	Lovering v Atkinson, Ferbrache and Richardson	**JUDGMENT**
	Court of Appeal	**26/2018**
	27th June, 2018	
An appeal concerning a professional negligence claim		

IN THE COURT OF APPEAL OF GUERNSEY
CIVIL DIVISION
(on appeal from the Royal Court of Guernsey Ordinary Division)

Civil Division Appeal No. 517

27th June 2018

Before: **Robert Logan Martin QC, President**
Sir Michael Birt
Deemster David Doyle

Between: **(1) RICHARD ANTHONY BAKER LOVERING**
(2) CHRISTINE ANNE LOVERING
Plaintiffs and Appellants

And

(1) PETER JOHN GRANVILLE ATKINSON
(2) MARK GERARD FERBRACHE
(3) PAUL RICHARDSON
(IN PARTNERSHIP AS ATKINSON FERBRACHE RICHARDSON ADVOCATES AND NOTARIES PUBLIC)
Defendants and Respondents

Advocate N J Barnes represented the Appellants
Advocate S R Geall represented the Respondents

The President

This is the judgment of the Court

Introduction

1. This appeal concerns a claim in professional negligence against the Defendants and Respondents who were engaged as the Plaintiffs and Appellants' legal advisers and

conveyancers in respect of the purchase of La Roche Douvre, Rue de la Folie, Torteval, Guernsey (the "Property") which completed on 31 January 2009.

2. The claim is in respect of an alleged defect in title to the driveway to the Property. The Respondents denied that the defect existed at the time that they were retained by the Appellants in respect of their purchase of the Property. The Appellants aver that when they came to sell the Property in 2012, the purchasers from them would not complete until steps had been taken by the Appellants to obtain a good title to the driveway and as a consequence of which the Appellants suffered loss and damage.

3. In the Cause (headed "Action") in this case the Appellants aver that "The Defendants were at all material times engaged by the Plaintiffs as their legal advisers and conveyancers in respect of their purchase of the Property which completed on 13 January 2009 ("the Purchase")" (and the date of the conveyance in question was actually 31 January although nothing turns on that). The Appellants then aver that "It was the Defendants' duty under its retainer with the Plaintiffs ("Retainer") that the Defendants exercise reasonable skill and care in the Purchase; in addition, the Defendants owed the Plaintiffs such a duty in negligence". The Appellants then refer to the duty of the Respondents under the Retainer to investigate the title properly and to make all necessary searches in respect of the Property.

4. The Appellants set out in paragraph 5 of the Cause what they aver was the nature of the defect:

> "At the time of the Purchase, the Property had a defect in title ("Defect") concerning a driveway ("Driveway") serving the Property which enabled access between the Property and the highway, namely Rue de Rougeval, as described more particularly below:
>
> (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;
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> (b) part of the Driveway in use at the time of the Purchase did not run along the Intended Course, and instead ran 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");
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> (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;
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> (e) in consequence of the aforementioned, upon the Purchase, the Plaintiffs neither owned, nor 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 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."

5. At paragraph 6, the Appellants aver that:

> "Had the Plaintiffs known about the Defect they would not have proceeded with the Purchase unless and until the Defect had been rectified."

6. At paragraph 7, the Appellants aver that:

> "The Defendants breached their duty to exercise reasonable skill and care in accordance with the Retainer and in negligence:
>
> PARTICULARS
>
> (a) the Defendants failed to investigate properly the title to the Property;
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> (b) the Defendants failed to make all necessary searches in respect of the Property and/or interpret the results of those searches correctly;
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> (c) the Defendants failed to make all necessary enquiries and undertake all necessary research in respect of the title to the Property and in particular the Driveway;
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> (d) the Defendants failed to discover the Defect; and
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> (e) the Defendants failed to advise the Plaintiffs of the Defect."

7. The Appellants then aver in paragraph 8 that "In consequence of the Defendants' breach of the Retainer and negligence, the Plaintiffs completed the Purchase in ignorance of the Defect."

8. The plan annexed to the Cause and which is referred to in paragraph 5 comprises an aerial photograph onto which various details have been superimposed. Viewed from the top of the plan which is to the north, the area outlined in red (that is, the "Intended Course" as averred) consists of a rectangular strip running south-east which then turns at a right angle towards the south-west before turning again to the south east. The area outlined in blue (that is, the "Unintended portion of Driveway") consists of a triangular area located at the inside of the right-angled bend but entirely outside the area outlined in red. This means that, as shown, the Unintended portion of Driveway lies outside, and is shown as separate from, the Intended Course. The area outlined in yellow (that is, the "Intended portion of Driveway") consists of a triangular area positioned inside the area outlined in red, and occupying the entirety of the area outlined in red at the location of the right-angled bend in the area outlined in red. This means that, as shown, the Intended portion of Driveway lies inside, and interrupts, the Intended Course. The right-angled bend in the area outlined in red has been referred to at times as the "dog leg".

9. The Cause was heard from 16 to 20 October 2017. Advocate Tee appeared for the Appellants in the court below and Advocate Geall appeared for the Respondents in the court below and in this Court. Advocate Barnes appeared for the Appellants in this Court.

10. The Deputy Bailiff, sitting with Jurats Le Pelley, Ferbrache and Morris, in a judgment handed down on 28 November 2017 dismissed the Appellants' claim stating at paragraph 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."

11. In a subsequent supplementary judgment handed down on 23 January 2018, the Deputy Bailiff sitting alone determined an application by the Respondents for costs. The circumstances included the fact that the Respondents had made without prejudice offers to settle the matter including an offer of which the Deputy Bailiff described the effect as being that "both sides would walk away from the action bearing their own costs" and that this "would have resulted in both sides saving the expense of preparing for and conducting the trial." The Deputy Bailiff awarded costs in paragraph 24 of that supplementary judgment as follows:

> "For the reasons I have given, the just costs order following the conclusion of the action before this Court is that the Plaintiffs be ordered to pay the Defendants' costs on the basis that the Defendants were the successful party. Further, because of rejection by the Plaintiffs of settlement terms which they did not then beat, I am satisfied that the basis upon which those costs be paid should be split between the usual order for costs on the recoverable basis up to the time when the offer was open for acceptance and that the costs thereafter should be paid on the indemnity basis, ie, from 2 May 2017."

The relevant conveyances

12. Before turning to the details of the judgment in the court below, it is necessary to describe the conveyances relating to the area of the land upon which the Property is located.

13. By a conveyance dated 8 December 1945 ("the 1945 Conveyance"), John Percy Brouard conveyed to John Le Lacheur an overall area of land lying between the Rue de la Folie towards the north and what is referred to as the Rue de Rougeval (referred to also in other conveyances as the route de Rougeval) towards the south. The house, originally known as La Folie and now as La Roche Douvre, is located in the north-east of this overall area adjacent to the Rue de la Folie.

14. By a conveyance dated 15 November 1960 ("the 1960 Conveyance"), Mr Le Lacheur and his wife conveyed to Mr and Mrs John de la Mare an area of land which included the site of the house now known as La Roche Douvre. The 1960 Conveyance included in respect of one boundary with neighbouring land the statement "des bornes entre deux". The 1960 Conveyance also referred to a plan which was numbered 2842 which showed an area coloured red which included what is the site of the house, and a narrow and irregular strip of land coloured blue which extended south east to the route de Rougeval.

15. By a conveyance dated 19 May 1967 ("the 1967 Conveyance"), Mr and Mrs de la Mare conveyed the land which had been conveyed to them, including the house Folie, to Mr and Mrs William Humphrey-Lewis.

16. By a conveyance dated 17 September 1968 ("the 1968 Conveyance"), Mr and Mrs Humphrey-Lewis conveyed to Miss Una Kaimes, who became Mrs Mansell and thereafter Mrs Harrison, the area of land which is the Property as pleaded. The 1968 Conveyance referred to a plan numbered 4782 which showed the area coloured red which was the site of La Roche Douvre adjacent to Rue de la Folie and to the south a narrow and irregular strip coloured blue which extended south east to the route de Rougeval. The area of land occupied by La Roche Douvre as conveyed in the 1968 Conveyance was less than the equivalent area conveyed in the 1960 Conveyance and the 1967 Conveyance because it did not include an area to the west. In describing one of the boundaries with neighbouring land of the narrow and irregular strip which

extended south east to the route de Rougeval, the 1968 conveyance used the statement "des bornes entre deux".

17. The land which remained in the ownership of Mr and Mrs Le Lacheur after the 1960 Conveyance was occupied by a dwellinghouse known variously as "Rougeval", "Laitte Revel" or "Rougeval Laitte Revel" (and we shall refer to that land hereafter as "the Laitte Revel land"). By a Conveyance dated 27 November 1980 ("the 1980 Conveyance"), the Estate of Mr and Mrs Le Lacheur conveyed to Mr and Mrs Lawrence Harding the Laitte Revel land which was described as being bounded "on or towards the North-east and the East by a driveway…" owned by Mrs Harrison.

18. By a conveyance dated 17 May 1984 ("the 1984 Conveyance"), Mrs Harrison conveyed to Mr and Mrs Cedric Brookfield a triangular area of land "forming part of a driveway shown coloured blue on Plans Nos 2842 and 4782".

19. By a conveyance dated 13 January 2009 ("the 2009 Conveyance"), Mrs Harrison conveyed to the Appellants what is the Property.

20. The detailed effect of these conveyances will be considered later in this judgment.

21. It is also necessary to refer to two other areas of land which lie generally on the eastern side of the Property. The first is the land to the south-east and bounded generally to the south by the Rue de Rougeval which is occupied by a house known as "Le Sommet" (and we shall refer to that land hereafter as "the Le Sommet land"). This land was the subject of a conveyance in 1979 in favour of Mr and Mrs Brookfield to whom Mrs Harrison conveyed the triangular area in the 1984 Conveyance. In 1985, Mr and Mrs Brookfield conveyed all of the land belonging to them to Mrs Margret Colley, and that comprised what had been the Le Sommet land as it had originally been conveyed to them as well as the triangular area. What this means is that by 1985, Mrs Colley owned both the Le Sommet land and the triangular area conveyed in the 1984 Conveyance. In due course, Mrs Colley's daughter, Mrs Elizabeth Clavadetscher, succeeded to these areas of land.

22. By a conveyance dated 27 November 2012 ("the 2012 Conveyance), Mrs Clavadetscher conveyed to the Appellants the land which had been the subject of the 1984 Conveyance. This amounted to a reconveyance back to the owners of the Property of the triangular area of land which had been conveyed away by their predecessor, Mrs Harrison. It was the 2012 Conveyance, along with separate agreements with Mrs Clavadetscher and with Mr and Mrs Harding as the owners of the Laitte Revel land, which enabled the Appellants to satisfy the purchasers from them that the Appellants could convey a good title to the driveway to La Roche Douvre.

23. The second area of land which is located in the eastern side of the Property is the land which is situated immediately to the north-west of the land occupied by Le Sommet. This comprises a field at one time belonging to Nicholas Brehaut (and we shall refer to that land hereafter as "the Brehaut field").

The judgment in the court below

24. The judgment in the court below was broken down into various sections with the headings "Introduction", "General directions", "Pleadings", "The witnesses", "The facts", "Vue de justice", "The Defect as a question of law", "The Defect on the facts", "Breach and causation", "Damages and remoteness", "Credit for profit made on sale" and "Conclusion".

25. Following a description of the directions given by the Deputy Bailiff to the Jurats, and reference to the pleadings and to the witnesses from whom the Jurats had heard evidence, the Royal Court narrated the facts, including the sequence of conveyances, commencing at paragraph 18 of the judgment. These were addressed in detail and described how the Appellants came to purchase the Property in 2009 and the circumstances which occurred when they decided in 2011 to sell it. It is not necessary to repeat a detailed description of these events although it may be noted that, commencing at paragraph 61, the Royal Court described how the Appellants came to re-acquire from Mrs Clavadetscher the triangular area which had been conveyed out of the Property by Mrs Harrison in the 1984 Conveyance. The result of that re-acquisition was that the Appellants were then able to give to those who were acquiring the property a good title to the land required to construct a functioning driveway to La Roche Douvre. As we have already said, the terms of that re-acquisition were subject to two separate Agreements with Mrs Clavadetscher and with Mr and Mrs Harding.

