<u>IN THE SUPREME COURT OF ST HELENA</u> Case No: **SHSC 6/2024**

BETWEEN: -

LARRY FRANCIS

APPLICANT

-v-

ATTORNEY GENERAL OF ST HELENA
FOR AND ON BEHALF OF THE CROWN

RESPONDENT

Case Stated for the opinion of the Supreme Court
Section 146 of the Registered Land Ordinance

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1. The Registrar of Lands ('the Registrar') has stated a case for the opinion of the Supreme Court on one issue. The question framed for the opinion of the Court is: Can Crown land be acquired by prescription?

2. The Attorney General, the Respondent on behalf of the Crown, raised this issue as a response to a prescription application by the Applicant which is before the Registrar of Lands. Given that this preliminary issue has never been raised before and has significant importance to the future of these types of applications the Registrar, with the support of the parties, decided to state a case. Therefore, this judgment addresses that one issue: whether Crown land may be acquired by prescription.

3. It is to be decided as a preliminary issue in the prescription proceedings because, if the Respondent is right that Crown land may not be acquired by prescription, there will be no need for the trial on the evidence to proceed and the Applicant's application would stand to be dismissed.

4. On 24 May 2024 I held a video hearing by Microsoft Teams. Mr Walter Scott, the Public Solicitor, appeared for the Applicant, and Mr Aldhelm Garner, Crown Counsel, appeared for the Respondent. I am grateful to them for their written and oral submissions.

<u>Summary of the background</u>

5. The prescription proceedings concern a number of commercial units all registered as Crown land. The land is divided into 4 units. The ground floor is units 240, 241 and 242. Unit 241 is between units 240 and 242. The first floor is unit 249 and has the same floor space as units 240, 241 and 242 combined and sits directly above the ground floor units.

6. The Applicant, Mr Francis, has made a prescription claim relating to units 241 and 249. He claims at least 15 years uninterrupted and exclusive possession of the two units ('the land').

7. Mr Francis has or had a lease or a licence from the Crown in relation to units 240 and 242. He claims his possession of units 240 and 242 commenced by lease dated 25th March 1995. When he took over these properties, he states that he very soon moved into unit 241 which was empty and is sandwiched between 240 and 242. He asserts that there was no agreement with the Crown to do this and that he has acquired ownership by peaceable, open and uninterrupted possession of the land since 1995 without permission of the Crown.

8. In 2006 he says he took possession of the upstairs unit 249 which was empty. Again, he asserts that he has acquired ownership of that unit by peaceable, open and uninterrupted possession of the land since 2006 without permission of the Crown.

9. Whether the evidence supports the Applicant's claim is not an issue for the case stated. The issue is whether it is possible for Mr Francis to obtain Crown land by prescription. The Applicant submits that this has never been argued before and the Attorney General's Chambers have always previously defended these claims on the basis that such an acquisition is possible. He submits that, on occasion, the Crown has agreed that land has been acquired in this way.

<u>Relevant UK law which applies to St Helena</u>

10. Section 112 of the Saint Helena Act 1833 ('the 1833 Act') provides the lawful basis on which St Helena (including its land and some properties) originally became vested in the Crown of the United Kingdom. It is also the empowering provision Privy Council or Crown to make Orders in Council as to how it is to be governed:

> 112.The island of St Helena, and all forts, factories, public edifices, and hereditaments whatsoever in the said island, and all stores and property thereon fit or used for the service of the government thereof, shall be vested in his Majesty, and the said island shall be governed by such orders as his Majesty in council shall from time to time issue in that behalf.

11. The latest and current St Helena Constitution is contained in the Schedule to the 2009 UK Order in Council – The St Helena, Ascension and Tristan da Cunha Constitution Order 2009 (S.I. 2009/1751) as amended ('the 2009 Order'**).** The current Constitution replaced earlier versions such as those contained in the Orders of 1966 and 1988.

12. Section 5(1) and (5) of the 2009 Order provide that:

Existing laws

5.—(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

…

(5) For the purposes of this section, "existing laws" means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of St Helena, Ascension or Tristan da Cunha immediately before the appointed day.

[Emphasis Added]

13. Existing laws for the purpose of section 5 of the 2009 Order include law having effect as part of the law of St Helena before it came into force in 2009. This includes local St Helena laws such as the 1980 Registered Land Ordinance addressed below.

14. Land and properties having been vested in the Crown by virtue of section 112 of the 1833 Act, section 31 of the St Helena Constitution provides for how land and immovable property may be dealt with if vested in the Crown.

15. Section 31 of the 2009 Constitution (the Schedule to the 2009 Order) as currently in force provides:

Powers to dispose of land

31.Subject to this Constitution and any other law the Governor or any person duly authorised by him or her in writing under his or her hand may, in Her Majesty's name and on Her Majesty's behalf, make and execute grants and other dispositions of any land or other immovable property in St Helena that is vested in Her Majesty in right of the Government of St Helena.

[Emphasis Added]

16. Section 115 of the 2009 Constitution on interpretation defines 'law':

"law" means law in force in St Helena, and includes an Ordinance, and any instrument made under an Ordinance, and any other instrument having the force of law and any unwritten rule of law, and "lawful" and "lawfully" shall be construed accordingly;

17. Section 31 of the 2009 Constitution replaced section 44 of the 1966 Constitution and section 51 of the 1988 Constitution which provided in identical terms (except for the words in square brackets):

Grants of land.

51. Subject to the provisions of any law [for the time being] in force in St. Helena and its Dependencies, the Governor or any person duly authorised by him in writing under his hand may, in Her Majesty's name and on Her Majesty's behalf, make and execute grants and dispositions of land or other immovable property within St. Helena and its Dependencies which may be lawfully granted or disposed of by Her Majesty.

18. At the time the 1988 Constitution came into force there was already law in force in St Helena, namely the Registered Land Ordinance of 1980.

Domestic St Helena Law passed by the local legislature

19. At present, ultimate legislative and executive authority for British Overseas Territories resides in the British Crown. The St Helena Constitution provides for a legislature, an executive and a judiciary; with specific measures enshrined to protect the independence of the judiciary from the other two organs of government.

20. St Helena has its own legislature (legislative council), empowered to make its local laws including primary legislation known as Ordinances. Many of the Ordinances enable the executive authority (usually the 'Governor-in-Council' – the Governor acting on the advice of the Executive Council) to make detailed secondary legislation in the form of Rules, Regulations or Orders. These Ordinances, and their associated secondary legislation, form the domestic or local legislation.

21. All of these local laws are made under the authority of St Helena's Constitution, the latest version of which is found in the Schedule to the 2009 Order made under the Saint Helena Act, 1833.

22. There is no dispute that in the hierarchy of laws, UK legislation such as the 1833 Act and Orders in Council made thereunder, including the Constitution, have primacy over locally made laws – those passed domestically by the St Helena legislature (its legislative council).

23. This is made explicit by section 2 of the Colonial Laws Validity Act 1865 which provides that "*Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Order and shall to the extent of such repugnancy but not otherwise be and remain absolutely void and inoperative*".

The Registered Land Ordinance 1980

24. Section 2 of the Registered Land Ordinance 1980 ('the Ordinance'), on interpretation, provides the following relevant definitions:

> "Dealing" includes disposition and transmission
>
> "disposition" means any act inter vivos by a proprietor whereby the proprietor's rights in or over the proprietor's land, lease or charge are affected, but does not include an agreement to transfer, lease or charge;
>
> …
>
> "lease" means the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of the land, and includes the right so granted and the instrument granting it, and also includes a sublease, but does not include an agreement for lease;
>
> …

"transfer" means the passing of land, a lease or a charge by act of the parties and not by operation of law, and also the instrument by which such passing is effected but does not include an agreement to transfer;

"transmission" means the passing of land, a lease or a charge from one person to another by operation of law on death or insolvency or otherwise howsoever, and includes the compulsory acquisition of land under any written law;
(emphasis added)

25. Section 135 of the Ordinance is the key provision on prescription and provides that:

Acquisition of land by prescription 135.
(1) The ownership of land may be acquired by peaceable, open and uninterrupted possession for a period of 15 years without the permission of any person lawfully entitled to such possession.
(2) Any person who claims to have acquired the ownership of land by virtue of subsection (1) may apply to the Registrar for registration as proprietor of the land.

26. Section 139(1)(b) provides that the Registrar of Lands may give effect to prescription by rectification of the register:

Rectification by Registrar 139.
(1) The Registrar may rectify the Register or any instrument presented for registration in the following cases—
…
(b) if any person has acquired an interest in land by prescription under Part IX

27. Sections 146-147(1) of the Ordinance provides for the power to state a case and appeals from decisions of the Registrar of Lands:

Power of Registrar to state case
146. Whenever any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Ordinance, the Registrar may, and must if required to do so by an aggrieved party, state a case for the opinion of the Court; and thereupon the Court must give its opinion on the case, which is binding upon the Registrar.

