

An appeal concerning the identity of the feudal unit of land, the fief, of which the Disputed Land is part.

[2020]GCA014

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 528

Before:

**James McNeill QC, President
George Bompas QC
Sir Michael Birt**

Between:

**A W HOLDINGS CORP
Plaintiff/Appellant**

and

THE CONSTABLES OF THE CASTEL PARISH

Defendants/First Respondents

and

H M PROCUREUR (as Partie Publique)

and

H M RECEIVER GENERAL (on behalf of the Crown)

Interveners/Second and Third Respondents

**Advocate N J Barnes for the Appellant
Advocate M G A Dunster for the First Respondents
Advocate R Gist for the Second and Third Respondents**

Judgment handed down: 12 March 2020

JUDGMENT OF THE COURT

THE PRESIDENT:

Introduction

- 1 This is an appeal from a decision of the Royal Court (the Bailiff, Sir Richard Collas, sitting without Jurats) given on 25 March 2019. The subject of the appeal is a strip of land, in the Parish of Castel, lying immediately to the north of the Route de Carteret and to the east of the Rue de la Saline (the part of the coast road on the west of the Island in the vicinity of Long Port and Cobo village). We refer to this land as “the Disputed Land”, the name which the Bailiff gave to the land in his judgment.

Background

- 2 The Disputed Land lies between the Rue de la Saline and a parade of shops, sub-post office and other premises. For a number of years the Disputed Land has been used as to one part, the southern part, as a car park for shoppers and visitors. However, there is no dispute between the parties, and the Bailiff accepted, that the Disputed Land as a whole is common land over which the local community has a right to store boats during the winter months and to use for drying seaweed; and part of the Disputed Land, the northern part, continues to be used for storing boats.
- 3 In the past, before the early nineteenth century when coastal defences were constructed, the Disputed Land was part of the dunes of La Banque du Long Port, the Banque du Long Port comprising an area of unproductive coastal dunes. We refer later to evidence concerning the nature of the dunes and their development. This is relevant in relation to the significance to be attached to what is (and is not) recorded in the *livres de perchage*, discussed below and central to the issues in the case.
- 4 Also, and importantly as noted in paragraph 9 of the Bailiff’s judgment, there is no dispute that the Disputed Land lies within and is part of a feudal fief. It is this feature of the case which makes it remarkable, giving rise to considerations of the history of land organisation in Guernsey dating as far back as the eleventh century.
- 5 The issues in this appeal require some understanding of the system of feudal land tenure; an ancient system of law which has been adopted in various forms in various jurisdictions and which remains in operation in certain parts of this Island. The issues also require an appreciation of the ways in which individual elements of the system have been and are recorded and, accordingly, how the existence of a particular element can be proved in litigation.
- 6 However, as with many other factual circumstances which are presented to the civil courts, the unusual nature of the matter does not lead to a different standard of proof: the civil standard of balance of probabilities still applies, but the evidence required to establish the fact contended for may require greater cogency than in more usual matters. On the other hand, the establishment of rights over land almost invariably requires an appraisal of formal documentary evidence; and the construction of relevant documents both as to formal validity and as to effect is a matter of law. These are the legal considerations which underlie the response of this court to the appeal before it.

The proceedings below

- 7 In Guernsey the control of land set aside for public use and, to an extent, its development, is in some measure in the hands of the Constables of the Parish. The Disputed Land is situated in the Parish of Castel and, for some time, the Constables of that parish have wished to tarmac the southern part of the Disputed Land and to control its use as a car park. After a period of some dispute as to rights over the Disputed Land, the Constables arranged for the southern part to be surfaced and that work has led to the present proceedings. The Plaintiff, the appellant company, claiming to be owner of the Disputed Land, brought these proceedings against the Constables (the First Respondents on the appeal) for trespass, seeking to restrain the Constables from continuing their works and to have them reinstate the land. Her Majesty's Procureur (the Second Respondent on the appeal) has been joined as *Partie Publique* and Her Majesty's Receiver General (the Third Respondent on the appeal) has been joined to represent the interest of the Crown.
- 8 As recorded by the learned Bailiff in paragraph 3 of his judgment, the principal evidence on which all parties relied in their submissions to him was that which came from the historic research of Dr. Darryl Ogier. Since 1996 he has held the offices of Island Archivist and *Archiviste de la Cour Royale*. Dr. Ogier produced two reports and gave oral evidence at the trial when he was cross-examined on his reports. The Bailiff indicated that he relied heavily upon Dr. Ogier's research and opinions. Dr. Ogier's reports had been produced from an academic and independent standpoint to assist the court. They exhibited copies of ancient documents as well as of more modern texts relating to issues such as the development of the Island's feudal system, rights of wreck and rights of common. Dr Ogier's evidence was of special value in that he had gathered and sorted materials spanning several hundred years, and was able to explain the significance of the materials, important in the case of the ancient documents accompanying his reports, and the context in which they were created.
- 9 At the trial written and oral evidence was given by Mr Thomas Holroyd, the sole director of the Plaintiff company and son of the present Dame of Fief de Carteret, Mrs Kathleen Holroyd. Also, there was at the trial written and oral evidence given by Mrs Gillian Davies. Mrs Davies was called as a witness by the Second and Third Respondents. She had been the wife, until his death, of the late Hugh Lenfestey, Dr Ogier's immediate predecessor as Island Archivist and *Archiviste de la Cour Royale*. We refer later to Mr Lenfestey's important contribution to research into the Island's feudal history.
- 10 The proceedings below had to deal with a number of distinct issues, only one of which remains live for this court: this is the ascertainment of the identity of the feudal unit of which the Disputed Land is part. The name given to these feudal units in Guernsey, and earlier in Normandy, is "fief". This bears similarities to the names used in other jurisdictions: in Roman Law "feodum", in Scotland "feu", in England "fee", elsewhere sometimes "feoff". Whichever word is used, the concept is the same: all land within any sovereignty is held by the sovereign who gives rights over certain areas to other individuals who hold the land in return for some form of loyalty or fealty or monetary or practical equivalent. Almost invariably each of those who hold directly of the sovereign may grant rights over smaller parcels to other individuals who, in their turn, hold of the person who holds of the sovereign in return for some loyalty, duty or payment to that person. There can be any number of further, similar, relationships in a chain. Within the chain each feudal tenant or vassal holds of her or his immediate feudal superior in the chain extending up to

the sovereign.

- 11 The system had much practical convenience in allowing those holding land to obtain direct economic benefit from it while ensuring that control of local areas remained in trusted hands. At different levels within the chain, certain rights appertaining to a holding might be a matter specified in a grant of the holding in question or identified through customary law. One such right which may be of importance here is the right to the product of wreck, being the right to goods washed ashore.
- 12 There is one further preliminary point of general importance. In Guernsey, a standard unit of measure for an area of land is the vergée: another, smaller in area, is the perch (a unit of measurement familiar to older generations in the United Kingdom).
- 13 As recorded by the Bailiff, typically in every generation or so a *livre de perchage* was prepared for each fief in order to record the revenue due to the holder of the fief in respect of individual pieces of land.
- 14 We have seen in its entirety one particularly relevant *livre de perchage*, made in 1878. From this example it can be seen that the entries are made by reference to individual tenants, and that after each name an indication is given of the location of the holding and its extent in vergées and perches. This *livre de perchage* is a very formal document, printed in this instance, and signed by twelve of the tenants, each of whom has been sworn in, under oath, as a member of the Douzaine to certify the perchage in accordance with an Act of the Royal Court specifically issued for this purpose. Rather like the Domesday Book, therefore, this document records holdings and revenues but, of course, may not provide a bounding indication of the whole of the land of the fief as not all of the land may be tenanted "en perchage".

The judgment appealed from

- 15 Before the learned Bailiff – and before us – the case for the Plaintiff was that the Disputed Land forms part of the Fief de Carteret. The Plaintiff contended for this because Mrs Holroyd, as Dame of Fief de Carteret, had conveyed the land to the Plaintiff in 2007. This required the Plaintiff to satisfy the Court that, on the balance of probabilities, the Disputed Land lies within Fief de Carteret. Relying on the researches of Dr. Ogier, but conducting his own analysis, the Bailiff found that the Plaintiff had not discharged the burden of proof of establishing that the Disputed Land was part of the Fief de Carteret; but the Bailiff found, also, that the Disputed Land lies within Fief St Michel so as to be within the control of the Crown in right of that fief.
- 16 The Bailiff expressed his conclusions as follows:

"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."