26. At paragraphs 68 and 69, the Royal Court described the circumstances of a vue de justice which was carried out by the court.

27. The Royal Court then addressed "the Defect as a matter of law". At paragraph 70 of the judgment the Royal Court recorded that:

> "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 [sic] establishing any such Defect, the action must be dismissed because it is as [sic] essential part of the alleged breach of duty against the Defendants that they failed to identify and advise on this Defect."

28. The Royal Court at paragraphs 71 and 72 recorded the respective positions of the Appellants and Respondents at first instance as follows:

> "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.
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> 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."

29. The Royal Court, starting at paragraph 73, referred to both advocates' reliance on the judgment of this Court, differently constituted, in Payne v Walsh (unreported, 30 October 1986), in which there had been reference to earlier English authorities.

30. At paragraph 74, the Royal Court referred to the well settled principles of the construction of documents including conveyances. At paragraph 75, the Royal Court considered certain of the English authorities which had been referred to in Payne v Walsh. The first of these was Wiggington & Milner Ltd v Winston Engineering Ltd [1978] 1 WLR 1462, and the Royal Court referred to the judgments in the Court of Appeal. The second case referred to was Willson v Greene [1971] 1 WLR 635, in which the unreported judgment of Denning LJ in Webb v Nightingale (8 March 1957) was quoted. At paragraph 78 of the judgment of the Royal Court, the learned Deputy Bailiff recorded that he considered that there was much to commend itself in the approach described by Buckley LJ in Wiggington & Milner Ltd and as adopted by this Court in Payne v Walsh. Finally, the Royal Court referred to the decision of the Royal Court of Jersey in Boyle v Highfield Country Apartments Association [2017] JRC 157.

31. At paragraph 79 of the judgment, the Royal Court focused on the 1968 Conveyance and the plan numbered 4782 on the basis that in 2009 Mrs Harrison could not sell to the Appellants more land than the land she owned. The Royal Court's approach of focussing on the 1968 Conveyance seems to have been adopted on the basis of the Appellants' primary case that the pleaded defect existed because plan 4782 as referred to in the 1968 Conveyance was not described as being by way of identification only and not of limitation, and the Appellants argued as a consequence that it formed part of the specific description of La Roche Douvre without qualification.

32. The Royal Court considered the 1968 Conveyance and at paragraph 79 it is recorded that the conveyance contained no express reference to any boundary being as demarcated on the plan and in particular there was no reference to the boundary with the Laitte Revel land being as shown on the plan. At paragraph 79 it is further recorded that:

> "… 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."

33. The Royal Court at paragraph 80 considered the 1967 Conveyance and the 1960 Conveyance.

34. At paragraph 81 of the judgment the Deputy Bailiff rejected the submissions of Advocate Tee on behalf of the Appellants that "the alleged Defect is established just by construing the conveyance, or even the series of conveyances". The judgment continued as follows:

> "… What is apparent in 1960 is that Mr and Mrs Le Lacheur chose to subdivide 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."

35. The Royal Court then dealt with what it described as "The Defect on the facts" and at paragraph 82 stated:

> "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."

36. The Royal Court made reference to the Ordnance Survey maps and at the end of paragraph 85 stated:

> "… The Jurats have not treated any of these maps as conclusive one way or another, 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."

37. The Royal Court at paragraph 86 referred to the plan numbered 2842 and at paragraph 87 referred to the consideration given by the Jurats to the words "des bornes entre deux" in the 1967 Conveyance and the 1968 Conveyance by which Mrs Harrison purchased Folie and re-named it La Roche Douvre.

38. At paragraph 88 of the judgment it is recorded that:

> "… the Jurats have concluded that the Plaintiffs have failed to persuade them that the boundary marks were placed along the broken line to the western side of the area coloured blue on the [sic] either of the plans … The premise on which the Plaintiffs have pleaded their case is not established."

39. At paragraph 90 it is stated:

> "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."

40. Finally, commencing at paragraph 91, the Royal Court addressed the issues of breach and causation, and aspects of damages and remoteness, and whilst recognising that it was not strictly necessary for the Royal Court to go further, it set out what the outcome would have been if the Appellants had satisfied the Royal Court that the Defect existed in 2009.

41. In its Conclusion at paragraph 111, the Royal Court recorded its decision on the merits of the claim as follows:

> "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)."

Grounds of appeal

42. There are five grounds of appeal set out in the Re-Amended Notice of Appeal for the Appellants, the first of which is sub-divided into individual paragraphs. Although the grounds are set out at length and rather more in the form of pleadings, it is appropriate to state them in full:

> "1.1. The Appellants' claim was that the respondents had negligently failed to advise them of a defect in title to the property La Roche Douvre… when acting for them in the purchase of that property in 2008 and 2009. As a consequence the Appellants incurred losses in respect of remedying the defect and exchange rate losses caused through the delay in acquiring the property they intended to move to in France. The property included a driveway which provided the sole means of vehicular access to the property. The driveway was described in the root of title of the property as a strip of land shown coloured blue on a plan with certain measurements and the title then went on to refer to the boundary features including that the strip of land was on or towards the east of the vendors property "des bornes entre deux". The conveyance did not describe what the "bornes" or boundary marks might consist of but the conveyance did specify that the strip of land was to the west of other land and that the boundary with that land comprised "fossées" – earth banks or hedges. The measurement showed the strip of land was ten foot in width for most of its length so by taking a ten foot measurement from the hedge it was at all times possible to establish where the boundary marks would have been when title to it was created in 1960 or where they ought to have been if they did not in fact exist.
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> 1.2. In 1984 the Appellants' predecessor in title conveyed part of the strip of land comprising a triangular area to the neighbour to the east. It must have comprised a substantial piece of land as one of the boundaries was described as being thirty feet in length. It was therefore clear that the Appellants' predecessor in title had conveyed part of the access driveway to a neighbour without replacing it with another means of access to her property. The Appellants complaint was that the Respondents had failed to advise them of this and that the prospective purchasers of their property when they came to sell refused to purchase it without the defect being remedied.

1.3. Notwithstanding this defect the learned Deputy Bailiff wrongly found as a question of construction that because the conveyance of 1960 did not refer to the strip of land only by reference to the plan but also by reference to boundary features no regard should be had to the plan and that the parties must therefore establish the position of the strip of land solely by reference to the boundary features when the description of one of those features "des bornes entre deux" was unhealthily vague.

1.4. The learned Deputy Bailiff wrongly interpreted Payne v Walsh… In accordance with its correct interpretation, and in light of the driveway to La Roche Douvre being described as a strip of land shown coloured blue on the plan in the root of title, he should not only have taken the plan into consideration in ascertaining the material boundaries to the property but he should also have concluded that the plan was brought in as part of the specific description of the property without qualifications so that it formed the equivalent to, and was incorporated into, the verbal description in what amounted to a clear, specific and particular identification of the location of the driveway and the material boundaries encompassed thereby.

2. The learned Deputy Bailiff having found that upon the construction of the conveyance there was no defect the Jurats then went on to find that the western edge of the strip of land was not ten foot from the hedge which formed the eastern boundary (which boundary feature existed in 1960 and 2009) but in some other position at a distance which would have to have been greater than ten foot from the eastern boundary, with the result that there was no defect in title and that a strip of land sufficient to provide vehicular access to the property had always formed part of it. That finding was perverse.

3. Further and or in the alternative to grounds 1 and 2, even if the conveyance was correctly construed and even if the Jurats had correctly found where the path of the driveway lay, the title was still defective because no reasonable purchaser would have accepted title because of the discrepancy between the plan and the conditions on site and the difficulty in identifying the former boundary marks, had they ever existed. Any reasonable purchaser would have insisted on an agreement with the owners of the neighbouring properties clarifying the position of the driveway.

4. The Court found that if a defect in title had been proved then the Respondents would have been negligent and they would have been awarded damages but not in the sum claimed. The Court wrongly found that the exchange rate losses and other losses incurred by the Appellants in respect of their intended move to France and the delay in the purchase of the French property would not have been recoverable because the losses were too remote and ought to have found that those losses were recoverable. The Court also wrongly found that it would have disallowed the Appellants' cost of alternative accommodation.

5. The Court wrongly ordered that the Appellants should pay costs on a full indemnity basis from 2nd May 2017 on the basis that they ought not to have declined the Respondents' offers not to claim costs if the Appellants withdrew their claim when that was not the proper basis for making such an award."

The submissions for the parties

43. The Appellants in their written case dated 3 April 2018 made the following points, amongst others:

(1) the Deputy Bailiff wrongly found that as a question of construction the Appellants' title to the Property was not defective;

(2) the Jurats wrongly found that the strip of land conveyed in the 1960 Conveyance was not in the position shown on the plan but (although it was ten feet wide and said to be bounded by a fossé (an earth bank or hedge)) the strip of land conveyed was in fact further to the west;

(3) the Royal Court wrongly concluded that title to the Property was not defective when the uncertainty over the position of the strip of land arising from the discrepancy between its position on site and its position in title required the Appellants to re-acquire land from a neighbour before they were able to complete the sale of their property;

(4) the Royal Court wrongly found that the exchange rate and other losses incurred by the Appellants in respect of their intended move to a new property in France were the type of loss that would not have been in the contemplation of the parties at the time they contracted or were otherwise claimable;

(5) there was no basis for the indemnity costs order against the Appellants.

44. In his oral submissions Advocate Barnes addressed the approach adopted by the Deputy Bailiff in relation to the 1968 Conveyance and he also addressed the position relating to the 2009 Conveyance upon the basis that it was what was purportedly conveyed to the Appellants which is the starting point for any consideration as to whether the Defect can be shown to have existed at the time of the sale of the Property to the Appellants.

45. In the Written Submissions of the Respondents dated 22 March 2018, their case is summarised as follows:

> "95. The Respondents' submit that the Appellants' title to the Property was not defective in any way.
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> 96. The plans referred to in the 1960 and 1968 conveyances did not precisely delineate the boundaries of either the Property or the Driveway, they were by way of identification not limitation.
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> 97. The Respondents' submit that despite the sale off by Mrs Harrison in 1984 there always remained a Driveway.
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> 98. The relevant conveyances on their face are clear that the Property was not enclavé.
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> 99. The triangular area of land which Mrs Harrison sold off was never used as part of the Driveway, indeed it was not capable of such use as it was approximately four feet high and required works of excavation before it could be used as part of the Driveway.
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> 100. At the "dog leg" the Appellants conceded at the eleventh hour that the Driveway was significantly more than 10 feet wide.
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> 101. There was no Defect and for this reason the Respondents did not advise in respect of an issue which did not exist.
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> 102. Both of the Appellants acknowledged in their evidence the very full advice given by Advocate Ferbrache in respect of title to the Property including the boundary marks and the triangular area of land.

103. The Appellants' intended move to France was not within the contemplation of the parties at the time the contract was concluded in December 2008/January 2009 and accordingly the exchange rate and other losses allegedly incurred by the Appellants in respect of their intended move to a new property in France are irrecoverable."

46. In their written case dated 6 April 2018 the Respondents make the following points, amongst others:

(1) the Deputy Bailiff properly interpreted Payne v Walsh and applied it correctly to the facts of this case. His construction was not "palpably wrong";

(2) the Jurats' findings were not perverse. They were entirely consistent with the evidence before the court at trial;

(3) ground 3 of the grounds of appeal was not argued by the Plaintiffs in the Royal Court and so cannot be advanced on appeal. If the Appellants had applied to amend their claim at trial to include this argument it would have constituted a new cause of action and would have been prescribed. In any event, the ground of appeal is misconceived;

(4) the Jurats' finding of fact is not perverse. On the Appellants' own evidence it was not in their contemplation at the time of the retainer in 2008/09 that they would move to France; indeed, it was their case that at the time of the retainer in 2009 the Property was to become their "forever home".

47. Advocate Geall in his oral submissions did not agree that the 2009 Conveyance was the starting point. He stressed that the Court must focus on the alleged defect as pleaded which existed prior to the 2009 Conveyance. Advocate Geall maintained that the Appellants could only succeed if they could prove the existence of the Defect as pleaded.

