Judgment 30/2010

Bougourd and Bougourd v Woodhead and Woodhead – Royal Court (Civil Action File 1359) – 26th August, 2010

Right to enjoy real property – plaintiffs' application for declaration that they are entitled to enjoy a dwelling pursuant to a contract or a proprietary estoppel or a constructive trust – alternatively that the plaintiffs are entitled to compensation from the defendants if their entitlement to occupy is terminated as a result of any order in saisie or in matrimonial proceedings between the defendants – held by the Jurats that the payment made by the plaintiffs to the defendants was subject to an express trust that it would be used to purchase a dwelling to be owned solely by the defendants but in which the plaintiffs would have the right to reside for as long as they chose to do so – on the facts of this case it was not appropriate to apply the English law doctrines of constructive trust and proprietary estoppel – helpful to consider modern French law on rights of enjoyment over real property.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

26th day of August 2010 before Richard John Collas Esq., Deputy Bailiff and
Stephen Edward Francis Le Poidevin, Barbara Jean Bartie & Margaret Anne Spaargaren

Brian BOUGOURD

And

Elizabeth Ann BOUGOURD

Plaintiffs

&

David WOODHEAD

First Defendant

And

Antoinette WOODHEAD

Second Defendant

Whereas on the 28th and 29th June and 8th July 2010 the Court considered an application by the Plaintiffs for declarations against the Defendants as to what rights they may have to occupy a wing in the Defendants' property, L'Abri du Rocher, Rocque Balan, L'Ancresse, Vale and heard thereon Advocates C A Tee and J E Roland counsel for the Plaintiffs and First Defendant respectively, the second Defendant appearing in person and whereas the Court found that when the Plaintiffs paid the sum of £75,000 to the Defendants for the specific purpose of applying it towards the purchase of L'Abri du Rocher (or such other property as they might mutually agree) the said sum was accepted and held by the Defendants under an express trust for that purpose, which purpose is still continuing, the Court this day handed down the reasons for its decision in the terms attached hereto.

S M D ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between

(1) Brian BOUGOURD

And

(2) Elizabeth Ann BOUGOURD

Plaintiffs

&

(1) David WOODHEAD

And

(2) Antoinette WOODHEAD

First Defendant

Second Defendant

Date of hearing: 28th & 29th June and 8th July 2010

Judgment handed down: 26th August 2010

Before: Richard John COLLAS Esq., Deputy Bailiff and
Jurats: S E F Le Poidevin, B J Bartie & M A Spaargaren

Advocate for Plaintiffs: C A Tee
Advocate for First Defendant: J E Roland
Advocate for Second Defendant: Unrepresented - appeared in person

Cases, texts, legislation and other material referred to:

"*Les Lois, Coutumes, et usages du Pays, en ce qui regarde l'Usufruit"*, Recueil d' Ordonnances de la Cour Royale, Tome III at page 308
Chitty on Contract (Volume 1 General Principles 30th edition) at para 1.001 & 2-161
Halsbury's Laws of England (Volume 52 (2009) 5th Edition), para 201
Section 1 of The Trusts (Guernsey) Law, 1989 and Section 1 of the Trusts (Guernsey) Law, 2007
Lewin on Trusts, 18th Edition, paragraph 4-02, 9-64 & 9-80
Yaxley v Gotts [2000] Ch 162
Advocate St J A Robilliard "*Trusts Under Guernsey Customary Law*" published in the Jersey Law Review, October 2003
Pirito v Curth (Guernsey Court of Appeal 10 April 2003)
Section 2(4) of The Saisie Procedure (Simplification) (Bailiwick) Order, 1952
Section 1(1) of The Conveyancing (Guernsey) Law, 1996

Introduction

1. The Plaintiffs applied for declarations against the Defendants, who are their daughter and son-in-law, as to what rights they may have to occupy a wing in the Defendants' property, L'Abri du Rocher, Rocque Balan, L'Ancresse, Vale.

2. The Defendants' marriage has ended and they are endeavouring to finalise the division of matrimonial assets. A judge sitting in the Matrimonial Causes Division of the Royal Court has directed that before the Defendants' financial matters can be resolved the entitlement of the Plaintiffs, if any, to occupy the wing must first be determined. Hence, the Plaintiffs issued the present proceedings.

3. This is the judgment of the Court. We advised the parties of our decision in a short judgment issued on 9th July and said that our full judgment would be issued after the return of the Deputy Bailiff from annual leave.

General Directions to the Jurats

4. The Deputy Bailiff reminded the Jurats of their respective roles. The Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats must accept his directions on the law and follow them, whereas the facts of the case are the Jurats' responsibility. He directed the Jurats to have regard to the whole of the evidence presented to the Court, including the evidence of the witnesses and the documents in the Trial Bundle and to form their own judgment about the witnesses and as to which evidence is reliable, and which is not. The Jurats were entitled to draw inferences, that is, to come to common sense conclusions based on the evidence which they accept, but not to speculate about what evidence there might have been or to allow themselves to be drawn into speculation. They could take account of the arguments in the speeches they heard, but were not bound to accept them. Equally, if at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them.

5. The Deputy Bailiff directed the Jurats that the burden of proof is on the Plaintiffs throughout. The standard of proof is the civil standard of the balance of probabilities; to establish something on the balance of probabilities means to prove that something is more likely so than not so.

6. Evidence for the Plaintiffs was given by them both, by their son, Brian, ("Mr B M J Bougourd") and by two experts, Mr Adrian Morris who is an estate agent, and Mr Stephen Jones who is an actuary. The First Defendant gave evidence but called no other witnesses. The Second Defendant was unrepresented in these proceedings but she supported the case put forward by her parents. She gave evidence and was cross-examined by the Advocates for the other parties but played no other part in the proceedings.

7. The Jurats were unanimous in their findings.

Background

8. A large amount of background evidence was either agreed or not disputed.

9. The Plaintiffs were married in February 1968. They have three children, Mr B M J Bougourd, the second Defendant and another daughter, Patricia.

10. Mrs Bougourd was originally from Ireland, her husband originally from Guernsey. They met and married in Guernsey. In September 1968, shortly after their marriage, they moved to Sussex where Mr Bougourd had the opportunity for greenhouse work. They also lived in Sandy, Bedfordshire and in Wigan before they returned to Guernsey in 1979 with their children to whom they wanted to give the benefit of an education and upbringing in this Island. They remained here until 1997 by which time their children were all independent.

11. The last house they owned in Guernsey was Laurel Villa, Bouet, St Peter Port, purchased on the 19th April 1979, for a total price of about £15,000, £13,750 of which was in respect of the realty. On 28th September 1995, they conveyed an undivided one half share in the property to their son Mr B M J Bougourd. Mrs Bougourd explained that the reason for that conveyance was that the property needed substantial repairs and modernisation which the Plaintiffs could not afford. Their son borrowed £40,000 by way of mortgage and also contributed some of his own money towards the repairs. In order to obtain his mortgage, they understood that the son had to own an interest in the property and therefore they conveyed an undivided one half share in it to him. When the property was sold in 1997, Mr B M J Bougourd was paid the money he had contributed towards the repairs. At the same time the Plaintiffs gave £5,000 to each of their three children and an additional £5,000 to Mr B M J Bougourd, in recognition of all the help he had given them.

