

Judgment 50/2004

**Duquemin and Duquemin v. Dunstan Investments
Limited – Royal Court (Civil action file 664) –
29 October, 2004**

**Real Property (Reform) (Guernsey) Law, 1987 – Loi relative à la Prescription Immobilière,
1909 – customary law of servitudes – application for rulings on preliminary issues of law**

IN THE ROYAL COURT OF GUERNSEY

The 29th day of October, 2004 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff; sitting alone.

In the matter of

MICHAEL KEATS DUQUEMIN

And

SALLY VANESSA DUQUEMIN

Plaintiffs

V

DUNSTAN INVESTMENTS LIMITED

Defendant

WHEREAS on 18th October 2004 the Deputy Bailiff considered an application for rulings on the following preliminary issues of Law:

1. What are the material principles of the Guernsey customary law of servitudes applicable in this case;
2. Do sections 18-23 of the Real Property (Reform)(Guernsey) Law 1987 apply to the rights at issue in this litigation; (i.e.) are the rights covenants within the meaning of Part III of the 1987 Law;
3. If the answer to 2 is yes, then
 - (a) what directions should be given to the Jurats concerning the matters which the Court is to consider under Section 20;

- (b) how should compensation (if any) be calculated under Section 21.
4. To the extent necessary, what are the material principles of the Guernsey customary law of prescription applicable to this case; in particular, whether a servitude may be extinguished and/or refined or otherwise varied by either (a) user of (b) non-user or (c) prescription acquisitive over time.

And heard thereon Advocates G.S.K. Dawes and J.A.S. White, Counsel for the Plaintiffs and Defendant, respectively. The Deputy Bailiff this day handed down judgment on the said issues in the terms attached hereto.

S. M. D. ROSS
Her Majesty's Deputy Greffier

Approved Text

IN THE ROYAL COURT OF GUERNSEY

Between	ORDINARY DIVISION	Plaintiffs
	Michael Keats Duquemin and Sally Vanessa Duquemin V Dunstan Investments Limited	Defendant

Judgment of the Deputy Bailiff Geoffrey Robert Rowland

**Advocate G Dawes for the Plaintiffs,
Advocate J White for the Defendant**

**Hearing date: 18th October 2004
Judgment handed down: 29th October 2004**

Cases, Legislation and Texts referred to:

Cases

Vaudin v Hamon [1974] AC 569

Colesberg Hotel (1972) Limited v Alton Hotel Ltd [2003] JLR 176

Legislation

The Real Property (Reform) (Guernsey) Law, 1987 Parts II and III (OC Vol XXX p.100)

Loi Relative á La Prescriptions Immobilière 1909 OC Vol IV p.281

The Law of Property Act 1925, sec 84

Texts

Houard Dictionnaire analytique, historique, étymologique, critique et interprétant de la coutume de Normandie, 1st ed. Vol 4 p.204.

Basnage Commentaires sur la Coutume de Normandie 4th ed. Vol 2 (1778) at p.559, 567, 568

The Report of the Committee on Positive Covenants Affecting Land in England 1965 HMSO Cmnd 2719

The Interim Report of the States Committee to Investigate the Sale of Flats and Leaseholders Billet d'Etat I of 1986 Item XXXIV p.108

Laurent Carey Essai sur les Institutions, Lois et Coûtumes de L'Ile de Guernsey p.215 and 216

Pardessus Traité des Servitudes ou Services Fonciers 8th ed Tome 2, 1838

Introduction

1. The Plaintiffs and the Defendants are in dispute concerning a number of servitudes affecting the Plaintiffs land.
2. Certain issues will need to be determined by the Jurats as arbiters of fact.
3. The parties considered that it would be helpful to have rulings on four preliminary issues of law and have invited me to rule upon them. I concurred with their view that it would be helpful to the parties in particular because it might assist them in resolving some areas of difference. I heard argument on 18th October 2004.

Agreed Facts

4. In July 1974 the Plaintiffs purchased a dwelling house called “Clos du Mesnil”, together with a garden and a passageway adjoining. The passageway and garden abut Vauvert, St Peter Port.
5. In 1975 the Plaintiffs sold Clos du Mesnil to the Defendant’s predecessor in title. The Plaintiffs retained the garden and passageway and granted certain rights over the material land. The rights are set out in the material conveyance dated 24th April 1975 (referred to collectively as the “1975 rights”). The relevant rights in the 1975 conveyance are stated as follows (the numbering following the paragraph numbering employed in the 1975 conveyance):

“1) right of way on foot and with a wheelbarrow over the eastern part of their said garden and over the passageway adjoining to go to and fro at all times between the premises hereby conveyed and Vauvert, including the right to bring in coal over the said premises, together with the right to place dustbins at the eastern end of the said passageway bordering Vauvert and the right to hang out washing on the said eastern part of their said garden;” (“the Pedestrian Right”).