Appeals
147. (1) The Governor or any person aggrieved by a decision, direction, order, determination or award of the Registrar may, within 30 days of the decision, direction, order, determination or award, give notice to the Registrar in the prescribed form of an intention to appeal to the Court against the decision, direction, order, determination or award.
….

28. Sections 159 and 160 provide:

Savings of rights
159. Nothing in this Ordinance affects any of the interests, rights, powers and privileges conferred on the Crown or the Government by any other written law.

Ordinance to bind Crown and Government
160. Subject to section 159, this Ordinance binds the Crown and the Government.

The Respondent's case

29. Mr Garner set out the Respondent's position in written submissions dated 11 December 2023, 16 February, 12 April, 3 May and 23 May 2024. It is fair to say that the Crown's case has evolved and changed and this has not always been easy to follow. I have done my best to reflect the arguments in this judgment.

30. Mr Garner contends that the 1833 Act is the legislation that creates the right to own St Helena land to the Crown and it is to be read in conjunction with section 31 of the Constitution, which gives exclusive rights to the Crown to grant interests in and dispose of Crown land.

31. The Crown's position is therefore that only the Governor can dispose of or otherwise deal with Crown land by virtue of section 31 of the Constitution and this prohibits its acquisition by prescription. Mr Garner submits that the Registered Land Ordinance 1980 does not affect any of the interests, rights, powers and privileges conferred on the Crown, see sections 159 and 160 of the Ordinance.

32. The Respondent therefore submits that section 135 of the Ordinance should be read as not permitting the acquisition by prescription of Crown land or does not have that effect.

33. Mr Garner relies on four alternative grounds in support of this proposition.

<u>Summary of my conclusions</u>

34. As far as I can understand it, the Respondent's grounds of challenge are fourfold. I consider and reject each of the grounds below.

35. Despite the valiant efforts of the Respondent, I am satisfied that neither section 112 of the 1833 Act, which vests land in the Crown nor section 31 of the Constitution which reserves the making and executions of grant and other dispositions of Crown land to the Governor, prohibits the acquisition of Crown land by prescription under section 135 of the Ordinance.

36. This is largely for the reasons submitted by the Public Solicitor on behalf of the Applicant. I incorporate and adopt some of his arguments in my analysis below.

The first ground – s.135 of the 1980 Ordinance cannot bind the Crown as it is subordinate to the Constitution and must be interpreted consistently and in conformity with it

<u>The Respondent's submission</u>

37. The Respondent's first ground of challenge is that the Registered Land Ordinance is subordinate legislation to section 31 of the Constitution in the hierarchy of laws. When section 31 states that is 'subject to any laws', that does not mean that section 135 of the Ordinance can be interpreted in a way which is contrary to or inconsistent with section 31 of the Constitution. This is because section 5 of the 2009 Order requires that the Ordinance must be interpreted consistently with the Constitution.

38. In short, the Respondent submits that section 135 of the Ordinance cannot bind the Crown because it is subject to the overriding provisions of the Constitution - thus acquisition by prescription is not a cause of action.

39. In more detail, the Respondent submits that if the contention were correct that a law made by the local legislature could qualify a power conferred the Constitution, that would have the effect of undermining the superior force in law of the Constitution as the supreme law of the territory (*Attorney General v Euro Bank Corporation and Others,* at paragraph 270). It would negate the effect of section 5(1) of the 2009 Order. If correct, this would enable any Constitutional provision to be amended by a local law.

40. Mr Garner submits that the superior status of the Constitution over local laws is expressly recognised and protected by section 5(1) of the 2009 Order, which acts to prevent the supremacy of the Constitution being derogated from or eroded, as does section 2 of the Colonial Laws Validity Act 1865.

41. It follows that the Registered Land Ordinance 1980 as an existing law must be construed, or if necessary modified, so as to bring it into conformity with the Constitution.

42. Mr Garner further submits that the 1980 Ordinance is local legislation of a type that could not validly legislate against the constitutional provisions set out by Order in Council. In support of this argument he relies on the commentary in Hendry and Dickson's *British Overseas Territories Law*, paragraph (2e) at page 75 dealing with local legislation affecting the Royal Prerogative. There it is written that 'there are major prerogative powers that are part of the constitutional foundation of a territory and which, without an express grant of competence (which in no case has been given), are beyond the competence of its legislature to effect.'

43. He also relies on a footnote following the above cited entry, referring to Roberts-Wray, Commonwealth and Colonial Law, describing the effect of such further commentary that if the prerogative is to be limited 'by a Dominion or Colonial Act it must be the Act of a Dominion or Colonial legislature which has been endowed with the requisite powers by an Imperial Act giving the power either by express terms or by necessary consent'.

44. Mr Garner argues that there is no such endowment from an Imperial Act. The relevant Act may be s112 of the Saint Helena Act 1833 vesting the island of Saint Helena to the Crown. The only powers for disposal of Crown Land as follow from that are by section 31 of the

Constitution. For orders in council to allow a local legislature to subvert the effect of s112 of the Saint Helena Act 1833, and do to do without authority from the parliament passing the Saint Helena Act 1833 would not be competent.

<u>Discussion and Analysis - The first ground</u>

General propositions on the hierarchy of laws

45. There is no dispute in this case as to the hierarchy of laws. The St Helena Act 1833, 2009 Order and the 2009 Constitution (contained in the Schedule thereto) hold primacy over locally enacted law (such as the 1980 Ordinance). Domestic St Helena legislation has no validity to the extent it attempts to override or contradict this UK legislation.

46. In the event of inconsistency or contradiction between the laws contained in the 1980 Ordinance (or any locally enacted ordinance passed by the St Helena legislature) and the Act, Order or Constitution, the latter are to prevail.

47. In the event of direct contradiction, the local law is void or inoperative. In the event of inconsistency, it is to be interpreted consistently or in conformity with the primary sources of law.

48. The rationale for these propositions is to be found in a number of sources – s.112 of the 1833 Act, s. 2 of the Colonial Laws Validity Act 1865, s. 5 of the 2009 Order and various specific provisions within the Constitution itself.

49. In relation to laws not already in existence but sought to be passed by the St Helena legislature, section 74(3)(b) of the Constitution requires that the Governor should refuse to assent to the passing of any locally enacted legislation if it is in contradiction of the Constitution:

> **74.(3)** Unless he or she has been authorised by a Secretary of State to assent to it, the Governor shall reserve for the signification of Her Majesty's pleasure any Bill which appears to him or her, acting in his or her discretion—
> *(a)* to be inconsistent with one or more of the partnership values declared in section 2;
> *(b)* to be repugnant to or inconsistent with this Constitution;
> (c)…

50. The Governor has the benefit of advice from the Attorney General ('AG') throughout any legislative process – both at the time of the drafting of any government bill, while any bill is being passed through the legislature and when any bill is presented for the Governor's assent. The AG and the Governor will be part of the legislature enacting legislation as well as executive considering its need.

51. In relation to the Registered Land Ordinance (passed in 1980), the Attorney General and Governor can reasonably be inferred not to have objected to the terms of section 135 as

being inconsistent with or contradictory the terms of the Constitution as then in force (section 44 of the 1966 Constitution).

52. The Governor would have had oversight over the decisions being the person empowered to grant and dispose of Crown Land under section 44 of the 1966 constitution and assent to section 135 of the Ordinance. The Governor would have a vested interest in ensuring no inconsistency between the Constitution and Ordinance.

Application to the present case

53. These general propositions may be of little assistance in this case because of the specific 'carve out' or 'proviso' contained in the first phrase of section 31 of the 2009 Constitution underlined below that:

> **Powers to dispose of land**
> <u>31.Subject to this Constitution and any other law</u> the Governor or any person duly authorised by him or her in writing under his or her hand may, in Her Majesty's name and on Her Majesty's behalf, make and execute grants and other dispositions of any land or other immovable property in St Helena that is vested in Her Majesty in right of the Government of St Helena.
>
> [Emphasis Added]

54. Section 115 of the 2009 Constitution on interpretation defines 'law':

> "<u>law" means law in force in St Helena, and includes an Ordinance</u>, and any instrument made under an Ordinance, and any other instrument having the force of law and any unwritten rule of law, and "lawful" and "lawfully" shall be construed accordingly;

55. Therefore section 31 of the Constitution specifically provides that its own provisions may be 'subject to' domestically enacted local law (which is defined as being 'any other law' under section 115).