17 The following is the essence of the learned Bailiff's reasoning.

- 17.1 There was common agreement that the Disputed Land is part of a fief in respect that it was not retained by the Duke of Normandy as ducal land in the 11th century when the ducal domain in Guernsey was divided into separate holdings under the dukedom. There was also agreement that, at a later date, Fief de Carteret was created out of a larger fief. (See paragraph 9 of the judgment.)
- 17.2 The earliest mention of Fief de Carteret is in the rolls of the Abbey of Mont St Michel at the turn of the 13th to 14th centuries where there is a reference to the "*feodum de quartret*". Other records from that period confirm the interest of the Abbot of Mont St Michel in the receipt of income from Fief de Carteret. (See paragraph 10 of the judgment.)
- 17.3 At about that time there had been disputes between the Abbot of St Michel and the *seigneur* of a separate fiefdom, Fief Le Comte, as to the rights over certain lands. The disputes were settled and there was evidence that, by 1329, the family possessing Fief Le Comte also possessed Fief de Carteret. As from that point in time, it is not disputed in the present proceedings that Fief de Carteret was a dependency of Fief Le Comte until it came, in the seventeenth century, to be divided off. Neither was it disputed that, historically, Fief de Carteret had not enjoyed a status matching those of Fiefs St Michel and Le Comte, leading to the conclusion that Fief de Carteret had been created out of one or other of those two. (See paragraphs 11 and 12 of the judgment.)
- 17.4 It is agreed that the Disputed Land has always been part of the foreshore (using that term in the broadest sense). It is probable, therefore, that the Disputed Land has never generated revenue and this might explain why it is not mentioned in any *livre de perchage* (and in particular not in any Fief de Carteret *livre de perchage*) earlier than 1878 at the earliest (see paragraph 15 of the Judgment.)
- 17.5 The learned Bailiff reached the view that, upon the basis of the views of Dr. Ogier, Fief de Carteret was more likely to have been created out of Fief St Michel as it existed before it became associated with Fief Le Comte. The Bailiff reached the view that it was more likely than not that, albeit that Fief de Carteret was a dependency of Fief Le Comte, the Disputed Land was not within, and was not part of the land of, Fief Le Comte. It was more likely, the Bailiff concluded, that the Disputed Land lies within Fief St Michel. (See paragraphs 13 and 89 of the judgment.)

18 Accordingly, the Bailiff concluded, whilst Fief de Carteret had been created out of Fief St Michel, and transferred to Fief Le Comte, not only was there no sufficient evidence that the Disputed Land was part of Fief de Carteret, but also it was entirely possible that the Disputed Land might have been retained in Fief St Michel when Fief de Carteret was created. (See paragraph 89 of the judgment.)

The Appeal

19 Advocate Barnes on behalf of the Plaintiff took issue with the judgment below in the following

principal respects.

- 20 At paragraph 71 of his judgment the learned Bailiff, so it was said, was in error in his reasoning concerning the 1878 *livre de perchage* to which we have referred. While this document was found to have described the Disputed Land as being within Fief de Carteret, it was also the case that no previous *livres de perchage* down to and including the last surviving earlier one of 1819 had done so. The Bailiff reasoned that: "*If both series of livre de perchage [up to 1819 and, separately, 1878] 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.*" As Advocate Barnes contended, where land is not *en perchage*, there is no need for it to be entered in a *livre de perchage*; and therefore the absence of reference to the land in earlier *livres de perchage* did not point to any need for a fresh conveyance of the land to be made during the nineteenth century to bring the Disputed Land within Fief de Carteret.
- 21 Turning to paragraph 82 of the Bailiff's judgment, Advocate Barnes was critical of what he submitted to have been the Bailiff's too ready acceptance of Dr. Ogier's view that, upon a proper construction of all the available documents, full weight could not be attached to a 1629 *partage* concerning Fief de Carteret in which there was mention of "*varec*" (wreck), or to a 1510 indenture by which the Seigneur of Fief Le Comte made a conveyance which suggested that a right of wreck was being transferred.
- 22 Advocate Barnes was therefore critical of the conclusions in paragraphs 84 and 85 of the Bailiff's judgment.
- 23 Finally, Advocate Barnes was critical of the Bailiff's conclusion in paragraph 89 as to the likelihood of the Disputed Land having continued to be within Fief St Michel: that, submitted Advocate Barnes, was mere speculation.

Discussion

- 24 There are two preliminary points we should note. First, the Disputed Land was held to be common land; that is, subject to rights for community use in particular ways. This point is not disputed: the land is not simply land in private ownership which would allow its owner to exclude the public. Nevertheless, before the Bailiff there was an issue as to whether the Constables of the Parish had, as a power to manage common land, the power to manage part of the Disputed Land as a car park. The Bailiff rejected the First Respondents' (the Constables') arguments on this issue, holding that if the Appellant had made out its claims to ownership, the Constables did not have the power they had claimed. The Bailiff held that use as a car park to enable persons to go shopping is of a fundamentally different nature from use of land for drying seaweed and laying up boats during the winter. The Constables did not cross-appeal against this aspect of the Bailiff's judgment, and we say no more about it.
- 25 The second point concerns the conveyance of the Disputed Land to the Appellant. The Bailiff explained that he had had concerns about the conveyance but that, after hearing evidence and submission, he had been satisfied as to the sufficiency of the conveyance. Again, on this appeal there has been no challenge to the conveyance, so that if the Disputed Land had lain on Fief de Carteret at the time of the making of the conveyance, and had been owned as part of that fief, the conveyance was sufficient to convey the vendor's right, title and interest in the Disputed Land.

- 26 As did the learned Bailiff, we express our gratitude to Dr. Ogier for the thoroughness and objectivity of his research. Nevertheless, as matters turn upon a proper construction and assessment of the documentary evidence we must, like the court below, embark upon our own examination of the materials.
- 27 As to this, it has been submitted on behalf of the Respondents that this Court may not reverse the Bailiff's findings, those being findings of fact, unless we are satisfied that there was no evidence on which the findings could be based or that for some other reason the findings were perverse. The authorities relied on in support of the submission are well-known, and include CYMA Petroleum (CI) Ltd v The States of Guernsey (unreported judgment, 05/2015) at [13].
- 28 The principle stands when a trial judge sitting alone makes a finding of fact. It is of less weight where the appeal concerns a conclusion of law based on inferences to be drawn from documents rather than from any assessment of oral evidence and the weight to be attached to witnesses' evidence; for in the latter type of case the trial judge will have had the immeasurable advantage over the Court of Appeal of having seen and heard the witnesses' evidence as it is given.
- 29 In our judgment, the present is one of those cases where this Court is in as good a position as was the Bailiff in the Royal Court to draw a conclusion concerning the ownership of the Disputed Land. This involves assessing the weight to be placed on documents of varying ages and the inferences to be drawn from what was, or was not, stated in those documents. The appeal does not involve disputed evidence: there is no question of any witnesses' credibility requiring to be assessed. We do not think that an appeal is only to be allowed if the Bailiff's conclusion was unsupported by any evidence or was perverse: it may be allowed if we are satisfied that the weight of the evidence points to a different conclusion.
- 30 We have already drawn attention to relevant features of Guernsey's feudal system. It is unnecessary to give greater detail. These matters can be found in Dr Ogier's reports (and attached documents) and in the Bailiff's judgment. What is significant is the hierarchy of land- holding. Nevertheless, it is worth describing a little of the history.
- 31 By about 1260 two large areas of the western half of Guernsey were held of the Crown, in the one case (the Fief St Michel) by the Abbot of Mont St Michel, and in the other (the Fief Le Comte) by the de Cheney Family. In turn, parts of each of those two fiefs were held by others owing fealty to the *seigneurs* of the fiefs, and obliged to render them services and in some cases to act as judges at manorial courts.
- 32 The third fief which we have already referred to is the Fief de Carteret. From about the first half of the fourteenth century this fief was an "arrière fief", or dependant fief, of Fief Le Comte. It appears that there were other such dependent fiefs of Fief Le Comte and other minor manors. In the statement she made for the trial, Mrs Davies gave evidence based on a modern typed copy of a document deriving from one of about 1547. This document (discussed later in this judgment), described the arrangements concerning the court of Fief Le Comte, if correctly transcribed and translated, and had indicated not only that the Seigneur de Carteret was one of the vavasseurs (or judges) of the court of Fief Le Comte, but also that this was because those vavasseurs held their lands of the Seigneur of Fief Le Comte.
- 33 Nevertheless, by the middle ages Fief de Carteret was a feudal holding with its own areas of tenanted land (land "*en perchage*") held by numerous individuals. This is confirmed by the surviving *livres de perchage* for Fief de Carteret.