It is to be noted that the Defendant contends that there are two such rights corresponding to two routes across this area of garden;

“2) the right from such time as the Vendors have converted their said garden into a car park, to park cars on the part thereof lying to the south of the dwelling-house hereby conveyed together with right of way on foot and with vehicles over the western part thereof to go to and fro at all times between the premises hereby conveyed and the driveway leading to La Couperderie, on paying a fair proportion of the cost of upkeep and maintenance of the part of the said car park which shall be used in common”

(“the Parking Right”);

4) right of access on their said garden and the said passageway with or without workmen equipment and materials in order to carry out repairs or other work to the part of the dwelling-house hereby conveyed bordering their said garden or passageway

(“the Maintenance Right”);

“5) the right to have and to keep water and gas and for an electricity cable and a drain in their said garden connected to the public mains in Vauvert with right of access thereto with workmen and materials to repair, renew and cleanse them when necessary on condition that all work be carried out promptly and in such a manner as to cause the least possible inconvenience to the Vendors and to their successors in title and on restoring the surface of the land disturbed as a result of such work in a proper manner”

(“the Services Right”).

6. The Plaintiffs wish to develop the eastern end of the garden in accordance with a drawing prepared by their architects. The intention is to erect a building comprising a block of four flats on the eastern end of the garden following the line of existing buildings on Vauvert. Provision (the adequacy of which is in dispute) has been made in the plans for each of the existing rights as set out in the drawing. Planning permission in principle has been given to the Plaintiffs and since renewed.

7. The Plaintiffs Cause falls into two distinct parts.

Firstly, the Plaintiffs seek declaratory relief to the effect that their plans and the provision they intend to make for the rights would not in fact breach all or any individual existing right.

Secondly, should the Court find that one or more of the existing rights would be breached by the proposed development and the provision they intend to make for the rights, the Plaintiffs also apply pursuant to Part III of the Real Property (Reform) (Guernsey) Law, 1987 (“the 1987 Law”) for the discharge or modification of the material provision or provisions so as to permit the development to take place lawfully.

8. The Defendant is a commercial undertaking which owns and lets realty. It acquired the premises from a related company by the name of Atticday Limited on 26th May 1998. Atticday had acquired the property on 26th August 1997. Clos du Mesnil comprises three flats. The property was purpose built as a block of flats. The flats are to let to individuals. The only lease to make reference to the parking rights is that for flat 3 (top floor) which refers to “the right to use one parking spaces in front of the building”.

9. The Defendant also says that the 1987 Law has no application to servitudes.

10. The 1975 rights relating to services were not in dispute. What is in dispute are certain issues relating to rights of way, a washing line and car parking spaces.

Issues to be determined

11. The parties are agreed as to the nature of the preliminary issues of law which ought in their view to be determined at this stage. They are as follows:

1. What are the material principles of the Guernsey customary law of servitudes applicable to this case?
2. Do sections 18 – 23 of the Real Property (Reform) (Guernsey) Law 1987 apply to the rights at issue in this litigation; i.e. are the rights covenants within the meaning of Part III of the 1987 law;
3. If the answer to 2 is yes, then

- a) what directions should be given to the Jurats concerning the matters which the court is to consider under section 20;
 - b) how should compensation (if any) be calculated under section 21?
4. To the extent necessary, what are the material principles of the Guernsey customary law of prescription applicable to this case; in particular, whether a servitude may be extinguished and/or refined or otherwise varied by either (a) user or (b) non-user or (c) prescription acquisitive over time.
12. I shall deal with the four preliminary issues in turn

QUESTION 1

What are the material principles of the Guernsey customary law of servitudes applicable to this case?

I had the benefit of skeleton arguments submitted by the parties. I am mindful of the dicta of Lord Wilberforce in *Vaudin v Hamon* [1974] AC 569 who was dealing with Guernsey law relating to prescriptions. The dicta is also of relevance when considering Guernsey law relating to servitudes -

“Thus, although as this Board has pointed out in La Cloche v La Cloche [1870] LR 3PC 125, it is proper to look at related systems of law, the particular legal provision under examination in any case, in this case the law of Guernsey as to prescription, must in the end be interpreted in light of its own terminology, context and history.”

It was common ground that the law of Guernsey in relation to servitudes is based on Norman custom law principles as developed in this jurisdiction over the centuries and that judicial development cannot change fundamental and substantive customary law.

I am also mindful of the dicta of Southwell J in *Colesberg Hotel (1972) Limited v Alton Hotel Limited* in the Jersey Court of Appeal.

“One main feature of the Jersey law of servitudes is that there is a presumption in favour of the freedom of land from excessive burdens of servitudes. Where servitudes derive their titre from a contract or deed, the effect of this presumption is that in interpreting the words of the contract or deed, in so far as there is any ambiguity, the ambiguous words are to be interpreted in favour of the freedom of the servient tenement.”

