JCPC 2025/0040

IN THE JUDICIAL COMMITTEE
ON APPEAL FROM THE COURT OF APPEAL
OF ST HELENA

BETWEEN:

LARRY FRANCIS

Appellant

AND

THE ATTORNEY GENERAL OF ST HELENA
(on behalf of the Crown)

Respondent

WRITTEN CASE FOR THE RESPONDENT

I. INTRODUCTION

1. The Appellant applied to the Registrar of Lands under the Registered Land Ordinance, 1980 (**Registered Land Ordinance**) to rectify the register to reflect his acquisition of certain Crown Land in St Helena by prescription. That application has yet to be determined. The Registrar stated a case for the Supreme Court asking whether, as a matter of principle, Crown Land in St Helena may be acquired by prescription. That is the question now before the Board.

2. The Supreme Court answered that question "yes": *Francis v Attorney General of St Helena* [2024] SHSC 6 (**SC**). The Court of Appeal answered it "no": *Attorney General of St Helena v Francis* [2024] SHCA 5 (**CA**). For the reasons set out below, the Court of Appeal was right to answer the question "no" and the Appellant's appeal should be dismissed. In summary:

   (a) By s 159 of the Registered Land Ordinance, nothing in the Ordinance prejudices any of the interests, rights, powers, and privileges conferred on the Crown or the Government by any other written law. That operates to prevent the prescription provisions of the Ordinance from applying to Crown Land because:

(i) first, the operation of the prescription provisions would prejudice interests, rights, powers, and privileges conferred on the Crown by s 112 of the Saint Helena Act 1833: the title to the land (these proceedings having been conducted on the basis that title to the relevant land was vested in the Crown under that provision); and

(ii) second, and in any event, the operation of the prescription provisions would prejudice interests, rights, powers, and privileges conferred on the Crown by s 31 of the Constitution of St Helena, Ascension and Tristan da Cunha (**Constitution**): the power to sell the land, the power to lease the land, and the power to dispose of other interests in the land.

(b) The Court of Appeal did not err in its application of the rule in *Pepper v Hart* [1993] AC 593. Its analysis was entirely orthodox. This is a case where the requirements are not met, and the report of the relevant legislative debate may not be used as an aid to statutory construction. In any event, even if it may be so used, it provides no meaningful support for the Appellant's case.

(c) Finally, the Appellant attempts to raise various further points before the Board for the first time. These points were not raised below, and the Board does not have the benefit of the Supreme Court or Court of Appeal's views on them. One of the points is inconsistent with the way the case was conducted below and is likely to turn (in part) on evidence not before the Board. The Appellant should not be permitted to raise these points now. They can be determined (if necessary) once the proceedings are remitted.

II. BACKGROUND

3. The factual background is summarised in the Statement of Facts and Issues (**SFI**) at [19]–[23]. The procedural history is summarised in the SFI at [24]–[35].

III. ISSUES BEFORE THE BOARD

4. The SFI lists four issues, though only two of them properly arise before the Board.

5. The **first** issue listed in the SFI is: *Can Crown Land in St Helena be acquired by prescription, in particular given section 159 of the Registered Land Ordinance read with s 112 of the Saint Helena Act 1833 or s 31 of the Constitution?*[1]

6. This is the key issue before the Board.

7. The **second** issue listed in the SFI is: *Was all private property in St Helena acquired by the Crown through operation of statute under the Saint Helena Act 1833? If so, did this conveyance by statute create an interest, right, power, or privilege capable of being preserved under s 159 of the Registered Land Ordinance?*

8. As is explained below, this issue was not raised in, or decided by, the courts below; it is inconsistent with the way the parties conducted the case below; and it is likely to turn (in part) on evidence not before the Board. The Appellant should not be permitted to raise it now. It can be determined (if necessary) once the proceedings are remitted.

9. The **third** issue listed in the SFI is: *Does the rule in Pepper v Hart [1993] AC 593 apply in respect of the Legislative Council of St Helena?*

10. As is explained below, this issue also was not raised in, or decided by, the courts below. Nor was it raised in the Appellant's Grounds of Appeal to the Board: indeed, the Grounds of Appeal are positively inconsistent with it. The Respondent (**the Attorney General**) has invited the Appellant to amend his notice of appeal (and apply for the necessary permission to amend) but the Appellant has not done so. In the circumstances, the Appellant should not be permitted to raise the issue now.

11. The **fourth** issue listed in the SFI is: *Did the Court of Appeal err in its application of the rule in Pepper v Hart [1993] AC 593?*

12. This issue is before the Board, though it is of minimal importance in this case: even if the relevant extract from the report of the relevant legislative debate may be used as an aid to statutory construction, it provides no meaningful support for the Appellant's case

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[1] The inclusion of the words "*or s 31 of the Constitution*" was disputed by the Appellant at the time of the SFI. The Attorney General has since obtained permission to rely on an amended notice of intention to participate, such that the objection has now fallen away.

on Issue 1.

IV. STATUTORY FRAMEWORK

13. The relevant statutory framework is set out in the SFI at [2]–[18]. The key points are as follows.

14. **First**, s 112 of the Saint Helena Act 1833 has two limbs. The first, the "vesting limb", vests "*[t]he island of St Helena, and all forts, factories, public edifices, and hereditaments whatsoever in the said island, and all stores and property thereon fit or used for the service of the government thereof*" in the Crown. The second, the "legislative limb", authorises the Crown in Council to govern St Helena by Order from time to time.

15. **Second**, under s 31 of the Constitution, subject to the Constitution and any other law, the Governor (or someone authorised by them) may, in His Majesty's name and on His Majesty's behalf, "*make and execute grants and other dispositions of any land or other immovable property in St Helena that is vested in [His] Majesty in right of the Government of St Helena*". Equivalent provisions appeared in s 51 of Schedule 1 to the St Helena Constitution Order 1988 and s 44 of Schedule 1 to the St Helena (Constitution) Order 1966.