- 34 The 1547 document referred to above is consistent with what is explained by Dr Ogier in his reports. His first report referred to various instruments, notably an “*Extente of Crown Revenues in Guernsey*” of 1331 made for Edward III and a *partage* of de Cheney estates in Guernsey of 1350, which indicate that by the early fourteenth century the de Cheney¹ family were interested in Fief de Carteret. Dr Ogier’s second report contains further reference to historical documents from the late sixteenth century and early seventeenth century which indicate that the Seigneur of Fief de Carteret was a vavassuer holding Fief de Carteret of the Seigneur of Fief Le Comte, and that Fief de Carteret was a dependency of Fief le Comte.
- 35 The character of Fief de Carteret as a dependent fief was relevant to the questions for decision by the Bailiff because, as the Bailiff found, the Appellant had “*established beyond doubt that over a long period of time successive Seigneurs and Dames of fief de Carteret [had] asserted a claim that the Disputed Land lies on their fief*”. Further, for reasons explained below, it was established that all the lands lying within the immediate vicinity of the Disputed Land (subject possibly to a coastal strip immediately to the north of the Disputed Land) are encompassed by the Fief de Carteret.
- 36 An argument made on behalf of the Plaintiff before the Bailiff was that, if the Fief de Carteret was created out of Fief Le Comte as a dependency of that fief, there would have been no reason for the Disputed Land to have remained as a part of Fief Le Comte separate from the surrounding land.
- 37 However, there was evidence before the Bailiff, which (as we have explained) the Bailiff accepted, that Fief de Carteret had its origins as a dependency of Fief St Michel. This evidence was in the form of early records, dating back to the late thirteenth century, from the Abbey of Mont St Michel and from the Vale Priory (a daughter house of the Abbey). These showed the Abbot of Mont St Michel to have been interested in rents from Fief de Carteret, among other fiefs and bordages (a form of minor tenure within the Guernsey feudal system) which are known to have been held in later times by the de Cheney family, in some cases as dependencies of Fief Le Comte.
- 38 There is evidence that during the second half of the thirteenth century there was a dispute between the Abbot of Mont St Michel and the de Cheney family as to their respective holdings: the Abbot of Mont St Michel laying claim to Fief Le Comte. This dispute is said to have been resolved by about 1290. However, the detail of the dispute is obscure, both as to the date of its conclusion and its outcome; and certain of the documents implying that Fief de Carteret was held by the Abbot of Mont St Michel postdate 1290. Nevertheless, the inference drawn by the Bailiff, accepting the opinion of Dr Ogier on the point, was that perhaps as a result of the outcome of this dispute or perhaps for some other reason now lost in history, Fief de Carteret had by about 1329 or shortly thereafter been transferred to Fief Le Comte from Fief St Michel and the Abbot of Mont St Michel, thereby becoming in turn a dependency of Fief Le Comte. What is clear is that, as we have explained already, during the fifteenth centuries and sixteenth centuries, until disposed of in the early seventeenth century, Fief de Carteret was associated with Fief Le Comte.
- 39 In about 1414 Henry V seized the property of what were referred to as Alien Priors; and it was then that Fief St Michel passed into the hands of the Crown, by whom it is held to the present. This is the reason why, if the Disputed Land lies on Fief St Michel, it is now held by the Crown.

¹ Sometimes “Chesney” or “Chaysne”, sometimes “Cheyne” or “Cheyney”

- 40 We have referred to the learned Bailiff’s conclusions in paragraphs 16 and 17 above. We refer here to his finding as to the possibility of Crown ownership of the Disputed Land. This was reached on the basis, essentially, that the Disputed Land (and, more generally, the dunes at the Banque du Long Port) had not been shown to be within Fief de Carteret. In reaching that view the Bailiff considered that an inference to be drawn was that, although the area might naturally – from its location immediately to the west and north of what was undoubtedly within Fief de Carteret and lying to the south of the Rue de la Mare de Carteret – have been expected to form part of Fief de Carteret, it must nevertheless have been retained by the Abbot of Mont St Michael as part of Fief St Michel at the time of the settlement with the de Cheney family it not having been passed on to the de Cheney family when Fief de Carteret came into their hands.
- 41 It is not obvious why unoccupied and unproductive common land should have been retained by the Abbot of Mont St Michel as and when the surrounding area, comprising Fief de Carteret, came to be held by the Seigneur of Fief Le Comte in the place of the Abbot. A suggested reason offered for the inference noted in the previous paragraph was that the dune land could have had value to its owner as a source of valuable rights of wreck to any goods and vessels coming ashore there. We describe later the position as to rights of wreck in the vicinity of Cobo and Banque de Long Port, and our conclusion concerning the suggested reason.
- 42 At this point it is helpful to consider in greater detail to the documents known as *livres de perchage*, to which we have referred above. These documents were formal records, compiled typically every generation or two (so about every 30 or 40 years) for each fief. Each of these was compiled by a body of tenants of the fief to list out the areas of land within the fief held by various tenants of the seigneur and the service to be provided by the respective tenants for the land. According to an antiquarian report of 1962 published by La Société Guernesiaise, the tenants of a fief had to provide a *livre de perchage* of their fief when requested by the seigneur.
- 43 In the case of Fief de Carteret the surviving *livres de perchage* start in 1551 and continue until 1951. However, the regular pattern of the Fief de Carteret *livres de perchage* was, it may be, interrupted in the nineteenth century. During that period there are only three surviving *livres de perchage*: one in 1819, the next in 1878 and the third in 1898. A plausible, but not a certain, inference is that at least one nineteenth century *livre de perchage* for Fief de Carteret has now been lost, this having been made in about the middle of the century, during the interval between 1819 and 1878.
- 44 In modern times Mr Hugh Lenfestey, who was Dr Ogier’s predecessor as Island Archivist and Archiviste de la Cour Royale (and until his death in 2012 the Seigneur of Fief Le Comte), had taken a great interest in, and carried out considerable research into, the feudal system of land holding in Guernsey. Writing in September 2008 he explained:
- “I have been much concerned with the detail and structure of Guernsey fiefs for many years since ... 1958. As a consequence, I have been able to seek out and acquire or copy every extant or surviving livre-de-perchage of each Island fief: of which there are 676 known to me. I would calculate that the total number between 1400 and 1970 would not have exceeded 1,000 livres, so that there has been a reasonably good survival rate.”*
- 45 Mr Lenfestey went on to explain how, using “current” *livres de perchage* “usually dating from the earlier 20th century” he had “been able to map all the fiefs within each parish” with certain irrelevant exceptions. He then continued:

“It is the most intricate jigsaw imaginable, yet it works; considering that each feudal douzaine every generation compiling a revision (sometimes quite dramatic) worked each time in isolation on its own fief with only a cerebral map or plan and still got it right. In addition where relevant, it bears out the detail and inferences that can be drawn from that detail in the Extente of 1331, which would suggest that the basics of the feudal system of the Island were established at the least earlier the previous century if not earlier yet by the later 1100s.”

- 46 As regards Fief de Carteret, Mr Lenfestey stated that his map encompassed the total extent of the fief. He went on to surmise that *“the areas of coast and coastal wastelands now in fee farm outside the livres-de-perchage of each fief remain in the possession of the ‘original’ medieval holders of such lands (being outside any grants so made) and as with fee farms must be currently in the ownership of the Crown”*. This surmise was one with which Dr Ogier, writing on 31 October 2008, had expressed disagreement.
- 47 In her evidence Mrs Davies added to Mr Lenfestey’s statement by describing how, before his death, Mr Lenfestey had compiled his map by comparing entries on *livres de perchage* with property ownership records as held by surveys of the Island prepared by the States Cadastres. Thus, according to Mrs Davies (repeating in this respect what had been said by Mr Lenfestey in his note of September 2008), the size and shape of Fief de Carteret had remained consistent over the ages since 1551 and corresponded with the depiction on Mr Lenfestey’s map. A copy of this map was included in the trial bundle.
- 48 What Mr Lenfestey’s map depicts for Fief de Carteret is an irregular block of land which, on the west side, continues right up to the coast road, where that road runs south from the Route de Carteret (ie immediately below the Disputed Land) but which is stepped in somewhat towards the east and away from the coast road all the way between the Route de Carteret northwards up to the Route de la Mare de Carteret. The Route de la Mare de Carteret is shown as forming the northern boundary of the Fief de Carteret.
- 49 According to this map, therefore, the Disputed Land is outside and on the west of the Fief de Carteret; but it is not shown as lying within any other fief or as being of unknown ownership (as is coastal land to the north of the Route de la Mare de Carteret).
- 50 Two further maps provide some additional indications concerning developments in the vicinity of the Disputed Land. One, from 1787, shows there to be no road along the coast in the vicinity of Cobo and Long Port. It does, however, show the field system along the coast in the vicinity of Fief de Carteret as resembling that described above in connection with Mr Lenfestey’s map of the fiefs, and with what seems to be a strip of coast between the fields and the shoreline. The second, from 1832, shows a coast road running north towards, but not reaching as far as, Route de la Mare de Carteret.
- 51 What had happened was that in 1813 there was a petition of the States to the Crown for the construction of sea defences, leading to the building of the sea wall. The petition explained that in 1811 *“considerable damage was ... sustained by the natural Bank at Cobo, and in several other parts of the Coast, all of which was ordered by the Court to be repaired in the usual manner ...”*. The petition went on to say that in 1812 and 1813 there was again damage to, in particular, *“the natural bank at Cobo”* and that, the cost of repairs being beyond the ability of the relevant parishes to bear, the Court suspended execution of the works of repair pending further consideration; and

the Crown was requested to allow the cost to be raised by a duty on alcohol. Shortly thereafter the sea wall was built.

