Hilary Term
[2022] UKPC 2
Privy Council Appeal No 0042 of 2019

JUDGMENT

CIEL Ltd and another (Appellants) *v* Central Water Authority (Respondent) (Mauritius)

From the Supreme Court of Mauritius (Court of Civil Appeal)

before

Lord Lloyd-Jones
Lady Arden
Lord Burrows
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
14 February 2022

Heard on 10 June 2021

Appellants
Maxime Sauzier SC
Deepti Bismohun
(Instructed by Thierry Koenig SA)

Respondent
Anwar Moollan SC
Jennifer Konfortion
(Instructed by Chambers of Sir Hamid Moollan SC)

LADY ARDEN:

1. Consolidated Investments and Enterprises Ltd ("CIEL") and Floréal Manufacturing Ltd, now called Tropic Knits Ltd ("TKL"), own and occupy respectively a plot of land ("the land") to the extent of 14 arpents and 16 perches on the banks of the River Tatamaka. They are the appellants in this appeal, which concerns water rights in the River Tatamaka. River Tatamaka has a tributary, Ruisseau St Martin, and both are shown (with the canal referred to below) on the attached sketch map prepared by land Surveyor Mr Francis Hall in 1937 prior to the Supreme Court of Mauritius making an order in 1939 as mentioned below.

2. The land formed part of the estate adjoining the River Tatamaka formerly belonging to Réunion Sugar Factory Ltd ("Réunion"). Réunion merged with the Médine Sugar Estate Company Ltd by forming a partnership, Société Reufac, to which Réunion transferred its water rights in respect of the River Tatamaka and the Ruisseau St Martin. Réunion and Société Reufac grew and/or refined sugar on the estate. In July 1987, CIEL acquired part of the land from Société Reufac together with the water rights. In April 1987, TKL (then known as Floréal), a member of CIEL's group, applied to the CWA for water rights to be granted to it. TKL at some point became a tenant of the land which CIEL had acquired (with the benefit of the water rights) from Société Reufac. TKL manufactures knitwear and its business involves dyeing.

3. Pursuant to an order of the Supreme Court of Mauritius made in 1888 ("the 1888 order"), Réunion had 22.035 shares in the water rights in River Tatamaka (which with the water rights in the Ruisseau St Martin was divided into 67 shares). The original order has been lost and no copies of it exist. The appellants contend that the Supreme Court did not attach any conditions to the 1888 order and that the order entitled Réunion to use the water of the River Tatamaka for any purpose. Additional water rights were granted in 1939 but the Supreme Court of Mauritius then attached conditions.

4. The respondent, the Central Water Authority ("CWA"), has brought these proceedings to obtain payment of its charges amounting to Rs1,367,998.50 for the water from the River Tatamaka which TKL used, via a private canal, called the Réunion canal, for its industrial purposes down to September 1996, together with its unpaid charges accruing thereafter down to the date of final judgment. The plaint (which is dated 8 January 2004) alleged that at 30 November 2003 CWA's claim had risen to Rs4,958,071.65. The Board is not concerned with the calculation of the amounts due to CWA if the appellants fail on this appeal. If the appellants succeed, then no amount will be payable to CWA.

5. On this appeal, CIEL and TKL contend that these charges are not due essentially for three reasons:

(i) They already owned the water drawn from the River Tatamaka and/or in the Réunion Canal which led from it by acquisition under the 1888 order or by prescription.

(ii) CWA did not "supply" the water for the purpose of its statutory powers to charge for water use.

(iii) CWA's claim is barred by prescription.

(1) The appellants' rights to the waters of the River Tatamaka and the Réunion Canal

6. As explained, the appellants' case is that the 1888 order conferred the unconditional right to use the water which TKL abstracts from the River Tatamaka and uses in its business, so they neither have to return such water to the River Tatamaka nor pay for it.

7. As explained the 1888 order has not survived, and no copies exist. There is no doubt that it was made as it was mentioned in the report of Mr Francis Hall which forms part of the 1939 application. In his report Mr Hall refers to the fact that "River Tatamaka and its tributary, the Ruisseau St Martin, have been divided by Mr Surveyor Maillard in 1888. The Report on this division has been homologated by the Supreme Court".