12. At that time, the Plaintiffs wanted to move to a smaller property and free up some capital. Having lived in England, they knew they could live happily over there and they chose Lincoln because it was an area where house prices were relatively low.

13. In Lincoln, Mr Bougourd worked a night shift in a potato crisp factory, working long hours (up to 70 hours per week) and sleeping during the day. We were not told whether Mrs Bougourd was working. She mentioned that she had worked, at some time, as a carer. Mr Bougourd relied upon Mrs Bougourd to look after their financial affairs and to deal with any matters of a business nature. Mr Bougourd's evidence of the discussions and arrangements between the Plaintiffs and the Defendants showed that he did not recall the details as clearly as his wife; in the opinion of the Jurats, that was because he relied upon his wife to take care of such matters.

14. In July 2002, the Plaintiffs sold their property in Lincoln, realising net proceeds of £83,608.37. That amount was transferred by the Plaintiffs' solicitor to the Defendants' bank account, as evidenced on page 26 of the trial bundle. The date of the transfer is not shown on the bank statement but is likely to have been on or before 9th July as the next entries on the statement are dated 10th July. On the day the money was received, the Defendants paid £3,608.37 to the Plaintiffs, leaving a balance in the Defendants' account of £80,000.

15. The Defendants first met when Mr Woodhead moved to Guernsey as an employee of Barclays Bank for whom Mrs Woodhead was then working. He arrived in June 1997 and they married in the summer of 2000. Their first child was born the following year. In 2002, at the time of the discussions over the Plaintiffs' move to Guernsey, Mrs Woodhead was pregnant with their second child. A third child was born later.

16. The Defendants bought their first house, "The Skelligs", Doyle Clos, Route Militaire, St Sampsons in December 1999. It was a good first home but they did not enjoy living on a Clos. After they had started a family, they were keen to move to a better and larger house in a better area.

17. In the summer of 2002, after selling their house in Lincoln, the Plaintiffs lived with the Defendants for a short while at "The Skelligs". Before moving into "L'Abri du Rocher", which the Defendants purchased on 17th September 2002, they lived together in a rented property in St Andrew's for a month, with the rent paid by the Defendants (out of Mr Woodhead's earnings).

18. The Defendants lived in the main part of the house and the Plaintiffs lived in the wing until May 2008 when Mr Woodhead moved out to join a partner with whom he had had a relationship for six years and with whom he is still living. Mrs Woodhead and the Plaintiffs still live at L'Abri du Rocher.

The purchase of L'Abri du Rocher and payment of £80,000.

19. To assist the Jurats in resolving the conflicts of evidence surrounding the decision to buy L'Abri du Rocher and the payment to the Defendants by the Plaintiffs of £80,000, the Deputy Bailiff reminded the Jurats of the witnesses' evidence by reference to a number of sequential stages in the evolution of the arrangements.

Discussions prior to the signing of the Letter

20. The parties all appear to agree that the discussions about the Plaintiffs returning to Guernsey began in the spring of 2002 when they visited the Island for the christening of their first grandchild. The Plaintiffs were happy in Lincoln but they were missing their family, Mr Bougourd was missing Guernsey, Mrs Woodhead was missing her parents, and the Defendants wanted to move to a bigger and better property.

21. They disagreed in their evidence as to who suggested the idea of them all living in the same property. Mrs Bougourd said that her daughter told her Mr Woodhead wanted them to sell up and return. Mr Bougourd said it was Mr and Mrs Woodhead who made the suggestion. Mrs Woodhead said it was her husband's suggestion that her parents should move in to the same property. On the other hand, Mr Woodhead denied that the idea was his; he said that at the time, he had not met his parents-in-law often and he was not sure why he would suggest they share a property.

22. Initially there was no discussion about the sums of money that would be required. A figure emerged after the parties had ascertained the value of the Plaintiffs' house in Lincoln. The Defendants knew how much they would have available from the sale of "The Skelligs" and they knew how much they could borrow. They then set about looking for a suitable property.

23. The Defendants found a property near the Beaucette Marina with a barn suitable for conversion into a separate unit of suitable size. They calculated that they would need a contribution of £75,000 from the Plaintiffs who agreed that figure. However the purchase did not proceed because the Bank was not prepared to lend on the basis of the Survey report.

24. The Defendants continued their search and found L'Abri du Rocher. They sent the particulars to the Plaintiffs who agreed to go ahead without seeing the property.

25. The Plaintiffs' house in Lincoln was sold in early July 2002 and the net proceeds transferred to the Defendants on or before 9th July, as we have said. The Conditions of Sale for the purchase of L'Abri du Rocher are dated 12th July and state that a deposit was paid on 11th July.

26. During the months prior to July 2002 there had been discussions about the arrangements. There are different recollections as to what was said and by whom. Mrs Bougourd said the proposal was discussed with their son Mr B M J Bougourd and with their daughter Patricia who were both happy to forgo their inheritance as long as the Plaintiffs received a life time enjoyment in return for their money, which Mrs Bougourd believes they all agreed. She said there was no discussion as to what would happen if a change of circumstances required the house to be sold, because the Plaintiffs thought this was the house in which the Defendants wanted to live for the rest of their lives.

27. Mr Bougourd also understood the Plaintiffs would remain in the house for their lifetimes. He understood they were paying £75,000 for the lifetime enjoyment of the wing or until they had to go into a Nursing Home. It never occurred to him that the Defendants might divorce; he thought they were made for each other.

28. Both Plaintiffs referred to this as a family arrangement. They did not seek legal advice in Guernsey or ask for any legal formalities because they relied upon Mr Woodhead who was an experienced lending manager, they thought he was honourable, and they trusted him.

Consequently they did not look for the written formalities they would have expected if they were dealing with a stranger. Neither of them understood there was any need to go to the Conveyancing Court to formalise the arrangement, even though in 1995 they had conveyed a one-half share in Laurel Villa to their son and attended Court for that purpose.

29. Mr B M J Bougourd was involved in the discussions. He spoke with his mother and with his sister, Mrs Woodhead; he said that on a couple of occasions when he was speaking with her, Mr Woodhead was present. He also represented their sister, Patricia. They were happy to forgo their inheritance as long as their parents received a lifetime enjoyment, which he said was a very important point. He had concerns as to whether the Plaintiffs and the Defendants could live in close proximity to each other but he thought it made sense for all concerned. It enabled the Plaintiffs to return to Guernsey and allowed the Defendants to have a nicer property of good quality. He said that, in the presence of Mr Woodhead, he told his sister that if their parents' circumstances changed, he did not want them to be forced out. For example if they had mobility problems, the Defendants would have to pay to adapt the property and he said that was accepted by them.

