were sufficient to convey the vendor's right title and interest in the land to the Plaintiff. After hearing counsel and with the benefit of Dr Ogier's knowledge of similar conveyances of land that previously had not been conveyed from the owner of the fief to a *tenant*, I am satisfied that the conveyance is sufficient, noting that

according to its terms there was no guarantee of title. There can be no objection to the jurisdiction of incorporation of the purchasing company being in the British Virgin Islands.

Damage to the Land

107. It was accepted that the works to the land were carried out by, or at the instance of, the Constables. The Plaintiff led no evidence as to the quantum of damage and I make no findings regarding quantum.

Conclusion

108. I have accepted the detailed research and careful analysis of Dr Ogier. My finding is that the Disputed Land does not lie on fief de Carteret and that the Plaintiff has not established sufficient evidence of possession of the Disputed Land to bring an action in trespass against the Constables. Even if there was such evidence, I am not able to say whether the English legal principles relied upon by the Plaintiff are part of Guernsey law and I would require further submissions from counsel as to the extent of the customary law of trespass in this island.

109. Rather than simply dismissing the Plaintiff's action, I have gone further. It is most unlikely that any further historic documents will ever be found. I believe I have the best evidence that could be produced. It is in the public interest to bring the long running dispute over the ownership of the Disputed Land to a conclusion. The Crown in its capacity as Seigneur of fief St Michel has the best claim to title based on the historic evidence available. The Constables have the right to manage the Disputed Land on behalf of parishioners and other members of the public subject to any views the Crown may express whilst respecting the historic common rights to dry seaweed and to lay up boats.

110. Any application from any party arising from this judgment is to be tabled within seven days of the formal handing down of the judgment.