

CC - 51/93.HC/Pg.1

JEHOVAH'S WITNESSES OF THE SOLOMON ISLANDS TRUST BOARD
(INCORPORATED) (APPELLANT) -v- THE REGISTRAR OF TITLES (FIRST
RESPONDENT), THE CHURCH OF MELANESIA TRUST BOARD (INCORPORATED)
(SECOND RESPONDENT)

High Court of Solomon Islands
(Palmer J.)

Civil Case No. 51 of 1993

Hearing: 17 May 1993

Judgment: 16 July 1993

W.P. Cathcart for the Appellant
F. Mwanasalua for the Second Respondent
A. Talasasa for First Respondent

PALMER J: The parties in this case are Jehovah's Witnesses of the Solomon Islands Trust Board (Incorporated) (the Appellant), the Registrar of Titles (as the First Respondent) and the Church of Melanesian Trust Board (Incorporated) (as the Second Respondent). The Registrar of Titles has been included on the basis that it is his determination on a boundary dispute between the Appellant and the Second Respondent made pursuant to Section 96 of the Land and Titles Act that is being challenged. The learned Registrar of Titles made his determination on the 15th of October 1992 and had copies of his determination distributed to the parties subsequently. A copy of that determination has been produced in court as exhibit 28 by the Appellant.

The appeal has been made pursuant to section 213 of the Land and Titles Act. The Notice of Appeal was filed on the 24th of February 1993, well within the six months time limit allowed.

In his determination the learned Registrar held and I quote:

"Therefore my determination is as stated that a survey on the ground had taken place in 1962 and boundary in the right bank of the stream as created in 1962."

The determination was in favour of the Second Respondent and so the Appellant appealed.

The grounds of appeal are as follows:

(i) *That the determination by the Registrar of Titles that the boundary between Lots 188 and 120 is the right or eastern bank of the stream as created by instructions to survey 2/62 is erroneous in point of Law.*

(ii) *That the determination by the Registrar of Titles that the boundary between Lots 188 and 120 is the right or eastern bank of the stream as created by instructions to survey 2/62 is inconsistent with and contradictory to the evidence and the determination is thereby erroneous in point of Law.*

(iii) *The facts are such that no person acting judiciously and properly instructed as to the relevant law could have come to the determination that the boundary between Lots 188 and 120 is the right or eastern bank of the stream as created by instructions to survey 2/62.*

(iv) *That the determination by the Registrar of Titles that the common law doctrine of accretion only applied in a situation where there was a complete absence of human intervention is erroneous in point of law, and*

(v) *That the determination by the Registrar of Titles that the erection of the gabion wall was a deliberate action by the Appellant to gain more property is inconsistent with and contradictory to the evidence and is thereby erroneous in point of law.*

The appeal has been conducted by way of a hearing de novo. Witnesses have been called and extensive submissions made. The learned Registrar appeared in person at the beginning of the hearing but then later asked to be excused from the lengthy hearing. He however has been cross-examined under oath by the Appellant.

The history of the boundary dispute between the parties goes back several years. The boundary however has been in existence between the parties for much longer. What seems to have sparked the boundary dispute originated from the erection of a gabion wall by the Appellant on what they allege was their land at a distance of 500mm or .5m from the right bank of the stream. (see Rodney Morris Fraser's evidence on oath). The construction of the wall begun according to the evidence of R.M. Fraser sometime in 1990. What seems to have raised the eyebrows of the second respondent was their concern that during heavy rain or the rainy season, the stream will be forced to overflow on to the Second Respondent's land as there was no wall to contain the flow of the stream on their side of the bank. This would cause flooding and perhaps damage to the Second Respondent's property. Following this, correspondence flowed between the

parties, the Commissioner of Lands and the Surveyor General's Office as to what the correct boundary was.

The Second Respondent maintains that the correct boundary was that as plotted on the relevant plans by a survey done in 1962. That survey they argue fixed the boundary between the two lots.

The Appellant on the other hand maintains that the boundary is the right bank of the stream as contained in the lease granted to Jack Richard Luke Gaskell dated 25/5/55. That description of the boundary refers to a natural feature and is therefore ambulatory. The position of the stream as surveyed in 1962, 1968 and 1990 showed that there has been a general movement westwards into Lot 188, the land occupied by the Second Respondent. The Appellants accordingly also contend that such movements which were imperceptible in observation and gradual are covered by the common law doctrine of accretion and applied in this case.

The Appellant is the holder of a fixed-term estate title over the land in parcel No. 191-032-22 or Lot 120. The Second Respondent is the holder of a fixed term Estate title in parcel 191-031-6 or Lot 188. These two parcels are separated by a stream. It is the description of the boundary in relation to this stream that is the issue in dispute in this case.

For ease of reference, the Surveyor General, Mr Jackson Vaikota, who was also called as a witness by the appellant, has plotted the various positions of the right bank of the stream as surveyed in 1962, 1968 and 1990 on a large plan. This plan is marked exhibit 34. That plan showed clearly that at certain points of the stream, the Appellant had gained as much as 3-4 metres of land from the movement of the stream as surveyed in 1962 to 1990.