8. Fifty years after the 1888 order was made, the water levels of the River Tatamaka and its tributary, the Ruisseau St Martin, had dropped. Réunion did not have enough water for its plantation and factory. In 1939 Réunion applied to the Supreme Court for an increased share of the water in the river. They made an application for approval of their agreement by the Supreme Court of Mauritius. A provisional order was made. The order contained conditions, which included requirements for the maintenance of a plate at the entrance to the Réunion Canal, regular flushing of the waters and the return the water unpolluted to the river after use on the land then held by Réunion. Those conditions for the return of the water are not capable of

compliance by TKL today. Réunion made no further application to the Supreme Court of Mauritius to confer any water right.

9. At the date of the 1939 order, Réunion was still the owner of 500 arpents of land but subsequently Réunion parcelled its land and so the land now owned and occupied by the respondents is only 14 acres, which is far less than that which Réunion held in 1939. The inevitable conclusion from the authorities discussed below is that (in the absence of prescription) TKL is not entitled to the full water rights granted to Réunion by the 1888 order since those rights could not be detached from the rest of the land owned by Réunion at the date of that order.

10. In 1987 TKL sought a further increase in its water allocation. The CWA agreed to this on terms that Rs1.50 per cusec was paid and on further terms to be agreed in writing. Meters were installed so that the CWA could monitor the amount of water which TKL used. The CWA also made it clear that TKL would need to apply to the Supreme Court for permission to increase its water allocation. However, during the negotiations, the CWA was informed that the appellants did not consider that they were obliged to pay the CWA's charges as they considered that they owned Réunion's share of the waters of the River Tatamaka and the waters in the Réunion Canal. They therefore stopped paying charges which they had been paying on an interim basis for the extra water which they were abstracting. The appellants declared that they had been advised that they were now the owners of Réunion's rights to the water they were able to draw from the River Tatamaka, and so they neither pursued their negotiations with the CWA nor made any application for the approval of a final order by the Supreme Court.

(2) The law applicable to the water rights of borderers and canal owners

11. Water rights are governed by the Rivers and Canals Act 1863 ("the RCA"), as now in force. This deals separately with rights in rivers and streams and rights in canals. The RCA provides that "rivers and streams are public property ("du domaine public" (section 3). This is so whether the waters are navigable or not. Section 6 provides that borderers have the right to use the water to the exclusion of all others and can use the water to irrigate their land: no further purpose is specified. All borderers have the same rights, but their shares may be different (section 6). If a person has a concession of which the title has been lost, the concession is deemed to be for purposes other than irrigation (section 10). Under section 12, borderers may use a proportion of the water in the river, but enough has to be left for the other borderers and the public. The Supreme Court could allocate a portion of water to any person to whom such a portion had not already been ordered. The Supreme Court had first to

appoint a competent person to measure the water and consider his report. The Supreme Court's approval is needed for the construction of a dam or machinery to take water from the river, or for any alteration to the quantity of water that may be taken by a superior borderer through a pipe or other means (sections 14 and 15). The prescription period, if any prescription period were relevant in this case, would be 30 years (article 2262 of the Civil Code).

12. There are different provisions, however, that apply to canals. In contrast to section 3, section 32 of the RCA provides that waters in a canal belong to those who paid for its construction, which in this case was Réunion (see, similarly, in relation also to another jurisdiction applying civil law, the decision of the Board in *Van Breda v Silberbauer* (1869) LR 3 PC 84 (Cape of Good Hope)). The Supreme Court of Mauritius has the right to determine portions in a canal if there is insufficient proof as to who paid for its construction. Water can be drawn by machinery from a canal whereas machines cannot be used to abstract water from rivers and streams, and rivers and streams cannot be diverted (see the RCA, section 4(2)). There are provisions for the management of canals, but applications go to the District Magistrate rather than the Supreme Court.

13. Section 80 of the RCA provides that, subject to provisions permitting the dedication of waters to public use (under section 5), all questions as to a concession or any right to water from a river, stream or canal should be remitted to the Supreme Court and decided by it.

(3) Arguments of the parties and conclusions of the Board on ownership of the waters in the River Tatamaka and the Réunion Canal

14. CIEL and TKL have also since the hearing sought permission to adduce in evidence an extract from a compilation by Frederick Chastellier, acting Judge's Clerk, published in 1918, entitled "*Index of Divisions of rivers, grants of water, Authorization to construct bridges, dams, etc Index of Procedure Precedents*". The work was published "with the authority of the Judges of the Supreme Court". At p 28, Mr Chastellier indexed the division, in accordance with the report of Mr Maillard and with the approval of the Supreme Court of Mauritius, of the waters of the River Tatamaka and the Ruisseau St Martin into shares, of which 22.035 were for Réunion. However, this work does not contain a full copy of the 1888 order, or of the report of Mr Maillard. So, this new material does not take matters any further, and the Board refuses the application. The Board notes that the division of waters in the case of the Tamarin River indexed on the same page correlates with the report of Colonel

Morrison to which the Supreme Court of Mauritius referred in *Rougé v Feillafé* [1871] MR 112 at 113.

