Alderney Land Registration - appeal from Court of Alderney. Dispute as to correctness of title register entries regarding rights of access dating from 1969. Principles of Alderney land registration, in particular of servitudes, discussed. Definition and treatment of "Minor Interests" discussed. Appeal allowed. Rectification of register ordered.

[2025]GRC051

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

ON APPEAL FROM THE COURT OF ALDERNEY

Between:

(1) BRENDAN BARRY NOONE
(2) DANUSIA HELENA DOR NOONE

Appellants/Applicants

-and-

(1) JACOB GEORGE DE WITT HAMON
(2) MICHELLE MELANIE MULLINS
(3) MELANIE EILIEEN MANLEY
(4) DAVID GILLINGHAM JR
(5) LISA JANE MILLAN
(6) ODEON HEIGHTS LIMITED

Respondents

Before Her Honour Hazel Marshall KC, Lt Bailiff, sitting alone

Date of hearing: 31st March, 1st April 2025

Judgment handed down: 20th June 2025

The Appellants appeared in person

Counsel for the First to Fourth and Sixth Respondents: **Advocate N Barnes**

Amicus Curiae: **Advocate P Grainge**

The Fifth Respondent did not appear and were not represented

Legislation, and cases referred to

Legislation

Alderney

The Alderney Land and Property, &c Law, 1949
Government of Alderney Law, 2004

Alderney Rules of Court made with reference to the Alderney Land and Property etc Law, 1949
Alderney Court Rules, 2000
Alderney Court (Appointment of Juge Délégué) Ordinance, 2007

Guernsey
Guernsey Royal Court Civil Rules, 2007 r 1

Cases

Alderney:

Barron v Watts, Guernsey Royal Court, (Unreported) 20 October 1994,
Cyma Petroleum (CI) Limited v States of Guernsey (2015) Guernsey Judgment 05/2015

Guernsey:

Hawkins v Greenwood [1985] 2 GLJ (2) Case No 57
Rector etc of St Saviour's Church v Traisnel and Bougourd (1989) 7 GLJ 51.

England and Wales

Allen v Jones [2004] EWHC 1119 (QB)

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J U D G M E N T

Introduction

1. The principal appeal in this matter is an appeal from an order of the Court of Alderney (Jurats Hunter (Chairman), Finding and Molloy: hereafter referred to as "the **Alderney Court**") made on 5th January 2024 ("**the Order**"). It concerns the rights and obligations affecting certain parcels of registered land.

2. There are also two further notices of appeal against procedural orders made by the Court in the course of hearing the main matter, on 6th September 2023. The first is an appeal against the Alderney Court's refusal to adjourn and seek the appointment of a *Juge Délégué* to preside over the hearing of the matter, but carrying on and do so itself. The second is an appeal against the Alderney Court's further refusal to grant orders (a) ordering disclosure of documents against the Alderney Land Registrar (not appearing as a party to the application) and/or (b) ordering further disclosure of documents against the Respondents, including disclosure of legal advice which had possibly been taken, and again, adjourning accordingly.

3. The Appellants, Mr and Mrs Noone, are the owners of a parcel of land in the area known as Les Rochers, which is registered in the Alderney Land Registry under Title No AY1213, and which they purchased in September 2012. It is "lollipop" shaped, having an open roughly square section in the north, about 70 ft square on average, with a long thin 10ft strip of land stretching from the southern boundary of that square to the public highway, a distance of about 210 ft. They also own a neighbouring parcel to the east, of this strip registered under Title AY1209, which they purchased in 2002. I shall refer to them as "**the Noones**" or "**the Appellants**" or, where more natural, since he has taken the lead in this matter on behalf of the Appellants, simply to **Mr Noone** (without meaning any disrespect to Mrs Noone).

4. The Respondents are neighbouring land-owners. All except the fifth Respondent own land which has a common boundary with parcel AY1213 on its eastern side, to some extent. The first and second Respondents, Mr Hamon and Ms Mullins are the owners of parcel AY1210, which lies immediately south of the Noones' parcel AY1209. The third Respondent, Ms Manley is the owner of AY1207 which is again south (but not quite immediately) of AY1210. The fourth Respondent, Mr Gillingham Jr, (I understand he is David James Gillingham, as contrasted with his father, David William Gillingham) is the owner of parcel AY1212, which lies north of the Noones' parcel AY1209. The fifth Respondent, Ms Millan (who, following a transfer of the property, has now been substituted for Mr and Mrs Marriner) is the owner of AY1208, which lies south of AY1207, but separated from AY1213 on its west by a narrow strip of land about 5 ft wide, which also has a small right angled "hook" of land pointing east, at its southernmost end. The sixth Respondent, Odeon Heights Limited, is the owner of AY1211 which lies to the east of AY1207 and AY1208 but includes a strip of land to the north of AY1207 (which is what separates AY1207 from AY 1210), which is the width of a track. AY1211 also appears to include the entirely detached 5ft strip of land to the west and south of AY1208, referred to above. Odeon Heights Limited is, I understand, a company owned by Mr Gillingham Sr, and there are family connections between some of the Respondents, but none of that is directly material to the issues in the case.

5. The Noones launched this present application on 1st December 2022, seeking determination or clarification of the true extent of certain rights of access then recorded in the Land Register against

AY1213 as an "adverse interest", and directions for any amendment of the Land Register required in consequence.

6. After a full day hearing on 6th September 2023, the Alderney Court, having made the procedural orders referred to in [2] above and heard the matter substantively, reserved judgment. It gave its judgment on 5th January 2024 and made the following order:

> "*For the avoidance of doubt, all parcels in the vicinity, being designated as AY1208, AY1209, AY1207, AY1210, AY1211, AY1212 and AY1213 should have an addition to their registers granting rights in perpetuity in accordance with section 7 of the Agreement dated 11th April 1969 between Marjorie Sidonia Phillips and Arthur Kenneth William Birtchnell"*

It directed the Alderney Land Registrar to amend the Registers accordingly. The terms of "*section 7*" are set out later, (see [60] below) but in essence they purport to grant rights as there described (which for brevity, I will refer to compositely as "**rights of access")** of pedestrian and vehicular passage over, and rights to lay service media under, land comprising the 10ft wide track which is part of AY1213, for the benefit of certain parcels of land, identified in the Agreement, adjoining it on the east. The Noones do not accept that such rights have been validly registered against their land in the events which have happened, and they therefore appeal the Alderney Court's ruling that those rights should be established on the Register by the Order which it made.

7. On this appeal, the Noones have represented themselves, although I believe with a degree of legal assistance behind the scenes. Advocate Barnes appeared for all the Respondents except the fifth Respondent, who is aware of the proceedings but chose not to appear. All the Respondents who appeared in the court below were unrepresented there, with the first Respondent acting as their spokesman. With this appeal having commenced in that manner, the Court requested the assistance of an *amicus curiae* on the appeal, since the issues appeared likely to raise technicalities of Alderney land law and land registration law. Advocate Grainge therefore appeared in that capacity. The Court is grateful to both Advocates for their assistance, and also to Mr Noone for having presented his case with courtesy and clarity. He did so with notable thoroughness and determination.

Plans

8. As must by now be apparent, it really is not possible to understand this case easily, if at all, without recourse to at least some plans. There were many within the materials in the case, but I think that three of these are both necessary and sufficient to enable such understanding. It is therefore convenient to introduce them at the outset, and they are annexed to this judgment. I shall call them "**Plan 1**" or the "**Current Plan"**, **"Plan 2"** or the "**Birtchnell Plan"** and **"Plan 3"** or the **"Original Plan"**. They work backwards in time.

Plan 1 - the Current Plan

9. Plan 1 shows the "AY" Title Nos of the relevant parcels of land as presently registered and their positions relative to each other. It also shows the position of buildings (homes) built on those currently delineated plots. (Plan 1 is the same as the Cadastre Plan, but this latter is not helpful because the parcel numbers are completely different from the Land Register title numbers.)

10. Plan 1 shows parcel AY1213 comprising a quadrilateral area in the north with a long thin straight strip of land stretching south from its southern boundary to where it meets the public highway in a T-junction, near the south-west corner of parcel AY1208. As the whole plot is thus roughly a "lollipop" shape, the long straight strip was referred to either as "the lollipop stick" or, more formally, as "the 10 ft strip" during the hearing. In this judgment I will call it the "**Yellow Strip**" for reasons which will become apparent. It is the legally extant rights of access over this Yellow Strip which are at the heart of the case.

11. It can be seen from Plan 1 that, as mentioned above in [4], the Respondents' land titles all abut the Yellow Strip on its east side to a greater or lesser extent, with the exception of AY1208 which is

separated from the Yellow Strip by another narrow (5ft) strip of land already described. This separation occurred on a later subdivision of land, in November 1994.

12. Plan 1 also shows Title AY1206, which is on the west side of the Yellow Strip. That parcel is owned by Mr Gillingham Sr, but it has no access rights over the Yellow Strip and is not concerned in this application in any way.

Plan 2 - The Birtchnell Plan

13. Plan 2, the "Birtchnell Plan", is central to the case because it is the plan forming part of the Agreement dated 11th April 1969 made between Mrs Majorie Phillips and Mr Arthur Birtchnell (which I will call "**the Birtchnell Agreement**") which is the foundation of the Order appealed from, and which was used to define the rights which the Alderney Court directed to become an "*addition*" to all the registered land titles of both the Appellants and the Respondents.

14. In 1969, the Title Nos. of registered parcels of land were those in the original Alderney Land Registration system introduced after 1949, and were different from the current parcel Nos. Plan 2 refers, therefore, to "Plots 141 and 143", as explained later, but the shape of the "lollipop" is clearly delineated. Plan 2 shows, tinted red, land to the east of the northern section of the "lollipop stick", which was the land being sold under the Birtchnell Agreement. The "lollipop stick" itself is tinted yellow.

15. This Plan is taken from the version of the Birtchnell Agreement which was held at the Land Registry. However, the letters "A" and "B", and the handwritten note "*Not a correct[?] straight line from A to B",* all of which are written in red on the Plan, and also the very faint penciled note below the red handwriting *"Pencil line from A to B shows correct position 25/9/73 GNPC*", are later additions to the Plan. They are not relevant to the issues in the case. "GNPC"are the initials of a Mr Crombie, who appears to have been the Land Registrar at that time.

16. The significance and effect of Plan 2 and the Birtchnell Agreement itself are discussed and examined later.

Plan 3 - the Original Plan

17. This is not a plan forming part of the original documentary evidence in the case, but it is a useful plan prepared by Mr Noone. It is not to scale but it is common ground that it is sufficiently accurate as to what it shows for present purposes. It shows the land relevant to this case as it was originally registered before 1969, when the material events occurred, and in fact as defined by the original Land Commissioner's awards made in 1963.

18. Plan 3 shows four adjacent Plots, at that time registered as Nos. 140, 141, 143 and 144, each being (broadly) long thin plots running parallel with and beside each other in an almost north/south direction, and each with southern boundaries on the public right of way referred to above and shown on Plans 1 and 2. In the north, Plan 3 also shows part of Plot 142, which protruded south between Plots 141 and 143, but which had road access further away on its own northern boundary. The southern boundary of Plot 142 was thus well "inland" from the public right of way in the south.

19. Plan 3 shows Plot 141, there edged yellow, as a long rectangle, with an off-set northern portion (to the west) corresponding to the present "lollipop head" of AY1213. It shows Plot 143, there edged green, as a rectangle with a narrowed northern portion where Plot 142 lies between it and the off-set part of Plot 141.

20. The contentious land (the "Yellow Strip") is part of Plot 141 running alongside its western boundary with Plot 140.

The land transactions

21. Mrs Phillips purchased both the yellow and green edged Plots on Plan 3 simultaneously in October 1968 from a Mr Neale. The totality of this land was then disposed of by her in three sale transactions made between April and November the following year. This was when the rights of access in issue in this case were originally conceived. Those transactions are therefore the starting point for determining the existence and extent of the relevant rights of access today. Before turning to these, however, it is necessary to describe the mechanism of the Alderney Land Registration system.