The determination of the appeal

48. We now turn to our determination of the appeal. Before addressing the individual grounds, in particular grounds of appeal 1 and 2 which relate to whether or not the Defect existed in the title to the land conveyed to the Appellants, we summarise what is the case pleaded for the Appellants.

49. In paragraph 5(a) of the Cause, the Appellants plead that at the time of the Purchase by the Appellants, that is to say at the time of the 2009 Conveyance, what is called the Intended Course of the Driveway was that specified in the 1960 Conveyance. The 1960 Conveyance was the conveyance by which the land occupied by La Roche Douvre was first conveyed out of the overall land belonging to Mr and Mrs Le Lacheur. It was at that point that the individual strip of land which was intended to provide a right of access to La Roche Douvre first became separately identified in the titles. Before that, that land had been an undistinguished part of the overall land belonging to Mr and Mrs Le Lacheur and which overall land had been conveyed to Mr Le Lacheur in the 1945 Conveyance.

50. The land conveyed in the 1960 Conveyance was in turn conveyed by the 1967 Conveyance and was again conveyed in the 1968 Conveyance subject to a reduction in the area to the north occupied by Le Roche Douvre. This reduction in the area occupied by La Roche Douvre is best understood by a comparison of the plan numbered 2482 and the plan numbered 4782, the first of which is referred to in the 1960 Conveyance and in the 1967 Conveyance, and the latter of which is referred to in the 1968 Conveyance. We refer to this comparison for the purposes of understanding only at this stage and subject to our consideration of the significance of these plans in due course. What may be said at this stage is that the reduction of the area of land

occupied by La Roche Douvre by reason of the 1968 Conveyance is not material to the issues before this Court which concern the title to a right of access.

51. By the 1968 Conveyance, the Property was conveyed to Mrs Harrison, and it was she who conveyed the Property to the Appellants in the 2009 Conveyance.

52. In paragraph 5(b) of the Cause, the Appellants aver that part of the Driveway which was in use at the time of the 2009 Conveyance did not run along the Intended Course, that is to say, what had been conveyed to the Appellants in the 2009 Conveyance as derived from the 1960 Conveyance and conveyed through the 1967 Conveyance and the 1968 Conveyance. According to what is pleaded by the Appellants. the route of the Driveway, as averred by reference to the plan annexed to the Cause, diverted from the Intended Course into an area generally to the west and onto land which belonged to a third party. That is what is called the Unintended Portion of the Driveway. It follows a much straighter course than the Intended Course, it has no right-angled bend, and its eastern side is separated by a distance from the boundaries of the land which lies generally to the east and which has never been part of the Property (that is the Brehaut field and the Le Sommet land). In paragraph 5(d) of the Cause, the Appellants aver that there was no right of way over the Unintended Portion of the Driveway and that the owners of the Property, up to and including the Appellants, had no right to pass over it.

53. In paragraph 5(b), the Appellants also aver that a part of what should have been the Intended Course, that is to say, what was conveyed in the 1960 Conveyance and was consistent with its successor conveyances, was a triangular area which is located at the apex of the right-angled bend and within the Intended Course of the Driveway. This triangular area is what is called the Intended Portion of Driveway. In paragraph 5(c), it is averred that this Intended Portion of Driveway was conveyed away by Mrs Harrison in the 1984 Conveyance and it was therefore not possible thereafter for the Driveway in its entirely to run along the Intended Course. In effect, this meant that Mrs Harrison could not convey a good title to the entirety of the Driveway to the Appellants in the 2009 Conveyance as it had been conveyed to her in the 1968 Conveyance.

54. In paragraph 5(e) of the Cause, the Appellants aver that as a result they did not receive any right to use the actual Driveway as it existed in 2009 and they did not receive a good title to the complete extent of the land required to constitute the Driveway along the route established in the 1960 Conveyance. That was what constituted the Defect upon which the Appellants rely in order to establish the breach of duty and negligence of the Respondents upon the basis that had they been made aware of the Defect then, as averred in paragraphs 6 and 7 of the Cause, they would not have proceeded with the Purchase unless and until it had been rectified.

55. In our judgment, these pleadings may be summarised as follows. There needed to be a right of access into the Property for its proper enjoyment. The land of the actual route of the access which existed physically in 2009, and which had existed for some time previously, was not conveyed in its entirety to the Appellants in the 2009 Conveyance nor was it the subject of any separate right of access in favour of the Appellants, and moreover part of the land of the actual route of the access which existed physically was not part of the land conveyed in any of the predecessor conveyances which conveyed the Property. The predecessor conveyances, beginning with the 1960 Conveyance, had included a continuous area of land running from the land in the north, upon which the house La Roche Douvre was situated, to the Rue de Rougeval in the south. That continuous area of land could have constituted a complete route for access to the Property from the Rue de Rougeval but by 2009 that could not happen because in 1984 a part of the land had been conveyed away.

56. This means that in order for the Appellants to succeed, they must establish that the Defect existed when the Property was conveyed to them by the 2009 Conveyance.

57. Before we proceed to consider the terms of the conveyances themselves, we have four preliminary observations on the case as pleaded by the Appellants. First, the state of the land which would be occupied by a driveway following the route in accordance with what was created in the 1960 Conveyance is not to the point. The case pleaded by the Appellants is that that route was capable of providing ownership of a continuous right of access to the Property even if at the time of purchase in 2009, and for a time before that, a different route for access had actually been in use. If it was the case that the straighter route which physically existed in 2009 was not subject to any rights in favour of the Appellants, then the route following the land conveyed originally in the 1960 Conveyance (that is the Intended Course) would have had to be used for the purpose of constructing an alternative access, and if the right to do so was compromised as pleaded, then the Defect existed. That that alternative route would have required physical works to be carried out as it was not in a state to occupy an actual driveway is not material. It is the ownership of that land at the time of the 2009 Conveyance which would have allowed for the creation of an enforceable right of access which is critical, not its physical state at that time. The fact that it could be altered to accommodate a useable right of access is demonstrated by the fact that such a driveway was created after the sale by the Appellants in 2012 and following their obtaining of a title to allow a driveway along that route to be physically constructed.

58. The second point is that the case does not require the Appellants to establish that the Property was enclavé. The Royal Court has suggested at paragraph 88 of its judgment that this was pleaded by the Appellants but as the terms of paragraph 5 of the Cause set out above demonstrate, that was not stated by the Appellants although it was referred to by the Respondents. The concept appears to have developed before the Royal Court, and it is referred to as an issue in the Written Submissions of the Respondents, but it is not the case that the Appellants have pleaded. What the Appellants aver is that the ownership of what was intended to be occupied by the access to La Roche Douvre commencing with the 1960 Conveyance was compromised at the time of the 2009 Conveyance by the conveying away of the triangular area in the 1984 Conveyance. The practical consequence of this may have been that the Property was enclavé in its truest sense, or it may have been something less. The case averred is that the right of access as it was created originally in the 1960 Conveyance was compromised so that it no longer existed in its entirety as a legally enforceable right of access in the form in which it had been intended.

59. Our third preliminary observation relates to the fact that, as the Royal Court has recorded at paragraphs 25 and 33 of its judgment, there were created rights in favour of the owners of the land to the west of the Property over the strip of land which was first conveyed in the 1960 Conveyance, and such rights passed to Mr and Mr Harding as a result of the 1980 Conveyance and a conveyance by Mr and Mrs Humphrey-Lewis in 1982. This is correct but it does not appear to us to be material. Whatever rights existed, these were rights over the strip of land which was the land actually conveyed by the 1960 Conveyance, that is to say the land intended to provide a means of access to La Roche Douvre. It is the location and extent of that strip of land which is critical to the case for the Appellants, not that there were rights over it. The existence and nature of such rights have no bearing upon the proper extent of the land over which such rights might be exercised. The fact that there were such rights over the land actually conveyed by the 1960 Conveyance and its successors was an element in the events in 2012 because, by their Agreement with the Appellants, Mr and Mrs Harding as the then beneficiaries of those rights agreed to abandon and relinquish their rights in return for being released from any obligation to maintain a driveway on the land concerned. We repeat that we do not regard this aspect as having any materiality to the issues before us and we do not refer to it again.

60. Finally, we would observe that in our consideration of the titles below, we have concentrated on those which bear upon the case pleaded by the Appellants. The Royal Court made reference

to additional events which we shall not mention. These relate particularly to conveyances of the land surrounding the Property and to changes in ownership of that surrounding land. Whilst these conveyances are a part of the circumstances concerning the dispute which is before us, we do not consider that they are material to our deliberations and we therefore make no detailed reference to them.

Ground of appeal 1: The Defect as a matter of law

61. The Royal Court commenced its consideration of the case for the Appellants at paragraph 70 of its judgment under the heading of "the Defect as a question of law". In that paragraph, as we have already noted, the Royal Court recorded that "It was agreed between the parties' Advocates that the first issue to determine is whether or not the Defect, as pleaded, exists." As we have also noted, the Royal Court continued at paragraph 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."

62. We do not repeat what the Royal Court then recorded at paragraph 72 but the essence of the contention for the Respondents was that "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 land which is the subject of the conveyance." The Respondents contended that the coloured area on the plans should not override the reference to "des bornes entre deux" in each of the 1960 Conveyance and the 1968 Conveyance. The task for the court was to ascertain where was the boundary line represented by these boundary marks.

63. The approach of the Royal Court was the result of the way in which the case was presented to it as the submissions for the Appellants concentrated on the 1968 Conveyance and the 1984 Conveyance. This was because, as it was said in paragraph 79 of the judgment, Mrs Harrison could not have conveyed to the Appellants in 2009 more than she actually owned. That is, of course, correct but in our judgment it is necessary to look at all of the sequence of conveyances up to and including the 2009 Conveyance because the case for the Appellants is not simply that the Defect existed at the time of the Purchase solely because Mrs Harrison was not capable in 2009 of passing on a good title to the triangular area. Rather the case for the Appellants is that they did not receive a good title to the whole area of the Driveway which was constituted by the 1960 Conveyance and also that the Appellants did not receive any other enforceable right of access to La Roche Douvre at the time of the Purchase. The nature of that case requires consideration of the whole sequences of the titles which relate to the area of land in question, from the 1960 Conveyance to the 2009 Conveyance.

64. Advocate Geall for the Respondents suggested that it was not appropriate to look at the 2009 Conveyance because the failures averred against the Respondents and Defendants in paragraph 7 of the Cause all related to omissions said to have occurred at a time when the 2009 Conveyance did not exist. We do not accept that. The measure of whether or not the interest in the Driveway (as defined in paragraph 5 of the Cause) which was conveyed to the Appellants was subject to the Defect as pleaded must depend on what was actually conveyed to the Appellants, and that can only be ascertained by what was conveyed by the 2009 Conveyance. The omissions averred against the Respondents would not be material if either what was conveyed to the Appellants could be seen not to have been subject to the Defect or, more

unlikely, if the 2009 Conveyance had never proceeded for some extraneous reason and the Appellants had never become the owners of the Property.

65. In order to understand what was and was not conveyed to the Appellants by the 2009 Conveyance, we therefore consider the series of conveyances chronologically. As the case is pleaded in paragraph 5(a) of the Cause, what was intended to be the land occupied by the Driveway to La Roche Douvre was that specified in the 1960 Conveyance.

66. The 1960 Conveyance was a conveyance by Mr and Mrs Le Lacheur to Mr and Mrs de la Mare and it conveyed two areas of land. The first area of land was that referred to PREMIER and this was the larger area of land upon which La Roche Douvre came to be built on the north-eastern part adjoining the Rue de la Folie. In respect of that land, it was stated that "(le dit morceau de terre teint en rouge sur le plan ci-annexé…)". The plan annexed was the plan numbered 2842.

67. The second area of land was referred to as follows:

> "SECUNDO: une lisière de terre (teint en bleu, avec mésurage, sur le dit plan) et aboutissement au Nord sur le morceau de terre du premier item de ce bail et au SUD sur la route de Rougeval,…; GISANT:- 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 appartenent au dit Nichoas Brehaut et d'une maison appelée "Le Sommet" avec serre et terrain appartenent à Demoiselle Mary Gallienne, des fossés entre deux".

