



Hilary Term
[2023] UKPC 1
Privy Council Appeal No 0084 of 2020

JUDGMENT

**Carriacou Devcor Ltd (Appellant) v Margaret Corion
and another (the Personal Representatives of the
Estate of Samuel Corion, Deceased) (Respondents)
(Grenada)**

**From the Court of Appeal of the Eastern Caribbean
Supreme Court (Grenada)**

before

**Lord Lloyd-Jones
Lord Briggs
Lord Hamblen
Lady Rose
Lord Richards**

**JUDGMENT GIVEN ON
17 January 2023**

Heard on 24 October 2022

Appellant

John McGhee KC
Ramesh Lawrence Maharaj SC
Robert Strang
(Instructed by BDB Pitmans LLP (London))

Respondents

Christopher Hamel-Smith SC
V Nazim Burke
Rowan Pennington-Benton
(Instructed by Duke Street Chambers (Trinidad))

LORD LLOYD-JONES (with whom Lord Briggs, Lord Hamblen, Lady Rose and Lord Richards agree):

1. This appeal concerns a dispute over title to a parcel of land (“the disputed land”) measuring approximately 7 acres, at Tyrell Bay on the western coast of the island of Carriacou which lies to the north east of Grenada.
2. On land to the south and south west of the disputed land, and immediately adjacent to it (“the CDC land”) Carriacou Devcor Limited (“CDC”) is developing a new marina and associated jetties. By a lease dated 4 January 2005 made between CDC and the Governor General of Grenada on behalf of the Government of Grenada, the Government leased the CDC land to CDC for the first phase of the development. With this lease was included a plan prepared by Mr Denis Thomas, a local surveyor, on 2 April 2003, depicting inter alia the CDC land (“the CDC plan 2003”).
3. In about 2013 CDC asked the Government for more land for the purposes of the development. At the request of CDC, Mr Thomas surveyed the mangrove swamp to the north of the CDC land and produced a plan on 13 March 2013, (“the March 2013 plan”) depicting the disputed land as an area of about 7 acres, bounded to the north by land belonging to Theodore Alexis (“the Alexis land”) and to the east by land belonging to the estate of Rufus Lendore (“the Lendore land”). On 6 May 2013 the Cabinet approved the grant of a lease to CDC of the disputed land. CDC was informed of the decision by letter dated 28 May 2013 from the Ministry of Agriculture, Forestry and Fisheries. On 29 May 2013 CDC entered the disputed lands and began construction on it.
4. The respondents to the present appeal are the personal representatives of the estate of Samuel Corion, deceased. On 20 June 2013, attorneys acting on behalf of the estate wrote to CDC alleging that the disputed land formed part of the estate of Samuel Corion and demanding that it cease its alleged acts of trespass. It complained that CDC was removing vegetation and filling in the natural mangrove swamp without the permission or consent of the estate. Attorneys acting for CDC responded, contending that the disputed land was owned in fee simple by the Government of Grenada and stating that CDC was the prospective lessee of the disputed land.
5. The respondents maintain that the disputed land formed part of the Grand Ance estate which, by deed made on 18 June 1885 (“the 1885 conveyance”), was conveyed to certain beneficiaries of the will of Judith Philip. The land conveyed was described in the deed as a parcel of land “containing one hundred and sixty acres or thereabouts

and now known as the Grand Ance estate". The boundaries of the parcel of land were not described and there was no plan.

6. On 3 May 1904, a survey plan was produced of the Harvey Vale estate situated immediately to the south of the Grand Ance estate ("the 1904 plan"). This survey was made by order of the Director of Surveys and lodged in accordance with the Grenada Boundaries Settlement Ordinance (No 2 of 1892).

7. By an indenture dated 19 February 1914 the Grand Ance estate was conveyed to Samuel Corion ("the 1914 conveyance"). The land conveyed was described as "all that Plantation or Estate lot piece or parcel of land called and known by the name of Grand Ance situate and lying in the quarter of Grand Carenage in the island of Carriacou ... containing one hundred and six and one half (106½) acres English Statute Measure be the same more or less ...". The boundaries were not described and there was no plan.

8. By a claim form dated 15 July 2014, the respondents issued a claim against CDC seeking a declaration that the estate of Samuel Corion was the owner of the disputed land, injunctive relief, damages and mesne profits for trespass. By an application of the same date, the respondents applied for an interim injunction restraining CDC from entering or remaining on the disputed lands and from carrying on construction and filling in the mangrove swamp on the disputed land. By order dated 5 August 2014, Margaret Mohammed J dismissed the respondents' application for an interim injunction, holding, among other things, that there was no serious issue to be tried as the respondents had failed to provide sufficient evidence as to title.