15. In these proceedings, in their clear and persuasive judgments, the Supreme Court of Mauritius (Teelock J) and the Court of Civil Appeal (the Hon K P Matadeen, Chief Justice and the Hon D Chan Kan Cheong) rejected the claims of CIEL and TKL. They held that it was for the appellants to prove the terms of the 1888 order which the appellants had failed to do. The Court of Appeal confirmed that as the land was considerably less than the estate, which was originally given water rights, the appellant could not be entitled to the same share of the volume of the river: it had been held in *Maingard v The Médine Sugar Estates Ltd* 2004 SCJ 310 and *Ex p Colin* [1891] MR 61 that a borderer is entitled to a share of water proportional to the extent of his irrigable land. For this reason alone, the appellants could not invoke the water rights granted in 1888, certainly in the absence of a copy of the order that was made. A claim in prescription could not succeed because the waters of the rivers formed part of the domaine public.

16. On this appeal, Mr Maxime Sauzier SC, who appears for the appellant in this case with Miss DP Deepti Bismohum, places considerable reliance on section 12 (not 10) of the RCA. They contend that the CWA acknowledges the grant of rights of water. Again, the Board is not persuaded that this assists the appellants because it is clear that certain rights were granted. What is not agreed or indeed proved is what those rights were and what the terms of the grant of the rights approved by the Supreme Court would have been, and, like the Supreme Court of Mauritius and the Court of Civil Appeal, the Board does not consider that the terms imposed in 1888 can be fairly determined without those matters being proved. It seems unlikely that no terms would have been imposed, and it would be unfair to other borderers and the public to hold that simply because the 1888 order is no longer available the rights must be assumed to be unconditional.

17. Mr Sauzier SC further relies on prescription, pointing out that it was nearly 100 years after the original grant of rights that the CWA took the appellants to task over their claims to own water rights. In the Board's judgment, this likewise does not assist the appellants. It is well established that public rights cannot be acquired by prescription. The borderers could only hold rights to use water on the basis that their rights could at any time be removed or reduced by the Supreme Court. In any event it is well established that there can be no prescription against public property.

18. Further it was not open to Réunion in law to sell its rights to the water in the river. The case of *Rougé v Feillafé* [1871] MR 112 decides that under the law of Mauritius the right to a share in the waters of a river is not a right of property that the

borderer owns and may sell or transfer. It was not private property or a private good. In that case the shares resulting from the division were for an irrigable area of a specific acreage. The Supreme Court of Mauritius (Chief Judge C Farquhar Shand Kt and Gorrie J) on a reference from the Land Court held that it was not possible in law for the holder of a share to allocate the whole of the share to himself when he sold part of the land. The Supreme Court rejected the argument that, as some commentators had considered to be the case, the borderers have more than a right of jouissance (ie to use) the waters in the river and therefore had some right of property. The Supreme Court decided that dispute under the law of Mauritius in the same manner as had been done by the Cour de Cassation on the basis of articles 641, 644 and 645 of the French Civil Code. The Supreme Court of Mauritius held that the rivers were res nullius and formed part of le domaine public. Indeed section 3 of the RCA provides that that is so (subject to the provisions of the RCA). Thus, the Supreme Court of Mauritius held:

> "The only authority which could competently grant water to any portion of ground, or deprive of water any portion was the Land Court which have here dealt with the division of rivers and streams. The vendor of the piece of ground in question, had no power within himself either to give water or to withhold it from any portion of ground whatsoever." (p 114)

19. As to the parties' agreement, only the Land Court could say whether effect should be given to the parties' agreement. The Land Court could decline to do so if there were reasons of public policy against it. The Supreme Court summarised its ruling as follows:

> "It will be seen from what has been already said that we regard the Land Court [whose jurisdiction in this regard was later transferred to the Supreme Court] as the rightful authority for dividing the waters of rivers, among the 'Riverains' proprietors for purposes of irrigation, and that without the sanction of that court, the proprietors themselves cannot make valid agreement which are of themselves of legal efficacy to convey or retain shares or portions of the water of the river. Whatever conventions may exist between riverains as to the respective shares to be enjoyed by them, must be submitted to the appreciation of the Land Court at the period of division and sanctioned by it before they can have any binding force." (p 115)