The first issue therefore before this court is to identify the correct boundary between Parcel 191-032-22 and Parcel 191-031-6 or Lot 188 and Lot 120. Is it a fixed boundary and described as the 'right bank of the stream as surveyed in 1962', or is it the right bank of the stream as a natural feature? Depending on the answer the next question then for this court to consider is whether the common law principles on accretion will apply.

THE HISTORICAL BACKGROUND:

The starting point would be to consider the two Fixed-Term Estate registers of the parcels of Land 191-032-22 and Parcel 191-031-6. The title of the Appellant in parcel 191-032-22 originated from a grant of a lease dated the 25th of May 1955 from the High

Commissioner on behalf of the Government of the British Solomon Islands Protectorate as grantor, to Jack Richard Luke Gaskell as grantee. A copy of that lease is marked exhibit 10 in the list of exhibits filed by the Appellant.

The Appellants land was then part of a bigger parcel of land with an area of about 4.4 acres. At page 1 of the lease document the land was described as:

"All that piece or parcel of land situate at Plot No.6 Section VI Honiara.... containing four point four (4.4)..... acres or thereabouts delineated and coloured pinkon the plan annexed..."

The plan referred to contained the following description of the same land:

" All that piece or parcel of land being portion of Plot No.1 Section VI Honiara..., containing an area of 4.4. acres, more or less, comencing at a cement peg, on the right bank of a small creek, being the Northwestern corner of Plot No.1 thence bounded by lines bearing approximately 50 ° 6' 30" about 160.75 feet distance, 130 ° about 177 feet distance, 96 ° about 130 feet distance, 158 ° about 110 feet distance, 170 ° about 153 feet distance, 213 ° about 300 feet distance to a wooden survey peg, 284 ° 22' 14" about 312 feet distance to a cement peg on the right bank of the said creek, thence down stream along the said creek to the point of commencement."

The boundary between the 2 cement pegs located at the right bank of the stream is described as "downstream along the said creek."

By Deed of Assignment of Lease dated the 29th of March 1961, Jack Richard Luke Gaskell assigned all his right and interest in the said parcel of land with all buildings to Symes Plantations and Trading Company Limited. This company then subdivided Lot 6 into 5 other Lots, namely Lots 117-121.

The request for that subdivision is contained in a note from the Acting Commissioner of Lands to a Mr Clark in a file in the Crown Surveyors Office (now Surveyor General's Office) marked 2/62.

The relevant part of that note read:

"1) To subdivide Lot 6 Section VI Honiara into 5 Lots, 117, 118, 119, and 120 121 in accordance with discussions with O.J. Symes and the print of miscellaneous plan 282 attached hereto."

Miscellaneous plan 282 is also contained in file 2/62. That plan is a contour plan of the five subdivisions requested.

Lot 120 is the Lot which eventually was transferred to the Appellant and filed for registration in the Registrar of Titles Office on the 26th of September 1978. The boundary as denoted on misc. plan 282 on the Western side of lot 120 was the stream.

Attached in the same file 2/62 is a more accurate copy of a similar plan (it is the last page in the file) drawn to a scale of 1" = 100' with the following words written below that plan:

"Lots 117-121 being parts of Lot 6 Section VI Town of Honiara"

The area of Lot 120 in that plan is recorded as 1.5327 acres. The boundary of that lot on the western side commences at a point marked 'K' on the upper part of the stream and goes down to a point marked 'M1'. The boundary is marked by a dark or heavy line and the words "BOUNDARY IS RIGHT BANK OF STREAM" in capital letters written beside it.

There is also a loose leaf note book with 33 pages attached, containing in detail the working field notes of the Surveyor who did the survey for the subdivision.

Particular reference has been made in the loose leaf notes of 8 bearings picked up by the surveyor to identify 8 points along the right bank of the creek. The first three points ie. points, 1,2,3 were picked up from line A and M with the following bearings and distances.

"Point	1.	355 ° 56'	72.0'
Point	2.	338 ° 58'	50.0'
Point	3.	191 ° 08'	71.0'

There is a note which says that the creek is approximately ten feet wide between the tops of the banks. (That page is conveniently identified as page 62/4 in the filed copy of papers submitted by the Appellant).

The next five points were picked up from a line between points A and N picking up the right bank of the creek as follows:

"Point	4.	258 ° 61'	148'	
Point	5.	242 ° 11'	165'	
Point	6.	230 ° 52'	181'	
Point	7.	218 ° 44'	220'	
Point	8.	210 ° 12'	221'	"

There is a note below these bearings which identified the width of the stream as from eight feet to five feet.

There is nothing in the field survey notes which indicate that the 8 bearings picked up were done for the purpose of defining or fixing the boundary of Lot 120 on its western side. All that can be said about the 8 bearings is that certain points of the right bank of the stream were picked up in the survey and identified. Mr George Scott, the former Surveyor General and the only surveyor available who had dealings with the survey of that stream in his official capacity in 1968 pointed out in evidence that in his professional opinion the survey that was done in 1962 was merely to delineate the presence of the stream. This was he said because the points picked up were too infrequent to properly pick up the stream. In his opinion the survey was not to fix the boundary of the stream. He mentioned other reasons for his opinion which are contained in the evidence which I have considered and noted.