16. **Third**, under the English Law (Application) Ordinance, 2005 (**English Law Application Ordinance**), 'Adopted English Law' applies in St Helena "*in so far as it is applicable and suitable to local circumstances, and subject to such modifications, adaptations, qualifications and exceptions as local circumstances render necessary*".[2] 'Adopted English Law' comprises the common law of England (including the rules of equity) and United Kingdom statutes in force in England as at 1 January 2006.[3] The application of 'Adopted English Law' is subject to any enactment of the Westminster Parliament extending to St Helena, any Order in Council extending to St Helena, and any Ordinance of the Legislative Council of St Helena.[4]

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[2] English Law Application Ordinance, s 3.

[3] English Law Application Ordinance, s 2.

[4] English Law Application Ordinance, s 4.

17. Similar provision for the adoption of English law was made by the English Law (Application) Ordinance, 1987. Before that, similar provision for the adoption of English law as at 1 April 1970 was made by the English Law (Application) Ordinance, 1970. Similar provisions existed before even before that.

18. **Fourth**, the key features (for present purposes) of the Registered Land Ordinance are:

    (a) Under s 23, registration as the proprietor of a parcel with absolute title vests in that person the absolute ownership of the parcel together with all rights and privileges belonging or appurtenant to it, free from all other interests and claims, but subject to (i) registered incumbrances and (ii) the overriding interests set out in s 28.

    (b) Under s 26, registration of land as Crown Land enables the Governor, subject to any registered incumbrances, to dispose of such land by a disposition registered under the Ordinance.

    (c) Section 28 lists overriding interests—interests that all registered land is subject to without their being noted on the Register. These include "*rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any written law*" (s 28(1)(c)) and "*rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription*" (s 28(1)(f)).

    (d) Under s 135(1), the ownership of land may be acquired by peaceable, open, and uninterrupted possession for a period of 15 years without the permission of any person lawfully entitled to such possession. Under s 135(2), any person claiming to have acquired the ownership of land by virtue of s 135(1) may apply to the Registrar for registration as proprietor of the land. Section 139(1)(b) likewise provides that the Registrar may rectify the Register if any person has acquired an interest in land by prescription.

    (e) Under s 159, "*[n]othing in [the] Ordinance affects any of the interests, rights, powers and privileges conferred on the Crown or the Government by any other written law*".

(f) Under s 160, "*[s]ubject to section 159, [the] Ordinance binds the Crown and the Government*".

19. **Fifth**, as to how prescription operates under the Registered Land Ordinance:

(a) Adverse possession in the context of unregistered land is an extinguishment-by-limitation regime. Once there has been adverse possession for the relevant amount of time, the paper owner's right of action to recover the land is barred and their title is extinguished by operation of law. The squatter is not conferred the paper owner's title—the squatter simply has the best remaining possessory title, which now cannot be challenged.

(b) Prescription in the context of registered land operates differently. Once there has been peaceable, open, and uninterrupted possession for 15 years without permission, the squatter acquires "*ownership of [the] land*": s 135(1). That is why s 135(2) confers a right to apply for registration as proprietor on any person "*who claims to have acquired the ownership of land by virtue of subsection (1)*" and why s 139(1)(b) authorises the Registrar to rectify the Register where any person "*has acquired an interest in land by prescription under Part IX*".[5] Once they are registered as the proprietor, the squatter obtains title to the parcel under s 23. Even before the squatter is registered, they have an overriding interest under s 28(1)(f).

(c) Once there has been peaceable, open, and uninterrupted possession for 15 years without permission, the squatter has a right to be registered as the proprietor. That is different to the position in England and Wales, where the squatter can only be registered as the proprietor in limited circumstances.[6]

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5 See also s 137(3), which refers to an applicant having "*acquired the ownership of the land claimed*".

6 See Schedule 6 to the Land Registration Act 2002. Once the relevant period of adverse possession has expired, the squatter may make an application to be registered as the proprietor of the land under paragraph 1(1). Under paragraph 3(1), the proprietor may then require the application to be dealt with under paragraph 5. Under paragraph 5, the applicant is only entitled to be registered as the proprietor if one of three conditions is met: (i) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant and the circumstances are such that the applicant ought to be registered as the proprietor; (ii) the applicant is for some other reason entitled to be registered as the proprietor of the estate; or (iii) the land adjoins the applicant's own land, the boundary is undetermined under

V. ISSUE 1: S 159 OF REGISTERED LAND ORDINANCE

20. Section 160 of the Registered Land Ordinance provides that, subject to s 159, the Ordinance binds the Crown[7] and the Government.[8] Section 159 provides that nothing in the Ordinance "*affects any of the interests, rights, powers and privileges conferred on the Crown or the Government by any other written law*".[9]

21. When it was enacted, the Registered Land Ordinance provided that nothing in the Ordinance "*shall prejudice*" any of the interests, rights, powers, and privileges conferred on the Crown or the Government by any other written law. The quoted words appear to have been replaced with "*affects*" by the Law Revision Commissioner in the exercise of powers granted by s 6 of the Revised Edition of the Laws Ordinance, 1999. Because those powers do not permit substantive amendments,[10] "*affects*" should be read as (or construed as if it read) "*shall prejudice*". This was common ground in the Court of Appeal.

22. For the reasons set out below, were the prescription provisions of the Registered Land Ordinance to apply to Crown Land, that would prejudice interests, rights, powers, and privileges conferred on the Crown or the Government by (i) s 112 of the Saint Helena Act 1833 and (ii) s 31 of the Constitution.