52 A feature of Mr Lenfestey’s map, mentioned above, is that south of the Route de Carteret the land which he had found to be *en perchage* with Fief de Carteret ran right down to the coast road and sea wall, in contrast with the area on which the Disputed Land lies to the north. Dr Ogier observed of this, at paragraphs 63 and 64 of his first report, that the descriptions in the 1813 petition suggested that the natural bank, the Banque du Long Port, had at that point been so intrenched upon by 1813 as to have been less than a few feet wide, with the result that there was no longer room for passage between the beach and the fields along the natural bank, and (according to a *Billet d’État* of 1854) travellers were obliged at that point to use the beach until the sea defence had been constructed. What was said in the petition of 1813 was:

“... in the bay of Cobo, the natural Bank which two years before was thirty feet wide and served for a cart road, was so very much intrenched upon that the whole of the road was carried away, and the bank reduced in some places to the breadth of three or four feet of earth or gravel forming the only barrier against the sea...”

53 Based on this, Dr Ogier’s opinion was that before the end of the eighteenth century there had been no material distinction in character between the sections of the Banque du Long Port to the north (where the Disputed Land lies) and to the south of the Route de Carteret.

54 It is convenient to mention at this juncture that the Disputed Land forms only the southern part of the strip of land between Route de Carteret and Route de la Mare de Carteret which is depicted on Mr Lenfestey’s map as lying to the west of Fief de Carteret, between the fief on the one side and the coast road and sea wall on the other. The northern part appears from plans and photographs before the court to be of similar character to the Disputed Land. A portion of this part, the northerly portion, was the subject of the conveyance referred to below.

55 In a memorandum of 25 October 2008 Mr Lenfestey explained as follows concerning the Disputed Land (as well as the land to the north, up to the Route de la Mare de Carteret):

“This particular area lay between Route de la Mare-de-Carteret on the north and Rue des Carterets (or Rue au Beir) on the south and extended some 30 yards inshore opposite the boat mooring area at Le Long Port. It went inland as far as a low dry-stone wall (still partly in place) which is the western boundary of various properties (including Checkers) in the livres-de-perchage of Fief de Carteret. In addition to that, it is clear from a map of the fief prepared from the livres-de-perchage of 1922 that all privately owned property in the immediate vicinity of these Dunes is situate on Fief de Carteret.

The Dunes have been long cleared leaving a rough cleared area into (sic) which includes a sea-wall, pavement and a wide coast-road. Currently the southern half of the area is now divided into a boat park for local boat-owners and the southernmost end of that has become Cobo car-park – which has been used daily by shoppers at the local stores. The northern half is not involved in any proceedings, as this area was conveyed by the 5th Baron de Saumarez to the States of Guernsey on 20/08/1938 on the strength of title given in his bille-de-partage of

29/01/1938, which is not substantiated by the boundaries and descriptions given in his father's conveyance of 04/06/1891 for the latter's purchase of the estate at La Mare-de-Carteret."

- 56 The change in the character of the dunes at Banque du Long Port must have begun a little after 1813, once the sea wall had been built. The change is therefore likely to have been between 1819 and 1878, those being the dates of the first and second (surviving) Fief de Carteret *livres de perchage* made in the nineteenth century. With the construction of the sea wall, dune land behind the sea wall would naturally stabilise and with time become more useful and worth noticing: the process is described in an article from March 1981 provided by Dr Ogier and discussing a section of coastal land at Les Grandes Mielles, a little to the north of Fief de Carteret.
- 57 A critical feature of each of the Fief de Carteret *livres de perchage* down to and including that of 1819 was that they made no mention of any part of the dunes at Banque de Long Port as being included within Fief de Carteret: only land *en perchage* was described in those *livres de perchage*, and it was only such land which was depicted on Mr Lenfestey's map.
- 58 We have referred to the submission of Advocate Barnes that it should be no surprise if *livres de perchage* make no reference to unoccupied common land lying on a fief. This submission we accept. The principal function of the *livres de perchage* was to record the tenancies, and the associated services and dues, as a record for the benefit of the seigneur and of those holding of the seigneur. The focus of *livres de perchage* was not with lands which were not *en perchage*; that is to say, land which was not held by a tenant of the seigneur and owing services and dues.
- 59 In other words, it would not follow that, if the Disputed Land was not identified within a *livre de perchage*, the Disputed Land simply did not form part of the relevant fief. Indeed, Mr Lenfestey's memorandum of October 2008 went on to assert that, although the Disputed Land was not referred to in any of the Fief Le Comte *livres de perchage*, nevertheless the Disputed Land "*should still be (some 830 years later) part of the lands of Fief le Comte outside its own series of livres-de-perchage, despite a lack of documentation on this matter*". (That said, Mr Lenfestey's conclusion, seemingly based on developments since the end of the nineteenth century, was that "*What is clear about the Còbo car-park is that there is no seigneurial right of ownership...*")
- 60 We now consider further the Fief de Carteret *livre de perchage* of 1878, a document which featured prominently in various submissions before the Royal Court and before us; and which is central to this appeal. As we have said, the document describes, area by area, who holds which defined portions and what the area is to yield; and this we have been told was the style used in all the previous surviving Fief de Carteret *livres de perchage*. The document bears the signatures of twelve of the tenants of the fief. It also recites that they were "*juré et sermentés suivant Acte de la Cour Royale ... à l'instance de Jean De Havilland Utermarck, Procureur de Jean Frédérick Thomas Dobrée, Ecuyer, Seigneur du dit Fief...*". As we have said, the document was manifestly one of formality.
- 61 It is convenient here to quote from the judgment below what the learned Bailiff said about the 1878 document:

"29 The late Hugh Lenfestey [Dr Ogier's predecessor as Island Archivist and Archiviste de la Cour Royale] carried out a detailed study based on Livres de Perchage covering the whole island. He 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 le 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 jusqu'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 wording in 1878. We do not know what evidence was available to support it and do not know whether it was correct. ..."

- 62 Having discussed the concept of *livres de perchage* with counsel and having considered, in particular, the livre of 1878 for Fief de Carteret, it is our judgment that significant weight falls to be given to such documentary evidence in this jurisdiction. Given the history of this form of land tenure in Normandy and Guernsey, given the antiquity of foundation deeds and the possibility that they may have been lost, an examination of the extent of a fief cannot be carried out as readily as can be done by examining a formal register of documents or a formal register of titles certified by a registrar. It seems clear that, to a significant extent, the system of maintenance of *livres de perchage* within this jurisdiction ought to be accorded a material degree of authority. As explained above, Mr. Lenfestey was able to acquire or copy some 676 Livres and, through them, to construct maps of almost all of the fiefs on the Island. As far as the system of land holding on the Island is concerned, therefore, *livres de perchage* are not perceived as merely transient documents: because individual fiefs, which maintain courts and court officials, also maintain their records over centuries, just as would be done by any senior court of law or national record office.
- 63 Not only that, and as we have mentioned above, the 1878 livre de perchage shows the degree of formality which enabled it to be created and, in our judgment, to become not merely a private document of the *seigneurs* to be used to enforce the collection of revenues or duties, but to create a formal record, attested by twelve of the many *tenants* and to which, if needs be, recourse could be made in the Royal Court in the event of dispute. As indicated in the preamble of the 1878 Livre, the Douzeniers had sworn to carry out their duties; duties which, in the circumstances, they would owe both to the court of Fief de Carteret and also to the *seigneur* and the *tenants*. It seems difficult to avoid the conclusion that, just as the obligation of identifying tenants and relevant measurements was in their hands for certification, so was the approbation of the concluding words which appear above their signatures. It must have been entirely open to them to have refused to have that statement included within the *livre*.
- 64 We therefore conclude that the text at the end of the 1878 Fief de Carteret *livre de perchage* cannot be dismissed as simply a mistaken and unconsidered addition: the document is self-evidently a detailed list of land holdings and tenants of the fief. The addition must have been regarded as

useful and accurate (at any rate as far as it went). The Bailiff observed in the passage of his judgment quoted above that “*we don’t know what evidence was available to support*” the additional wording. This is true. Mr Lenfestey in his letter of September 2008 had remarked that each feudal douzaine would be compiling their *livre* working in isolation on their own fief and with only a cerebral map or plan. The point he was making, however, was that each Douzaine would be working from shared, that is community, tradition and memory. His further comment was that they “*still got it right*”.