56. This still has to be read in light of section 5(1) of the 2009 Order:

> **5.**—(1) Subject to this section, <u>the existing laws</u> [including locally enacted ordinances] shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution <u>and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution</u>.
> [words inserted to give effect to section 5(5)]

57. What effect do these provisions have on the proviso phrase 'subject to…any law' within section 31 of the Constitution when read together? It is not straightforward.

58. When read together the provisions might mean that section 31 of the 2009 Constitution specifically provides for inconsistent or even contradictory local law (section 135 of the Ordinance) to prevail and such local law might still be valid (operative) because it is specifically authorised and envisaged by section 31 of the Constitution.

59. On this view, ‘subject to other laws’ in sections 31 and 115 of the 2009 Constitution says what it means in including local St Helena laws and Article 5 of the 2009 Order on existing laws means the same. This might not offend the hierarchy of constitution over local law as the constitution expressly delegates to local laws in ‘Subject to this constitution and laws’ and defines law under section 115. ‘Subject to’ allows for modification – does it allow contradiction?

60. On this view, section 2 of the 1865 Act and section 5 of the 2009 order do not completely prohibit local law being permitted to prevail over the constitution because they would only act as a bar to contradictory local law if the provisions of the constitution were silent on the relationship with local law. If a provision of the constitution itself specifically authorised contradictory local law, then this may arguably not offend section 2 of the 1865 Act and section 5 of the 2009 Order because the local law, even if providing for a contradictory result, would still be consistent with the Constitution.

61. The contrary view is that such local legislation, even if nominally authorised by the Constitution, could never be valid because it would be void as repugnant (see s.2 of the 1865 Act) or, if existing law, would need to be interpreted consistently with the Constitution (see s. 5 of the 2009 Order).

62. On this view, in order for s.31 to permit contradictory local law to prevail over its terms, clearer or more express provision might need to be given than simply the phrase ‘subject to’. This construction would require express authorisation within section 31 to permit contradictory local law to be enacted, if not in existence, or applied if in existence. Further, such a provision of the Constitution permitting contradictory local law might itself be ‘unconstitutional’ if it allowed for local to prevail over the constitution in the face of s.2 of the 1865 Act or s.5 of the 2009 Order – it would usurp the hierarchy of laws.

63. Although I do not need to decide this issue determinatively, for the reasons I set out below, I prefer the counter argument.

64. The better view is that the phrase ‘subject to’ in section 31 of the 2009 Constitution only permits local law to be read alongside or consistently with section 31 or at least that local laws may not contradict or undermine the provision but only supplement it (for example provide additional conditionality or procedures to be followed). The absence of more express wording in section 31 of the Constitution does not provide for more.

65. Mr Garner, during the oral hearing, also pointed to a number of other provisions of the 2009 Constitution: ss 24(11), 49(1), 50 (1) & (2), 53(2)-(4) and 70 which each specifically envisage and provide that local legislation, Ordinances, may be passed to supplement the terms of the Constitution. However, such supplementary ordinances would not and could not contradict the constitution because of the specific terms of the sections of the Constitution themselves which do not permit it. Although section 31 of the Constitution

does not explicitly provide for the same, and that may be an argument against it, the better view is that this supports the Respondent's interpretation.

Whether only the Governor can grant or dispose of Crown land pursuant to section 31 of the Constitution

66. Another issue is whether section 31 of the Constitution simply codifies a prerogative power of the Governor or whether it preserves to the Governor and his or her designates exclusivity in the disposal of Crown land[1]. The Applicant submits that, as an alternative argument, the disposition of Crown land is not exclusive to the Governor and therefore section 31 of the Constitution does not provide the exclusivity of disposition that the Crown asserts it does.

67. The Respondent argues that disposition (and grants) of Crown Land are "saved" to the Governor by section 31 of the Constitution and therefore the provisions of Section 135 of the Ordinance on Acquisition of Land by Prescription cannot operate as to the disposal of Crown Land.

68. The Respondent says that ownership of land and property is a right vested in the Crown by virtue of section 112 of the 1833 Act and that only the Governor may execute grants and dispose of that land and immovable property by virtue of section 31 of the Constitution:

> 31. Subject to this Constitution and any other law the Governor or any person duly authorised by him or her in writing under his or her hand may, in Her Majesty's name and on Her Majesty's behalf, make and execute grants and other dispositions of any land or other immovable property in St Helena that is vested in Her Majesty in right of the Government of St Helena.

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[1] The Applicant submits that the disposition of Crown Land is not exclusive to the Governor and may be subject to any other law as such what is saved cannot be an exclusive right.

The Applicant submitted that as per the Interpretation Ordinance 1968, no Ordinance binds the Crown unless specifically provided for (see section 43 (1) of the Interpretation Ordinance). Section 160 of the Registered Land Ordinance ('RLO') specifically provides that it does bind the Crown except that where a law provides different powers, rights or privileges to the Crown or Government. It is clear it has to be a law in force. Section 31 of the Constitution does not grant an exclusive right to the Governor to grant or dispose of Crown Land.

Arguably then the right that is "saved" is a right that is one that can be complimented by the provisions of another law. The saving provision - not being drafted as an "exclusion "proviso" cannot be read or interpreted so as to save a delegated authority as being "exclusive" (as argued by the Respondent) when the full extent of section 31 allows "other laws" to be enacted as far as the dealing of Crown Land is concerned. All that can be saved is a right that can be complimented (or fettered) by any other law. The RLO is any other law and saving provision or not can be construed as the "any other law" anticipated by section 31 of the Constitution.

69. Again, I do not need to rule determinatively on this argument and will assume for present purposes that section 31 of the Constitution does in fact go as far as the Crown asserts and provides exclusivity to the Governor (and his or her designates) in the making and executions of grant and dispositions of Crown land.

70. Section 31 needs to be read in conjunction with sections 159 and 160 of the Registered Land Ordinance 1980 which provide:

> 159. Nothing in this Ordinance affects any of the interests, rights, powers and privileges conferred on the Crown or the Government by any other written law.
>
> 160. Subject to section 159, this Ordinance binds the Crown and the Government.

71. This means that if section 31 of the Constitution prohibits acquisition by prescription of the Crown land then the Ordinance cannot override it but otherwise the Ordinance, including section 135 on the acquisition of land by prescription, binds the Crown.

<u>Conclusion on Ground 1</u>

72. I have set out the competing arguments above and expressed some provisional conclusions, for example on the effect of the proviso ('subject to any other law') in section 31 of the 2009 Constitution. However, there is no need for me to express a concluded view on any of these issues for a number of reasons.

73. The first is that, for the reasons I set out in relation to the second and third issues, I am satisfied that section 135 of the Ordinance is not inconsistent with, let alone contradictory to, section 31 of the Constitution nor s.112 of the 1833 Act. There is nothing within section 31 or section 112 which expressly or impliedly prohibits acquisition by prescription of Crown land. Therefore, there is no need for me to deem section 135 of the 1980 Ordinance void (inoperative) or to give it a conforming interpretation.

74. I therefore do not need to come to a concluded view on the effect of the proviso in the first phrase of section 31 and whether it permits s.135 to provide inconsistent or contradictory law to that contained in section 31.

75. The second reason is that this may be an important point of principle that should be reserved to a case where it becomes determinative or decisive.

76. The third reason is that this is unlikely to arise frequently in practice. Due to section 74 of the Constitution, locally enacted legislation is very unlikely to receive assent from the Governor, unless he or she, acting on the advice of the AG, is satisfied that an Ordinance is consistent with the Constitution. After all, the Governor is also sits on the top of the local legislature and can refuse to assent to the passing of inconsistent laws under section 74 of the constitution and has AG to advise. That means that there could theoretically be inconsistent local law prevailing by virtue of 'subject to' but in practice not, because the Governor should not assent to it.

The Second ground – whether s.31 of the Constitution expressly prohibits acquisition by prescription of Crown land when it reserves disposition to the Governor or with his consent

<u>The Applicant's argument</u>

77. The Applicant submits (that as between section 159 of the Ordinance and Section 31 of the Constitution) what is saved to the Governor (and presumably to others further delegated) is the right to make grants and other dispositions of Crown Land; further, that acquiring 'a right or interest' in land by prescription is neither a grant nor a disposition but is recognising a greater title to land and rectifying the land registration details accordingly. The Applicant submits that to this extent section 159 of the Ordinance '*cannot therefore affect the delegated authority of the Governor to grant and dispose of Crown land'*.

<u>The Respondent's argument</u>

78. The Respondent's second ground is that section 31 of the Constitution expressly prohibits the acquisition of Crown land without the consent of the Governor. The argument is that section 135 of the Registered Land Ordinance is either contrary to or must be interpreted consistently with the Constitution by not applying acquisition by prescription to Crown land. It is submitted that the definition of grant or disposition of land as reserved to the Governor under section 31 of the Constitution expressly prohibits the acquisition by prescription because it occurs without the Governor's consent (or that acquisition by prescription could only occur with the Governor's consent).