The purpose of ss 159 and 160 of the Registered Land Ordinance

23. The purpose of s 160 is to make express that the Registered Land Ordinance binds the

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section 60, the applicant (or a predecessor) reasonably believed for ten years it was theirs, and the estate was registered over a year before applying. If the application is rejected because no condition is met, and the squatter remains in adverse possession for a further two years, they can then apply again under paragraph 6 and are then entitled to be registered under paragraph 7 (subject to limited exceptions).

7 Section 42 of the Interpretation Ordinance, 1968 provides that any reference in any Ordinance to the Crown "*is to be construed as a reference to the Sovereign for the time being*".

8 Section 3(1) of the Interpretation Ordinance, 1968 defines "Government" to mean "*the Government of St Helena*".

9 Section 3(1) of the Interpretation Ordinance, 1968 defines "written law" to mean "*all Ordinances, all subsidiary legislation, all Acts of Parliament of the United Kingdom extending expressly or by necessary implication, or applied to, or otherwise having the force of law in St Helena, Ascension or Tristan da Cunha, as the case may be, and all Orders in Council, Letters Patent and Royal Instructions so extending or applied or having such force*".

10 Revised Edition of the Laws Ordinance, 1999, s 7(1).

Crown and the Government, displacing the common law[11] and statutory[12] principle that a statutory provision does not bind the Crown save by express words or necessary implication.

24. But s 160 is expressly subject to s 159. The purpose of s 159 is to save from being prejudiced certain rights held by the Crown and the Government under other written laws. Those rights would not be prejudiced if (as is the default position) the Ordinance did not apply to the Crown and the Government. Section 159 confirms that those rights are not to be prejudiced by the Ordinance's application to the Crown and the Government. To put that another way: to the extent that those rights would be prejudiced by the Ordinance, the Ordinance does not apply to the Crown and the Government.

25. Section 159 applies to "*interests*", "*rights*", "*powers*", and "*privileges*". That is broader than other provisions; for example, the equivalent provision in the Interpretation Ordinance, 1968 only refers to "*the rights of the Crown*".[13] Indeed, it is difficult to think of broader language. It is apt to encompass not only all forms of legal and equitable interests or rights, but also powers and privileges not amounting to interests or rights. The wording is plainly intended to be as inclusive as possible and there is no good reason to read it down.

Section 112 of the Saint Helena Act 1833

26. As is explained below in relation to Issue 2, the proceedings have to date been conducted on the basis, and this appeal should also be resolved on the basis, that the land the subject of these proceedings was vested in the Crown by operation of s 112 of the Saint Helena Act 1833. The Appellant now attempts to dispute that premise, but for the reasons given below in relation to Issue 2 that should not be entertained.

27. The Crown obtained title to the relevant land under s 112 of the Saint Helena Act 1833. That title was plainly an "*interest*" or "*right*" (or, more accurately, a bundle of rights)

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11 *R (on the application of Black) v Secretary of State for Justice* [2018] AC 215 at [22]–[37].

12 See s 43(1) of the Interpretation Ordinance, 1968, which provides that "*No Ordinance in any manner whatever affects the rights of the Crown, unless it is therein expressly provided or unless it so appears by necessary implication.*"

13 Interpretation Ordinance, 1968, s 43(1).

within the meaning of s 159 of the Registered Land Ordinance. If the prescription provisions of the Registered Land Ordinance apply to that land, that title is plainly prejudiced: it is extinguished (other than by voluntary act of the Crown as holder of the title). As explained above, the effect of the prescription provisions of the Registered Land Ordinance is that the squatter obtains ownership of the land and may be registered (as of right) as its proprietor, extinguishing the Crown's title. It is difficult to think of a clearer case of an interest or right of the Crown being prejudiced.

28. The Attorney General accepts that it is within the Legislative Council's power to prejudice the Crown's title to Crown Land in that way, but by the words of s 159, it chose not to do so in the Registered Land Ordinance. As the Court of Appeal rightly stated, effect must be given to "*the clear language of s 159*": CA at [50]. For that reason, the appeal should be dismissed.

29. The Appellant makes a number of points in response, but they do not withstand scrutiny.

30. First, the Appellant says that s 159 is concerned only with "*ongoing interests, rights and privileges created by written law*": Appellant's Case at [33] (page 10).[14] The Saint Helena Act 1833, he says, did something different: it "*served to effect a transfer in a specific moment in time*": Appellant's Case at [39](a) (page 13).

31. This submission cannot be reconciled with the words of s 159. The section refers to "*interests, rights, powers and privileges conferred on the Crown or the Government by any other written law*". It imposes two criteria, and two only: (i) source (the interest, right, power, or privilege must be "*conferred … by any other written law*"); and (ii) beneficiary (it must be conferred "*on the Crown or the Government*"). There is no third criterion that the interest, right, power, or privilege must be "*ongoing*" in some sense.

32. Where the Legislative Council intended to impose an additional criterion, it made that clear. By way of example, s 28(1) of the Registered Land Ordinance refers to overriding interests "*that for the time being subsist*". The absence of such words from s 159 must be

[14] The paragraph numbering in the Appellant's Case contains a number of typographical errors: (i) a second set of paragraphs 31 to 34 appears between paragraphs 38 and 39; (ii) after paragraph 50 the numbering resets to paragraph 37; and (iii) after paragraph 46 (the second time) the numbering resets to paragraph 31. To avoid confusion references in this written case contain both paragraph number and page number.

taken to be deliberate, and it tells against reading in the limitation for which the Appellant contends.

33. The Appellant's construction also produces results that the Legislative Council cannot have intended. It would mean that if a statute conferred a right of entry on the Crown, s 159 would protect it. Yet if the same statute went further and vested ownership of the land in the Crown, s 159 would not. On the Appellant's reading, the greater the interest, the weaker the protection. That cannot be right.