65 We therefore accept that the 1878 *livre de perchage* is to be taken as evidence – strong, but not necessarily conclusive – concerning the extent of the land comprised in Fief de Carteret. But it is still necessary to consider what inference is correctly to be drawn from the text itself. There are two related questions: what was described and why was it relevant to give the description when previously no similar one had been given?

66 At first instance, the parties had left it to the learned Bailiff to determine the meaning of the concluding words of the 1878 *livre*, and in particular of the words “*le long du Rivage de la Mer*”. The Bailiff accepted the definition in a late 19th century Dictionary “of the French and English languages” which defined “Rivage” as “*shore: a) land bordering on the sea, and washed by the waves; beach, strand, sea-shore; coast, sea-side, side*”; and concluded that such a boundary would be beyond (on the seaward side of) the Disputed Land: see paragraphs 77 and 78 of the judgment. In other words, the description in the 1878 *livre* would be apt to capture what remained of what had once been dunes comprising the Banque du Long Port. We have no reason to disagree. We return to this description later.

67 However, something had changed between 1819 and 1878 which could have justified the inclusion of the additional text in the Fief de Carteret *livres de perchage* where no similar text had previously been included. This change meant that the different content of the 1878 *livre* compared with any earlier ones was not necessarily dependent upon there having been some now lost conveyance of the Disputed Land or other parts of the Banque du Long Port to the Seigneur of Fief de Carteret in the interval between 1819 and 1878. Rather, there had been a physical change to the Disputed Land, following the construction of the coastal defences and the coast road. The Disputed Land, by 1878, was no longer a bank of sand and gravel, but land lying behind a sea wall. That land had now the potential for use.

68 It therefore follows, in our judgment, that the 1878 *livre de perchage* is a firm indication that the Disputed Land lies within Fief de Carteret. In determining such a matter on the balance of probabilities, however, it is necessary to consider all evidence before deciding whether, upon that balance, the fact in question has been proven either by reference to primary or inferential findings.

69 In determining not to place reliance upon the 1878 *livre de perchage*, the learned Bailiff relied in particular upon the following. First, earliest records available contained no reference to Fief de Carteret having rights over the foreshore. Second, whilst there were some references to rights to wreck in subsequent documents, they were outnumbered by other documents in which no such rights were claimed and may have been of dubious accuracy.

70 This mention of rights over the foreshore and rights to wreck arises from the reports of Dr. Ogier. In his first report, Dr. Ogier had stated (at paragraph 69a):

“I am unsure as to upon which fief the land in controversy lies. If any claim by fief de Carteret to wreck could be substantiated it could be “read back” from that that

the banque adjacent to the foreshore is on that fief (i.e. if the banque is on the fief there goes with it the right to wreck on the adjoining shore). Fief de Canelly, at different times had dependency of both fiefs de St Michel and Le Comte, may have had such a right, but this does not demonstrate that fief de Carteret adjoined the foreshore, as the former apparently did, and I suppose must still do. Any similar right to wreck was claimed directly in two of the transfers of fief de Carteret, in each case in a questionable manner, and it was not directly claimed in the conveyances of 1525, 1535, 1615 (bis), 1897 and 2004.

On present evidence and reasoning I think the land in dispute is likely to be on fief St Michel, which had interests in the land noted in 1406 and to the wreck on the foreshore adjoining it as noted in the extente of 1331 and elsewhere. If further research were to show, for example, that seigneurs or dames of fief de Carteret have successfully enjoyed rights to wreck at Long Port, where the land in controversy joins the foreshore, then this might well cause me to change my view."

- 71 Applying these comments to the situation in which we find ourselves in placing significant weight on the 1878 *livre de perchage*, we look to the remaining material to identify whether, on balance, it suggests that the Abbot of Mont St Michel might have retained the foreshore and Disputed Land in Fief St Michel when Fief de Carteret was created and then later transferred, as the learned Bailiff surmised at paragraph 89.
- 72 As appears from the Bailiff's judgment, there was at the trial detailed argument concerning what could, or could not, be inferred from such historic evidence as there was concerning wreck. The suggestion made by Dr Ogier, and repeated by the Bailiff, was that if it were shown that Fief de Carteret had enjoyed any right to wreck, that would be evidence from which it might be inferred that the land encompassed within the fief included the Disputed Land as being coastal land carrying the right to wreck; but, conversely, if it could be shown that there was no right to wreck, that would point to the Disputed Land as not being included.
- 73 In Guernsey Law the right to wreck was a feudal right; but by the end of the thirteenth century at the latest it had come to differ from the customary law of Normandy. That law provided that goods washed ashore remained to the lords in whose fiefs they came ashore, except for certain precious goods reserved to the Duke. In Guernsey, in contrast, the position up to at least the fifteenth century was, broadly, that the King took a share of any wreck, with the *seigneurs* of Fiefs St Michel and Le Comte taking between them another share. In later time the position reverted to the Norman law position. (This outline simplifies certain of the detail, as we explain later.)
- 74 We approach matters in chronological order.
- 75 Dr. Ogier had identified, and exhibited to his first report, extracts from *Medieval Administration of the Channel Islands, 1199 – 1399'* (1939, Oxford University Press) by J H le Patourel. At page 80, the author explained:

"In Guernsey ... For wreckage, the most profitable stretch of coast ... lay almost entirely in the fiefs of St. Michel and Le Comte. In Henry III's reign [from 1216 to 1272], therefore, the Abbot of Mont St. Michel and the Seigneur of Fief Le Comte had been induced to share with the king, henceforth, the wreckage on all coasts of the

Island, save within the domains of the Seigneur of Sausmarez, the Prior of Blancheland, and the Abbot of Mont St. Michel himself. In the division the king was to take a half, and the Abbot and the Seigneur of Fief Le Comte a quarter each”.

- 76 The Fief Le Comte *Custumal* of 1406, which we describe and discuss below, made reference to what was a similar position in place at the time of King Henry III’s son, King Edward I. This is consistent with one of the documents collected and translated by Sir Havilland de Sausmarez, Bt (Bailiff of Guernsey 1922-1929 and Seigneur of Sausmarez) and published by La Société Guernesiaise in 1934 in a book with the title entitled “*The Extentes of Guernsey of 1248 and 1331 and other documents relating to ancient usages and customs in that Island*”). This document, set out at page 39, is from the time of King Edward I and dated after 1265, according to the notes accompanying the text. The document notes:

“Then our lord the King has his wreck of the sea throughout the island, the rights of the Abbot of Mont St Michel and of Madame de Cheyney and of Matheot de Sausmarez excepted, and throughout the island and in the Vale and in Lihou and in Jethou he takes the right of view and of gold and unworked silk and uncut scarlet cloth and scarlet cloaks without fastenings and sturgeon”.

- 77 Lihou and Jethou were islands separated from the main island of Guernsey by sea. These were lands of the Abbot of Mont St Michel. So too was Clos de Valle, what is now the northern part of the Island but which was until comparatively modern times (until joined for military purposes) separated by a strait.

- 78 In the time of Edward III, in 1331, an *Extente* of Crown revenues was made. This was referred to by the Bailiff at paragraph 18 of his judgment. The document, otherwise titled “*The Extente of 5 Edward III, 1331*” contains the response to a royal inquisition to establish customs and services due to the Crown and, accordingly, the royal revenues. A translation is set out in Sir Havilland de Sausmarez’ work, referred to above.

- 79 In the 16th chapter, under the heading “*Vereccum Maras*” (wreck of the sea), the following is stated (as translated by Sir Havilland de Sausmarez):

"Also the Lord the King has wreck of the sea in the same Island in the manner following: to wit sometimes a half, sometimes a fourth part, sometimes an eighth part.

The half when a ship should be lost so that ... the goods of that ship have come to the shore of the sea without the help of anyone, and no more, for the Abbot of Mont Saint Michel and William de Cheyney shall have jointly from all (wrecks) just as the Lord the King.

...