Houard in his *Dictionnaire analytique, historique, étymologique, critique et interprétant de la coutume de Normandie*, 1st ed. Vol 4 at p204 said this:

“en fait de servitudes, ceux qui les possèdent doivent en jouir avec la plus grande modération...”

I have no difficulty in stating that that Southwell J’s succinct summary encapsulates the position under the law of Guernsey as does Houard’s statement of the customary law of Normandy.

13. I heard argument from both Counsel on the material principles applicable in this case. In the event what emerged was that differences between Counsel on the nature and extent of the principles relating to servitudes were few.

14. Miss White conceded with respect to rights of way deriving title from a registered contract that because a servitude burdens and fetters the use and development of the servient land the owner of the dominant land cannot when in receipt of a request from the owner of the servient land refuse as an alternative route an equally convenient means of achieving the purposes secured by the right. Plainly a similar principle would apply to the siting of a washing line or car parking space. However argument focused largely on the right of way issue because that is likely to prove to be the most contentious and because, unsurprisingly, references to rights of way feature in Norman law authorities. However sight must not be lost of the fact that at a future hearing argument will no doubt focus also on the rights relating to the washing line and car parking spaces if the parties cannot in the meanwhile come to some accommodation on those points.
15. Miss White also conceded that if the Defendant is found to be correct in its assertion that there was in 1975 a grant of a second right of way across the eastern part of the Plaintiffs' land the Plaintiffs would, on the basis of customary law, be at liberty to stipulate that the second route could be relocated anywhere including immediately alongside the passageway in respect of which there is no argument that a right of way was created in 1975. However the alternative route must be equally accessible, no less practical and no less convenient. It was common ground that it is for the Court to put the true construction on the language used in the document creating a right. It was necessary to consider the original purpose of the parties to the contract when the right was granted. She accepted that a right had to be construed in favour of the servient land. This concession by Miss White was a proper concession. It is consistent with the principle of the natural liberty of land. Basnage (p559) Commentaires sur la Coutume de Normandie 4th ed vol 2 p.559 with reference to servitudes deriving title from a contract stated as follows:

“Si par le titre de la constitution de la servitude l'on n'a point déclaré de quelle maniere l'on pourra passer, ni désigné le lieu par lequel l'on doit souffrir le passage, ni sa largeur, ni si c'est pour y passer à pied, à cheval, ou avec chevaux & charrettes, comment fera-t-il permis d'en user? Il semble que l'on peut passer par-tout, parce que l'héritage entier est sujet a cette servitude, & le propriétaire n'y peut rien faire qui empêche l'usage : Il n'est pas juste néanmoins de souffrir que celui á qui le passage est du en puisse abuser, le propriétaire peut lui designer un chemin, dont il doit se contenter, pourvu qu'il soit accessible, quoique ce ne soit pas l'endroit le plus commode, parce que les servitudes ne s'étendent point, & qu'il lui doit suffire d'avoir un passage commode, bien qu'il le pût être davantage en un autre lieu : Que s'il n'est point fait mention de la largeur du passage, ni de la maniere que l'on s'en pourra servir, l'on doit examiner quelle a été l'intention vraisemblable des contractans, & la fin pour laquelle le chemin a été stipulé & promis; que si ces circonstances ne donnent point assez de lumiere, Il faut en cette obscurité favoriser le fonds servant, quod minimum sequendum est, & ne donner qu'un simple chemin á pied. Toutes ces difficulties sont décidées en la loi.”

16. Laurent Carey in his Essai sur les Institutions, Lois et Coûtumes de L'le de Guernsey at p. 215 when reviewing the law of Guernsey relating to servitudes referred to the authority of the law of Normandy in the following terms:

“.....sur quoi la vielle Coûtume étant déficiente, consultez les commentateurs de la nouvelle”

and at p.216

“pour les droits de servitudes de passage et généralement tout ce en quoi ce ces peut échoir, je vous renvoie á la dite nouvelle coutume.”

It is to be recollected that the first collation of the coutume of Normandy was the Trés Ancien Coutumier in the early 13th century and the Grand Coutumier followed later that century. Guernsey's principal source for Norman customary law is the Grand Coutumier. The Grand Coutumier was replaced shortly after the L'Approbation des Lois in 1583 by the new Coustumes du Pays de Normandie (the Coutumier Reformée). Many of the commentators routinely cited over the centuries in the Bailiwick Courts, including Basnage, comment on the Coutume Reformée.

Laurent Carey was clearly satisfied in the 18th century that it was appropriate in matters relating to servitudes to refer to the Coutume Reformée in order to determine the law of Normandy where the Grande Coutumier is found to be deficient.