34. Finally, whatever superficial appeal the Appellant's construction may have for "*rights, powers and privileges*", it founders on the word "*interests*". Interests (as a class) are generally ongoing, in the sense that once transferred or vested they subsist until a further relevant event. But the Appellant appears to contend that they must be ongoing in some different sense which is not generally true of interests. That would exclude most interests and is unlikely to be what the Legislative Council intended. For example, "*interest in land*" is defined in s 2 to include "*absolute ownership of land*"—the paradigm of an interest created in a single transfer or vesting and thereafter simply subsisting. Having deliberately chosen to include "*interests*" in s 159, the Legislative Council cannot have meant to exclude the clearest example of one.

35. Second, the Appellant gives various examples of statutory provisions which he says create an "*ongoing*" right or interest capable of protection under s 159: Appellant's Case at [35] (page 10).

36. The Appellant relies on provisions of the Forestry Ordinance, 1954 giving the Chief Forestry Officer certain rights in relation to privately held land designated as a protected private forest,[15] provisions of the Land Acquisition Ordinance, 2006 giving the Attorney General the right to take temporary possession of land, and provisions of the Airport Development Ordinance, 2006 giving the Governor power to regulate the activities of persons within a designated Airport Development Area. Each of those statutory rights is

[15] The example is, in any event, a bad one. Privately held land may only be constituted a protected private forest on the request of the owner: s 4(1)(c). The Chief Forestry Officer has a power to enter onto any land in St Helena in s 16, but the power to conduct works in s 15 is conferred (in relation to protected private forests) on the owner of the land, not the Chief Forestry Officer.

covered by s 28(1)(c) of the Registered Land Ordinance, which preserves as an overriding interest "*rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any written law*".[16] There is no need for them to be saved from being prejudiced by s 159. It is likely that they are also saved by s 159, but the Appellant's suggestion that they illustrate the types of provisions that the Legislative Council must have had in mind when enacting s 159 is not correct.

37. The Appellant then relies on various non-St Helena provisions that make land inalienable other than by legislative act. It is likely that such provisions would engage s 159, but that is no basis for saying that s 159 is limited to such provisions.

38. Third, the Appellant suggests that the purpose of s 159 is "*not to protect private law ownership of land, even where that private ownership of land is acquired through a statutory conveyance*": Appellant's Case at [36] (page 11). But private law ownership of land is the highest and most fundamental form of interest or right it is possible to hold in respect of land. As explained above, it would be anomalous for such an interest or right (or, more accurately, bundle of rights) not to be captured by the broad words of s 159.

39. Fourth, the Appellant says that his argument is supported by cognate legislation in other jurisdictions that expressly provides that Crown Land cannot be acquired by prescription: Appellant's Case at [29]–[30] (page 10), [37]–[38] (page 12). But that cognate legislation says nothing about the St Helena legislation. In particular, it says nothing about the proper construction of the St Helena legislation.

40. More fundamentally, the question here is not whether, in the abstract and without more, the Registered Land Ordinance permits Crown Land to be acquired by prescription. The Attorney General accepts that it does (subject to the effect of s 159 together with any other written law). The question is whether s 159 of the Registered Land Ordinance, read with s 112 of the Saint Helena Act 1833, prevents that result. Section 112 of the Saint Helena Act 1833 is unique to St Helena, and the Appellant has not suggested that equivalent provisions exist for the other jurisdictions on which he relies.

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[16] The same is true of the other statutory provision on which the Appellant relies, s 3 of the Aviation Ordinance, 2015.

41. Fifth, the Appellant suggests that the difference in the treatment of Crown Land and non-Crown Land for prescription purposes is "*capricious and arbitrary*": Appellant's Case at [32] (page 13). But the Crown has long been treated differently for the purposes of adverse possession: see, eg, the provisions in Schedule 1, Part II of the Limitation Act 1980 (which have a long history), which extend the time period from 12 years to 30 years for Crown land and 60 years for Crown foreshore. The principal justification for this is that it is difficult for the Crown to look after its land as closely as a private proprietor unless it employees teams of officials for that purpose (which is not feasible). That justification has particular force in St Helena, where the Government has limited resources.

42. Sixth, the Appellant relies on s 161 of the Registered Land Ordinance, by which (relevantly) matters in relation to registered land not provided for in the Ordinance or any other written law must be decided in accordance with "*the principles of justice, equity and good conscience*": Appellant's Case at [33]–[34] (page 13). This is a red herring. This appeal does not concern matters in relation to registered land not provided for in the Ordinance or any other written law. It concerns a provision of the Ordinance that refers to, and gives primacy to, certain provisions of other written laws.

43. In any event, it is not correct to say, as the Appellant does, that St Helenians are "*a non-self-governing people*" being deprived of "*the right to acquire public land by prescription based on [the Saint Helena Act 1833]*": Appellant's Case at [34] (page 13). St Helena is an internally self-governing British Overseas Territory. The effect of the Saint Helena Act 1833 in this case arises solely because of s 159 of the Registered Land Ordinance—which was passed by the self-governing legislature of St Helena. It is open to that legislature to change the position: see paragraph 28 above.

44. Seventh, to the extent that the Appellant relies on the report of the relevant legislative debate, that is addressed under Issue 4 below.

Section 31 of the Constitution

45. Section 31 of the Constitution is entitled "*Powers to dispose of land*" and provides:

> Subject to this Constitution and any other law, the Governor or any person duly authorised by him or her in writing under his or her hand may, in Her Majesty's name and on Her Majesty's

> behalf, make and execute grants and other dispositions of any land or other immovable property in St Helena that is vested in Her Majesty in right of the Government of St Helena.

46. The Governor therefore has the power to "*make and execute grants and other dispositions*" of Crown Land in St Helena. The Governor must exercise that power on the advice of the Executive Council.[17]

47. The Constitution does not define "*disposition*", but in this context it extends to "*all acts by which a new interest (legal or equitable) in the property is effectually created*".[18] Section 31 therefore confers on the Governor the power to dispose of interests (of any kind) in Crown Land.