68. Those words of description referred to five boundaries of the land being conveyed. The first two are that the land culminates to the north at the land conveyed PREMIER in the same conveyance ("aboutissement au Nord sur le morceau de terre du premier item de ce bail"), that is to say the land to be occupied by La Roche Douvre, and the land culminates to the south on the route de Rougeval ("aboutissement… au SUD sur la route de Rougeval ").

69. The third boundary which is described is that the land is said to lie to the east of the land belonging to Mr and Mrs Le Lacheur, with "bornes" between ("GISANT: à l'EST ou environ des dits maison, serre et terrain appartenant aux dits Bailleurs, des bornes entre deux"). In practical terms, this means that it is bounded towards the west by land being retained by Mr and Mrs Le Lacheur (that is, the Laitte Revel land).

70. The fourth boundary is that the land lies to the west of an enclosure belonging to Nicholas Brehaut (that is, the Brehaut field), a "fossé" between ("GISANT:… à l'OUEST ou environ du dit courtil appartenent au dit Nichoas Brehaut… des fossés entre deux").

71. The fifth and final boundary is that the land lies to the west of land occupied by the house "Le Sommet" (that is, the le Sommet land), a "fossé" between ("GISANT:… à l'OUEST ou environ… d'une maison appelée "Le Sommet" avec serre et terrain appartenent à Demoiselle Mary Gallienne, des fossés entre deux").

72. Four of these five boundaries could be ascertained by reference to identifiable features. Those at the north and south were respectively where the area conveyed PREMIER ended and where the land conveyed SECUNDO met the Rue de Rougeval. Those to the east were where the land bounded two areas of land in separate ownership, the Brehaut field and the Le Sommet land, there being a "fossé", that is a bank or hedge, between. In the case of the boundaries with the Brehaut field and the Le Sommet land the description meant that the land being conveyed SECUNDO followed, and was adjacent to, the edge of each of these two areas of land in separate ownership with only a linear feature between which marked the line of the boundary. The result is, in our judgment, that all four of these boundaries were identifiable on the ground

by reference to the descriptive words alone. In summary, these words described a continuous area or strip of land running north to south from its boundary with other land, along and adjacent to boundaries with two areas of land in other ownership, and to a point where it met an established highway.

73. That leaves the remaining boundary to the west. That was described as being with land being retained by those granting the 1960 Conveyance, with the boundary marked by "bornes", that is by marker stones or other boundary marks, but the precise position of where those marker stones ought to be was not identified in the descriptive words thus far. The solution to that is to refer to the opening words in the description of the land conveyed SECUNDO which state that the strip of land is coloured blue on the plan annexed to the 1960 Conveyance ("une lisière de terre (teint en bleu, avec mésurage, sur le dit plan)"). That plan is the plan numbered 2482.

74. The critical aspect of those words of description is the inclusion of the words "avec mésurage", that is, with measurements. What that means is that the words of description have incorporated into those words of description all of the measurements stated on the plan which refer to the strip coloured blue.

75. The plan numbered 2842 shows a strip of land coloured blue which is identical in location and shape to the description of the area of land just described as derived from a consideration of all of the descriptive words in the 1960 Conveyance. The strip of land coloured blue on the plan runs from its northern end in a generally southerly or south-easterly direction from the land described PREMIER (which is that shown coloured red), the area coloured blue bounds the Brehaut field and the Le Sommet land immediately to the north-east and south-east and it bends around the latter, and it ends at its southerly end at the Rue de Rougeval. It is shown generally as being of a consistent width and it has the legend "10′ 0″" (ten feet) with arrows pointing into the blue coloured area in three places where the width is shown as regular.

76. The incorporation into the words of description of the land conveyed SECUNDO of the measurements of ten feet means that the boundary with the Laitte Revel land to the west of the land being conveyed can be identified as being ten feet away from the boundary to the east which we have already said can be identified throughout its length because it is adjacent at all points with the Brehaut field and the Le Sommet land. This means, in our judgment, that in construing the words of description of the land conveyed SECUNDO in the 1960 Conveyance the location and extent of that land can be identified definitively.

77. This means that what is shown coloured blue on the plan numbered 2482 as being the land conveyed SECUNDO is consistent with what is described in the words of the description in the 1960 Conveyance. In summary, it is a length or strip of land joining the land to the north, that is the land to be occupied by La Roche Douvre, to the Rue de Rougeval to the south and being ten feet in width and lying immediately to the west of the Brehaut field and the Le Sommet land. That alignment and width are consistent with it being intended to provide ownership of a pedestrian and vehicular access between La Roche Douvre and the public road network. The boundary with the land being retained with the Laitte Revel land therefore did not need to be identified by finding the boundary marks which are referred to as existing along that boundary but rather these boundary marks should have been placed on the western edge of the land along the line of what was ten feet from the boundary with the Brehaut field and the Le Sommet land to the east. The fact that such boundary marks might be placed as a consequence of the 1960 Conveyance along a boundary which can be determined from the words of description used appears to us to be a reasonable inference given that the land being conveyed SECUNDO by the 1960 Conveyance was being separated from an overall area of land for the first tine as a result of the 1960 Conveyance. Having said that, such an inference is not necessary to support the conclusion which we have already reached which is that the location and boundaries of the

area conveyed SECUNDO can be ascertained by an application of the words of description used as we have just explained.

78. That conclusion is subject to one further consideration. The area coloured blue is shown as having a consistent width except at the inside of the right-angled bend where the boundary line is curved and the blue coloured area is wider on the side away from the Brehaut field and the Le Sommet land than would be indicated by a consistent width of ten feet. That curved alignment is not referred to in the words of description. There might therefore be said to be uncertainty as to whether the extent of the blue coloured area meant that the inside of the right-angled bend did curve outwards as shown on the plan, or alternatively was confined to the meeting of two lengths each ten feet in width such that the inside of the bend was itself a right angle as suggested by a strict application of the words of description.

79. In order to address this aspect, we refer to the decision of this Court in Payne v Walsh. In doing so, we note that the Royal Court referred at paragraph 73 of its judgment to this case not being "squarely on all fours" with the present one. This is because the description of the property in the conveyance in Payne v Walsh referred to premises conveyed "by way of identification but not of limitation shown coloured pink on the plan… annexed". These words clearly referred to a plan which was said in terms to be of identification but not of limitation. The reference to the plan numbered 2842 in the 1960 Conveyance does not contain any such direct words describing the status of the plans but rather the 1960 Conveyance merely uses the words "sur le dit plan".

80. In Payne v Walsh, the conveyance in question described the boundaries of the property in question including the following:

> "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 conveyance also provided that the purchasers were to "have right of way on foot and with animals and vehicles over the said cartway coloured green".

81. In the judgment delivered by Collins JA, the Court of Appeal said:

> "We conclude 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.
>
> We were referred to a quotation from the judgment of Lord Justice Romer in the unreported case of Webb v Nightingale… which is quoted in Willson v Green, 1971 1 Weekly Law Reports, page 635, at page 639. Lord Justice Romer in that case said this:
>
> > "Now it seems to me that the words "for the purpose of identification only" are virtually meaningless in the context in which they are found in this particular document, and I have the greatest doubt as to whether the draughtsman had the smallest idea of what he meant by putting them in. Words of that kind are, of course, frequently used in conveyances in which the parcels are described in the body of the deed. In such cases the plan is merely to assist identification and, in the event of any inconsistency arising, is subordinate to the verbal description."
>
> Here we find that the plan has been brought in as a part of the specific description of the property without qualification and that forms the equivalent to the verbal

description, and is incorporated into the verbal description, as described by Lord Justice Romer in the passage cited."

82. The Royal Court in the present case also referred to Willson v Green and to the judgment of Foster J, where having referred to a passage in the judgment of Denning LJ in Webb v Nightingale which we do not find it necessary to quote, Foster J said (at [1971] 1 WLR, p 635G) that that case "clearly shows that a boundary marked out and agreed supersedes a plan which is for identification only."

83. The Royal Court also referred to the decision of the Court of Appeal of England and Wales in Wigginton & Milner Ltd v Winster Engineering Ltd, and which had also been referred to by this Court in Payne v Walsh. At paragraph 75 of the judgment of the Royal Court, the Deputy Bailiff quoted from two of the judgments in Wigginton & Milner Ltd and we repeat these quotations as they appear to be relevant to the issue immediately under consideration. At [1978] 1 WLR, p 1473G, Buckley LJ said:

> "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."

At p 1475E, Bridge LJ said:

> "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."

84. At paragraph 78 of the judgment below, the Deputy Bailiff stated that he considered that there was much to commend itself in the approach described by Buckley LJ and he regarded it as evident that the principle had been adopted as Guernsey law because the Court of Appeal chose to adopt it in Payne v Walsh. We agree with both aspects of that and this Court likewise adopts the same approach in the present appeal.

85. Finally, the Royal Court referred to the decision of the Royal Court of Jersey in Boyle v Highfield Apartments Association and Advocate Geall's reliance on the statement in the judgment at paragraph 32 that "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."

86. From a consideration of these authorities, and in particular Payne v Walsh which is a decision of this Court, we identify the following approach. In identifying what are the boundaries of land which is the subject of a conveyance, it will always be permissible to look at any annexed plan, even if that plan is stated in the conveyance as being for identification but not of limitation. In that situation, the words of description will rule in the event of a discrepancy between the words and the plan. That is the effect of what was said by Buckley and Bridge LJJ in Wigginton & Milner Ltd. In a situation where an element of the plan is referred to directly in the words of description, such as the reference to the line of demarcation in Payne, the plan will be regarded as having "been brought in as a part of the specific description of the property without qualification and that forms the equivalent of a verbal description" to quote Collins JA. That will be the case even where the plan is referred to otherwise as being by way of identification but not of limitation. That is the consequence both of what was the result in Payne v Walsh and of what was said by Romer LJ in Webb v Nightingale.

87. Applying that approach to the existence of the curved boundary shown on the plan numbered 2842 which is referred to in the 1960 Conveyance, we have concluded that the land within the curved boundary was included in the land conveyed SECUNDO. The plan is not stated as being for identification only. The plan is otherwise entirely consistent with the boundaries described in the words of description. There is nothing in the words of description which would contradict a curved boundary on the inside of the right-angled bend. That the boundary at that point (and at that point only) would not directly follow the measurement of ten feet in width is consistent with the boundary being marked by "bornes".

88. In summary, what this means is that the land conveyed SECUNDO in the 1960 Conveyance was the land shown coloured blue on the plan numbered 2842.

89. Any uncertainty about whether or not the boundary was curved at the inside of the right-angled bend cannot make any material difference to the extent of what was conveyed SECUNDO in the 1960 Conveyance. That is because along all of its length the boundary was described as being placed ten feet from the boundary with the Brehaut field and the Le Sommet land, and this means that the extent of the area conveyed was defined by the words of description used throughout almost all of its length. Even if the boundary is taken to be the curved boundary on the inside of the right-angled bend as shown on the plan numbered 2842 as we have found, that cannot have the effect of extending the area conveyed to any material extent into the Laitte Ravel land such that it might include all of the Driveway as it physically existed in 2009 (that is, the Unintended potion of Driveway as pleaded). That is demonstrated by what is shown on the plan annexed to the Cause which shows the curved boundary of the Intended Course on the inside of the right-angled bend with the Unintended Portion of Driveway beyond that and within the Laitte Revel land.

90. The result is that this Court is satisfied, by reference to what is pleaded in paragraph 5(a) of the Cause, that what was conveyed SECUNDO in the 1960 Conveyance was intended to be the ownership of the route of a right of access to the land of the Property and that that may be described as the Intended Course of the Driveway as the Appellants have pleaded. That, in our judgment, is the consequence of a consideration of the 1960 Conveyance itself.