9. By a defence dated 15 October 2014, CDC denied the respondents' title to the disputed land. It averred that the disputed land was the property of the Crown and that CDC's occupation of the disputed land, pursuant to the Cabinet decision, was lawful. CDC put the respondents to strict proof of the title and boundaries of the land they claimed.

10. By an amended claim form and statement of case dated 31 October 2014, the respondents amended their claim to aver that the estate of Samuel Corion had been in full, free and undisturbed possession of the disputed land and sought a declaration that the estate of Samuel Corion was the owner in possession of the disputed land.

11. By an application notice dated 1 December 2014, CDC applied to strike out the respondents' claim on the ground that it failed to establish a prima facie claim of title

to the disputed land. On 19 January 2015 the respondents filed a notice of opposition to the application.

12. By an application notice dated 5 March 2015, the respondents applied to add the Attorney General representing the Crown as a defendant to the claim. On 15 March 2015 Thomas Astaphan J ordered that the Attorney General be added as a party but on 23 July 2015 Shiraz Aziz J ordered that the Attorney General be removed as a party. Nevertheless, the Attorney General participated in the proceedings below.

13. By order dated 23 January 2017, Adrien-Roberts J dismissed CDC's strike out application and directed that the question of title to the disputed land be determined as a preliminary issue.

14. At the trial of the preliminary issue, the respondents maintained that they derived title to the disputed land from the 1914 conveyance. They relied, in particular, on the 1904 plan which showed the disputed land as part of the Grand Ance estate, and the CDC plan 2003 which showed it as private land. They further submitted that the evidence showed that they had been in possession of the disputed land.

15. CDC submitted that the burden was on the respondents to prove their title to the disputed land. As to paper title, it submitted that the respondents were unable to prove the extent and the boundaries of the land conveyed to Samuel Corion by the 1914 conveyance. As to possessory title, it submitted that the respondents had given no adequate evidence that they had been in possession of the disputed land. At a late stage in the proceedings, following the completion of evidence, CDC raised for the first time a plea that the disputed land was foreshore and therefore Crown land by virtue of the prerogative.

16. The Attorney General submitted that it was for the respondents to prove their title to the disputed land. He submitted that the respondents had failed to discharge the burden of proving they had a better title than the Crown, by whose authority CDC was in possession of the disputed land. The respondents could not prove title because the 1914 conveyance did not delineate or describe the boundaries of the land conveyed. The respondents' evidence was also inadequate to establish possessory title.

17. In a judgment dated 16 October 2018, Adrien-Roberts J held that the estate of Samuel Corion was the owner of the disputed land.

(1) The judge found that the respondents had proved that the disputed land was part of the Grand Ance estate.

(2) The judge rejected the submission that the disputed land was foreshore and therefore presumed to belong to the Crown. The fact that the disputed land might be referred to as “swamp lands” did not make it Crown lands.

(3) The judge went on to find that the 1914 conveyance had been effective to convey the Grand Ance estate, including the disputed land, to the estate of Samuel Corion, and accordingly she found that the respondents had proved title.

(4) The judge considered that, as the respondents had proved title, they had no need to prove factual possession and animus possidendi on which she made no ruling.

18. CDC appealed to the Court of Appeal and the Attorney General applied successfully to be added as a party to the appeal.

19. The Court of Appeal (Blenman JA, Michel JA and Webster JA (Ag)) heard the appeal on 29 October 2019 and dismissed it in a judgment delivered by Webster JA (Ag) on 31 October 2019.

(1) The Court of Appeal held that the fact that the 1914 deed did not describe the land conveyed other than the general description that it was “the Grand Ance estate” was regrettable but not fatal. The judge had to infer what was the disputed land and whether it was part of the estate. The Court of Appeal referred to the evidence called by the parties and a plan produced by Mr Thomas in 1980 at the request of Roosevelt Churchill Corion, a descendant of Samuel Corion (“the 1980 plan”), the CDC plan 2003 and the March 2013 plan. It held that, faced with conflicting evidence, the judge had been entitled to resolve the issue by accepting the evidence of the respondents that the disputed land was part of the estate of Samuel Corion. There was no basis for interfering with her findings of fact.

(2) The Court of Appeal further held that CDC and the Attorney General had failed to establish that the presumption of Crown ownership of the foreshore applied in this case, because it had adduced no evidence that the disputed land lay to the seaward side of the mean high water mark.

