Hilary Term
[2023] UKPC 11
Privy Council Appeal No 0032 of 2021

JUDGMENT

Charles Edward Porter and another (Respondents) *v* Robert Stokes (Personal Representative of the Estate of Walter Edward Stokes, deceased) (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Briggs
Lord Kitchin
Lord Sales
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
30 March 2023

Heard on 1 March 2023

Appellant
Ramesh Lawrence Maharaj SC
Robert Strang
Katharine Bailey
(Instructed by BDB Pitmans LLP (London))

Respondents
Ian Benjamin SC
Kerwyn Garcia
(Instructed by Signature Litigation LLP (London))

LORD BRIGGS:

Introduction

1. By a Deed of conveyance dated 18th August 1982 ("the Deed") Mr and Mrs Porter acquired a parcel of land ("the main parcel"), lying between the Maracas river to the west and the Maracas Royal Road to the east, from their good friend and neighbour Walter Stokes. The main parcel was separated from the Royal Road mainly by land retained by Walter Stokes ("the retained land"). The only means of access to the main parcel from the Royal Road (or from any other public highway) was along a strip of land ("the strip") running along the southern boundary of the retained land, connecting the south-east corner of the main parcel with the Royal Road. Although it was already in use for that purpose at the time of the Porters' acquisition of the main parcel, the strip was neither conveyed to the Porters by the Deed, nor was any right of way over it granted to them.

2. This curiosity, that the Porters had apparently acquired a landlocked parcel of land with no right of way to or from it, remained apparently unnoticed by either side for the following 24 years, in the sense that it was not mentioned in any surviving document. The strip remained in use as a de facto means of access both to the main parcel and to the retained land, with no complaint by either side. In the meantime Walter Stokes had died in April 1990, and his estate (including the retained land) vested in his son Robert Stokes pursuant to a grant of probate in July 1990.

3. But in February 2006 the Porters' attorneys wrote to Robert Stokes suggesting that the Deed had by mistake omitted to include the strip as part of the land conveyed, and inviting him to execute a deed of rectification to put that mistake right. Robert's refusal to do so led to this claim by the Porters for rectification of the Deed, issued in October 2007 and tried by Charles J in November 2012. Charles J, in her judgment in December 2013, dismissed the claim. This was followed by an appeal heard in October 2018 by Bereaux, Jamadar and Pemberton JJA, leading to their unanimous decision in June 2019 to reverse the judge and make the order for rectification sought by the Porters.

The Parties' Cases

4. In bare outline the parties' cases at trial were as follows. The Porters relied upon a prior binding agreement for sale dated 15th May 1982 ("the Contract") which included the strip as part of the land agreed to be sold. They also relied upon indications in the Deed and its accompanying plan which suggested that, apart from

the mistaken exclusion of the strip by the omission of three key words, it was intended to be included. In particular they relied upon the express reservation in the Deed of a right of way over the strip in favour of Walter Stokes, for the benefit of the retained land, which made no sense if he was not parting with the strip.

5. Robert Stokes' case was that the Contract was itself the result of a mistake in including the strip. That mistake was spotted by Robert Stokes after the Contract was made and, to put the matter right, the Contract was allowed to expire unperformed, followed by the execution of the Deed which correctly excluded the strip from the land being conveyed. Robert acknowledged that the Porters enjoyed a right of way along the strip to the main parcel, not by virtue of the Deed, but by prescription.

6. There were other subsidiary issues in the proceedings, including a claim by the Porters to adverse possession of a separate triangular piece of land, which failed, and by Robert Stokes that the Porters had obstructed the strip, which partly succeeded. But they have all been resolved by the courts below and were of no real consequence for the issue of rectification, with which the Board is solely concerned.

7. A reading of the careful reserved judgments of Charles J and Bereaux JA (with which his colleagues agreed) reveals a sharp divergence between them in the relative weight which they accorded to the oral evidence (on which Charles J placed her main emphasis) and the surviving documents (on which the Court of Appeal relied almost exclusively). It will be necessary to explore that divergence in some detail in due course. But a careful review of the surviving documents is at least the appropriate starting point in any case in which the trial took place 30 years after the relevant events, following the death of a principal actor, Walter Stokes. More to the point it was 24 years before the emergence of the present dispute gave anyone the impetus to try and remember the detail of what at the time had been just a routine conveyancing transaction between friends. Thanks in part to the excellent custodianship of the Deeds Registry of Trinidad and Tobago the main conveyancing documents and plans have survived, even to the point where, during the hearing of this appeal, coloured versions of the key plans were promptly made available by email from Trinidad whenever requested by the Board during argument. This speedy trans-Atlantic co-operation in real time has been greatly appreciated. The key documents will now be described broadly chronologically.

The Documents

8. The earliest, which formed part of Walter Stokes' title in the sale to the Porters, is a deed of conveyance dated 20th June 1967 ("the 1967 Deed") by which Janet Stanhope-Lovell sold and conveyed both the main parcel and the strip to

Walter Stokes, while remaining the owner of the retained land. In the 1967 Deed the main parcel was called "the hereditaments" and the strip was called "the Right of Way". They were described in detail in Parts 1 and 2 of the Schedule to the 1967 Deed, both in terms of boundary location and area (then using the old system of acres, roods and perches), and stated to be coloured pink and green respectively on the accompanying plan ("the 1967 Plan").

