Lovering v AFR Advocates
Royal Court
28th November 2017

JUDGMENT
53/2017

Claim in professional negligence in the conveyance of a property.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

RICHARD ANTHONY BAKER LOVERING
and
CHRISTINE ANNE LOVERING **Plaintiffs**

-and-

PETER JOHN GRANVILLE ATKINSON, MARK GERARD FERBRACHE AND PAUL RICHARDSON IN PARTNERSHIP AS ATKINSON FERBRACHE RICHARDSON ADVOCATES AND NOTARIES PUBLIC **Defendants**

Dates of hearing: 16th to 20th October 2017

Judgment handed down: 28th November 2017

Before: Richard James McMahon, Esq., Deputy Bailiff
Jurats: C H Le Pelley, T J Ferbrache and S J Morris

Counsel for the Plaintiffs: **Advocate C A Tee**
Counsel for the Defendants: **Advocate S R Geall**

Cases, Texts & Legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008
The Ordonnance relative au Barreau et au Corps des Écrivains, 1932
Payne v Walsh (unreported, 30 October 1986)
de Putron v de Putron and de Putron [2013] GLR Note 1
Pothier, *Traité des Obligations*
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896
Bank of Credit & Commerce SA v Ali [2001] 1 AC 251
Boyle v Highfield Country Apartments Association [2017] JRC 157
Wiggington & Milner Ltd v Winster Engineering Ltd [1978] 1 WLR 1462
Willson v Greene [1971] 1 WLR 635
Webb v Nightingale (8 March 1957)

Baird v Hastings [2015] NICA 22
Healey v Shoosmiths (a firm) [2016] EWHC 1723 (QB)
The Misuse of Drugs (Bailiwick of Guernsey) Law, 1974
The Firearms (Guernsey) Law, 1998
Wellesley Partners LLP and Withers LLP [2016] 2 WLR 1351
Jackson & Powell on Professional Negligence, 8th ed.
Owen v Fielding [1998] ECGS 110

Introduction

1. This is a claim by Richard and Christine Lovering, the Plaintiffs, in professional negligence against the then partners of the firm that is now AFR Advocates, the Defendants. It arises from an allegation that the Defendants failed to spot and advise upon an alleged defect in title when the Plaintiffs purchased property in Torteval in 2009. The Advocate who acted for them was Advocate Mark Ferbrache, but Advocates Peter Atkinson and Paul Richardson are also Defendants because the three of them were in partnership at the material time.

2. The Plaintiffs are represented by Advocate Clare Tee and the Defendants by Advocate Geall. The Court has had the benefit of a bundle of documents and will refer to some of them by reference to the tab in that bundle behind which the relevant document can be found. The Court undertook a vue de justice as well.

3. This judgment, which has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008, contains the unanimous findings of the Jurats.

General directions

4. The Deputy Bailiff reminded the Jurats about 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 were directed that they must accept the Deputy Bailiff's directions on the law and follow them. The Deputy Bailiff explained that to establish something on the balance of probabilities means to prove that something is more likely so than not so. Whilst the burden of proof generally rested on the Plaintiffs, insofar as the Defendants sought to establish any fact, the burden of proof rested on them to prove that fact to the same civil standard. In respect of the Defendants' assertions that the Plaintiffs had failed to mitigate their losses, the burden of establishing that failure rested on the Defendants.

5. The Jurats were directed to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the witnesses, and which evidence they treated as reliable, and which they considered was not. They might take account of the arguments in the speeches they heard, but were not bound to accept them. 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. The Deputy Bailiff summarised that position by clarifying that, when it comes to the facts on the questions for determination in this case, it is the Jurats' judgment alone that counts.

6. The Deputy Bailiff emphasised the need for the Jurats to have regard to the cases pleaded by the parties because these formed the basis of the dispute between them. If the Jurats felt that they had heard evidence that did not concentrate on the central issues they were required to resolve, they could, save to the extent that such evidence went to the credibility of a witness, choose not to make any findings about what might be regarded as the surrounding circumstances of the case.

Pleadings

7. The Plaintiffs have pleaded their claim in a particular way by reference to what they define as "the Defect" and the duty the Defendants had in respect of it. The Cause, settled by Advocate Crawfourd, was first tabled on 15 May 2015.

8. There is no dispute that the Plaintiffs engaged the Defendants to act for them in the purchase of La Roche Douvre just before Christmas in 2008 and that, until their purchase completed on 13 January 2009, the Defendants were their legal advisers and conveyancers in respect of that purchase. The Defendants also admit that, pursuant to this retainer, they had a duty to exercise reasonable skill and care in the purchase. The Defect is alleged by the Plaintiffs to have existed at the time of their purchase. That Defect relates to "*the Driveway*" by which the owners of La Roche Douvre gain access from Rue de Rougeval to the bulk of the land on which the dwelling-house now bearing that name was built in the 1960s. The particulars pleaded are:

> "*(a) the majority of the Driveway in use at the time of the Purchase ran over land forming part of the Property and constituting the intended course of the Driveway ("**Intended Course**") as specified in a conveyance of the Property registered on 15 November 1960 and a material part of which is shown outlined in red on the plan annexed hereto;*
>
> *(b) part of the Driveway in use at the time of the Purchase did not run along the Intended Course, and instead ran along a course over land belonging to a third party as shown outlined in blue on the plan annexed hereto ("**Unintended Portion of the Driveway**"), when in accordance with the Intended Course it should have run a course over land originally forming part of the Property as shown outlined in yellow on the plan annexed hereto ("**Intended Portion of the Driveway**");*
>
> *(c) the land over which the Intended Portion of the Driveway should have run was conveyed out of the Property to a third party by a conveyance registered on 17 May 1984, and it was therefore no longer possible at the time of the Purchase for the Driveway in its entirety to run along the Intended Course or otherwise to run over land which formed part of the Property;*
>
> *(d) there was no right of way serving the Property in respect of the land over which the Unintended Portion of the Driveway ran. Therefore, the owners for the time being of the Property, both prior to and after the Purchase, had no right to pass over the Unintended Portion of the Driveway;*
>
> *(e) in consequence of the aforementioned, upon the Purchase, the Plaintiffs neither owned, not possessed a right of way over, the entirety of the Driveway in use at the time of the Purchase by virtue of the Unintended Portion of the Driveway and the Intended Portion of the Driveway being in the sole unencumbered possession of third parties rather than the Property, and therefore in using the Driveway they committed trespass over the Unintended Portion of the Driveway.*"

9. Cross-referencing to the plan annexed to the Cause is significant because it shows the extent of the areas of land in the vicinity of what might be termed the “dog-leg” in the Driveway to which the Plaintiffs refer. The plan itself is an aerial photograph. It does not appear to be the same as any of the other aerial photographs in tab 34A of the trial bundle. If nothing else, the vehicles shown are in different places. It is more enlarged anyway than any of those aerial

photographs. The two red lines shown thereon appear to follow the outline of the area coloured blue on the plans numbered 2842 and 4782 lodged at the Greffe. The yellow area is shown in the corner of the dog-leg between the two red lines. In the angle of the dog-leg it stretches across the entire area between the two red lines. It touches the red line partway along what would be the hypotenuse of a triangle. The other two sides of the triangle run along the red line as it bounds a neighbouring property, Le Sommet, and a field, which was once owned by Nicholas Brehaut ("the Brehaut field"). The blue area is shown with what would roughly be its hypotenuse being along the boundary with premises now owned by Mr and Mrs Harding, including what is the opening made furthest from Rue de Rougeval, and the other two sides of the rough triangle made by the area shown as blue are long the red line, ie, the western boundary of the area the Plaintiffs argue is the Intended Course. The yellow and blue areas meet at the red line in the angle of the dog-leg. So as to assist, the Plaintiffs produced a further enlargement of this element of the aerial photograph (tab 17B of the trial bundle), which shows the yellow and blue areas meeting for a short distance rather than it being a single point. The Deputy Bailiff directed the Jurats to concentrate on the Plaintiffs' case as pleaded in their Cause and to disregard any suggestion possibly being made on their behalf by Advocate Tee that the case turned on any other problem that the Plaintiffs might be advancing as amounting to a defect in title.

10. The Defendants deny that this Defect existed at the time they were retained by the Plaintiffs in respect of their purchase of La Roche Douvre. (The Defendants' further or alternative defence to the claim had been that the person selling La Roche Douvre to the Plaintiffs in 2009 had acquired acquisitive title to the disputed area of land in 1988, ie, 20 years after purchase (as set out at para. 20 of Les Defences). The Deputy Bailiff reminded the Jurats that the Defendants were no longer relying on that contention as a result of having seen the evidence of Lawrence Harding that had been filed on behalf of the Plaintiffs in late September 2017. Accordingly, the Jurats were directed that they were not required to consider at all any issue relating to acquisitive title.)

11. The Plaintiffs claim that if they had known about the Defect at the time, they would not have proceeded with the purchase of La Roche Douvre until it had been rectified to their satisfaction. The Defendants deny that the Plaintiffs are able to establish this causal link. They say that the Plaintiffs were so keen to buy La Roche Douvre that they would have taken any risk associated with gaining legitimate access to the dwelling-house and its curtilage, especially given the First Plaintiff's known appetite for risk.

12. In respect of the breach of duty to exercise reasonable skill and care, the Plaintiffs allege that the Defendants failed to investigate title properly, failed to make the necessary searches and to make necessary enquiries in respect of the title, in particular, to the Driveway, and so failed to identify the Defect and failed to advise the Plaintiffs of it. The Defendants deny this allegation. They do so on the basis that there was no Defect anyway. The Deputy Bailiff further directed the Jurats that there was no allegation pleaded against the Defendants that there had at any time been an admission of liability, despite the nature of some of the evidence the Court had heard touching on that possibility. In the absence of any such pleading, the way to consider the question of anything said or indicated about liability was to treat it as a means by which to call into question the credibility of the Defendants' witnesses, particularly as that related to Advocate Ferbrache.

13. On the Plaintiffs' case, the Defect was only discovered when they were selling La Roche Douvre in 2012. It took time to sort out the Defect to the satisfaction of the couple purchasing La Roche Douvre and, in particular, the firm of Advocates advising the bank from which those purchasers were borrowing. As a result, the completion of the sale was delayed and the Plaintiffs claim is for the monies they say they lost as a result. The amounts are set out in

para. 11 of the Cause. They total £115,143.95, although during the course of the trial some of those losses were abandoned by the Plaintiffs.

The witnesses

14. Turning to the evidence, the Deputy Bailiff reminded the Jurats that they had heard in person from both Plaintiffs, from Jeremy Woodward and from Advocate Ferbrache. In addition, there were written statements from Lawrence Harding, Colin Guilbert, Brian Gabriel and Una Harrison. The Jurats were directed to treat the statements of Lawrence Harding and Brian Gabriel as unchallenged evidence. The Defendants had chosen not to require either of these witnesses to be called to give oral evidence so as to test any of their evidence by cross-examination. In respect of Colin Guilbert, the Plaintiffs served a hearsay notice in accordance with section 2(1) of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 and rule 1 of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 dated 13 July 2017 (tab 14). In respect of Una Harrison, the Defendants served a hearsay notice dated 13 September 2017 (tab 10).

15. The Deputy Bailiff drew to the Jurats' attention the considerations that are relevant to weighing hearsay evidence found in section 4 of the 2009 Law, which provides:

> "*(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings, the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.*
>
> *(2) Regard may be had, in particular, to the following –*
>
> *(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness,*
>
> *(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated,*
>
> *(c) whether the evidence involves multiple hearsay,*
>
> *(d) whether any person involved had any motive to conceal or misrepresent matters,*
>
> *(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose,*
>
> *(f) whether the circumstances in which the evidence is adduced as hearsay suggest an attempt to prevent proper evaluation of its weight, and*
>
> *(g) any other circumstances which the court may, in the interests of justice, consider relevant.*"

16. The reason why Mrs Harrison was unavailable to give evidence at the trial is that she died on 8 January 2017. Her evidence was in the form of a short Affidavit sworn by her on 16 October 2012. The reason why Mr Guilbert was unavailable to give evidence is that his general practitioner had given the opinion that, due to serious illness and the treatment associated with it, he would not be medically fit to attend. The Deputy Bailiff reminded the Jurats that Advocate Geall had made submissions as to whether someone else from Carey Olsen involved in 2012 and 2013 on behalf of the Plaintiffs, eg, Advocate Jason Morgan, could have been called to give some of the evidence that Mr Guilbert gave in his unsworn witness statement, although he acknowledged that there were some elements of Mr Guilbert's

evidence that could only be given by that gentleman. The Deputy Bailiff further directed the Jurats that they could have regard to the contemporaneous documentation to which Mr Guilbert makes reference as possibly supporting the evidence set out in Mr Guilbert's statement. Although it would be a matter for the Jurats, they might wish to consider how these factors affect their assessment of the weight to be afforded to what Mr Guilbert had to say about a telephone conversation on 9 October 2012 of which there was no recording and so no transcript.

17. A further issue on which the Deputy Bailiff gave the Jurats some direction arose from the criticism made by Advocate Tee about the order in which the Defendants chose to call their witnesses. Advocate Tee suggested that Advocate Ferbrache, as one of the parties to the case, should have been called before Mr Woodward was called as a witness on behalf of the Defendants. The Deputy Bailiff indicated that he could not direct the Defendants how to run their case in this regard, but that this level of criticism could be dealt with by way of a suitable direction. Accordingly, he reminded the Jurats that they should approach the evidence of Advocate Ferbrache, so far as they considered it necessary to do so, on the basis that he had already had the benefit of hearing the evidence of Mr Woodward. If they felt that Advocate Ferbrache had in any way modified the evidence that he then gave, they were able to adjust the weight they would choose to give it accordingly.

The facts

18. In 2008, the Plaintiffs were house-hunting. The First Plaintiff acknowledges that previously he had been a wanderer. However, as the Plaintiffs grew older, they were looking to find a permanent home in Guernsey to purchase. At this time, they were renting their home. The First Plaintiff identified a detached bungalow in Torteval being marketed through Morris & Co. The property was called La Roche Douvre. The Second Plaintiff regarded Torteval as her preferred parish. After viewing the property, initially involving just the First Plaintiff attending with the agent, they liked La Roche Douvre enough to make an offer. The vendor of La Roche Douvre, Una Harrison, did not accept the Plaintiffs' offer. Another offer was made by someone else, causing the Plaintiffs to step back. When the other purchaser was unable to proceed, the agent contacted the First Plaintiff to see if the Plaintiffs were still interested in purchasing La Roche Douvre. This time, the Plaintiffs' offer of £525,000, of which £25,000 represented the price for the personalty, was accepted by Mrs Harrison.