91. The next conveyance in sequence is the 1967 Conveyance by which Mr and Mrs de la Mare conveyed to Mr and Mrs Humphrey-Lewis what had been conveyed to them in the 1960

Conveyance. The 1967 Conveyance also referred to the plan numbered 2482. The words of the 1967 Conveyance are not identical to those of the 1960 Conveyance but in our opinion there is no difference in their effect and we do not analyse them in detail. The effect of the 1967 Conveyance was that Mr and Mrs Humphrey-Lewis received title to two areas of land, referred to as PRIMO and SECUNDO, which were the same as the two areas of land to which Mr and Mrs de la Mare had received title by the 1960 Conveyance. In relation to the area of land conveyed SECUNDO, the reference to it in the 1967 Conveyance was as "(teinte en bleu sur le dit plan No 2482)", and the description referred directly to a strip of land of ten feet in width ("de dix pieds de laize"). This means that the reference to ten feet in width was included directly in the words of description in the case of the 1967 Conveyance, rather than being incorporated by reference to a plan as it was in the case of the 1960 Conveyance. We do not consider that this different manner of description makes any difference to the conclusions which we have reached and which are the same as those in relation to the 1960 Conveyance.

92. We now turn to the 1968 Conveyance by which Mr and Mrs Humphrey-Lewis conveyed the Property to Mrs Harrison. As we have said, this was the conveyance upon which the Deputy Bailiff concentrated in the judgment of the Royal Court because that was the way in which the case for the Appellants was presented at first instance. The conclusion described at paragraph 81 of the judgment was that the Defect could not be established by construing this conveyance, or even the series of conveyances.

93. The 1968 Conveyance first conveyed the land referred to PRIMO which was the land occupied by the house then known as Folie and which was proposed to be called La Roche Douvre. That land was said to be shown coloured red on the plan annexed ("les dites prémisses de cet item indiquées en teint rouge sur le plan ci-annexé"). That plan was the plan numbered 4782. The 1968 Conveyance then referred to the second area of land being conveyed as follows:

> "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 appartenent au dit Nicholas Brehaut, un fossé enter deux; à l'ouest et au sud-ouest ou environ d'une maisonetts appelée "Le Sommet" et terrain appartenent à Demoiselle Mary Gallianne, un fossé entre deux; et au nord-ouest ou environ pour petite partie de et bordant la route de Rougeval…"

94. The first thing to notice about what was conveyed SECUNDO is that the 1968 Conveyance refers to the land having a width of ten feet or thereabouts ("LISIÈRE DE TERRE de dix pieds ou environ de laize"). Subject only to the introduction of a degree of approximation, which we do not consider to be material, that description of width is the same as that described in the 1960 Conveyance.

95. Turning to the words of description of the boundaries in the 1968 Conveyance, it is to be noted that they refer to five boundaries as did the equivalent descriptive words in the 1960 Conveyance. In the case of the second and fifth boundaries described in the 1968 Conveyance, the land is said to lie to the south-east of the land of La Roche Douvre which was being conveyed PRIMO ("GISANT:-… au sud-est ou environ pour petite partie des prémisses du premier item de ce bail") and, to the north-west or thereabouts for a short distance, to border the route de Rougeval ("GISANT:-… au nord-ouest ou environ pour petite partie de et bordant la route de Rougeval"). These are the equivalents of the first two boundaries which are described together in the 1960 Conveyance and are to the same effect.

96. In the case of the third and fourth boundaries described in the 1968 Conveyance, the land is said to lie to the south-west of the Brehaut field ("GISANT:… au sud-ouest ou environ du dit courtil appartenent au dit Nicholas Brehaut, un fossé enter deux") and to the west and south-west of the Le Sommet land ("GISANT:… à l'ouest et au sud-ouest ou environ d'une maisonette appelée "Le Sommet" et terrain"). These are the equivalents of the fourth and fifth boundaries which are described in the 1960 Conveyance and are once again to the same effect. These descriptions also refer to there being a "fossé" between in each case. That is also the same as is described in the 1960 Conveyance.

97. The final boundary described in the 1968 Conveyance is said to lie to the north-east, to the east, and again to the north-east of the land belonging to the widow of Mr Le Lacheur, with markers between ("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"). This is the equivalent of the third boundary described in the 1960 Conveyance with one qualification. Unlike the 1960 Conveyance, the 1968 Conveyance gives the orientation of the boundary with the Laitte Revel land. That orientation changes: first, the land conveyed lies to the north-east of the Laitte Revel land, then the land conveyed lies to the east, and finally the land conveyed lies to the north-east again. This means that the boundary is not straight or nearly straight but follows an irregular course. If one follows the line of the boundary with the Brehaut field and the Le Sommet land on its eastern side, and applies the ten feet or so in width, then the three orientations described are what one would expect for the line of the boundary with the Laitte Revel land towards the west.

98. The conclusion which we reach having considered the descriptive words which apply to the land conveyed SECUNDO in the 1968 Conveyance is that the five boundaries which were described are the same as the five boundaries described in the 1960 Conveyance, subject to the more detailed description of the orientation of the boundary with the Laitte Revel land which appears only in the 1968 Conveyance.

99. The 1968 Conveyance refers to the land conveyed SECUNDO as being indicated in blue on the plan annexed ("indiquée en teint bleu sur the dit plan si-annexé"), and that plan was the plan numbered 4782. The significant difference between the plan numbered 4782 and the plan numbered 2872 is that the area coloured red is substantially reduced on the later plan and that is consistent with the fact that the 1968 Conveyance conveyed PRIMO only the land immediately occupied by La Roche Douvre and that was a smaller area than had been the subject of the 1960 Conveyance (and the 1967 Conveyance).

100. The plan numbered 4782 shows a strip of land coloured blue which is identical in location and shape with the description of the boundaries of the strip of land described SECUNDO which we have just described. The blue coloured strip of land shown on the plan runs from the northern end in a generally southerly or south-easterly direction from the continuation of the driveway within the area described PRIMO, the blue coloured area abounds the Brehaut field and the Le Sommet land immediately to the north-east and south-east and it bends around the latter, and it ends at its southerly end at the Rue de Rougeval. It is shown generally as being of a consistent width which would be consistent with its being approximately ten feet in width other than at the inside of the right-angled bend where the boundary is curved and thus wider on the side away from the Brehaut field and the Le Sommet land. It has the legend "10′ 0″" with arrows pointing into the blue coloured area in three places where the width is shown as regular although not at the right-angled bend where the blue area is wider.

101. As far as that blue coloured area is concerned, we reach two conclusions. First, the blue coloured area on the plan numbered 4782 is the same as on the plan numbered 2842. This was a conclusion reached by the Royal Court at paragraph 26 of its judgment and we need say no more about it. Secondly, the blue coloured area on the plan numbered 4782 shows a strip of

land which is consistent with the description of the boundaries of the land described SECUNDO in the 1968 Conveyance, subject only to the curved boundary on the inside of the right-angled end which is not the subject of any direct words of description (although the width is stated in the words of description as being of ten feet or thereabouts).

102. In this situation, we reach the same conclusion as we did in the case of the plan numbered 2842 as it was annexed to the 1960 Conveyance and for the same reasons. The only difference is that the plan is referred to in the 1968 Conveyance as "indiquée… sur le plan" but these are not words of limitation. We are satisfied that the 1968 Conveyance conveyed SECUNDO all of the land shown coloured blue on the plan numbered 4782, including the curved boundary on the inside of the right-angled bend, and that was the same land as shown on the plan numbered 2842 which was conveyed by the 1960 Conveyance and the 1967 Conveyance. As the absence of direct reference to this curved boundary in the 1968 Conveyance is the same as in the case of the 1960 Conveyance, we regard the same consideration as applying and we do not repeat what we have already said in relation to the plan numbered 2842.

103. At this point in the sequence of conveyances, the position was that, commencing with the 1960 Conveyance, through the 1967 Conveyance, and by the 1968 Conveyance, the same strip of land had been conveyed each time and this land lay between the land of La Roche Douvre and the Rue de Rougeval, and in each case that land had been described and had been shown on a plan annexed in a consistent way. The land conveyed provided a continuous right of ownership of a strip of land of irregular shape which was of the order of ten feet wide and thus capable of providing a continuous route of access between La Roche Douvre and the Rue de Rougeval. The result is that the Intended Course of the Driveway which is the subject of averment in paragraph 5(a) of the Cause can be identified from the terms of the conveyances in 1960, 1967 and 1968 to have been the subject of transfer from the original ownership of what became La Roche Douvre to Mrs Harrison. The extent of the land as described in each of these conveyances is consistent with what is shown on the two plans referred to.

104. Before we consider the next conveyance which concerned the land in question, we refer to the 1980 Conveyance by which the Estate of Mr and Mrs Le Lacheur conveyed to Mr and Mrs Harding the Laitte Revel land. The land conveyed was described as being bounded:

> "on or towards the North-east and the East by a driveway and land the major part shown whereof (shown coloured blue on Plan No 2842…) owned by Una Harrison…, 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".

105. We make three observations about that description. First, it refers to the land belonging to Mrs Harrison as a "driveway" which may be said to demonstrate the understanding of those representing the late Mr and Mrs Lacheur as to what was the intended purpose of the land conveyed by them SECUNDO in the 1960 Conveyance. Secondly, the land which had been conveyed to Mrs Harrison is described as "the major part" and that is referred to as being shown on the plan numbered 2842. There is no reference to boundary marks as defining the driveway which is "the major part" which was conveyed to Mrs Harrison; the only reference to boundary marks relates to the boundary with land remaining with the Estate of Mr and Mr le Lacheur (and it is uncertain as to what that land was although that is not material for present purposes). The third observation is that the boundary is stated to be irregular (north-east and east) which is consistent with the route of the driveway being irregular. That is similar to what we have already said about the boundary with the Laitte Revel land as described in the 1968 Conveyance.

106. What was said in the 1980 Conveyance, which dealt with separate land, could not determine the boundaries to be identified from the conveyances which actually apply to the land belonging to Mrs Harrison in 1980. Nevertheless, what is said in the 1980 Conveyance is consistent with the

conclusions which we have drawn from a consideration of the 1960 Conveyance, the 1967 Conveyance and the 1968 Conveyance about the boundary towards the west of the land connecting La Roche Douvre to the Rue de Rougeval (even if the reference to other land in the ownership of the Vendors is uncertain).

107. We turn now to consider the 1984 Conveyance. As we have observed, this was said to be critical to the consideration of the issue by the Royal Court because it was submitted that Mrs Harrison could not convey to the Appellants what she did not own.

108. In the 1984 Conveyance, Mrs Harrison, who was described as "the Vendor", conveyed to Mr and Mrs Brookfield as the then owners of the Le Sommet land, who were described as "the Purchasers", an area of land which was described as follows:

> "A TRIANGULAR AREA OF LAND forming part of the driveway shown coloured blue on Plan Nos 2842 and 4782…
> THAT the area of land hereby conveyed is BOUNDED
> on or towards the North-east for a distance of approximately thirty feet by a field owned by Miriam Robillard (née Brehaut)… 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".

109. The first thing to note about that description is that it refers to the triangular area of land which is being conveyed as being part of the area coloured blue on both of the plans numbered 2842 and 4782. It is therefore clear immediately that Mrs Harrison was conveying away a part of the area coloured blue which at that time belonged to her as a result of the 1968 Conveyance. The second thing to note is that the triangular area is not said itself to be shown on any plan annexed to the 1984 Conveyance and it is obviously not shown on the plans numbered 2842 or 4782 which were annexed to the earlier conveyances. The third thing is that the triangular area is described as being "part of the driveway" which is consistent with a recognition that the area coloured blue on the plans numbered 2842 and 4782 was at least regarded as providing a route of access to La Roche Douvre even if the actual route of the driveway which existed physically at the time was different.