48. The Governor's power to dispose of interests in Crown Land is plainly a power—and probably also a right—within the meaning of s 159 of the Registered Land Ordinance. That power and right would be prejudiced if prescription under the Registered Land Ordinance applied to Crown Land. The effect of the prescription provisions of the Registered Land Ordinance is that the squatter obtains ownership of the land and may be registered (as of right) as its proprietor, extinguishing the Crown's title. That plainly prejudices the Governor's power to dispose of interests in the land. Indeed, it defeats it entirely: the Governor cannot sell, lease, or otherwise dispose of an interest in Crown Land that has passed out of the Crown's ownership by prescription.

49. Again, the Appellant makes a number of points which do not withstand scrutiny.

50. First, the Appellant says that s 31 of the Constitution is "*[s]ubject to … any other law*": Appellant's Case at [39] (page 25). That is true. That proviso operates to give primacy to laws that are inconsistent with s 31 of the Constitution. But the question here is whether there is any such inconsistency in the first place. If the Attorney General's submission about s 159 of the Registered Land Ordinance is correct, then the Legislative Council declared that it was not intending to prejudice the right and power granted by s 31 of the Constitution. That means there is no inconsistency and nothing to engage the "*[s]ubject*

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17 Constitution, s 43(1). None of the exceptions in s 43(2) apply.

18 *Ho Po Sang v The Director of Public Works* [1959] 4 HKLR 632 at 666–667, where the Full Court of the Supreme Court of Hong Kong adopted this definition, taken from *Carter v Carter* [1896] 1 Ch 62, in the context of the Hong Kong equivalent of s 31. The issue was not addressed in the subsequent appeal to the Board, save for an indication that an agreement to later make a grant or disposition of land would not be a disposition: see *Director of Public Works v Ho Po Sang* [1961] AC 901 at 926–927.

to … any other law" proviso.

51. Second, the Appellant says that "*[t]he fact that some Crown land is acquired by prescription does not in any way affect or undermine the Governor's power to dispose of or grant land and other immovable property owned by the Crown*": Appellant's Case at [40] (page 25). That is not correct. As explained above, if Crown Land is acquired by prescription, the Governor's power to dispose of interests in that land is defeated.

52. Third, the Appellant relies on the Supreme Court and Court of Appeal's reasoning: Appellant's Case at [41] (page 26). As to this:

    (a) The Supreme Court and the Court of Appeal both rejected arguments to the effect that s 31 of the Constitution is inconsistent with, and must prevail over, the application of s 135 of the Registered Land Ordinance to Crown Land (without relying on s 159 of the Ordinance): SC at [45]–[76], [91]–[114], [126]–[155]; CA at [27]–[32]. The Attorney General does not renew that argument.

    (b) The Attorney General's argument is instead that the right and power in relation to Crown Land conferred on the Governor by s 31 of the Constitution would be prejudiced if the prescription provisions of the Registered Land Ordinance applied to Crown Land. Section 159 therefore (in effect) disapplies those provisions from Crown Land.

    (c) The Supreme Court's reason for rejecting that argument was that s 31 does "*not give the Crown a right to prohibit, prevent or restrict acquisition by prescription of its land*" and that there was "*no pre-existing right or interest of the Crown … that Crown land could not be acquired by prescription*": SC at [166]. But that was to set too high a bar. Section 159 does not require a 'right to be free of prescription'. It simply requires an interest, right, power, or privilege conferred by another written law that would be prejudiced by the application of the prescription provisions. That is so here for the reasons given above.

    (d) On this point, the Court of Appeal simply agreed with the Supreme Court's reasoning and did not add anything further: CA at [35].

VI. ISSUE 2: S 112 OF THE SAINT HELENA ACT 1833

53. The Appellant says that the Court of Appeal's decision was "*predicated on the Crown having acquired the land in question through s.112 of the [Saint Helena Act 1833]*" and that the Supreme Court and the Court of Appeal "*appear to have proceeded on the basis that the Crown acquired ownership over all land on St Helena through s.112 of the [Saint Helena Act 1833]*": Appellant's Case at [40] (page 14). The Appellant then submits that that construction of s 112 of the Saint Helena Act 1833 is incorrect: Appellant's Case at [41]–[50] (pages 14 to 19). He submits that s 112 should be construed only to apply to "*properties and hereditaments … fit for or used in the service of Government*" and not "*private properties used for commercial purposes*": Appellant's Case at [44] (page 15).

54. That is not a correct description of what happened in the courts below.

55. The proceedings to date have been conducted on the basis that the relevant land was acquired by the Crown under s 112 of the Saint Helena Act 1833. The Court of Appeal recorded this expressly:

    (a) At [40], the Court of Appeal noted that the Respondent (now the Appellant) argued that "*no interest in land which could be affected by S. 135 of the Ordinance was granted by s. 112*". The Court said that it would consider this argument further "*but it would appear to be contrary to the way the hearing was conducted in front of the Chief Justice*". The Court then quoted two passages from the Chief Justice's judgment.

    (b) At [58], the Court of Appeal was clear when framing its conclusion: "*in our view accepting the proposition that the Crown did acquire an interest in land by virtue of the 1833 Act, which was how the matter was argued in front of the Chief Justice, the answer to the posed question is 'no'*".

56. Consistently with that, there were no submissions below of the type now advanced by the Appellant: to the effect that the relevant land fell outside the scope of s 112 or that s 112 is to be construed in a certain way. The upshot is that the Appellant is attacking a finding that the Court of Appeal never made.

57. The Attorney General accepts that there is a question about the proper construction of s 112 and (depending on the answer to that question) there may be a question about whether the relevant land falls within the scope of s 112. He accepts that those questions have not yet been determined in these proceedings. But they should be determined (if necessary) at first instance when the matter is remitted. The Appellant should not be permitted to raise those questions for the first time before the Board.