9. The 1967 Deed reserved to Ms Stanhope-Lovell an easement of way over the strip for the benefit of the retained land in the following terms:

> "Except and reserving unto the Vendor in fee simple full and free rights and liberty at all times hereafter and for all purposes connected with the existing use of the remainder of the adjoining property of the Vendor known as 'the Glen' with or without horses and other animals, carts, carriages and motor and other vehicles of every description laden or unladen to go pass and repass along the Right of Way."

10. The 1967 Plan labels the strip as "Right of Way" in accordance with the nomenclature of the 1967 Deed, and a coloured copy obtained during the hearing shows that the main parcel and the strip were coloured pink and green in accordance with the descriptions in the Schedule.

11. At some date before 1982 Walter Stokes acquired the retained land from Ms Stanhope-Lovell, so that it, the main parcel and the strip were in his common ownership by the time of the sale to the Porters. The easement of way over the strip had thereby been extinguished in law, although the strip remained the de facto means of access from the Royal Road, both to the main parcel and to tenanted houses on the southern part of the retained land.

12. Turning to 1982, the first two relevant documents in point of time are two plans, which came to be labelled "A2" and "A4" in the courts below. The Board will adopt that nomenclature. They were both prepared by the same surveyor, Mr Sylvester, and both were described as having been prepared for "Mr Stokes", ie Walter Stokes. Taking them in turn, Plan A2 is dated (in Mr Sylvester's handwriting) 23 March 1982 and describes itself as "PLAN of a Parcel of land coloured pink". The copy of Plan A2 in the trial bundle bears the series number 91705 and is signed by each of Walter Stokes, Mr Porter and Mrs Porter. That copy in the black and white bundle bears no colouring, but copies of the same plan, numbered 91704 and 91705 sent from Trinidad during the hearing, do contain colouring. 91704 shows the main parcel coloured pink and both the strip and the Royal Road coloured in some

different colour which varies (depending on the computer screen upon which it is viewed) between yellow and beige or light brown. 91704 is not signed by any of the parties to the transaction. The coloured copy of 91705 is signed, but only by the Porters. Thus that coloured copy of 91705 must be slightly earlier in time of copying than the version of 91705 signed by all three of the parties. It also shows the main parcel coloured pink. The strip is also coloured, but not the Royal Road. It is not possible to tell (after the passage of 40 years) what that colour of the strip is. In all copies of Plan A2 the main parcel is given an area (5340.3 square metres) but the strip is not given any area.

13. All versions of Plan A2 label the strip as "Right-of-Way". To the uninitiated viewer of Plan A2 on its own it looks as if it is seeking to distinguish between the main parcel as being subject to the sale and the strip as being subject only to a right of way, serving the main parcel. But if Plan A2 is viewed in the knowledge of the 1967 Plan (which, with the rest of the 1967 Deed, was no doubt being used as a precedent) it looks as if the person drawing and writing on Plan A2 has simply lifted the label for the strip from the 1967 Plan.

14. Plan A4 bears the date 21 April 1982, again in Mr Sylvester's manuscript, and has the series number 91713. It later came to be annexed to the Deed. As will appear there was much dispute at trial and in the Court of Appeal about whether this was the correct date, or whether it was prepared in August 1982, but it is now common ground between counsel that it was correctly dated 21 April. It describes itself as:

> "PLAN of 2 Parcels of land coloured Pink &
> Green…Containing together five, seven, seven hectares."

15. The stated area is the aggregate of the stated areas of the main parcel and the strip. The number "2" has been added to replace "1", "Parcel" changed to the plural and "& Green" has been squeezed after "Pink". It is not possible to tell for certain when these alterations were made, save that they pre-dated the filing of Plan A4 with the Deed at the Registry on 30 August 1982. But neither of the parties have advanced any case or submission that these alterations were made after the date when Mr Sylvester signed plan A4, and the Board understood that the common ground about the 21st April date which emerged for the first time during the hearing related to the whole of the contents of the plan.

16. Plan A4 departs from Plan A2 in the following further respects. First, the label "Right-of-Way" for the strip has been removed, and replaced with a precise statement of its area: namely 430 square metres. This removes an indicator (discussed above) that the strip was not itself agreed to be conveyed, and replaces it

with an area description which suggests that it was. Secondly there is added the route of a 5 ft wide "Existing Drain" running north to south from the southern corner of the retained land, across the west end of the strip, and then east to west along the southern boundary of the main parcel to the river. Finally the colouring of the strip has changed to green, in accordance with the "Pink and Green" part of the explanation of the purpose of the plan.

17. Plan A4 does not appear to have been signed by any of the parties to the transaction. Apart from Mr Sylvester's signature, it also includes the signature of someone described as "Conveyancer" under a certificate that the plan is that referred to in the Deed. This signature and certificate is unlikely to have pre-dated the Deed itself.