110. The boundaries of the triangular area are then described and may be summarised as follows. The first is that the land is bounded "on towards the North-east for a distance of approximately thirty feet by a field owned by Miriam Robillard (née Brehaut)… a hedge between". That is a reference to the boundary of the triangular area being directly along the north-eastern boundary of the land belonging to Mrs Harrison with the Brehaut field, and with only a hedge between. That boundary of the triangular area is described as being approximately thirty feet in length. The precise location of that boundary of the triangular area is then established by the next element in the description which is that it is bounded "on or towards the South-east by a dwellinghouse called "Le Sommet" and land owned by the Purchasers, a hedge between". The fact that this boundary lies directly along the boundary of the area coloured blue with the Le Sommet land, with only a hedge between, demonstrates that the apex of the triangular area being conveyed in the 1984 Conveyance was located along the boundaries on the outside of the right-angled bend. The triangular area can thus be seen to be located at its southerly or south-easterly end at the apex of the right-angled bend and its boundary with the Brehaut field ran in a generally northerly direction for thirty feet. The length of the boundary with the Le Sommet land was not stated. It is therefore clear that the triangular area occupied an area at the apex of the right-angled bend and thus the land at that point as shown on the plans numbered 2842 and 4782 no longer belonged to Mrs Harrison. Only the extent of that triangular area along the boundary with the Le Sommet land remains to be ascertained.

111. The third boundary of the triangular area is described as being "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". This boundary is curious because it refers to two alignments: south-west and north-west. That is not consistent with a straight line boundary as being the boundary forming the third side of a triangular area. This side might be regarded as the hypotenuse of the triangular area given that the apex is located at the outside of the right-angled bend, and we shall continue to refer to that boundary as the hypotenuse whilst recognising that strictly it is not described as a straight line boundary.

112. The hypotenuse is described as being orientated south-west and north-west "by the remainder of the said driveway". At paragraph 88 of its judgment, the Royal Court referred to the use of the word "remainder" as meaning that the land sold off by Mrs Harrison did not cross the entirety of the land that had been conveyed to her in the 1968 Conveyance. Whilst that may be strictly correct, in our judgment it does not make any material difference to the extent of the triangular area within the blue coloured area of the driveway. It is clear that everything that is being described must lie within the area coloured blue on the two plans, and the right-angled triangular area, one side of which is thirty feet long, must constitute a material area which is lost from the area coloured blue. This is consistent with the two orientations used in the descriptive words because, in order to cross the width of the driveway from the boundary with the Le Sommet land, the line of the boundary would first run approximately north-westerly and thus be a boundary of the triangular area "on or towards the South-west", and then turn to run north-easterly towards the northerly end of the thirty feet boundary with the Brehaut field and thus be a boundary of the triangular area "on or towards… the North-west".

113. The boundary of the triangular area on the hypotenuse side is also referred to as having a "hedge between belonging to the Vendor", that is belonging to Mrs Harrison (and in the succeeding provision in the 1984 Conveyance she covenants not to allow that hedge to obstruct the view from Le Sommet which is situated "to the South-east of the area of land hereby conveyed"). In construing the words of description precisely, the reference to the hedge would suggest a hedge which had been planted along the boundary of the driveway on the outside or generally western side, or within the land of the driveway, because Mrs Harrison had received no title to any land beyond that point in the 1968 Conveyance for the reasons already explained. Whether that was strictly the case on the ground, or whether the hedge was actually related to the route of the driveway as it physically existed in 1984, cannot be certain but that is not in our judgment material. What is material is that a consideration of the words used to describe the boundaries of the triangular area conveyed in the 1984 Conveyance has the result that in 1984 Mrs Harrison conveyed to the owners of the Le Sommet land an area of land which existed within the right-angled bend of the land conveyed in the 1968 Conveyance (and in the predecessor conveyances), and that the area of land occupied the land of the driveway along the boundaries of the Brehaut field and the Le Sommet land, it extended for a distance of thirty feet along the boundary with the Brehaut field, and as a result of the location of its hypotenuse (albeit strictly not a straight line), the triangular area occupied a material part of the width of the driveway at the location of the right-angled bend.

114. As a result, we find that by a consideration of the 1984 Conveyance, along with the earlier conveyances, it is possible to establish that what the Appellants have averred at paragraph 5(c) of the Cause has been made out. It is averred that:

> "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".

We are satisfied that that averment has been made out as a matter of law and upon a full consideration of the relevant conveyances and that as a result of the land having been conveyed away by Mrs Harrison in the 1984 Conveyance "it was therefore no longer possible at the time of the Purchase for the Driveway in its entirety to run along the Intended Course".

115. As we have already said, it is a consideration of the 2009 Conveyance which will determine whether or not the Defect has been shown to exist. That is because it was by that conveyance that the Appellants obtained title to the Property and all that went with it. In order to succeed, they must establish that the Defect existed "At the time of the Purchase" as averred in the opening words of paragraph 5, and in sub-paragraphs (b) and (d), of the Cause. The Appellants must establish that as a result of what was conveyed to them by the 2009 Conveyance the Appellants did not receive a good title by which they could take access to and from La Roche Douvre.

116. The 2009 Conveyance was made between Mrs Harrison, described as "the Vendor", and the Appellants, described as "the Purchasers". In clause 1, various definitions were given including the following:

> "1.1 "the Driveway" means 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;"
>
> …
>
> 1.6 "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 Folie…;
>
> 1.7 "the 1984 Conveyance" means the Conveyance by the Vendor to Cedric John Brookfield and Sheila Eileen Brookfield… his wife, (predecessors in title to Mrs Clavadetscher) registered on 17th May 1984".

Aside from the details of the definition of the Driveway in clause 1, it may be noted that the 2009 Conveyance did acknowledge the existence of the 1984 Conveyance.

117. Clause 2 of the 2009 Conveyance stated that "The Vendor conveys the Property… to the Purchasers" and clause 3 stated that "The Purchasers accept the Property…". Clause 8 provided in part that "This Conveyance comprises all right, title and interest in the Property vested in the Vendor…"

118. At this stage, it is clear that by the 2009 Conveyance, Mrs Harrison conveyed to the Appellants the whole of the Property, as defined, all of which she purported was vested in her without qualification, and that what was the Property conveyed included the Driveway, also as defined.

119. Clause 4 provided a description of the boundaries of the dwellinghouse of La Roche Douvre and its garden ground along with the continuation of the Driveway as referred to in item 1.6.1 which it is not necessary to quote. Clause 5 provided a description of the boundaries of the Driveway as follows:

> "5 That part of the Property described in item 1.6.2 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 Clavadetcher, the hedge ("fossé") 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".

120. The first thing to note about what was conveyed as the "Driveway" in the 2009 Conveyance is that it is referred to in clause 1.1 as "measuring ten feet or thereabouts in width shown coloured blue on Plan 4782". Both the words used and what is shown on the plan numbered 4782 suggest the continuous and irregular area or strip of land of consistent width which we have already found to have been conveyed in the 1968 Conveyance, as well as in the 1960 Conveyance and the 1967 Conveyance by reference to the plan numbered 2842. Neither those words used in the 2009 Conveyance nor the plan referred to suggest that any part of the blue coloured area was being excluded from what was conveyed in the 2009 Conveyance.

121. It may also be noted that the words of description of what was conveyed as the "Driveway" in the 2009 Conveyance described the boundaries referred to as existing outwards by reference to the land which lay beyond. This is in contrast with, and is the direct opposite of, the description of the boundaries of the area conveyed SECUNDO in the 1968 Conveyance which referred to the boundaries inwards from the land beyond. By way of example, the description in item 5.3 of clause 5 in the 2009 Conveyance is that the Driveway is described as "bounded on or towards the… South-east by the Rue de Rougeval" whereas the final boundary in the description in the 1968 Conveyance is described as lying to the north-west or thereabouts for a short distance bordering the route de Rougeval ("GISANT… au nord-ouest ou environ pour petite partie de en bordant la route de Rougeval"). But despite this direct opposition in how that same boundary is described, the result is identical.

122. Clause 5 of the 2009 Conveyance described five boundaries. That is the same as the 1968 Conveyance which also described five boundaries of the land conveyed SECUNDO, as did the 1960 Conveyance, all as we have already discussed. It is therefore possible to compare directly the description of the boundaries of the land conveyed by Mrs Harrison in the 2009 Conveyance with the equivalent descriptions of the boundaries of the strip of land conveyed to her in the 1968 Conveyance.

123. We begin by considering four out of these five boundaries. The first boundary to be considered is described as being with the land belonging to the Brehaut Heirs (that is, the Brehaut field) which is said in item 5.1 to lie to the north-east with the boundary being an earthbank or fossé. This can only mean that the Driveway as defined along that length must run along, and be immediately adjacent on the north-east to, adjoining land which is the Brehaut field from which it is separated only by the linear physical feature of an earthbank or fossé. The effect of that description is the same as the equivalent boundary with the Brehaut field which is described in the 1968 Conveyance ("GISANT:… au sud-ouest ou environ du dit courtil appartement au dit Nicholas Brehaut, un fossé enter deux").

124. The next boundary to be considered is described as being with the Rue de Rougeval which is said in item 5.3 to lie to the south-east. That is a boundary with an identified highway and may thus be taken to identify one end, namely the southern end, of the Driveway. Once again, the

effect of that description is the same as the equivalent boundary which is described in the 1968 Conveyance ("GISANT:-… au nord-ouest ou environ pour petite partie de et bordant la route de Rougeval").

125. The third boundary to be considered is that stated in item 5.4 in clause 5 of the 2009 Conveyance. This refers to the Driveway being bounded to the "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". This description is the equivalent of what is the same boundary as it is described in the 1968 Conveyance ("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"). The same considerations apply and this means that this alignment of the boundary of the strip of land which is described as the Driveway in the 2009 Conveyance towards the Laitte Revel land to the west is not described any differently from the equivalent description in the 1968 Conveyance.

126. The following may be noted about that description. First, it describes a boundary which has the land of Laitte Revel generally on the western side. Secondly, it describes a boundary which is irregular and not straight or almost straight because it refers to the boundary being to the south-west, the west, the north-west and the south-west again. These are consistent with the boundary of the Driveway towards the west being with the Laitte Revel land and following an irregular route. Thirdly, the boundary is said to have "boundary marks between". These may be assumed to have been in existence at the time of the 2009 Conveyance but in our judgment these marks would have been indicative of a boundary whose location had already been identified because of the words of description. Finally, the description of the boundary means that Mrs Harrison conveyed to the Appellants a strip of land with the same boundary with the Laitte Revel land towards the west as had been conveyed to her in the 1968 Conveyance. In other words, Mrs Harrison did not purport in the 2009 Conveyance to convey to the Appellants a title to any additional land further to the west and which might have included part of the driveway which actually existed.

127. The fourth boundary to be considered at this stage is said in item 5.5 to lie to the north-west and is the continuation of the Driveway which was also conveyed in the 2009 Conveyance. That boundary may be taken to identify the other end, namely the northern end, of the Driveway as defined. As before, that description is the equivalent of the description of the same boundary in the 1968 Conveyance ("GISANT:-… au sud-est ou environ pour petite partie des prémisses du premier item de ce bail").

128. As a result of these considerations, we find that, in the case of the four boundaries just discussed, they describe the same boundaries as the equivalent boundaries which were described in the 1968 Conveyance. This means that they are describing the same four boundaries as are to be seen on the plan numbered 4782. It also means that thus far what Mrs Harrison conveyed to the Appellants in the 2909 Conveyance was the same strip of land with the same four boundaries as had been conveyed to her in the 1968 Conveyance.

129. This leaves the fifth boundary as it is described in item 5.2 of the 2009 Conveyance. This refers to a boundary lying towards the "South-east for a short distance and the north-east by land with a dwellinghouse known as "Le Sommet"…, the hedge ("fossé") forms the boundary…". This follows upon the description of the boundary with the Brehaut field to the north-east in item 5.1 and it describes a continuation of the line of that boundary in a southerly direction. That continuation is said to lie with the Le Sommet land to the south-east for a short distance and then to the north-east. That is to be compared with the equivalent description in the 1968 Conveyance in which the Le Sommet land was said to lie to the west and south-west of the Le

Sommet land ("GISANT:… à l'ouest et au sud-ouest ou environ d'une maisonette appelée "Le Sommet" et terrain").

130. Given that, as we have already discussed, the description of the boundary with the Le Sommet land is described in the 2009 Conveyance as existing outwards by reference to the land which lay beyond, whereas the description of the equivalent boundary in the 1968 Conveyance was referred to inwards from the land beyond, it is possible to conclude that the descriptions of the boundary with the Le Sommet land in the 2009 Conveyance and in the 1968 Conveyance are to the same effect even although the actual directions of the boundary stated are not completely interchangeable. The direction "north-east" in the 2009 Conveyance may be said to be to the same effect as the direction "sud-ouest" in the 1968 Conveyance, but the other alignment of the boundary is not directly interchangeable in the same way because the alignment "South-east for a short distance" as stated in the 2009 Conveyance is not the same in its effect as the alignment "l'ouest" as that appears in the 1968 Conveyance.