It is clear to me that the instructions to survey in 1962 as obtained from the discussions with O.J. Symes and the print of the miscellaneous plan 282 showed unequivocally that the western boundary of Lot 120 was the right bank of the stream.

It is also clear to me from my assessment of the records as contained in file 2/62 that certain points along the right bank of the stream (8 points in all) were picked up and recorded by the surveyor in his survey field notes. There is however no evidence whatsoever or inkling in the instructions to say that those bearings were intended to be fixed points for purposes of establishing the boundary of Lot 120. If that was so, it would have made it very clear in the instructions, in the field notes, and in the plan attached.

The opinion of the former General Surveyor, Mr Scott, therefore that the survey done was merely to pick out the presence of the stream, has considerable force.

THE 1968 SURVEY:

The first important point to note about the instructions for the 1968 survey is that they were made in respect of a different piece of land adjacent to Lot 120. The references therefore in that instruction as to the eastern boundary bordering Lot 120 are of equal importance to take note of. It would not be proper to only regard the instruction to survey in 1962 and ignore the instructions to survey of 1968. The instruction to survey in 1968 should be given equal if not due consideration when determining what the correct boundary should have been. Both descriptions should refer to the same thing and be identical in their description of the boundary between Lot 188 and Lot 120. The instructions to survey of 1968 will show or confirm what the boundary is between those two lots. It is therefore important to consider this set of instructions in detail.

By a letter of instruction dated 21st March 1968 (page 68/1) from the Crown Surveyor, (George Scott), the land to be surveyed was described as "*Lot 188 Section VI Honiara, or as more specifically delineated edged blue on the Map marked A. Approximate area is 1 acre.*"

There is no copy of the map marked A referred to in file 6/68 (exhibit 36). The only plan filed was the same plan as affixed in the last page of file 2/62, albeit blown to about twice its size.

At the back of that letter, certain special directions were set out, numbered 1 to 6. Direction 5 is of relevance here and I quote:

"The east boundary of the block (i.e. Lot 188) is to be the east bank of the stream." (words in brackets mine).

This description of the boundary of Lot 188 on its eastern side is totally consistent with and in perfect harmony with the description of the western boundary of Lot 120 as contained in instruction to survey 2/62.

The letter containing the instructions was addressed to Mr J Carter, a registered Surveyor. The survey however was conducted by V.D. Baker, of Carter, Rees and Associates Ltd. The field work was commenced on the 16th April 1968 and submitted for examination it seems by the Crown Surveyor on the 29th April 1968. The above details are contained in the copy filed for the courts use at page 68/5. That report on the survey done by Mr Baker also stated that the boundaries were displayed to Father D. Ferguson, Rector of Honiara on the 30th of April 1968. At page 68/6 a copy of the boundary certificate is shown. At the top of the page there is a note marked 'N.B' and says: "*It is important that this certificate be correctly completed and returned with survey records to the Crown Surveyor.*"

Below this is the title 'Boundary Certificate' and the following statement:

I DONALD THOMAS FERGUSON hereby certify that I have inspected the boundary marks and boundaries of the parcel of land known as Lot 188/VI/H (approximate sketch plan of which is shown below), and that I agree to their positions. Date: 30/4/68 Signed: "D.T. Ferguson". Owner/lessor/agent/purchaser/etc. Countersigned by Surveyor: "V.D. Baker."

Below this the following words are written: "Approximate Sketch Plan" (to be prepared by Surveyor before above signatures are affixed)."

Below that in turn is the sketch plan. The boundary on the eastern side of Lot 188/VI/H is marked by a heavy line and the words 'East bank of stream' written along side it.

The description could not be any clearer, and could not be any more consistent with the description of the western boundary of Lot 120.

There is no mention whatsoever of any fixed boundary as surveyed in 1962 in that instruction to survey of 1968. There is no mention of any artificial features or points or pegs or markers to delineate the boundary as that surveyed in 1962. If it had indeed been intended and established that the survey in 1962 fixed the boundary between certain artificial points then the change from a natural feature to an artificial feature would first have been agreed to by the owner of Lot 120 and Lot 188. There is no evidence of that in any way. Secondly, the boundary on the eastern side of Lot 188 would have been described as "East bank of stream as fixed by survey in January 1962 in I. to 2/62" or some such similar phrase! There was again nothing of that sort in any way.

The simple answer to this long drawn out dispute is that the boundary between Lot 120 and Lot 188 is the right bank or the east bank of the stream. In other words, that boundary is marked by a natural feature. The evidence considered so far and the descriptions of that boundary are so plain and obvious.

So where did the reference to the boundary described as 'Boundary is Right bank of Stream as surveyed January 1962 by I. S. 2/62' come from? The answer can be gleaned in my view from file 6/68. At page 68/5 at the second last paragraph Mr Baker made the following statement:

"The Eastern boundary of Lot 188 /VI/H is the eastern side of the creek, but this does not coincide with the side of the creek as defined in I. S. 2/62. The old definition is dotted on the plan."