79. The Respondent submits that acquisition by prescription in Saint Helena does, by administrative correction of the Land Register, effect the acquisition of ownership from the previous registered owner to the new registered owner. The Respondent does not accept that the effect of acquisition by prescription is to recognise in law a 'greater interest in the land' as the Applicant claims.

80. The Respondent submits that 'disposition' and 'dispose' should be given an ordinary meaning and offer from Blacks Law Dictionary, 7th Edition the following:

> **Disposition** […], *n.* **1.** The act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property <a testamentary disposition of all the assets>. **2.** A final settlement or determination <the court's disposition of the case> […]

81. Mr Garner submits that in view of ordinary meaning of the language and of the kind of meaning given in Black's Law Dictionary the transferring of ownership by prescription from the Crown to another owner would indeed be a disposition; and in that respect the rights of disposition in the Constitution would be saved from being affected by the acquisition of ownership by prescription under the Registered Land Ordinance.

82. The Respondent would add that within examples of detailed technical language of land law it may be possible to distinguish rights obtained by prescription from a 'grant' or other 'disposition'. It does not follow that such specific language should be used in analysis of the meaning of section 112 of the Act and section 31 of the Constitution, not least that terms defined elsewhere do not, absent special provision, carry such definitions with them to the Constitution.

83. Furthermore, he observes that even from within the Ordinance a distinction of the kind described can be discerned at section 2 of the Ordinance between:

> **''disposition''** means any act *inter vivos* by a proprietor whereby the proprietor's rights in or over the proprietor's land, lease or charge are affected, but does not include an agreement to transfer, lease or charge;
> **''interest in land''** includes absolute ownership of land;
> ''**transfer**'' means the passing of land, a lease or a charge by act of the parties and not by operation of law, and also the instrument by which such passing is effected but does not include an agreement to transfer;
> **''transmission''** means the passing of land, a lease or a charge from one person to another by operation of law on death or insolvency or otherwise however, and includes the compulsory acquisition of land under any written law.

84. As to whether there are any grounds to limit the meaning of 'disposition' at section 31 in the way it is limited in the Ordinance would depend on whether the requirement for such disposition to be read as an *inter vivos* (or similar) act of a proprietor. In that sense it is notable that the Ordinance takes additional care to define 'disposition' in exactly that way. Looking to English law other statutes also take such care. This includes:

    a. Housing Associations Act 1985 (s9 (5)) includes '*for these purposes 'disposition' means sale, lease, mortgage, charge or any other disposal.*

    b. Family Law Reform Ac, 1987 (s 19) describing dispositions 'inter vivos' and dispositions by 'will or codicil' and expressing inclusion of oral dispositions,

    both of which statutes, like the Ordinance, take care to define or limit the extent of a disposition.

85. Mr Garner submits that, in contrast, section 115 of the Constitution provides various definitions of legal expressions, including 'legal representative', 'minor', 'subordinate court', 'St Helenian Status' and 'wrongfully removed or retained child' all of which words or phrases have a legal meaning in which care has been taken to describe in detail. That 'disposition' is not included here would tend to suggest a wide and general meaning is intended rather than that a narrow and technical meaning is left to be implied.

86. Mr Garner submits that ignoring the fact that, for the immediate purpose, the definitions at section 2 of the Ordinance do not apply to a reading of the Constitution if, nevertheless, it could by some means be stated that:

a. section 31 of the Constitution concerns only grants or other dispositions of Crown land, and,

b. acquisition of ownership by prescription is neither a grant or disposition (but is in some sense a transmission of land, or similar),

then, while that transmission may not expressly offend section 31, it still falls foul of the Ordinance's saving's provision which requires to leave unaffected the *'interests, rights, powers and privileges conferred on the Crown by any other written law*'.

87. He contends that, pursuant to accompanying submissions made by the Respondent, the Crown's interest in the land, as landowner, comes about by the Saint Helena Act 1833 vesting the island of St Helena and all hereditaments to His Majesty.

88. Therefore, he argues that should acquisition of ownership by prescription be permitted then inevitably land that came to the Crown by the St Helena Act 1833 is land over which the Crown has interests, rights and powers which stand to be entirely lost to Crown, contrary to the intention of the Ordinance's savings provision.

89. This is an eventuality that sections 160 and 159 of the Ordinance prohibit.

90. The Respondent notes that, depending upon other arguments made, the position may be different for land coming to the Crown other than by the St Helena Act 1833 or other written law (e.g. land that the Crown may purchase).

Discussion and Analysis on Ground 2

91. In my view, section 31 of the Constitution does not expressly prohibit acquisition by prescription of Crown land.

92. I accept the Applicant's arguments that an acquisition by prescription pursuant to section 135 of the Registered Land Ordinance is not a grant or other disposition of land for the purposes of section 31 of the Constitution. The provision is not inconsistent with or contradictory to section 31 of the Constitution nor section 112 of the 1833 Act such that I do not need to consider the effect of the proviso 'subject to…any other law'.

93. I agree with the Applicant that the acquiring a right or interest in land by prescription as governed by section 135 of the Ordinance does not fall within the definition of a grant or other disposition of Crown Land as used in section 31 of the Constitution. The Power to dispose of land- in title and 'make and execute and grants and other dispositions' – all active acts by the Governor in land – does not expressly include acts taken by others in respect of land such as acquisition by prescription.

94. I agree with the Applicant that the legal consequences of section 135 of the Ordinance do not constitute ‘grants and other dispositions of any land’ as anticipated by section 31 of the Constitution nor do they contradict the operation of law that land in St Helena originally became vested by virtue of section 112.

95. The starting point is the plain and ordinary of the language of section 112 of the 1833 Act and section 31 of the Constitution.

96. ‘Grant or other disposition’ in the context of Crown land (or any land) is not defined by the Constitution. The ordinary interpretation of the words can be applied within the context of the phrase ‘the Governor… may make and execute grants and other dispositions of any land’.

97. I am of the view that dispositions of land in the context of section 31 refers to the sale, exchange, lease, assignment, or other transaction designed to convey an interest in a parcel of land. I do not accept the Applicant’s argument that it must also be undertaken for gain or profit. I do not agree with the Applicant’s submission that the gain or profit must be intended as there is also a power to grant land and this it is submitted ‘a grant’ of Crown Land is where land is given by the Crown without gain or profit. It seems to me that ‘a grant’ of any interest in land must be either the creation of or transfer of any right of interest in land.

98. Nonetheless, I accept the Applicant’s submission that there is no grant or other disposition of Crown land by virtue of acquisition by prescription under the section 135 of the Ordinance. The section simply provides the framework for determining whether a person has acquired title of the land through 15 years of unauthorised but peaceable, open and uninterrupted possession. Where a person can demonstrate this regarding Crown land the actions of the Registrar are set out in Part X of the Ordinance in s139(1)(b) namely- “The Registrar may rectify the Register or any instrument presented for registration [..] if any person has acquired an interest in land by prescription under Part IX.”

99. I consider that the Registrar is not granting or otherwise disposing of land but recognising the interest in the land now held by the successful claimant over the interest held by the paper title holder. In so doing he is given the power to rectify the Register of Land to reflect the new ownership acquired by prescription.

100. Therefore, the acquisition of title by prescription against the Crown as title holder is not a grant or other disposition of Crown land as anticipated by Section 31 of the Constitution. Section 135 of the Ordinance does not therefore affect (is not consistent with or contradictory to) the delegated authority of the Governor to grant and otherwise dispose of Crown Land and as a consequence the saving provisions in section 159 of the Ordinance do not exclude the operation of section 135 as to the acquisition of Crown Land by prescription.

101. Grant and disposition are terms not defined in the Constitution for the purposes of section 31. However, 'grant' or 'disposition' in relation to land would commonly be understood to unilateral and active acts taken by the owner, proprietor, lessor, chargor or interest holder in land to affect the rights therein (ie. gift, sale, or other transfer of the freehold, grant of a lease or licence or charge etc). This is in contrast to the acquisition of land which encompasses acts taken by a person additional to or other than the proprietor by which they acquire rights or interests in the land (such as purchaser, lessee, chargee etc.).

102. 'Disposition' of land is defined in section 2 of the 1980 Ordinance consistently with this interpretation. In the absence of any other inconsistent definition within the Constitution, the definition in the Ordinance can be adopted for the purposes of interpreting section 31 of the Constitution. Section 2 of the Ordinance provides that:

> <u>"disposition" means any act inter vivos by a proprietor whereby the proprietor's rights in or over the proprietor's land, lease or charge are affected, but does not include an agreement to transfer, lease or charge;</u>

103. The only act by a proprietor or owner or interest holder in respect of land that not is not a disposition is 'an agreement to transfer, lease or charge' ie. a contract or option for the purchase of property which does not create a right or interest in the property itself.