58. The Board's practice was stated by Lord Diplock in *Baker v The Queen*:[19]

> [The Board's] normal practice is not to allow the parties to raise for the first time in an appeal to the Board a point of law which has not been argued in the court from which the appeal is brought. Exceptionally it allows this practice to be departed from if the new point of law sought to be raised is one which in the Board's view is incapable of depending upon an appreciation of matters of evidence or of facts of which judicial notice might be taken and is also one upon which in the Board's view they would not derive assistance from learning the opinions of judges of the local courts upon it. A consequence of this practice is that in its opinions delivered on an appeal the Board may have assumed, without itself deciding, that a proposition of law which was not disputed by the parties in the court from which the appeal is brought is correct. The proposition of law so assumed to be correct may be incorporated, whether expressly or by implication, in the ratio decidendi of the particular appeal; but because it does not bear the authority of an opinion reached by the Board itself it does not create a precedent for use in the decision of other cases.

59. The exceptional circumstances Lord Diplock contemplated for allowing a new point to be raised do not apply here. On the contrary, there is every reason not to allow the point to be taken now:

(a) When construing a statute from 1833, the way it has been interpreted in practice will likely be important.[20] But the Board has no evidence before it of how s 112 has been interpreted in practice.[21]

(b) The construction of a statute should take place against the backdrop of actual facts. The Appellant in effect asks the Board to construe s 112 in a vacuum, without reference to a particular parcel of land or set of facts.

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19 [1975] AC 774. This has been consistently applied; see, eg, *Port Authority of Trinidad and Tobago v Daban* [2019] UKPC 22 at [25]–[28].

20 See, eg, *Bloomsbury International Ltd v Sea Fish Industry Authority* [2011] 1 WLR 1546 at [58]–[61].

21 The Appellant also asserts (without evidence or citation) that "*many of the properties which were held in private ownership prior to the 1833 Act coming into force have remained in private ownership to the present day*": Appellant's Case at [46](c) (page 17). If correct, that would need to be established by evidence.

(c) The proper construction of one of the foundational statutes of St Helena is obviously a matter on which the Board would benefit from the considered opinions of the St Helena courts. It does not have those views in this case.

60. In the Grounds of Appeal at [14], the Appellant suggested that he would apply for permission to adduce fresh evidence before the Board to demonstrate that the relevant land was used solely for commercial purposes (and thus was not vested in the Crown, on the Appellant's interpretation of s 112). Any such application would have been bound to fail on ordinary *Ladd v Marshall*[22] principles. The Appellant appears now to have abandoned that suggestion and accepts that the factual issue will have to be determined on remitter: Appellant's Case at [49] (page 19).

61. Despite abandoning the suggestion of an application to adduce fresh evidence, the Appellant still suggests that the land in question was used solely for commercial purposes in 1833: Appellant's Case at [13] (page 4), [49] (page 19). For the avoidance of doubt, it is by no means clear that the Appellant's factual contention is correct. At the time, the land in question contained New Longwood House, the building constructed between 1818 and 1821 as a residence for Napoleon (with the intention that it would replace Old Longwood House, where Napoleon lived, which was nearby). As it happened, Napoleon refused to occupy New Longwood House and died in 1821. The Appellant contends that the land was used solely for commercial purposes in 1833, but there is evidence that it was in fact the residence of Governor Dallas (the last East India Company Governor of St Helena)—both before and after the enactment of the Saint Helena Act 1833.[23] That is plainly a governmental rather than a commercial purpose, as the Appellant accepts.[24]

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22 [1954] 1 WLR 1489.

23 The Second Commissioners of Inquiry Report (1834), reprinted in Fox and Baldwin (eds), *A Precarious Livelihood: St Helena 1834 East India Company Outpost to Crown Colony* (Society of Friends of St Helena, 2014) at 65 ("*The new house at Longwood, at present inhabited by the Governor …*"); Kitching, *A Handbook and Gazetteer of the Island of St Helena Including a Short History of the Island under the Crown 1834–1902* (1947) at 36 ("*In 1832 Dallas moved to Longwood New House, and Plantation was not reoccupied until the transfer to the Crown in 1836…*").

24 Appellant's Case at [44] (page 15) ("*… those fit for or used in the service of Government such as the Governor's residence…*").

VII. ISSUE 3: PEPPER V HART IN ST HELENA

62. The rule in *Pepper v Hart*[25] provides that reference to reports of legislative debates as an aid to statutory construction is permitted only where: (a) the legislation in question is ambiguous, obscure, or leads to absurdity; (b) the material relied on comprises statements by the Minister or other promoter of the bill; and (c) the statements relied on are clear and directed at the point in issue.[26] As is well known, *Pepper v Hart* established a narrow exception to a broad exclusionary rule. In this written case, "*the rule in Pepper v Hart*" refers to both the broad exclusionary rule and the narrow exception.

63. The Appellant contends that the rule in *Pepper v Hart* does not apply in St Helena: Appellant's Case at [40](a) (page 20).

The Appellant should not be permitted to raise the issue

64. The applicability of the rule in *Pepper v Hart* in St Helena was not argued before, or decided by, the Court of Appeal. The Board does not have the benefit of the lower courts' view on this (important) issue. The Appellant did not raise it as a ground in his Notice of Appeal; indeed, he positively asserted that the *Pepper v Hart* principles "*apply to devolved legislatures and, therefore, are likely to also apply to the legislatures of overseas territories*".[27] The Attorney General invited the Appellant to apply to amend his Notice of Appeal, but he has not done so.[28] In the circumstances, the Appellant should not be permitted to raise the issue before the Board.

In any event, the rule in *Pepper v Hart* does apply in St Helena

65. As explained in paragraph 16 above, under the English Law Application Ordinance the common law of England (including the rules of equity) and United Kingdom statutes in force in England as at 1 January 2006 apply in St Helena insofar as it is applicable and suitable to local circumstances, and subject to such modifications, adaptations, qualifications, and exceptions as local circumstances render necessary. The rule in *Pepper v Hart*

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25 [1993] AC 593 at 634.