It is important to note that this is the first reference to a discrepancy in the location or position of the right bank of the stream as surveyed in 1962 and compared with the survey done in 1968. But note, that there is nothing said about the survey done in 1962 as delineating the boundary of the stream! In the plan drawn by V.D. Baker he marked the right bank of the stream as surveyed with a heavy line and wrote alongside it the words "Boundary East bank of Creek." The old definition of the boundary as surveyed in 1962 is marked with a dotted line and the words 'Boundary defined by I. to S. 2/62' written alongside it. Both those writings are consistent and very similar in appearance and it is clear to me that they were the original writings of Mr Baker. They are also consistent with what he said in his second last paragraph in his report.

There is however another writing in red with an arrow in red pointing to the old definition with the words: 'Boundary now East bank as by I to S 2/62 and not as requested in this I/S 1'. That writing is different in appearance to the other two writings referred to and is neither initialled nor dated. Also the area as surveyed by Mr Baker written in black ink as 1.1177 Acres has been crossed out by a red dash and below it a new area put as 1.1494 Acres, obviously to take into account the extra area as lost in the survey of 1968.

As to this day, no one knows who made the writings in red and there is no evidence or explanation provided whatsoever of how that change was made. At page 15 of the file 6/68, there is also some similar writing in red containing calculations done to obtain the new area of 1.1494 acres. At the bottom right of that page the following words in red are written (obviously by the same person who wrote in red in the plan):

"This amendment calculated 21.11.69 although "c" series amended previously no prior record of change can be located." There is a signature at the bottom which nobody seems able to identify or more accurately no evidence has been led it seems to its identification. It appears to me that the person who wrote on the plan is the same person who made the writing at page 15 of file 6/68. The style of the handwriting is very similar. It is also my opinion that the writings were made on or about the same time.

The reference to the 'c' series plans needs to be commented on briefly. These 'c' series plans were done in imperial measurements. Later they were re-drawn in metric. These 'c' series plans were drawn from original plans such as C18Ad and C18Aa. Plan C18Ad is referred to in fixed-term estate register of parcel number 191-032-22. No copy of the

plan C18Ad was available to the parties prior to the hearing. However, during the hearing a copy was found in the Office Headquarters of the 2nd Respondent and produced in court as an exhibit. That copy is the only available copy, as the file copy could not be located. No copies too were filed in the Registrar of Title's Office.

Plan C18Ad showed the boundary between Lot 120 and Lot 188 as marked by a heavy line and the words 'Boundary is Right Bank of Stream as surveyed January 1962' written beside it. There is no indication on the plan as to when it was drawn. However, this must have been drawn sometime after the 1968 survey. This is clear from the inclusion on the plan in light dotted lines the boundary of the stream as surveyed in March 1968.

The reference at page 15 of file 6/68 in the red writing concerning the amendment in the 'c' series plan can only be reference in my view to the change in the description of the boundary. The reason or basis for that change or amendment in the descriptions of the boundary cannot be identified or located. It is clear that as early as the 21st of November 1969, it was known that the 'c' series plan contained a change in the description of the boundary as originally provided for in the lease documents and the instructions to survey of 1962 and 1968. Yet no attempts were made to make the necessary correction or to make the necessary arrangements to get the owners of the estates then to agree to that change. There is no evidence or record of such an agreement or arrangement.

I now turn to consider the ruling of the learned Registrar in which he states:

"Whilst addressing the issues I am obliged to refer to the documents relating to the boundary registered in the Land Registry. Survey Plans C18Aa and C18Ad show that survey had taken place. It is also shown on the survey plan marked 2/62 that a survey had taken place on the ground in 1962. Also on the same survey plans, it was written that the boundary between Lots 188 and 120 is the right bank of the stream and is the eastern boundary. I am obliged under Section 121(3) of the Land and Titles Act together with Regulation 2(4) of the Land and Titles (Evidence) Regulation to accept as conclusive evidence a boundary which form part of documents registered under the Land and Titles Act. The Survey Plans C18Aa and C18Ad were deposited and registered with interests in Lot 188 and Lot 120 and thus form part of the land register. Therefore my determination is as stated that a survey on the ground had taken place in 1962 and boundary in the right bank of the stream as created in 1962.

Both plans C18Ad and C18Aa were not filed or deposited in the Lands Registry. Both copies of the fixed-term estate registers of parcel Nos. 191-032-22 and 191-031-6 had the word 'filed' crossed out. However, both fixed-term estate registers contained entries of the survey plan numbers. The learned Registrar of Titles therefore is correct to a certain extent in saying that the survey plans C18Aa and C18Ad formed part of documents registered under the Land and Titles Act. Those plans however were not deposited or filed in the Land Registry and therefore there was no way of ascertaining whether the proviso in Regulation 2(4) of the Land and Titles (Evidence) Regulations had been complied with or not. The only other alternative was to request that the file copies of those plans in the Surveyor General's Office be made available. Had he done so he would have been provided with a file copy of plan C18Aa contained in the original file from the Surveyor General's Office marked 6/68.

That file copy has been made available to the Court and there is no attestation by the Surveyor General as to the accuracy of that plan evident on the plan.

The file copy of plan C18Ad from the Surveyor General's Office could not be located and therefore he would not have had access to it prior to giving his determination. As pointed out a copy was made available only at the trial.