19. The First Plaintiff had been instructing Advocate Mark Ferbrache and his colleagues in respect of various personal and business affairs since around 2005. This existing relationship continued once the Defendants established their new firm in 2007. A sister of the First Plaintiff, Linda, was employed by the Defendants. A brief handwritten note made by Advocate Ferbrache (tab 35) indicates that he was first aware of the Plaintiffs' plan to purchase La Roche Douvre on 23 December 2008. By a letter dated 24 December 2008 from Morris & Co., stamped as having been received that day at noon (tab 36), Advocate Ferbrache was provided with the title deeds for the property and draft Conditions of Sale. He was informed that Randell & Loveridge were acting for the vendor.

20. On Monday, 29 December 2008, the First Plaintiff telephoned the Defendants to check that they had received the paperwork from Morris & Co. His sister, Linda, confirmed that Mr Woodward had already started the research and would be in touch shortly. In an e-mail to Mr Woodward at lunchtime that day (tab 36), she commented that it was clear the First Plaintiff was keen. That same day, Mr Woodward sent to the Plaintiffs a letter of engagement identifying that he would be assisting Advocate Ferbrache and would commence their investigation into title to La Roche Douvre, involving a Cadastre and a Greffe search and a site visit, following which the Plaintiffs would be contacted so that the firm could report on

title (tab 38). The First Plaintiff also telephoned to speak to Mr Woodward on 30 December 2008.

21. As part of his investigations, Mr Woodward completed a pro forma internal document (tab 41) and annotated some print-outs from the Cadastre records (tab 39). In doing so, he had looked at the conveyance by which Mrs Harrison had purchased La Roche Douvre in 1968 (tab 21), and the conveyances of that land in 1967, 1960 and 1945 (tabs 20, 19 and 18 respectively). He had also looked at a conveyance in 1984 by which Mrs Harrison sold a portion of her land to her neighbours (tab 26). The annotations made on the Cadastre records relate to the properties adjoining La Roche Douvre, being a field in the ownership of Christine Snell, Le Sommet and Laitte Revel and refer to various conveyances. The other boundaries of La Roche Douvre are public roads. At that time it was envisaged that completion would take place on 27 January 2009. The details of the conveyances to which the Court's attention has been drawn are as follows.

22. Mrs Harrison, then referred to as the widow of a Mr Mansell, purchased La Roche Douvre from William and Alice Humphreys-Lewis by way of a conveyance dated 17 September 1968 ("the 1968 Conveyance"). Annexed to the conveyance was plan numbered 4782, dated September 1968. The parcel of land purchased was described in two parts:

> "*PRIMO: UNE MAISON appelée "FOLIE" que la dite preneure se propose d'appeler "LA ROCHE DOUVRE", JARDIN et lisière de terre, situés bordant la route de la Folie en la paroisse de Torteval sur le Fief de Huit Bouvées – les dites prémisses de cet item indiquées en teint rouge sur le plan ci-annexé et paraphé en double ce jour par nous soussignés Lieutenant Bailiff et Jurés et GISANT: au nord-est et à l'est ou environ d'une jaonière appartenant aux dits bailleurs, le fossé entre deux mitoyen; au sud ou environ de et bordant la dite route de la Folie; à l'ouest et au sud-ouest ou environ d'un courtil appartenant à Monsieur Nicholas Brehaut, un fossé entre deux; et au nord-ouest ou environ pour petite partie de la lisière de terre du deuxième item de ce bail. SECUNDO: une autre LISIÈRE DE TERRE de dix pieds ou environ de laize, indiquée en teint bleu sur le dit plan ci-annexé, et GISANT:- au nord-est, à l'est et encore au nord-est ou environ d'une maison, serre et terrain appartenant à Dame Evelyn Melina Guille, veuve de Monsieur John Le Lacheur, des bornes entre deux; au sud-est ou environ pour petite partie des prémisses du premier item de ce bail; au sud-ouest ou environ du dit courtil appartenant au dit Nicholas Brehaut, un fossé entre deux; à l'ouest et au sud-ouest ou environ d'une maisonnette appelée "Le Sommet" et terrain appartenant à Demoiselle Mary Gallienne, un fossé entre deux; et au nord-ouest ou environ pour petite partie de et bordant la route de Rougeval.*"

The conveyance continues by referring to the following servitudes:

> "*Et souffriront la dite preneure ses hoirs et ayants-cause (1) à la dite Evelyn Melina Guille ses hoirs et ayants-cause droit de passage de pied de cheval, de charrue, de charrette et d'automobile, enfin comme par dessus une rue publique, par dessus la dite lisière de terre de ce bail indiquée en teint bleu sur le dit plan pour aller et venir toutes fois et quants de la dite route de Rougeval à leurs dites prémisses et ce en payant leur proportion des frais de maintien et entrétien de la dite lisière de terre; (2) aux dits bailleurs aux hoirs du survivant des deux et ayants-cause pareil droit de passage par dessus le terrain de ce bail indiqué en teint bleu et haché en teint bleu sur le dit plan ci-annexé et ce en payant leur proportion des frais de maintien et entretien du dit terrain et (3) aux dits bailleurs aux hoirs du survivant des deux et ayants cause le droit à leurs propres frais, d'ouvrir une brêche de quinze pieds de laize dans le fossé mitoyen, et ce entre les points marqués A et B sur le dit plan.*"

23. Plan 4782 (tab 17A) shows the position of Folie, as it was then known, at the end of a strip of land running from Rue de Rougeval. It is coloured blue and has marked on it in three places, the dimension of 10′ 0″ (ten feet). Two of those measurements are shown alongside the plot of land on which Le Sommet sits. Indeed, the blue colouring extends so as to include the narrower area bordering Le Sommet, ie, the fossé between. There is an arrow inbetween those two measurements with the arrowhead pointing towards the land on which Mrs Le Lacheur's land and dwelling-house, marked as "Rougeval", sits. The third ten feet measurement is closer to the hatched area, being the southernmost portion of the land shown coloured red. Points A and B are marked at the northwestern and southern points along the boundary with land being retained by the vendors, Mr and Mrs Humphreys-Lewis. The field owned by Mr Brehaut is shown as the other parcel bounding the strip of land. The narrower strip between ie, the fossé, is not coloured.

24. Mr and Mrs Humphreys-Lewis purchased Folie from John and Joan de la Mare by way of a conveyance dated 19 May 1967 ("the 1967 Conveyance"). In respect of the first part of the parcel of land purchased, on which Folie was situated, the document includes "*l'assiette des dites prémisses indiquée en teint rouge sur le plan No. 2842 logé au Greffe*". In respect of the second part, it states:

> "*SECUNDO: la dite LISIÈRE DE TERRE de dix pieds de laize (teint en bleu sur le dit plan No. 2842) et aboutissant au nord aux prémisses du premier item de ce bail et au sud à la route de Rougeval, GISANT: au nord-est ou environ des dites prémisses de la dite Evelyn Melina Guille, des bornes entre deux; au sud-ouest du dit courtil appartenant au dit Nicholas Brehaut, un fossé entre deux; à l'ouest et au sud-ouest ou environ d'une maisonnette appelée "Le Sommet" et terrain appartenant à Demoiselle Mary Gallienne, un fossé entre deux.*"

25. Mr and Mrs De La Mare purchased the land on which Folie was built from John and Evelyn Le Lacheur by way of a conveyance dated 15th November 1960 ("the 1960 Conveyance"). In respect of the first part of the parcel of land purchased, described as "*un morceau de terre*", the document includes "*le dit morceau de terre teint en rouge sur le plan ci-annexé et paraphé par nous soussignés Bailiff et Jurés*". In respect of the second part, it states:

> "*SECUNDO: une lisiére de terre (teint en bleu, avec mésurage, sur le dit plan) et aboutissant au Nord sur le morceau de terre du premier item de ce bail et au SUD sur la route de Rougeval, sur le dit Fief de Huit Bouvées: <u>GISANT</u>: à l'EST ou environ des dits maison, serre et terrain appartenant aux dits Bailleurs, des bornes entre deux et à l'OUEST ou environ du dit courtil appartenant au dit Nicholas Brehaut et d'une maison appelée 'Le Sommet' avec serre et terrain appartenant à Demoiselle Mary Gallienne, des fossés entre deux.*"

This 1960 Conveyance also reserved a right of way for the owners from time to time of the vendors' land to pass over this strip of land:

> "*ET souffriront les dits Preneurs, les hoirs du survivant des deux et ayants cause aux dits Bailleurs les hoirs du survivant des deux et ayants cause, droit de passage de pied, de cheval, de charrue, de charrette et d'automobile, enfin comme par dessus une rue publique par dessus la dite lisière de terre pour aller et venir toutes fois et quants de la route de Rougeval à leurs dites prémisses et en payant leur proportion des frais du maintien et entretien de la dite lisière de terre*".

The substance of this right of way was repeated in the 1967 Conveyance.

26. The plan referred to in the 1960 Conveyance became plan 2842 and is dated 15 November 1960 (also in tab 17A). The area coloured red is larger than on plan 4782 because it includes the area of land retained in 1968 by Mr and Mrs Humphreys-Lewis and there is no separate strip of land, including the hatched area, adjacent to field owned by Mr Brehaut, which became the continuation of the access route to the house throughout the time La Roche Douvre was owned by Mrs Harrison. The area coloured blue was, though, shown in the same manner as on plan 4782. (During the course of the trial, the Court had the benefit of viewing the original plans as lodged at the Greffe in order to clarify the markings thereon because some of the copying in the bundle was not all that clear.)

27. Mr and Mrs Le Lacheur registered the conveyance by which they purchased this land dated 6 December 1945 ("the 1945 Conveyance") two days after they appeared before the Bailiff and Jurats. The vendor was John Brouard, who gave an address in Cheshire and who appeared through his attorney, Osmond Hotton. The land conveyed was described as follows:

> "*une maison appelée "Laitte Revel", édifices, belles et courtil situé en la dite paroisse de Torteval sur le Fief de Huit Bouvées Gisant:- au nord ou environ de et bordant la Rue de Rougeval; à l'Est ou environ d'une maison, jardin et jaonière appartenant à Monsieur Nicholas Gallienne; au Sud et à l'Ouest ou environ de et bordant la Rue de Folie; et à l'Ouest ou environ d'un courtil appartenant à Osmond Priaulx Gallienne, écuyer, et d'un courtil appartenant à Demoiselle Mary Gallienne.*"

28. In addition to the background to the title acquired by Mrs Harrison by the 1968 Conveyance, part of her land was sold off by way of a conveyance dated 17 May 1984 ("the 1984 Conveyance"). Mrs Harrison sold to Cedric and Sheila Brookfield, the owners of Le Sommet:

> "*<u>A TRIANGULAR AREA OF LAND</u> forming part of a driveway shown coloured blue on Plan Nos. 2842 and 4782 lodged at the Greffe, situate near Rougeval in the said parish:*
>
> *<u>THAT</u> the area of land hereby conveyed is <u>BOUNDED</u>*
>
> *on or towards the North-east for a distance of approximately thirty feet by a field owned by Miriam Robilliard (nee Brehaut) wife of Gerald Osmond Robilliard, a hedge between;*
>
> *on or towards the South-east by a dwellinghouse called "Le Sommet" and land owned by the Purchasers, a hedge between; and*
>
> *on or towards the South-west and the North-west for a short distance by the remainder of the said driveway, the hedge between belonging to the Vendor*".

The purchase price was £100 and there was a covenant on behalf of Mrs Harrison and her successors in title not to allow the hedge owned by her to obstruct the view from the dwelling-house at Le Sommet and a covenant on behalf of Mr and Mrs Brookfield not to erect buildings on the area of land conveyed and to ensure that it remained grassed over and/or planted with shrubs in perpetuity.

29. Mr and Mrs Brookfield had purchased Le Sommet from S.C.B. Builders Limited by way of a conveyance dated 12 July 1979 ("the 1979 Conveyance": tab 21A). The relevant part of the boundaries clause in that conveyance reads:

"*on or towards the West and the North-west by a cottage, glasshouse and land owned by Evelyn Melina Le Lacheur (nee Guille) widow of John Le Lacheur, a driveway ten feet in width (shown coloured blue on Plan No. 4782 lodged at the Greffe) between belonging to Una Harrison (nee Kaines)*".

30. Having incorporated the so-called triangular area of land into Le Sommet, Mr and Mrs Brookfield sold Le Sommet to Margaret Colley by way of a conveyance dated 4 June 1985 ("the 1985 Conveyance": tab 28). The relevant part of the boundaries clause in that conveyance reads:

> "*on or towards the West by a cottage, glasshouse and land owned by Lawrence Paul Harding and wife, a driveway ten feet in width (forming part of the said land shown coloured blue on the said Plan No. 4782) between belonging to Una Harrison (formerly Mansell, nee Kaines);*
>
> *on or towards the South-west and the North-west for a short distance by the said driveway owned by the said Harrison, the hedge between belonging to the said Harrison; and*
>
> *on or towards the North-east for a distance of approximately thirty feet by the said field owned by the said Robilliard, a hedge between*".

The covenants set out in the 1984 Conveyance were repeated. Following the death of Margaret Gardener, who was formerly Margaret Colley, one of her heirs, Elizabeth Clavadetscher, purchased the undivided two-thirds share of the other two heirs by way of a Conveyance dated 11 May 2006 (tab 29) and so became the new sole owner of Le Sommet. No boundaries are recited in that conveyance.

31. On the other side of the strip of land forming part of La Roche Douvre, the land remained in the ownership of Evelyn Le Lacheur until her death on 5 June 1980. (John Le Lacheur had died before the 1967 Conveyance.) Her will of realty dated 23 June 1972 was registered on 3 July 1980 (tab 23) and devised her Guernsey Real Estate to the persons sworn as executors or administrators of her will of personalty upon trust "*to sell realise and convert the same into money at such time or times and in such manner*" as they thought proper and "*pending such sale and realisation to manage the same and receive the income therefrom*". Mrs Le Lacheur appointed her brother and sister, Lawrence Guille and Millicent Tostevin, as the executors of her will of personalty, also dated 23 June 1972, which was proved in the Ecclesiastical Court by the two of them on 20 June 1980 (tab 22).

32. Mr Guille and Mrs Tostevin sold Laitte Revel to Lawrence and Heather Harding by way of a conveyance dated 27 November 1980 ("the 1980 Conveyance": tab 24). Clause 2 of that conveyance describes the boundaries as follows:

> "*<u>THAT</u> the premises hereby conveyed are <u>BOUNDED</u>:*
>
> *on or towards the North-west by a furzebrake owned by William Owen Humphreys-Lewis and wife, the hedge between belonging to the premises hereby conveyed;*
>
> *on or towards the North-east and the East by a driveway and land, the major part whereof (shown coloured blue on Plan No. 2842 lodged at the Greffe) owned by Una Harrison (formerly Mansell, nee Kaines), the remainder owned by the Vendors, the boundary for the major part being as shown on the said plan and for the remainder by boundary marks;*

on or towards the South by Rue de Rougeval; and

on or towards the West by a dwellinghouse called "Highfield", glasshouses, other buildings and land owned by the Heirs of the late Nicholas Gallienne, a wall and earthbank between".