131. This discrepancy could suggest that the boundary with the Le Sommet land is being described as existing along the line of the hypotenuse of the triangular area of land conveyed to the owners of the Le Sommet land in the 1984 Conveyance. This would mean that that triangular area was excluded from what was being conveyed in the 2009 Conveyance. That would be supported by how the boundary along the hypotenuse was described in the 1984 Conveyance as being bounded "on or towards the South-west and the North-west for a short distance by the remainder of said driveway". That orientation is the same as the equivalent in the 2009 Conveyance ("South-east for a short distance and the north-east by land with a dwellinghouse known as "Le Sommet"…") albeit that the 1984 Conveyance was describing that boundary as part of the triangular area being conveyed to the owners of the Le Sommet land whereas in the 2009 Conveyance the same boundary was being described as a boundary of the land which remained part of the Property.

132. The fact that the boundary being described was the one along the hypotenuse of the triangular area would be supported by the final words of description in item 5.2 which state "the hedge ("fossé") forms the boundary and belongs with the Property (as set out in the 1984 Conveyance)". This can be taken to be a reference to the hedge which was said to lie along the line of the boundary of the triangular area. As we have said in considering the 1984 Conveyance, that can only have been intended to be a hedge believed to lie somewhere within or on the western side of what was being described as the driveway because otherwise it would lie beyond what belonged to Mrs Harrison.

133. Having said that, there is no direct reference in the 2009 Conveyance to the triangular area, which was the subject of the 1984 Conveyance, being excluded. It may be inferred for the reasons just explained but it is not stated directly. The 2009 Conveyance states in the definition in item 1.1 that the expression "the Driveway" which is being conveyed as part of the Property, "means 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". The part of the Property referred to in item 1.6.2 is then the subject of the descriptions of the boundaries which we have just discussed. The area coloured blue on the plan numbered 4782 does not show any aspect of the triangular area which was conveyed in the 1984 Conveyance but shows the continuous and irregular strip of land which is consistent with a width of the order of ten feet (other than at the inside curve of the right-angled bend). In other words, if one refers to the area coloured blue which is said to show the area of the Driveway which is the subject of the 2009 Conveyance then the triangular area which was the subject of the 1984 Conveyance is shown as being included in the 2009 Conveyance notwithstanding that it was actually conveyed away by Mrs Harrison some years previously.

134. In the case of the 2009 Conveyance, the words of description of the boundary with the Le Sommet land may be said to be uncertain for the reasons just explained. A consideration of the plan numbered 4782 and how it is referred to in the 2009 Conveyance may be able to provide the appropriate assistance "in understanding the description of the parcels". That plan is not referred to as being "for identification only" and is therefore not subject to the potential limitation referred to by Bridge LJ in Wigginton & Miller Ltd. But even if it were to be subject to such a stated limitation, it appears to us that, applying what has been said by both Buckley and Bridge LLJ in that case, this Court would still be entitled to look at the plan in question insofar as it forms part of the conveyance. The only effect of words of limitation would be to give supremacy to the words of description although, as we have just said, we do not consider that there are any such words of limitation in the 2009 Conveyance.

135. If what is shown coloured blue on the plan numbered 4782 as it is referred to in the 2009 Conveyance were to be applied directly, it would mean that the triangular area was actually included in what was intended to be conveyed by Mrs Harrison to the Appellants in the 2009 Conveyance notwithstanding that she had already conveyed away that area in the 1984 Conveyance.

136. Having considered this issue, we have not found it to be straightforward. On the one hand, it may be said that the words of description of the critical boundary in item 5.2 describe that boundary as being with the Le Sommet land to the north-east and south-east of the hypotenuse. The result would be that the hypotenuse of the triangular area was the boundary with the Le Sommet land and the triangular area itself was excluded from the 2009 Conveyance. This would mean that the words of description would over-ride what is shown on the plan which is said to be the correct approach indicated by Buckley and Bridge LJJ if a plan is said to be for purposes of identification only.

137. On the other hand, the extent of the Driveway as a defined expression is said in item 1.1 to be "shown coloured blue on Plan 4782" and these words may be said by themselves to be words of description. In other words, the plan may be said to be part of the words of description because the plan has been incorporated into the words actually used as an element in the description of what was being conveyed. That would be because it has been given a greater status in the 2009 Conveyance as it has been referred to directly in the words of description as actually showing the land which was being conveyed as the Driveway. That would be the equivalent of what was decided in Payne v Walsh, namely that what has been shown on the plan has been incorporated into the words of description.

138. In reaching our decision on this issue, we consider that the description of the land being conveyed as the Driveway in the 2009 Conveyance is by no means certain but we reach the conclusion that it did not include the triangular area which had been conveyed away by Mrs Harrison in the 1984 Conveyance. That is certainly what would be expected because the 2009 Conveyance ought clearly to have excluded the triangular area. The fact that it did not do so leads us to the inference that it was excluded because of the direct words of description in item 5.2 and because, had it purportedly been included in the land conveyed by the 2009 Conveyance, Mrs Harrison could not in any event have given a good title to the triangular area to the Appellants.

139. We now come to consider the critical issue which is whether the Appellants have established the existence of the Defect as a matter of law and upon a consideration of the conveyances alone. We have already said that, following our consideration of the 1984 Conveyance, we are satisfied that the averment in paragraph 5(c) of the Cause has been made out, namely that "it was therefore no longer possible at the time of the Purchase for the Driveway in its entirely to run along the Intended Course". As the averment in paragraph 5(c) goes on to state, it was no longer possible for the Driveway in its entirely to run along the Intended Course "or otherwise

to run over land which formed part of the Property." This is an acknowledgement of the position that, for the Defect to have existed, the Appellants must establish that there was no other route of access to La Roche Douvre within the land which was conveyed to them in the 2009 Conveyance and also that there was "no right of way serving the Property" over what was the actual physical driveway which existed in 2009 and which had existed for many years previously as that is averred in Paragraph 5(b) and (c) of the Cause.

140. The judgment of the Court is that there was no such right of access and that the existence of the Defect has been established following the consideration of the conveyances which we have carried out. In the first place, we have found that the triangular area conveyed away in the 1984 Conveyance occupied a substantial area of what was the area or strip of land at the right-angled bend. We have already observed that the Appellants are not required to establish that the Property was enclavé but only that their right of access from the highway to La Roche Douvre was materially compromised. This has been established by reference to our conclusions on the effect of the 1984 Conveyance. The ownership of land available to give access to La Roche Douvre had been constituted as an irregular strip of land of the order of ten feet in width and following the boundaries with the Brehaut field and the Le Sommet land generally on the side to the east. As we have said above, the width of what was the driveway was materially interrupted by the triangular area at the location of the right-angled bend. We have no hesitation in concluding that the right or ownership of a continuous ten feet wide strip of land between La Roche Douvre and the Rue de Rougeval had ceased to exist as a matter of title by the time of the 2009 Conveyance and there is nothing within the 2009 Conveyance which may be said to have re-established that continuous ten feet wide strip.

141. In this respect, we have said that our conclusion is that the 2009 Conveyance did not purport to include the triangular area which had been conveyed away by Mrs Harrison in the 1984 Conveyance. We should make it clear that our conclusion on what were the boundaries of the land conveyed in the 2009 Conveyance is not ultimately material. By 2009, Mrs Harrison no longer had the ability to convey the triangular area to the Appellants and whether it was excluded from the land conveyed by the 2009 Conveyance (as we have found), or that she purported to include it (contrary to what we have found), makes no difference. This is because the critical conclusion is that she was not in a position to convey the triangular area to the Appellants and nothing in the 2009 Conveyance altered that.

142. There is also nothing in the 2009 Conveyance which conveys or purports to convey to the Appellants the ownership of any other continuous strip of land connecting La Roche Douvre with the Rue de Rougeval and upon which a physical access could be constituted. Nor is any right over land in the ownership of a third party included in the 2009 Conveyance such that an alternative enforceable and continuous right of access could be constituted. In particular, no right was purportedly given over the route of the actual access, that is the Unintended Portion of Driveway as averred in paragraph 5(b), and that is consistent with the fact that the area of that access lay outside the area of what had been created in the 1960 Conveyance and conveyed to Mrs Harrison in the 1968 Conveyance. That land belonged with the Laitte Revel land and Mrs Harrison had no right over it such that she could convey such a right to the Appellants. We are therefore satisfied that the averment in paragraph 5(d) is made out.

143. The Appellants aver in paragraph 5(e) of the Cause:

> "(e) in consequence of the aforementioned, upon the Purchase, the Plaintiffs neither owned, nor 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 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."

144. We are satisfied that what is averred in paragraph 5 of the Cause can be established as a matter of law and upon a consideration of the relevant conveyances. We find that what is averred in paragraph 5(c) has been established following a consideration of the conveyances and we conclude that the Appellants have established that the Defect which they have pleaded did exist at the time of their purchase of the Property in 2009.

145. This means that we disagree with the conclusion reached by the Deputy Bailiff as a matter of law. At paragraph 79 of the judgment of the Royal Court, the Deputy Bailiff described the boundaries "As it were on a clockface", as running from the land occupied by La Roche Douvre, along the boundaries with the Brehaut field and the Le Sommet land, to the Rue de Rougeval. That is consistent with our own conclusions. The Deputy Bailiff then said "In particular, there is no reference to the boundary with Laitte Revel being as shown on the plan". He then found that there was "nothing to prevail over the verbal description of that boundary of the strip of land being the boundary marks."

146. We disagree. Although the Deputy Bailiff referred at paragraphs 79 and 80 to the description of the land conveyed as being ten feet in width, he stated that "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 the site in 1960". In our judgment, this fails to recognise that the reference to ten feet in width is itself part of the words of description of the boundaries because what it means is that the boundary towards the west, that is with the Laitte Revel land, will be located ten feet from the boundaries towards the east, that is with the Brehaut field and the Le Sommet land. It is along that boundary that the boundary marks would have been placed on the ground. The position of the boundary marks was dictated by the words of description and was not at large. In 1960, the boundary marks could not generally have been placed to the west more than ten feet away from the boundaries with the Brehaut field and the Le Sommet land in the east.

147. The only exception to this relates to the curved boundary on the inside of the right-angled bend. For the reasons already explained, we have found that to be a part of the strip of land conveyed by the 1960 Conveyance and its successors, and that it is shown coloured blue on the plans numbered 2842 and 4782. Once again, the boundary marks at that location would have been placed along the line of the curved boundary as shown on these plans. The boundary marks could not have been placed any further to the west.

148. At paragraph 81 of the judgment, the Deputy Bailiff said that:

> "if [Mr and Mrs le Lacheur] had wanted the land so sold to be limited to ten feet along these 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 other purchaser would be able to identify."

The Deputy Bailiff appears to regard the ten feet measurement as something which required to be referred to expressly by reference to the plan. We do not agree because in our judgment the description of the ten feet in width is by itself a part of the words of description. In the case of the 1968 Conveyance, that reference is direct, and in the case of the 1960 Conveyance, the ten feet in width is stated on the plan and that is incorporated into the words of description by the reference to the plan numbered 2842 as being "avec mésurage". We see that as a consequence of the approach derived from Payne v Walsh.

149. In the same paragraph of the judgment, the Deputy Bailiff also said:

> "Looking at the 1960 Conveyance (thereafter the 1967 Conveyance and the 1968 Conveyance, and noting that Mrs le Lacheur remained the owner of Laitte Revel on both occasions)… it would have been apparent from going on site that there were some form of boundary marks 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."

This reference to "no need to refer to boundary marks" appears to suggest that because there was reference to boundary marks in the words of description then the boundary in question could only be identified by finding those marks. Once again, we do not agree. We see no reason why a conveyance should not give a detailed description of the boundaries of an area of land, which would be sufficient by themselves to identify the boundaries of the area in question, and also refer to the fact that those boundaries have been shown on the ground by boundary marks. In such a case, the boundary marks would require to follow the words of description and a reference to boundary marks would not, in our judgment, mean that the words of description were somehow no longer capable by themselves of providing a definitive description of the boundaries.