20. The judge and the Court of Appeal both rejected Mr Sauzier SC's argument that the 1888 order gave Réunion an absolute right of property in the waters of the River Tatamaka so that it could deal with waters in any way it or its successors in title decided. The Board agrees with the Court of Appeal: the only right of the borderers was a right of jouissance: Réunion could only use the water for irrigation or under a concession in accordance with section 10 of the RCA (see para 11 above) and then return it to the river, as where water is diverted into a mill stream to operate a watermill and then returned to the river. It is true that the surveyor, Mr Francis Hall, whose report was placed before the Supreme Court of Mauritius in 1939 (but not expressly approved), had referred to the 22.035 shares as the property of Réunion. However, this could not override the mandatory provisions of section 3 of the RCA making the waters public property.

21. As the respondent submits, CIEL and TKL cannot rely on the 1939 order as replacing the 1888 order as the 1939 order was only for the grant of additional water rights and for temporary purposes. In any event it follows from the case of *Rougé* that the 1939 order of the Supreme Court of Mauritius cannot make TKL transferee of Réunion's rights to use those waters.

22. Moreover, section 12 of the RCA, on which Mr Sauzier SC relies, makes it clear that the owners of shares in the waters of a river do not have an absolute and exclusive right to the waters of a river as there must always be enough water to meet not only the borderers' needs but also those of the public. The desire of TKL to use water for the purpose of its knitwear business would not be within section 12 as it is not for irrigation purposes. There would need to have been some special provision in the order of the Supreme Court. The use of the water is controlled by the Supreme Court and the CWA.

23. Mr Sauzier SC submits that the appellants acquired not only rights to share in the waters of the River Tatamaka but also Réunion's rights to the waters in the Réunion Canal, and that the latter was sufficient for it to succeed.

24. But this argument must be rejected as the law of Mauritius has not accepted that there is any distinction which can be made here between the waters in the Réunion Canal abstracted from a river, and the waters in the river itself. This point applies even if the water was being drawn for purposes approved by the Supreme Court of Mauritius, which cannot be shown due to the loss of the 1888 order.

25. The case of *Maingard*, like the earlier case of *Rougé,* concerned the Yemen Estate, but this time the relevant argument was that the borderer, who had purchased

land and water rights to a share of the Tamarin River had acquired the water through a canal taking water from the Tamarin River that had been previously approved by the Supreme Court. The Supreme Court, in a decision upheld by the Court of Civil Appeal of Mauritius, rejected this argument. The waters, being domaine public, were inalienable. The purchaser had to show that the water which went into the canal had been lawfully obtained from the river, which he could not do. As Teelock J put it, "one cannot forget the source of the water".

26. In the opinion of the Board, the position here is indistinguishable from *Maingard*. The waters in the Réunion Canal have not been shown to have been lawfully obtained from the River Tatamaka. But undoubtedly water did flow into the Réunion Canal.

27. As to prescription, which is particularly relied on by TKL, under the law of Mauritius, possession during the period of prescription may lead to a person obtaining ownership of a right. As has been indicated in para 17 above, there can, however, be no prescription against a right in the domaine public, and thus the appellants could not obtain any right of property in the right to share in the waters of the River Tatamaka or the Réunion Canal (as the latter depended on the lawful acquisition of a right).

28. Under sections 32 and 33 of the Rivers and Canals Act, provision is made for borderers on a canal for rights to water to be determined by titles or in default by the Supreme Court. The Board does not consider that section 33 is establishing a right of ownership but merely establishing the way in which disputes between the various borderers to a canal could be resolved.

29. Mr Sauzier SC also relied on paras 172-173 of Dalloz, *Répertoire de droit civil (June 2016) on "Eaux: propriété et usage*" (Dalloz, *Civil Law Directory* (June 2016) on *Waters: Property and Use*). Para 173 states that, in line with article 644 of the French Civil Code, waters in a canal belong to the persons who built the canal. But this is dealing with the right to water once it is in the canal. It does not resolve the problem of how the appellants can establish a right to abstract the water lawfully.

30. For all these reasons the Board holds that the appellants have not established any rights to the water in the river or the Réunion canal.