20. The Attorney General and CDC appeal as of right to the Judicial Committee of the Privy Council. On this further appeal the agreed issues are as follows:

(1) Whether the judge and the Court of Appeal erred in their finding (i) that the disputed land was part of the Grand Ance estate and (ii) that it was, therefore, conveyed by the 1914 conveyance;

(2) Whether the Court of Appeal erred in finding that it was for the appellant to prove that the disputed land was foreshore ie that it lay to the seaward side of the mean high water mark;

(3) In any event, or alternatively, whether there was sufficient evidence to establish that the disputed land, or part of it, was foreshore.

21. On 20 October 2022, shortly before the appeal was due to be heard on 25 October 2022, the Attorney General applied to withdraw the Attorney General's appeal. As a result, at the hearing of the appeal Mr John McGhee KC, Ramesh Lawrence Maharaj SC and Robert Strang appeared on behalf of CDC only.

22. It is the practice of the Board not to entertain appeals on questions of fact where there are concurrent findings of fact of two lower courts, save in exceptional circumstances (*Devi v Roy* [1946] AC 508). At the hearing of this appeal the Board invited Mr McGhee on behalf of CDC to address briefly the question whether the appeal sought to challenge concurrent findings of fact made by Adrien-Roberts J and the Court of Appeal. Having heard him, the Board decided to hear full argument on the appeal without prejudice to the issue of concurrent findings of fact.

Title by conveyance

23. CDC's case is that the onus was on the respondents to prove title to the disputed land and that that onus was not discharged by the 1914 conveyance.

24. The respondents object that CDC's submission that there "was no or no sufficient evidence" that the disputed land was conveyed by the 1914 conveyance is a clear attack on the concurrent findings of fact of both courts below. CDC replies that the Court of Appeal erred in law in considering that the question whether the 1914 conveyance was of land which included the disputed land depended on the assessment of the oral evidence of witnesses on disputed issues of fact. CDC submits

that the question depended on construing the 1914 conveyance, as to which the oral evidence was of no probative value.

25. There are on occasion limits to what can be achieved by construing documents considered in isolation. In the present case the 1914 conveyance merely described the land conveyed as “all that Plantation or Estate lot piece or parcel of land called and known by the name of Grand Ance situate and lying in the quarter of Grand Carenage in the island of Carriacou ... containing one hundred and six and one half (106½) acres English Statute Measure be the same more or less ...”. The 1914 conveyance did not delineate or describe the boundaries of the land conveyed and no map or plan was annexed to it. In such circumstances construction of the document alone cannot establish whether any particular parcel of land is or is not contained within the land conveyed. It is, therefore, permissible to look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was expressed in it as the intention of the parties and to resort to extrinsic evidence in order to ascertain what precisely is referred to by the general words of the conveyance (*Eastwood v Ashton* [1915] AC 900 per Earl Loreburn at p 906, per Lord Parker at p 913). It is not permissible, however, to use extrinsic evidence to contradict the clear intention of the parties as expressed in the conveyance.

26. In *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894, an appeal concerned with the precise position of a boundary, Lord Hoffmann (with whom the other members of the Appellate Committee of the House of Lords agreed) drew attention to the fact that under the old system of unregistered conveyancing in England and Wales the conveyances themselves could not be relied upon as delineating precise boundaries. He continued:

“It follows that if it becomes necessary to establish the exact boundary, the deeds will almost invariably have to be supplemented by such inferences as may be drawn from topographical features which existed, or may be supposed to have existed, when the conveyances were executed.” (at p 896 B)

27. In *Pennock v Hodgson* [2010] EWCA Civ 873, another boundary dispute where a plan was attached to the conveyance, Mummery LJ observed:

“Looking at evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when

you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction. The rejection of extrinsic evidence which contradicts the clear terms of a conveyance is consistent with this approach..." (at para 12)

28. Similarly, the editors of Megarry and Wade, *The Law of Real Property*, 9th ed., (2019), state at 5-043:

"A common defect of conveyances is that boundaries are inadequately defined. In that case extrinsic evidence is admissible to establish the true intent of the parties, which may be clear from other documents, such as auction particulars. That extrinsic evidence may include the subsequent conduct of the parties to the conveyance, but only insofar as it casts light on their intentions at the time the boundary was created. But if the location of boundaries is clear from the conveyance, neither extrinsic evidence nor any presumptions can be used to contradict it, save only in proceedings for rectification." (footnotes omitted)

29. In the present case, construction of the 1914 conveyance establishes the starting point that it was the intention of the parties that all of the lands known as the Grand Ance estate should be conveyed because it expressly says so. The question then becomes whether the disputed land did or did not fall within that estate. The question as to what was the extent of the Grand Ance estate in 1914 is essentially a question of fact.