150. In conclusion, given that we have found that the triangular area located at the right-angled bend was conveyed away by Mrs Harrison in the 1984 Conveyance and that she could not have conveyed it to the Appellants in the 2009 Conveyance, and that the 2009 Conveyance did not give to the Appellants any other right of access into the Property, the result is that we find that what has been averred in paragraph 5 of the Cause is established as a matter of law. We are satisfied that the Defect as pleaded existed at the time of the Purchase by the Appellants.

151. We find that the individual grounds set out in paragraphs 1.1, 1.2 and 1.3 of ground of appeal 1 have been made out and for the reasons explained above. With reference to paragraph 1.4, we do not find that the Deputy Bailiff wrongly interpreted Payne v Walsh but rather that he did not properly apply to the conveyances in this case the approach which is to be derived from that and the other authorities referred to. In the present case, the issue did not turn upon whether the plans in question were stated to be by way of identification but not of limitation because that qualification did not appear in any of the relevant conveyances. In any event, it is always necessary to see whether a plan has been incorporated into the words of description.

152. We therefore hold that ground of appeal 1 has been made out and we allow the appeal.

Ground of appeal 2: The Defect as a matter of fact

153. This ground of appeal does not now arise for our consideration. It concerns matters of fact judged by the Jurats in determining where the boundary marks towards the west of the Driveway were.

154. It would not be appropriate for us to say anything further about this ground of appeal given our decision on ground of appeal 1 but it is obvious that the two are related. The Deputy Bailiff directed the Jurats on the potential position of the boundary marks as a consequence of his decision that that was the only means by which the boundary to the west of the Driveway could be ascertained. We have disagreed and thus the manner in which the Jurats were directed and the findings which they reached can no longer be relied upon.

155. Having said that, we should make it clear that we are not formally allowing this ground of appeal but merely observing that the circumstances in which the issue in question was decided by the Royal Court are no longer appropriate.

Ground of appeal 3: A defective title even of the Defect did not exist

156. Once again, we do not need to determine this ground of appeal.

157. It concerns the situation which would have existed if we had not found that the Defect did exist. The position for the Respondents is that this was not an argument made before the Royal Court and, if it had been, it would have required amendment of the pleadings which would have been barred by prescription.

158. In the circumstances, we make no further comment on this ground of appeal.

Ground of appeal 4: Damages

159. We now turn to the issue of damages.

160. The defence of the Respondents was that the Defect did not exist and the Royal Court dismissed the action upon that basis. As we have disagreed, and given that the Respondents have not claimed that the Defect was brought to the notice of the Appellants before they completed the Purchase of the Property, this means that the claim succeeds because, as averred in paragraph 7 of the Cause, the Respondents failed in their duty to the Appellants under the Retainer and were negligent, and the Appellants are entitled to damages.

161. From paragraph 91 onwards in the judgment at first instance under the heading "Breach and causation" the Royal Court helpfully and 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".

162. The Royal Court dealt with breach of duty at paragraph 92 of the judgment as follows:

> "… 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."

163. We agree. At paragraph 94 there is a finding to the effect that had the Appellants been advised by the Respondents that the defect existed they "would not simply have gone ahead and taken the risk surrounding the Defect without addressing it in some way". The Jurats were not persuaded that the Appellants would have bought La Roche Douvre "knowing that there was a real problem about the driveway leading to it … Consequently, they would, had they needed to, have concluded that the Defendant's breach of duty caused some loss and damages to the Plaintiffs".

164. We agree that the Respondents' breach of duty has caused loss to the Appellants for which they should be compensated in damages.

165. The Royal Court referred to the particulars of loss which were pleaded at paragraph 11 of the Cause as follows:

> "(a) The Plaintiffs had to pay legal fees to Trinity Chambers in order to seek advice about the Defect: £937.50
>
> (b) The Plaintiffs had to pay legal fees to Carey Olsen in order to, *inter alia*, have the Defect rectified by investigating how the Defect could be rectified, rectifying the Defect by arranging for

the Plaintiffs to purchase the land over which the Intended Portion of the Driveway ran, and drafting a licence to enable the New Purchasers to reside in the Property whilst the Defect was rectified: £28,731.80

(c) The Plaintiffs had to purchase the land over which the Intended Portion of the Driveway ran: £10,000.00

(d) The Plaintiffs had to pay 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: £1,683.00

(e) The Plaintiffs had to pay surveying fees to PlanB in respect of the construction of the Intended Portion of the Driveway: £804.60

(f) The Plaintiffs had to pay fees to Drainforce Limited in respect of the construction of the Intended Portion of the Driveway: £8,421.14

(g) The Plaintiffs had to pay fees for rental accommodation in Guernsey ("Rental Accommodation") that they lived in between October 2012 and February 2013 inclusive to enable the New Purchasers to reside in the Property whilst the Defect was rectified in order to protect the sale of the Property to the New Purchasers: £3,000.00

(h) The Plaintiffs had to pay fees for the housing of their cats at the GSPCA for part of the time whilst they lived in the Rental Accommodation as it was not suitable for the cats to live in the Rental Accommodation: £277.50

(i) The Plaintiffs had arranged to purchase a property in France inclusive of furniture ("French Property"), for the purchase price of 1,197,296.62 Euros, out of the funds of the sale of the Property immediately upon the completion of the sale to the New Purchasers on the Original Completion Date. Following the discovery of the Defect, the purchase of the French Property had to be delayed until after the Final Completion Date. The earliest date on which the Plaintiffs were able to complete on the purchase of the French Property was 19 March 2013, by which time the Euro exchange rate was 1.1726664381 Euros to the GB Pound, whereas it was 1.2416439857 Euros to the GB Pound on 12 October 2012, causing the Plaintiffs to pay extra for the French Property were it not for the Defect: £56,720.22

(j) The Plaintiffs had to pay a fee for the transport of their furniture originating from the Property, which was due to be transported in October 2012 straight from St Malo to the French Property, from St Malo to a storage depot in France instead pending the rectification of the Defect and the Final Completion Date: £255.83

(k) The Plaintiffs had to make a return trip from Guernsey to France between 15 and 18 October 2012 inclusive in order to arrange storage in France for their furniture originating from the Property pending rectification of the Defect and completion on the French

	Property:	£785.32
(l)	The Plaintiffs had to pay fees for the storage of the their furniture originating from the Property in a storage depot in France between 22 October 2012 until, at the earliest, 28 February 2013 inclusive pending rectification of the Defect and completion on the French Property:	£2,416.05
(m)	The Plaintiffs had to make further return trips from Guernsey to France in order to, in particular, safeguard the purchase of the French Property pending the rectification of the Defect and the Final Completion Date by, *inter alia*, meeting with the French estate agent and the vendor and keeping the deal alive:	£877.30
(n)	The Plaintiffs had to pay an extra 112 days' Tax on Real Property in respect of the Property between the Original Completion Date and the Final Completion Date:	£100.80
(o)	The Plaintiffs had to pay an extra 112 days' occupiers and refuse rates in respect of the Property between the Original Completion Date and the Final Completion Date	£35.25
(q)	(sic) The Plaintiffs had to pay an extra 112 days' property insurance in respect of the Property between the Original Completion Date and the Final Completion Date:	£97.64
	Total:	£115,143.95"

166. At paragraph 96 of the judgment, the Royal Court recorded that the claims in respect of items (n), (o) and (p) were abandoned by Advocate Tee on behalf of the Appellants. It also recorded that the claim in respect of item (e) was reduced to cover the later of the two invoices dated 29 October 2012 which referred to surveying services, two site visits and drawing as requested. It further recorded that in respect of items (a) and (d), the Respondents raised no objection.

167. On appeal, the main issues in dispute in respect of damages were items (b), legal fees to Carey Olsen for advice, arranging to rectify the Defect (£28,731.80) and items (i) to (m) relating to adverse currency fluctuation affecting the purchase price of the property in France (£56,720.22) and costs associated with the move to France.

168. At paragraph 100 of the judgment of the Royal Court, it was stated:

> "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 … The loss in item (i) would not have been awarded as damages in any event."

169. We agree for the reasons stated at first instance.

170. The Royal Court at paragraph 101 also rejected the claim in respect of items (j), (k), (l) and (m) and stated that all of these items:

> "… 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."

171. We also agree for the reasons stated at first instance.

172. The judgment at paragraph 102 recorded that items (g) and (h) "would have been rejected by the Jurats" as "it was outside of the reasonable contemplation of the parties" that the Appellants would have moved out of La Roche Douvre in October 2012. Moreover, the Jurats felt that the Appellants, in permitting Mr and Mrs Garrod to occupy La Roche Douvre without paying an amount to cover the expenses which the Plaintiffs were put to through vacating the premises, was "a failure by them to mitigate their losses". We agree with the Royal Court in respect of items (g) and (h).

173. It is clear from paragraph 103 of the judgment that the Jurats would have awarded damages in respect of items (a), (c) and (d) and at paragraph 104 it was stated that items (e) and (f) "would have been awarded". We agree that it is appropriate to award damages in respect of the items which the Royal Court would have awarded damages.

174. Item (b) was dealt with by the Royal Court as follows:

> "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."

175. In principle we agree that the reasonable fees of Carey Olsen are recoverable by the Appellants as damages. The reasonableness of such fees must be objectively assessed and we note that the likelihood is that the Royal Court would have invited further submissions on quantum. We therefore remit the issue of the exact amount recoverable under item (b) to the Royal Court for determination in default of the parties within 21 days after the delivery of this judgment agreeing the amount payable under item (b).

176. At paragraph 108 the Royal Court concluded in respect of the damages claim as follows:

> "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."

177. The final issue touched upon by the Royal Court in the context of the damages claim was in respect of the Respondents' argument that "a plaintiff is required to give credit for any incidental or compensating benefit flowing from a breach of duty" (paragraph 109). The Deputy Bailiff at paragraph 110 stated that he would, on this point, have been "inclined to reject Advocate Geall's submissions" adding:

> "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 purchases and sale of La Roche Douvre."

178. We agree for the reasons stated by the Royal Court.

179. In short summary, in respect of the damages, there are two items in dispute on appeal, namely the:

    (i) legal fees to Carey Olsen; and
    (ii) currency fluctuations and the expenses incurred in respect of the move to France.

    We agree with the Royal Court on both items. In principle, damages in respect of the legal fees to Carey Olsen should be awarded but we remit that issue to the Royal Court for determination of quantum if not agreed. We disallow the claims in respect of the currency fluctuations and the expenses incurred in respect of the move to France. They are too remote.

Grounds of appeal 5: Costs

180. As the appeal on the merits has been allowed, it is not necessary for us to determine the appeal by the Appellants against the costs order made by the Deputy Bailiff. That order falls and the issue of costs is at large for this Court. Having said that, we would observe that the order made by the Deputy Bailiff for indemnity costs in favour of the Respondents was described in paragraph 24 of his supplementary judgment as having been made solely upon the basis that the Appellants had rejected a settlement proposal and had proceeded to trial. We are satisfied that that is an issue which would have required careful consideration had the appeal on the merits

not succeeded. In normal circumstances, whilst rejection of an offer is likely to lead to an order for costs incurred thereafter, it will not of itself justify an order for indemnity costs. Something more (normally an element of unreasonableness) is required to take the case "out of the norm".

181. As to our own decision on the costs of this appeal and of the proceedings before the Royal Court, we are minded to make an order that the Respondents pay the Appellants' costs in this Court and in the court below on the recoverable basis and that is because the Appellants have been substantially successful in establishing the liability of the Respondents in these proceedings. This view is provisional and subject to consideration of any written submissions to the contrary. If the parties wish to submit to the contrary, their concise written submissions should be filed and served within 7 days with concise written submissions in reply, if any, to be filed and served within 7 days thereafter. This Court will then determine the position in respect of costs on paper together with any other consequential applications filed and served within 7 days and without the necessity of a further oral hearing.