26 For a recent restatement, see *Darwall v Dartmoor National Park Authority* [2025] AC 1292 at [40].

27 Grounds of Appeal at footnote 8. This is in fact repeated in the Appellant's Case at footnote 23.

28 SFI at footnote 8.

is part of the common law of England. There is nothing that renders it inapplicable or unsuitable to St Helena, or requires it to be subject to any modifications, adaptations, qualifications, or exceptions.

66. In *Pepper v Hart* itself, Lord Browne-Wilkinson explained that the broad exclusionary rule to which *Pepper v Hart* created a narrow exception was justified on four grounds: (i) it preserves the constitutional proprieties leaving the legislature to legislate in words and the courts to construe the meaning of the words finally enacted; (ii) the practical difficulty of the expense of researching legislative material that would arise if the material could be looked at; (iii) the need for the citizen to have access to a known defined text which regulates their legal rights; and (iv) the improbability of finding helpful guidance from the reports of legislative debates.[29] Each of those grounds applies in St Helena.

Legislative Council Proceedings Ordinance, 1974, s 4

67. The Appellant's case as to why the rule in *Pepper v Hart* does not apply in St Helena appears to rest entirely on s 4 of the Legislative Council Proceedings Ordinance, 1974 (**Legislative Proceedings Ordinance**). Section 4 of that Ordinance applies to evidence relating to (i) debates or proceedings in the Council or a committee of the whole Council and (ii) the contents of any document laid before the Council or a committee of the whole Council, or any proceeding of or before the Council or a committee of the whole Council. It provides that such evidence is inadmissible in court without the Governor's permission.

68. The Appellant argues that s 4 covers the field and that the broad exclusionary rule to which *Pepper v Hart* created an exception does not apply: Appellant's Case at [42] (page 20). But that is not correct. The two rules are different:

    (a) The rule in *Pepper v Hart* is a rule of *substantive* law. It determines when it is legally permissible for a court to have regard to reports of legislative debates in construing a statute. Section 4 of the Legislative Proceedings Ordinance is different. It is a rule of *evidence*—which is why it speaks of the admissibility of evidence. In St Helena, it sets an additional hurdle that must be cleared before the court can have regard to reports of legislative debates. The two are different kinds of rules,

[29] *Pepper v Hart* [1993] AC 593 at 633.

though this is sometimes obscured by ambiguous language.[30]

(b) The rule in *Pepper v Hart* determines when reports of legislative debates may be used in construing a statute. Section 4 is wider. It applies whenever evidence relating to debates or proceedings in the Council or a committee of the whole Council is sought to relied on in court. There are many purposes apart from the construction of a statute for which such evidence may be adduced, including proving that something was said or done as a matter of historical fact,[31] assessing the proportionality of legislation,[32] and judicial review of executive decisions.[33]

69. The history of s 4 of the Legislative Proceedings Ordinance confirms that it is distinct from the rule in *Pepper v Hart*.

70. Section 4 is a statutory enactment in St Helena of the old practice of the House of Commons requiring the leave of the House before its officers or members could give evidence in court about, or produce the records of, its proceedings.[34] As Lord Browne-Wilkinson noted in *Pepper v Hart*,[35] "*the House of Commons took the view that any reference to Hansard in court proceedings would constitute a breach of its privileges and required a petition for leave to use Hansard to be presented in each case*". That practice was enacted in statutory form in various colonies. In some cases the permission of the Speaker was required;[36] in St Helena, the permission of the Governor was required. This was probably because, under the Constitution in force at the time, the Governor was a member of, and presided at meetings of, the Legislative Council (there being no Speaker).[37]

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30 See, eg, *Cherry v Steele-Park* (2017) 96 NSWLR 548 at [49] per Leeming JA ("*Strictly speaking, it is one thing for a document to be admitted into evidence and another for it to be available to be used in support of legal reasoning. Yet quite commonly "admissible" is used as a shorthand way for referring to the use of the evidence … [T]he word "admissible" even in a legal context is ambiguous: the word can refer to a rule of evidence, or it may mean that evidence is not legitimately able to be used in some reasoning process.*").

31 See, eg, *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337; *Buchanan v Jennings* [2005] 1 AC 115 at [18].

32 See, eg, *R (on the application of SC) v Secretary of State for Work and Pensions* [2022] AC 223 at [173]–[184].

33 See, eg, *Toussaint v Attorney General of St Vincent and the Grenadines* [2007] 1 WLR 2825 at [16]–[17].

34 *Erskine May: Parliamentary Practice* (25th ed, online) at [13.15].

35 [1993] AC 593 at 623.

36 See, eg, the St Vincent and the Grenadines equivalent considered by the Board in *Toussaint v Attorney General of St Vincent and the Grenadines* [2007] 1 WLR 2825.

37 See ss 14(1)(a) and 30(1) of Schedule 1 to the St Helena (Constitution) Order 1966.

71. Although that practice was current when the Ordinance was enacted in 1974, the position is now different. On 31 October 1980, the House of Commons passed a resolution that, while re-affirming the status of proceedings in Parliament confirmed by Article 9 of the Bill of Rights,[38] gave general leave for reference to be made to parliamentary materials in court.[39] The position has thus changed in the United Kingdom, but it remains the same in St Helena.