30. In cross-examination, Mr B M J Bougourd said that he wanted the arrangement to be documented and they had spoken about having an agreement. He did not see the Letter (as defined below) until after Mrs Bougourd had signed it. He is a banker (he is currently a lending manager with Schroders) and had previously worked for Barclays on the corporate side. He said that both he and Mr Woodhead knew that if Barclays were told of the arrangement they would have required more information and might have charged a higher rate of interest or they might have refused to grant any mortgage.

31. Mr B M J Bougourd said that he understood that what was agreed was an obligation that the Defendants would house his parents for the rest of their lives.

32. Mrs Woodhead said that she had discussions over the arrangement with her husband and then discussed the matter by telephone with her mother. Her parents were not buying any interest in the property which was to be owned solely by the Defendants. They were acquiring the right to live in the wing for life and thereafter the property would belong exclusively to the Defendants. If her parents required care, she would provide it for as long as possible until it became necessary for them to move to a home. The cost of any adaptations needed to cope with mobility problems would be paid by the Defendants. Mrs Woodhead said it was her husband's idea to draw up a letter; she did not see a draft of it before it was sent to her parents.

33. Mr Woodhead said that he was responsible for formulating the first draft of the letter which appears at pages 24 and 25 and page 77 of the Trial Bundle and to which we refer as "the Letter". He said the Letter was discussed widely within the family. He could not recall with whom he discussed it but he said the Plaintiffs' son, Mr B M J Bougourd was their counsellor in the matter. Following the discussions, Mr Woodhead said he redrafted the Letter but he cannot recall the details of the amendments made.

34. Mr Woodhead said, the main purpose of the Letter was to demonstrate that £75,000 was a gift with no requirement to repay it. Ultimately it was for the protection of the Defendants' children to protect them against any demand for repayment on the death of the Plaintiffs.

35. He denied that the Plaintiffs' other two children were giving up their inheritance. He said it was put to him many times that there was a property in Ireland worth 150,000 Euros which would be their inheritance. This was denied by the Plaintiffs who admitted there was a family property in Ireland but said it would not pass to them.

36. Mrs Woodhead was cross-examined on the letter written by her to her husband which is to be found at page 51 of the Trial Bundle and in which she wrote (at page 56) that her parents

would have to move to Ireland if the house was sold. Mrs Woodhead said she was distraught at the time she wrote the letter. It was soon after she had learned of her husband's affair, she had not eaten for a month, it was written in the early hours of the morning and she was using emotional blackmail in the hope of persuading her husband to return in a desperate attempt to save her marriage.

37. Mr Woodhead said the Defendants did not agree either to provide care to the Plaintiffs or to pay for adaptations to the wing to cope with any mobility issues.

38. He also denied that the existence of the arrangement would have prejudiced their borrowing from Barclays. He said it was possible he had disclosed it to Barclays prior to their approval of the mortgage.

39. He said the intention was that in the event of a change in circumstances requiring a sale of the property, the Defendants would have no legal obligation to protect the Plaintiffs but they would have a moral obligation to repay some of the money based on the length of time they had lived in the wing, their conduct and any contribution they had made to the running of the property.

The Signing of the Letter

40. The next stage in the chronology is that Mrs Bougourd signed the Letter. All parties are in agreement that she is the only person who did so. The Letter reads as follows:

"Mr. B and Mrs. E.A. Bougourd,
Le Hanois,
23 Garrick Close,
Lincoln,
LN5 8TG

16/06/2002

Mr and Mrs D G Woodhead,
The Skelligs,
2 Doyle Clos,
Route Militaire,
Guernsey,
GY2 4ED

Dear David and Antoinette,

Re: Gift of GBP75,000

Brian and I are writing to set out the details of the gift that we are going to give to you in connection with the proposed purchase of L'Abri du Rocher, Rocque Balan, L'Ancresse, Vale, Guernsey at the agreed price of GBP440,000.

The purpose of this letter is to set out the terms of the gift in the belief that this will ultimately protect you, your family and us in the future.

We are giving the gift freely because we both want to return to Guernsey to live and we understand that on the one hand there are no properties available to buy in our price range and on the other that we would quickly spend our cash reserves if we chose to rent.

The funds that you receive are to be used solely towards the purchase of the above mentioned property or in the event that this purchase falls through, towards the purchase of such other property as is mutually agreed. The benefit to you is that the money will enable you to purchase a property that is more expensive than you would otherwise be able to afford. In return for the gift we will have the right to live in and enjoy our section of the property and the shared gardens for as long as we choose to do so.

We fully understand that you will be under no obligation to return any of the money to us at any time and that the property will be owned entirely by you and will pass down in accordance with your wishes. If Brian and/or I at any time leave the house for any reason, for example through choice, ill-health or death, you and your family will not owe anything to either of us or anyone else.

These terms will remain in full force and effect unless we mutually agree with you to vary them.

Yours sincerely,

Brian Bougourd *Elizabeth Ann Bougourd*

Mr. B and Mrs. E.A. Bougourd,
Le Hanois,
23 Garrick Close,
Lincoln,
LN5 8TG

Signed on ……At the offices of ……..

Witnessed by ……

Signature of Witness ……..Click here to type your Closing"

41. Mrs Bougourd received a telephone call from her solicitor saying he had received a draft letter from Mr Woodhead. Mrs Bougourd attended at the solicitor's office. She went alone because her husband's work prevented him from attending during normal working hours. The solicitor showed her the Letter. The solicitor said he could not advise on matters of Guernsey Law. However, he asked her some questions about Mr Woodhead, he enquired about the relationship and he asked Mrs Bougourd whether she was happy with the proposed arrangement.

42. Mrs Bougourd understood that the Letter reflected what had been agreed, namely that in return for payment of £75,000, the Plaintiffs would be entitled to a lifetime enjoyment of part of the Plaintiffs' property. They would be able to remain there for as long as they chose to do so, or until the death of both of them, or until they needed to move into full-time nursing care. In the event of them vacating the property for any of these reasons, she understood that the Plaintiffs would not be required to repay the money to them and they would have sole ownership of the property.

43. Mrs Bougourd signed the Letter at the solicitor's office. The Letter was then posted back to Guernsey without a copy being retained by either Mrs Bougourd or the solicitor (who has since died). Mrs Bougourd later phoned her daughter, who confirmed that the Letter and the money had been received in Guernsey.

44. Mr Bougourd never saw the Letter. When he read the Letter in the Court, he said he had not previously read it and when he was asked whether it reflected what had been agreed, his reply was that "*It's the way he [Mr Woodhead] writes letters"*. He said that if he had seen it at the time, he would have asked what it was about; they trusted each other so why was it necessary to have a letter? He disagreed with the wording of the letter. The money was not a gift; it was to enable the Defendants to raise the money to purchase a larger house in exchange for which the Plaintiffs would have the lifetime enjoyment of the wing.