18. The next relevant document is the Contract, dated 15 May 1982 and signed by all the parties. Clause 1 is central to the case, and reads as follows:

> "The Vendor will sell and the Purchasers will purchase the freehold parcels of land comprising FIVE THOUSAND THREE HUNDRED AND FORTY POINT THIRTY FIVE SQUARE METERS· (5340.35 s.m.) (together with the buildings thereon and appurtenances thereto) and FOUR HUNDRED AND THIRTY SQUARE METERS (430 s.m.) (subject to a Right of Way over the same being granted to the Vendor by the Purchasers) respectively and which said parcels of land are more particularly delineated and coloured pink and brown respectively on the Copy of the Survey Plan dated March 23, 1982 prepared by Winston Sylvester which is attached hereto and marked 'A' (hereinafter called 'the said property')."

19. Clause 3 provided for completion within 90 days, time being of the essence. Clause 6 provided liberty to either party to rescind if completion did not take place within the prescribed time due to the other party's default.

20. The plan attached and marked "A" is Plan A2. There has been much debate about whether the Contract (including its attached Plan A2) is ambiguous. Viewed without Plan A2 it plainly constitutes a two parcel agreement, with a right of way granted by the purchaser to the vendor over the smaller part. The precise description of the area of the smaller parcel as 430 sq.m sufficiently identifies the strip, and the grant of the right of way over it to the vendor only makes sense in relation to the strip, since the only 'land' rendered accessible by a right of way from the retained

land over the main parcel is the river. When Plan A2 is added to the Contract the extent to which it might be thought to cast doubt on whether this was to be a sale which included the strip depends on how (before 40 years' fading) the strip was actually coloured on the version attached to the Contract. But whatever the original colour of the strip, it does not detract from the Contract as an agreement to sell the strip as well as the main parcel, and the contrary was not suggested.

21. The lasting mystery, upon which the judge evidently pondered at length, is why Plan A2 rather than the more up to date Plan A4 was appended to the Contract if, as is now agreed, Plan A4 was in existence by that date. This is not something about which the documentary evidence sheds any useful light. The Board will have to return to it when addressing the judgments of the courts below, in each of which there is a radically different explanation, neither of which now withstands analysis.

22. The next and final relevant document is the Deed itself, to which Plan A4 was attached. It is dated 18th August 1982, over 90 days from the date of the Contract. It was clearly prepared with the 1967 Deed in mind, and used loosely as a precedent. The key part for present purposes is the first recital, as follows:

> "WHEREAS the vendor is seized and possessed in fee simple of the freehold hereditaments and premises described in the First Part of the Schedule hereto (hereinafter called 'the said Lands') TOGETHER with certain rights and liberties connected therewith (hereinafter called 'the Privileges') and more particularly described in a certain deed registered as No. 2695 of 1924 SUBJECT HOWEVER to the right of passage (hereinafter called "the Right of Way") over and along the parcel or strip of land described in the Second Part of the Schedule hereto reserved to Janet Stanhope-Lovell by deed registered as No. 6152 of 1967 and Subject also to the covenant (hereinafter called 'the Covenant') set out in Clause 2 of the said deed registered as No. 6152 of 1967 but otherwise free from encumbrances."

23. At clause 1 the Deed then conveys "the said Lands" together with the Privileges and the Covenant "subject to the Right of Way". The Schedule is divided into three parts. The First Part contains a precise description of the main parcel, described as delineated on the annexed plan and coloured pink. The Second Part contains an equally precise description of the strip, complete with location, boundaries and area, described as delineated on the annexed plan and coloured

green. The Third Part reserves to the vendor the drainage right along the drain shown on the plan. The annexed plan is, as already described, Plan A4.

24. The Deed is notable also for what it did not contain, namely any right of way over the strip in favour of the Porters. The only right of way to which the Deed made reference, albeit slightly incorrectly since it had been extinguished when the main parcel and the strip came into Mr Stokes' common ownership, was to the Right of Way over the strip, in the form originally created by the 1967 deed, which expressly reserved it for the benefit of the retained land.

25. Reference may briefly be made to the mortgage ("the Mortgage") by which the Porters charged their new purchase to a bank as security for a loan towards the purchase price. Although disclosed, this was not a document relied upon at the trial or in the Court of Appeal. It charged both the main parcel and the strip to the lender.

The Witnesses

26. The Porters relied on witness statement evidence from Mr Porter, Mr Sylvester and a Mr Emerick Brown, who lived in a house on the retained land served by the track along the strip. Mr Brown had little to contribute beyond a general understanding that the Porters owned or at least controlled the strip. Mr Sylvester described his role in the making of Plans A2 and A4. He thought, in his witness statement, that the A4 plan was prepared in about August 1982, but in cross examination accepted the April 21st date which he had written on it.

27. Mr Porter was the main witness. He stated that it had always been agreed between him and Walter Stokes that the strip was to be included in the sale. He thought that Plan A4 had been made in August, as a result of advice that the drain which was to be the subject of what became the drainage right in the Deed needed to be shown on the plan. He said that this was why completion had been delayed beyond the 90 day prescribed period.