The Alderney Land Registration system

22. Alderney was totally evacuated during World War II and occupied by the Germans. After the war, it was found that not only had property title records been lost or destroyed, but property boundaries had also been changed or destroyed, and so it was necessary to reconstruct property ownership rights again. This was done under the *Alderney Land and Property etc Law 1949*, ("**the Law**") which provided for a system of land ownership awards and registration of such ownerships. An appointed Land Commissioner systematically examined land ownership claims in sections of the island, (here it was Section V) and adjudicated on these over the following years. The awards which he made were then lodged with the Alderney Land Registrar and recorded in the Land Register. The material parts of the Law are set out below.

The Law

23. The Register of such awards was to be kept by the Clerk of the Alderney Court, who was styled "Land Registrar" for that purpose (s.13). The Register was to be in such form as the Court (ie the Alderney Court) would direct by Rules, but these were directed to ensure that "*ownership*" of land was distinguished from "*interests less than ownership*", and also that there should be a nominal index of owners and an index to properties themselves by reference to a map (s.13 (2)).

24. S.14 (1) provided that an interest or a charge awarded to a person other than the States of Alderney should vest in that person as soon as it was registered without the necessity of a conveyance. This therefore established the very first, original, ownerships of Alderney land, from which to go forward. S. 15 provided for public inspection of the Register.

25. S. 16 (1) provided that once the Land Registrar had effected a first registration of such ownership interests under s 13 (1),

> "*no change of ownership shall be effective until the Register has been altered to show the effect of such change*".

S.16 (2) laid down the circumstances in which such changes in the Register would be effective and provided (insofar as material for present purposes) for this to be done only (a) by order of the Court (ie the Alderney Court) or of the Royal Court, or

> *"(b) in the case of an agreement, upon written application made by one of the parties to the agreement, or upon written or oral application made jointly by those parties, and upon production if* [the Land Registrar] *so requires of evidence of the agreement."*

S.16 (4) authorised the Court to make Rules relating to the practicalities of registration, the evidence to be required, and procedural matters such as fees.

26. Thus, and in accordance with the usual principles of a land registration system, the Register was to become the definitive record of the ownership of real property interests in Alderney once these had become registered, and title was subsequently to be created or transferred only by, and at the time of, being recorded in the Register itself. S. 17 of the Law, under the heading "*Register to be exclusive title*", reinforced this by providing that,

> *"After the date upon which an award … is lodged with the Clerk of the Court, no evidence of ownership or boundaries other than the Register shall be to be of any legal effect in relation to the interest to which the relevant award relates."*

However, this makes the Register absolutely conclusive only as to ownership or boundaries recorded in the original land award itself, see *Barron v Watts,* Guernsey Royal Court, (Unreported) 20 October 1994, where the Royal Court held that this section did not prevent the Court looking at (admissible) evidence outside the Register in order to determine the disputed position of the boundaries of sub-divided Plots between themselves. The present case is not concerned with disturbing any aspect of the original land awards.

27. The general intended effect of the Register, therefore, after and apart from first registration, was and is that the records on the Land Register are the authoritative records of title to real property interests and rights in Alderney. However, the Register is not absolutely conclusive in this respect, and can be amended or corrected in appropriate circumstances. The parties have accepted that principle in this case, ie, whilst the Register is intended to be the authoritative record of real property rights, and due weight should be given to this, nevertheless it can, where required, be corrected or amended.

28. S. 18 dealt with the "*Entry of charges and minor interests subsequently created".* It provided in s.18 (1) that, after any first registration of an award under s. 13, a person might apply to the Registrar to be registered (a) in respect of any "*rente"* or "*obligation"* enforceable against the land, or any judgment subsequently obtained or

> "*(b) to have a note of an interest in land which is less than ownership made against an entry on the Register, which note shall constitute notice of the interest so noted to all persons deriving title under the ownership of the interest to which the said entry refers."*

S. 18 (2) then provided for such a registration or note to be made (a) if every person registered as owner of an interest which would be affected by the application concurred in writing with the application or (b) if the court so ordered. S. 18 (3) provided that if *"the person registered as owner*" [ie, therefore, owner of the/an interest affected] *does not … concur in writing"*, then the matter should be determined by the Court.

29. S. 21 sets out the powers of the Clerk of the Alderney Court as Land Registrar and s. 22 provides that where any doubt, dispute or difficulty arises upon any matter affecting the Register, the Registrar or any other person interested may apply for directions to the Court and the Registrar shall comply with such directions. This is the section under which the Noones have made this, and indeed a previous, application. S. 22 (2) provides for Rules of Court to be made in relation to procedure and suchlike upon any such application.

30. S. 23 provides for the Court to obtain insurance against loss to any person resulting from errors or omissions in the Register, and that to the extent that any such loss is proved to the satisfaction of the Court *"to have resulted from an error or omission in the Register*", the person who has suffered such loss is to be indemnified.

31. S. 25 provides for the Register to be rectified pursuant to a Court Order or by the Registrar himself (subject to an appeal to the Court), in various situations. It is framed permissively ("*The Register may be rectified … where)* and the applicable situations, summarised in paraphrase, are that: -

    (a) the Court thinks rectification is required in consequence of a decision of the Court;

    (b) the Court makes an order for rectification *"on the application any person who is aggrieved by an entry in or the omission of any entry from the Register"* (or by a default or delay in making any such entry);

    (c) all persons interested consent to the rectification;

    (d) the Court is satisfied that an entry has been obtained by fraud;

(e) two or more persons are mistakenly entered as the owner of the same registered interest or charge;

(f) "*the Registrar is made aware of a clerical error in the Register which can in his opinion be corrected without detriment to any person's interest"* and

(g) it is in any other case deemed by the Court to be just to rectify the Register *"by reason of an error or omission therein or by reason of an entry made under a mistake".*

The Order of the Alderney Court in this case would come under subsections (a) or (g). By s. 25(2) the Registrar is required, forthwith, to give notice in writing to every person whose name appears in the Register in connection with an entry which has been rectified.

The Rules

32. As noted above, the Law provided for Rules of Court to be made with regard to the operation of the Land Register and these were initially made and entitled *Rules of Court made with reference to the Alderney Land and Property &c Law 1949 ("***the Rules***").* It appears to have been accepted that these were the Rules applicable at the relevant time. The material parts of the Rules are noted below.

33. By rr. 2-5 it was provided that the Register would be a paper, loose leaf, system with a sheet for each registered interest (and if more than one such sheet, the sheets to be kept together) with stipulations as to the size, form and layout of such sheets. Insofar as the Law might require a plan relating to the property, that was to be deemed to be annexed to the relevant sheet of the property register so long as it bore the same title number as that property, even if not physically annexed to it. R. 6 provided for such sheets to be distinguished by a Title No. prefixed by F, L, R or O, depending on whether the interest was a Freehold, a long Leasehold, a *Rente* or some "Other" interest. Registrations of each such type were to be kept in separate sections of the Register and the Title Nos. themselves were to be determined serially according to the time of first registration. This case is concerned only with "F" Title Nos.

34. By r.7 there was also to be a nominal alphabetical index of owners of registered interests and by r.8 an index map on a scale sufficiently large to enable each registered parcel to be identified by number. The original parcel number was to be determined according to the award of the Land Commissioner, but as regards subsequent numbering, it was to be determined according to the relevant transaction, and formed by embodying the original parcel number so as to retain it on the map. Thus where (as happened here) land was sold off from a parcel numbered 'X', the newly created parcel came to be designated 'X(a)' with the former parcel 'X' retaining that number but with a consequently reduced area and an appropriate note on its register as to the removal of the land sold off.

35. By r.9 the sheet for every Freehold or Leasehold registration was to be divided into four parts namely

Part I	Description of property
Part II	Particulars of ownership
Part III	Particulars of charges and other adverse interests; and
Part IV	Notes as to minor interests.

36. It should be noted, therefore, that this is a different and very much simpler system from the English system of registered land dating principally from 1925. It should also be noted that the term "*minor interest*" here has a different meaning from that which applied in the English system, where it would be understood to refer to interests in land recognised under the English principles of equity (a concept which is not part of Channel Islands customary law) and which would be overridden on an English transfer of registered land, unless protected under the particular rules of that system. In the Alderney system, a "*minor interest*" is simply the name for an "*interest less than ownership"* which forms part of the registered title to a parcel by being noted in Part IV of the title register of the parcel to which it

is attached as a benefit. It should lastly, also, be noted that the Alderney system does not have machinery for registering or protecting claimed or pending rights over land, such as the English system of enabling a "caution" to be placed on the title register by a third party, with procedures for then resolving any resulting dispute.

37. R.10 provided that where, in an award of the Commissioner, an interest less than ownership was specified to exist over another registered property interest, the Registrar should make a note of that fact against the register of that other interest, and should also insert a reference to all the registered Title Nos. which were affected, on all the relevant sheets. (The same provision was applied where there was more than one "ownership" of a property, which was possible because of the separate registration of long leasehold titles as well as freeholds.)

38. R.15 laid down principles as to the evidence which the Registrar could *prima facie* treat as satisfactory for the purpose of altering the register in accordance with the Law. The material provisions regarding transactions bringing about the transfer or creation of a real property interest were that:-

    (a) where all the parties to the transaction appeared before him, there should be evidence of their identities and such sworn or other statements from any of them as should satisfy him that the transaction had taken place; and

    (b) where only some, or none, of the parties appeared before him, there should be a written application made in pursuance of s.16 (2) of the Law, together with a sworn statement or statements of the terms of the transaction in pursuance of which alteration of the register was desired.

39. R.16 provided that where an alteration to the register was made to create a new interest, then, in addition to creating a new registered title for that interest, the Registrar should cross-reference that new title No. on the registration of every previously registered title affected by such creation. R.17 provided that where the Registrar was to register an "*interest less than ownership*" (either under r.10 of the Rules (original award), or s.18 (1) of the Law (created subsequently)) he should do so by inserting a sufficient description in Part IV of the title sheet relating to the registered interest affected by the Note. Further rules laid down the procedure by which the Registrar might apply to the Court for directions if in difficulty with regard to keeping the Register.

40. The above, therefore, sets out the legal framework for land registration in Alderney, as it applied at the relevant times for this case, principally, 1969. Certain points are noteworthy.

41. First, the system envisaged that the original title Nos, created by the first registration of awards by the Land Commissioner, should be retained as the registers of those particular parcels, but new titles, created out of them by subdivision, should be related to them by keeping the original parcel No. with an additional notation. Thus, in this case, and as an example, part of the original parcel F143 (with which part this case is not concerned), being the far northern part of F 143, was sold off and became No F143(a) in October 1966. The original Title No F143 continued on the register as to the retained land, with reduced area, and with a note made on the register recording that the northern part had been so sold off and was registered under No 143(a).

42. Second, and as already mentioned, in the Alderney Land Registration system, a "minor interest" in land is simply an "interest less than ownership", and is a *sui generis* concept as to which the Law and Rules must be construed and applied entirely autonomously.

43. Third, there are the consequent effects of the above on the treatment of servitudes (easements) such as a right of way or the present "rights of access". Such an incorporeal right affects two properties, the dominant property, which has the benefit of the right and the servient property which is burdened with its imposition. As regards the servient property, this burden is quite easily and naturally regarded as an "adverse interest" and to be appropriately registered in Part III of the property register of the servient title. As regards the dominant tenement, such a right is an "interest less than ownership" but an interest in the servient land, ie land <u>other</u> than the dominant tenement. What is stipulated is that this

additional interest, in other land not within the boundaries of the registered dominant title itself, should be registered by Note, as a "minor interest", in Part IV of the property register of the dominant title.