104. Consistently with this interpretation, section 205(1) Law of Property Act 1925 of England and Wales also provides General Definitions including the following definition of 'disposition' of land:

> "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and
>
> "disposition" includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and "dispose of" has a corresponding meaning;

105. Therefore – when section 31 of the Constitution refers to the Governor making or executing the grant or other disposition of land vested in Crown this refers to the unilateral acts by him as the representative proprietor or owner or freeholder in respect of this land – ie. an action by the Governor on behalf of the Crown in respect of the land which is vested in it.

106. In contrast, acquisition by prescription for the purposes of section 135 of the Ordinance involves an act not by the proprietor of the land but by an occupying person asserting a right over the land through the operation of law against the proprietor's right in the land. It does not involve the execution of a grant or disposition by the proprietor (in this case the Governor on behalf of the Crown).

107. Adopting the definition in the Ordinance, the acquisition of land by prescription under section 135 of the 1980 Ordinance may be considered to be a 'transmission' of the land for the purposes of section 2 of the Ordinance:

> "transmission" means the passing of land, a lease or a charge from one person to another by operation of law on death or insolvency or otherwise howsoever, and includes the compulsory acquisition of land under any written law;

108. The effect of section 135 of the 1980 Ordinance in providing that "land may be acquired" is better described as a transmission of land. It conforms to the definition of transmission provided for by section 2 of the Ordinance. Where the criteria provided for in section 135 are met there is a transmission of the land from the registered owner to the applicant. The role of the Registrar under section 140 of the Ordinance in correcting the register is simply an act giving effect to the transmission of land from one owner to another.

109. Likewise, acquisition of land by prescription does not fall within the definition of a transfer of land within section 2 of the Ordinance ('the passing of land...by act of the parties') because transfer involves both parties to the transaction to act, rather than passing of the land by the operation of law:

> "transfer" means the passing of land, a lease or a charge by act of the parties and not by operation of law, and also the instrument by which such passing is effected but does not include an agreement to transfer;

110. The acquisition by prescription involves the unilateral action of the occupier in seeking to acquire the land on the operation of the law rather than by the act of both the parties.

111. Land that is acquired by prescription could not be fairly interpreted as having been 'granted' or 'disposed of' by the inaction of the proprietor – granted or disposed of by their neglect or due to their failure to exercise any of the rights of ownership or acquiescence in another taking over the land. The 'act' of the proprietor is absent or passive rather than active as is required. Likewise, the Registrar of Lands does not 'grant' or 'dispose of' land when he or she finds that a person has acquired ownership by prescription. The Registrar simply recognises or formalises the acquisition of ownership when the Applicant has exclusively and uninterruptedly occupied or possessed the land with the registered proprietor having neglected his land or acquiesced in another taking possession of it.

112. Section 3(2) of the Ordinance makes provision that it applies only to land, interests in land or dealings in land registered under the Ordinance. Parcels 249 and 241 are registered as under this Ordinance. No specific exception is made for the transmission of Crown Land. Consequently, on this interpretation, it must follow that a transmission of Crown Land registered under the Ordinance, in accordance with section 135 is lawful and the Registrar can thereafter properly rectify the register in accordance with the powers granted to him by section 139. If this is right, then the powers of the Governor to grant and make other dispositions of Crown Land pursuant to section 31 of the Constitution are not infringed by

section 135 as read with section 139 because there is no grant or other disposition of land for the purposes of the Ordinance - a rectification of the Registrar is not a grant or disposition and so does not offend section 31 of the Constitution. Likewise, the Governor's powers to make grants and other dispositions are untouched by the Registrar's power to make rectifications.

113. Section 112 of the St Helena Act 1833 does not assist in any of this analysis. It is right to say that the land in St Helena was originally vested in the Crown but there is nothing express in the Act or Constitution that restricts or prevents it thereafter being transmitted to others in acquisition by prescription, just as it may be granted or disposed to others by the Governor under the Constitution.

Conclusion

114. I reject the Respondent's second ground of challenge.

The Third ground — acquisition by prescription is impliedly prohibited by s.31 of the Constitution or it must be given a purposive interpretation

<u>The Respondent's argument</u>

115. The third ground upon which the Respondent relies is that section 31 of the Constitution impliedly prohibits the acquisition of Crown land without the consent of the Governor. Section 135 of the Registered Land Ordinance is either contrary to or must be interpreted consistently with the Constitution by not applying acquisition by prescription to Crown Land.

116. The Respondent submits that even if section 31 of the Constitution does not expressly prohibit acquisition by prescription of Crown land, and grant or dispositions of land does not include acquisition by prescription, the provision impliedly prohibits it.

117. Further or alternatively, the court should adopt a purposive interpretation of section 31 preventing any action against Crown land that would fetter the Governor's discretion to dispose of it.

118. Mr Garner submits that on a purposive reading of the section, acquisition by prescription without the consent of the Governor is contrary to the intent of the Constitution that the Governor's absolute right to deal with, transfer or dispose of Crown land cannot be interfered with. If section 135 of the Ordinance permitted acquisition by prescription of Crown land, it would fetter the Governor's discretion to deal with Crown land and it must be read consistently with this purpose laid down in the Constitution so that only the Governor may deal with Crown land.

119. Mr Garner contends that before the coming into force of the Registered Lands Ordinance in Saint Helena the Crown had existing interests, rights, powers and privileges conferred by written law. Specifically, that included the ownership of Crown land dating to the vesting of the Island in the Crown in 1833. It also included provision under the Constitution controlling the classes of person entitled to make disposals (later dispositions) of Crown land. The restriction in section 31, relating to persons able to make dispositions of Crown land may, on an implied or purposive construction, encompass any parting of possession; even if by a narrow, technical language an involuntary transmission of ownership by operation of law could feasibly be distinguished from a disposal or disposition.

120. The Applicant points out that other British Overseas Territories have similar ordinances, with similar savings provision and in the two examples cited an additional eleven words providing that no person shall so acquire the ownership of Crown land by prescription. The Applicant considers that this comparative context should affect the interpretation of the words used by the St Helena legislature.

121. Mr Garner, on behalf of the Respondent, replies that:

a. The plain meaning of the St Helena legislature, to apply the Ordinance to the Crown except to save the '*interests, rights, powers and privileges conferred on the Crown by any other written law*' omits the need for such elaborate comparative interpretation as the Applicant seeks; and,

b. It is anyway not probative or determinative of the issue at hand to consider what other territories may have provided for. That two other legislatures may have included different wording does not show that without that wording they understood a different effect would have been had, or that by choosing the wording it did that the Saint Helena legislature itself intended something different from what those territories appear to have granted to themselves. Apart from anything else, the legislative wording as used in Saint Helena may have a different effect in the context of other territories. For example, only the Saint Helena Act 1833 vests the island and hereditaments of that island in the Crown. The British Settlement Acts 1887, 1945, the West Indies Act 1962, the Bermuda Constitution Act 1967 and the Anguilla Act 1980 may be legislative sources of government but neither vests the respective territories in the Crown. To that extent the savings provision observed by the Applicant to be common to St Helena, Anguilla and the Turks and Caicos, reserves different '*interests, rights, powers and privileges conferred on the Crown by any other written law*'. If any comparative exercise is useful at all it may be that with the island of Saint Helena vested in the Crown in 1833 such land as was still held by the Crown at the passing of the Ordinance was saved from the claim of prescription by the wording of section 159 in a way that it was not in other territories. It may be precisely for that reason that these territories used additional wording for additional clarity only.

122. The Applicant argues that the failure since the passage of the Ordinance by the Crown to advance any argument for no cause of action in any prescription claim suggests that the present argument is ill founded in law.

123. Mr Garner accepts that instances of such claims may have been few and far between but nonetheless the Respondent replies that:

a. If this argument has not been argued previously then, considering that the particular issue has not been adjudicated upon there cannot be any proper bar to arguing it now; and

b. Even if this argument could have been taken previously it is insupportable to consider that general arguments not previously taken should determine the extent of the law in the face of legislation argued to be to the contrary.

124. At paragraphs 28-30 of his submissions the Applicant opines that were Crown land to be saved from claims of prescription, as the Respondent contends, then it would be unclear why the Governor (as well as person aggrieved by any decision) should have recourse to appeal a decision, direction, order, determination or award of the Registrar.