45. Mr Bougourd's evidence contradicted that of Mrs Bougourd in that he said his wife did not sign the Letter in the solicitor's office, but came home and discussed it with him before signing it and returning it in the stamped addressed envelope that the Dependants had supplied.

46. Mrs Woodhead said she did not see the Letter until it was returned to the Defendants in the post. She said the Letter did not represent all the terms agreed between them such as the need to provide care for her parents.

47. She said the Letter was kept by the Defendants for a while and she showed it to her brother but she does not know where it is now.

48. Mr B M J Bougourd said the Letter reflects part of the understanding between the parties. He said it has the flavour of what they agreed but does not deal with all the surrounding issues and he was not happy with the wording. In particular, the money was not a gift.

49. Mr Bougourd saw the Letter for the first time after it had been signed by his mother. It was shown to him when he was at a family barbecue at the Defendants' house, "The Skelligs" when his parents were living there after they had sold their house in Lincoln and before the move to L'Abri du Rocher.

50. He went home from the barbecue intending to draft a better agreement for all parties to sign. However, he decided not to interfere. It was a loving relationship, all was going well and he felt it was not his place as the big brother to interfere.

51. Pages 76 and 77 of the Trial Bundle are a screen print, taken from Mr Woodhead's old computer which Mrs Woodhead had found in their shed after Mr Woodhead left the family home. It shows that the document was last modified on his computer on the 17th June when it was converted from a Lotus programme to Word.

52. Mr B M J Bougourd said that the version of the Letter that he saw signed by his mother was the version printed at page 77 of the trial bundle, not that at page 24 and 25.

53. Mr Woodhead said that his wife was responsible for all the incoming and outgoing post so it would have been her who sent the Letter to Lincoln, not him and she would have opened the envelope when the signed copy was sent back.

An additional £5,000

54. An issue relied upon by Mr Woodhead is the fact whereas the Letter refers to a gift of £75,000, the amount actually paid by the Plaintiffs to the Defendants was £80,000.

55. Mrs Bougourd said it was the solicitor who first told her the additional £5,000 was required when she attended at his office. She said it was mentioned in a separate note received from

Mr Woodhead which she has not seen. Mrs Bougourd does not now know whether it was in a covering letter accompanying the Letter the Plaintiffs were asked to sign, or whether it was received subsequently.

56. All parties agreed the additional £5,000 was a loan but they disagreed when it was to be repaid, Mr and Mrs Bougourd said it was to be repaid "as soon as possible" but Mr Woodhead denied those four words were agreed.

57. All parties agreed that the loan is no longer outstanding although they disagreed as to how the debt came to be discharged. They agreed that £2,500 was repaid probably about four years later. As for the remaining £2,500, the Plaintiffs said they were tired of waiting for it and thought their daughter and son-in-law were in some financial difficulties, so they agreed to waive the additional £2,500. Mr Woodhead said they were going to repay some of it but the Plaintiffs agreed they need not do so.

58. The main significance of this issue is that Mr Woodhead claims it is another matter that is not mentioned in the Letter.

59. Neither of the Defendants can recall precisely how the sum of £80,000 was applied. The Defendants' bank statement at page 26 of the Trial Bundle shows that on the day the money was received in their account, £41,447.49 was paid out under the narrative *"Payment to Home Loan".* Interest earned on the £80,000 prior to the purchase of L'Abri du Rocher was kept by the Defendants.

60. There is no dispute that the Defendants needed £80,000 from the Plaintiffs to complete the purchase of L'Abri du Rocher and it is accepted the money was used for the purchase.

The Installation of a Kitchen

61. There is a dispute as to whether Mr Woodhead agreed that the Defendants would pay for the installation of a kitchen for the use of the Plaintiffs.

62. The Plaintiffs said they required their own kitchen as they did not wish to have to share a kitchen with the Defendants. They both said that Mr Woodhead verbally promised that the Defendants would pay for a kitchen; Mrs Woodhead agreed with them. Mr Woodhead denied there was such an agreement. He said he could not accept why he would have agreed to install a kitchen in their part of the property. If it was agreed, it is another matter that was not included in the Letter.

63. Mr Bougourd explained that there were three different arrangements over the kitchen facilities. Initially, all of them shared the same kitchen. Then, after a few weeks, the Plaintiffs purchased a table-top cooker so that they could cook independently. That arrangement was not satisfactory and some time later, he cannot recall after how long, they decided to install a kitchen at their own expense. They converted a former study. It was paid for by the Plaintiffs. Mr Bougourd estimated the cost, including the kitchen units, their installation and the appliances, at about £5,000.

Contributions to Utilities, Rates etc and Maintenance

64. Mr Woodhead said that problems arose between the parties soon after his parents-in-law moved in. He said he had not expected that his parents-in-law would live in the wing for free but they said they did not want to pay for utilities.

65. The Plaintiffs said that after they had been living in the property for a while, the Defendants asked them to contribute £60 per month towards the utilities and shared expenses such as rates

etc. Mr Woodhead said the figure of £60 per month was put forward to him and he accepted it begrudgingly in order to avoid an argument.

66. They all agreed that there has never been any increase in the figure and no discussion about increasing it. Mr Woodhead submitted that £60 does not represent a fair share of the true cost, having regard to the sums claimed by Mrs Woodhead in the matrimonial proceedings (page 69 of the Trial Bundle). Mrs Woodhead justified the figure as being what they estimated, in 2002, to be the extra cost of having her parents in the wing, over and above what the Defendants would have paid in any event.

67. The only utility bill paid by the Plaintiffs is for their telephone, which they installed.

68. The Plaintiffs have never contributed towards the cost of maintaining the property. Shortly after they moved in the handle of the patio door in their wing was broken. Mr Woodhead said he refused to pay for the repair and the Plaintiffs also refused. The Plaintiffs and Mrs Woodhead said it needed no more than to be glued and that has been done. It was not clear from the evidence when the door handle was repaired.

69. At the start, Mrs Woodhead received £75 per week for food and petrol from her husband. She said she struggled but could not ask her husband for more because he was controlling so her parents helped her by contributing towards the cost of her food and petrol. She denied this contradicted a statement by her in the matrimonial proceedings that they enjoyed a high standard of living. She said they had a good lifestyle but she only had £75 per week for food and petrol.

70. Mr Woodhead said he had no knowledge of his parents-in-law paying towards their food or his wife's petrol. His wife was not working and she had control of the bank account.

71. The Plaintiffs said they contributed £500.00 for each of two annual holidays in France enjoyed by the Defendants and their children. Mr Woodhead said that the Plaintiffs might have refused amounts proffered as part repayments of the £5,000 loan and suggested that they be used towards the two holidays.

72. Mrs Bougourd said that on her twice-yearly visits to Ireland, she bought clothes for Mrs Woodhead and the grandchildren. Mr Bougourd said they clothed the children and that allegation would hurt Mr Woodhead. Mr Woodhead strongly denied it and said that clothes bought by the Plaintiffs for their grandchildren were by way of gift, as any grand-parent would do.