44. It is apparent, though that in dealing with such minor interests, the relevant provisions, - s.18((1) (b) of the Law and rr. 10 and 17 of the Rules - use language more appropriate to adverse entries than benefits, talking of registering such interests "*against*" another interest and giving "*notice*" of it. S.18 (1) (b), although expressly dealing with the registration of an "*interest in land… less than ownership*" (ie a "minor interest" as defined) does so in terms which seem more apt to the concept of the "adverse interest" against the <u>other</u> registered property to which it relates. Whilst it is possible to interpret its language as relating to registration in respect of the benefiting (dominant) registered property, that does stretch the language somewhat unnaturally. The only express direction as to how the <u>benefit</u> of such an "interest in land less than ownership" is to be registered is in r. 17 of the Rules, which talks of making such a note in "Part IV" (thus showing that it is registering the benefit of a minor interest) but then refers to "*of the sheet relating to the registered interest <u>affected</u> by the note"* (emphasis added), which smacks of burden rather than benefit. It therefore has to be deduced that "*affected*" must be referring to the register of the dominant property, rather than the servient property, which would be the more natural inference On mature consideration, however, the overall scheme is clear. The burden of a servitude is to be registered as an "adverse interest" in Part III of the registered title to the servient property, and the benefit of such servitude is to be noted in Part IV of the registered title to the dominant property as a "minor interest" ie an interest in other land, but annexed to that title.

45. The above Rules applied until 2000. At that time, with the paper Land Register being now 50 years old and having become rather worn and not adequately up to date, it was decided to digitise the Register, and in the course of this exercise registered land parcels were given new numbers prefixed "AY". The process of digitisation was, however, simply a change in the form of the Land Register. It was not intended to, and indeed could not, itself, alter the rights and obligations which had been registered previously as attaching to properties and affecting their ownerships.

46. The actual Rules were also modernised at that time, (*Alderney Court Rules 2000*) and modified as regards some details. For example, the date of transfer of ownership of an interest was then specified to be the date when a correctly presented application for such change was received in the Registry, rather than the date of the actual change made on the property register (new rule 31). The Registrar was also given more discretion as to the mode of registering interests "less than ownership" (new rule 26) and the rules as to sufficient evidence for registering an alteration to the register were modified (new rule 34). However, the provisions of the Law itself remained in force, and in any event, the matters with which this application is crucially concerned took place under the old Rules.

History

47. The following account is taken neutrally from the documentary evidence in the case. This is in a bundle of documents originally compiled by Mr Noone and including supplementary documents supplied by the Respondents, which became known as the "Record Bundle" in the case. All this material was therefore before the Alderney Court. It includes copies of the historic registers of title to the various plots as mentioned, these having been preserved with the title records of a later subdivided plot, (see [76] below). Mr Noone took the Alderney Court through these materials in presenting his case on 6th September 2023, although complaining, both then and now, that he had inadequate time to do so properly (he has cited this point as part of the grounds of his appeals). He has done the same in this Court in presenting the appeal, but without any guillotine as to time.

The key transactions and their treatment on the Land Register

48. The original "F" titles relevant to the matter were created by awards made by the Land Commissioner and dated in 1963. They are there shown on portions of a small scale index map, (it appears to be to a scale of 1:2500) which was reproduced on their title sheets. As can be seen from the three Plans annexed to this judgment, and in particular Plan 3, the two parcels of central significance were those then numbered 141 and 143.

49. They were awarded and first registered to a Colonel Brooker. He quickly sold off the northern part of 143 (which had road access in the north) and he then sold all Plot 141 and the remainder of Plot 143 to a Mr Neale in 1966. The titles remained separate on the Register. In 1968 Mrs Phillips purchased both parcels from Mr Neale for £3,500. The titles again remained separate. Mrs Phillips then sold off the entirety of both of these parcels in three transactions during the following year. These are the key original transactions, and they are the following:-

(i) <u>The Cohen Transaction</u>

50. This was a sale by Mrs Phillips to a Mr and Mrs Cohen (the "**Cohen Transaction"**) of the northern off-set quadrilateral area of Plot141 together with a strip of land 10 ft wide, on the western boundary of the southern section of Plot 141, running from this northern quadrilateral area south to the public right of way. This was thus the transaction which created the familiar "lollipop" shaped parcel.

51. The new title to this area was then opened and registered as title F141(a), and is what has latterly become renumbered AY1213. The newly opened title F141(a) described the sale transaction in Part II of its register as being

> *"Mrs M. S. Phillips sells for £1500 part of parcel 141 together with an access strip of land 10 feet wide along the western boundary of 141 to Christopher David Arthur Cohen and Judith May* [sic] *Cohen née Pyne jointly and to the survivor of them absolutely."*

The date of this entry is 29th April 1969. The entries were made by the then Land Registrar, Mr Radice. In the "Remarks" column is an entry which says

> *"Land sold is shown on the annexed 1:500 plan."*

However, there is no such plan which can be identified within the papers in the evidence whether by annotation, by parcel number, or even just from bearing that scale.

52. No copy of any written Phillips-Cohen sale agreement is lodged in the Registry and none has been found. However, in the "Adverse Interests" section of Title 141(a) the following entry, also dated 29th April 1969, was made:

> "*In buying this parcel Mr and Mrs Cohen agree to afford access to vehicles on* [sic] *on foot and to allow laying of pipes etc for services to the remainder of parcel 141 in favour of the owners of parts thereof their heirs successors and assigns along and from the strip of land forming part of 141(a) along the western boundary of former parcel 141."*

I will call this the "**Cohen Reservation**", but I emphasise that I do so only as a convenient label and without implying any particular legal significance or operation. This entry was also made by Mr Radice and its typeface appears to be the same as that of the Ownership entry.

53. This entry was the only entry of an adverse interest made against Title 141(a) at the time. A <u>later</u> entry was made on this register, but only on 10th September <u>1993.</u> The suggested effects of this are controversial (see [111] – [112] below), and as I am now focusing attention on what happened at the time of the actual transactions it is convenient to leave this to be examined later.

54. As to the original Title 141 itself, an entry was made on the register of Plot 141, to record the land being transferred out of that title. It was made in Part II, ie the "Particulars of Ownership" section. It read

> *"Part of 141 marked (a) on the plan sold to Mr and Mrs C. D. A. Cohen, for £1500, with strip of land 10 feet wide for access, along the western boundary of parcel 141 to the public road."*

This entry is also dated 29th April 1969 and was also made by Mr Radice. There is no cross-reference to the actual title No. of the new title being created, as it seems there should have been, although this number can possibly be benevolently deduced from the reference to "*marked (a)".*

55. The sheet register plan to Plot 141 is to a small scale, as previously noted. It shows the land comprised in Plot 141 itself tinted pink and there is an inked line to the right of the red western boundary line of the southerly section of the Plot, with an arrowed annotation to it saying *"10' access*". That is therefore accurate, although it is not clear when this might have been made.

56. However, there is nothing in the available sheet register of Plot 141 recording any Note of any minor interest being continued to be enjoyed by Plot 141 in the land being transferred away, in the shape of the rights of access mentioned in the Cohen Reservation - or at all. There are in fact no register sheets for Plot 141 recording any Part III or Part IV matter. The only registrations of this transaction were therefore those noted in [54] and [55] above.

57. There is also no evidence of any entry of any kind made in relation to this transaction on the title register of Plot 143, although of course since this transaction *prima facie* concerned land only in Title 141, that might not be surprising.

(ii) <u>The Birtchnell Transaction</u>

58. This was a sale by Mrs Phillips to Mr Birtchnell of the northern parts of both Plots 141 and 143 (the "**Birtchnell Transaction**"). The Agreement for this sale (the "**Birtchnell Agreement**") was lodged in the Registry and is, of course, the Agreement of 11th April 1969 referred to in the Order. The plan on the Agreement is Plan 2.

59. Clause 1 of the Agreement specifies the area of the land being sold by area ("*forty five perches or thereabouts*") and states that it is shown for identification purposes coloured red on the Plan (ie Plan 2). The plan shows areas, but states the area to be 1 vergee 8 perches, which is actually 48 perches. The sale plot has a straight southern boundary across the width of both Plots 141 and 143. Plan 2 shows the "lollipop stick" strip of land tinted yellow, and clearly lying outside the red tinted land, between the western boundary of the original Plot 141 and the western boundary of the land being sold. A printed arrowed note stating *"Right of Way 10' wide"* points to that yellow strip.

60. The new title thereby created was registered with the Title No. F141(b), notwithstanding it also contained parts of Plot 143. In the descriptive heading, it describes the land in the title as being

> *"those parts of parcels 141 and 143 shown on the plan attached to an agreement dated 11th April 1969 and collectively numbered…*" 141(b).

It was opened on 16th June 1969 again by Mr Radice, although then designating himself <u>Deputy</u> Land Registrar. There is a note in the "Remarks" column: "*Agreement dated 11.4.69"* which is, of course, a reference to the Birtchnell Agreement. The plot numbers listed in Part 1 of this title register as being those bounding the property being sold are clearly incorrect in several respects, although the land being sold, when identified by reference to the tinting on the Birtchnell Plan itself, is clear.

61. Clause 7 of the Birtchnell Agreement is not in terms of an actual <u>grant</u> of rights, although the implication is there. It makes reference to common rights of access in perpetuity being recognised between Mrs Phillips and her successors to Plots 141 and 143 on the one hand and Mr Birtchnell and his successors (necessarily, therefore, to the land being purchased) on the other, over the "*roadway marked in yellow*" on the Birtchnell Plan. It is not appropriate to discuss its implications here, but I set it out to assuage curiosity. It reads

> *"7. The Vendor* [ie Mrs Phillips] *for herself and her successors in title owner or owners of any part or parts of the said plots 141 and 143……and the Purchaser [*ie Mr Birtchnell] *for himself his successors in title and licensees shall after the signing of this Agreement have the rights in perpetuity over the roadway marked in yellow on the plan annexed hereto, the said roadway being of a width of ten feet or thereabouts and running from the public right of way to the north of Plot 179 to the said Plot and adjacent to Plot 140…*
>
> (a) *from time to time and all times to use the road intended to be constructed over the strip of land shown coloured yellow on the said plan but as regards the*

carriageways thereof with or without carts carriages motor-cars, vehicles, horses and other animals;

(b) *to lay and maintain in the said road* [service media] *and from time to time* [to dig up the road for laying, maintenance, repair, renewal etc purposes] *on condition of* [proper and prompt reinstatement and so as] "*to cause the minimum inconvenience to the owners for the time being of any part of Plots 141 and 143…".*

62. There are no adverse interests registered against Title F141(b), nor, and importantly, are there any Notes of minor interests registered as benefitting it. There do not appear to have been any sheets opened on this register relating to such interests; none is present or referenced in the evidence.

63. The Birtchnell Transaction was thus a partial sale of land in both Plots 141 and 143 and it was therefore appropriate to record it on both those titles. As regards Plot 141, the entry reads

> *"Part of 141 marked (b) and part of 143 marked (b) on the plan sold to Arthur Kenneth Birtchnell with a strip of land 10 ft wide for access along the western boundary of parcel 141 to the public road for the sum of £2,300"*

All the land being sold is then hatched in red on the small scale plan on title F141, (which shows the originally awarded Plot 141 tinted pink) with a "B" in red on both parts.

64. The reference in the narrative entry on Title F141 to "*with a strip of land…*" reads as if this is a part of the parcel being conveyed; it materially reproduces the wording used in relation to Plot 141(a), where that is what actually happened. At first blush, therefore, this narrative suggests that there is another strip of land 10 ft wide being sold with the land conveyed; the alternative would seem to be that the same strip of land was being sold as that in the Cohen Transaction. However, the plan on the Agreement, and the plan on the new title then created (which is Plan 2 and which land became title F141(b)) is perfectly clear that no second such strip is being conveyed; the rights of access are expressly related to the Yellow Strip, which was not being conveyed. The wording of the entry on Title F141 makes practical sense, although not legal accuracy, if the reference to "*with a strip of land…*" is read as indicating the rights of access over the Yellow Strip on the Birtchnell Plan - which rights were obviously needed or the land would have been *enclavé* - rather than as envisaging any transfer of ownership of such strip.

65. This entry bears the date of 11th April 1969 and this is significant, because that precedes the Cohen transaction. It was signed off by Mr Crombie as Land Registrar.

66. It has already been noted that there were no registrations of either adverse interests or minor interests made on the title register of Plot 141, there being no evidence of any sheets being opened for recording any.