It was therefore not altogether correct for the learned Registrar to say that he was obliged to accept as conclusive evidence the boundary as contained in plans C18Aa and C18Ad.

Secondly, section 121(3) of the Land and Titles Act is subject to section 208 and 209. Although there may have been no conflict found at the time of his determination, his findings can be overruled or amended if this court subsequently should find that there is a conflict with sections 208 or 209.

The learned Registrar therefore was required to probe deeper into this dispute and consider in detail the evidences that were before him than what may have appeared at first sight. Had he done so, he would have or perhaps may not have picked up the inherent mistake contained in the 'c' series plan (marked XK 067575) as to the description of the boundary between Lots 188 and Lot 120.

Neither party too picked up the discrepancy until the dispute about the gabion wall flared up. Through the advice of the Commissioner of Lands, the 2nd Respondent relied on the description of the boundary as contained in the 'c' series plan XK 067575 as the correct one.

It is this courts view however, that had the learned Registrar of Titles applied his mind properly to the original lease documents in particular to the descriptions as to the boundary, the instructions to survey of 1962 and 1968, and all relevant documents and plans attached therewith, with specific reference to the boundary between Lots 188 and 120, he would have come to the inevitable conclusion that the boundary is the east bank or the right bank of the stream

I do note that in his determination the learned Registrar did state and I quote:

"Also on the same survey plans, it was written that the boundary between Lots 188 and 120 is the right bank of the stream and is the eastern boundary."

In this sentence he identifies the correct boundary. But then he states and I quote:

"Therefore my determination is as stated that a survey on the ground had taken place in 1962 and boundary in the right bank of the stream as created in 1962."

The error he made in his conclusion is in stating that the survey in 1962 created the boundary as a fixed boundary at the right bank of the stream. The documentary evidence before him as pointed out could not have led him to this conclusion. The only piece of evidence which may have led him to that conclusion perhaps would have been the description of the boundary as contained in 'c' series plan XK 067575 and the writings in red, un-initialled, contained in the survey plan drawn by V.D. Baker in file 6/68. In his judicial capacity however, he should have called for more evidence or submissions on these before making his determination. It is then possible that he would have picked up the anomaly or error and proceeded on to have it corrected under sections 93 and 208 of the Land and Titles Act.

His conclusion therefore on this point cannot be substantiated.

I now turn to the next crucial question, whether the Common Law principles of accretion would apply in this particular case.

It is not disputed that three separate surveys have been done as to the boundary of the stream; one in 1962, one in 1968 and the most recent one in 1990. It is also not disputed that the boundary has changed through the forces and processes of nature. Overall, the movement of the change has been in favour of the Appellant. A clear picture of the changes that have occurred is shown in a map marked exhibit 34 drawn by the Surveyor General, Mr Jackson Vaikota. The approximate total area gained as indicated in the

map marked exhibit 34 is according to my calculation, 0.0162 Ha. (i.e 0.0008 + 0.0002 + 0.0152 Ha.).

Application of the Common Law principles to the Law of Solomon Islands.

Section 2 of Schedule 3 of the Constitution of Solomon Islands states:

- (1) "Subject to this paragraph, the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands, save in so far as:-
 - (a) they are inconsistent with this constitution or any Act of Parliament;
 - (b) they are inapplicable to or inappropriate in the circumstances of Solomon Island from time to time; or
 - (c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.

- (2) The principles and rules of the common law and equity shall so have effect not withstanding any revision of them by any Act of the Parliament of the United Kingdom which does not effect as part of the Law of Solomon Islands".

Section 2 of Schedule 3 of the Constitution is very clear. The common law principles of accretion will apply unless one of the exceptions listed applies. The Second Respondent does not take issue about the application of this doctrine. What it argues is that it does not apply here because it is not appropriate.

As far as I can understand the submission of learned counsel for the Second Respondent, he submits that the description of the boundary as the right bank of the stream as surveyed in 1962 refers to a boundary which does not abut the stream. Lot 188 abuts Lot 120 at the right bank of the stream, not the stream itself. Therefore he submits the common law principles of accretion will not apply here.

It is not disputed that the common law doctrine of accretion is limited to land abutting on tidal water or running water. (See the book 'Introduction to Land Law' by G.W Hinde, D. W Mcmorland and P B A Sim, Wellington Butterworths 1979 at page 170). Also in the case Southern Centre of Theosophy -v- South Australia (1982) A.C 706 at page 715, Lord Wilberforce stated the same thing, that the doctrine was limited "to the sea-shore and land abutting on rivers of running water....."

The word 'abut' is defined by 'The Australian Little Oxford Dictionary as 'adjoin, border on; touch or lean on or against'.

The question to consider therefore is what is the meaning of the word 'the right bank of the stream? Where does the right bank of the stream commence'? Does it border on or touch the stream?

The case of Hindson -v- Ashley (1986) 1 Ch 78 at 84 (case no. 11 cited by Mr Cathgart) is of direct relevance on the distinctions drawn between the banks of a river and the bed of the river or stream. In that case Romer J. quoted with approval the judgement of Curtis J. in the case of Howard -v- Ingersoll 54 U.S. at page 427. Judge Curtis made the following statements:

"That the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between its highest and least flow. Something must also depend upon the rapidity of the stream and other circumstances. But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctivtive appearances they present, the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water."