For the same Abbot and William will always have in all (wrecks) as much as the King except gold, unworked silk, uncut scarlet tissue, cloth of gold, drapery or silk material of scarlet, new without attachments, which will altogether, if they accrue from wreck, remain to the King.

...

And everywhere in the whole Island of Guernsey where the King takes this profit

this is to be observed – except that within the Clos du Valle, Lihou and Jethou, the Lord Abbot should take and have of ancient right the whole of the wreck and adventures of the seal on the view of the Bailiff of the Lord King aforesaid, except gold and other precious things as aforesaid, which shall always remain to the King everywhere in the whole of the said Islands ..."

- 80 In summary, by 1331 the King was entitled to the entirety of certain precious cargo wherever it came ashore, but otherwise shared all wreck, wherever it came ashore and whatever its character, with the Abbot of Mont St Michel and William de Cheyney (the Seigneur of Fief Le Comte), the latter two taking equal shares between them. The exception to this arrangement was where the wreck came ashore in the Clos du Valle, Lihou and Jethou, where William de Cheyney had no rights.
- 81 The relevance of this is that at that period, at any rate, the Abbot's right to wreck coming ashore in the vicinity of Fief de Carteret would not have depended upon the foreshore or lands down to the shore remaining part of Fief St Michel.
- 82 As Dr. Ogier noted, the 1331 *Extente* at the same time indicated that lands including those of the Abbot of Mont Saint Michel insofar as concerned Clos du Valle, Lihou Jethou, followed the Norman custom.
- 83 The next document of importance is the *Custumal* of Fief Le Comte of 1406, to which we have already made reference. Although, throughout the document, the words "*Fief and Seigneurie of Anneville*" are used, it is accepted that this was an inquiry into the rights, services, etc, of Fief Le Comte. This was explained in Dr. Ogier's first report at paragraph 46, footnote 12.
- 84 The 1406 *Custumal* gives a somewhat ambiguous explanation concerning coastal common land with which the de Cheney family were connected in right of Fief le Comte. A translation of the *Custumal*, made in about 1962 by T F Priaux, Hon Secretary of the Antiquarian Section of La Société Guerneisaise and published in 1963 was exhibited by Dr Ogier.
- 85 The *Custumal* includes two passages of immediate significance. The first concerns rights to wreck; the second concerns vacant or common land. As to the first, the relevant French language text of the *Custumal* reads: "*Le Seigneur du dit fief ... a droit de vareq de mer qu'il doit partager avecq le Seigneur Le Roy en la mangniers que le Roy Edorard premier la ordonnée*".² As to the second what is said is:

²Translated as "*The Seigneur of the aforesaid Fief ... has the right to Wreck of the Sea which he must share with the lord the King in the manner that King Edward the First has ordered.*" The reference to Edward I cannot be treated as simply a mistaken reference to Edward III, the monarch at the time of the *Extente* of 1331, as the *Custumal* describes Edward I, in a later paragraph, as being son of Henry III.

*"A l'avant dit fief appartient la Mare de Carteret la Claire Mare la Mare Hala avecq leur pecheries et appartenance et autres terres laisees pur communes le long le rivage de la mer du depuis le Chapelle de Notre Damme de Pulayes jusques au ruisseau de la Fontain de St Brioc qui decoull au havre de Roquaine en la paroisse de St Pierre du Bois les quelles terres vaqantes ou communes une moitie appartient à l'abé de St Michel et lautre moitie au fief d'Anneville."*³

86 As the Bailiff explained in his judgment, although the precise location of the chapel at Pulias is now lost, Pulias is an area well to the north of Cobo and Long Port. Indeed, Pulias is almost at what was once the most northerly point of the Island’s west coast before the closing off of the strait lying between Clos du Valle, on what is now the northern part of the Island and a significant part of Fief St Michael, and the rest of the Island. Roquaine Bay, on the other hand, is more or less the most southerly of the bays on the Island’s west coast.

87 Further, it seems to have been accepted at the trial before the Bailiff that those vacant or common lands “*le long le rivage*” referred to in the *Custumal* were coastal lands; that is to say, lands running down to the sea shore. These lands would include dunes lying between the shore and fields using for farming.

88 The *Custumal* raises two questions.

88.1 First, is it a reasonable inference, as submitted by Advocate Barnes on behalf of the Appellant, that if the *Custumal* referred to the vacant or common coastal land in the vicinity of Banque du Long Port as pertaining to Fief Le Comte, this was because that land was part of, Fief de Carteret, a fief which by 1406 was a de Cheney holding and connected with Fief Le Comte?

88.2 Second, what was the reason for, and the nature of, the sharing with the Abbot of Mont St Michel mentioned in the *Custumal*?

89 A consideration supporting Advocate Barnes’ submission in the previous paragraph is that the Mare de Carteret, now a large area of land immediately to the north east of the Disputed Land once comprised or included a lake or ponds. An 1852 copy of a map from 1681 shows “Carteret Mare” as a lake somewhat inland from “Havre Long Port”. Further, and as mentioned, Mr Lenfestey’s mapping of the Guernsey Fiefs based on the *livres de perchage* places that area, as well as the area west and south of Mare de Carteret, but with the exception of the Disputed Land and the coastal strip to the north, as being within Fief de Carteret. And the Bailiff noted in his judgment that “*it is accepted [that La Mare de Carteret] is on fief de Carteret*”. If, as the Bailiff held, Fief de Carteret came to be part of Fief Le Comte having previously been within Fief St Michel, a reasonable inference would be that the coastal vacant or common land comprising Banque du Long Port and lying beside the area of Mare de Carteret would have come to Fief le Comte from Fief St Michel as part of Fief de Carteret so as to be able to be referred to in the Fief le Comte *Custumal*.

³ Translated as “*To the aforesaid fief belong La Mare de Carteret, la Clairemare and la Mare Hala with their fisheries and appurtenances, as well as other lands left as Commons along the seashore from the Chapel of our Lady of Pulias to the brook of the Fountain of St Briocq which flows into Rocquaine harbour in the parish of St Peter-in-the-Wood. One half of the said vacant lands or Commons belongs to the Abbot of St Michel and the other half to the Fief of Anneville.*” As explained, for “Fief of Anneville” one is to understand “Fief Le Comte”.

90 Mr Lenfestey’s memorandum of October 2008 had referred to a conveyance of 20 August 1938 made by the 5th Baron de Sausmarez. The subject of that conveyance was a section of land directly to the north of the Disputed Land, lying between the coast road and a large area of land which includes the Mare de Carteret area. The conveyance of 20 August 1938 transferred the relevant land for £1 to the States of Guernsey.

91 On behalf of the Second and Third Respondents it was submitted before us that that conveyance

showed the land to the north of the Disputed Land and to the west of what was within Fief de Carteret to have been coastal common land lying with Fief St Michel, as there was in the conveyance reference to leave from paying *treizième* having been given by the Crown (not, that is to say, by the Seigneur of Fief de Carteret whose leave would normally have been appropriate if the land lay within Fief de Carteret).

- 92 We are not clear that any particular significance can be given to this conveyance. If indeed the land in question lay within Fief St Michel, absent any conveyance of the land by the Crown to the predecessor in title of the 5th Baron de Sausmarez before the 20 August 1938 conveyance, the land already belonged to the Crown in right of Fief St Michel. We note that in reaching his conclusions the Bailiff made no reference to the conveyance; and while he referred to certain other conveyances of land in the vicinity, he also commented that none of the owners of those premises were party to the present proceedings. We note also Mr Lenfestey's comment about the 20 August 1938 conveyance made in his memorandum of October 2008. Since we think that there is no assistance one way or the other as to the Disputed Land to be gained from the 20 August 1938 conveyance, we say no more about it.
- 93 This, then, engages the second of the two questions mentioned above. What was the character of the sharing of coastal common land between Fief Le Comte and Fief St Michel, as indicated by the 1406 *Custumal*. One possibility is that the sharing gave each, the Seigneur of Fief Le Comte and the Abbot of Mont St Michel, a joint share in the whole of the coastal lands. The other possibility is that, of the coastal lands, one half lay on Fief Le Comte and the other half on Fief St Michel.
- 94 In his judgment the Bailiff concluded (at paragraph 78) that "*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 Cheney's whether fief de Carteret or fief Le Comte*". This is correct; and, in agreement with the Bailiff, we do not see that it is possible on the materials before us to reach any conclusion as to what the 1406 *Custumal* was describing concerning the coastal lands which encompassed what is now the Disputed Land.
- 95 At this point it is appropriate to say a little more about historic rights to wreck.
- 96 As Dr. Ogier also noted, in an *Approbation des Loix, Coustume, et Usages*, ratified by the Privy Council on 27 October 1583, it was confirmed that usage according to the 1331 *Extente* continued.
- 97 On the other hand, before the Bailiff and relied upon by Advocate Barnes in his submissions on behalf of the Plaintiff were two instruments connected with Fief de Carteret which suggested interms that there was a right to wreck, one dating from 1510 and the next dating from 1629. These we describe later.
- 98 Having considered the *Custumal* of 1406, Dr. Ogier noted that further guidance could be obtained from an essay on the constitutions, laws and customs of Guernsey by Laurent Carey (a Jurat in Guernsey 1765 – 1769) in a print published in 1889. In his first report, at paragraph 48, Dr Ogier had set out an extract from page 101 of the essay. However, the essay had started, at page 99, by explaining that the right to wreck was a feudal right enjoyed by the *seigneurs* in right of their fiefs; and it had continued by describing the 1331 *Extente*. It continued as follows:

“Au temps du dit Roi [Edward III], Guillaume de Chesney et l'Abbé du Mont Michel partageoient également tous les profits et avantages qui peuvent être perçus le moyen de varech, à la reserve des choses dus dites, qui appartenoient au

Roi seul, mais depuis que ceux qui sont venus au droit du dit de Chesney ont aliéné à plusieurs et diverses personnes les Fiefs et féodaux par lesquels il avait ce droit de partage avec Sa Majesté dans les biens avant dits, le dit droit est hors d'usage, et chaque possessor des Fiefs ainsi aliénés jouit du droit du varech selon la Coutume de Normandie, sans prejudice au droit special du Roi, ci-dessus spécifié.”

- 99 The extract from the article quoted by Dr Ogier, it is worth recording, had started with the words mentioning the “*abrogation du droit égal qu’avoient Guillaume De Chesney et l’Abbé de St. Michel avec le Roi dans ce partage du varech ...*”
- 100 Thus, according to Carey in the passages just quoted taken with the passage set out in Dr Ogier’s first report, the time came when, aside from the special case of certain precious goods, the Crown had lost any right to share in wreck coming ashore within Fief Le Comte or other fiefs and “féodaux” which had been disposed of by the Seigneur of Fief Le Comte.
- 101 Taking this matter further, Dr. Ogier had identified a claim made before the Royal Court on 7 March 1835 whereby the Seigneur of Fief de Cannelly had sought entitlement to rights of wreck near les Salines, Rocquaine, an area within that covered by the agreement recorded in the *Extente* of 1331. In the view of Dr. Ogier, Fief de Cannelly was a fief of similar status to Fief de Carteret.
- 102 Dr. Ogier had identified this similarity through an investigation of the accounts of Vale Priory, Guernsey, a daughter house of the Abbey of Mont Saint Michel. Those accounts included rolls setting out what were stated to be wheat rents owed to the Priory, arranged under the names of the respective fiefs or other holdings upon which they fell due. The roll of arrears for the years 1283 - 1308 had headings naming holdings including Fief de Cannelly and Fief de Carteret. Further, an undated roll forming another part of the assemblage of accounts of the Vale Priory again included Fief de Cannelly and Fief de Carteret: see paragraphs 17 to 21 of Dr. Ogier's first report. Accordingly, Fief de Cannelly appears to be in the same position as Fief de Carteret in being identified clearly as having obligations to Mont Saint Michel whilst being, at some time, a dependency of Fief Le Comte.
- 103 It therefore appears from these documents that Fief Saint Michel and Fief Le Comte had shared rights to wreckage on Guernsey’s west coast in the 14th century, that so far as concerns Fief Le Comte the right had become over time exclusive and associated with the coastal lands of the fief and subordinate fiefs enjoyed by the Seigneur of Fief Le Comte as these were transferred. It therefore comes as no surprise that a wreck claim in the 19th century was made in respect of what was once one of the subordinate fiefs of Mont Saint Michel but which has passed to the Seigneur of Fief Le Comte and then been transferred on. This suggests that there was no apprehension in the 19th century that Fief Saint Michel had retained for itself the right to wreckage upon creation of Fief de Cannelly.
- 104 If that is the proper inference to draw, it would seem difficult to be drawn to the conclusion that a different arrangement was to be inferred in relation to a fief of similar status in the same part of Guernsey. The right to wreckage would, of course, include the right to foreshore as, otherwise, there could be no access to the debris washed ashore; hence Dr. Ogier's suggestion at paragraph 69a that he might have changed his view in the event of research showing that *Seigneur or Dame* of Fief de Carteret had successfully enjoyed rights to wreck.
- 105 As Dr. Ogier indicated (at paragraph 55 of his first report) it would appear, according to Norman customary law, that if Fief de Carteret extended as far as the foreshore then it would also have

enjoyed rights to wreck. However, Dr. Ogier had also examined various conveyancing instruments concerning the fief made in 1510, 1525, 1535, 1615 (*bis*), 1629, 1897 and 2004. Of those, the conveyances of 1525, 1535, 1615 (*bis*), 1897 and 2004 did not make any express reference to wreck. This was the point made by Dr Ogier in paragraph 69a of his first report, quoted above. But two instruments did make express reference to wreck, namely those of 1510 and 1629.

106 Dr. Ogier was unwilling to place reliance upon the conveyance of 16 February 1510, an indenture by which Robert Willoughby, Lord Brooke, conveyed Fiefs Le Comte, Carteret and Beauval and all other property in Guernsey to Nicolas Faccham. The conveyance was expressed as including all:

“... other manors lordships fees lands tenements meadows woods pastures mills waters tythings rents reversions fines ... courts leet hundreds commons warrens wrecks waifes estrays liberties franchises advowsons of churches churches free chapels heriots knights fees profits commodities and hereditaments with the appurtenances whatsoever they be within the said Isle of Guernsey”.

107 That provision was, according to Dr Ogier, formulaic and had the appearance of a clause standard in conveyances of English manors in the period which included rights unknown in the Island. Accordingly, Dr Ogier considered that the mention of wreck, therefore, like the mention of those other things, might be merely formulaic. Further, he concluded, the conveyance was dealing with other fiefs besides Fief de Carteret, at least one of which (Le Comte) had rights to wreckage: see Dr. Ogier's first report at paragraphs 50 to 54. Therefore, Dr Ogier concluded, and the Bailiff found, the 1510 instrument could not be taken to imply necessarily that there was any right to wreck associated with Fief de Carteret. We agree.

108 The 1629 document stands, in our judgment, in a different case. It was a publication by the Royal Court on 28 January 1629 of a *partage* between two individuals of the Fiefs de Carteret and des Bruniaux. It specified that what was being divided included, among other matters, *"le fief de Carteret avec toutes les terres, varec, services et toutes aultres droits ..."*.

109 Whilst initially suspicious of the inclusion of the word "*varec*" in that the word was interlined in the sealed original, Dr. Ogier's second report makes clear that upon considering a further letter under seal of the *partage* dated 28 January 1629 he could see that the word "*varec*" was not similarly interlined and was prepared to take the reference at face value and as authentically included in the original. Further, we note that the 1629 *partage* was, according to Dr Ogier's first report, registered with the Greffe in 1705: Dr Ogier exhibited a copy of this registration to his first report. Before the court is a photocopy of the manuscript transcription of the *partage* as written out in 1705 into the register: the transcription appears to use a word which resembles "*varec*" or possibly "*varot*" or "*varek*" standing in the place where the word "*varec*" was included in the *partage* itself.

110 A submission was made to us by Advocate Dunster on behalf of the Constables that the word "*varec*" used in the *partage* was not to be translated as wreck. For this Advocate Dunster based himself on the 1705 manuscript copy of the 1629 *partage*. We do not accept this submission. Dr Ogier recognised the word used in the *partage* as "*varec*", a word which he translated as "wreck", as Advocate Dunster acknowledged in a subsequent submission. We note also that Dr Ogier had exhibited a copy of the 1705 registration without mentioning that the transcription of the relevant word might have demonstrated that the word meant something other than wreck.