28. Robert was his own main witness. He was at the time a busy airline pilot. He emphasised the close, almost familial, relationship between his father and the Porters. He described attending a meeting between them at which the Porters had asked for but been refused a sale of the strip by his father. He described how he had spotted what he regarded as the erroneous reference in the Contract to a sale of the strip as well as the main parcel and raised it with his father. He was later told by his father that he had received an apology from the Porters, and an oral agreement from them to correct the mistake. Rather than amend the Contract they had agreed to let

it expire, and then convey just the main parcel otherwise than pursuant to the Contract. This was, his father told him, because the Porters were concerned that amending or cancelling the Contract might prejudice or delay their loan application.

29. Robert called two friends of his father to testify that they had heard his father saying that he was the owner of the strip and had declined to sell it to the Porters. One of them, a Mr Victor, described being told by Walter Stokes about the mistake in the Contract in similar terms to the account given by Robert. But he died before the trial and his witness statement was admitted under a hearsay notice. The other, a Mr Pechenik, also said that the Porters had admitted to him that they did not own the strip. The two other witnesses, Robert's son and a Mr Ramischand gave evidence about the obstruction and adverse possession issues, but nothing of direct relevance to the rectification issue.

The Judgments of Charles J and of The Court of Appeal

30. The judge delivered a reserved judgment a little over a year after the trial. She described the parties' cases, the witness evidence, including cross examination, and the submissions. She provided what she described as a summary of the relevant law about which there was no dispute between the parties, by reference to *Private Rights of Way* by Smith, Francis, Jessel and Shaw (2012), *Fowler v Fowler* (1859) 4 De G & J 250, *Irnham v Child* (1781) 1 Bro C C 92), *Murray v Parker* (1864) 19 Beav 305, *Crane v Hegeman-Harris Co. Inc* [1939] 1 All ER 662, 664 and *Earl v Hector Whaling Ltd* [1961] 1 Lloyd's Rep 459, 470. She directed herself that she would need to be persuaded by clear and unambiguous evidence, by what she called "strong proof", that the Deed, a professionally drawn document, should be "reformed", that this could be done by written and parol evidence, and that where (as here) there was a prior written agreement then parol evidence was admissible to resolve any ambiguities in it.

31. The judge's analysis of the evidence may be summarised thus. First, Plan A2 signed by all parties evidenced an intention that only the main parcel was to be sold because, in particular, the strip was not coloured. She placed great weight on the fact that Mr Porter had said that the delay in the execution of the Deed was in order to deal with the drainage issue, which she described as "a deliberate untruth" and a "gratuitous fabrication" designed to conceal the real reason for the delay, namely to let the Contract expire. Above all she found that the Porters had deliberately prepared Plans A2 and A4 with a view to deceiving Walter Stokes. She said (at para 65):

> "Additionally and very importantly I form the view on the clear evidence before me that the Claimant had prepared two survey plans before the execution of the agreement for sale - one depicting the first parcel only and the second depicting both parcels with the drain reserve. In order to induce Mr Stokes to sign the agreement for sale, A2, which only depicted the first parcel was drawn to his attention. He signed that plan at the same time that he signed the agreement for sale. A reasonable inference to be drawn from these events is that Mr Stokes was never shown A4 and this was deliberately planned by the Claimants. In my view the only reason for this deception was that Mr Stokes was adamant that he would only sell to them the first parcel and not the second."

This was a finding of fraud against both the Porters. If well-founded it plainly entitled her to treat Mr Porter's evidence as unreliable. She then concluded that the Porters had failed to prove their case, and dismissed their claim. In her view the common intention, all along, had been that only the main parcel was to be conveyed, and this was what the Deed provided.

32. The Court of Appeal trenchantly reached the opposite conclusion. But first they had to consider whether they were entitled to interfere with the decision of the judge. Bereaux JA directed himself by reference *to Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21, [2014] 4 All ER 418 at paras 12 and 17 (per Lord Hodge), and *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 at para 53, (per Lord Neuberger of Abbotsbury). He concluded that an appellate court may revisit and reverse a trial judge's findings of fact if the conclusion was (i) one which had no evidence to support it or (ii) one which was based upon a misunderstanding of the evidence or (iii) one which no reasonable judge could have reached. Mindful of the need to respect the advantage of the trial judge of having seen and heard the witnesses he concluded that the advantage was in the present case at the lower end of the relevant spectrum because, after such a passage of time, the decision on the rectification issue was bound to turn primarily on the documents. Although the scope for appellate departure from findings of fact at first instance has been the subject of a great deal of recent authority, no-one suggested on the appeal to the Board that Bereaux JA's summary of the relevant principles involved any error of law.

33. The Court of Appeal decided that it was at liberty to depart from the judge's factual findings for the following three reasons (taken from para 27 of the judgment of Bereaux JA):

(i) She failed to consider or properly to consider the documentary evidence and in particular the provisions of the 1982 Deed.

(ii) She misconstrued the survey plan A4, and in particular the corrections made to it and failed to reconcile all the corrections on it with the provisions of the 1982 Deed. She placed too much emphasis on the fact that the parties to the conveyance did not sign it.

(iii) She drew wrong inferences about Mr. Porter's evidence (based on her misunderstanding of document A4) and wrongly rejected his evidence.