125. Mr Garner, for the Respondent, replies that this ignores the fact that the right of the Governor to bring an appeal is broad. If, as would follow from the Applicant's position, the only practical purpose to that power were to appeal the acquisition of ownership by prescription then more specific wording might have been used. It is clear that such a broad right appeal includes a multitude of matters quite separate from any, or no, acquisition of Crown Land by prescription; this includes determining boundaries, determining compensation for mistake or omission requiring rectification, requiring production of documents, summons, refusal of registrations, cancellation of registrations, the correcting of maps, the giving of notice to various persons, the conversion of provisional to absolute title, issuing of new land certificates; for all of which it is feasible that a Governor (with or without connection to land concerned) may properly wish to bring an appeal, or to be party of an appeal brought by others. Such broad right of appeal is of little assistance in determining the section 159 savings provision for application to the Crown.

<u>Discussion and Analysis on Ground 3</u>

126. I have already decided that neither section 112 of the 1833 Act nor section 31 of the Constitution expressly prohibits acquisition by prescription of Crown land. I must now decide if they impliedly do so or if they do so on a purposive reading.

Approach to statutory and constitutional interpretation of section 31

127. The task of statutory and constitutional interpretation in this case is not straightforward. I bear in mind Lord Bingham's words in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, [8]:

"The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

128. Lord Hodge, giving the leading judgment for the Supreme Court in the case of *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343 said at [29]-[31]:

"29.The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:

> *"*Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context*." (R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396).

Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: *"Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."*

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below…

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."'

129. There is a presumption that the legislature intends to act reasonably and so should not be taken to "*intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless"*: R *(Edison First Power) v Central Valuation Officer* [2003] UKHL 20, at [116].The more unreasonable the result produced, the less likely it is that Parliament intended it: *Edison* at [117].

Application to section 112 of the 1833 Act and section 31 of the Constitution

130. In construing the relevant provisions within section 31 of the Constitution and section 112 of the 1833 Act I must therefore ascertain the meaning of the words in the light of their context, their legislative history and the purpose of the provisions.

131. I also note that while constitutional rights and protection of fundamental freedoms under the Constitution (such as sections 5 to 25 which give local effect to the rights under the European Convention on Human Rights) should be given a broad and purposive construction. However, I am not satisfied that the same should be given in respect of the Crown's powers under section 31.

132. I have also had regard to the legislative history of the Constitution. The fact is that section 31 of the 2009 Constitution has been through various iterations in the 1966 and 1988 versions as set out above. While there are no legislative materials or Hansard (if admissible) to inspect or consult in relation to the purpose of section 31, because it is an Order in Council, it can be gleaned that it is developed from the powers of the Governor set out in the earlier Constitutions to make grants in relation to Crown Land. The provisions are very similar although section 31 of the 2009 constitution speaks of 'grants or other dispositions' rather than 'grants or dispositions'.

133. However, I am not satisfied that the addition of the word 'other' was intended to materially broaden the effect of the section impliedly to prohibit acquisition by prescription of Crown land. There is no need to imply such a meaning in order for the provision to make sense or avoid absurdity. More express wording would reasonably be expected if it

were intended to go further to prevent acquisition of Crown land in other circumstances other than with the Governor's consent.

134. I am satisfied that section 31 should not be read purposively or impliedly to give the Governor the unfettered right to control or deal with Crown land and prohibit its acquisition by prescription. I am satisfied that the section was not intended to prevent any dealing with, control or acquisition of Crown land by any other person that is not expressly stipulated. In my view, if the provision had been intended to prohibit others asserting or acquiring rights against crown land – it would have said so expressly.

135. Section 31 applies to land vested in the Crown. The land was originally vested in Crown under section 112 of the St Helena Act 1833 but by virtue of section 135 of the 1980 Ordinance - acquisition by prescription expressly permits the removal of the land from being vested in the Crown. Again, the 1833 Act and the 2009 constitution only address how land becomes vested in the Crown and is then granted or disposed of. I cannot reasonably divine a wider purpose in the sections that imply that Crown land can only ever be vested in the Crown under the direction of or consent of the Governor.

136. I consider that the purpose of section 31 is to deal with the grant or onward disposition of land once vested in the Crown. The legislative intent is to prevent any person other than the Governor or someone acting on his behalf from granting or disposing of Crown Land – that is the mischief to which it is addressed. I do not consider there is anything that implies or intends that it should be construed more widely – such as to prevent the transfer or transmission or acquisition of Crown land without the Governor's consent. I do not accept that acquisition by prescription of Crown land fetters the Governor's discretion to dispose of Crown land – as set out above, acquisition is an assertion by the occupier against the rights of the owner. I am satisfied that there would need to be express wording in the Constitution to prohibit such acquisition or an equivalent prohibition in a domestic Ordinance (such as there is in the Turks and Caicos Registered Land Ordinance) to the effect that acquisition by prescription of Crown land is prohibited.

137. My consideration of the purposive approach and legislative intent is informed and supported by legislative history – the 1980 Ordinance preceded both the 1988 and current 2009 Constitution which incorporated it as the existing law and did not seek to contradict or overrule it. The 1980 Ordinance could only itself have been passed with the consent of Governor as not offending the Constitution because section 74 of the current Constitution (and equivalent predecessor) requires Governor's consent for local legislation to be passed and assent would only be given where it does not offend the Constitution.

138. In arriving at this conclusion and in giving my reasons, I also have some regard to the arguments advanced on behalf of the Applicant, with which I mostly agree.

Clarity of Legislative Intention

139. The Applicant argues that if it is right that section 31 of the 2009 Constitution provides a wholesale exclusion of Crown land from acquisition by prescription under the 1980 Ordinance, this would be of such importance to the drafter of the 2009 Constitution and its 1988 predecessor, and the Privy Council itself, that they would have used express and unambiguous language.

140. The Applicant submits that support for this argument is drawn from the fact that all British Overseas Territories grant the delegated authority to dispose of Crown Land to their respective Governors (see the text- *British Overseas Territories Law*, Hendry/Dickson page 45). The "Torrens" model for the Registration of Land was adopted in the 1960's (copying a Kenyan Ordinance at the time) and a "one statute fits all" model was adopted (with minor variations) in all Territories. This was rolled out in the 1970s in the Caribbean area and in 1980 in St Helena. There has been a similar "copy cat" nature to the historic introduction of Land Registration to the Overseas Territories.

141. Mr Scott submits that some Ordinances are almost word for word and section for section identical across the Territories (for instance Turks and Caicos) others have seen the section numberings differ but contain the identical provisions (such as Anguilla). Importantly all have the same saving clause seen at section 159 and application clause seen at section 160 of the 1980 Ordinance. The most striking point is that the legislature in both Turks & Caicos and Anguilla did not view the saving clause as having the effect now argued by the Respondent. This is evident as their respective Legislatures added to their identical section 135 (section 144 in Anguilla) the following proviso-

> "but no person shall so acquire the ownership of Crown Land".

142. Mr Scott submits that arguably these eleven words were seen as important to their Legislature when enacting identical legislation. These words are missing from St Helena legislation (which came later) and had the benefit of the Turks and Anguilla precedent law. The strength of this comparative law exercise is to advance the argument that the authority to deal with Crown Land granted to the Governor (across all Overseas Territories) could not have been seen as being "saved" in their identical saving clause used in each Overseas Territory. If it were otherwise there would be no need to specifically include the words set out above.

143. Mr Scott submits that clearly thought was given by those Territories as to what the Ordinance would cover as far as Crown Land was concerned and they have omitted to exempt Crown Land from their "Rectification of the Register". This makes sense as no Legislature would want Crown land exempt for being corrected where a mistake is identified. The Registrar should be able to correct all mistakes even if they affect Crown Land.

144. If the Respondent is right that all dealings with Crown land are within the exclusive authority of the Governor (as per the saving clause) then Crown Land is not capable of Rectification for mistake by the Registrar.

145. I essentially agree with these submissions, even though Mr Garner has raised some reasonable points of distinction when conducting the comparative law exercise.

Historic Interpretation by the Crown, Governor's and Attorneys-General

146. Mr Scott submits that it is not just the comparison of identical Overseas Territories approach to their legislative intentions that should assist the Registrar on the proper interpretation of the Ordinance - it is also the approach of successive Registrars and Attorneys-General, Governors etc over the past 43 years who have interpreted section 31 of the Constitution and the saved powers under sections 159-160 of the Ordinance as not limiting the application of section 135 of the 1980 Ordinance to Crown land.

147. Mr Scott argues that this is evidenced by a number of cases where the Crown as Respondent, duly notified, either indicated to the Registrar that they had no opposition to a section 135 claim or in the event that they did oppose - failed to argue the "no cause of action" point now argued. On this point it is interesting to note that the Respondent in this Case on the 9 November 2023 submitted their initial objections to the application. At that time identified evidential tests being their grounds for opposition. No mention was made as to "no cause of action" being a potential defence.