Clauses 3 and 4 of that conveyance set out the following servitudes:

"*3. <u>THAT</u> the Vendors for themselves and their successors in title, as owners of part of the aforesaid driveway situate to the north-east of the premises hereby conveyed, hereby grant to the Purchasers right of way as over a public road over their said area of the aforesaid driveway in order to come and go at all times between the premises hereby conveyed, the said premises owned by the said Una Harrison and Rue de Rougeval aforesaid, on paying their fair share of the costs of upkeep and maintenance of the said part of the aforesaid driveway;*

4. <u>THAT</u> as reserved in the Conveyance by John Le Lacheur and wife (predecessor in title to the Vendors) to John Robert Daniel de la Mare and wife (predecessors in title to the said Una Harrison), registered on the 15th day of November, 1960, the Purchasers shall have a right of way as over a public road over the said land shown coloured blue on the said plan in order to come and go at all times between the premises hereby conveyed and Rue de Rougeval aforesaid, on paying their fair share of the costs of upkeep and maintenance of the said land".

33. Mr and Mrs Harding subsequently purchased from Mr and Mrs Humphreys-Lewis the land that the Humphreys-Lewises had retained when selling Folie to Mrs Harrison in 1968 by way of a conveyance dated 23 November 1982 ("the 1982 Conveyance": tab 25). The land conveyed is described as "*<u>AN AREA OF LAND</u> (the site whereof is shown, together with other premises, by way of identification but not of limitation coloured red on plan number 2842 lodged at the Greffe) situate at Rue de la Folie*". This conveyance continues:

"*<u>THAT</u> the premises hereby conveyed are <u>BOUNDED</u>:*

on or towards the North-east by a dwellinghouse called "La Roche Douvre" and land (being the remainder of the said premises shown coloured red on the said plan) owned by Una Harrison (formerly Mansell, nee Kaines), the hedge between being party;

on or towards the South-east by a dwelling house called "Laitte Revel", glasshouse, outbuilding, driveway and land owned by the Purchaser a hedge between;

on or towards the South-west by a dwelling house called "Highfield", glasshouses and other buildings and land owned by Kenneth Basil Moore and wife, a hedge between;

on or towards the North-west, the East and again the North-west on a curve by Rue de la Folie aforesaid;

<u>THAT</u> the Purchasers as heretofore granted or reserved shall have:-

(1) the right at their expense to make an opening of fifteen feet in the party hedge between the premises hereby conveyed and the said driveway (shown

hatched in blue on plan 4782 lodged at the Greffe) owned by the said Harrison, between the points marked "A" and "B" on the said plan; and

(2) right of way on foot with animals and vehicles over the driveway situate to the South-east of the premises hereby conveyed (shown coloured and hatched blue on Plan number 4782 lodged at the Greffe) owned by the said Harrison upon paying a fair share of the cost of upkeep and maintenance of the said driveway."

Mr and Mrs Harding now refer to their property as "Rougeval Laitte Revel".

34. In accordance with the requirement imposed by article 4 of the Ordonnance relative au Barreau et au Corps des Écrivains, made permanent on 18 January 1932 at the Court of Chief Pleas held that day ("*Tous contrats, obligations, procurations, billes de partage, pièces pour être mises sous le sceau du Bailliage, et autres pièces pour laquelle la signature des Jurés est requise, seront signés en marge de la main d'un des Officiers du Roi, des Avocats, ou des Écrivains, faute de quoi ils ne recevront pas la signature des Jurés, et ne pourront être déposés au Greffe afin d'être enregistrés*"), the 1979 Conveyance, the 1980 Conveyance, the 1982 Conveyance and the 1984 Conveyance were all signed by Advocate Langlois. The 1985 Conveyance was signed by Advocate Brelsford, who practised at the same firm as Advocate Langlois.

35. The handwritten annotations made by Mr Woodward on the print-outs from the Cadastre records demonstrate that he had reviewed these conveyances before he attended at La Roche Douvre with the First Plaintiff on 31 December 2008. At that site visit, Mr Woodward and the First Plaintiff walked around the site. Mr Woodward pointed out the boundary features, commenting that the boundary marks referred to in the 1968 Conveyance were not identifiable on site. Mr Woodward also pointed out the area that he thought had formerly been part of La Roche Douvre but which had been sold off by Mrs Harrison to the neighbours. Mr Woodward explained to the First Plaintiff that Mr and Mrs Harding enjoyed a right of way over the drive to the house to gain access to their land. There were two openings they saw, one nearer to Rue de Rougeval than the other. The First Plaintiff commented that he hoped he would be able to persuade Mr and Mrs Harding to relinquish their right of way, and clarified at the trial that he was referring to the right in respect of further down the drive to open up a gap in the party hedge to gain access to the additional land purchased by Mr and Mrs Harding under the 1982 Conveyance. The First Plaintiff had explained to Mr Woodward that he intended to knock down La Roche Douvre and rebuild it. He added that his reference to Mr and Mrs Harding relinquishing their rights related to his intention to install gates that could then be locked at a location that has now been identified as being in the vicinity of the line between the red and blue coloured areas shown on plan 2842. The First Plaintiff further explained that he did not need to commission a survey of la Roche Douvre because he was capable of undertaking this for himself. Nothing said by Mr Woodward at this site visit gave any cause for concern to the First Plaintiff.

36. During the course of this site visit, Mr Woodward took some photographs (tab 43). He marked on a location map of La Roche Douvre the positions from which each photograph was taken and the direction in which he was facing (tab 40). The photographs include the start of the drive from Rue de Rougeval, the fence running along the approximate boundary with Rougeval Laitte Revel, including the opening nearest the road in which a red car can be seen, and the second opening further down. There is also a view taken from just in front of the dwelling-house looking back up the drive. The area covered in tarmac at that time was in front of the house and stretching just a short distance up the drive. The majority of the drive had a grass strip running between the tracks made by tyres. (Mr Woodward acknowledges that he has placed one arrow (photograph 6) in the wrong direction.) Mr Woodward has also

written on some of the photographs, referring to kerbs found in places on both sides of the drive to La Roche Douvre, in the area between Le Sommet and Rougeval Laitte Revel.

37. During the early afternoon on 31 December 2008, Mr Woodward sent an e-mail to Advocate Ferbrache setting out what had been discussed with the Plaintiffs (tab 44). He regards this e-mail as acting as his file note. It comments on the First Plaintiff's intention to demolish and re-build and the enquiries that Mr Woodward had made with the Guernsey Financial Services Commission and the Financial Intelligence Service in respect of the source of funding, which the Second Plaintiff had explained was coming from the sale of the Plaintiffs' property in France some time earlier. Mr Woodward also wrote:

> "*Property matters. I ran through the boundary features and ownerships (if known) with Richard Lovering on site and we walked most of them. I pointed out the rights of way which Mr and Mrs Harding have although it looks to me if they have created the opening on to their land from their land and not from Roche Douvre land (which they have a legal right to do so). RL hopes to get them to relinquish that R of W (relating to the 15feet opening) at some time not now. (I WILL CHECK THIS POINT WITH HIM). Basically he seemed very relaxed with the information I had given him and is intent on purchasing.*
>
> *I said I wanted to check with Randells about the sale of a triangular area of land which is not shown on any plan but I believe I know where it is.*"

38. The Plaintiffs attended at Advocate Ferbrache's offices on 5 January 2009 for a meeting with him and Mr Woodward. Advocate Ferbrache made a brief handwritten file note which succinctly summaries the matters discussed (tab 45). It includes:

> "*Went through title. Considered plans/title etc. Some boundaries not attributed.*
>
> *Width of access road = 10' approx.*
>
> *RL had discussed felling/lopping trees with Env. Dept.*
>
> *Move in and later seek more development permissions.*"

Those present had regard to the photographs that Mr Woodward had taken and considered the plans, with Advocate Ferbrache highlighting that the plans were for the purposes of identification and not of limitation. Advocate Ferbrache also indicated that he would repeat title in the conveyance by which the Plaintiffs would purchase La Roche Douvre. The First Plaintiff expressed his concern about the width of the drive to the house, explaining that it appeared that the vegetation was overgrown and the need to be able to accommodate lorries down it for the building work the Plaintiffs intended to undertake at La Roche Douvre. Advocate Ferbrache referred to the width being 10 feet or thereabouts rather than any other specific measurement. The First Plaintiff was satisfied that the vegetation he had seen on site could be cut back adequately to obtain access.

39. The Guernsey Bar Conditions of Sale (1997 edition) were signed by the Plaintiffs at this meeting (tab 46). The operative date was stated to be 5 January 2009. The proposed completion date remained 27 January 2009. Mr Morris acknowledged receipt of a deposit of £52,500. One of the covenants given by Mrs Harrison in these Conditions of Sale was that:

> "*The Vendor covenants with and warrants to the Purchaser as follows:-*

(i) the Vendor has never been in dispute with any person about the Property or the Contents and the Vendor is not aware of any circumstance likely to give rise to any such dispute".

40. The First Plaintiff arranged to obtain early access to La Roche Douvre so that he could carry out preparatory works to make it habitable. La Roche Douvre had been unoccupied for a period prior to the Plaintiffs' purchase. The date for completion was brought forward to 13 January 2009. Under cover of a letter from Mr Woodward dated 9 January 2009 (tab 47), the Plaintiffs were sent a copy of a draft conveyance. That draft had been prepared by Mr Woodward. Advocate Ferbrache reviewed the draft and made some changes to it. It was also seen by the Advocate acting for Mrs Harrison, and Advocate Loveridge's initials appear to be on the face of the draft found at tab 48.

41. The Plaintiffs duly purchased La Roche Douvre from Mrs Harrison by way of a conveyance dated 13 January 2009 ("the 2009 Conveyance: tab 30) signed in the margin by Advocate Ferbrache. By clause 1.6 of the document:

"*"the Property" means:*

*1.6.1 a **DWELLINGHOUSE** known as "**LA ROCHE DOUVRE**" (formerly known as "Folie") and **GARDEN**, shown coloured red on Plan 4782 together with the **CONTINUATION OF THE DRIVEWAY**, shown coloured red and hatched in blue on Plan 4782; and*

*1.6.2 **THE DRIVEWAY**;*

the whole adjoining and situate at Rue de la Folie in Torteval Parish on Fief des Huit Bouvées".

By clause 1.1, "*the Driveway*" is defined as "*the driveway measuring ten feet or thereabouts in width, shown coloured blue on Plan 4782, and is the driveway referred to in item 1.6.2 below*". By clause 5:

"*That part of the Property described in item 1.6.2 hereof is bounded on or towards the:*

5.1 North-east by the field belonging to the Brehaut Heirs, an earthbank ("fossé") forms the boundary;

5.2 South-east for a short distance and the North-east by land with a dwellinghouse known as "Le Sommet" belonging to Mrs Clavadetscher, the hedge "fosse") forms the boundary and belongs with the Property (as set out in the 1984 Conveyance);

5.3 South-east by Rue de Rougeval;

5.4 South-west, the West, the North-west and the South-west by land with a dwellinghouse known as "Rougeval" (otherwise known as "Laitte Revel") belonging to Mr and Mrs Harding, boundary marks between; and

5.5 North-west by the continuation of the Driveway as referred to in item 1.6.1 above".

Clause 6 sets out the right of way enjoyed by the owners of Rougeval Laitte Revel to pass over the Driveway and the continuation of the Driveway, as defined, and to make an opening of fifteen feet between the points marked "A" and "B" on plan 4782, and clause 7 repeats the covenants found in the 1984 Conveyance.

42. The First Plaintiff telephoned Mr Woodward on 21 January 2009, but spoke only to his secretary, about the proposal to persuade Mr and Mrs Harding to relinquish their right to make an opening to the land they had purchased under the 1982 Conveyance in return for not requiring them to contribute to the expenses associated with maintaining the drive to La Roche Douvre. In due course, Mr Woodward prepared a draft agreement, which he sent to the Plaintiffs under cover of a letter dated 6 April 2009 (tab 54). The First Plaintiff resolved matters by entering into an oral agreement with Mr and Mrs Harding, and Mr Woodward heard nothing further about the matter until later.

43. The Plaintiffs had work done to La Roche Douvre enabling them to move in by the Spring of 2009. Thereafter, rather than demolish and re-build the house, they remained living there and undertook substantial renovations and extensions. However, by 2011, the First Plaintiff wished to move away from Guernsey as a result of health issues and his perception of what Guernsey was becoming and persuaded the Second Plaintiff that they should put La Roche Douvre on the market and look to moving to south-west France. This happened in 2012 and it was that summer that they found a property in France they wished to purchase. As a result, they lowered the asking price for La Roche Douvre, which resulted in Richard and Moira Garrod making an offer to purchase La Roche Douvre at a price that was acceptable to the Plaintiffs on 3 September 2012. Conditions of Sale with a proposed completion date of 11 October 2012 and an operative date of 26 September 2012 were prepared (tab 55). Mr and Mrs Garrod instructed Advocate Torode at Mourant Ozannes to act for them on their purchase. The Plaintiffs did not instruct an Advocate to act for them on the sale. Mr and Mrs Garrod were looking to borrow from NatWest ("the Bank") in respect of their purchase. Carey Olsen were instructed by the Bank on 20 September 2012.

44. The First Plaintiff travelled to France in order to progress their proposed purchase of the property the Plaintiffs wished to purchase. Mourant Ozannes contacted the Plaintiffs with a view to the oral agreement with Mr and Mrs Harding being formalised, which led to the Second Plaintiff sending an e-mail on this topic to Mr Woodward on 21 September 2012. The First Plaintiff was in France at this time and he intended to stay there because he was aiming to enter into a binding contract for the French property around 9 October 2012, with completion on 12 October 2012, being the day following the intended completion of the purchase by Mr and Mrs Garrod of La Roche Douvre. Mr Woodward replied on 24 September 2012, and subsequently explained further that he was discussing the draft document he had prepared with Mourant Ozannes. He also understood that Mr and Mrs Garrod had encountered a problem with the sale of their property. The Second Plaintiff sought an update on 25 September 2012, at which point Mr Woodward indicated that he had an appointment to see Advocate Torode the following day. The Second Plaintiff was also liaising with the Plaintiffs' estate agent at this time, who indicated that the problem with the sale by Mr and Mrs Garrod had been taken out of context and that the boundary exchange with Mr and Mrs Harding that the Defendants were working on was all that was holding up the Conditions of Sale being signed. Mr Woodward indicated in an e-mail to the Second Plaintiff on 26 September 2012 that he had met with Advocate Torode and left the draft with him for any comments before Mr and Mrs Harding were approached.