34. The Court of Appeal then proceeded to reverse the judge on the rectification issue. In summary this was because, for reasons which the Board will explain in detail in due course, a careful review of the surviving documents both tended to prove the Porters' case, and because the surviving documents were more consistent with their testimony than with that adduced on behalf of the defendant Robert Stokes.

35. Part of the Court of Appeal's reasoning was that, flatly contrary to the judge's finding, Plan A4 had indeed been finalised in August rather than in April 1982, which tended to corroborate Mr Porter's explanation of the reason for the delay in completion rather than what the Court of Appeal thought was the inherently improbable reason put forward by Robert Stokes. But they concluded that, even if finalised in April, Plan A4 tended to support the Porters' case. Another part was the Court of Appeal's assumption, expressed in para 85(i) of the judgment of Bereaux JA that, at the time of the execution of the Contract "there was no controversy that both parcels were being sold". As will appear both these parts of the Court of Appeal's analysis were criticised by Mr Maharaj SC for the appellant Robert Stokes. He said that the Court of Appeal were not entitled to depart from the judge's findings of fact and that, even if they were, they came to the wrong conclusion.

36. This appeal therefore raises two main issues:

1) Was the Court of Appeal entitled to depart from the judge's findings of fact? If not, the judge's decision against rectification must stand.

2) If the Court of Appeal was so entitled, did they get the answer right or wrong?

But before addressing those issues directly it is first necessary to say a little more about the law relating to the equitable remedy of rectification, in respect of which the law of Trinidad and Tobago reflects the law of England and Wales.

Rectification – the Law

37. During the ten year period between July 2009 when the decision of the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101 was delivered and July 2019 when the decision of the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2019] EWCA Civ 1361; [2020] Ch 365 was handed down, the previously placid waters of English law about rectification may fairly be said to have been stirred up into a veritable storm. Students of legal history will find in chapter 3 of *Hodge on Rectification*, 2nd Ed (2015) a detailed account of the storm written while it was still raging. It perhaps remains to be seen whether it has now entirely died down as the result of the comprehensive disapproval of the unanimous obiter dicta in *Chartbrook* by a unanimous Court of Appeal in *GLAS*.

38. The judgments of both the judge and the Court of Appeal in the present case were delivered during that stormy period, and therefore in ignorance of what the Court of Appeal was about to say in *GLAS.* But the storm was raging only over one part of the relevant waters. A party to a document may seek rectification of it in two distinct types of situation. The first is where the document failed to implement an earlier binding contract between the parties to the document sought to be rectified. The second is where there is no earlier binding contract, but only a common intention, mutually expressed, which differs from the terms of the document sought to be rectified. Both *Chartbrook* and *GLAS* fell into that second category.

39. There was a time, before *Joscelyne v Nissen* [1970] 2 QB 86, when it was thought by some that the first type of case was the only type for which rectification was an available remedy. Absent an earlier binding contract there was nothing upon which an equity of rectification could be based: see per Lord Hoffmann in *Chartbrook* at para 59, referring to *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 88 per Cozens-Hardy MR. Rectification of a mistaken document (eg a deed of conveyance) made pursuant to an existing contractual obligation would be granted almost as a kind of specific performance. If the claimant could show that the later document failed to implement the earlier contract, objectively construed, then it would be rectified so that it did. It would be irrelevant, in Lord Hoffmann's view, that the subjective intentions of one or more of the parties differed from its meaning objectively construed. Lord Hoffmann said:

> "But for present purposes the significance of cases like *Lovell & Christmas Ltd v Wall* 104 LT 85 is that the terms of the contract to which the subsequent instrument must conform must be objectively determined in the same way as any other contract. Thus the common mistake must necessarily be as to whether the instrument conformed to those terms and not to what one or other of the parties believed those terms to have been."

40. Thus far Lord Hoffmann's analysis was probably uncontentious: see *Britoil plc v Hunt Overseas Oil Inc* [1994] CLC 561 at 572 (per Hobhouse and Glidewell LJJ). The dicta which caused the subsequent storm were those by which Lord Hoffmann sought to apply that objective approach to the communications of the parties prior to making the document sought to be rectified where there was no earlier binding contract to enforce.

41. While in *GLAS* the Court of Appeal disapproved those contentious dicta, they were at pains to uphold the need for an objective analysis of an earlier binding contract (albeit obiter in that case because there was no earlier binding contract): see paragraphs 141, where the specific performance analysis in the *Lovell* and *Britoil* cases is approved and para 176, where their departure from the dicta in *Chartbrook* is expressly confined to cases where there is no prior binding contract.

42. The *Britoil* case also points the way to a better understanding of what may be in issue in a case where there is a prior binding contract. At p. 572 Hobhouse LJ said:

> "Where the prior agreement is a legally binding contract then the grant of the remedy of rectification is, as was pointed out by Lord Cozens-Hardy in *Lovell & Christmas v Wall* (1911) 104 LT 85 at p 88, analogous to the remedy of specific performance. The parties were entitled to have an agreement conforming to their earlier contract. If the later document fails to fulfil this entitlement, the parties are entitled to have it rectified so that it will do so. <u>Such a conclusion will only be defeated if the parties have intended to vary their earlier agreement</u>. In such a situation the court will have to construe the earlier agreement as a contract and as a matter of law. Having decided as a matter of law what its effect is, the court will give effect to the legal rights of the parties." (the Board's emphasis).