- 111 Further, Dr Ogier did not regard the language of the 1629 *partage* as being merely formulaic, in contrast to his criticism of the 1510 indenture. Despite this, Dr Ogier remained doubtful about drawing any inferences from the *partage*: his opinion was that it was significant that none of the other instruments referred to above (aside from that of 1510) made any specific reference to wreck as a separate right.
- 112 There are two matters which in our judgment support Advocate Barnes' criticism of the Bailiff's having given weight to Dr Ogier's doubts concerning the inferences to be drawn from the historic instruments concerning Fief de Carteret.
- 113 First, in his second report Dr Ogier drew attention to the complete copy of a document made, seemingly, in about 1607 by Thomas Fouaschin, son of Thomas Fouaschin. It was Mr Lenfestey's transcription of this document which was exhibited to Mrs Davies' Statement and to which we have referred earlier. The document itself was one compiled, so it was said, by Thomas Fouaschin from two old copies of an earlier document of 1547 introduced with a heading written out by Dr Ogier as: "*Ensuiuant les services feautez et dignitez lesquelles les tenants de la ... [?]. du fief le Comte sont tenues et subjects faire au Sr danneville seigneur du dit fief le Comte*". The penultimate paragraph of the document, with a side-note reading "*Le vereck de Mer autrement dit de Naufrage*", appears to have been part of an addendum by Thomas Fouaschin the senior: it cannot have been in the 1547 document. It started with some words quoted and discussed by Dr Ogier in his second report (the first clause quoted below); but there was further relevant text which included the words emphasised below:

"Item le dit S^r. du Comte ha le vreck de la mer par toute l'Isle d Guernsey, comme est declaire en L'Estente de notre Souverain Sire le Roy en la paroisse de S^t. Peirre port, Et comme mon pere Thomas Fouaschin S^r. Danneville la recue per les mains de James Perrin receveur du Roy et Hellier Gosselin procurer du Roy en l'an 1547, Et comme aussy moymesme Thomas Fouaschin S^r. Danneville j'ay receu par l'ordre de Sier Leonard Chamberlain Capitaine de l'Isle de Guernsey pour ma part du navire chargé de poivre et de Bresil, dents d'elefant, leine de coton at autres machandises lequel fut perdu aupres de Carteret."

- 114 Dr Ogier explained in his second report, when setting out the first clause of this passage of Thomas Fouaschin's document, that Thomas Fouaschin had a reputation for "*fertility of invention, including in manorial matters*". This comment was directed by Dr Ogier to, in particular, Thomas Fouaschin's indication that the 1331 *Extente* had given the Seigneur of Fief Le Comte the right of wreck throughout the Island.⁴ But we accept that before the Court the only evidence for there having been associated with Fief Le Comte a right to wreck in the vicinity of de Carteret acknowledged by "*l'ordre de messier Leonard Chamberlain Capitaine de l'Isle de Guernsey*" was Thomas Fouaschin's statement made in 1607. Nevertheless, and this is of significance, in 1607 and before the subsequent separation of Fief de Carteret from Fief Le Comte there was an assertion of that right made by the then Seigneur of Fief Le Comte. This assertion was long before 1878 and indeed before the making of the 1629 *partage*.
- 115 The first exhibit to Dr Ogier's first report was a description of the conveyances and other instruments concerning the descent of Fief de Carteret over the period from 1497 to 2004, setting out the instruments listed in paragraph 69a of his first report from which we have quoted already.

Included with the exhibit were copies of those documents. According to Dr Ogier's description, between 1607 and 1629, when the 1629 *partage* was made, George Fashin (described as Seigneur of Anneville) sold to John Quetteville both Fief de Carteret and Fiefs des Bruniaux and St Martin. This was embodied in two instruments of 1615, one describing the sold fiefs as being sold "*together with all and manner of dignities priviledges perrogatives defaultes rightes duties comodytes profittes and dependencies whatsoever*"; the other using the words "... *avec toutes et tells maisons, terres, estangs, caparts, cheverentes, poullages, traiziemes, forfaitures et generallyment toutes autres manieres de dignities, privileges, prereogatives, casualitez, droitz, courtz, usages, debvoirs, commonditez, proffitz, emolumentz et dependances quelconques...*".

- 116 The 1629 *partage* itself involved a division of Fief de Carteret from Fief des Bruniaux; and, as explained above, the division included the right to wreck along with all other seignorial rights.
- 117 The upshot, in our judgment, was that by early in the seventeenth century at the latest a right of wreck was indeed being claimed for, and disposed of as being included with, Fief de Carteret.
- 118 Second, it was not argued before us that the language of the instruments referred to in paragraph 105 above would have been insufficient to embrace any and all rights as regards wreck, if there were indeed any subsisting rights to wreck: the general words would have carried such rights, if indeed there were any. In short, the instruments do not establish either that there was no right, or that any such rights as there were had been lost on the making of the instrument and the disposition of Fief de Carteret.

Conclusion

- 119 On the basis of the analysis which we have just carried out, it is our judgment that the appeal succeeds. It follows that the Disputed Land forms part of Fief de Carteret and that the 2007 conveyance, referred to in paragraphs 15 and 25 above, transferred the Disputed Land to the Plaintiff.

⁴The 1331 Extente had given a right of wreck throughout the Island, albeit not an exclusive right in that it was shared with the Abbot of Mont St Michel. Clos de Valle, Lihou and Jethou, where the Seigneur of Fief Le Comte had no rights, were at the time separate islands.

- 120 Allowing the appeal does not, however, mean that the Plaintiff succeeds in establishing a right to all the relief claimed in its action. It was confirmed to us at the hearing of the appeal that the Plaintiff was not seeking damages. Also, the Bailiff explained that he had not reached a conclusion as to whether the customary law of trespass in this Island would entitle the Plaintiff to the relief claimed, and would require further submissions. We therefore remit all outstanding parts of the Plaintiff's claim as set out in the Cause to the Royal Court for consideration in the light of our decision as to the Plaintiff's ownership of the Disputed Land.

Costs

- 121 We have had submissions made to us concerning the costs of the appeal of A W Holdings Corp, the Plaintiff. The Plaintiff, having been successful, asks for its costs to be ordered to be paid by the Respondents. These are, on the one hand the Constables of the Castel Parish ("the Constables"),

and on the other the Intervenor in the action (“the Intervenor”), namely Her Majesty’s Procurer (as *partie publique*) and Her Majesty’s Receiver General on behalf of the Crown.

- 122 The Respondents do not oppose the order sought by the Plaintiff, which will result in joint and several liability on the part of the Respondents. Nevertheless, advocate M G A Dunster on behalf of the Constables asks that, as between the Respondents, the burden of the Plaintiff’s costs should fall as to 75% on the Intervenor.
- 123 The Constables, just as much as the Intervenor, sought to oppose the appeal and uphold the Bailiff’s judgment on the single issue on which the appeal proceeded, namely the question of the ownership of the Disputed Land. On this we saw no distinction between the two sets of Respondents. We consider that in principle the appeal costs should follow the event, the Plaintiff being entitled to its appeal costs, but that beyond this further no special order is needed concerning the sharing of the burden of the Plaintiff’s costs. These we therefore simply order to be paid by the Respondents jointly and severally on the on the recoverable basis.
- 124 The Plaintiff asks also that the costs order made by the Royal Court should be set aside and the Plaintiff should have its costs below. The order made by the Royal Court was for the action to be dismissed, with the Plaintiff paying the Respondents’ costs of and incidental to the proceeding.
- 125 Again, Advocate Dunster on behalf of the Intervenor resists the Plaintiff’s contention, submitting that this Court should make no order in relation to the Royal Court’s costs order. In his written submissions he explains that “*The question of the costs of the Royal Court proceedings can then properly be reconsidered by the Royal Court once the matter has been remitted and finally determined in its entirety*”.
- 126 The foundation of this submission is that this Court’s order on the appeal sets aside the order made by the Royal Court dismissing the action, and determines the question of the ownership of the Disputed Land in favour of the Plaintiff; but this Court’s order on the appeal will not finally end the proceedings, as the case is to be remitted to the Royal Court to determine the relief to which the Plaintiff is entitled in the light of its ownership of what is common land in the Parish of Castel which has been managed by the Constables.
- 127 It is clear to us that the Royal Court’s costs order cannot be left to stand undisturbed. The Plaintiff’s successful appeal means that the Plaintiff succeeded on all the matters canvassed at the trial, apart from one question – namely, the question of the form of any relief – which is left over for further consideration.
- 128 Insofar as the Advocate Dunster’s submission is that we should substitute for the Royal Court’s costs order an order reserving the costs of the trial before the Bailiff to a further decision once there have been further proceedings before the Royal Court, we reject that submission. We consider that the Plaintiff has succeeded on the principal question with which the trial was concerned. Certainly, there were questions left unresolved, these concerning the implications of the Plaintiff’s ownership of the Disputed Land. These the Royal Court did not need to resolve. We therefore think the appropriate order to be made should be for the Royal Court’s costs order to be set aside and instead for the Respondents to be ordered jointly and severally to pay the Plaintiff’s costs of and incidental to the trial on the recoverable basis. The costs covered by this order will not be the general costs of the proceedings, which will remain to be determined by the Royal Court at the conclusion of the proceedings.