45. Mr Woodward telephoned Mr Harding on the morning of Saturday, 29 September 2012 and arranged to meet him that afternoon. When Mr Woodward went to La Roche Douvre he first saw the Second Plaintiff and then met with Mr and Mrs Harding. They walked along the drive, with Mr Harding commenting that the Plaintiffs had re-surfaced some of it and put in

fencing. After Mr and Mrs Harding had moved into Rougeval Laitte Revel, they had planted hedging along the boundary of their property, leaving the two gaps by which they could gain access to their land. Mr Woodward recalled the photographs he had taken in 2008 showing the kerbs and fencing. Apparently, Mr Harding regarded the kerbs as forming the boundary between the respective parcels of land. Mr and Mrs Harding indicated that they were content to forego the right to make the opening they were permitted by the 1982 Conveyance to make in return for not having to contribute towards the maintenance costs of the whole driveway. Mr Woodward told them he would have to check with the First Plaintiff that this was what had been agreed. Mr Woodward also aired the possibility that Mr and Mrs Harding would covenant with the Plaintiffs in relation to not building or allowing vegetation to block the views enjoyed from La Roche Douvre. This was a suggestion put to him on behalf of Mr and Mrs Garrod by Mourant Ozannes. A discussion was had in company with the Second Plaintiff, which ended with Mr and Mrs Harding not being prepared to give such a covenant. There was further discussion about the entitlement to lop and trim overhanging braches, the positioning of the stone cairn incorporating the name "La Roche Douvre" and whether the purchasers of La Roche Douvre owned dogs, which might lead to Mr and Mrs Harding wishing to put up more fencing. Mr Woodward summarised these meetings in a file note (a copy of which is exhibited by Advocate Ferbrache to his Affidavit – page 69 of tab 8).

46. On 2 October 2012, Carey Olsen received a copy of the draft conveyance by way of exchange to be agreed between the Plaintiffs and Mr and Mrs Harding. This agreement would form part of the title to be acquired by Mr and Mrs Garrod. On the same day, Mr Guilbert received a telephone call from Mr Harding in relation to this draft conveyance. Mr Harding was concerned that the draft did not appear to address the entirety of the boundary between Rougeval Laitte Revel and La Roche Douvre. Mr Guilbert contacted Mr Woodward to inform him that Mr Harding had consulted him. Mr Guilbert also sent an e-mail to Nicholas Le Poidevin at Mourant Ozannes on the morning of 3 October 2012 (tab 67), in which he explained:

> "*I was consulted by Mr Harding yesterday in regard to this matter. Mr Harding feels that the document produced to him by AFR yesterday only addresses part of the boundary between the two properties and what is desirable is that there should be certainty as to boundary along its entirety.*
>
> *I have not been to the property so am at a disadvantage to you. My client advises that his land is very much furzebrake uncultivated and it is not evident from within his property where the old party "fosse" is. The photographs on their own do not assist me in understanding what forms boundary with Harding's furzebrake. I understand that you are totally satisfied as to where the boundary is. Can you identify for me on photographs the relevant boundaries. If there is a well defined fosse along the remainder of the boundary is it not possible to define the same and to avoid doubt indicate that the same is "approximately ? feet in width measured at its upper level". This would ensure that we do not have a massive sloping fosse which could extend for many feet into the furzebrake.*
>
> *My client is not going to be able to achieve completion on this for tomorrow as he will be wanting me to meet him on site once we have a more substantive agreed exchange.*"

47. Later that week, probably on the Thursday, the Defendants and Mourant Ozannes were informed by Carey Olsen that Mr and Mrs Harding were no longer requiring the entire boundary to be dealt with in the draft conveyance. First thing on the following Monday morning, Mr Woodward sent an e-mail to all those involved (tab 68) in which he summarised

the root of title of La Roche Douvre from the 1945 Conveyance, the 1960 Conveyance and the 1968 Conveyance. In respect of the 1980 Conveyance, he wrote:

> "*In the Laitte Revel title in the sale to Mr and Mrs Harding on 27th November 1980 it refers to land being retained by Lawrence Guille and his sister, Millicent Tostevin, heirs of Evelyn Le Lacheur nee Guille. I am not sure how it affects La Roche Douvre title as we acquired a strip of land 10 feet wide in 1960.*"

He sought input from anyone and hoped that agreement could be reached as to the way forward as soon as possible. The response received from Glyn Davies, a colleague of Mr Guilbert shortly thereafter explained (also tab 68):

> "*I spoke to Mr Harding late on Friday. He told me that Lawrence Guille and Millicent Tostevin (former owners of his property) retained a piece of land between his property and the then Una Harrison (now the Lovering) driveway with the intention that they would sell it on to Mrs Harrison. It might be worth conducting a check to see if this was ever done – most likely, it would have been shortly after the sale of my clients' property to them in November, 1980.*
>
> *I am not going to do any more on this one until title is satisfied – I don't believe that prescription could be taken on the piece of land as was suggested last week, as there is clearly some title to it. It would be possible, with research, to find the heirs of Lawrence Guille/Millicent Tostevin, if it was never sold by them of course.*"

48. In the meantime, the First Plaintiff had returned to Guernsey from France. Being keen to secure the potential sale of La Roche Douvre to Mr and Mrs Garrod, the Plaintiffs agreed to grant to the Garrods a licence enabling them to occupy La Roche Douvre from 9 October 2012 to 19 April 2013, or for a shorter period in the event of the licence being surrendered (tab 56). The Plaintiffs duly vacated La Roche Douvre and went to live at the rented premises of the Second Plaintiff's brother, Leonard Le Noury. They agreed to pay Mr Le Noury £600 per month in respect of their occupancy, as evidenced by a letter from him to them dated 12 October 2012 (tab 58). The Plaintiffs made arrangements for their five cats to be boarded at the GSPCA shelter. This arrangement lasted approximately 10 days, after which the cats went to the premises of Drainforce Limited, the Plaintiffs' business. An invoice from the GSPCA dated 11 October 2012 in the name of the Second Plaintiff shows that £277.50 was paid on 19 October 2012.

49. Mr Guilbert reviewed the position on 9 October 2012. He reminded himself about the content of the 1980 Conveyance and the 1982 Conveyance, in which he had played a part acting for Mr and Mrs Harding. He considered the draft conveyance by way of exchange and concluded that it was defective because it did not purport to claim that the Plaintiffs had any interest in the area of land that Mr Guille and Mrs Tostevin had retained under the 1980 Conveyance and he believed that prescriptive title could not be asserted given the use by Mr and Mrs Harding since their purchase of Rougeval Laitte Revel in 1980. He relayed his thoughts to Advocate Torode at Mourant Ozannes that afternoon.

50. The First Plaintiff was in attendance later that afternoon with Advocate Ferbrache and Mr Woodward at the Defendants' offices. Mr Guilbert returned a telephone call to Advocate Ferbrache at around 5 pm and there was a discussion for approximately 40-45 minutes, conducted using a speakerphone so that all those at the Defendants' offices could hear, during which Advocate Ferbrache and Mr Woodward sought to gain an understanding of the problem with title that had been identified and raised by Mr Guilbert. Mr Guilbert referred to his involvement with the 1980 Conveyance, noting the specific delineation of the driveway of what became La Roche Douvre on plan 4782 and the disposal by Mrs Harrison of part of that

land by the 1984 Conveyance. Mr Guilbert took the view that the solution was for the Plaintiffs to purchase the land that had been retained by Mr Guille and Mrs Tostevin so that it could then be sold to by the Plaintiffs to Mr and Mrs Garrod. This was also the first occasion on which the First Plaintiff had had clarified for his benefit what the issue was. It increased his concerns that Mr and Mrs Garrod would not be minded to proceed with the purchase until matters had been sorted out and that the Plaintiffs found themselves with the prospect of losing the property in France they wished to purchase. Mr Guilbert followed up on this conversation by sending an e-mail to Mourant Ozannes the next morning (tab 69).

51. The First Plaintiff returned to the Defendants' offices on the morning of 10 October 2012 to meet with Advocate Ferbrache and Mr Woodward. Although the First Plaintiff wanted the Defendants to sort out what he considered to be the mess for which they were responsible, Advocate Ferbrache informed the First Plaintiff that the Defendants could not act for the Plaintiffs on their sale and that the firm needed to inform its insurers. Recognising that the Plaintiffs needed some help in moving matters forward, Advocate Ferbrache suggested that Advocate Ayres, whose firm, Trinity Chambers, undertook a lot of domestic conveyancing and was not already involved in the transaction, might be able to assist. The First Plaintiff left to undertake various other tasks with a view to finding a solution, including ascertaining whether Mr Guille was in a position to assist. He was also in contact with a surveyor. He returned later that morning to meet with Advocate Ferbrache, Mr Woodward and Advocate Ayres. The position was explained and Advocate Ayres was provided with copy documentation. The First Plaintiff agreed to instruct Advocate Ayres to assist.

52. On 11 October 2012, Trinity Chambers informed Mr Guilbert that they were instructed by the Plaintiffs. The same day, Conditions of Sale between the Plaintiffs and Mr and Mrs Garrod were signed (tab 57). The purchase price is shown as £1.3 million of which £65,000 is in respect of contents. Completion was to take place on or before 16 April 2012 [sic]. Special conditions were inserted making the sale "*subject to the Vendors, at their expense, and prior to 5.00 pm on the 28th March 2013, rectifying all such flaws in title to the Property as shall be necessary to satisfy the Purchasers, the Purchasers' Advocates and the Purchasers' lending bank and its Advocates*". In the event that this happened, completion was to take place within 10 working days following such confirmation. However, if no such confirmation was provided by the deadline, Mr and Mrs Garrod were put to their election of either withdrawing from the purchase, in which case the deposit paid, together with accrued interest, would be returned to them, or of proceeding with the purchase anyway.

53. Also on 11 October 2012, Trinity Chambers offered two solutions to Carey Olsen as options to resolve matters. The First Plaintiff was informed about these in a telephone conversation. On 12 October 2012, Jon Shepherd of Trinity Chambers provided an update by e-mail to the Plaintiffs (tab 70):

> "*Colin Guilbert will not change his stance on matters and he has made it clear that the Trustee of the estate of the late Evelyn Le Lacheur will have to convey a strip of land which they own which is situate between the track and the Harding premises. We would then enter in to an exchange with the Harding's to confirm that boundary between the Harding premises and the track to reflect the boundary at present. This will satisfy Colin.*
>
> *In the will of personal estate of the said Evelyn Le Lacheur, Mr Guille and Millicent Tostevin were appointed Trustees of the real estate belonging to Evelyn at the time of her death. Millicent has since passed away and we are confirming with Mr Guille's Doctor if he is happy that Mr Guille is mentally capable of acting as a Trustee. Mark has indicated that he thinks it would be beneficial to have Mr Guille's sister appointed as a Trustee in any event as he believes that there should be at least two*

Trustees to consent to the sale of the strip of land. Mark will take on the Trustees appointments but he has stated that this may take a month to do as the appointment of a Trustee must be before the Royal Court etc."

(The "Mark" to which reference is made here is Advocate Torode.)

54. The First Plaintiff provided an update to Advocate Ferbrache by way of an e-mail sent later on 12 October 2012 (tab 71). The Plaintiffs had concluded that they should instruct Carey Olsen in place of Trinity Chambers, recognising that the way forward for them might be facilitated if they also used Mr Guilbert and Advocate Jason Morgan, to whom the First Plaintiff had already spoken. The First Plaintiff had telephoned Mr Shepherd to explain this and that the Plaintiffs considered that Carey Olsen held all the cards, being a reference to Carey Olsen acting for the Bank as well as for other parties such as Mr and Mrs Harding, where the bank could effectively control whether Mr and Mrs Garrod could get the finance to purchase La Roche Douvre. By an e-mail on 15 October 2012 from the First Plaintiff to Mr Guilbert (tab 75), he confirmed that he was instructing Carey Olsen and had asked Trinity Chambers to stand down.

55. The furniture of the Plaintiffs that had been removed from La Roche Douvre was destined to be delivered to the property in France they wished to purchase. Because their purchase had not crystallised, the First Plaintiff went to France, with his brother-in-law, between 15 and 18 October 2012 to arrange for the furniture to be stored at a depot rather than being taken directly to the property in France. Having made these arrangements, the furniture was transported to France on or about 22 October 2012.

56. On 16 October 2012, Mr Woodward went to see Mrs Harrison at The Grange Lodge Hotel, which is where she was living. On his way in, Mr Woodward met Peter Mansell, the son of Mrs Harrison, who accompanied him to her flat, introduced Mr Woodward to her and then left. Mrs Harrison explained to Mr Woodward that she had already spoken with Mr Guilbert. As a result of what Mr Woodward was told, a draft Affidavit was prepared and Mr Woodward, accompanied by Advocate Richardson, also a Notary Public, returned to The Grange Lodge Hotel later that morning. Mr Mansell was also present. Although Mrs Harrison had turned 100 earlier that year, Mr Woodward considered her very lucid, with a good memory. The Affidavit was read to Mrs Harrison and Advocate Richardson took her oath. A copy of the sworn Affidavit was provided to Advocate Morgan by Advocate Ferbrache under cover of a letter later that day (tab 76).

57. Mr Guilbert made contact with relatives of Mr Guille and Mrs Tostevin, who he knew a little when she was alive. As a result he spoke with Mr Guille's niece, Isabelle Batiste, and wrote to her on 18 October 2012 on behalf of the Plaintiffs (tab 77). Mr Guilbert set out his understanding of the position by reference to the various conveyances, noting that "*the physical position of the driveway to our clients' property does not accord with the approximate location of the intended driveway, particularly along the western side of the northern part thereof*". It was his "*belief that following the sale to Mr and Mrs Harding the intention would have been for Uncle Lawrence and Aunt Milly to have transferred legal ownership of that part of the actual driveway which they found themselves retaining to Mrs Harrison. Such transfer never took place. Our clients would wish to see this matter addressed and to that end would wish to seek the family's assistance in regularising the matter.*" Mr Guilbert was of the opinion that "*The only basis on which the matter can be resolved in these circumstances is for an application to be made to the Royal Court under the 2007 Trusts Law, for the appointment of two new trustees in place of Uncle Lawrence.*"

58. Mr Guilbert visited La Roche Douvre on 30 October 2012 with Mrs Batiste and her husband. He prepared a file note the following day (tab 95), which includes:

"*I measured out in a few places the 10ft width. We also noted the raised section of the land which was subsequently sold by Mrs Harrison to Brookfield. Mr Batiste was of the same mind as myself namely that the stone walling around that area was old and could well have existed at the time when John and Evelyn first sold the plot and created the driveway. …*

I roughly marked out on site the approximate position of the land in question. They could then appreciate the position. I also explained that Lawrence Harding had been granted right of way over it."

Thereafter, Mr Guilbert continued to liaise with various people, including Advocate Wood of Mourant Ozannes, with a view to arranging for new trustees to be appointed who would then be capable of conveying the land he regarded as having been retained by Mr Guille and Mrs Tostevin in 1980 to the Plaintiffs. He prepared a draft conveyance and forwarded it to Advocate Morgan and the First Plaintiff by e-mail on 7 November 2012 (tab 86). Clause 2 of that draft conveyance reads:

"***THAT*** *the Property is* ***BOUNDED*** *on or towards the:*

2.1 ***West*** *by the Harding Premises, boundary marks between; and*

2.2 on its remaining boundaries by the Lovering Premises".