73. Mrs Bougourd and Mrs Woodhead estimated the additional money paid by the Plaintiffs, including the £60 per month for shared utilities etc, holidays, petrol, food and central heating oil, amounts to about £12,000. Mr Woodhead denied it was so much and was astonished they had added the sums up when most were by way of gift.

L'Abri du Rocher

74. The accommodation in the wing occupied by the Plaintiffs comprises a bedroom, kitchen, bathroom, hallway, sun-lounge and private garden. In order to access the property, the Plaintiffs park in a shared parking area behind the house and have to walk across the Defendants' garden in order to reach their own private garden, which leads into their wing. There is an internal door dividing the two parts of the property which was kept locked, with the key on the Defendants' side, until Mr Woodhead moved out.

75. Initially the main part of the house, occupied by the Defendants, had two bedrooms. They converted the loft space and carried out a few other improvements so that it is now four-

bedroomed. The Defendants had to borrow money to pay for the alterations and the two further bonds, for £23,500 and £6,500 are shown on page 45 of the Trial Bundle.

76. Mr Morris, the estate agent called by the Plaintiffs, estimated the present value of the whole property to be £850,000. The value of the wing, assuming there was planning permission to sell it as a separate unit would be £250,000 but the value of the main part of the house on its own would be reduced to £500,000; the value being adversely affected by the close proximity of the wing and the need, for example, for the occupiers of the wing to cross the garden of the main house to get to the wing.

77. If the wing was let as a separate unit, the rental would be £700 to £800 per month.

78. Mr Jones, the actuary called by the Plaintiffs confirmed the contents of his report at pages 78 and 79 of the Trial Bundle. He assumed the value of the wing to be £250,000 and the economic benefit of it (i.e. the rent) to be £900 per month. He took the current age of the Plaintiffs (both now 71 years) and assumed they had life enjoyment until the death of the survivor. Based on that information, the apportionment of their respective interests in the value of the wing is 54.3% to the life interest and 45.7% to the reversionary interest.

79. If the life interest ceased on the death of the first of the Plaintiffs, the value would be reduced. He had not calculated by how much but a rough estimate would be a reduction to perhaps 50%. Similarly, the lower rental quoted by Mr Morris would also have a slight effect on the value, possibly reducing it to around 50% he estimated. He said the reduction would not be proportionate to the change in rental value.

Droit d'Usufruit

80. Before starting to analyse what is the legal nature of the arrangements between the parties, it is helpful to say what it is not.

81. The parties are agreed that the Plaintiffs do not have a *"droit d'usufruit"* or a *"droit d'habitation"*. The Report of the Committee established to examine "*Les Lois, Coutumes, et usages du Pays, en ce qui regarde l'Usufruit"* and adopted by Chief Pleas on 16th January 1854, (published in Recueil d' Ordonnances de la Cour Royale, Tome III at page 308) stated that such rights may be established in respect of immovable property by agreement ("*par la volonté de l'homme"*) but only by*"Contrat Juridique"* or by will. In this case, as the arrangements were not set out in a conveyance completed in front of the Conveyancing Court, we agree that those requirements have not been fulfilled.

Lease

82. In their Skeleton Argument and in Advocate Tee's initial submissions to the Court, the Plaintiffs claimed that all the ingredients of a lease were present:

    1) The grant of exclusive possession;

    2) The grant is for a fixed or periodic term; and

    3) Rent.

83. When she was asked to say when such lease came into existence, Advocate Tee said it was when the Letter was signed. However, in her closing speech, she accepted that as the Defendants did not own L'Abri du Rocher at the time when the Letter was signed, the most that the Plaintiffs could have claimed was an agreement to lease, not a lease.

84. Advocate Tee did not pursue the claim for a lease and she did not claim any remedy for breach of agreement to lease separately from the claim for breach of contract pleaded in the Cause.

Binding Contract

85. In their cause, the Plaintiffs pleaded their claim in a number of alternative ways, one of which was that the Plaintiffs had been granted a right of enjoyment by contract. In paragraph 11 of the Cause, they pleaded that:

> *"The terms expressed in the [L]etter followed by the Plaintiffs' payment to the Defendants constitute a binding contract between the Plaintiffs and the Defendants entitling the Plaintiffs to occupy the wing of the property in accordance with the terms of the [L]etter."*

Advocate Tee's submissions as to whether there was a binding contract

86. On behalf of the Plaintiffs, Advocate Tee submitted that there had been an oral agreement between the parties which was reduced to writing in the Letter and that at the time of drafting the Letter, it embodied all the terms of the agreement.

87. Subsequently, new arrangements came into existence by mutual agreement (such as the payment of £60 per month). Such new arrangements did not affect the validity of the original agreement because the final paragraph of the Letter envisaged that the terms could be varied by mutual agreement.

88. The Letter was drafted by Mr Woodhead and the version in the trial bundle is the final version; no subsequent draft having been found and the whereabouts of the original of the letter signed by Mrs Bougourd being unknown.

89. The principal terms of the agreement are clear and unambiguous. £75,000 was given by the Plaintiffs to the Defendants and termed a gift, on the conditions set out in the Letter:

    i) The money was to be used solely for the purchase of L'Abri du Rocher or such other property as they might mutually agree;

    ii) The Plaintiffs were to have the right to live in and enjoy their section of the property for as long as they chose to do so;

    iii) The Defendants were under no obligation to return the money;

    iv) The Defendants were to be the owners of the property; and

    v) Nothing was to be owed by the Defendants to the Plaintiffs if the Plaintiffs left the property, for whatever reason.

90. It is immaterial that the Letter did not envisage all eventualities because it could be varied by mutual agreement.

91. Advocate Tee submitted that the Plaintiffs would not have sold their own property and given the bulk of the proceeds to the Defendants leaving themselves with nowhere to live if there was no agreement.

92. There was an intention to create legal relations. Mr Woodhead instigated the drafting of the Letter largely for the Defendants' protection by making it clear that there was no obligation to repay the money.

Advocate Roland's submissions as to whether there was a binding contract

93. On the other hand, Advocate Roland submitted there was no binding contract between the parties. In particular, the parties only had an informal family arrangement which was not legally binding and no intention to create legal relations.

94. She submitted that the terms of the Letter were never agreed by all parties and it is, at best, only a draft.

95. The Letter was only ever signed by Mrs Bougourd. Neither she nor her Solicitor kept a copy. The original cannot now be found.

96. The Letter does not incorporate all the terms claimed by the Plaintiffs. In particular, it contains no reference to the additional loan of £5,000, and does not mention the contribution of £60 per month to running costs (subsequently agreed) or who had responsibility for ongoing repairs and maintenance.

97. The Letter does not reflect what the Plaintiffs say was agreed. For example, the penultimate sentence refers to the death of "*Brian and/or I"* whereas the evidence of both Plaintiffs was that they had agreed that the survivor of the Plaintiffs would have the right to continue to live in the property.