148. Accepting, as the Applicant does, that the historic approach to the legislation and more importantly the effect of the saving clause will not be decisive on the point, it is none the less argued that the correct approach of statutory interpretation is as Lord Nicholls explained in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] AC 349, 397*: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament".

149. Mr Scott contends that not just citizens but also Governors, the Government and their advisors (Attorneys General) who over the last 43 years have been able to correctly understand the legislative enactment and regulated their conduct accordingly (i.e. accepted that Crown land was capable of being acquired by prescription). These are not mere citizens but the holders of high office with oversight of the Constitution, Crown land and Crown laws. It is submitted that there must be some weight to the argument that the Respondent's newly advanced argument not only flies in the face of historic interpretation but in their own recently applied interpretation of the law is evidence that they now have misconstrued the legislative effect of section 159 of the 1980 Ordinance.

150. I note the arguments of the Applicant on this topic, but I am not satisfied that the historic approach or practice of the Respondent can be held against it as undermining its newly argued construction of section 31 of the Constitution. I simply disagree with the construction for the other reasons I have given.

Governor's specific Appeal powers under the 1980 Ordinance

151. Mr Scott made a further submission in support of the Applicant's position. He argued that section 147 of the 1980 Ordinance provides: 'Appeals- The Governor or any person aggrieved by a decision, direction, order, determination or award of the Registrar may, [..} appeal to the Court against the decision.'

152. He submits that it is unclear on what basis the Governor would need the Grounds of Appeal if the legislature intended for Crown land to be excluded from the remit of the LRO.

153. He argued that the specific reference to the Governor in section 147 of the Ordinance is evidence that the Registrar can make orders against Crown Land to which the Governor might disagree and wish to Appeal.

154. I disagree with this submission for the reasons given by Mr Garner – there are other actions which the Registrar may take, other than acquisition by prescription, that may affect Crown land and which the Governor may seek to appeal.

Conclusion

155. I reject the Respondent's third ground of challenge.

The fourth ground – the saving provision in section 159 of the Ordinance

<u>The Respondent's argument</u>

156. Mr Garner finally submitted that the provision made by section 31 of the Constitution for powers to dispose of Crown Land under the Royal Prerogative are made subject to the Constitution and 'any other law'. Further, that the issue, as to whether or not an ordinance passed by the local legislature would amount to 'any other law' within the meaning of the Order in Council does not arise because the Registered Lands Ordinance (the 'Ordinance'), at section 159, excludes from its reach any 'interests, rights, powers and privileges of the Crown or the Government by any other written law'.

157. Mr Garner, on behalf of the Respondent, submits that the statutory right within the Registered Land Ordinance to acquire ownership of land by prescription stands to infringe the pre-existing interests, rights, powers and privileges of the Crown; by either or both of section 31 of the Constitution and section 112 of the Saint Helena Act 1833. The application of the 1980 Ordinance to the Crown (by virtue of section 160) does not extend to acquisition

by prescription because of the saving provision (section 159) which excludes the right to acquire ownership of land from the Crown by prescription.

158. The Applicant suggests that if the Respondent's contention were valid then Crown land would be excluded wholesale from the Ordinance and if that were intended the legislature would not have bound the Crown to the extent it did.

159. In reply, the Respondent notes that the Applicant goes too far to assume that the preservation of interests, rights and powers of the Crown bestowed by other written law (such as to preclude the acquisition of Crown Land by prescription) renders other application of the Ordinance against the Crown as an irrelevance. For Crown land to be registered, mapped, bounded, subject to registered interests, cautions, rectification, compensation, implied terms of lease, its tenants to be subject to relief from forfeiture and for such land to be administered by forms and by instruments in common with the rest of land on the island are hardly measures without purpose as the Applicant would contend.

160. For this purpose, the Constitution amounts to 'any other written law' and the Power to Dispose of Crown land is self-evidently a power of a description falling within the meaning of section 159 of the Ordinance. At section 160 the Ordinance is expressed to bind the Crown and Government subject (at section 159) to the savings of rights for the Crown and Government as conferred by any other written law.

161. Mr Garner argues that by application of the Interpretation Ordinance 1968 the expression 'written law' when used in ordinary course in local ordinances includes the St Helena, Ascension and Tristan Da Cunha Constitution Order, 2009 which is an Order in Council falling within the above meaning of 'written law' and provides for the disposition of Crown land at section 31 of the Schedule thereto (the 2009 Constitution).

162. Mr Garner contends that while section 31 of the Constitution is also subject to the Constitution or any other written law, that does not override the saving of rights provision at section 159 of the Registered Lands Ordinance. He submits therefore that there is no cause of action over the Land, being Crown land, for the following reasons:

(1) while the Ordinance does generally bind the Crown and Government it does so subject to a savings provision that explicitly seeks not to affect the interests, rights, powers and privileges conferred on the Crown or Government by any other written law.

(2) The disposal of Crown Land is the subject of written law in the Constitution which provides only that Governor (or any person duly authorised by him or her) in writing under his hand may, in His Majesty's name and His Majesty's behalf, make and execute grants and dispositions of any land vested in His Majesty.

(3) If, in theory, the legislature in St Helena can bind the Crown and can do so where

constitutional powers are subject to 'any other law' the legislature has not done so in the Registered Lands Ordinance. Instead, a saving provision has been introduced.

(4) That Ordinance creates a mechanism for transfer of ownership of land (acquisition by prescription) but maintains a saving provision expressly to ensure that nothing within the Ordinance affects the rights, interests, powers or privileges on the Crown or Government.

(5) The ownership of Crown land is a right of the Crown and disposal of such land is dealt with in the written law of the Constitution. There disposal of Crown land is reserved to the Governor (or persons so authorised), in writing and as a matter of prerogative.

(6) Accordingly, to subject disposal of Crown land to the statutory mechanism that is acquisition by prescription is improper where the Registered Land Ordinance includes a savings provision protecting the rights and interests of the Crown provided by written law and where there is written law providing exclusively for disposal of Crown land by the Governor in exercise of the prerogative.

163. For the reasons previously submitted, the Respondent maintains the argument that acquisition of ownership by prescription against Crown Land is not given lawful effect by section 135 of the Registered Land Ordinance. This is because of the savings provision (at section 159 of the Ordinance) ensuring that the *'interests, rights, powers and privileges conferred on the Crown or the Government by any other written law*' are not affected by the Ordinance. The written law relied upon is: a. The vesting of St Helena in the Crown by virtue of section 112 of Saint Helena Act 1833; and b. Powers to dispose of Crown land in section 31 of the Constitution:

164. Put another way, it is averred that it is impossible to reconcile the acquisition of ownership by prescription against Crown Land with the express preservation of the '*interests, rights, powers and privileges*' of the Crown as provided by other written law.

<u>Discussion and analysis</u>

165. This ground of challenge is like the first ground – not necessary for me to determine in light of my rulings on the second and third grounds. Even if section 159 of the Ordinance provides for a saving provision in respect of *'interests, rights, powers and privileges conferred on the Crown or the Government by any other written law*' this does not undermine, restrict or prohibit the application of section 135 of the Ordinance to Crown land.

166. The written law relied upon by the Respondent for the purposes of section 159 of the Ordinance (a. The vesting of St Helena in the Crown by virtue of section 112 of Saint Helena Act 1833; and b. Powers to dispose of Crown land in section 31 of the Constitution)

do not give the Crown a right to prohibit, prevent or restrict acquisition by prescription of its land. This is for the reasons I have given at length in respect of the second and third grounds. In the course of those reasons, I also touched on the effect of sections 159 and 160 of the Ordinance. There was no pre-existing right or interest of the Crown (under the 1966 Constitution or 1833 Act) prior to the coming into force of the 1980 Ordinance that Crown land could not be acquired by prescription. There was nothing that section 159 of the Ordinance could 'save'.

167. The interrelationship between the saving provision section 159 of the Ordinance and a) the proviso in section 31 of the Constitution ('subject to'); b) section 160 of the Ordinance; or c) Article 5 of the 2009 Order, are all interesting questions but entirely academic in light of my rulings. If the savings provision in section 159 does not bite to assist the Crown then section 160 applies section 135 to Crown land.

168. I also agree with Mr Scott that had the savings provisions of section 159 of Ordinance intended to exclude Crown land from prescription then those who drafted the Ordinance and the local St Helena legislature that passed it would have ensured that such an important detail was not wrapped up in an obscure and unclear saving provision. Again, express words would have been contained. As I also touched on above, the Governor should not have assented to that legislation if he understood sections 135, 159 and 160 to be inconsistent or contradictory to section 31 of the Constitution.