(4) Entitlement of CWA to levy charges on TKL for the use of water from the River Tatamaka and appropriate period of prescription

31. It is common ground that, since 1989, TKL has been diverting water from the River Tatamaka at Point A on the annexed plan and from the Ruisseau St Martin from Point B. This issue raises the question of the CWA's statutory powers applicable in this case, the impact of prescription and finally the separate position of CIEL. For the reasons given below, the Board considers that the CWA is entitled to judgment as against TKL for water charges from the date claimed by it, ie January 1994.

32. The CWA was set up by the Central Water Authority Act 1971 ("the 1971 Act") to be responsible for the control, development and conservation of water resources (section 4). It has power to levy charges for water supply but not, save by consent, in relation to existing water rights (section 22).

33. Despite holding that the appellants had no subsisting water right of their own, the judge held that the CWA had no claim for charges because it was not within section 24(a) of the 1971 Act. The judge accepted the argument of the appellants that the CWA had not supplied this water as it came from the private canal and not from waterworks which the CWA owned. This point requires the Board to set out section 24 of the 1971 Act and the definitions of non-domestic supply and waterworks in the relevant regulations made thereunder. These led the judge to hold:

> "As rightly pointed out by Mr Sauzier, the CWA had no works as set out in the CWA Act and therefore no supply is made by the CWA. There is also no regulation under which charges for use of water from the rivers in question."

34. Section 24 provides:

> "24. The Authority may receive -
>
> (a) revenue accruing from rates and fees to be levied under any regulations made under this Act;
>
> (b) loans raised under this Act; and

(c) any money properly accruing to the Authority from any other source."

35. Section 24(a) refers to regulations. Section 49 of the 1971 Act provides that the Central Water Board, which was set up under the same Act, could make such regulations as it thought fit for carrying into effect the provisions of the 1971 Act.

36. Under the Central Water Authority (Water Supply For Non-Domestic Purposes) Regulations 1962 ("the regulations"), made pursuant to section 49 of the 1971 Act, "non-domestic supply" means "water supplied from the waterworks and used … (e) for any purpose which is not a domestic purpose". "Waterworks" are defined as "the different system of canals, conduits, mains, pipes, wells, dams, reservoirs, fountains, treatment works, machine and other appliances of the Authority for supplying and measuring water, and includes all works, structures, lands, rights of way and other appurtenances held by the Authority for the purpose of carrying into effect these regulations". If the matter had stopped there the judge might have been upheld by the Court of Civil Appeal but as it was she had in error given no weight to section 24(c), which was capable of being an independent source of power for the CWA to charge for the supply of water.

37. On appeal to the Supreme Court of Mauritius (Court of Civil Appeal), the CWA argued that the judge should have held in its favour because of section 24(c) of the 1971 Act. The Court of Civil Appeal accepted this argument and so the CWA succeeded before the Court of Civil Appeal. The Board considers that the Court of Civil Appeal was plainly correct as that conclusion irresistibly flows from section 24(c).

38. The next issue before the Board is whether the CWA's claim was barred by prescription. The CWA had originally commenced proceedings in 1996 against the appellants to recover charges for water use for the previous ten years, being the limitation period which it considered was applicable. In error, it had invited the Supreme Court of Mauritius to strike out its earlier proceedings. The CWA did not take steps to revive the 1996 proceedings and instead started new proceedings in 2004.

39. There is then a question of the required length of any prescription. The appellants argue that article 2279 of the Civil Code of Mauritius applies in this case. Article 2279 of the Civil Code of Mauritius provides for a three-year prescription period to specific matters such as loan interest and "everything that is paid on a yearly basis or over shorter time periods".

40. However, article 2270 of the Civil Code of Mauritius provides that a period of ten years applies unless there is express provision to the contrary.