98. Furthermore, the Letter does not evidence a clear intention to share the property indefinitely. It does not envisage what was to happen in the event of a change of circumstances such as a requirement for the Defendants to move, whether by reason of changes in Mr Woodhead's employment, or to relocate to another jurisdiction, or otherwise; or Mrs Woodhead predeceasing her husband and/or her parents; or the Defendants being unable to pay the mortgage; or divorce; or whatever.

99. It is not the role of the Court to fill the gaps left by the parties.

100. Advocate Roland submitted that the Letter is characteristic of an informal arrangement not a legally binding contract.

The Court's decision as to whether there was a binding contract

101. The Jurats asked the Deputy Bailiff for a definition of a contract. He quoted to them from Chitty on Contract (Volume 1 General Principles 30th edition) at paragraph 1.001 where two definitions are offered of a contract in English common law.

> "*1-001* ***Competing definitions of contract.*** *There are two main competing definitions of a contract in the common law. The first, which was adopted by the 26th edn of this work, defines a contract as a promise or set of promises which the law will enforce. The competing view, which was taken by the 2nd edn of this work, is that a "contract is an agreement giving rise to obligations which are enforced or recognised by law".*

102. On the facts of this case, the Deputy Bailiff did not consider it necessary to choose between those two competing definitions but had it been necessary to do so, he might have been inclined to direct the Jurats that Guernsey Law favours the latter view. That is because the authors of Chitty say that the idea of contracts as being based on agreement was introduced into English law in the nineteenth century under the influence of Pothier's *Traité des Obligations.* Hence it may be the definition that would be favoured under Guernsey Law.

103. The issue as to whether the arrangement was purely an informal family agreement or a binding legal contract was a question of fact for the Jurats to decide. The Deputy Bailiff

directed the Jurats that in deciding whether there was a contractual intention, they were to apply an objective test (para 2-161 of Chitty 30th edition).

104. The Jurats concluded that there was no legally binding contract as alleged by the Plaintiffs in paragraph 11 of the Cause. The Letter of 16 June 2002 was only ever signed by Mrs Bougourd (and it was not counter-signed by any third party as witness to her signature). Mr Bougourd did not sign the Letter and he said that he did not see it before the court case. When he read the letter in Court, Mr Bougourd said that he did not agree with it in full. He also said that at the time of the discussions in 2002 he thought there was no need for anything to be recorded in writing; it was a family matter and they trusted each other. Mrs Woodhead said that she saw the Letter for the first time after her mother had signed and she never signed it herself. Mr Woodhead said that although he had drafted the Letter, he was not sure that the version produced to the Court was the final draft.

105. Furthermore, the Jurats concluded that the Letter did not incorporate all the terms of the agreement between the parties. They reached that conclusion despite the fact that the evidence showed that the parties do not agree the extent of the arrangements agreed prior to the purchase of L'Abri du Rocher. There were numerous conflicts of evidence between the various witnesses. The Jurats found that Mr Woodhead was evasive in a number of his answers, especially in cross-examination and, in general, he was the least plausible of the witnesses. They considered that some of the evidence of Mrs Woodhead as to her recollection of events was possibly coloured by the extent of the distress she has undoubtedly suffered as a result of the breakdown of the marriage and also perhaps by her loyalty to her parents. Mr and Mrs Bougourd both gave clear evidence and the Jurats were impressed by the clarity of Mrs Bougourd's recollection of events but even her memory of some of the finer details of her evidence may have been distorted by the passage of time. Mr B M J Bougourd also gave clear evidence but he was not party to all of the discussions, indeed he deliberately stood back because he did not want to be interfering in the arrangements between his sister and brother-in-law and their parents. It is not surprising that he now regrets that he did not involve himself more and, in particular, that he did not insist on his parents taking legal advice or ensuring that the arrangements were properly recorded.

106. The Jurats were not persuaded that the terms of the Letter are enforceable as a legally binding contract.

107. In summary, the Jurats are satisfied that the parties had reached a common agreement that the sum of £75,000 would be applied by the Defendants in the purchase of a bigger and better property incorporating a self-contained unit to be occupied by the Plaintiffs for their lifetimes or as long as they chose to live there. (The parties agreed, and the Jurats accepted, that the additional £5,000 was initially advanced by way of loan). The decision of the Jurats is that the agreement was an informal family arrangement that was never reduced to writing in the form of a legally binding contract, and in particular the Letter did not constitute a contract.

Unconditional Gift

108. After the Court had retired to consider its decision, the Deputy Bailiff invited Counsel to make submissions as to whether the transfer from the Plaintiffs to the Defendants of £80,000 could be characterised as an unconditional gift. Written submissions were received from both parties followed by a further hearing on 8th July.

109. Counsel agreed that in Guernsey Law the definition of an unconditional gift is the same as under English Law. There was no discussion of the Guernsey Law relating to *Donations*. Halsbury's Laws of England (Volume 52 (2009) 5th Edition), para 201, defines a gift in the following terms:

> *"A gift made between living persons (inter vivos) may be defined shortly as the transfer of any property from one person to another gratuitously while the donor is*

> *alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true owner in possession to another person with the full intention that the thing shall not return to the donor. It has been said that there must be an intention on the part of the recipient to retain the thing entirely as his own without restoring it to the giver, but it seems that this is incorrect and that a gift is effective when the donor intends to make it a gift and the recipient takes the thing given and keeps it, knowing that he has done so: the mere fact that the recipient regards the thing given as a loan and intends so to treat it does not by itself prevent the transaction from being effective as a gift."*

110. The Jurats were not persuaded that the sum of £75,000 paid by the Plaintiffs to the Defendants was an unconditional gift, because it was not transferred to the Defendants gratuitously. All four parties (both of the Plaintiffs and both of the Defendants) recognised that the money was to be applied for the purpose of assisting in the Defendant's purchase of a property in which all of them would reside.

Express trust

111. As well as inviting submissions on the issue of unconditional gifts, the Court also invited submissions on whether an express trust was created when the sum of £75,000 was paid to the Defendants. During the course of the hearing there had been lengthy submissions on constructive trusts but no mention of any express trust. The Court requested further submissions, after we had retired to consider our decision, because we wanted to understand how the parties described the legal status of the money during the period between the receipt of it in the Defendants' bank account and the purchase of L'Abri du Rocher. For instance if, for whatever reason, the Defendants had decided not to buy L'Abri du Rocher or any other property that the Plaintiffs could occupy, what would have happened to the money or, to put it another way, could the Plaintiffs have required that it be returned to them and, if so, why? The arguments based on proprietary estoppel and constructive trust did not appear to explain the position prior to the purchase of the property.