30. The Board considers that, when considering the intention of the parties to the 1914 conveyance, the best objective evidence of what would have been considered to be the extent of the Grand Ance estate at that date is the 1904 plan, which, although not precisely contemporaneous, is close in time to the 1914 conveyance. That plan is a detailed survey not of the Grand Ance estate but of the adjoining Harvey Vale Estate. It was created under order of the Director of Surveys pursuant to the Grenada Boundaries Settlement Ordinance. It was lodged with the Director of Surveys and the Registrar of the Supreme Court in accordance with section 21(1) and (2) of the Ordinance. The Registrar was required to give notice of the plan in the Gazette. Section

21(3) of the Ordinance provides that a plan lodged in this way shall stand confirmed and be binding on all parties unless contested in accordance with section 22(1). However, quite independently of those statutory provisions, the 1904 plan is illuminating as to what would have been considered to be the extent of the Grand Ance estate at that time.

31. The 1904 plan shows the Harvey Vale estate divided into lots and reserved areas. It also shows topographical features. In every location it identifies by name the neighbouring estates. The Grand Ance estate is named at three points as the bordering estate to the north. In the north-west corner of the Harvey Vale estate there is shown a reserved area marked "Swamp" extending at its western limit to Tyrrel Bay. Its area is stated to be "4a. 2r. 0p." (4 acres, 2 rods and 0 perches). The northern boundary of this reserved area of swamp is a line running east to west between two boundary stones and is an extension of the line formed by the boundary road running east to west which forms the northern boundary of the Harvey Vale estate at that point. The northern boundary of the reserved area of swamp in the 1904 plan, which is drawn with great precision, coincides exactly with the current northern boundary of the land comprised in the CDC lease of 4 January 2005 as depicted in the CDC plan 2003 and the southern boundary of the disputed land. Symbols, possibly representing vegetation, appear on the plan throughout the reserved swamp area of the Harvey Vale estate and also extend into the area north of the northern boundary of the Harvey Vale estate ie into the area now constituting the disputed land. On the plan, immediately to the north of that boundary appear the words "Grand Ance Est." indicating that the swamp extends into the Grand Ance estate.

32. While it is correct that the 1904 plan does not show how far to the north the area of swamp within the Grand Ance estate extends, it nevertheless provides clear evidence that the area of swamp lying immediately to the north of the northern boundary of the land leased by the Government to CDC in 2005, ie the southernmost part of the disputed land, was in 1904 a part of the Grand Ance estate.

33. On behalf of CDC it is objected that it does not follow that the disputed land remained part of the Grand Ance estate at the date of the 1914 conveyance. In this regard attention is drawn to the fact that while both the 1885 conveyance and the 1914 conveyance state that the land conveyed comprises all of the Grand Ance estate, that was described in the 1885 conveyance as containing "one hundred and sixty acres or thereabouts" whereas it was described in the 1914 conveyance as "containing one hundred and six and a half (106½) acres English Statute Measure be the same more or less". This discrepancy, it is said, is consistent with part of the estate having been sold after the 1904 survey but before the 1914 conveyance. This submission encounters a number of difficulties, however. First, it seems inherently improbable that if any of the

Grand Ance estate was sold at that time it should have been the 7 acres of swamp at this extremity of the estate. Moreover, if the disputed land was sold at that time it is clear that the purchaser did nothing with it thereafter. Secondly, at trial CDC and the Attorney General relied on the evidence of Mr Venace Msacky, the Director of Lands and Surveys in the Ministry of Agriculture, Lands, Forestry and Fisheries which included an analysis of the survey plans. It was Mr Msacky's evidence that his research had revealed no filed conveyance of the disputed land to any person. In the circumstances, the discrepancy between the 1885 conveyance and the 1914 conveyance may well be a simple error of transcription.

34. By contrast, there is further evidence corroborative of the conclusion that the disputed lands formed part of the Grand Ance estate at the date of the 1914 conveyance. Every plan produced of the disputed land shows that land as in private ownership or as part of the Grand Ance estate.