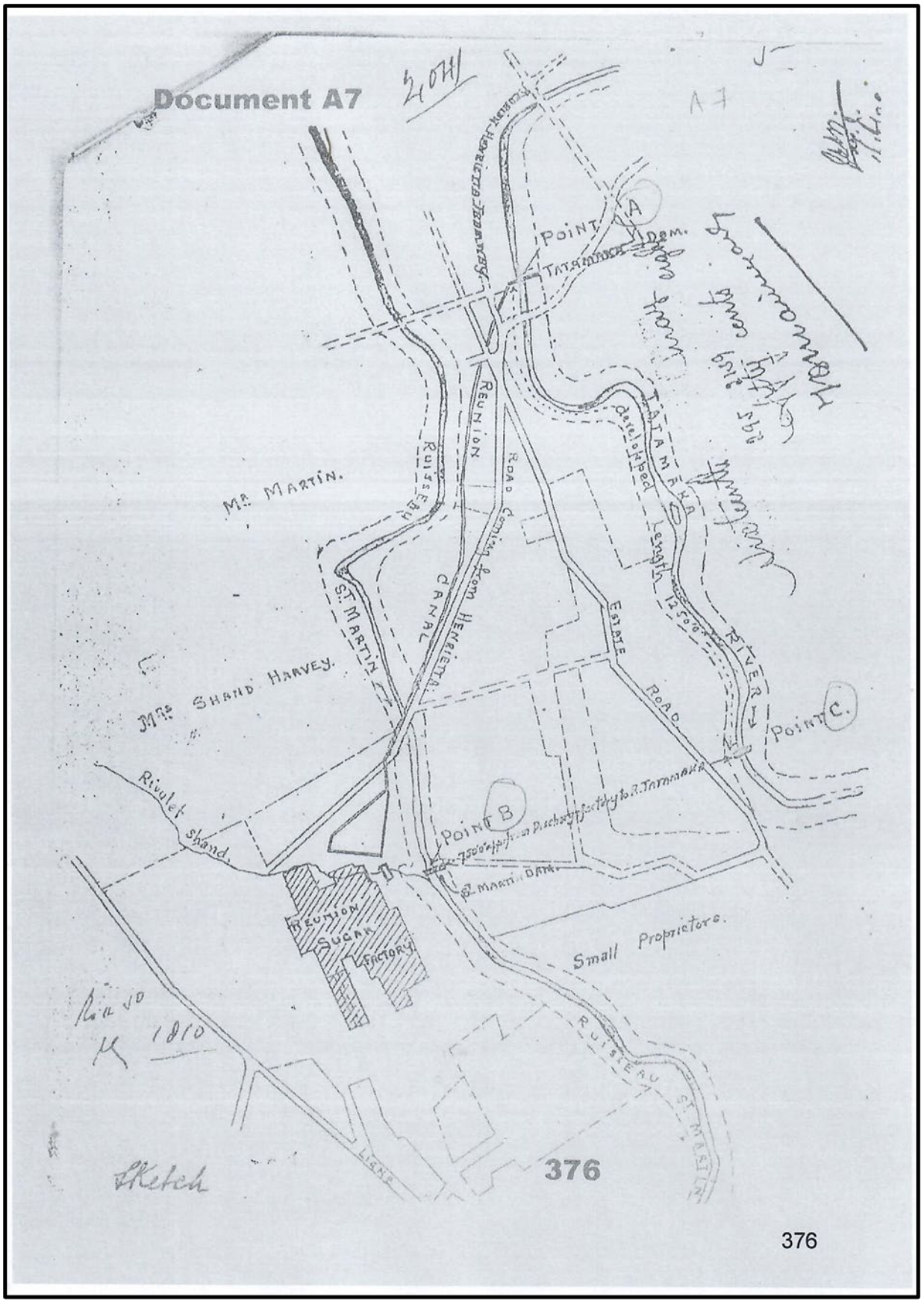
41. Article 2279 is an express provision to the contrary but the shorter three-year period described in that article applies only to periodic payments payable in pre-agreed fixed amounts. There is no evidence of any such agreement, only a provisional agreement for three years from 18 May 1989 recorded in a letter of that date from the CWA, and no other document passing between the parties on these charges is available. In those circumstances the appellants' contention that the payments were agreed to be periodic on a provisional or any other basis must fail. On the facts, the longer ten-year period applies.

42. The Board need not consider the further issue as to whether the prescription was interrupted by earlier proceedings, which the CWA withdrew in error in 1996. The ten-year period suffices for the charges for which it claims in these proceedings.

43. However, it appears that CIEL never used any abstracted water in the period in question. The CWA's claim alleges only that TKL consumed water. In those circumstances, the appropriate course is for judgment on liability for the water charges to be entered solely against TKL (as successor to Floréal). If there is any dispute which is still to be resolved about the amount payable for charges, the Board remits the matter to the Supreme Court of Mauritius for it to determine.

The Board's conclusion

44. In those circumstances the Board dismisses the appeal.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Point A
Dam.
Tatamagouche
Reunion
Road
Ruisseau
Mr. Martin.
St. Martin
Canal
from Henrietta
Tatamagouche
Road
Estate
Road
River
Point C.
Mrs. Shand Harvey.
Rivulet
Shand.
Point B
St. Martin Dam.
Reunion
Sugar
Factory
Small Proprietors.
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