72. The change in House of Commons practice was considered in *Pepper v Hart* itself. The Attorney General put before the House of Lords a letter from the Clerk of the House of Commons expressing the view that the use proposed to be made of parliamentary materials went beyond that permitted by the 31 October 1980 resolution and that the leave of the House of Commons should be sought.[40] However, the House of Lords concluded that the use proposed to be made of Hansard would not contravene Article 9 of the Bill of Rights.[41]

73. If the Appellant's submission that s 4 covers the field occupied by the rule in *Pepper v Hart* was correct, the analysis in *Pepper v Hart* would have been different. On the Appellant's analysis, the blanket permission given by the 31 October 1980 House of Commons resolution (which is equivalent to the Governor's permission under s 4) would have done away with the broad exclusionary rule entirely (subject to the argument about breach of Article 9, which the House of Lords rejected). The leave of the House of having been obtained through the resolution, the parliamentary material could have been used in

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38 "*That the Freedom[] of Speech and Debates or Proceedings in Parl[i]ament ought not to be impeached or questioned in any Court or Place out of Parl[i]ament.*" The Appellant submits that Article 9 does not apply in St Helena: Appellant's Case at [26] (page 7). The applicability of Article 9 is irrelevant in this case. But if it is relevant, the Attorney General's position is that it does apply: both Article 9 and the broader common law principle of which it is a manifestation (*Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332; *R v Chaytor* [2011] 1 AC 684 at [13] are picked up and applied by the English Law Application Ordinance.

39 The resolution read: "*That this House, while re-affirming the status of proceedings in Parliament confirmed by article 9 of the Bill of Rights, gives leave for reference to be made in future court proceedings to the Official Report of Debates and to the published Reports and evidence of Committees in any case in which, under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to Parliamentary papers be discontinued.*"

40 *Pepper v Hart* [1993] AC 593 at 623–624.

41 *Pepper v Hart* [1993] AC 593 at 638–640. See also 644–646, where Lord Browne-Wilkinson deals with the question of other privileges.

aid of construction without meeting the three conditions set out by Lord Browne-Wilkinson.

74. But that is not what happened in *Pepper v Hart*. The broad exclusionary rule was maintained, subject to a narrow exception. This shows that there are two different requirements in play: (i) the requirement to obtain the leave of the House or the permission of the Governor and (ii) the requirement to meet the three conditions set out by Lord Browne-Wilkinson. In England, the first requirement has not been necessary since the 31 October 1980 House of Commons resolution; in St Helena it is still necessary. But the important point for present purposes is that the rule in *Pepper v Hart* is separate.

75. For those reasons, if the Board permits the Appellant to raise this issue, the answer is that the rule in *Pepper v Hart* does apply in St Helena. Even if the Attorney General is wrong about that, and the extract from the report of the relevant legislative debate may be used as an aid to statutory construction, it provides no meaningful support for the Appellant's case on Issue 1 for the reasons set out under Issue 4 below.

VIII. ISSUE 4: COURT OF APPEAL'S PEPPER V HART REASONING

76. If the Appellant is not permitted to raise Issue 3, or if Issue 3 is determined in the Attorney General's favour, Issue 4 asks whether the Court of Appeal correctly applied the rule in *Pepper v Hart*. The Appellant submits that it did not: Appellant's Case at [40](b) (page 20).

77. The relevant extract from the report of the relevant legislative debate is set out in the SFI at [32]. It includes the following sentence from the Government Secretary, which is the entirety of what the Appellant relies on:

> An interesting feature is the right of prescription which entitles a person to absolute ownership of land, probably belonging to someone else or the Crown, after that person has squatted in peaceable, open and uninterrupted possession for a period of 15 years.

78. The Court of Appeal held that the requirements of the rule in *Pepper v Hart* were not satisfied because (i) the words of s 159 of the Registered Land Ordinance were not ambiguous or obscure and the literal meaning would not lead to an absurdity and (ii) the words of the Government Secretary did not clearly disclose the legislative intention or

mischief because of the use of the word "*probably*": CA at [56].

79. The Attorney General supports and relies on the Court of Appeal's reasoning. In particular, the Government Secretary's statement was a single remark, of a general nature, made in remarks totalling 330 words during which he moved that the Bill be read a first time. Neither the provisions relating to prescription nor ss 159 and 160 were referred to. The statement was conditioned by the word "*probably*". It simply cannot be said that the statement was clear and directed to the point now in issue.

80. But there is a more fundamental objection. The question here is not whether, in the abstract and without more, the Registered Land Ordinance permits Crown Land to be acquired by prescription. The Attorney General accepts that it does (subject to the effect of s 159 together with any other written law): see paragraph 40 above. If that were disputed it would involve a question of construction of the Registered Land Ordinance alone, and the requirements of the rule in *Pepper v Hart* might (in theory) be satisfied.

81. Instead, the question is whether s 159 of the Registered Land Ordinance, read with s 112 of the Saint Helena Act 1833 or s 31 of the Constitution (or both), prevents that result. That involves partly a question of construction of s 159 of the Registered Land Ordinance and partly a question of how it operates with s 112 of the Saint Helena Act 1833 and s 31 of the Constitution. The Government Secretary's statement is not directed to that issue—indeed, there is no mention of any of those provisions—and is irrelevant.

82. Finally, the Appellant submits that even if the requirements of the rule in *Pepper v Hart* are not satisfied, it is permissible to have regard to reports of legislative debates to establish the mischief and context of legislation: Appellant's Case at [36](c) (page 24). If that proposition were right, the report of legislative debate here would not assist the Appellant for the reason given immediately above. In any event, the proposition is not right: the Supreme Court has confirmed that the rule in *Pepper v Hart* applies both to identifying the specific meaning to be given to individual words and phrases and to identifying the context of legislation and its purpose or mischief.[42]

[42] *Darwall v Dartmoor National Park Authority* [2025] AC 1292 at [39]–[43].

IX. CONCLUSION

83. For all these reasons, which are summarised in paragraph 2 above, the Attorney General respectfully submits that the Board should dismiss the appeal. The answer to the question stated for the Supreme Court should remain "no", by virtue of s 112 of the Saint Helena Act 1833 (for Crown Land vested in the Crown under that section) and s 31 of the Constitution (for all Crown Land).

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16 June 2026