67. As regards the title to Plot 143, the only entry made on this register regarding the Birtchnell transaction was a handwritten note in the section for Particulars of Ownership (ie Part II of the register) reading simply "*Part of 141 and 143 marked B sold to A.K.W. Birtchnell"* and nothing more. The entry is undated but appears to be in the handwriting of Mr Radice and it bears his initials but no note of his office. The relevant part of Plot 143 shown tinted pink on the small scale plan on its title register is marked "B" in ink, but there was/is no marking of any part of Plot 141. There was no marking, either, of any access strip on the small scale plan on the register of Plot 143, as there had been on the plan on the register of Plot 141. Once again, there is no sheet of the register recording adverse interests, nor any carrying Notes of a relevant minor interest benefiting Plot143.

(iii) <u>The Dines Transaction</u>

68. The third transaction was a sale by Mrs Phillips to a Mr Dines of all the remaining (southerly) parts of Plots 141 and 143 stretching down to the public road itself (**"the Dines Transaction**"). There is a

copy of this agreement ("**the Dines Agreement**") in the evidence. It was dated 1st November 1969. The agreement itself does not refer to any plan, but describes the land to be sold simply as being

> "*Part Parcels of Plot 141 and Plot 143… being an area of* [115] *feet by* [170] *feet approx 40 perch free of rentes and all adverse charges whatsoever*",

69. It is a short agreement, making no mention of the grant, reservation or record, of any rights of access in favour of the property sold, or in any way affecting it. However, in practical terms no grant of such rights was necessary, because the property sold adjoined the public highway along its southern boundary.

70. The new title created to give effect to the Dines Transaction was given the No. F141(c), again despite the fact that it also contained land which was part of Plot 143. Although the main heading to the title register appears incorrectly to read **"***141(b*)"; the number is correct in the body of the parcel description. The land is described in handwriting as "*those parts of parcels 141 and 143 shown on the plan attached hereto and collectively numbered… 141(c)".* However, there is no plan with such numbering. The boundary plots listed on this title are accurate this time, save for ignoring the existence of Title F141(a) and describing this property as being bounded on the west by Plot 140.

71. This new title was opened on 18th November 1969. It was opened by Mr Crombie as Land Registrar. In the "Remarks" column it is noted "*Agreement dated the 1st November, 1969".*

72. The entry in the "Particulars of Ownership" reads

> *"Part of parcels 141 and 143 as shown on the map annexed to the Agreement of 1st November 1969 was sold by Mrs M S Phillips to Malcolm James Dines of* [UK address] for £2,000."

However, as noted above, there was no map or plan actually mentioned in, or annexed to, that Agreement. It appears that a copy of the Birtchnell Plan was found among the papers relating to this title, but that copy does not have the Dines land being sold "*collectively marked (c)"* or indeed marked at all.

73. (As an aside, and only for completeness, I note here, that there is a land plan elsewhere in the evidence – though it appears to have been treated as being part of the materials relating to Plot F141(a) see Record Bundle, page A16 - which carries measurements corresponding to those used in the Dines Agreement (in particular, a specified plot width of 115ft) but which are <u>not</u> the same as the measurements used on the Birtchnell Plan (which notes the same width as 120ft). There is nothing, though, which expressly links that other plan with the Dines Agreement. However, it does not appear to relate to the creation of Plot F141(a) in April 1969, as it does not show the plot boundaries as they stood at that time, but only as changed later.)

74. There was, once again, no entry made either in the adverse interests register of Title 141(c) or (and again central for present purposes) its minor interests register, at the time of its first registration. However, in this instance there were sheets apparently opened and headed up, available to take such entries. (Whilst the header for these sheets is labeled "141(b)" I was informed that the Registry has stated that this was a clerical error.)

75. There is, though, and once again, a <u>later</u> entry in the minor interests register of Title 141(c), but made only on 25th November 1994. It reads:-

> "*On the transfer of Parcel F141(a) to Mr and Mrs Cohen on 9th April 1969 the following entry appears as an Adverse Interest against that parcel. 'In buying this parcel Mr and Mrs Cohen agree to afford access to vehicles on foot and to allow laying of pipes etc for services to the remainder of parcel 141 in favour of the owners of parts thereof their heirs successors and assigns along and from the strip of land forming part of 141(a) along the western boundary of former parcel 141.*
> *29th April 1969'*

That part of this parcel which was created out of F141 appears to be entitled to the benefit of this entry and is therefore added to the Register.

25th November 1994"

That entry was made by the then Land Registrar in 1994 who was, by that time, a Mr Johnson. It was made at the same time as the first subdivision of Plot 141(c), when Mr Dines sold the northern 80ft section of Plot 141(c) together with the narrow five foot strip with a right angled hook at its southern end, to Mr Gillingham Sr.

76. There was also a later entry made on the Ownership register of Title 141(c), (ie Part II) in the "Remarks" column, which reads:-

"This title consists of the residue of F141 and F143 in Section V. See original Registers (filed herewith) for entries which affect this and other titles."

This entry had been made a year earlier, on 10th September 1993 and was also made by Mr Johnson. There is no express link to the "*other titles*" referred to nor any indication of the understood, or possible, effects of such entries.

77. As regards the original register of the original Plot 141 itself, an entry recording the Dines transaction was made contemporaneously on that Title and read

"*Part 141 marked (c) and part 143 marked (c) on the plan sold to Malcolm James Dines with strip of land 10' wide for access along the Western boundary of Parcel 141 to the public road for the sum of £2000."*

This entry is dated 18th November 1969 and was made by Mr Crombie. It repeats the verbal error and ambiguity as regards the 10' strip, although, once again, the extent of the land in fact being conveyed is actually clear from the description and the markings of "(c)" which were made on the registered plan of Title 141.

78. Once again there are no entries regarding adverse interests or minor interests, but as this sale disposed of the whole of the land remaining in Title F141, none would be necessary nor expected to remain.

79. As regards the original register of the original Plot 143, an entry identical to that in respect of Plot 141 was made with regard to the land transferred, and "(c)" marks were made on that registered plan. There were no other entries.

Further matters

80. After these three transactions there was therefore no land remaining in the previous Titles F141 and F143, all that land having been disposed of into Titles F141(a), F141(b) and F141(c). Those previous titles were therefore defunct at that point, even if not then formally closed.

81. There was no further entry on those titles until 10th September 1993 when both titles gained the entry

"For reference the residue of this land is now amalgamated in title F141(c)."

This entry was made by Mr Johnson, both at the end of the register, and in capital letters at the top of each of the two titles.

82. Thus, Mr Johnson seems to have been carrying out what he saw as a "tidying up" exercise on these titles on 10th September 1993. All of

- the two "finalising" entries on the defunct Titles F141 and 143, (see [81])

- the referencing on Title 141(c) of the old paper registers of former Plots 141 and 143 and their being filed with that title [76]); and

- the later entry in the adverse interests register of the title to Plot 141(a) referred to at [53] above purportedly giving "further detail" of the Cohen Registration, by reference to the Birtchnell Agreement (see [111]-[112] below)

were made on that date.

Subsequent transactions

83. There has been no subsequent change in the land comprised in Plot F141(a) after the Cohen Transaction took place. That selfsame land then became Title No AY1213 upon digitisation of the Register, in about 2000.

84. However, the lands comprised in the other two new titles, F141(b) and F141(c), were subject to several subsequent transactions, involving further subdivisions of these plots and also amalgamations with other land, until they eventually became incorporated into the several other titles which are now AY1207-AY1212 (inclusive) as shown on Plan 1. This appears to have started from 20th September 1993, with several changes over the next few years, and to have occurred in connection with investigation of possible further residential development of the land in this vicinity, pursued mainly (it would appear) by Gillingham family interests.

85. Tracing the course of all these interrelated transactions, involving land swaps and the granting of other rights, is complicated partly because of the very intricacy of the transactions themselves, but, in addition, because confusion is created by an unfortunate, and rather extraordinary, re-use of the number "F141" by subsequent Land Registrars (specifically Mr Johnson) in creating later new titles. (It seems that this would have been prohibited under the revision of the Rules in 2000.) This began with the re-creation by Mr Johnson, on 25th November 1994, of a new parcel, numbered simply "F141", and described as being

> "*a parcel created out of part of Parcel F141(c) (this itself being created out of part of F143 and F141)"*.

86. This re-creation was made by Mr Johnson when Mr Dines sold a part of the then Plot 141(c) to Mr Gillingham Snr on 25th November 1994. It led to yet further confusing re-use of subdivided parcel numbers when this "141" number was then used by Mr Johnson, for creating a second, and therefore actually duplicative, "Plot F141(a)" in December 1995, when Mr Gillingham Snr sold off part of the second "Plot 141", again containing land which had been part of the original Plots 141 and 143, to Ms Manley. This duplication, of course, created the possibility of references to such parcel Nos. being references to different areas of land, depending on which parcel was in contemplation at the time. The confusion is illustrated by the terms of a letter dated 5 December 2006, from a yet subsequent Land Registrar, Ms Kelly, sent to Ms Manley, which Mr Noone felt was of particular significance.

87. However, it is not necessary to trace the detail of these and other, later land re-arrangements, because the essential issue in this case relates to the true burden of the rights of access imposed on the land in Title AY1213, and those rights have their origins in the three transactions just examined.

88. It is convenient, though, to note here, as general context, three particular developments giving rise to the present land configuration in the various current titles. The first is that in the north, the land comprising Title 141(b), which had all been sold by Mr Birtchnell to Complaine Ltd in 1972, was then purchased by Mr Gillingham Jr more than 20 years later on 20th September 1993, and amalgamated into one parcel with land which was part of Plot 142 (shown on Plan 3). This happened a few days after Mr Johnson's "tidying up" exercise of 10th September 1993, noted above (see [82]). Title AY1212 now includes land which was formerly part of Plot 142.

89. The second is that in January 1994, Mr Gillingham Snr purchased Plot 144 (shown on Plan 3) from a third party. The present Titles AY1209, AY1210 and AY1211 now include land which was formerly the southern part of Plot 144.

90. The third is that on 25th November 1994, as previously mentioned, Mr Dines sold the northern part of the new Title 141(c) (though then renumbered merely "F141" as noted at [85] above), to Mr Gillingham Sr, but in doing so he included also the five foot strip of land with a "hook" at the southern end of it, lying immediate adjacent to the southern section of the Yellow Strip which is part of AY1213, and which, as mentioned above, now separates the present parcel AY1208 from AY1213 (see Plan 1). From this configuration, it appears likely that the objective was to try to enlarge the width and splay of vehicle access to the Yellow Strip at its southern end.

Current state of Respondents' titles

91. Finally, therefore, it is appropriate to note the state of the various Respondents' titles currently as regards relevant entries. By "relevant entries" I mean entries which could purport to register the benefit of any rights of access which could be claimed over the Yellow Strip of land in title AY1213. Whilst the following account is taken from the evidence of certified copy Land Registry entries dating from 2018 and 2019, I understand there has been no material change since then. The account can be followed on Plan 1.

Title AY 1207

92. The third Respondent's (Ms Manley) Title AY 1207 comprises land which was part of the original Plots 141 and 143 and then subsequently within the newly designated Plot F141(c) when Mr Dines made his purchase in 1969.

93. In the Adverse Interests register, the first entry is not relevant but the second entry is to the effect that

> "*This land is subject to the rights contained in [the Birtchnell Agreement]. NOTE: COPY FILED".*

94. This is strange, as the only land ever made "subject" to any such rights under the terms of the Birtchnell Agreement was the Yellow Strip. If this registration were meant to record that the land was supposed to have the benefit of such rights, then it should have been recorded in the Minor Interests register and not the Adverse Interests register.

95. In the Minor Interests register, the Cohen Reservation is registered, verbatim; it is exactly as stated in the first Adverse Interest entry on the register of AY1213, which itself reproduces exactly the original entry on the Adverse Interest register of the earlier Plot 141(a), (ie "*In buying this parcel Mr and Mrs Cohen agree to afford access to vehicles on* [sic] *on foot and to allow laying of pipes etc for services to the remainder of parcel 141 in favour of the owners of parts thereof their heirs successors and assigns along and from the strip of land forming part of 141(a) along the western boundary of former parcel 141")* including the date of 29th April 1969. However, no specific note is made of the fact that the benefit of this right was expressly stated to be only in favour of land which had been part of the former (ie the original) Plot 141, and the entry contains no indication of the extent of the land benefited. It will be recalled that by the time of the conveyance to Ms Manley, in December 1995, Mr Johnson had created a so-called "Plot 141" which now included land in the original Plot 143: see [85] above.