112. The definition of a trust in section 1 of The Trusts (Guernsey) Law, 1989 and section 1 of the Trusts (Guernsey) Law, 2007 is:

> *"A trust exists if a person (a "trustee") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his own estate –*
>
> *(a) for the benefit of another person (a "beneficiary"), whether or not yet ascertained or in existence;*
>
> *(b) for any purpose which is not for the benefit only of the trustee."*

113. Section 6 of both Laws provides that a trust may be created by oral declaration or by conduct, as well as by an instrument in writing and that no technical expressions are required for the creation of a trust. Section 6(3) of the 2007 law provides that a trust of real property situated in Guernsey may be created only in writing. There is no similar provision in the 1989 Law because the definition of "property" in the 1989 Law specifically excluded real property in the Bailiwick of Guernsey (section 73(1)).

114. Both counsel referred to the three essential requisites of a private express trust under English law: certainty of words showing an intention on the part of the settlor to create a trust; certainty of subject matter; and certainty of the objects or persons who are to benefit from the trust (paragraph 4-02 *et seq* of Lewin on Trusts, 18th edition).

115. Although the three certainties are not mentioned in Guernsey's statutory definition of a trust, the Deputy Bailiff directed the Jurats to have regard to them in deciding whether an express

trust of the money existed prior to the purchase of the property. The question the Jurats were directed to decide, having regard to the terms of section 1(b) of the Trusts Law was whether the evidence established that, on receipt of the sum of £75,000 into the Defendants' bank account (i) the money did not form part of the Defendants' estate; and (ii) it was for a purpose that was not for the benefit only of the Defendants.

116. Advocate Tee contended that the Plaintiffs' evidence at trial and the Letter disclosed no intention or agreement to create an express trust and that likewise, the Defendants' evidence disclosed no such evidence or agreement.

117. Advocate Roland accepted that it is not necessary to use the word "trust" when creating an express trust however in the circumstances of this case, there was insufficiency as to the intention to create a trust because there was inconsistency as to what had been agreed with regard to the terms of the trust.

118. The Jurats were satisfied that although the parties did not employ terms such as "trust", "trustee", "settlor" or "beneficiary" the common intention shared by the parties was sufficient to satisfy the first of the three certainties required of an express trust as identified at paragraph 4-02 of *Lewin on Trusts*.

119. As to the subject matter, the Jurats were satisfied that the trust related to the sum of £75,000 and not to any interest or right of enjoyment over the wing of L'Abri du Rocher, as the Defendants did not then own the property and had not even signed Conditions of Sale when the money was received into their account.

120. The persons who were to benefit included the Plaintiffs as the money was received by the Defendants for the purpose of assisting in the purchase of a property in which the Plaintiffs would have the right to live for as long as they chose to do so. Hence the money was for a purpose that was not for the benefit only of the Defendants.

121. The Jurats were satisfied that on receipt of the money it did not form part of the Defendants' estate. If the Defendants had changed their minds and had decided not to move house or to purchase a property for their sole occupation and not for sharing with the Plaintiffs, they could not have kept the money for themselves, it would have had to be returned to the Plaintiffs.

122. Consequently, the Jurats concluded that when the sum of £75,000 was transferred from the Plaintiffs to the Defendants it was subject to an express trust for the purpose of using the money in the purchase of a property (L'Abri du Rocher or such other property as they might mutually agree) to be owned solely by the Defendants but in which the Plaintiffs would have the right to reside for as long as they chose to do so.

Constructive Trust and Proprietary Estoppel

123. Having established that the money was transferred subject to an express trust, the Deputy Bailiff directed the Jurats that they did not need to consider whether the facts of the case had established either a constructive trust or a propietary estoppel, both of which had been the subject of lengthy submissions from counsel. Out of respect for counsels' submissions, the Deputy Bailiff wishes to comment on these doctrines.

124. Many of the cases cited were decisions of the English courts and the Deputy Bailiff acknowledged that an English court might have adopted a different approach. Lewin on Trusts, 18th Edition at page 320, paragraph 9-64 states:

> *"If property is purchased in the name of one party and another directly contributes part of the purchase money (including a contribution by way of assumption of liability to make mortgage payments), there has traditionally been a rebuttable*

> *presumption that the legal owner holds the property on trust for the contributors in proportion to their contributions. It will frequently now be the case, however, that direct contributions should be viewed under the common intention principle, which allows for flexibility in the quantification of the shares."*

125. Advocate Tee submitted that under English Law, the doctrines of proprietary estoppel and constructive trust had largely coincided. As Robert Walker L.J said in Yaxley v Gotts [2000] Ch 162, at page176B:

> *"At a high level of generality, there is much common ground between the doctrines of proprietary estoppel and the constructive trust, just as there is between proprietary estoppel and part performance. All are concerned with equity's intention to provide relief against unconscionable conduct, whether as between neighbouring landowners, or vendor and purchaser, or relatives who make informal arrangements for sharing a home, or a fiduciary and the beneficiary or client to whom he owes a fiduciary obligation."*

126. Advocate Tee quoted from para 9-80 of Lewin on Trusts, 18th Edition at page 330:

> *"The courts have increasingly recognised that, at least in the context of a joint enterprise for the acquisition of land, the concepts of the constructive trust and proprietary estoppel coincide."*

127. It has previously been established that the doctrines of constructive trust and proprietary estoppel are recognised under Guernsey law. Advocates Tee and Roland referred the Court to a number of Guernsey (and Jersey) cases demonstrating how local law has evolved. With no disrespect to counsel, we consider there is no need to refer to the cases in detail. (They were very helpfully reviewed by Advocate St J A Robilliard with his characteristic thoroughness in an article entitled "Trusts Under Guernsey Customary Law" published in the Jersey Law Review, October 2003.)

128. When considering whether these doctrines have any applicability in the present case, the Deputy Bailiff was mindful of the cautionary words of Southwell JA in Pirito v Curth (Guernsey Court of Appeal 10 April 2003). At page 17, paragraph 35 of the Court's judgment, Mr Southwell said:

> *"Mrs Haskins argued that equitable principles of English law form part of the law of Guernsey, and must be applied in the same way as in English law. For my part I do not consider that such principles can be imported wholesale into the Guernsey law of real property, which is derived from Norman not English origins, and which is in many ways very different from English law, particularly English statute law from the major statutory reforms of 1925 onwards."*

129. In the context of the present case, the Deputy Bailiff was particularly concerned about how any finding in the Plaintiffs' favour of a constructive trust or proprietary estoppel might be given effect in the event of *Saisie* proceedings. The prospect of a *Saisie* is not merely fanciful. To date, Mr Woodhead has continued to service the Defendants' mortgage, which the Bank has temporarily reduced to an interest only basis. He said he does not know for how long he will be able to continue to do so, especially if interest rates start to rise.

130. It is also not inconceivable that one of the Defendants might themselves institute *Saisie* proceedings. We have no idea what orders may be made by the Matrimonial Causes Division of the Royal Court but we are aware that the Court has in the past made a vesting order in favour of one party to the marriage on terms that require a payment to the other party and which might require the latter party to institute *Saisie* proceedings if payment is not forthcoming on a voluntary basis.