(1) The 1980 plan of the Grand Ance estate produced by Mr Thomas at the request of Mr Roosevelt Churchill Corion, describes the Grand Ance estate as totalling just over 163 acres and partitioned into ten lots. Lot 1 in the plan contains the disputed land and is clearly within the Grand Ance estate. The southern boundary of Lot 1, which coincides with the southern boundary of the disputed land, adjoins land marked on the plan "Govt of Grenada". This land had formerly belonged to the Harvey Vale estate and was subsequently leased to CDC by the Government of Grenada in 2005.

(2) In 1985 eight acres forming part of the Grand Ance estate were conveyed to Roosevelt Churchill Corion. On the plan attached to that conveyance ("the 1985 plan"), the disputed land is marked as "Estate of Samuel Corion".

(3) The CDC plan 2003, which was prepared by Mr Thomas at the order of the Government and attached to the 2005 lease granted by the Government to CDC, shows the land leased to CDC divided into three lots. Lot A is swamp land while Lots B and C are in the sea, Lot B being described as an area of sea bed to be reclaimed and Lot C as an area to be acquired for sea bed rights where the proposed jetties would be built. The northern boundary of Lot A coincides precisely with the southern boundary of the disputed land and is an extension of the line formed by the public road running east to west. On the plan the disputed land is marked "Private Lands" which is entirely consistent with the 1904 plan, the 1980 plan and the 1985 plan and inconsistent with the disputed land being owned by the Crown.

(4) In July 2013 Mr Godwin Alexis, a surveyor, produced on the instructions of Mr Frederick Corion and others a plan of the area depicted as Lot 1 in the 1980 plan, dividing it into three lots: Lots A, B and C. Once again the disputed land is shown within the Grand Ance estate with the words “Gov’t of Grenada” written on the land to the south of the disputed land.

35. In the Board’s view there was an abundance of evidence which supported the judge’s conclusion that the disputed land was part of the Grand Ance estate which was conveyed to Samuel Corion in 1914. The Court of Appeal upheld that finding of fact, concluding that there was no basis on which it could be disturbed. There were, therefore, concurrent findings of fact with the result that the case falls within the Board’s practice described in *Devi v Roy*. Moreover, there are present here no exceptional circumstances which would justify a departure from the Board’s usual practice. On the contrary, the Board considers that the extrinsic evidence adduced provides compelling support for the respondents’ contention that the disputed land was conveyed to Samuel Corion in 1914 as part of the Grand Ance estate.

36. In *Dass v Marchand* [2021] 1 WLR 1788 Lord Burrows, delivering the judgment of the Board, made the following observation in relation to the Board’s practice:

“It is worth here clarifying that the practice of the Board (in not going behind the concurrent findings of fact of two lower courts) imposes a super-added constraint on this appellate court. That is, it goes beyond the standard constraints on an appeal court and adds an additional hurdle for an appellant to overcome when appealing to the Privy Council. This is for two main reasons. First, the trial judge, given his or her opportunity to see and hear witnesses at first hand, is likely to be in the best position to make findings of fact. Where those findings of fact have been upheld by one appeal court, there is no reason to think that a second appeal court – the third court looking at the facts – is more likely to be correct about the facts than the two courts below. Secondly, the Privy Council wishes to respect factual circumstances peculiar to the country from which the case comes (especially, for example, local customs, attitudes and conditions) and the first instance and appeal court judges in those countries are very likely to be in a better position to assess such factual circumstances than is the Board.” (at para 16)

37. The present case provides a clear example of the good sense of the second reason for the practice identified by Lord Burrows. National courts are often much better placed than is the Board to evaluate such extrinsic evidence because they are more familiar with local conditions.

The foreshore

38. On this appeal CDC submits in the alternative that, even if, contrary to its primary contention, the 1914 conveyance did purport to convey land which included the disputed land, the respondents failed to demonstrate that the presumption that title to the foreshore vests in the Crown did not apply. CDC submits that only if that presumption is rebutted could it be concluded that the 1914 conveyance was effective to convey title to the disputed land.

39. In the courts below, CDC and the Attorney General asserted that the disputed land was part of the foreshore. The presumption on which they relied is stated in Halsbury's Laws of England in the following terms:

“By prerogative right the Crown is prima facie the owner of all land covered by the narrow seas adjoining the coast, or by arms of the sea or public navigable rivers, and also of the foreshore, or land between high and low water mark, the right being limited landwards to the medium line of high tide between spring and neap tides. There is a presumption of ownership in favour of the Crown and the burden of proof to the contrary is on the claimant.” (Halsbury's Laws of England, 4th ed, (1998) Crown Property, Vol 12(1), para 242. See generally *Loose v Lynn Shellfish Ltd* [2017] AC 599, at para 32 per Lord Neuberger and Lord Carnwath; G Marston, *The Marginal Seabed: UK Legal Practice*, (1981), Chapter XI.)