17. It is clear that in the absence of agreement the Court has jurisdiction to determine the time, route and extent of a right of way. Guernsey common law, following Norman customary law, does not provide for any payment to the owner of the dominant land if the route of a right of way is thus altered because the dominant land, if the Norman principles have been respected, will have suffered no loss of enjoyment. It is the proper enjoyment of the dominant land which is at the heart of the matter. The nature and extent of a right of way will depend upon the circumstances of each particular case.
18. In 1975 no restriction was granted precluding the Plaintiffs from building on their land. The absence of any restriction enables the Plaintiffs to carry out development provided that the 1975 rights are respected and local building regulations are complied with. Accordingly such rights of way as may exist over the servient land could in theory be exercised and enjoyed for the benefit of the dominant tenement along passageways located within any building which may hereafter be developed by the Plaintiffs. There is no contractual provision that rights of ways or the car parking spaces reserved in 1975 must be capable of being exercised in the open air.
19. Miss White did not concede that the Court had a customary law power to discharge a right of way. She submitted that this would remain the case even if the right of way had been seldom used. Indeed she did not concede that there is any legislation which would enable the Court in a private law dispute to discharge a right of way in such circumstances because she contended that legislation on which the Plaintiffs may seek to rely cannot be invoked in respect of servitudes.
20. Mr Dawes briefly referred me to the 1975 grant of the right of way. He accepted that the interpretation of that grant is a matter of fact to be determined by the Jurats.
21. Nevertheless I was invited by Counsel to make some preliminary observations and I do so:
 1. the right of way is expressed in such a way that it is open to the Jurats to hold as a matter of fact that there is either a single right of way to Vauvert or that there are two such rights of way;
 2. as is evident from the conveyance plan the passageway does not run from the front door of Clos du Mesnil to Vauvert. It is necessary to walk across part of what is described as the eastern part of the garden in order to gain access to the western end of the passageway;
 3. if the Advocate who tendered the conveyance document to the Court on behalf of the purchasers and took responsibility for it, intended to reflect an intention of the parties that two separate rights of way should be created to go

to and fro between Clos du Mesnil and Vauvert then it may be thought surprising that he did not express such an intention more clearly;

4. had there been an intention to grant a second right of way then it would have been an easy matter for the avoidance of any doubt to mark with precision the two separate routes on the plan, perhaps using separate colours to identify each, a practice not uncommon amongst conveyancers both in those days and since;
5. it is not disputed that there are two rights of way on foot giving access to nearby public highways. One is a right of way on foot over the passageway to Vauvert and the other is a right of way on foot and with vehicles over the area currently designated as a car park and thence via the driveway to La Couperderie. That begs the question whether there was an intention to create a third pedestrian right of way given the short distance between the exit points to Vauvert and La Couperderie.
6. It is not stated who may use the right of way, but as Clos du Mesnil in 1975 comprised three flats the rights of way conferred can be used by a range of persons including the owners, their invitees and licensees, the tenants, their families, guests, visitors and trades people even though not mentioned in the grant.

22 *QUESTION 2.*

Do sections 18-23 of the Real Property (Reform) (Guernsey) Law 1987 apply to the rights at issue in this litigation; (i.e.) are the rights covenants within the meaning of Part III of the 1987 Law.

23. In order to do justice to the arguments of both Counsel I review a number of matters and will then comment on their relevance. In 1984 the States of Deliberation resolved to appoint an Investigation Committee (“the Committee”) with the mandate to consider inter alia:-

“(a) what reforms (if any) are necessary to facilitate the horizontal conveyancing of property held for an estate of inheritance (‘freehold’) with particular reference to the enforcement of covenants;”

The States were seeking reforms to the law of real property and, if appropriate, laws governing leasehold interests (personal property which could not be charged) in order to facilitate the sale of flats on a freehold basis. The need for some sort of reform had been identified in 1973 but little progress had been made principally because of the doubts of some Advocates as to the legality of horizontal conveyancing. The consequence was that some lending institutions had been reluctant to lend against the security of such flats. There was also concern about the enforceability of covenants and this would need to be addressed if the construction of blocks of flats or the subdivision of buildings was to be encouraged and the conveyancing of flats facilitated.

24. The Committee, in the course of its investigations, had considered the 1965 Report of the Committee on Positive Covenants Affecting Land in England. (“the Wilberforce Committee”). In particular the Committee interested itself in the solution recommended by the Wilberforce Committee with regard to the difficulties which were evident in the enforcement of positive covenants in that jurisdiction. In the event although the recommendations of the Wilberforce Committee concerning positive covenants some 19 years after the publication of that Report had never been implemented they did find

favour with the Committee. (Billet D’Etat I of 1986 Item XXXIV at pages 110-111). The Committee’s Policy Letter was expressed to be an interim report because the Committee had not yet dealt with all matters falling within its mandate. It left for a later date investigations into the question of leaseholds. There has been no further report.

25. The Committee at para 7 of its report said this

“The need for reforms to facilitate the sale of flats on a freehold basis was accepted by the States in 1973 and had become more acute. The amount of land available for building is restricted, and anything which will enable better use to be made of the existing and potential housing stock is to be welcomed.”

That would suggest that the Committee had interpreted its mandate very widely.