The definition of "Harding Premises" refers to what Mr and Mrs Harding had purchased by way of the 1980 Conveyance and the 1982 Conveyance and the definition of the "Lovering Premises" refers to what the Plaintiffs purchased by way of the 2009 Conveyance. At around this time, the Plaintiffs received a written advice from Advocate Ayres set out in a letter dated 6 November 2012 (tab 96).

59. By mid-November 2012, there was still no resolution of how the Plaintiffs would acquire from the trustees, whoever they may turn out to be, the land referred to in the 1980 Conveyance as having been retained adjoining the land conveyed to Mr and Mrs Harding. One issue that had arisen was how to put a value on it. In an e-mail to the First Plaintiff on 16 November 2012 (tab 88), Spencer Noyon of Swoffers questioned how it would be possible to value a piece of land "*without knowing where it is and how big or small it is*". Advocate Wood suggested that the valuation process could compare the value of La Roche Douvre without vehicular access with its value with vehicular access and an approach to secure a valuation on that basis was made by Mourant Ozannes to Martel Maides on 22 November 2012 (tab 93). Prior to that, the First Plaintiff had questioned the position in an e-mail to Advocate Morgan and Mr Guilbert on 19 November 2012 (tab 90), in which he proposed to reconsider the position. He was concerned at the amount of the fees for which the Plaintiffs were becoming liable, which he understood were already at or past £6,500. He summarised the position as follows:

"*As my understanding is that Colin believes that there is a piece of land, that no one exactly knows where or what size it is, this piece of land may or may not be in the driveway to "La Roche Douvre". If that was the case, it is possible that the heirs of Le Lacheur could take a civil action against the owners of "La Roche Douvre" for trespass. I understand that trespass is a civil matter and they would have to fund this action. When, or if, they ever go to court, how would they prove* ***where*** *<u>the piece of land</u> was, what size it was and what harm we were doing to it as it is a piece of land that they cannot get access to as it is land locked, or have I completely misunderstood the facts?*"

Advocate Morgan's response the following day (tab 91) was that he believed "*we are as certain as we can be that the piece of land is in the driveway. The exact location and extent of the land is less certain, but may be made more so by the further survey being carried out by Paul Le Tissier tomorrow.*" He also indicated that the fees of Carey Olsen had risen above £8,200, but proposed a 10% discount as a gesture of goodwill.

60. On 20 November 2012, Mr Guilbert and the First Plaintiff spoke about how to identify the land that has been sold by Mrs Harrison under the 1984 Conveyance. Later that day, Mr Guilbert e-mailed to the First Plaintiff (tab 92) an annotated enlarged copy of plan 2842 on which he attempted to identify the land. Mr Guilbert added "*As you are aware on site the extent of the land acquired by Brookfield could well be that which is demarcated on site by the old stone walling and which retains the neighbouring upper land.*"

61. The First Plaintiff went to see Mrs Clavadetscher of Le Sommet on or about 23 November 2012. He had reached the conclusion that the most pragmatic way forward was to seek to re-acquire the land that Mrs Harrison had sold off under the 1984 Conveyance. In his mind, this would restore the position to how it had been when Mrs Harrison purchased La Roche Douvre in 1968 and so enable the Plaintiffs to give good title to Mr and Mrs Garrod. Having explained the position to Mrs Clavadetscher, she requested time to think about the proposal. The following day, Mrs Clavadetscher agreed to sell back the so-called triangular area of land for £10,000 on condition that the land would remain as it then was unless it became absolutely necessary to re-align the course of the drive to La Roche Douvre. The First Plaintiff immediately contacted Mr Guilbert and a conveyance was drafted and duly registered on 27 November 2012 (tab 31). That conveyance was signed by Advocate Morgan. In its preamble, it recites that:

> "*3 It has only recently become apparent that the Purchasers and Mrs Harrison, as their predecessor in title to their aforesaid premises, have been utilising a section of driveway not in their ownership ("the third party owned land") as part of the present means of pedestrian and vehicular access to their said premises.*
>
> *4 The Vendor has agreed to convey the premises hereby conveyed to the Purchasers upon the terms and conditions hereinafter contained, in case the Purchasers should ever be prevented from continuing to use the third party owned land to access their said premises.*"

Clause 2 is as follows:

> "***THAT*** *the premises hereby conveyed are* ***BOUNDED*** *on or towards the:*
>
> ***North-east*** *for a distance of approximately 30 feet by a field owned by the Heirs of Nicholas Le Huray Brehaut, a hedge between;*
>
> ***South-east*** *by a dwellinghouse called "Le Sommet", buildings, gardens and land ("the Retained Premises") retained by the Vendor, the boundary being as shown on the said Plan No. 2842 and comprising the site of the former boundary hedge, which forms part of the premises hereby conveyed; and*
>
> ***South-west*** *and* ***North-west*** *for a short distance by the remainder of the driveway owned by the Purchasers*".

Clause 7 provides that the Plaintiffs as purchasers would enter into possession of the land conveyed on the earlier of the date on which Mrs Clavadetscher ceased to own Le Sommet or

the expiry of three months' written notice served on her though the offices of HM Sergeant, which in turn could not be issued unless there were an order of this Court precluding the owners of La Roche Douvre exercising a vehicular right of way over the third party owned land (clause 3.3). There was also provision that if the owners of La Roche Douvre acquired the third party owned land, they would not sell the re-acquired so-called triangular area of land without first offering it to Mrs Clavadetscher to re-purchase for £1.

62. The terms of the purchase of the so-called triangular area of land by the Plaintiffs did not satisfy Mr and Mrs Garrod. The special condition in the Conditions of Sale was not, therefore, met. Instead, Mr and Mrs Garrod required the Plaintiffs to construct an actual area of driveway over which there was the right to pass. An application to the Environment Department was made on 12 December 2012, with the work for which full planning permission was sought being described as "*Enlarge existing driveway*". Permission was granted on 21 January 2013 (see documents at tab 100B). Several drawings were stamped on that day and attached to the written permission given to the Plaintiffs. They appear to show that the area to be covered with tarmac would result in the kerb on the eastern side of the driveway in the area of the dog-leg, which was then in place, being removed and a new kerb being installed along the boundaries of the land with Le Sommet and with the Brehaut field.

63. During December 2012, there were discussions involving the First Plaintiff, Mr Guilbert, Mr Garrod and Advocate Torode that suggest that the only solution regarded as satisfactory by Mr and Mrs Garrod (or their Advocate) was for the land retained by Mr Guille and Mrs Tostevin to be purchased so as to become part of La Roche Douvre. However, a revised agreement with Mrs Clavadetscher was negotiated and a second conveyance, this time dated 27 December 2012 and signed by Advocate Le Marquand, was registered (tab 32). This second conveyance varied some of the terms of the earlier conveyance. It enabled the Plaintiffs to gain immediate and exclusive possession of the re-acquired so-called triangular area of land. The Plaintiffs covenanted with Mrs Clavadetscher that should they or the survivor of them acquire what had been defined as "*the third party owned land*" before creating a driveway on the so-called triangular area of land, that area of land would not be sold without first offering it to Mrs Clavadetscher to re-purchase for £1. Mrs Clavadetscher released the Plaintiffs from the covenants at clauses 3.3 and 3.4 of the earlier conveyance.

64. In due course, the Plaintiffs arranged for Drainforce Limited to undertake the works for which planning permission had been received. An invoice dated 1 April 2013 (tab 126) describes the work as being "*To clear area as indicated of shrubs, stones, earth and other waste, remove off site to States tip. To prepare area in readiness to receive hogging and gravel, vibrated and levelled to receive tarmac and edgings*". The total amount invoiced was £8,421.14.

65. The agreement with Mr and Mrs Harding for them to relinquish their rights in respect of opening up a gap in the boundary with the land they purchased by way of the 1982 Conveyance in return for not being required to contribute anything towards the maintenance of the driveway was duly prepared and registered on 24 January 2013 (tab 33). In clause 1.3, a definition of "*the Lovering Premises*" refers to only part of a driveway and to the Plaintiffs' land as being the major part as purchased by the 2009 Conveyance and the remainder as purchased from Mrs Clavadetscher by the conveyance registered on 27 November 2012. There is no mention of the second conveyance registered on 27 December 2012. The Plaintiffs agreed to bear the costs of preparing and registering this conveyance between them and Mr and Mrs Harding.

66. The sale by the Plaintiffs of La Roche Douvre to Mr and Mrs Garrod was completed on 31 January 2013 by a conveyance registered that day ("the 2013 Conveyance": tab 34). The land conveyed is described in three parts. The first is the dwelling-house, land and a section of

driveway. Reference is made to plan 4782. The second and third are described as the principal driveway and the triangular area of land, the latter of which is defined in clauses 1.11 and 1.14 as having been acquired by the conveyance registered on 27 November 2012, as varied by the second conveyance registered on 27 December 2012. Clause 1.3 defined "*the Driveway*" as "*the driveway measuring ten feet or thereabouts in width, shown coloured (but not hatched) blue on Plan 4782*". Clause 4 of this conveyance provides, in respect of this Driveway:

> "*The parts of the Premises described in clauses 2.2 and 2.3 above are* ***BOUNDED*** *on or towards the:-*
>
> *4.1* ***North-east*** *by the said field owned by the Brehaut Heirs, and earthbank (fossé) between;*
>
> *4.2* ***South-east*** *by the Clavadetscher Premises, the boundary being as shown on Plan No. 2842 lodged at the Greffe and comprising the site of the former boundary hedge, which forms part of the Premises (as stated in the 2012 Conveyance);*
>
> *4.3* ***South-east*** *again and* ***North-east*** *by the Clavadetscher Premises, a hedge (fossé) between;*
>
> *4.4* ***South-west****, the* ***West*** *on a curve, the* ***North-West*** *on a curve and the* ***South-west*** *by a dwelling-house known as "Rougeval" (formerly known as "Laitte Revel") and land, the greater part of which is owned by Mr and Mrs Harding and the remainder of which (comprising an area of land, the exact location and size of which is unknown) is owned by the Devisees in Trust under the Will of Realty of the late Evelyn Melina Le Lacheur registered on the 3rd July 1980), the boundary being as shown on Plan 4782; and*
>
> *4.6* ***North-west*** *by the section of driveway described in clause 2.1 above.*"

The purchase price was £1,235,000.

67. Having sold La Roche Douvre and received the net proceeds of sale, the Plaintiffs were able to finalised their purchase of the property in France they still wished to buy. That purchase completed on 19 March 2013. The Notaire's account (tab 102) shows that the total costs to the Plaintiffs were €1,197,296.62.

Vue de justice

68. On the morning of the first day of the trial, the Court undertook a site visit to La Roche Douvre. It was an opportunity for the Advocates to highlight any salient features that would be less apparent from the plans and photographs contained in the trial bundle. It also presented a good opportunity for the members of the Court to see for themselves what is in issue and to visualise from what is currently there what most probably would have been visible at the various points in time that are material to the Court's decision. In particular, the steeply sloping driveway at around and below the so-called triangular area of land that has been mentioned, the positioning of the gateposts installed by the Plaintiffs and the relationships with neighbouring land are all easier to appreciate having attended on site. The Advocates were unable to state precisely where the hatched area over which there was the reserved right of way lay, which Mr and Mrs Harding relinquished in 2013, and how much greater, if at all, than the fifteen feet that could be opened up into the part of the land acquired by them by the 1982 Conveyance that hatched area was. However, there was agreement that it was below the gateposts and gate installed by the Plaintiffs and so closer to the dwelling-

house. Similarly, there was no precise point at which the 30 feet approximately measurement alongside the Brehaut field that formed one side of the so-called triangular area of land ended or any clear indication as to the other dimensions of the piece of land that was sold by Mrs Harrison in 1984 and purchased by the Plaintiffs in late 2012. Indeed, there is still a wall made from pieces of granite placed on each other loosely and some land to which an occupier of Le Sommet apparently has access that might be on part of the so-called triangular piece of land. The Court noted the different areas of tarmac, distinguishing between the driveway from before 2012 and the extra area tarmacked in 2013 after it was acquired by the Plaintiffs and planning permission was obtained.

69. Both Advocates were invited to walk across the original driveway to a point that they considered was shown on the plan outlining the area said by the Plaintiffs to be the land retained by Mr Guille and Mrs Tostevin at the time of selling Laitte Revel to Mr and Mrs Harding. Although they both ended up in slightly different places, approximately one metre apart, both reached a point that the Jurats assess as potentially being too narrow to drive an ordinary-sized motor car down between there and the wall they saw in place next to Le Sommet. The boundary with the land acquired by Mr and Mrs Harding in 1980 is well-established. Whether along that boundary or anywhere else, the "*bornes*" must have been evident, but no such boundary marks were pointed out to the Court at the vue de justice and it is common ground that none can now be found.

The Defect as a question of law

70. It was agreed between the parties' Advocates that the first issue to determine is whether or not the Defect, as pleaded, exists. If the Plaintiffs fail on establishing any such Defect, the action must be dismissed because it is as essential part of the alleged breach of duty against the Defendants that they failed to identify and advise on this Defect.

71. The Plaintiffs' primary case is that the Defect exists because plan 4782, as referred to in the 1968 Conveyance, was not described as being by way of identification only and not of limitation, with the consequence that it forms part of the specific description of La Roche Douvre without qualification. In other words, the construction of the 1968 Conveyance is a question of law that falls to be determined by the Deputy Bailiff in favour of the Plaintiffs and there is nothing thereafter for the Jurats to resolve on this issue.

72. The Defendants submit that this contention represents a fundamental misunderstanding of the status to be afforded to plans referred to in conveyances. The true position is that, even without being explicit about the issue, the plan is always for the purposes of identification only unless there is express reference to it governing any matter, eg, one or more of the boundaries of the parcel of the land which is the subject of the conveyance. In relation to the title acquired by Mrs Harrison, deriving as it did from the 1960 Conveyance and the 1967 Conveyance, the blue-coloured area does not automatically override the reference to "*des bornes entre deux*" in each of those conveyances. Rather than it being a question of law for resolution by a judge, the Court's task is to find where the line represented by the boundary marks ran and so continued to run in 2008 and 2009 at the time when the Plaintiffs purchased La Roche Douvre.

73. Both Advocates relied on how the Court of Appeal had addressed this type of issue in ***Payne v Walsh*** (unreported, 30 October 1986). Both acknowledge that that case is not squarely on all fours with the present case and so the outcome is not strictly binding on this Court. The conveyance in that case provided that the "*premises hereby conveyed are by way of identification but not of limitation shown coloured pink on the plan thereto annexed and were formerly part of a field called "Le Courtil de Derrière"*" and continued:

"*That the premises hereby conveyed are bounded:-*

on or towards the West by a glasshouse and land owned by the Vendors, a party wall between;

on or towards the North by another glasshouse and land owned by the Vendors, the gable of the glasshouse forming part of the premises hereby conveyed belonging to the premises hereby conveyed;

on or towards the East by an outbuilding and land owned by the Vendors, a party wall between;

on or towards the North by a cartway (coloured green on the said plan) owned by the Vendors, the demarcation line being as indicated on the said plan."