96. There is no other relevant entry.

Title AY 1208

97. The fifth Respondent's (Ms Millan's) Title AY 1208, comprises land which was also part of the original Plots 141 and 143 and then part of the new Title F141(c) created in 1969, but it has no common boundary with the Yellow Strip. Its southern frontage is on the public highway.

98. The Adverse Interests register is not relevant and contains nothing pertinent.

99. In the Minor Interests register, the Cohen Reservation is again recorded, but here only in report. It has an introduction stating, "*On the transfer of Parcel F141(a) to Mr and Mrs Cohen on 29th April 1969 the following entry appears as an Adverse Interest registered against that parcel*". The Cohen Reservation is then recited verbatim, including its date of 29th April 1969. However, whilst the only original entry on the title of Plot 141 (c), made on 25th November 1994, did state that the land apparently having the benefit of this right was the land in the original Plot 141 (even if that entry was not made at the time) thereby confining it, by implication, to that land, that limitation is <u>not</u> reproduced on the AY1208 Title. There is no indication of the, or any, particular area of land within parcel AY1208 which is supposed to enjoy that benefit, conveying the clear impression that it is not limited.

Title AY1209

100. This is the Appellants 'own property and is not therefore in issue, but for completeness, it contains land which was formerly part of the original Plots 141 and 143 (subsequently new Title F141(b)) and also Plot 144, and its register records no relevant Adverse Interests nor any Minor Interests. These would, of course, have become extinguished in any event, as a matter of law, by "*confusion*", upon Mr and Mrs Noone acquiring both titles.

Title AY1210

101. The first and second Respondents' (Mr Hamon and Ms Mullins') Title AY 1210 comprises land formerly within Plots 141 and 143 (subsequently within new Title F141(b)) and Plot 144. The title register records no relevant Adverse Interests or Minor Interests.

Title AY1211

102. The sixth Respondent's (Odeon Heights Limited's) Title AY1211 comprises land mostly within the former Plots 144 (with a southern frontage on the public highway) and 143 (the part which became part of title F141(c), (ie the Dines land), but also includes a track comprising a strip of land lying on the north of AY 1207, which track was initially part of both the original Plots 141 and 143, but subsequently the new Title F141(b), ie the Birtchnell land. This track debouches on to the Yellow Strip. This Title appears also to include, separately, the narrow five foot strip with eastern "hook" which separates Title AY1208 from both the Yellow Strip and a short section of the public road in the south. (Whilst I would have expected this detached piece to have been registered separately, there is no indication of this in the papers.)

103. There is no relevant entry in the Adverse Interests register.

104. In the Minor Interests register, it is recorded

> "*Upon the transfer of Parcel F141(a) to Mr and Mrs Cohen on 29th April 1969 the Adverse Interest Register to their Register contained the following entry:…"*

and the Cohen Reservation is then quoted verbatim, with its internal reference to Plot 141, but with that whole reported entry being dated 25th November 1994. There is no note recording any limitation as respects the land which is identified as having the benefit of such rights. There is no other relevant entry.

Title AY1212

105. The fourth Respondent's (Mr Gillingham Jr's) Title AY1212 is the most difficult to follow. It consists principally of land in the original Titles 142 and 143 but now including also part (at least) of the land which had been sold off by Colonel Brooker from the north of 143 and had become Plot 143(a) before 1968 (see [49] above). It appears, now, also to include land previously within yet another original parcel, which became Plot F145x(6) under the old numbering system and then AY2027 on digitisation. However it is not possible, even by comparison with the Cadastre Plan, to tell exactly where this latter

piece of land might be; the original Plot 145 was north of the original Plot 144. AY1212 clearly does, though, include a very small part of the original Plot 141 beside the south eastern corner of the "lollipop head" of Title AY1213, giving it a frontage with the northern end of the Yellow Strip.

106. In the Adverse Interests register for this title AY1212 the second entry is the only relevant entry. It reads:

> *"The land is subject to the rights contained in* [the Birtchnell Agreement]. NOTE: COPY FILED".

Again, the point can be made that the Birtchnell Agreement does not purport to make this land in this title subject to anything.

107. In the Minor Interests register, the first entry reads:

> "*The land in this title has the benefit of the rights set out in the Agreement dated 11th April 1969 referred to in Part III"* (ie the Birtchnell Agreement).

108. There is no other relevant entry and there is no reference to the Cohen Reservation. There is no entry noting the extent of the land to which the Birtchnell Agreement rights apply, even though this would not be the whole of "*the land in this title*". This contrasts with such limitations being expressly recorded in respect of several other entries on this title register, which note rights which apply only in respect of land which had been part of Plot F145x(6).

The history of this Application

109. As already mentioned, the Noones purchased AY1213 in 2012, and there had been no change in the land itself and no material change of ownership between the time of the Cohen Transaction in April 1969 and their purchase. Mr Cohen died on 12th October 1993 (he had been a retired solicitor, living at Ide Hill in Kent) but the registration of Mrs Cohen as sole owner of the (then) Plot 141(a) did not take place until 15th May 2000. It is not clear whether the Noones purchased from Mrs Cohen or an intermediate owner, but nothing turns on that.

110. When the Noones acquired AY1213, Part III of that digitised title contained <u>two</u> entries in respect of Adverse Interests. The first was a simple recital of the Cohen Reservation and its date of 29th April 1969, as already set out above at [52]. However, there was a second entry which read:

> *"The land is subject to the rights contained in an Agreement dated 11th April 1969 made between Marjorie Sidonia Phillips (1) and Arthur Kenneth William Birtchnell (2). NOTE: COPY FILED".*

ie the Birtchnell Agreement. This entry was not dated.

111. Mr Noone did not agree with this entry, and the evidence shows that it had been inserted in that precise form of wording only on the digitisation of the Register. Examination of the former paper-registered title to parcel F141(a) showed, again, that there had been two entries in the Adverse Interests section of that register at the time of digitisation, of which the first was, again, the Cohen Reservation, but the second read:

> *"A copy of the Agreement dated the 11th April 1969 between MARJORIE SIDONIA PHILLIPS (nee Arnott) and ARTHUR KENNETH WILLIAM BIRTCHNELL is lodged <u>to give further details of</u> the Adverse Entry Interest registered on the 29th April 1969 in this title*" (emphasis added).

As already noted, that second entry was dated 10th September <u>1993</u>. It had been made by the then Land Registrar, Mr Johnson when making the "tidying up" entries noted above at [82], just before the time when the question of further development of land to the east of the then Title F141(a) seems to have become active.

112. Mr Noone disagreed with this previous entry, as well. He disagreed first that the second entry could be regarded as giving details of the first entry at all, because it actually expanded its scope, and second, and more fundamentally, he disagreed that it could have any application to Plot F141(a)/AY1213 in all the circumstances.

113. The material parts of Clause 7 of the Birtchnell Agreement are repeated here for ease of reference.

> *"The Vendor* [ie Mrs Phillips] *for herself and her successors in title owner or owners of any part or parts of the said plots 141 and 143……and the Purchaser [*ie Mr Birtchnell] *for himself his successors in title and licensees shall after the signing of this Agreement have the rights in perpetuity over the roadway marked in yellow on the plan annexed hereto, the said roadway being of a width of ten feet or thereabouts and running from the public right of way to the north of Plot 179 to the said Plot and adjacent to Plot 140…*
>
> *(a)* [rights of passage with and without vehicles];
>
> *(b)* [rights to install, maintain, repair, and renew service media] *on condition of* [proper and prompt reinstatement and so as] "*to cause the minimum inconvenience to the owners for the time being of any part of Plots 141 and 143…"*

114. This clause certainly elaborates significantly on the content of the skeletal rights recorded in the Cohen Reservation (although it might be suggested that this was no more than filling out practical detail which would naturally be implied, for obviousness and efficacy) but, and more importantly, it extends such rights to purport to apply for the benefit, not only of land within Plot 141 (as recorded in the Cohen Reservation itself) but also the land in Plot 143 being purchased by Mr Birtchnell.

115. Mr Noone took the view that the second entry on the Adverse interests register of AY1213 was illegitimate, could not stand and should be removed, for the following reasons. Insofar as this entry came from the former paper register, it was inaccurate for actually enlarging the rights recorded in the first entry, 24 years after the event. The subsequent change in the wording on digitisation not only could not legitimise the former illegitimate entry, but actually entrenched this by removing, even, any link between the two entries and asserting, outright, that the land in AY1213 was "*subject to*" the terms of the Birtchnell Agreement itself, when, he contended, it simply was not and could not be.

116. His argument on this point was that the Cohen Transaction and its transfer of title had preceded the Birtchnell Transaction and transfer of title, because it had been registered before it. Title 141(a) (and its legal rights and obligations) had been created by registration on 29th April 1969, whereas Title 141(b) which gave legal effect to the terms of the Birtchnell Transaction had only been created by registration later, on 10th June 1969. The Birtchnell Transaction was therefore incapable of affecting the rights previously established by and upon registration of the Cohen Transaction. The only possible recognition of potentially reserved rights out of the Cohen title (Title F141(a)) had been rights of access exercisable for the benefit of the remainder of Plot 141, alone. At the time when the Birtchnell Transaction took legal effect by registration, Mrs Phillips no longer owned Plot 141(a) and therefore did not have the power to grant any (extended) rights over Plot 141(a) for the benefit of Plot 143. Therefore, no such extended rights were created in law, and none could have been validly created by an erroneous and unjustified purported registration. The Cohen Reservation therefore recorded the only possible valid Adverse Interest against Plot 141(a) (later AY 1213) and the subsequent entry extending this was invalid and should be removed.

117. Mr Noone took up his complaint with the Land Registry after his purchase of AY1213, but his arguments were rejected. The reasons for this, put forward by the then Land Registrar, Mr Anderson, were based on the fact that the Birtchnell Agreement bore the date of 11th April 1969, whereas the Cohen Transaction was registered only on 29th April 1969, and whilst the creation of title effected by the Birtchnell Transaction had not taken place until 16th June 1969, the entry recording the transaction and the land being taken out of Plot 141 on the "Particulars of Ownership" Register of that title, was dated 11th April 1969, ie before the Cohen Transaction had been registered, or the new Title F141(a) created. Mr Anderson took the view that the discrepancy of date simply reflected the "registration gap", ie the practical delay between Conditions of Sale being recorded and the transaction being

completed and actually registered, and he considered that the former could and should therefore be treated as the applicable date.

118. Mr Noone argued that this could not be the case. He said that the purported date of 11th April 1969 given for the entry of the Birtchnell Agreement on the title for Plot 141 was obviously a mistake; the Land Registrar at that time had mistakenly put in the date of the Agreement (from the Remarks column) rather than the date when the entry must actually have been made. However, the current Land Registrar did not accept this. Eventually, therefore, Mr Noone concluded that he would have to take his complaint to the Court, under s.22 of the Law.

119. The matter then took quite a tortuous course, which only needs to be described in outline, because it is now historic. Mr Noone took the view that the Noones' complaint was a complaint against the Land Registrar, for error in mis-registering the rights of access against Plot 141(a)/Title AY1213. The Noones therefore brought their initial s.22 Application against the Land Registrar as Respondent.

120. Considering the matter to be legally complex, Mr Noone then applied to the Chairman of the Alderney Court to exercise his power to ask the Bailiff of the Royal Court to appoint a legally qualified *Juge Délégué* to preside over the matter, under s 9 of *The Government of Alderney Law 200*4 (see also s.1(1) of the *Alderney Court (Appointment of Juge Délégué) Ordinance 2007)*. He cited the fact that both the Alderney Court itself, and the Clerk to that Court, were lay persons without legal qualification, and that whilst it had been suggested that the Guernsey Law Officers would be able to give legal advice to the Alderney Court, they had already (he understood) given legal advice to their Clerk in his capacity as Land Registrar. This meant that there would be apparent, or even actual, bias in the situation, as the Court would be being advised by its Clerk, and this was contrary to the rules of natural justice, and such that the Noones could not be assured of a fair trial without the appointment of a *Juge Délégué*.