26. In paragraphs 10 – 13 of its report under the heading ‘Application of Covenants’ the Committee addressed the issues of both positive and negative covenants and identified the need for positive covenants to run with freehold land. Under the heading ‘Enforcement of Covenants’ the Committee recommended a positive covenant enforcement procedure. It is of considerable importance to note that servitudes run with the land and so that there was no servitudes enforcement issue which the Committee needed to address.

27. The Committee at para 16 of its Report stated as follows:

“16. The Committee agrees with the recommendation of the Wilberforce Committee that the Court should have power to modify or remove any onerous covenants.”

The Committee did not elaborate further on this subject.

28. The Committee’s recommendations are set out at paragraph 20 of the Report. Unsurprisingly it recommended in paragraph (a) that Guernsey law should be clarified to remove doubt about the lawfulness of separating the ownership of real property from the ownership of other real property, horizontally, vertically or otherwise. The States were also recommended to direct the preparation of legislation to provide that:-

(b) the burden of a positive covenant relating to a property for the benefit of another property shall go with the freehold and bind the covenantor’s successors in title

(c) positive covenants shall be enforced along the lines proposed in paragraphs 15 and 16 of this Report.

(d) the Royal Court shall have power to modify or remove any onerous covenants”

29. The propositions on which the States would vote were framed in identical terms to the Committee’s recommendations. The States on 30th January 1986 so resolved to direct the preparation of legislation. The States subsequently approved a Projet de Loi on 29th January 1987. The Real Property (Reform) (Guernsey) Law, 1987 (“the 1987 Law”) received the sanctions of Her Majesty in Council on 18th May 1987. It came into force on 28th October 1987. Part III of the 1987 Law is entitled “Discharge and Modification of Covenants”.

30. It is for the Court authoritatively to determine the meaning of Part III of the 1987 Law. The Court has the power to spell out its meaning if the States has not, on the face of the legislation, conveyed its intention clearly, expressly and completely. If the meaning is not clear, express and complete then the Court has power either to find and declare implications in the words used by the States or by regarding the breadth or other obscurity

of the express language as conferring a power to elaborate its meaning in accordance with public policy and the purpose of the legislation.

Part III was drafted by the Law Officers as a stand-alone section in the legislation. It was the duty of the Legislation Committee to determine whether the draft *Projet de Loi* went further than the States resolutions. Had Legislation Committee considered that the draft *Projet* went further than the States resolutions then it would have been necessary for the sponsoring committee to draft a supplementary Policy Letter for consideration by the States when it considered the *Projet*. There was no such Policy Letter. The States were obviously satisfied that the legislation reflected their purpose and intent.

Section 18 reads as follows: (emphasis supplied)

“18 An owner of any land who, by virtue of his ownership thereof, is bound to comply with or has the benefit of a covenant, may apply to the Court for an order that the covenant be discharged or modified in the manner specified in the order.”

The words by ‘virtue of his ownership’ are of importance. Servitudes run with the land.

31. The Plaintiffs say that the 1987 Law is relevant and material only if the Court finds that the Plaintiffs’ development proposals would be a *prime facie* breach of the 1975 rights. The Plaintiffs argue that if they have to resort to the 1987 Law to achieve their objective then ‘covenants’ in section 18 necessarily includes ‘servitudes’. The Plaintiffs argue that covenant must be interpreted in the context of Guernsey real property law and not English real property law which has entirely different origins. A covenant is an agreement and embraces servitudes. The Plaintiffs, to the extent that it may be necessary to refer to the reasoning of the Wilberforce Committee, argue that the States were recommended to adopt a suggested solution but not thereby to incorporate into Guernsey Law substantive English law concepts and distinctions. There is a limited definition of ‘covenants’ in Part III of the 1987 Law at Section 25 (the Interpretation Section): (emphasis supplied)

“covenant” includes a charged covenant within the meaning of Part II of this Law”

Part III is therefore expressly not restricted to charged covenants only. Indeed it would appear that the legislation does not provide that all positive covenants will run with the land. They will run with the land if they are designated in a registered document as a charged covenant. Part II of the 1987 Law deals with the enforcement of charged covenants.

32. The Defendant refutes the Plaintiffs argument. It asserts that the power to modify or discharge covenants in the 1987 Law does not apply to servitudes. Put simply it argues that section 18 applies to positive and negative covenants but servitudes are not covenants within the meaning of section 18. In English real property law servitudes would be classified as easements. They are distinct from negative and positive covenants. The Defendants further contends that the acquisition or extinguishment of easements is governed by English common law, and that of restrictive covenants by the Law of Property Act 1925. The Defendant asserts that as the Committee following the Wilberforce Committee’s recommendations on positive covenants did not recommend that the States should legislate to grant to the Court a power to modify or discharge servitudes.
33. I am satisfied that section 18 of the Law is clear, express and complete. The States resolutions directing the preparation of legislation were clear in themselves. One of them directed that legislation should be prepared so as to give the Court “power to modify or

remove any onerous covenants”. The legislation which in time was approved by the States did not limit that power to positive and negative covenants.