The Court of Appeal noted that three of the four boundaries were described by reference to certain physical characteristics, whereas the fourth boundary made reference to the plan. Referring to certain English cases, which will be addressed in due course, the Court concluded "*that the words "the demarcation line as being indicated on the said plan" are a clear, specific and particular identification of one of the boundaries of the property and must be given effect to.*" The Court further explained "*that the plan has been brought in as a part of the specific description of the property without qualification and that forms the equivalent of the verbal description, and is incorporated into the verbal description*".

74. The principles that apply when construing documents are reasonably well settled. The Court was not referred to any specific case, but the position in Guernsey, as summarised in, eg, *de Putron v de Putron and de Putron* [2013] GLR Note 1, referring to Pothier, *Traité des Obligations*, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and *Bank of Credit & Commerce SA v Ali* [2001] 1 AC 251, demonstrates that the object of the Court is to give effect to the intentions of the contracting parties, reading the terms of the agreement as a whole, and giving the words their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to them. These intentions are to be ascertained objectively. This position is broadly the same as was described at para. 21 of *Boyle v Highfield Country Apartments Association* [2017] JRC 157, a case to which reference was made by Advocate Geall. There is nothing special arising from the fact that the Court is required to construe a conveyance and so the Deputy Bailiff has had regard to the way these principles apply when construing the conveyances in issue in this case.

75. The first of the cases to which the Court of Appeal referred in *Payne v Walsh* was *Wiggington & Milner Ltd v Winster Engineering Ltd* [1978] 1 WLR 1462. The case concerned a disputed area of land and the effect in an earlier conveyance of the words "*by way of identification only delineated on the plan ... and thereon coloured yellow*". The appeal arose because of the way Foster J dealt with the matter:

> "*In my judgment all the court can look at to see what the 1921 conveyance did or did not convey, must be gleaned from looking at that conveyance, its parcels and its plan. In Hopgood v. Brown [1955] 1 W.L.R. 213, 218 Jenkins L.J. says: 'It is true that the plan is referred to as being for the purpose of facilitating identification only and therefore it cannot control the parcels in the body of the deed.' In Halsbury's Laws of England (1973), 4th ed., vol. 4, para. 834, it is said (and I quote): 'It is common for a verbal description of the parcels to be followed by words incorporating a plan to be referred to "for the purposes of identification only." It seems that the effect of these words is to confine the use of the plan to ascertaining where the land is situate and to*

prevent the plan controlling the verbal description of the parcels.' In my judgment that passage correctly states the law."

The Court of Appeal disagreed. Buckley LJ stated (at p. 1473G):

"*Where a court is required to decide what property passed under a particular conveyance, it must have regard to the conveyance as a whole, including any plan which forms part of it. It is from the conveyance as a whole that the intention must be ascertained. To the extent that the conveyance stipulates that one part of it shall prevail over another part of it in the event of there being any contradiction between them in the ascertainment of the parties' intention the court must of course give effect to that stipulation. So if the conveyance stipulates that the plan shall not control the description of the parcels, the court must have due regard to that stipulation; but in so far as the plan does not conflict with the parcels, I can see no reason why, because it is described as being "for identification only," it should not be looked at to assist in understanding the description of the parcels. The process of identification is in fact the process of discovering what land was intended to pass under the conveyance, and that is the precise purpose which the plan is said to serve. Accordingly, so long as the plan does not come into conflict with anything which is explicit in the description of the parcels, the fact that it is said to be "for the purposes of identification only" does not appear to me to exclude it from consideration in solving problems which are left undecided by what is explicit in the description of any parcel.*"

Bridge LJ added (at p. 1475E):

"*When a conveyance plan which is said to be for the purpose of identification only shows a boundary line which differs in detail from some physical feature on the ground which the conveyance otherwise indicates as the intended boundary line, it is clear that the latter prevails over the former. ...*

To refer to the plan in such a case in order to ascertain the boundary allows the plan merely to elucidate, not to control, the parcels. The ascertainment of boundaries being an integral part of the process of identifying the land conveyed, I cannot see why, as a matter of language, the qualifying words "for the purpose of identification only" should inhibit the use of the plan for this purpose when no other means is available by which the relevant boundary can be ascertained."

76. The second case to which the Court of Appeal had regard in *Payne v Walsh* was *Willson v Greene* [1971] 1 WLR 635, in which the vendor's agent had pegged out a boundary line in the presence of the purchaser, prior to there being a contract of sale of the land, where the line was not a straight line but had a kink in it. However, the plan with the conveyance, expressed to be for the purpose of identification only, showed the boundary line as being straight. Within his judgment, Foster J referred to and quoted extensively from an unreported decision of the Court of Appeal, *Webb v Nightingale* (8 March 1957), explaining that the case "*clearly shows that a boundary marked out and agreed supersedes a plan which is for identification only*" (see p. 638G). One of the quoted passages was from Denning LJ:

"*It seems to me that the line of white stakes with the white peg at the south-east corner and the post and wire fence at the north-east corner, were physical features on the land showing what was being sold. The plan on the conveyance was for the purpose of identification only. If it were an exact delineation there would be some difficulty in regard to the northerly northern boundary. It would run along the line of the hedge and trees and would make the northern boundary four to six feet further north of the post and wire fence. But as the plan is only for the purpose of*

identification, I think we can ignore that discrepancy. On the land itself the metes and bounds of this property were sufficiently shown so that anyone looking at the land at that date of the conveyance could have seen perfectly well what was being sold."

77. Advocate Geall has further relied on the approach described recently by the Royal Court of Jersey in the ***Boyle*** case (*supra*), where it was stated (at para. 32): "*The extent of a person's ownership of immoveable property is ascertained both by the description contained in the conveyance ... and by application of that description to the site.*"

78. The Deputy Bailiff considers that there is much to commend itself in the approach described by Buckley LJ. It is evident that the Court of Appeal chose to adopt that principle as forming part of Guernsey law, because it referred to applying it. The task of the Court is to ascertain the intention of the parties by having reference to the conveyance as a whole. There are various ways in which that intention can be reflected by reference to a plan. Quite what is meant by the draftsman incorporating standard phrases derived from developments in other jurisdictions will not always result in the same meanings being applicable here. In order to be definitive, insofar as that is practicable, a plan will need to be referred to expressly in such a manner that it is clear it represents what the parties had agreed. As shown in ***Payne v Walsh***, stating that a demarcation line is as indicated on a plan demonstrates that the plan was intended to identify where the line runs. This is the style also used in part in the 2013 Conveyance by which the Plaintiffs sold to Mr and Mrs Garrod. It has the effect, as explained in ***Payne v Walsh***, that the plan is brought in as a part of the specific description of the property without qualification and so forms the equivalent of, and is incorporated into, the verbal description.

79. It is trite law that, in 2009, Mrs Harrison could not sell to the Plaintiffs more land than the land she owned. The starting point for ascertaining the land she had purchased from Mr and Mrs Humphreys-Lewis is the 1968 Conveyance. The reference to the two parts of land conveyed to her is that they are "indicated" ("*indiquée*") on plan 4782. Each part is then more particularly described by the boundary features set out in respect of that part. There is no express reference to any boundary being as demarcated on the plan. In respect of the strip of land, the boundary features are described in a manner that is consistent with the 1967 Conveyance. The strip of land joins the first part of the land being purchased. As if it were on a clockface, the boundary then runs along the Brehaut field, "*un fossé entre deux*", along the boundary with Le Sommet, again "*un fossé entre deux*", until it meets Rue de Rougeval, and then adjoins the land of Evelyn Guille, ie, Laitte Revel, "*des bornes entre deux*". Accordingly, the physical features being referred to are clear. In particular, there is no reference to the boundary with Laitte Revel being as shown on the plan. The Deputy Bailiff finds that the absence of such wording means that there is nothing to prevail over the verbal description of that boundary of the strip of land being the boundary marks. The reference to the plan in relation to this second part of the land being conveyed, even though it states that the strip of land is ten feet or thereabouts wide and indicated in blue colouring assists in identifying the approximate course of the strip of land, being the means by which access to the main part of the land being purchased and on which Folie then sat, but the plan does not operate to limit the land so described by its boundaries.

80. On a similar basis, the land acquired by Mrs Harrison could not be greater than the land previously purchased by Mr and Mrs Humphreys-Lewis and, before them, by Mr and Mrs de la Mare by the 1967 Conveyance and the 1960 Conveyance respectively. The boundaries again made no reference to the plan, and the physical features referred to were described in similar terms to those in the 1968 Conveyance. In particular, the boundary with the land of Laitte Revel both times was simply "*des bornes entre deux*". The 1960 Conveyance refers to the strip of land "*teint en bleu, avec mésurage, sur le dit plan*", being plan 2842, where the

measurements in three places are shown as ten feet. The 1967 Conveyance refers to the strip being ten feet wide. Although this is a precise figure, and despite becoming "*or thereabouts*" in 1968, this Court does not find that this means that the plan measurements override the description of the boundaries of this part of the land by reference to the physical features that will have been found on site in 1960. Further, there is no need to include in the conveyance anything clarifying that the plan is for the purposes of identification only. It remains the default position that, unless and until there is something explicit incorporating something found on the plan into the verbal description, any plan referred to is to assist in identifying the subject-matter of the conveyance.

81. For these reasons, the Deputy Bailiff rejects the submission of Advocate Tee on behalf of the Plaintiffs that the alleged Defect is established just by construing the conveyance, or even the series of conveyances. What is apparent in 1960 is that Mr and Mrs Le Lacheur chose to sub-divide the land they had purchased in 1945. That is the clear intention of the parties to the 1960 Conveyance. They sold off the land they owned furthest away from Rue de Rougeval (and the dwelling-house) and which lay adjoining, but above, Rue de la Folie (and so far as relevant) the private road leading from it. That area of land was not (and still is not) readily accessible from Rue de la Folie. This is clear from going on site, but may not be clear simply from looking at a two-dimensional plan. Consequently, in order to afford access to the land being sold off, Mr and Mrs Le Lacheur chose to sell off a strip of land as a track, or driveway, so as to be able to reach it. They might have chosen to retain ownership of the land and grant a servitude as a right of way, but instead they chose to part with ownership of the land. They clearly wanted the driveway to be functional for whoever would purchase but also wished to retain for themselves as much of their land as they sensibly could. A track of around ten feet along the edge of their land seems to have been the solution identified. The fact that it runs along the edge of Le Sommet and the Brehaut field is shown on the plan. However, if they had wanted the land so sold to be limited to ten feet along those boundaries by reference to the plan, they needed to make it expressly so limited. They did not do so, but rather chose to refer to boundary marks along with the other physical features that any purchaser would be able to identify. This is the manner in which the land was sold off in 1960 and it is the same strip of land that Mrs Harrison duly purchased in 1968. In other words, as a matter of law, the strip of land conveyed in 1960 remained the strip of land acquired in 1968, with title to it being repeated each time. Looking at the 1960 Conveyance (and thereafter the 1967 Conveyance and the 1968 Conveyance, and noting that Mrs Le Lacheur remained the owner of Laitte Revel on both occasions), adopting the style of the comments of Denning LJ, it would have been apparent from going on site that there were some form of boundary marks in place which showed the extent of the land being conveyed. If that were not the case, there would have been no need to refer to boundary marks. The proper construction of each conveyance is that the boundary with Laitte Revel, owned by Mr and Mrs Le Lacheur was fixed by reference to the physical characteristics of where the boundary marks were located and not solely by measurement as shown on the annexed plan.

The Defect on the facts

82. The question of where those boundary marks were located is for determination by the Jurats. The Deputy Bailiff directed the Jurats that, in the absence of any direct evidence as to where the boundary marks are, or even where they were, they would need to infer from all the other evidence they had heard and seen where the boundary of the strip of land owned by Mrs Harrison was. The Plaintiffs' case was that the only proper inference was that the boundary marks referred to had been placed along the edge of the area that is coloured blue on the two plans. That boundary was shown on both plans as a broken line. If the Jurats were to find that this was the route of the boundary marks, the Plaintiffs would have proved this aspect of their case. However, if the Jurats concluded that the Plaintiffs could not show that the boundary marks followed that line, the action would fail and the claim against the Defendants

would have to be dismissed. Although the Defendants had suggested that the line of the boundary marks would more likely than not have followed the line of the driveway as it had been throughout the ownership of Mrs Harrison and how it appeared from the aerial photographs, the Defect as pleaded did not require the Jurats to make any such finding.

83. In reaching their conclusions on this question, the Jurats have paid particular attention to the topography of the land as they saw it on the vue de justice. They have related what they saw to the documents in the trial bundle. They have not had much, if any, reason to take into account the evidence of the various witnesses from whom the Court heard in respect of this issue and so the submissions made by the Advocates about the weight to be afforded to the evidence of the witnesses, and especially of Mr Guilbert and Advocate Ferbrache, have no bearing on their findings on this issue.

84. Having regard to the Ordnance Survey maps in tab 34A, they noted that the oldest of them, dating from 1898, showed the area of land measuring 20.9 perches as the rough site of the parcel on which Folie was built in the early 1960s. Given the height of this area of land above Rue de la Folie, they infer that the most probable means of accessing this area (assuming the Brehaut field, shown as being one vergee 19.5 perches was in separate ownership) was by passing across the adjoining land parcel, shown as measuring one vergee 6.7 perches, which roughly relates to the land acquired by Mr and Mrs Harding by way of the 1982 Conveyance. Reaching that access route would entail passing over the land on which "Rougeval", shown to have already been constructed by that time, sits, with two areas shown as 17.9 perches and 23.1 perches. The position as shown on the 1938 Ordnance Survey map indicates that the position remained the same 40 years later. In other words, the means of the owners of all the land reaching this "bottom" area would be by passing over their own land rather than directly from the public road, Rue de la Folie. The Jurats further infer that this was the position when Mr and Mrs Le Lacheur purchased the whole parcel of land in 1945.

85. The third Ordnance Survey map is dated 1963. By this time, Mr and Mrs de la Mare had had Folie constructed, as shown, and the markings of the track to reach the first part of the land conveyed to them by the 1960 Conveyance shows that it does not hug the boundaries with Le Sommet and the field owned by Mr Brehaut as shown on plan 2842. Instead, it follows a route from the entry point from Rue de Rougeval, running along the edge of Le Sommet to begin with but then not continuing round to where the land is bounded by the Brehaut field, but cutting across to the entry point to the area on which Folie had been constructed, ie, the parcel shown on the earlier maps as measuring 20.9 perches. The Jurats further took into account that Advocate Geall had invited the Court to extrapolate backwards in time to conclude that this track could be regarded as following the historic route of gaining access to that area of land and which would have existed in 1960 when Mr and Mrs de la Mare purchased. Advocate Tee acknowledged on behalf of the Plaintiffs that this was a reasonable approach to take and did not argue that such an extrapolation is impermissible. The Jurats have not treated any of these maps as conclusive one way or the other, but regard them all as matters to which they can properly have regard when inferring where the boundary marks would most likely have been placed in 1960.