As in *Chartbrook* these observations were unfortunately only *obiter dicta,* because there was no prior binding agreement in *Britoil.* Nonetheless the Board considers that, with one adjustment, they are a correct statement of English and Trinidadian law. The adjustment that the Board would make is that there is nothing to stop a defendant to a claim for rectification based upon an earlier binding contract from claiming that the contract was itself liable to be rectified.

43. In the Board's view this distinction between the basis of a rectification claim where there is, or is not, a prior binding contract is well-founded in basic principle. Where there is a prior binding contract, the nature of the claimant's equity is to have their contractual right vindicated by bringing the later implementing document into accordance with the terms of the contract. By contrast, the nature of the equity in a case where there is no prior binding contractual right is to remedy the unconscionability of the enforcement of a binding document which runs counter to the outwardly manifested common intention of the parties making it. A similar basis of unconscionability underlies rectification for unilateral mistake known to the other party, but that need not be addressed here. To reduce the significance of a prior binding contract merely to evidence which may (or may not) be probative of the parties' common intention would be to deprive the claimant of an equity based upon the specific enforcement of the contract.

Issue 1: was the Court of Appeal entitled to depart from the judge's findings of fact?

44. In the Board's opinion, the Court of Appeal was entitled to revisit the judge's findings of fact. The Board has considered it necessary to address that question afresh because of the two aspects of the Court of Appeal's analysis described in paragraph 35 above. The first was that, in the view of the Court of Appeal, Plan A4 really was made or at least finalised in August rather than April 1982. Before the Board neither of the parties supported that conclusion. The second was that a sale of two parcels was uncontentious as at the time of the Contract. This was challenged by the defendants in their pleadings and their evidence, and indeed the judge found to the contrary. As to that point it may be that the Court of Appeal meant no more than to say that the Contract plainly provided for a two parcel sale (as it did), and that the defendant was not seeking to have it rectified. But the Board cannot be sure.

45. The reasons why the Board considers that the Court of Appeal (and in turn the Board) were and are entitled to depart from the factual findings of the judge are as follows. First, although the judge recognised that this was a case of a prior binding contract, she approached the analysis of the rectification claim as if it were of the second type (no prior binding contract) by setting the claimant the task of proving by

strong unambiguous evidence that the common intention of the parties was other than expressed in the Deed. Her whole emphasis was on the credibility or otherwise of the Porters' witness evidence about common intention. When it failed to come up to that demanding standard, in her view the claim failed. But the Porters' claim for rectification simply depended upon the Contract itself, which plainly provided for a sale of both parcels, even when read with Plan A2. Although the completion date had passed, it remained in force as between the parties when the Deed was executed, because neither party had rescinded it in accordance with its terms. The Porters' claim did not depend upon proving common intention, by witness evidence or otherwise. It was the defendant's case that the Contract had been replaced (rather than varied) by an agreement between the parties to exclude the strip from the sale. The focus of the judge's task should have been to decide on the credibility of the defendant's evidence, by reference to a careful analysis of the surviving documents, bearing in mind the death of a main participant (Walter Stokes), the very long lapse of time between the relevant events and the trial, and the long period after 1982 before the matter even became a contentious issue.

46. The Board has considerable sympathy with the judge over this, because she was invited by the parties to treat her summary of the relevant law as common ground. But this erroneous approach tended to undermine the validity of her fact finding. In particular it led her to underestimate the importance of the Contract itself, which was the primary relevant document in the case given that it created the rights which the Porters were seeking to enforce.

47. Secondly, the judge simply did not engage with a detailed review of the Deed itself, to see whether it was consistent with either party's case. For reasons which will appear, this was a significant error, since the Deed is very difficult to reconcile with what Robert Stokes said was a genuine attempt to put right a mistake in the Contract, by excluding the strip from the sale.

48. Thirdly, the Board considers that the judge clearly went astray in the central finding of dishonest deception by the Porters which plainly went to the heart of her view that the evidence of Mr Porter was unreliable. Her conclusion was that, knowing that Walter Stokes would not sell them the parcel, the Porters deliberately had two plans prepared, the first (A2) showing only a single parcel, which they showed Walter and asked him to sign, and the second (A4) which showed two parcels for sale, the second being the strip, which they presumably intended to deploy for the purpose of getting the strip, while deceiving Walter with Plan A2.

49. If this finding was well made, it would have amounted to a serious fraud by the Porters against their long-standing friend, all the more so because, at his

insistence, the sale was being proffered at a very favourable price to the Porters. But no such fraud or deception had been pleaded, nor put to Mr Porter in cross-examination, or even put forward in closing submissions. Rather the case had been that the Contract provided for a two parcel sale by a genuine mistake, that when the mistake had been discovered by Robert Stokes and pointed out to his father, the Porters had apologised, agreed that only the main parcel was subject to the sale, and then arranged for the mistake clearly to be put right in the Deed.