34. A covenant is an agreement between two or more persons in which they contract to do or allow something or to prevent or refrain from doing something. It would strain the meaning of the word covenant to limit it in the way contended by the Defendant. The purpose of Part III of the 1987 Law was to confer on the Royal Court a mechanism in appropriate cases inter alia to rid real property of the burdens of servitudes. It is not an unfettered right. I do not accept the Defendant’s submission that the States when passing the *Projet de Loi* intended to limit the scope of Part III so as to exclude servitudes. I have so concluded notwithstanding Miss White’s forceful submissions concerning the references in the Policy Letter to the English Report of the Committee on Positive Covenants Affecting Land. The principles of statutory interpretation to which she referred me would have been of some relevance if section 18 had not been clear, express and complete.

35. If it had been necessary for me to have regard to the Policy Letter in order to interpret section 18 then I express myself satisfied that in 1987 the States intended to modernise Guernsey real property law in order to facilitate development of units of accommodation in an Island where land designated for development for housing purposes was at a premium. Thereby the States hoped to relieve an acute housing problem whilst preserving ever decreasing areas of undeveloped land. It would in my view have been contrary to public policy and the purpose inherent in the Policy Letter to give to the Court a narrow power which would preclude it from modifying and discharging onerous servitudes in appropriate cases.

36. *QUESTION 3*

If the answer to 2 is yes, then

(a) what directions should be given to the Jurats concerning the matters which the Court is to consider under Section 20;

(b) how should compensation (if any) be calculated under Section 21.

37. It is to be recalled that the Court will only have regard to the 1987 Law if it concludes that one or more of the existing 1975 rights would be breached if the Plaintiffs were to proceed with their development plans. In that event the Plaintiffs make application under Section 18 of the 1987 Law to discharge or modify any offending servitude.

Since 1987 the Royal Court has had the power to sanction a modification of a covenant and the importance of that power is that it can order a modification even if its order falls short of full observance of customary law modification principles. In such a circumstance appropriately it would have the power to award compensation.

The 1987 Law also provides that the Court can go further than modification. It can discharge a covenant. In this case the Plaintiffs seek the discharge of any material covenants which may preclude the development which they seek.

38. The Court’s powers in dealing with applications for modification or discharge are fettered. Section 19 and 20 provide as follows: (emphasis supplied)

“19. The Court shall only make an order under section 18 if having considered all the circumstances of the case, including where appropriate the

matters set out in section 20, it is satisfied that it would be oppressive or unreasonable if the covenant were not to be discharged or modified.

20. *The matters mentioned in section 19 which the court is to consider amongst the circumstances of the case are –*

- (a) *whether the cost or burden of compliance with the covenant is likely to be disproportionate to any advantage or benefit which would be derived from such compliance;*
- (b) *whether, since the covenant was created, the cost or burden of compliance with the covenant has increased so as to throw a fresh and unexpected burden onto the land;*
- (c) *whether the covenant, by reason of changes in the character or nature of the land in question or the neighbourhood or other circumstances, is obsolete;*
- (d) *whether the covenant impedes some reasonable use of the land;*
- (e) *whether the covenant secures any practical advantage to any person entitled to the benefit of it;*
- (f) *whether the persons of full age and capacity entitled to the benefit of the covenant have agreed, expressly or by implication to the discharge or modification of the covenant;*
- (g) *whether, if the covenant were to be discharged or modified, money would be an adequate compensation for any loss or disadvantage likely to be suffered by any person entitled to the benefit of the covenant as a result of the discharge or modification.*

39. The Court’s power to pay compensation is stated in Section 21. (emphasis supplied)

“21. An order under section 18 to discharge or modify a covenant may direct the person who applied for the order to pay to any person who is entitled to the benefit of the covenant, and who is likely to suffer any loss or disadvantage as a result of the discharge or modification such compensation as may be specified”

40. I do not consider it appropriate now to set out the directions which I should give to the Jurats. These will be discussed with Counsel after evidence has been heard and before they make their final speeches. However to assist Counsel I will now deal with points argued by Counsel.

Section 20 circumstances

41. The Court may take into account the circumstances set out in Section 20 if it is appropriate to do so. Whatever circumstances it does take into account it must not modify or discharge a covenant unless it is satisfied that it would be oppressive or unreasonable to the Plaintiff if it did not do so. This is a hurdle of some significance. The Plaintiffs contend that it would be oppressive or unreasonable in all the circumstances if the Court did not modify or discharge an offending covenant.