121. The Chairman refused the application to appoint a *Juge Délégué*, being of the view that the case was a matter of Alderney law and practice, which the Alderney Court was well able to deal with itself, and any awkwardness arising from the dual role of the Clerk could be dealt with by bringing an alternative Greffier from Guernsey. The Noones appealed this decision.

122. During the course of that appeal hearing, on 4th July 2022, and with the Royal Court (myself) pointing out some of the difficulties in the way of such an appeal, and that the real essence of the Noones' complaint or dispute lay, anyway, against such of their neighbours as might possibly seek to take advantage of the disputed rights of access against the Noones' property, (who would have to be convened in any event if the Noones' application were going to affect their rights) the Noones withdrew that appeal, and, instead proposed to re-formulate their application to convene the owners of the various neighbouring titles affected. This then became the present Application, commenced on 1st December 2022.

The proceedings and the hearing below

123. The relief claimed in the Application of 1st December 2022 was expressed as follows

    1. "*To clarify whether the obligation contained in the sale agreement of parcel F141(b), registered on 16 June 1969, had been validly registered in terms of the Law at the time of conveyancing.*

    2. *To confirm whether the Registered Adverse Entry dated 29 April 1969 has been overridden by the amendment to the Register on Title AY1213 at the time of digitisation.*

    3. *To confirm the benefit that Titles AY1207, AY1208, AY1209, AY1210, AY1211 and AY1212 have in relation to Title AY 1213.*

    4. *If deemed appropriate, an order to amend all affected Titles accordingly.*

    5. *All such further Orders and Directions as the Court considers appropriate including as to the costs of the Application."*

124. The Application then proceeded in the Alderney Court, with the First to Fourth Respondents having then indicated an intention to defend. Directions were initially given for disclosure and the production of skeleton arguments with a view to a hearing on 27th July 2023, but this was adjourned, in the event, to 6th September 2023.

125. The Noones made certain applications in the interim, and sought further adjournment of the hearing whilst their requested orders were complied with.

126. The hearing therefore came before the Alderney Court on 6th September 2023, listed for a full day, but with the various applications made by Mr Noone on behalf of the Noones needing to be dealt with as preliminary issues. These were

- an application previously made on 13th July 2023, described as being "*ex parte*", for the Respondents to produce a skeleton argument no more than two days before the hearing originally listed for 27th July 2023;

- an application dated 20th July 2023, against the Land Registrar, for wide-ranging general disclosure of documents comprising "any correspondence" about various matters such as correspondence with HM Land Registry regarding the general process of digitising the Alderney Land Register, or relating to particular entries on the digitised title registers which Mr Noone regarded as odd or unexplained and lastly, information about the payment of any and all insurance claims made against the Alderney Land Registry since 2000;

- an application of 3rd August 2023 requesting disclosure against each of the Respondents (but naming Mr Gillingham Snr rather than Odeon Heights Ltd itself) of their correspondence and enquiries made before purchasing their properties, and also details of legal advice about rights of access which they might have received, having been advised to take such advice;

- a letter of 28th August 2023 raising concerns about the extent of previous relevant knowledge and experience of the Jurats in the matter and that this should be made known to the Applicants, to prevent any possibility of "bias"; and

- a letter of 1st September 2023, renewing the Noones' application that a *Juge Délégué* should be requested, not only because of the complexities of the case but also because the requirement for a fair trial (Article 6 of the Human Rights Convention) required not only that the tribunal should be independent and impartial but also that it should be suitably competent. It was submitted that this would not be the case unless a suitably legally qualified judge tried the case.

127. The Alderney Court first dealt with the three initial applications. It rejected the first application on the grounds that the Respondents' disclosed documents and statements made their cases sufficiently clear in any event. It rejected the second and third applications on the basis that these were requests for further documentation which ought therefore to have been presented on 4th May 2023 when (by its eventual order of 23rd May 2023) the Court had allowed late documents to be admitted, but directed that no further documents would be admitted, so that it was just too late to ask for yet more disclosure and it would not be admissible anyway.

128. Mr Noone then requested an adjournment to enable him to appeal these latter decisions, on the grounds that they paid insufficient regard to the essential nature of the information sought in enabling the Alderney Court to have the full picture, but this application was also refused, on the basis that, if necessary, such complaints could always be raised as a point on any appeal which might be made against any substantive decision.

129. Turning next to the two letters, after questioning Mr Noone about what his concerns were about bias, the Court retired to consider these, but then announced its decision to reject them. It saw no grounds

for any perception of bias and, noting that Mr Noone had by then requested the appointment of a *Juge Délégué* twice before and this had been rejected, saw no reason to revisit that decision.

130. As these applications had taken up the whole of the morning, the Court directed that it would reconvene at 2 pm, after which each side would be allowed an hour to present their cases, with about fifteen minutes or so for summing up. Mr Noone objected that that would not be sufficient, but he was told that as the morning had been used up by his applications, that was all the time that was available.

131. The Court resumed at 2 pm, making it clear that it had read the parties' written submissions. Mr Noone repeated his protests about lack of time, but eventually he made his oral submissions, highlighting that his complaint was about the two Adverse Interest obligations on the title of AY1213, one registered on 10th September 1993 and the other registered only in 2000 when digitisation took place.

132. The transcript shows that he then took the Court through the registration of the various entries registered in the Land Registry (which I have set out factually above under "**History**") submitting that the two entries now left as adverse interests on Title AY1213 actually conflicted, and that that was not possible. He submitted that all that was being requested by the Noones was that the Land Register should accurately reflect the true effect of the transactions carried out, so that there would be no uncertainty or lack of clarity when it came to buying or selling the properties. He finally drew attention to the principle of Alderney (and Guernsey) property law which derives from the Normandy customary law, that there is "*nul servitude sans titre"*, which maxim expresses the principle, (in contradistinction to that of English real property law) that it is not possible, in customary law, to obtain a servitude or easement simply by proof of long use, even apparently as of right, however long such use might have been. This could therefore not, he effectively submitted, override the position which ought to be recorded on the Register.

133. Mr Hamon then addressed the Court on behalf of the relevant Respondents, very briefly. The transcript shows that he emphasised that the Respondents had had no knowledge of the dispute, or that the Noones had gone to the Court, until recently given notice of these proceedings, that they had no other documentation and were not trying to hide anything, and that they had all bought and transferred their lands "*in good faith*," and "*had combined land to improve the size of our plots over the years…… to produce the best layout for the land up there and believ[ing], whether rightly or wrongly, that all of us that were part of former plot 141 had rights of access over the yellow road to our parcels of land*".

134. Mr Hamon sought to draw attention to a notice refusing a right of way and threatening to remove utility services as supposed evidence of Mr Noones' aggressive behaviour, and asked the Court to bear that in mind. However, Mr Noone contested that this had been his action, but rather an entirely separate act of Mr Gillingham Sr, relating to a different piece of land. It was ultimately accepted that this notice was in fact irrelevant, and would not be taken into account.

135. There were then some questions from Mr Noone to Mr Hamon about the suggested significance of certain documents which had been introduced by the Respondents, although these did not seem to elicit anything very material. Mr Noone also pointed out, though, during this questioning of Mr Hamon (but this would have been a legitimate point of submission to make in reply to Mr Hamon's submissions about the Respondents' attitude to their properties) that the fact that the documents might show a right of access from the yellow strip "*along and from*" it to all parts of what had been the boundary of the remainder of the former Plot 141 did not extend that right to land which was not part of Plot 141 and therefore beyond that agreed right. That, he submitted was legally impermissible "*aggravation*".

136. After a few more exchanges the Court then adjourned to consider its judgment.

The judgment below

137. The Alderney Court issued its judgment on 5th January 2024. After noting its rejection of Mr Noone's preliminary applications, it gave its judgment on the substantive issues relating to rights and directions to the Land Registry. This is sufficiently brief that it can be quoted in full.

"***SUBSTANTIVE DIRECTIONS HEARING***

The Jurats would like to acknowledge the efforts and research made by Mr & Mrs Noone in preparing their submissions to the Court in what is clearly a rather muddled series of transactions and documents.

BACKGROUND FACTS AND CONCLUSIONS

The various parcels were created by transfers over the years and upon the digitisation of the Land Registry records in the year 2000, the "AY" identification numbers were created and allocated, transferring from the previously allocated "F" identifications.

Parcels F141 and F143 were sold by the parties, Phillips to Birtchnell, the agreement for which contained provisions, granting rights in perpetuity for the laying of utilities, pipes for sewage water etc., but it appears this was not registered on the land award, but was incorporated in the accompanying land registry documents.

Latterly the parcels were sub divided, transferred/sold and portions amalgamated with new and varied register numbers allocated.

The various sales, and subsequent subdivision and re-designation of the parcels from the original "F" numbers to the later "AY" numbers upon digitisation of the registers over time may have added to the muddling of the situation.

The Jurats are in agreement that it appears to have been the intention that the rights should have attached to all parcels as they were and are now, as from correspondence, subsequent later attempts to rectify the registers were made particularly in 1994 and 2000.

Mr and Mrs Noone purchased parcels AY1209 and AY1213 on 16th April 2002 and 27th September 2012 respectively, with AY 1213 being the parcel with the 10 ft strip the rights [sic] *over which adjacent properties appear to have access rights for services, utilities etc.*

The Jurats can only assume from the documentation in the submissions that Mr & Mrs Noone were aware of the conditions of the sale agreement between Mrs Phillips and Mr Birtchnell, when they bought their 2 plots in 2002 and 2012, and are surprised it has taken until this time for them to raise any concerns they may have had.

The Jurats agree that it would be "unnatural justice" to prohibit access for services from the adjacent properties and they do not consider that would have been the intention of the parties when the original sale agreement of 11th April 1969 between Mrs Phillips and Mr Birtchnell was signed, in spite of possible subsequent omissions in the register(s).

The Jurats have had the opportunity to consider all the papers and verbal submissions from both parties in this matter, and after due consideration make directions as detailed below."

138. There then followed the directions Order recited at the beginning of this judgment (see [6]) which is set out again for convenience.

"***DIRECTIONS***

For the avoidance of doubt, all parcels in the vicinity, being designated as AY1208, AY1209, AY1207, AY1210, AY1211, AY1212 and AY1213 should have an addition to their registers granting rights in perpetuity in accordance with section 7 of the Agreement dated 11th April 1969 between Marjorie Sidonia Phillips and Arthur Kenneth William Birtchnell."

The Appeal

139. As has been noted (see [1] and [2] above), the Noones have issued three notices of appeal, of which the first two raise procedural matters (the Alderney Court's refusal to seek the appointment of a *Juge Délégué* to preside over the case, and its refusal to grant orders for further disclosure of documents against the Land Registrar or the Respondents). The third challenges the substantive Order made, although also invoking certain of the procedural complaints, as grounds for upsetting that substantive decision, in any event.

140. It would normally be convenient to deal with the substantive appeal first, because the possible relevance or effect of any procedural flaws in the conduct of the Application will either be taken into account there, or will vary according to the outcome of that appeal. However, in order to clear away some points and simplify the issues, I will deal with them here, since I can do so briefly.

The procedural appeals

141. The first notice of appeal, which is the Noones' appeal, yet again, against the Court's refusal to seek the appointment of a *Juge Délégué*, has been rather overtaken by subsequent events. It becomes irrelevant unless I allow the appeal but decide that I am obliged to remit the case to the Alderney Court with guidance as to future procedure. I therefore do not need to determine it now, but I would comment that, given the obvious complexity and technicality of the legal arguments which plainly arose in this case, that decision might be regarded as unwise. It was, however, a case management decision, and my comment should not to be taken to mean that the Noones' appeal would necessarily have succeeded; I simply have not had to go into the arguments relating to it in any detail on this appeal, and it is not necessary to say anything further.

142. As regards the Noones' second notice of appeal, that against the Court's refusal to order further disclosure against either the Land Registrar or the Respondents, I would unhesitatingly dismiss both those appeals. In each case, the Court's refusal of such applications, was a case management decision, which was eminently justified.