50. The finding that the creation of Plans A2 and A4, both prior to contract, was part of a dishonest scheme by the Porters to obtain the strip by deception of Walter Stokes, appears to the Board to have been a creature of the judge's imagining. This included her explanation for the existence of the two plans prior to the Contract, the absence of signatures on Plan A4 and Mr Porter's recollection in evidence that it had been prepared in August, which she described as a gratuitous fabrication designed to conceal the real reason for the delay in completion.

51. In the Board's opinion this serious conclusion was not open to the judge in the circumstance that at no time had deception been part of the defendant's case. It is one thing for a judge to conclude that evidence has not been honestly given, but quite another to find as a fact that there had been a deliberate deception leading to a signed Contract for two parcels (including the strip) as part of an unsuccessful attempt to obtain land from a generous friend by false pretences. It was a conclusion for which there was no evidence, and a conclusion which no reasonable judge could reach in the circumstances. Although touched upon lightly in their judgment, it was something which, on its own, required the fact-finding of the judge to be re-opened by the Court of Appeal.

52. If this allegation of deception had been pleaded, or even put in cross examination, it is easy to see how firmly it could have been gainsaid by the Porters, quite apart from its sheer improbability as part of the negotiation of the sale between old friends and neighbours. The status of the Contract as a two parcel sale (including the strip) did not depend at all upon the use of Plan A4, which was not deployed as part of the transactional documents until annexed to the Deed in August. That aspect of the sale was emblazoned upon the contract by clause 1, in a relatively simple and clear document signed by Walter Stokes. It would have been pure luck that Walter Stokes might sign the Contract without reading it, and this was not something which could realistically have been planned by would-be fraudsters. The unfairness of the finding is compounded by the fact that Mrs Porter, against whom the finding was also made, did not have the opportunity to give evidence to rebut it.

53. Furthermore the finding that Mr Porter's evidence about the date of Plan A4 was a gratuitous fabrication designed to conceal the truth is itself implausible, otherwise than in the context of an *a priori* conclusion that he had set out to deceive. Plan A4 was, as noted, only used as part of the transaction in August. It dealt with the drainage issue which was only otherwise addressed in the Deed. It contained obvious amendments (as described in paragraph 15 above). From all those aspects it is easy to see how, thirty years after the transaction, Mr Porter could have persuaded himself that it was made, or at least finalised, in August rather than in April. It is, as already noted, an unfathomable mystery why, if it was prepared in April, Plan A4 (rather than the by then outmoded Plan A2) was not used as the annexure to the Contract in May.

Was the Court of Appeal right to order rectification?

54. The Court of Appeal's natural inclination to regard the documents rather than the witness evidence as the best guide to the correct answer was if anything reinforced by having to re-consider the matter without being able to see and hear the witnesses. But the judge did not suggest that her distrust of Mr Porter's evidence had anything to do with his demeanour, and a full transcript of the cross examination was available, as it is to the Board. No-one, then or now, has suggested a re-trial. Bearing in mind that the main value of the strip to the Porters is as a means of access to the main parcel, and its main value to Robert Stokes is as a means of access to the retained land, neither of which are challenged, it would be utterly disproportionate for there to be a retrial now, 40 years after the transaction in issue.

55. Nonetheless since the Board is constrained to accept that the Court of Appeal made two significant errors in its own appraisal as already explained, it is necessary for the Board to carry out its own analysis, rather than merely review the analysis carried out by the Court of Appeal. It is at least no worse placed than the Court of Appeal to do so despite the further passage of time, save perhaps that the Court of Appeal in Trinidad and Tobago may fairly be supposed to have a greater familiarity with local practices in unregistered conveyancing.

56. The Board starts, in conformity with the above summary of the law, with the recognition that this is a case where rectification is sought to bring the Deed into alignment with an earlier binding agreement, namely the Contract. Although Robert Stokes' case is that the Contract was deliberately allowed to expire, it is plain that it was still in force between the parties when the Deed was made. The "time of the essence" completion date had by then passed, but neither side had exercised their contractual right to rescind. That being so the Porters have a clear prima facie case

for rectification, since the Contract does promise a conveyance of the strip to the Porters whereas the Deed does not convey it.

57. Therefore the key issue in the case is whether, despite having an enforceable right to a conveyance of the strip based on the Contract, it had either been varied or was itself subject to rectification to exclude the promise to convey the strip. Neither of those alternative defences was pleaded in terms, there being no claim by Robert Stokes to rectify the Contract, and only a hopeless case that it expired by effluxion of time. Nonetheless the Board is prepared to accept that the substance of both those defences was part of Robert Stokes' case, since he alleged both that the Contract failed to reflect his father's intention, and that, although wrongly clothed with the garb of expiry, the Contract was orally agreed to be varied as to future performance by the exclusion of the strip from the subject-matter of the sale. The Board will address each of those defences in turn.

58. In order for the Contract to be rectified to exclude the strip, it would be necessary for Robert Stokes to show that both his father and the Porters intended, up until the making of the Contract, that the strip was to be excluded and that they had outwardly manifested this common intention. It would not be enough merely to show that Walter Stokes had no intention to include the strip.