42. The words oppressive or unreasonable must be given their natural meaning. When considering whether it would be oppressive or unreasonable the Court as a material consideration may take into account the fact that Clos du Mesnil was purpose built as a block of three flats and has remained so and that the Plaintiffs wish to redevelop an area of their land which they retained in 1975, perhaps hoping that one day they would secure infill development permission.
43. Subsections (a) – (g) of Section 20 must also be given their natural meaning. The application of these and other relevant circumstances to the facts of the case is a matter for the Jurats. I do not consider it appropriate to rehearse the arguments which they may conceivably consider to be relevant. However I do make some limited observations.
44. In considering whether it would be oppressive or unreasonable not to discharge a second right of way to Vauvert (if it exists) the Court must weigh in the balance the competing arguments of the parties. The Court would in so doing be bound to include in its deliberations consideration of the following:
- (i) whether the occupants of Clos du Mesnil would suffer any significant loss of enjoyment if the flats enjoyed only one right of way to Vauvert, taking into account that Clos de Mesnil was granted in 1975 the benefit of a right of way on foot and with vehicles to nearby Le Couperderie;
 - (ii) the limited surface area over which two rights could be exercised with the consequence that they would be close together;
 - (iii) the fact that there is no requirement that either right of way should be other than a tunnel passageway if that is what suits the Plaintiffs.
45. The Court must also weigh in the balance whether it would be an unjustified burden on the Plaintiffs if they were required to continue to provide a second passageway giving access to Vauvert. The Court would have to have regard to the fact that if there is a second right of way to Vauvert its existence cannot preclude the construction of flats. Its existence would do no more than limit the surface area of habitable accommodation which could be developed on the ground floor of a new building.

Section 21 Compensation

46. If the Court is minded to order the discharge or modification of a covenant then if it considers that the Defendant would suffer any loss or disadvantage it has a discretion to order compensation.
47. I have been referred to a number of English authorities where Courts in that jurisdiction have awarded compensation. I have concluded that cases where the defendant owner of land had taken steps which put him in breach and left him open to an injunction or an award of damages are not relevant to the computation of statutory compensation in this case. Unsurprisingly the English Courts saw fit in those cases to compute damages on the footing that the aggrieved plaintiff and defendant should be considered in the same position as if the defendant had not carried out the offending development in breach of the plaintiff's rights. It followed in those cases that the original bargaining power of the plaintiff should be respected. Inevitably in such cases the profit to the plaintiff would have been at the heart of the bargaining which would have taken place.

That scenario is far from the position in this case where no building work has been carried out and so no breach has occurred. The Court in this case is not concerned with an action for an injunction or for damages. The Court in this case would be assessing

compensation as provided for in section 21. The Plaintiffs being owners of the servient land far from being in the wrong have first to satisfy the Court that it would be oppressive or unreasonable to them if the Court did not order that a servitude should be modified or discharged.

48. In determining whether there is likely to be loss or disadvantage to the Defendant in this case the Court should have regard not only to features which are likely to impact adversely on the enjoyment of the dominant land but also to have regard to any compensating benefits likely to arise from the development which will enhance the enjoyment of the dominant land.
49. The Court if it resolves to award compensation must not take into consideration the loss of amenity which Clos du Mesnil may suffer as a result of the construction of an entire building because there is no restrictive covenant preventing the Plaintiffs from constructing a building in the location which they propose.
50. It is to be recollected that Section 21 provides that compensation may be payable (emphasis supplied)

“to any person who is entitled to the benefit of the covenant (in this case the Defendant) and who is likely to suffer any loss or disadvantage as a result of the discharge or modification.”

51. If the Court were to conclude that compensation should be payable to the Defendant it should be paid only to compensate for the amenity loss or disadvantage likely to be suffered by the Defendant as a result of the Court making an order. The Court will first have to identify the loss or disadvantage if any which the Defendant is likely to suffer and then compute appropriate compensation. If the Defendant cannot show that it is likely to suffer any loss or disadvantage to its enjoyment then no compensation should be awarded. If the Defendant suffers an insignificant loss or disadvantage to its enjoyment then any compensation sum should reflect that fact.
52. For these reasons I have concluded that the potential profit which the Plaintiffs may make if they redevelop their land is not a relevant factor to be taken into account in computing compensation.
53. If I am wrong in my interpretation of section 21 and the Court is obliged to take into account in some way the likely benefit which would accrue to the Plaintiffs then the Court should restrict itself to taking into account the profit which will accrue to the Plaintiffs by virtue of the modification or discharge of the second right of way. If the Court discharged the second right of way then the benefit to the Plaintiffs would be the extra area of accommodation they would gain on the ground floor of the proposed building and no more than that.

54. *QUESTION 4*

“To the extent necessary, what are the material principles of the Guernsey customary law of prescription applicable to this case; in particular, whether a servitude may be extinguished and/or refined or otherwise varied by either (a) user or (b) non-user or (c) prescription acquisitive over time.”

55. The Plaintiffs assert that certain of the 1975 rights have been extinguished or substantially modified by the operation of prescription.

56. Basnage in Tome 2 of his 4th edition emphasised the underlying principle of liberty of real property. He stated as follows at p. 567:

“.....mais la liberté se peut racquerir par la possession de quarante ans continuels, contre le titre de servitude.”