The effect of the Crown Proceedings Ordinance

169. Mr Scott, for the Applicant, further relied on the Crown Proceedings Ordinance 1993 ('CPO') in support of the Applicant's position that the intention of section 159 of the 1980 Ordinance is not what the Crown <u>now</u> say it is. Part III of the CPO covers Jurisdiction and Procedure for civil proceedings against the Crown. He relies on Section 12 (1B) as read with Section 14 (3)(b):

> **S12(1B) Crown Proceedings Ordinance 1993**
> In any proceedings against the Crown for the recovery of land or other property the court must not make an order for the recovery of the land or the delivery of the property, but may instead make an order declaring that the plaintiff is entitled as against the Crown to the Land or property or to the possession of it.
>
> **S14(3) Crown Proceedings Ordinance 1993**
> Notwithstanding anything in the preceding provisions of this section, the provisions of this part do not have effect with respect to any of the following proceedings, which is to say:
> (a)…
> (b) proceedings by or against the Registrar of Lands

170. Mr Scott submits that the CPO makes clear exceptions as to the judgement and enforcement of orders against the Crown (specifically towards Crown Land at 12(1B)). Where the Court is dealing with Crown Land and claims under Crown Land there is a clear

limit on the ability of any Court making a final order as to rights over land <u>except</u> where it is a matter being dealt with by the Registrar of Lands.

171. The CPO describes itself as

> "AN ORDINANCE to declare the law relating to the civil liabilities and rights of the Crown and to civil proceedings by and against the Crown: to declare the law relating to the civil liabilities of persons other than the Crown, in certain cases involving affairs or property of the Crown, and for connected purposes. *"*

172. Mr Scott argues that reference to the Registrar of Lands in the CPO is reference to the Registrar's powers in dealing with "property of the Crown" within a framework of determining rights over Crown Land. The Registrar of Lands is mentioned as the legislature anticipated the Registrar was determining rights over Crown Land, and exemptions were needed to give full effect to the Registrar's power over Crown Land under the 1980 Ordinance. To interpret section 159 of the Ordinance in the manner advanced by the Respondent would make otiose the need for an exemption as to the Registrar's powers over Crown Land if there is indeed, as pleaded by the Respondent, no such power available to the Registrar.

173. I reject this argument for the same reasons I have addressed above. There may be other actions the Registrar can take in respect of Crown land short of rectification of the register to reflect acquisition by prescription. The existence of the references to actions of the Registrar in respect of Crown land in the CPO, just like references in the 1980 Ordinance, do not necessarily mean that prescription is available over Crown land.

174. I also include some of the further argument on behalf of the Applicant in the Appendix to this judgment. In light of my decision and reasons, there is no need for me to address them in the body of this judgment.

<u>Conclusion</u>

175. The answer to the question stated is yes: Crown land can currently be acquired by prescription in St Helena pursuant to section 135 of the 1980 Ordinance. Neither section 112 of the 1833 Act, nor section 31 of the Constitution expressly, impliedly or purposively construed, restrict or prohibit acquisition by prescription of Crown land. As always, it is entirely within the hands of the executive and legislature if they wish to change the law.

176. Therefore, the Applicant's application should now return to the Registrar of Lands for determination on its merits after trial.

Chief Justice Rupert Jones

16 July 2024

Appendix

Further arguments on behalf of the Applicant

1. Mr Scott submitted that if an acquisition by prescription does require a corresponding disposal as suggested by the Crown, then can Crown land be disposed of by neglect or acquiescence? This may depend on whether section 31 of the Constitution does provide the exclusivity in the Governor that the Crown suggest.

   “No Cause of Action”.

2. The “No Cause” argument of the Respondent is contained in para 6.8 of the Response document. It can be summarised as follows - the saving provisions of section 159 of the Registered Land Ordinance (RLO) prevents the disposal of Crown Land by the Registrar as section 31 of the Constitution provides for the exclusive disposal of Crown Land by the Governor in exercise of the prerogative.

3. If the court is satisfied that the saving provision in section 159 does extend to the Governor then the provisions of section 135 of the Ordinance as read with section 139(1)(b) are not disposals of land and are therefore not inconsistent with the saved powers and rights delegated to the Governor by section 31 of the Constitution.

4. Taking each in turn, the saving provision does not extend to the Governor acting in that sole capacity:

   [2.1] Definition of “Crown and Government”

   A saving provision in legislation can be defined as- a provision the intention of which is to narrow the effect of the enactment to which it refers so as to preserve some existing rule or right from its operation.

5. Section 159 of the Ordinance saves the rights etc of “The Crown or the Government by any other written Law”. The Legislature would have had in mind the definition of each in the Interpretation Ordinance 1968 (predating the RLO 1980) that provides -

   > Section 3: “Government” means the Government of St Helena,
   >
   > “Governor” means the person for the time being holding, or lawfully performing the functions of, the officer of Governor of St Helena;
   >
   > References to the Crown
   >
   > Any reference in any Ordinance to the Sovereign or to the Crown is to be construed as a reference to the Sovereign for the time being.

6. It is therefore submitted that the Governor's delegated authority to dispose of Crown Land granted by Section 31 of the Constitution is authority delegated to him in his sole capacity and cannot be interpreted as an "interest, rights, powers and privileges conferred on the Crown or the Government by any other written law".

7. In the alternative, the power to dispose of land is not a reserved power of the Governor under the Constitution and as such not an exclusive power but one which could be complimented by any other law. The saving provision does not act as an exclusion provision and as such can only save that which is delegated which is a power that can be the subject of "any other law". The legislature when enacting the saving provision must have had in mind that the Ordinance was any other law complimenting the authority delegated to the Governor.

8. Addressing the secondary argument of the Respondent, the Registrar must be satisfied that the 1980 Ordinance falls within the definition of "any other law" provided for by Section 31. The Respondent argues that a local Ordinance cannot be a "law" as far as an Order in Council is concerned due to the hierarchy of laws (see Response to Application para 2(c)).

9. The Respondent advances Roberts-Wray discourse on the matter (see response to Application para 5). The Applicant finds no fault in the legal principles outlined by the Respondent but draws the Registrar's attention to the provisions of the Constitution at Section 115 of the Constitution.

   > "law" means law in force in St Helena, and includes an Ordinance, and any instrument made under an Ordinance, and any other instrument having the force of law and any unwritten rule of law, and "lawful" and "lawfully" shall be construed accordingly.

   Therefore, the Order in Council itself provides that a local Ordinance can make provisions for the disposal of Crown Land as per Section 31 of the Ordinance.

10. The Respondent advances various authorities supporting their argument, more specifically *AG v EuroBank Corporation [2002 CILR 334]*. The Respondent does recognise in its submissions that the case of *Eurobank* is to be distinguished on the basis that the authority of the Attorney General was expressly stated in the Constitution as not being subject to the direction of control of any person or authority (including a Court).

11. In so dealing with that distinguishing feature the Respondent does not advance exactly how the *Eurobank* judgment assists. However, it is noted that the Respondent looks to elevate the delegated power under Section 31 of the Constitution granted to the Governor as a constitutionally granted authority that cannot be fettered by subordinate

laws. In so elevating the Governor's powers under Section 31 the Respondent further argues that any law that curtails the Crowns rights "*relative to the provisions of s.31 of the Constitution*" (para 31 of AG's submissions) must be inconsistent with the Constitution and by virtue of S2 of the Colonial Laws Validity Act 1865 ought to be deemed repugnant and void and inoperative as per the *Eurobank* ruling.

12. It is respectfully submitted that the Respondent has not applied the correct approach. Not only is *Eurobank* distinguishable for the reasons cited, this case also highlights the Applicant's submission that the Constitutional landscape is one within which the Governor is not granted an unfettered constitutional powers but one that can be subject to any other law including local St Helena laws.

13. Using the helpful dicta in *Barbosa* cited by the Respondent at para 9 of its submissions "*respect must be paid to the language that has been used, the traditions and usages which gave rise to the language*", adopting this approach the only interpretation of what was intended by section 31 was to allow for local St Helena laws to deal with disposals of Crown Land.

14. The Respondent properly cites the text, Hendry and Dickson on British Overseas Territories Law as authoritative on matters of the constitution in Overseas territories. It is submitted that page 45 of that text assists us in determining the extent of the power granted to the Governor- " *The Governor is given the power by overseas constitutions, subject to any law in force, to dispose of Crown land or other immovable property*".(my emphasis).

15. The Crown (His Majesty in Council) has determined that local laws can make such provisions as to the disposal of Crown Land. It must follow then that if it is decided by this Court that the actions of the Registrar are indeed a "disposal", it is submitted, that any saving provision in local legislation saves nothing more than the right of the Crown and Government to make local laws under Section 31 to deal with the disposal of Crown Land, which they have done.

Rupert Jones
The Chief Justice

16th July 2024