86. Plan 2842 has been considered by the Jurats because the second part of the land conveyed to Mr and Mrs de la Mare refers to it. The Jurats are satisfied that the opening at Rue de Rougeval and the opening to the lower part of the land being sold off are clearly shown. The intention of the parties was, in the Jurats' views, to convey the access route that was already in existence. Following the contours of the land, but leaving as much of the land being retained by Mr and Mrs Le Lacheur as physically appropriate, the drive of ten feet in width would, in their opinions, have been marked out using the approximate line of the route then in existence. There is no certainty as to what was used as boundary marks. It could have been posts or it might have been pieces of granite or some other means of identifying the boundary line may

have been adopted. Whatever was used, the Jurats are satisfied they had disappeared by 2008. However, the Jurats are also satisfied that the boundary marks would have been adequately identifiable so as to distinguish between the land being sold by Mr and Mrs Le Lacheur and the land that they retained in 1960. There has been no evidence to suggest that the route that became the driveway to which Mrs Harrison came in 1968, and which the Jurats accept from her evidence did not change in its alignment throughout her ownership of La Roche Douvre, did not follow the alignment of those boundary marks. Indeed, the Jurats infer that the boundary marks would most logically have been placed along that route having regard to the site features. The Jurats have further inferred from plan 2842 that the gap in the features, probably a hedge, shown at the point where what became the access route to Folie as sold to Mrs Harrison by Mr and Mrs Humphreys-Lewis had been constructed, which is entirely consistent with the route by which access to that part of the land, with the measurement of 20.9 perches on the older Ordnance Survey maps, supports their conclusion that the route to be taken from Rue de Rougeval would follow the natural contours of the land but also run as close as possible to the Brehaut field.

87. The Jurats have also considered the way in which this boundary by reference to "*des bornes entre deux*" has been repeated in the 1967 Conveyance and the 1968 Conveyance by which Mrs Harrison purchased Folie and re-named it La Roche Douvre. They accept that this means that the boundary marks, whether still visible or not at that time, continued to govern the extent of the land being conveyed. They do not regard the change between the measurements being shown on plan 2842 and then brought into the wording of the 1967 Conveyance or the addition in the 1968 Conveyance of "*or thereabouts*" as affecting this position. They have noted that the other boundaries of this strip of land are uncontentious and accepted to be where they have always been described to be. They have further noted the evidence, including the invoice from Drainforce Limited and the documents resulting from surveying work that the Plaintiffs had undertaken by PlanB (tab 59), that the area of land within this strip of land in the corner of the "dog-leg" was raised and so most likely at the level seen by the Jurats at the vue de justice as effectively a continuation of the contours from Le Sommet. Accordingly, in order for the Plaintiffs' case to be accepted, the Jurats recognise that the boundary marks would have had to be placed in such a fashion that the driveway giving access to the land on which La Folie was built would have required earthworks to be undertaken to make that driveway usable. Further, had that been done, it would have meant that the small area of land conveyed by Mrs Harrison to Mr and Mrs Brookfield by the 1984 Conveyance would not have had any real utility to them, being several feet below the rest of their land. Instead, as Mrs Harrison has stated, this represented an area of land that was of no use to her, because the hedging along the edges of the driveway that had been established for more than 15 years, gave her no realistic access to it. Consequently, the Jurats consider it more likely than not that the boundary marks placed when Mr and Mrs Le Lacheur sold off that portion of their land would have created the most logical route along the edge of their original land, but taking into account in the area of the dog-leg that the eastern edge would not have been taken from the boundary with Le Sommet and the Brehaut field, but continuing with an approximate width of ten feet from a point where a route already existed. They take that view on the basis that the land in the corner of the dog-leg was in 1960 and still in 2008 and even when Mr Guilbert eventually attended on site on 30 October 2012 and "*noted the raised section of the land which was subsequently sold by Mrs Harrison*" at a higher level than the logical route to gain access to the land being sold off. The works that the Plaintiffs caused to be undertaken at the insistence of Mr and Mrs Garrod to tarmac the area re-acquired from Mrs Clavadetscher, or more likely a part of it, is also consistent with having to dig out some of the land to be able to complete this work.

88. For these reasons, the Jurats have concluded that the Plaintiffs have failed to persuade them that the boundary marks were placed along the broken line on the western side of the area coloured blue on the either of the plans. In reaching the conclusion, the Jurats are further

satisfied that the land on which La Roche Douvre sits was not *enclavé* as pleaded by the Plaintiffs. They have particularly noted the way that the boundaries referred to in the 1984 Conveyance clarify that the land sold off by Mrs Harrison did not cross the entirety of the land that had been conveyed to her by the 1968 Conveyance. This is because the boundary of the so-called triangular area of land is described as being the remainder of the driveway. Accordingly, whatever was actually sold by Mrs Harrison did not stretch across the entirety of the area of land she had purchased. Further, when Advocate Langlois prepared the 1984 Conveyance and presented it to the Court, the Jurats consider it reasonable to infer that he satisfied himself that the purchase by Mr and Mrs Brookfield of an area of land owned by Mrs Harrison did not have the effect of rendering Mrs Harrison's land at La Roche Douvre *enclavé*. It would be extremely odd if the effect of the 1980 Conveyance and the 1984 Conveyance read together produced that outcome. As the Jurats have noted, the corresponding boundaries in these two conveyances do not meet. Accordingly, whether or not the 1980 Conveyance was correct in identifying an area of land being retained by Mr Guille and Mrs Tostevin, it must be situated away from the new boundary between the so-called triangular area of land and the Jurats find it more likely than not that the 1984 Conveyance was not regarded as affecting the ability of the owner of La Roche Douvre to gain access to the parcel of land in which the dwelling-house sits and further that it did not have the effect of compromising the right of way that existed over the land in favour of Mr and Mrs Harding. The premise on which the Plaintiffs have pleaded their case is not established.

89. The Jurats find that the aerial photographs in tab 34A of the bundle, the earliest of which is from 1979, support this conclusion. The inference they draw from the visual manifestation of the land over the decades is that Mrs Harrison's evidence should be accepted. In other words, the alignment of the driveway did not change from the time she acquired La Roche Douvre onwards. Accordingly, they consider that it is a permissible inference for them to draw that the line of the driveway was always in the same place from the time it was laid out in accordance with the 1960 Conveyance, which, as they find, is entirely consistent with the physical features on site. As such, the reference in the 1980 Conveyance to some area of retained land continuing to be owned by the trustees of the real estate previously owned by Evelyn Le Lacheur appears to be an unaccounted for anomaly. Although that issue does not have to be resolved in this case, the most likely outcome is that this area of land does not exist. The boundary marks to which the 1980 Conveyance refers have not been suggested to be anything other than the boundary marks referred to in the 1960 Conveyance, the 1967 Conveyance and the 1968 Conveyance. They could only have some significance if they are different boundary marks. If they are the same boundary marks, the effect of the 1960 Conveyance was to convey title to the strip of land to the east of them to Mr and Mrs de la Mare in 1960 and thereafter to Mr and Mrs Humphreys-Lewis and then to Mrs Harrison, which means that what Mr and Mrs Harding acquired by way of the 1980 Conveyance should have been all the land bounded by the land previously conveyed by Mr and Mrs Le Lacheur out of the title of Laitte Revel. References to an area of land being retained by Mr Guille and Mrs Tostevin appear to be to something that cannot be identified, deriving from the legally flawed view that the land conveyed in 1960 and thereafter is limited to what is shown on the plans.

90. As a result of the Jurats' conclusion that the facts as found do not support the case advanced by the Plaintiffs, there was no breach of the duty of care owed by the Defendants to the Plaintiffs and so the action against the Defendants is dismissed.

Breach and causation

91. Although it is not strictly necessary for the Court to go further, in case it becomes relevant, we briefly set out what the outcome would have been had the Plaintiffs managed to satisfy the

Court that the Defect actually existed in 2009 when the Plaintiffs purchased La Roche Douvre.

92. If the Plaintiffs had succeeded in establishing that the Defect exists, whether as a matter of law or as a result of factual findings, it follows that the Court would be recognising that the Defect was capable of being identified in late 2008 or early 2009 by the Defendants. The allegation against the Defendants in those circumstances is that they did not meet the standards of care expected of a reasonable Advocate in failing to identify and then advise upon that Defect. In those circumstances, the Deputy Bailiff did not have to resolve any of the issues raised by Advocate Geall on the question of the extent and nature of the duties owed by the Defendants, referring *inter alia* to *Baird v Hastings* [2015] NICA 22 and whether the standard of care expected of the Defendants was lower in respect of the Plaintiffs, as experienced property developers, than in respect of a comparative novice in the property market. Missing a defect in title in the manner on which this part of the Court's determination is predicated, despite recognising that the onus of proving professional negligence is a heavy one, is regarded by the Jurats as being so fundamental to the Advocate-client relationship in a property transaction, that the absence of any advice on such an issue necessarily would constitute a breach of duty under the Defendants' retainer.

93. On the question of causation, the Deputy Bailiff directed the Jurats that they needed to be satisfied that the breach of duty could properly be linked to the loss claimed by the Plaintiffs to have been suffered by them as a result. It had been common ground that some of the loss pleaded would be loss for which the Defendants would be liable in the event that the Plaintiffs established a breach of duty and a causal link, so the question of the Jurats was whether the Plaintiffs had satisfied them that the purchase of La Roche Douvre would not have gone ahead in the manner it did had the Defendants advise them that there was the Defect as pleaded. This largely turned on whether the Plaintiffs' contentions that they would have taken steps to have the Defect rectified before they purchased or have sought to re-negotiate over the purchase price with Mrs Harrison were more likely than the Defendants' suggestion that the Plaintiffs were so keen to purchase La Roche Douvre that they would have overlooked the Defect because the risks associated with it preventing access to the house were risks they were prepared to take anyway. The Deputy Bailiff's direction to the Jurats on the Defendants' contention drew attention to the way similar issues had arisen in comparable cases in England and Wales (eg, *Healey v Shoosmiths (a firm)* [2016] EWHC 1723 (QB)).

94. The Jurats accept the evidence of the Plaintiffs on this issue. The First Plaintiff was quite clear that had he been advised by the Defendant that the Defect existed, he would not simply have gone ahead and taken the risk surrounding the Defect without addressing it in some way. The Jurats accept the unchallenged evidence of Mr Gabriel that, in respect of a different land purchase in the autumn of 2009 with which the Plaintiffs were involved, albeit that the purchaser was Drainforce Limited, when a defect in title was identified and not immediately resolvable, the First Defendant used this as a negotiating lever leading to the purchase price being reduced in agreement with Mr Gabriel, the vendor. The Jurats are, therefore, satisfied that this supports the First Plaintiff's evidence that he would, less than a year earlier, have responded in a similar fashion had the Defect been raised with him by the Defendants. In reaching that conclusion, the Jurats do not regard the appetite for risk that the Defendants suggested was high, arising at least in part from the conviction in 2007 of the First Plaintiff for offences under the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 and the Firearms (Guernsey) Law, 1998, undermines the evidence that the First Plaintiff gave. Whatever risk the Plaintiffs, and particularly the First Plaintiff, would accept in respect of the purchase of a property in which they would live, the Jurats are not persuaded that it would have been to buy La Roche Douvre knowing that there was a real problem about the driveway leading to it. As experienced property developers, the Jurats accept that the Defect would have been used by the Plaintiffs at the very least as a means to re-negotiate the purchase price, meaning that the

transaction would not have been pursued to completion without the issue being further addressed. Consequently, they would, had they needed to, have concluded that the Defendants' breach of duty caused some loss and damage to the Plaintiffs.

Damages and remoteness

95. The Particulars of Loss pleaded at para. 11 of the Cause are as follows:

(a) Legal fees to Trinity Chambers for advice about the Defect (937.50);

(b) Legal fees to Carey Olsen for advice and for arranging to rectify the Defect through purchasing the land over which the Intended Portion of the Driveway ran, and drafting a licence for Mr and Mrs Garrod to reside at La Roche Douvre whilst the Defect was rectified (£28,731.80);

(c) The purchase price of the land over which the Intended Portion of the Driveway ran (£10,000);

(d) Legal fees to Mourant Ozannes to enable the legal owners of the land over which the Unintended Portion of the Driveway ran to take legal advice on the potential sale of that land to the Plaintiffs (£1,683);

(e) Surveying fees to PlanB in respect of the construction of the Intended Portion of the Driveway (£804.60)

(f) Payment to Drainforce Limited in respect of the construction of the Intended Portion of the Driveway (£8,421.14);

(g) The cost of the rental accommodation from October 2012 to February 2013 incurred by the Plaintiffs (£3,000);

(h) Boarding fees for cats at GSPCA (£277.50)

(i) The adverse currency fluctuation in respect of euro/sterling exchange rate affecting the purchase price of the property in France the Plaintiffs were purchasing resulting from the delay in selling La Roche Douvre (£56,720.22);

(j) Transportation costs of furniture going to storage in France rather than directly to the property the Plaintiffs planned to purchase (£255.83);

(k) Costs of return trip to France in October 2012 of First Plaintiff to arrange storage of furniture (£785.32);

(l) Storage costs in France (£2,416.05);

(m) Further travel between Guernsey and France to preserve purchase of property in France pending completion of the sale of La Roche Douvre (877.30);

(n) Additional Tax on Real Property (112 days) payable by the Plaintiffs in respect of La Roche Douvre (£100.80)

(o) Additional occupiers' and refuse rates (112 days) payable by the Plaintiffs in respect of La Roche Douvre (£35.25);

(p) Additional property insurance (112 days) payable by the Plaintiffs in respect of La Roche Douvre (£97.64).

These amounts aggregate to £115,143.95.

96. During the course of the hearing, the First Plaintiff acknowledged that the additional sums payable by them in respect of La Roche Douvre (items (n), (o) and (p)) could properly be regarded as being set-off against what would have been payable by the Plaintiffs had they purchased the property in France in October 2012 in respect of comparable expenses they would have had to pay. Indeed, the First Plaintiff was realistic enough to accept that these expenses for these property-related costs would have been greater had the sale and purchase they eventually undertook completed in 2012 rather than 2013. The claims in respect of these items were abandoned on their behalf by Advocate Tee. Similarly, having regard to the invoices in respect of PlanB (tabs 109 and 110), the First Plaintiff accepted that the first of those invoices dated 29 October 2012 described the work undertaken as having been on 12 June 2012, which meant that it could not be shown to have been associated with expenses incurred once the Defect was known to the Plaintiffs. Consequently, the claim in respect of item (e) was reduced to cover just the later of the invoices, also dated 29 October 2012, which referred to surveying services, two site visits and drawing as requested. The rest of the items were pursued and, in respect of items (a) and (d), the Defendants raised no objection to them.