40. The manner in which the point was first taken in these proceedings was unsatisfactory. The point was not pleaded. Following the completion of evidence the parties made their submissions in writing. CDC's written submissions dated 16 May 2017 asserted that by prerogative right the Crown is prima facie the owner of the foreshore and continued:

“Having regard to the nature of the disputed property, it is submitted that the same was at all material times lands of

the Crown and remains so, notwithstanding the Claimants' claims." (para 38)

No particulars were provided. The Attorney General in written submissions dated 15 May 2017 did not refer to the point at all but did adopt the submissions made by CDC. In the circumstances the respondents had had no opportunity to respond to a pleaded case or to address the issue in the course of evidence.

41. Nevertheless, the judge and the Court of Appeal dealt with the issue in their judgments, both deciding it against CDC and the Attorney General. In her judgment the judge dealt with the point briefly observing, *inter alia*, that the fact that the disputed parcel of land may be referred to as swamp lands does not make it Crown lands. On appeal, the Court of Appeal held that the fact that the disputed land was swamp land almost entirely covered with seawater was insufficient to invoke the presumption of Crown ownership. For the presumption to operate, the Crown needed to prove that the land lay to the seaward side of the mean high water mark. This was a matter of technical evidence and CDC had adduced no such evidence. The Court of Appeal considered that CDC had failed to discharge the evidential burden of raising the presumption of Crown ownership and, as a result, there was nothing for the respondents to rebut. The Court of Appeal also rejected the Attorney General's application that the matter be remitted to the High Court for it to hear further evidence as to the mean high water mark.

42. On this appeal, Mr McGhee submits on behalf of CDC that it is clear on any view that the land immediately to the west of the disputed land is part of the sea. It is so described in the 1980 plan and the July 2013 survey. It was common ground that almost the entirety of the disputed land was covered by seawater. Accordingly, he submits that, putting it at its lowest, there was at least a serious possibility that the foreshore presumption applied. He submits that, given that the 1914 conveyance was not a conveyance from the Crown, the respondents had to demonstrate not only that the 1914 conveyance included the disputed land but also that the seabed and foreshore presumption did not apply. This they have failed to do. In particular, he submits, even if the presumption depended on the determination of the mean high water mark, it was for the respondents to demonstrate that the disputed land was on the landward side of that mark, not for CDC to demonstrate that the disputed land was on the seaward side of that mark.

43. In the present proceedings it was for the respondents to persuade the judge that they had better rights in the disputed land than did CDC. However, there was no burden on the respondents to prove that the presumption of Crown ownership of the foreshore did not arise. It was CDC and the Attorney General who maintained that the

disputed land was owned by the Crown. It was for them to plead and prove that case. In taking the point they sought to rely on a legal presumption that the foreshore is owned by the Crown. However, in order to do so, they had first to establish that the disputed lands formed a part of the foreshore. Only when this is established will the presumption arise and the respondent become subject to an evidential burden to establish the contrary. Both the judge and the Court of Appeal came to the firm finding that CDC and the Attorney General had failed to establish that the disputed lands were part of the foreshore. As a result, they concluded that the legal presumption was never triggered. Consequently, no question arose as to whether the presumption had been rebutted.

44. For present purposes, it is enough that there were findings of fact by both the judge and the Court of Appeal that CDC and the Attorney General had failed to establish that the disputed lands formed part of the foreshore. Applying *Devi v Roy* and the usual practice of the Board, it is not appropriate to go behind such concurrent findings of fact. There are no exceptional circumstances here which would justify departing from the practice.

45. However, the Board should add that the conclusion of the courts below that the presumption did not apply was clearly correct. In order to establish that the disputed land was part of the foreshore it was necessary for CDC and the Attorney General to establish that it lay seaward of the mean high water mark. The matters relied upon by CDC in this regard consist of fragments of evidence which had not been directed at the issue because it had not been raised at the time the evidence was given. In particular, it is said that almost the entirety of the disputed land was covered with water, that the Corion family's fishing boat was moored there and that they fished for oysters and crab there. However, this does not suffice for the present purpose. There could be many reasons for the incursion of water into the swamp other than that it lay below the mean high water mark. The evidence relied upon totally failed to establish that the disputed land lay within the foreshore.

Conclusion

46. For these reasons the Board will humbly advise His Majesty that the appeal should be dismissed.