In Pay -v- Miller 3 BPR [97170] 9163 at 9167 Lee J. defined the word 'bank' as meaning 'the boundary marking the extremity on either side of a creek'. At page 9168 Lee J. states:

"In considering the bed of the river in relation to its banks, one is entitled to look at the actual effects visibly apparent of the passing of water over the ground."

In the case of Thomas Conservators -v- Smeed, Dean & Coy [1897] 2 QB 334 at page 338, the court described the bed of the River Thames as "that portion of the river which in

the ordinary and regular course of nature is covered by the waters of the river. It need not be constantly covered if, in the ordinary course of things, it is habitually covered."

The description of the boundary as the right bank of the stream therefore in my view can only be appropriately described as a reference to land bordering on or touching the stream. The bank of the stream or a river commences basically where the river bed or stream bed ends. And from the authorities cited, the stream bed basically is that part of the stream over which water virtually flows over, if not always, habitually. The right bank of the stream therefore abuts running water. The doctrine of accretion accordingly applies.

The word 'accretion' is defined by The Osborn's Concise Law Dictionary, Sixth Edition by John Burke as:

" *The act of growing on to a thing; usually applied to the gradual accumulation of land from out of the sea or a river. If the accretion to land is imperceptible, it belongs to the owner of the land...*"

The leading case on the doctrine of accretion is Southern Centre of Theosophy -v- State of South Australia [1982] A.C. 706. (this is case No.1 in the list of cases referred to by Mr Cathgart). At page 716 Lord Wilberforce made the following statement:

"This is a doctrine which gives recognition to the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water. Where these changes are gradual or imperceptible..., the law considers the title to the land as applicable to the land as it may be so changed from time to time. This may be said to be based on grounds of convenience and fairness. Except in cases where a substantial and recognisable change in boundary has taken place (to which the doctrine of accretion does not apply), it is manifestly convenient to continue to regard the boundary between land and water as being where it is from day to day or year to year. To do so is also fair. If part of an owner's land is taken from him by erosion, or diluvion (i.e. advance of the water) it would be most inconvenient to regard the boundary as extending into the water: the landowner is treated as losing a portion of his land. So, if an addition is made to the land from what was previously water, it is only fair that the landowner's title should extend to it. The doctrine of accretion, in other words, is one which arises from the nature of land ownership from, in fact, the long term ownership of property inherently subject to gradual processes of change. When land is conveyed, it is conveyed subject to and with the benefit of such subtractions and additions (within the limits of the doctrine) as may take place over the years. It may of course be excluded in any particular case, if such is the intention of the parties. But if a rule so firmly founded in justice

and convenience is to be excluded, it is to be expected that the intention to do so should be plainly shown. The authorities have given recognition to this principle."

Also in the case of Rex -v- Lord Yarborough (1824) 3 B & C 91 per Abbot CJ at p.107 he points out that the doctrine of accretion will apply where the change is so gradual as to be imperceptible on a day to day basis, but not over a long period of time such as on an annual or over a few years lapse of time. In the same way land gradually incroached upon by water ceases to belong to the former owner - (see In re Hull and Selby Railway Co 5 B&W 327.)

As earlier pointed out, learned counsel for the Second Respondent does not take issue about the application of the doctrine of accretion where it is appropriate. Where he has deviated is in arguing that the boundary does not abut the stream.

It is not disputed by the Second Respondent that the process of accretion has occurred in this case. The plans as drawn by Jackson Vaikota (exhibit 34) show that this process has occurred between the period 1962, 1968 and 1990. The geologist, Patrick Michael Brian Smith, called by the Appellant as a witness did give a rough estimate of the rate of accretion, at two to three centimetres per year, but pointed out that this may not be perceptible up to a period of 5-10 years, even 20 years.

The next question is whether even if the boundary was as defined by the 1962 survey, whether the doctrine of accretion will still apply or not? The boundary of the stream in 1962 as described clearly abutted the stream.

There is clear case authority which establishes that even if the original boundary can be identified, if it is bounded by running water then the doctrine of accretion nevertheless will apply, unless it has been specifically excluded.

The leading authority is again Theosophy's case at pages 716, 717 and 718 per Lord Wilber force's judgment. At p.716 para. G he states:

"They have (i.e. the case authorities) firmly laid down that where land is granted with a water boundary, the title of the grantee extends to that land as added to or detracted from by accretion, or diluvion, and that this is so whether or not the grant is accompanied by a map showing the boundary, or contains a parcel clause stating the area of the land, and whether or not the original boundary can be identified."

On page 717, he quotes the judgment of Gibson J. in the case of Attorney General -v- M'Cartney [1911] 2 I.R. 260 and stated:

"...that it makes no difference whether the original boundaries are fixed by natural objects, or by constructions, or by measurements and maps. The principle governing the ownership of alluvion growing by imperceptible process of nature is the same."

Also in the case of **Attorney General of Southern Nigeria -v- John Holt & Company (Liverpool) Limited (1915) AC 599** at page 612, the Privy Council stated that in their opinion, *"..... properties scheduled or specifically measured but in fact abutting on the seashore are not excluded from the operation of the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea"*.