At p. 568 he stated as follows:

“Toutes choses étant naturellement libres, & le retour de chaque chose à son premier état étant si facile, les lois ont introduit des moyens pour recouvrer la liberté que l’on avoit perdue. En cet article la Coutume admet la prescription de la liberté contre la servitude, après quarante ans de non jouissance, de sorte que si durant ce temps l’on n’a point exercé le droit de servitude sur le fonds lequel y étoit sujet, il en demeure entierement affranchi...” and

“Qoique la prescription de la liberté contre la servitude soit si favorable, que suivant cet article elle puisse se racquerir par quarante années, cela ne laisse pas de recevoir de la difficulté dans l’usage & dans la pratique;”

57. Basnage at p.568 with reference to the part use of a servitude stated as follows:

“Il suffit aussi de retenir la servitude en partie, parce qu’elle est individuelle, pro parte retineri, pro altera parte amitti non potest; c’est assez de passer par un endroit d’un chemin, ou de faire couler l’eau sur une partie de l’héritage pour conserver ces servitudes, l. stillicidii, ult. quemadm. servit. amitt. parce que je m’en peux server selon ma commodité, & comme je le trouve à propos.”

58. I do not consider it appropriate at this stage exhaustively to review the authorities on Norman customary law relating to servitudes but instead to deal with them should they prove relevant in due course at the hearing. To review comprehensively even the likely material customary law principles relating to the right of way, washing line and car parking space issues would in advance of evidence be a demanding exercise some of which may prove in the event not to have been necessary.

Depending upon the evidence admitted at the trial of this case all or some of those statements made by Basnage may be of relevance.

59. It was common ground between the parties that since the enactment of the Loi Relative á La Prescriptions Immobilière 1909 the prescriptive period has been 20 years. In 1852 it had been reduced from the customary law period of 40 years to 30 years by the law entitled “De la Prescription Immobilière”. The 1909 law applies to all real property, real property actions and matters dependent on real property.
60. Counsel in argument differed with regard to the burden of proof in a dispute whether prescription has operated to extinguish a servitude. Mr Dawes referred to the distinction under Norman customary Law between ‘servitudes continues’ and ‘servitudes discontinues’. A ‘servitude continue’ is one which is or may be continual without the need for man to exercise it. ‘Servitudes continues’ would by way of example include rights to a view and a water conduit. A ‘servitude discontinue’ is one that requires a positive act on the part of a person entitled to exercise it. ‘Servitude discontinues’ would by way of example include a right of way, a right to draw water, a right to irrigate and a right of pasturage.
61. Relying on the underlying principle of liberty of the servient land Mr Dawes submitted that whereas in the case of a ‘servitude continue’ the burden of proof would be on the

owner of the servient land that is not the case where a ‘servitude discontinue’ is concerned. Therefore in the case of a right of way the onus would be upon the person in possession of the right (in this case the Defendant) to prove use of a right so as to prevent extinction of the servitude or in certain circumstances a reduction of its extent. Mr Dawes claimed that the underlying principle that gives rise to the distinction is that it would be virtually impossible in the case of a ‘servitude discontinue’ for the Plaintiffs to prove that at no time had a right been exercised by the Defendant or someone representing it. A right could conceivably have been exercised intermittently at odd times of the day or night unknown to the Plaintiffs even though it appeared that it had not been exercised. It is easier for the person who has the benefit of a right to prove its exercise than for the person burdened by it to prove a negative.

62. Miss White submitted that the burden of proof was on the owner of the servient land (the Plaintiffs) to prove that the Defendant (or its predecessor in title) as owner of the dominant land had not used the right during the prescriptive period.
63. Having considered Basnage’s exposition of Norman customary law on servitudes I am satisfied, not without some hesitation, that Norman customary law would in the case of a right of way which is a ‘servitude discontinue’ place the burden on the Defendant to prove that a right has been exercised but only once the Plaintiffs have raised the matter and established a prima facie case.
64. I derive some comfort from what is contained in Pardessus *Traité des Servitudes ou Services Fonciers* 8th ed Tome 2 1838 under the heading *De l’extinction par le non usage* – at pages 166 - 172. I do so with appropriate caution given that it is not a work on Norman customary law but on the Code Civil. I do so mindful that judges in the Royal Court have not hesitated to refer to Pardessus in cases where Norman customary law may not state with clarity the customary law position on servitudes and where no clarification can be found in Guernsey authorities.
65. I am conscious that I may not have answered the four questions as extensively as Counsel may have wished. However I am confident that the Plaintiffs and Defendant should now be better informed on matters of law which should be taken into account by them and their clients.
66. Should Counsel consider that there are other matters of law on which they would wish me to pronounce I will be willing to hear their representations as to why it would be appropriate to do so. It is likely that I will be prepared to pronounce further on matters of law in this case if there is a likelihood that it will assist in the resolution of differences between the parties or if it will enable them to narrow down the scope of factual issues to be determined by the Jurats.