97. The Deputy Bailiff directed the Jurats on the question of how to consider these damages claims by reference first to the agreed position adopted from *Wellesley Partners LLP and Withers LLP* [2016] 2 WLR 1351 that, if contractual and tortious duties to take care in carrying out a client's instructions exist alongside each other, the test for recoverability of damage for economic loss is the contractual one. Consequently, in considering these losses, which would have been found to flow from the breach of the Plaintiffs retainer with the Defendants, there did not need to be any consideration about whether the damages recoverable would be different if there had been a conclusion that the Defendants were also liable in negligence. The rationale for this position is stated as follows by Floyd LJ (at para. 69):

> "*The rule which controls what damage is recoverable in contract has been reviewed and analysed in many decisions since Hadley v Baxendale (1854) 9 Exch 341. The rule was restated by the Court of Appeal in the Victoria Laundry case [1949] 2 KB 528, re-examined by the House of Lords in Koufos v C Czarnikow Ltd (The Heron II) [1969] 1 AC 350 and most recently considered by the House in The Achilleas [2009] AC 61. It remains the basic rule that a contract-breaker is liable for damage resulting from his breach if, at the time of making the contract, a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. The principle is founded on the notion that the parties, in the absence of special provision in the contract, would normally expect a contract-breaker to be assuming responsibility for damage which would reasonably be contemplated to result from a breach.*"

His Lordship continued (at para. 80):

> "*The basis for the formulation of the remoteness test adopted in contract is that the parties have the opportunity to draw special circumstances to each other's attention at the time of formation of the contract. Whether or not one calls it an implied terms of the contract, there exists the opportunity for consensus between the parties, as to the type of damage (both in terms of likelihood and type) for which it will be able to hold the other responsible. The parties are assumed to be contracting on the basis that liability will be confined to damage of the kind which is in their reasonable*

contemplation. It makes no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that the tortious duty arises out of the same assumption of responsibility as exists under the contract."

The Deputy Bailiff also drew attention to the position as summarised by Longmore LJ (at para. 186):

"*In my view, a solicitor who negligently fails to follow his instructions should be liable for the normal contractual measure of damages (namely that the client should be restored to the position in which he would have been if the instructions had been complied with); the corollary of that proposition is that he should only be liable for loss which could reasonably have been contemplated by the parties when the retainer came into existence. As Dr McGregor puts it, a solicitor and his client "are not strangers as most tortfeasors and tort victims are"; they should therefore be bound by that contractual relationship "in terms of what risks have been communicated by the one and undertaken by the other". There is, of course, no express communication and undertaking of risk in the usual solicitor and client relationship but the law of contract adopts the reasonable contemplation test and it is that test which should apply in contractual relationships even if they can also be categorised as relationships in tort. It follows that a solicitor who fails to carry out his instructions does not undertake responsibility for unexpected or catastrophic falls in the market any more than a valuer does.*"

98. As a consequence, the Deputy Bailiff directed the Jurats to concentrate on what could have been reasonably contemplated as the loss flowing from not identifying and advising on the Defect at the time of the retainer in 2008 and 2009. In particular, any loss that the Jurats considered to be outside those for which the Defendants could properly be expected to undertake responsibility, including anything unexpected, might not be loss for which the Defendants should be made liable. Further, in respect of any of the items of loss claimed that the Jurats considered were the responsibility of the Defendants, the Jurats should further consider whether the Defendants had persuaded them that the Plaintiffs had failed to take steps to mitigate that item of loss.

99. The largest single amount claimed in para. 11 of the Cause is item (i). Indeed, it represents approximately half of the Plaintiffs claim. The way this element of their claim has been calculated is to take the entire amount that Notaire's account shows as being paid by the Plaintiffs (tab 102), in the sum of €1,197,296.62 and to compare the exchange rates on 12 October 2012 and 19 March 2013. Those exchange rates are taken from tables found on the website of xe (tab 129), showing the mid-market rates, and were respectively €1.2416439857 and €1.1726664381 to £1. (The Bank of England spot rates for those days, also at tab 129, were marginally different at €1.2405 and €1.173 respectively.) There was no evidence of the actual rates at which the Plaintiffs converted sterling to euros.

100. Having regard to the reasonable contemplation test, the Jurats are not persuaded that losses incurred in currency fluctuations can properly be attributable to the Defendants. On the Plaintiffs' own evidence, in 2008 they were looking for a property in Guernsey for their retirement. Seeking to use their previous ownership of property in France as a basis on which to argue that it must have been contemplated that, if the Plaintiffs sold, they might move to a country in which the currency is not sterling, and so run the risk that there would be adverse currency fluctuations if their purchase at that time were delayed is, in the view of the Jurats, far too speculative to have been in the contemplation of either side during the time of the Plaintiffs' retainer of the Defendants. The Jurats have further noted the First Plaintiff's evidence that he felt it necessary to take steps to keep the vendor of the property in France happy, which included agreeing to buy wine and other items at the property as evidencing of

the Plaintiffs' good intentions to proceed with the purchase when they were financially able to do so. Whether to take that step or choose instead to run the risk that the property in France would no longer be available to purchase was very much a decision for the Plaintiffs to take. The decision to spend nearly €200,000 on wine and materials was not, in the Jurats' views, an aspect of the Plaintiffs seeking to mitigate their losses but rather a personal decision for them because the property they had found was what they wanted to move to. The inclusion by the Plaintiffs in their claim of the proportion of the currency fluctuation relating to purchasing something over and above a replacement home is even further removed from anything that could have been in the reasonable contemplation of the parties during the retainer. The loss in item (i) would not have been awarded as damages in any event.

101. Similar reasoning has been applied to items (j), (k), (l) and (m), all of which relate to expenses incurred in respect of the Plaintiffs' decision to emigrate from Guernsey and move to France. The Jurats are of the view that it was not in the reasonable contemplation of the parties during the retainer that when rectifying the Defect, the losses flowing from the Defendants' breach would include expenses arising from a decision to emigrate.

102. The claim for monies expended by the Plaintiffs resulting from their decision to move out of La Roche Douvre in October 2012 (items (g) and (h)) would have been rejected by the Jurats for one of two reasons. The first is that they find that it was outside of the reasonable contemplation of the parties that this would happen. They view the decision of the Plaintiffs to permit Mr and Mrs Garrod to occupy La Roche Douvre without having to pay any licence fee for that occupation, was a choice the Plaintiffs made in order to keep the sale to Mr and Mrs Garrod feasible whilst the Defect was being resolved. In effect, they balanced the risks of losing their prospective purchasers with what the position might be if La Roche Douvre needed to be put back on the market. This is not a type of loss that a reasonable person in the shoes of the Defendants would have had in mind as "*not unlikely to result from a breach*". However, even if that approach is flawed, the Jurats would have treated the decision of the Plaintiffs not to have required payment by Mr and Mrs Garrod for their occupation of La Roche Douvre of an amount that would have covered the expenses to which they were put through vacating the premises as a failure by them to mitigate their losses. The Jurats have noted that the terms of the licence agreement allowed for a fee of £15,000 to be payable in the event that the licence expired on 19 April 2013, which broadly equates to a fee of £2,500 per month of occupation, which the Jurats regard as a realistic assessment of the value of the licence to Mr and Mrs Garrod. They further note that this fee would have been pro rated had Mr and Mrs Garrod surrendered the benefit of the licence before that time. In those circumstances, making an allowance, even at a reduced rate, for the time of occupation under the licence before the sale of La Roche Douvre to Mr and Mrs Garrod completed would have been a reasonable step for the Plaintiffs to have taken, rather than seeking to recover the whole of their payments to Mr Le Noury over the same period and in respect of having to board out their cats for a short time.

103. As already stated, the Defendants did not raise any objection to the recoverability of items (a) and (d). They raised a small objection to the amount paid by the Plaintiffs to Mrs Clavadetscher for the re-conveyance of the so-called triangular area of land, pointing out that £10,000 was much larger, even allowing for inflation, than the amount of £100 for which the area was sold by Mrs Harrison in 1984. Further, no valuation had been obtained in respect of the area of land; it was just a sum of money the First Plaintiff negotiated as payable in order to resolve a pressing problem. The Jurats are not persuaded that any of these objections have merit. It would always have been in the contemplation of the parties that a defect in title would need to be rectified. Identifying the solution and taking steps to put in place that solution, which in this case was achieved by bringing back into the title of La Roche Douvre the land that had been sold off, where the price payable would be whatever the then owner of it chose to extract, is what the Jurats consider to be properly payable in the circumstances. If

there were two or more options as to how to resolve the defect identified and the Plaintiffs had chosen what was demonstrably a more expensive option, the Jurats might have been persuaded that the damages claimed went further than could be awarded, but that is not the position here. Accordingly, damages in respect of item (c) would also have been awarded.

104. Items (e) and (f) would have been awarded on a similar basis. The need to have surveying work done as part of the exercise to identify how much of a problem existed and needed to be resolved and then carrying out the physical work to tarmac an area to the satisfaction of Mr and Mrs Garrod were expenses that would have been in the reasonable contemplation of the parties when contracting should a breach arising from failing to spot the Defect have been established. In respect of the work carried out by Drainforce Limited, and the submission of Advocate Geall that what was paid included a profit element, the Jurats do not consider that such a profit element is outside the range of what is recoverable by the Plaintiffs on the basis, as explained by the First Plaintiff, that the carrying out by the company of work by them meant that the company was unable to make a similar profit through other work.

105. The final item of the Plaintiffs' claim is item (b). The legal fees in respect of work carried out by Carey Olsen are put at £28,731.80. Some explanation of this amount was provided by way of an e-mail from Advocate Crawfourd to Advocate Geall dated 26 February 2015 (tab 128). Reference is made therein to the invoices received and settled by the Plaintiffs, albeit the first invoice in the sum of £16,638.50 had been discounted with £892 being written off. Further, the completion statement in respect of the sale of La Roche Douvre referred to fees otherwise payable by Mr and Mrs Harding for which the Plaintiffs had taken responsibility, as set out at clause 3 of the conveyance relating to the relinquishment of rights registered on 24 January 2013 (tab 33). That exercise would have been needed in any event and is not directly related to the Defect. The billing guide breakdowns of the invoices are found in tab 119 and during his evidence the First Plaintiff acknowledged that some of the work set out therein did not relate to the advisory and conveyancing services to rectify the Defect but rather related to consideration of whether there was a claim in professional negligence against the Defendants.

106. The Defendants have criticised the level of fees forming part of this action because they are significantly greater than would be the case if the Plaintiffs had sought to fix the fees payable in advance, whether by reference to usual tariff charges or otherwise. Some of the work undertaken related to the insistence of Mr Guilbert that the only means to resolve matters was for the Plaintiffs to purchase the land that is referred to in the 1980 Conveyance as not having been sold to Mr and Mrs Harding but retained by Mr Guille and Mrs Tostevin, which was work that rendered unnecessary once the First Plaintiff progressed the re-acquisition of the so-called triangular area of land. That said, the Defendants accepted that there would be some fees payable to a firm of Advocates for the advice and conveyancing work that needed to be done in respect of the Defect, of which the fees of Trinity Chambers formed a part but other work, possibly running to some thousands of pounds in total, would also have been required.

107. The Jurats take the view that the amount claimed by the Plaintiffs as item (b) is greater than the damages for which the Defendants could be found liable. In effect, this involves a combination of finding that some of the fees claimed are too remote and/or that the Plaintiffs failed to mitigate their losses in this regard. Having been invited to take a broadbrush approach, for the purposes of providing some indication to the parties about the approximate level of damages that could have been awarded had the Plaintiffs managed to prove their case on liability, the Jurats would most probably have ended up at a figure of roughly 50% of the amount claimed. This is, however, no more than an indicative figure and the likelihood is that further submissions would have been required before a final amount ordered to be paid would have been determined.

108. The consequences of the Jurats' findings on damages are that instead of the amount claimed being ordered to be paid by the Defendants to the Plaintiffs, the amount would have been in the region of £36,000. As far as the Jurats are concerned, that would have been the maximum approximate quantum of damages that would flow from the breach of duty of the Defendants had the Plaintiffs proved the Defect and so established the Defendants' liability.

Credit for profit made on sale

109. The final issue to touch on is that the Defendants also advance an argument that a plaintiff is required to give credit for any incidental or compensating benefits flowing from a breach of duty. The Plaintiffs have estimated that, although they cannot now find all the paperwork relating to the bills they had to pay when re-developing La Roche Douvre, the overall costs, including the initial purchase price paid to Mrs Harrison, were less than the net proceeds of their sale to Mr and Mrs Garrod by approximately £130,000 (as shown in their Response to the Further Information ordered by the Court pursuant to an application dated 16 October 2016 at tab 6). Advocate Geall submits that this principle, as set out in *Jackson & Powell on Professional Negligence*, 8th ed., at para. 11-265 et seq., should apply to extinguish any liability for which the Defendants would otherwise be liable (and this figure clearly exceeds the damages that the Jurats would otherwise have been minded to award the Plaintiffs).

110. Had it been necessary to reach a conclusion on this question, the Deputy Bailiff would have been inclined to reject Advocate Geall's submissions. Whilst the general application of such a principle may well be available in an appropriate case, para. 11-267 includes some examples of where the benefits in question have been found to be too remote or incidental to justify requiring the plaintiff to give credit for them. In footnote 1187, *Owen v Fielding* [1998] ECGS 110 is mentioned, which is a case where the defendant solicitor was not given credit for profits made on the sale of land when the plaintiff had purchased it subject to rights of common due to the Defendant's negligence. The nature of the property market in Guernsey is such that some owners of land are able to make a profit when selling and it is always difficult to know whether the profit results from a general increase in property values over the time between purchase and sale or whether it is as a result of something that the owner has actually done to the land to make it more valuable. Further, without any evidence being adduced as to how much of the profit could properly be attributable to the purchase of the land taking place despite an Advocate's breach of professional duty, the whole exercise becomes too speculative. The outcome proposed by the Defendants would, in the view of the Deputy Bailiff, produce an unjust result because the Plaintiffs would be deprived of any additional benefit they might say relates to what they did to the land during their ownership. Accordingly, whilst leaving open for determination in a case where it is relevant the question of whether in a case such as this the principle advanced by the Defendants can operate in the manner suggested, this Court would have concluded that the damages found to be payable by the Defendants in the region of £36,000 would not have been reduced or extinguished on the basis that the Plaintiffs still made a profit on their purchase and sale of La Roche Douvre.

Conclusion

111. For the reasons given, the Plaintiffs' claim is dismissed. They have not proved that the Defect existed and so have failed to establish that the Defendants breached their duty under the retainer (or in negligence). The Court has further explained briefly that, even if the Plaintiffs had succeeded on the issue of the Defect and the breach of duty, the amount of damages that would have been awarded by the Court would have been approximately one-third of the amount claimed.

112. In respect of the costs of this action, the Deputy Bailiff invites the parties to seek to agree the appropriate order. If agreement cannot be reached, any application for costs, together with

brief supporting written submissions, should be lodged with 14 days of the handing down of this judgment, with a further 14 days thereafter for submissions in response. Thereafter, unless there has been a request for an oral hearing, the Deputy Bailiff proposes to determine who will pay what costs on the papers, unless he wishes to hear further submissions, in which case the Court will re-convene for that purpose.