In a more recent Privy Council decision: **Government of the State of Penang -v- Beng Hong Oon (1972) A.C 425** at page 436, Lord Cross made the following statement:

"It is, of course, well settled that if the boundary of the land conveyed is the line of medium high tide the mere fact that the acreage of the land conveyed is given and that the position of the line of medium high tide at the date of the conveyance can be established - whether or not it is delineated on a plan - will not prevent land which subsequently become dry land through the gradual and imperceptible recession of the sea from being added to the land conveyed".

The same principle should apply to the gradual and imperceptible recession of the stream or river on its banks.

So even if the boundary was as surveyed in 1962 as submitted by the Second Respondent and held by the learned Registrar, the doctrine of accretion will still apply because the boundary of the Appellants land clearly abutted the stream.

The learned Registrar's determination on that point therefore cannot be sustained. I quote the words used:

"The principle may become helpful if no actual survey had taken place on the ground."

The case authorities just cited prove otherwise.

The doctrine of accretion however could be excluded by clear words. And this is the next point that I will now turn to. The authority for this proposition is the case of **Baxendal -v-Instow Parish Council [1982] Ch.14**.

Did the survey of 1962 exclude the doctrine of accretion? Is it clear that the survey of 1962 was to fix the boundary of the stream along the 8 bearings picked?

I have already mentioned the evidence of Mr George Scott, about his observations of that survey. He also gave invaluable evidence about the survey done in 1968 of which he was directly involved in. Then there is the evidence of the botanist, Mr Francis Charles Dennis about the approximate age of several trees along the right bank of the stream and the submissions of Mr Cathgart about their relevance to the 1962 boundary, and how some of those trees could not possibly be where they are presently located if the stream was as where it was alleged to be in 1962.

I have also considered the evidence too of an enlarged aerial photograph of the stream done in 1968 and the outlines of several trees along the banks of the stream.

The evidence of Mr Patrick Michael Brian Smith, a geologist about two shafts dug under his supervision; one along the 1962 boundary and the other along the stream bed to identify the old bed of the stream as surveyed in 1962 if any has also been considered and his observations noted.

These evidences, basically unchallenged, taken together with all the other relevant documentary evidence, point to the unequivocal conclusion, that the survey of the stream in 1962 was not intended to fix the boundary on the 8 bearings taken but to pick out the presence of the stream so that it could be delineated on a plan. The doctrine of accretion, accordingly applies.

It is clear that from 1962 to 1990, there has been accretion and mostly to the favour of the Appellant. There is no evidence whatsoever that there has been any human intervention or interference to that process, and the Second Respondent does not deny this.

I also note that the learned Registrar did recognise the principle of accretion but erred when he did not take into account the accretion that occurred in the period from 1962 to 1990. I quote:

"The principle is best applied to situation where there is a complete absence of human intervention. Therefore where steps taken for the purpose of preventing erosion lead to silting up at the water edge the boundary of land will be moved to encompass the additional area of dry land provided the purpose of human intervention was not deliberately to acquire more land."

There was no human intervention in the period 1962 - 1990. In 1990 however there was a construction of a gabion wall done by the Appellant on its side of the bank of the stream.

Very clear evidence has been produced by the Appellant's witnesses that the construction work was done with as much care and attention so as not to interfere with the normal and natural flow of the stream on the Appellant's bank. The construction work was supervised by a qualified and experienced builder, Mr Rodney Morris Fraser.

He stated that the wall was constructed at a distance of 0.5 metres from the edge of the stream. Throughout the construction period, he was at the site on a daily basis. Also the Honiara Town Council Building Inspectors were contacted and informed about the work and attended the site. He stated that no expressions of disapproval were ever made by them. The work took in total about eight months to complete.

The object of the gabion wall was to fortify the bank of the stream on the Appellant's land to prevent further erosion. There is little or no evidence to the contrary. Accordingly, I am also satisfied on the balance of probability that the flow of the stream was not interfered with in any way. I am also satisfied that there is little or no evidence to show that the construction of the wall was done to acquire more land.

The finding of the learned Registrar therefore that the walling built by the Jehovah's witnesses was a deliberate one to gain more grounds, cannot be substantiated.

Further, his conclusion that the common law principle therefore did not support them on that basis is immaterial. The question of whether the doctrine of accretion applied since the construction of the gabion wall is not and has never been raised as an issue.

DOCTRINE OF OWNERSHIP AD MEDIUM FILUM

The doctrine of ownership ad medium filum is based on a general presumption that in the absence of any evidence to the contrary the bed of rivers and streams is presumed to belong to the riparian owners as far as the middle of the stream. (see Halsbury's Lands of England, 4th Edition, para. 854).

The submission of Mr Cathcart is that since the Appellant is in possession of land that abuts the stream, that entitles it to claim ownership of the stream ad medium filum. He has cited several cases, in support of this principle. The first one referred to is the case of *Tilbury -v- Silva* (1890) 45 Ch.D. 98 at page 108 in which the court stated:

"It is a law of conveyancing that, prima facie, where a man grants land on the bank of a river, having himself the soil ad medium filum, without any words describing the boundary to be the medium filum, the soil ad medium filum passes by the grant. That is the general law".