59. The surviving documents point strongly away from any such conclusion. By the time of the Contract, Plan A2 (which may be said to point to a conveyance of the main parcel alone) had, as the parties now agree, been superseded by Plan A4, which plainly assumed a sale of the strip as well. It described itself as a Plan of 2 parcels with an aggregate area of 577 hectares (the aggregate of the main parcel and the strip). The strip was given its own measured area. Plan A4 describes itself as having been prepared for Walter Stokes. Even were that not so, it plainly points to an intention of someone (who could in that event only have been the Porters) that the strip should be included.

60. The parties cannot be said to have mistakenly included the strip in the Contract by some slip of the pen. Quite apart from Plan A4, someone had taken the trouble to measure the area of the strip for that to be included in clause 1. If mistake there was it lay in the inclusion as an attachment of the by then outmoded Plan A2 rather than A4. The extent to which, read with the rest of the Contract, Plan A2 pointed away from the inclusion of the strip depends upon how it was originally coloured, something which cannot now be determined with any confidence after the passage of 40 years.

61. All there is in the witness evidence to suggest that it was not at that stage the Porters' intention to acquire the strip is the witness statement of Robert Stokes which, at paragraph 10, suggests that the parties were not *ad idem* about whether the strip was to be included in the sale. The Porters wanted it to be included, but Walter Stokes did not. That is not only inconsistent with the way the matter then proceeded (in the preparation of Plan A4 and the preparation and execution of the Contract), but even if credited in full it comes nowhere near being evidence that the Porters intended up until the date of the Contract that the strip should be excluded.

62. For those reasons the Board considers that the defence based upon the proposition that the Contract itself was liable to be rectified fails *in limine.* That leaves only the question whether the Contract was in substance varied by the exclusion of the strip before the execution of the Deed.

63. Now that Plan A4 is to be treated as pre-dating the Contract, there is no surviving document which sheds any light on whether Robert Stokes' case in this regard is to be believed, other than the Deed itself and (if admissible at all, not having been deployed at the trial) the mortgage. Robert's case is that he discovered that the Contract included the strip, told his father, who raised it with the Porters, who apologised and agreed that the Deed should be prepared so as to exclude the strip.

64. A principal difference between the analysis of the judge and that of the Court of Appeal is that she did not, but they did, conduct a careful examination of the Deed to see whether it was consistent with the Porters' or Robert Stokes' case. The Board regards such an examination as essential. Does it reveal a careful drafting exercise designed to exclude the strip, or does it do the opposite, apart from what may have been a slip of the pen in failing to include the subject matter of the Second Part of the Schedule (ie the strip) as part of "the said Lands" in the first recital?

65. In the Board's view the second of those alternatives is the clear winner. To start with, there was apparently a deliberate decision to annex Plan A4 rather than Plan A2 to the Deed. For the reasons already given, Plan A4 clearly points to an intention to include the strip, whereas Plan A2 does not. Next, the Schedule at Part 2 goes to the trouble of identifying the measured area of the strip, something which would be unnecessary if it were only to be subjected to a right of way. Then there is the clear express reservation of a right of way over the strip to the vendor, by incorporating by reference the by then extinguished right of way reserved in the 1967 Deed. As the Court of Appeal held, that reservation is inexplicable if the strip was not to be conveyed to the Porters. Then there is the parallel failure to grant to the Porters any right of way over the strip as the means of access to the main parcel,

if the strip was not to be conveyed to them. No remotely competent conveyancer would fail to do that, and (as Mr Maharaj suggested) leave it as having been already obtained by prescription. Finally, whereas it would be hard to describe all those elements as simple mistakes, the failure in the first recital to add "and Second Part" after "First Part" as part of the definition of "the said Lands" can easily be put down to a three word slip of the pen, on the part of a conveyancer otherwise carefully drafting a document designed to convey the strip as well as the main parcel.

66. As the Court of Appeal guessed, the financing of the transaction would be likely to lead to a security being granted to the lender over both the parcels described in the Contract. The late production of the mortgage shows that guess to have been correct, but it is not necessary to admit it in evidence against the Appellant's objection. The evidence from a detailed review of the Deed is amply sufficient to point firmly away from Robert Stokes' case that, by the time it was executed, the parties had agreed that only the main parcel was to be conveyed.

67. Mr Maharaj submitted that the explanation for all the indications in the Deed which point to a continuing intention to include the strip may have been that a conveyance including it had already been drafted, and the parties' change of mind was then implemented by the inclusion of the minimum necessary alterations required to achieve that result, leaving all the contrary indications there, redundant but doing no harm. In the Board's opinion that ingenious suggestion comes nowhere near displacing the opposite conclusion on a balance of probabilities. Furthermore the omission of any right of way for the Porters over the strip could have done real harm to them, particularly on any later attempt by them (or their mortgagee) to sell the main parcel. If there were to be no rectification, it would remain a blot on their title to this day.

68. It follows that recourse to the surviving documents as the best way, after such a lapse of time, of testing the reliability of the parties' diametrically opposed witness evidence, leads inexorably to the conclusion that the Porters' evidence is to be preferred over that of Robert Stokes and his additional witnesses on the rectification issue. For that reason the Board considers that Robert Stokes' defence that the Contract was in substance varied before the execution of the Deed also fails.

Conclusion

69. The result of this necessarily long analysis is that, albeit for slightly different reasons than those of the Court of Appeal, this appeal must be dismissed.