143. The Land Registrar is only technically a party to these proceedings by way of notice, which he is required to be given by any party seeking directions about the Land Register, even though he is probably not involved in the actual dispute and is likely simply to accept to act as the Court may direct.

144. In any event, though, the content of the documentary evidence sought by the Noones' application was extravagant, disproportionate and irrelevant. It went to matters which were not issues before the Court, but rather materials going to peripheral arguments as to the weight of other evidence or the strength of the "presumption of regularity", ie the starting point that matters officially recorded or carried out should be presumed to have been done correctly (*omnia praesumuntur rite esse acta*). In the interests of proportionality, litigants cannot compel the disclosure of documentary evidence with only indirect relevance or effect in the matter, eg going only to matters such as credit, or to the weight which might be attached to other, direct, evidence. This request was of that character and was also so vague and disproportionate that it could immediately be properly disallowed as a "fishing expedition". This is all the more so given that counsel for the Land Registrar (Advocate Hill) had previously confirmed that the Land Registry did not have any more documentation relevant to the issues in this case.

145. The application for further disclosure against the Respondents was similarly properly rejected by the Alderney Court. The correspondence entered into, or the advice obtained by, the Respondents on purchasing their properties is simply not relevant to the question what the correct entries on the respective registers of title should already have been, having regard to the historic facts which gave rise to them, which was the issue before the Court. Such correspondence obviously cannot have any relevance to ascertaining the meaning or effect of the original transactions carried out in 1969. This objection is quite apart, also, from the point that any legal advice taken is more than likely to be the subject of legal advice privilege from production, in any event.

146. For the above reasons, therefore, I dismiss the procedural appeals. This means that the substantive judgment and order can be examined on the basis that they were reached in the light of all relevant and admissible evidence having been brought before the Alderney Court.

The substantive appeal

The Appellants' arguments – grounds of appeal

147. This brings me to the substantive appeal. As the Noones' grounds of appeal amongst the initial documents are not always very clear or distinct from each other, and contain very many references to the Noones' complaints about procedure mixed up within them, it is convenient to set out the various grounds and points raised in the appeal from a document handed up by Mr Noone in the appeal hearing, where they are more distinctly set out.

Ground 1 - Judgment inadequate and of legally insufficient reasoning

148. It is here argued that the judgment failed to explain adequately how, or why, it concluded that the Birtchnell Agreement imposed binding obligations on AY1213, or why it applied in favour of all seven surrounding parcels. In particular it is said that

- The Court did not analyse whether the Birtchnell Agreement was validly registered;
- The Court did not make any finding as to how or why "*successors in title, such as the Appellant*s" (thus, apparently, successors to AY1213) were bound by it;
- The Court stated that it could "*only assume*" that the Noones were aware of the Birtchnell Agreement, and that was a legally impermissible basis for such a finding;
- The Court did not "*apply basic land law tests regarding binding interests or registration*".

149. However, this ground of appeal is then actually used as grounds for arguing that the judgment should be set aside for insufficient reasoning to enable it to be understood or appealed, rather than as alleging that those features themselves inevitably disclosed errors of law.

Ground 2 – Perverse findings contrary to evidence and law

150. It is here said that the findings of the Court were perverse (acknowledged to mean that no reasonable tribunal, properly directing itself, could have reached them) in that

- The Court inferred that the Noones were aware of the Birtchnell Agreement despite there being "*no evidence"* showing that it was disclosed or registered;
- The Court ordered amendments to seven land titles without a parcel-by-parcel analysis of whether it affected each;
- The Court relied on what it believed to be the intention of the original parties, which was contrary to the principle of registered land that intention was no substitute for legal effect, citing *Allen v Jones 2004 EWHC 1119 (QB).*

151. Whilst this ground is cited as "*perversity*", it is in essence arguments as to why the Appellants submit that the Alderney Court went wrong in law.

Ground 3 - Misuse of judicial discretion

152. Part (a) of this ground is a complaint that the Court directed the Land Registrar to amend registered titles to import rights arising from an unregistered Agreement without determining whether the Agreement was enforceable, applicable to each parcel, or within the Court's powers to do so in accordance with the Law or other jurisprudence. Part (b) is directed at the "*dismissal of disclosure and adjournment applications*", which is criticised as failing properly to balance fairness, necessity or relevance, or to recognise that such requests were proportionate.

153. Part (a) therefore simply reiterates the Appellants' complaints, but by reference to the consequential orders made rather than just the conclusions stated, and it adds nothing to the main substance of the appeal. Part (b) relates to the procedural appeals, which I have already rejected.

Ground 4 - Improper reliance on inferred intention in a registered land system

154. This ground asserts that the Court's decision is at odds with the principle that in a registered land system, the Register defines the rights and burdens on the land and unregistered interests do not bind third parties (unless falling within specified legal exceptions), with added submissions as to what a court's attitude should be. As such, it again really repeats grounds of appeal already noted.

Ground 5 - Failure to determine whether agreement was validly registered

155. This ground objects that the Court never made a clear finding as to whether the Birtchnell Agreement was validly registered or remained enforceable, and in particular in that it

- acknowledged only that the Agreement may have been "*incorporated in accompanying documents*" but did not find that it was actually registered on the land award;
- made no ruling on whether the 1993 or 2000 references to the Agreement constituted valid registration;
- did not consider the effect of unilateral amendments made by the Land Registrar, or the digitisation of the Register, on the legal force of the Agreement.

It is alleged that without such determinations, the Court lacked any legal basis to impose or confirm rights affecting the Appellants' title, and such omission is "*fatal*" to the judgment.

156. This ground, though, once again, really only expresses in different words grounds of appeal already raised, namely aspects of the argument that the Court's decision has no sound basis in law.

157. The above points embrace all the Noones' complaints against the actual decision of the Alderney Court and their own contentions as to what the position on the register of Title 1213 ought to be. Distilling these, they come down to the essential proposition that the only rights of access which could properly be registered as subsisting against Title AY 1213 and in favour of any neighbouring parcels of land (and these must be considered individually) are confined to rights for the benefit of the original parcel F141 (ie those mentioned in the Cohen Reservation), because Mrs Phillips sold the part of the land in Title 141(a), as to which title passed with that being the only burden in any way registered, <u>before</u> the registration of the Birtchnell Transaction could take legal effect to transfer title or create any rights as mentioned in the Birtchnell Agreement.

158. This makes the rights which were described expressly in the Cohen Reservation itself the maximum which could possibly be the subject of a legally valid registration against AY1213, in favour of any other title, and in the end this seemed to become Mr Noone's contention as to what the registered entries ought to reflect.

159. However, it also seemed to me that, at times, and as mentioned in places in his Grounds of Appeal noted above, he was actually putting in issue the question whether the way in which even the Cohen Reservation had been registered could actually be effective to create any rights over F141(a)/AY1213 which could be enforced by adjoining landowners. I will consider that separately where necessary.

160. Mr Noone's consequent submission is thus that the Alderney Court's direction to the Land Registrar simply to "add", to everyone's titles, a grant of rights in perpetuity "*in accordance with section 7*" of the Birtchnell Agreement is not only not "*for the avoidance of doubt*" as it purports to be, but actually has no sufficient legal basis, on any account, and none is disclosed by any of the reasons given in the judgment of the Alderney Court. Those do not stand scrutiny on proper legal principles.

161. He submits that any rights claimed in respect of each of the six other relevant titles must be justified by showing a legal chain of derivation from rights granted and validly created out of the 1969 transactions, and that this results in such rights being shown to be, as a maximum, confined to rights in respect of the land (only) which was once part of Plot 141 – though as mentioned above I think with the caveat that even those rights may not have been validly created by a correct (and therefore effective) registration. He said several times, though, that he does not seek to prevent people from accessing their houses if he is right, but he does want the entries on the registers of everyone's titles in the area to be correct and put beyond doubt, by being recorded properly.

The Respondents' arguments

162. I can say at the outset, that Advocate Barnes does not seek to support the actual order made by the Alderney Court.

163. At the beginning of the hearing and again at the beginning of his submissions, I asked Advocate Barnes whether he was seeking to defend the order which the Alderney Court had made. His response was that he was not seeking to do so, because he accepted that making a collective direction as to what should be inserted on the seven relevant titles in the matter could not be a correct or satisfactory direction, on any basis.

164. He accepted that the key issues before the Court were:

    (i) what was registered as to the transactions taking place in 1969,

    (ii) the effect of such entries and

    (iii) whether they correctly recorded the actual transactions.

    He also agreed that what was subsequently registered could not affect what was originally agreed, and thus could not affect what ought to have been registered at the time, unless the parties whose interests were affected had made a new agreement. He did, though, remind the Court that the Registrar had power to amend an entry under S.25 (f) of the Law if he understood there to have been only a clerical error and the amendment could be made without detrimentally affecting any person's interests. However, considering this, he therefore accepted that if subsequent registrations purported to change rights or the effect of rights as originally registered, without a new agreement, then those subsequent entries *prima facie* should be removed.

165. He accepted that what the Court of Alderney ought to have done was to sort out what the Register really ought to say, and then give effect to that. He submitted that if the Register were amended by the Court, (he used the example of a burden being added to one's title which ought to have been, but had not, been registered when one purchased the property) then that gave the adversely affected party a right of recourse against the States' insurers, because of the mistake that had - on this hypothesis - been made by the Land Registrar. (I am not sure that that can be taken as a universal proposition; the question who had made the "mistake" might well be fact-specific, but that does not matter for present purposes.)

166. Advocate Barnes agreed that there were, indeed, potential issues about what was actually registered against the titles, but he also submitted that, given the lack of clarity in the entries themselves, it was right to analyse the position by looking at them together. He submitted that the circumstances justified the Court in taking a "broad approach" to the question what the Register ought to say, because there was now, at this point in time, no other way of dealing with the matter. He submitted that this approach did provide a justification for the generalised approach of the Alderney Court to the ultimate question of what rights of access were properly attached to the relevant titles, even though the directions to give effect to that ought to be considered individually.

167. He relied on the fact that Alderney Land registration had been conducted relatively informally in those times, ie from before 1969 until at least digitization. It was possible to have a transaction entered on the Register simply by the parties attending before the Registrar and orally confirming their agreement

(see s. 16 (2) (b) of the Law and r.15 (a) of the Rules) and indeed it was only after the key period in this case that the procedure began to require forms to be completed.

168. His submission came down, in the end, to the proposition that, even accepting that there were anomalies and deficiencies in the way in which registrations appeared on the various registers of title, there was still sufficient evidence, including the fact of these very entries having been thought appropriate when they were made, to support the conclusion that both Mrs Phillips and all her three original purchasers (the Cohens, Mr Birtchnell and Mr Dines) had intended, and sufficiently acceded to, the general intention that "rights of access" of the nature described in the Birtchnell Agreement (at clause 7) should be enjoyed by all Mrs Phillips' land contained in Plots 141 and 143 as a servitude exercisable over the roadway identified as the "Yellow Strip" on the Birtchnell Plan.

169. In relation to the Birtchnell land itself (the former Plot 141(b)) he relied strongly on the references to the Birtchnell Agreement entered on the registers of both the new Title 141(b) which was created, and the original Title to Plot 141 in particular, as demonstrating the clear intention that the whole of the Birtchnell land enjoyed the benefit of such rights of access over the Yellow Strip. Bearing in mind the informality of Alderney land conveyancing, it could and should be inferred that the Cohens had understood and agreed to this, and the Alderney Court plainly must, from its decision, have thought it to be the case. In relation to the Dines land (former Plot 141(c)) he stressed the terms of the final entries made on the titles of both the original Plot 141 and Plot 143 when the Dines Transaction was registered, submitting that these plainly and naturally read as recording that rights of access were enjoyed over the Yellow Strip (that, obviously, being the "*strip of land*" mentioned) to the whole of the Dines land and again that this could be seen as part of all the relevant parties' general intentions as to the scheme of rights. Therefore, he submitted, those were the rights which now ought to be properly recorded in and against the various registered titles.

170. In effect, therefore, he supported the underlying broad-brush decision of the Alderney Court, namely that it was "Birtchnell rights" which were exercisable against the Yellow Strip in favour of all the land which had formerly been part of Plots 141 and 143 in Mrs Phillips' hands, whilst at the same time accepting that the matter needed to be dealt with on a parcel-by-parcel basis, and more precisely than in the Order made.