The second case referred to is a Privy Council decision: **Attorney General -v- Maclaren (1915) A C 258.** at page 273 the court stated:

"But in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it **ad medium filum aquae** or **viae** the law holds that it is the exclusion of that land that must be evidenced by the term of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it. Hence it is settled law that no description by words or by plan or by estimation of order is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land **ad medium filum** merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream".

The description of the boundary in this case is quite specific. It refers to the right bank. I have referred to several cases in which the definition of the bank of a river or stream as opposed to its bed has been distinguished. (see **Hindson -v- Ashley**; **Howard -v- Ingersoll**; and **Pay -v- Miller**). The description of the boundary as the right bank in my view naturally excludes the doctrine of **ad medium filum**. The right bank ends where the bed of the stream commences. The bed of the stream is owned by the Second Respondent and therefore the principle does not apply. There is no general presumption that the Appellant owns land up to the middle of the stream. It ends where the right bank meets the bed of the stream.

The issue of riparian rights however is different. A person who owns land abutting on water is a riparian owner. He is entitled *ex jure naturae* to access and regress from the water where it is in contact with his frontage provided his land is in daily contact with the water (see 49 Halsbury's Laws of England (4th Edition) para. 388).

In **Chesmore -v- Richards (1859) 7 H.L Cas 349** at 382 in the judgment of Lord Wensleydale he makes the following statement:

"The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has now been settled that the right to the

enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, and flow, quantity, and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour".

The Appellant owns land that abuts the stream. It therefore has riparian rights although it does not own the stream bed.

The River Waters Act.

The title of this statute reads:

"An Act to provide for the control of River Waters and for the equitable and beneficial use thereof and for matters incidental thereto and connected therewith".

Section (1) provides that 'the statute ".....shall apply to such part or parts of Solomon Islands, including any river or part thereof, as the High Commissioner may by order declare". (Today it would be the Minister of the Crown responsible for such Act).

The relevant question therefore is simply whether there has been an order issued under section (1) of the River Waters Act which covers this particular stream. The simple answer is that there has been no such order issued or that I am aware of and therefore the River Waters Act does not apply.

Costs

The Registrar of Titles must bear some of the costs of this application. Had he fully applied his mind to all the relevant factors before him he would have come to the inevitable conclusion that the boundary was the right bank or eastern bank of the stream and that the change in the description of the boundary as used in the 'C' series plans which stated that the 'boundary is right bank of stream as surveyed January 1962 by I to S 2/62' was done without any record of any authorisation for that change and that accordingly it was an error in the 'C' series plans. It is possible that he may not have been able to pick this up because of the unavailability of the relevant plans referred to in the fixed-term estate register.

Further, although the understanding of the learned Registrar on the doctrine of accretion is correct he has mis-applied that doctrine to the facts of this case and thus resulting in a further error of law. The crown will therefore be responsible for 50% of the party/party costs of the Appellant.

The Second Respondent too cannot be altogether without blame. There were serious attempts made to have the dispute settled between the parties without resorting to the judicial process. In 1990 some sort of agreement was reached between representatives of both parties in which they agreed to accept the 1990 survey done by a Senior Surveyor, Mr Konale, from the Surveyor General's Office as to the boundary between Lots 188 and Lot 120.

Clear evidence has been produced before this court by the Lands Officer, Mr Paul Kini of the agreement reached between the representatives in his presence after which they shook hands to show their agreement. On the same day however, one of the representatives of the Second Respondent contacted the Commissioner of Lands, got his advice about the boundary, and then wrote a letter dated the 13th September 1990 in which he revoked the agreement made the previous day. With due respects to the office of the Commissioner of Lands it does not reflect too well on itself when officers are instructed to perform certain tasks but then overruled in an indirect way by giving contrary advice to one or the other parties. It creates confusion and frustration.

Had the representatives of the Second Respondent honoured the agreement made with the representative of the Appellant, then no extra costs would have been incurred by the parties. The Second Respondent will be responsible for 20% of the Appellant's costs on a party/party basis.

The remaining 30% will have to be borne by the Appellant itself. The Surveyor General's Office must bear responsibility for the error in the description of the boundary between Lots 188 and Lot 120. The Surveyor General however was not a party to this proceeding. No orders for costs therefore can be made against him for the error committed by someone in the drawing up of the original plans, as to the correct description of the boundary.

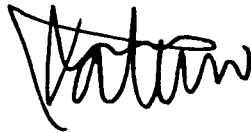
The order as to costs are made accordingly.

The orders of the court therefore are as follows:

- (i) The determination of the learned Registrar of Titles dated the 15th of October 1992 is hereby quashed and substituted with this judgment.

- (ii) The boundary between Lot 188 and Lot 120 is the east bank or the right bank of the stream.

Pursuant to section 209 of the Land and Titles Act I direct that the relevant documents in the Land Registry pertaining to the boundary between Lots 188 and Lot 120 be rectified accordingly. This may require consultation with the Surveyor General's Office, the parties and the Registrar of Titles. Any outstanding matters may be brought before this court again and heard in chambers.



(A.R. Palmer)

JUDGE