131. If the Court found that the Plaintiffs are entitled to the life-time enjoyment of the wing of L'Abri du Rocher, pursuant to a constructive trust or proprietary estoppel, neither of the Defendants would be able to evict them. Hence the Defendants would not be able to secure vacant possession of the property without the co-operation of the Plaintiffs and they would not be able to sell the property, or at least not for its true value.

132. If the Plaintiffs were unco-operative, the Defendants would only be able to sell the property with vacant possession if i) it was the Bank that obtained a Preliminary Vesting order; ii) the Bank applied to the Court for the eviction of the Plaintiffs (which, Advocate Tee conceded, they would be unable to resist as their rights would not have priority over the bonds registered to date in favour of the Bank); ii) the Bank obtained an eviction order; iv) any period of stay of eviction expired; and v) the order was enforced by the Bank; vi) before it obtained an Interim Vesting Order.

133. If the Defendants are unable to sell with vacant possession, it is likely that they would be unable to resist the Bank's application for an Interim Vesting Order. After the Bank has obtained an Interim Vesting order, the Plaintiffs would be able to register their claim in the register of claims against the real property of the Defendants that the Bank would be required open under section 2(4) of The Saisie Procedure (Simplification) (Bailiwick) Order, 1952. If there are no other claimants, the Plaintiffs could then obtain a Final Vesting Order on condition that they pay to the Bank the money owed to it, which they might be able to do as the value of the property significantly exceeds the indebtedness to the Bank.

134. If the Plaintiffs become the owners of L'Abri du Rocher in this way, Mr Woodhead would be completely divested of his interest in the former matrimonial home. That would not, in the view of the Court, be fair and equitable and cannot be what the parties intended when they entered into arrangements for sharing the property.

135. Consequently, the court concluded, having regard to Mr Southwell's words of caution, that on the facts of this case it cannot be appropriate to apply the English law doctrines of constructive trust and proprietary estoppel.

136. If there is any future occasion on which a party seeks to persuade the Royal Court that rights of enjoyment have been granted over real property that are in the nature of a *droit d'usufruit or droit d'habitation* but do not fulfil the strict requirements for the creation of such rights, it might be helpful to the court if counsel could refer to modern French law to see how the law relating to such rights has evolved in that jurisdiction. The Deputy Bailiff's understanding is that the authors of the Royal Court Report of 1852 relied heavily upon the French law of the day in preparing their report and therefore when looking to comparative jurisdictions for guidance, it is more logical to look first to French law.

The Conveyancing (Guernsey) Law, 1996

137. Section 1(1) of The Conveyancing (Guernsey) Law, 1996 ("the 1996 Law") requires that:

> *"An agreement for the sale or other disposition of real property can be made only in writing and only by incorporating all the terms which the parties have expressly agreed in one or more documents or, where conditions of sale are exchanged, in each."*

138. Section 1(3) provides that the documents incorporating the terms must be signed by or on behalf of each party to the agreement.

139. The First Defendant pleaded in paragraph 21 of his defences that any interest in favour of the Plaintiffs created by agreement or proprietary estoppel would constitute a disposition of an interest in real property and would therefore have to comply with the requirements of the

1996 Law. On his behalf, Advocate Roland submitted that the Letter (being the only written document in existence) did not comply with those requirements as it did not include all the terms alleged by the Plaintiffs to have been agreed and it was signed only by Mrs Bougourd.

140. In reply, Advocate Tee submitted there would only have been a disposition of real property if there had been a grant of a *"droit d'usufruit"* or a *"droit d'habitation"*, but as no such grant was claimed, the arrangement was not rendered invalid by the provisions of the 1996 Law.

141. In the light of the Court's findings, we are not required to consider the provisions of the Conveyancing (Guernsey) Law.

Conclusion

142. When the Plaintiffs paid the sum of £75,000 to the Defendants, they did not give the money unconditionally to the Defendants. It was to be held by the Defendants for the specific purpose of applying it towards the purchase of L'Abri du Rocher or such other property as they might mutually agree. Having regard to the definition of a trust under Guernsey statutory law, the Jurats concluded that the sum of £75,000 was accepted and held by the Defendants under an express trust for that purpose, a purpose that is still continuing.

143. The Defendants later signed conditions of Sale for the purchase of L'Abri du Rocher and subsequently took a conveyance of the property. Since then, the Plaintiffs have occupied the wing of the property but they have no legal right (*droit d'usufruit* or *droit d'habitation)* entitling them to do so.

144. Following the breakdown of the Defendants' marriage, there is a possibility that the Defendants may not be able to continue to service the mortgage. If the Court had found there was a constructive trust or proprietary estoppels in the Plaintiffs' favour and if their Bank took *Saisie* proceedings, the Bank's bonds would take priority over any rights that the Plaintiffs might have and hence the Bank could evict them although the Defendants could not themselves evict the Plaintiffs if they wished to sell the property with vacant possession and the Plaintiffs refused to vacate the wing voluntarily. If the Bank issued *Saisie* proceedings and obtained an Interim Vesting Order, the Plaintiffs could end up as the owners of the property with Mr Woodhead divested of all his interest in the property.

145. The reason for instituting the present proceedings is that the Defendants are trying to resolve financial matters between them in the context of divorce proceedings. The parties have incurred considerable legal costs, costs which no doubt they can ill afford and costs which would not have been incurred if the parties, especially the Plaintiffs, had taken legal advice at the outset as to how their respective positions could best be protected. It was suggested that Mr Woodhead did not wish to do so for fear of prejudicing the lending from his bank. He denied that in his evidence but the Jurats remain undecided as to whether there was any intention to avoid making full disclosure to the Bank.

146. In order to assist in resolving the real differences between the parties, Advocate Roland has urged the Court to give an indication of the value to be attributed to the Plaintiff's rights if the property has to be sold as a result of the resolution of the matrimonial proceedings. The Court is not in a position to do so.

147. Whilst we do not want to interfere in the matrimonial proceedings, we wish to add a comment in the light of Advocate Roland's request for guidance.

148. It seems to us to be unlikely that the Matrimonial Causes Division of the Royal Court would make an order that would place the Defendants in a position where they have no alternative other than to commit a breach of trust. It seems to us (and we stress that we know nothing about the matrimonial proceedings other than what we have learned during the present hearing) that a possible outcome would be that Mrs Woodhead will assume responsibility for

honouring the Defendants' obligations under the trust. If so, the Matrimonial Causes Division will have to ensure that she has sufficient assets available to her to accommodate herself, her children (if she is to have a Residence order) and her parents for at least as long as they are all to live in the same property. Whether that will be at L'Abri du Rocher or at some other property is not for us to speculate upon.

149. The Court hopes that the parties will be able to reach agreement as to how the matrimonial assets are to be divided, taking account of the trust that this Court has found to exist.

150. When issuing the brief note of its decision at the conclusion of the hearing, the Court said that if, after the Court had issued its reasoned judgment, the parties wished to seek further orders in the present action, they were to make application in that regard.

151. Any such application and any other application arising out of this judgment is to be tabled, in the first instance, in an Interlocutory Court.