171. As I understood him, though, he also accepted that on any basis the Birtchnell rights of access did not and could not, without more, be registered as conferring benefit on land other than that which had formed the old Plots 141 and 143 - ie not in favour of those parts of the old Plots 142 and 144 which had now become amalgamated with parts of the old Plots 141 and 143. He said he would argue, though, that such rights would be enjoyed as extending to that land, by virtue of the customary law principle by which land which was *enclavé* (ie land-locked) could claim a right of access to the public highway over neighbouring land, by the most sensible and convenient route.

172. That, however, is an argument which is, on any basis, one for another day. The customary law rules which would apply in Alderney, relating to whether an easement might be claimed "*sans titre*" under principles of necessity, or by applying the doctrine of "*destination du bon père de famille"* (which Advocate Barnes also said might be invoked) are complicated and unfamiliar. Some potential problems are immediately obvious. They are those such as

- whether such rights of necessity could be claimed over the land of third parties (as Advocate Barnes submitted they could indeed be in the customary law deriving from Norman and French law principles),
- whether such rights could be claimed if the land had become inconveniently landlocked from the public road only by the actions of the owner himself or his predecessor in title, and
- whether a right of way of "necessity" would in any event also extend beyond rights of passage to rights to such modern facilities as the installation of service media.

The doctrine of "*destination du bon père de famille"* appears to owe much to the civil law treatment of communal family land on being subdivided, even if the principle was ingeniously extended, in Guernsey, to practices under the German Occupation: see *Rector etc of St Saviour's Church v Traisnel and Bougourd* (1989) 7 GLJ 51. The correctly available application of such rights therefore requires considerably more investigation and research than has been conducted in this case or is necessary for the purpose of deciding the matters in issue here. Those matters are simply: what are the correct entries to be made in the Land Register, according to Alderney Law, with respect to the servitudes created by the key transactions?

173. From the above, though, it is clear that there is a measure of agreement between the parties in that each accepts and urges that the Land Register entries ought to be accurate according to law and the events which have happened. Their main difference is that Advocate Barnes argues for a wider interpretation of the events which have happened, and a more broad and liberal interpretation of the entries made on the Land Register at the time, than Mr Noone is prepared to allow.

The jurisdiction on appeal - approach

174. I turn now, therefore, to my jurisdiction and how it might be exercised in this case. This is a true appeal; it is not a re-hearing. My function, accordingly, is to review the decision of the Alderney Court, in accordance with recognised appellate principles. This means that insofar as the Alderney Court has made decisions of law, if I conclude that it has made an error of law, ie an error in formulating or applying relevant legal principles, then I will set the decision aside, allow the appeal and rule accordingly, depending on how that error has affected its decision.

175. However, if the Alderney Court has made findings of fact, I can only interfere if I am satisfied that there was no evidence before it upon which it could reasonably have arrived at those findings of fact on which its decision depends, or that for any other reasons those findings of fact were perverse: see *Hawkins v Greenwood* [1985] GLJ (2) Case No 57. By "no evidence" what is really meant is "no evidence sufficient to be capable of supporting" the relevant finding. In other words, where the Court below has made a finding of fact, or has exercised a judicial discretion, the question to be asked is: was there evidence or materials upon which that Court could reasonably have come to the conclusion which it did? If so, this Court will not interfere, even though it may feel that it would not, itself, have come to that same conclusion.

176. It is also the case, of course, that the Alderney Court must give sufficient reasons for its decision.

> *"Litigants are entitled as of right to a reasoned judgment so that they may understand how the decision has been reached and in particular whether there is any flaw or error in the decision-making process that should be challenged on appeal. Further, it is important that an appellate court may also understand the judgment so that it can decide whether to reverse or interfere with the decision":*

see *Cyma Petroleum (CI) Limited v States of Guernsey*, Guernsey Judgment 05/2015 (CA) at [24],

177. It is right to record the further point that, in examining the Alderney Court's decision, it is appropriate to bear in mind that that Court is composed of lay persons rather than qualified lawyers, and to exercise some benevolence in interpreting their judgment and seeking to extract their reasoning from the words they have used, bearing in mind that they may not have expressed themselves with the precision and accuracy to which trained lawyers are accustomed. In other words, the objective is to extract and evaluate the Court's real meaning rather than focus rigidly on the language actually used. In principle, though, this is still the process of seeking to discern the actual reasons of the Court itself. It is not, and must not be allowed to fall into the error of, supplying reasons which the Court below might have had, but did not in fact have. That would risk this Court's slipping into the error of substituting its own judgment for a judgment which has been confided to the lower Court, and hence usurping that Court's function: see *Cyma Petroleum* (above) at [20] – [23]. It is a matter of judgment in any case where that line might be crossed.

178. The above suggests that where an erroneous decision of the Alderney Court depends on findings of fact which this Court concludes were not justified, this will tend to require that the case be remitted to the Alderney Court for reconsideration, always in the light of any guidance or comments of this Court (as happened in *Barron v Watts,* above.) The position would be similar if a corrected application of the law then required a consequential decision based on findings of fact which the Alderney Court simply had not made; the case would normally have to be remitted. However, if this Court were to allow an appeal on point of law, but could also be confident that it was in as good a position as the Alderney Court either was itself at the time, or would be if the case were remitted to it, to make any further necessary findings of fact required for a decision, this Court would be able to take jurisdiction to do so itself. In my judgment it would be inclined to do so if possible, in the interests of efficiency, in these days when the delay and expense of court processes are so high.

179. To do so would require, though, that this Court would have to be sure that all the necessary relevant evidence was now before it. It is therefore likely to be the case only where the crucial evidence is documentary, and such findings do not depend on the weighing of oral witness evidence, because evaluation of oral evidence is a fundamental function of the Court of first instance.

180. On the second day of the hearing, I asked both sides whether they wished to address me on whether, if I were minded to allow the appeal, I would have to remit the case back to the Alderney Court, or whether they agreed that I could and should make a final determination of the issues involved myself, at this, appellate, level.

181. Mr Noone strongly urged that I should do so if I could, in order to "sort things out", saying that he strongly feared that if the matter were referred back to Alderney, the result would be that the parties would be likely to end up in the same place (ie here), after yet more delay, expense and trouble.

182. Advocate Barnes was reluctant to commit himself. At one stage I understood him to agree that I should decide the issues myself now – which of course would have effectively conferred jurisdiction – but on reflection, I do not think he actually did. When asked if he contended that I must send the case back to Alderney, he would only say that he was "not sure".

183. I would be extremely reluctant to remit the case to Alderney for rehearing if this can be avoided, for obvious reasons of efficiency and saving of costs. Also, given the legal complexities of the case, any guidance I might have to give would be likely to be rather intricate and therefore impractical. However, and as a provisional judgment at this juncture, I do not think I have to do so.

184. I have identified the fundamental issues in the case as being:

- what were the material land transactions which took place?
- what has been entered on the Register, particularly at the key original relevant time in 1969, in respect of those transactions?
- did these entries correctly record the relevant transactions as they should have done?
- if not, should the Register now be amended and if so by what amendments?

The central points in the case are thus points of law being principally matters of construction, namely of the relevant Alderney legislation, the actual entries made in the Land Register (with the principal ones being as long ago as 1969) and of the true construction of other documents such as agreements. Insofar as the application of the law depends on matters of fact, the vast majority of those are also established by documents, eg an agreement recording the terms of a transaction which then happened. There were no underlying facts sought to be proved by witness evidence and indeed, at this remove in time – some 55 years - the possibility of there being any available, relevant and admissible oral evidence is virtually non-existent. None was called in front of the Alderney Court, and whilst the addresses to that Court of each of Mr Noone and Mr Hamon will no doubt have included assertions of fact these were more in the nature of submissions than evidence.

185. All these issues are thus either points of law or dependent on documentary evidence and inferences from documentary evidence. Insofar as factual findings were made by the Alderney Court, and are either express in their judgment or can be seen by necessary implication to underlie it, then of course, as an appellate court, I can and must respect these and only interfere if convinced either that there was no sufficient evidence to permit such a finding, or that it was otherwise perverse.

186. Putting all these points together, it is my appellate function to determine the points of law, and as regards any findings of fact which are a necessary basis for this, I either have these from the Alderney Court, or, if that Court made no identifiable finding on a material point, or if I have concluded that its finding was not legally supportable, I am in just as good a position as the Alderney Court to derive any necessary further findings from the documentary evidence in the case. I can - and as a matter of procedure I even must - regard this as comprehensive, because it includes everything produced to the Alderney Court for the substantive hearing of the case.

187. I therefore approach the appeal on the above basis, although I will revisit this approach if necessary.

Discussion

The judgment below

188. From the outset, it seemed clear that that the actual decision of the Alderney Court could not stand for at least two immediately obvious reasons, both amounting to errors of law in themselves, and appearing from the Order and a cursory reading of the judgment.

189. The first is that the Order itself simply does not deal with the issues which were put squarely before the Court by the Application see [123] above. It does not make any express decision at all on the first two issues on which its ruling was sought, although these might possibly be inferred from its judgment, but, and crucially, it does not recognise the fact that there are six individual relationships between parcel AY1213 and the six other parcels (AY1207-AY1212), and that there is not merely a possibility, but a probability, that the legal effects of these may differ owing to the different histories - transactional or registrational - of such other parcels. The Order deals with the third head of relief only, and does so globally, and whilst it is true that the grammar of the third head of relief is framed collectively, it is obvious from the facts, the arguments, and the expectations of the fourth head of relief that what was being sought by the Appellants was a set of individual decisions in relation to each of the six neighbouring parcels. It is, of course, logically possible for the Court to have concluded that exactly the same rights apply to each such relationship; indeed, that is *prima facie* what it did conclude. However, if so, the legal justification for arriving at such a uniform collective result would need to be explained, and it was not.

190. Second, at a substantive level, simply ruling that the terms of Clause 7 of the Birtchnell Agreement are to be "*grant*[ed]" against Title AY1213 as rights simply appended to all the six other Titles (which is what the Alderney Court Order does) ignores the fact that the six other parcels all at least include, or even comprise (consider AY1207 and AY1208) land which was not the subject of the Birtchnell Agreement at all. There is no indication of how this fact is supposed to be being accommodated by the Order, whether within what the Alderney Court envisages as "*granting rights in accordance with*" s. 7 of the Birtchnell Agreement or otherwise. The Court's blanket direction *prima facie* confers the Birtchnell rights on all the land comprised in all the parcels, even though (a) it could only benefit the parcels other than AY1213 on any basis, and (b) several of the other six titles now even include land which was never the subject, even, of the three key transactions which might have created such rights in the first place.

191. Neither the judgment nor the Order itself grapples at all with the effects of the Cohen Reservation, nor with the validity or effects of the entries which were actually made on the relevant title registers over time - and which would apparently even remain on the register under the terms of the Court's Order.

192. On a more detailed level, there are the following problems in particular with the basis of the judgment.

193. First, in the second paragraph under "Background Facts and Conclusions" the judgment recites only the Phillips-Birtchnell sale transaction, and does so as if it had comprised sale of the whole of Parcels F141 and F143, when it simply did not. It does so without making explicit its findings of who purported to create what rights, to whom, when and over what land. It proceeds on the apparently assumed basis that it was only the Birtchnell Agreement which affected or underpinned, the rights of parties who held any land fronting on to the Yellow Strip. On that basis, it fell into error, because it simply did not take account of the factual situation created by the existence of the Cohen Transaction, or how the Dines Transaction was integrated into that supposed scheme of rights with legal effect.

194. The fifth paragraph contains a key and apparently unanimous finding by the Jurats that

> "*it appears to have been the intention that the rights* [apparently, the Birtchnell Agreement rights] *should have attached to all parcels as they were and are now*" (emphasis added).

This is a vague generalisation. It does not identify whose intention is being found nor how the conclusion of law that this "intention" bound AY1213 is arrived at. The validity of any such conclusion cannot therefore be evaluated. The only evidence cited as proof of such "intention" is "*later*" attempts to "*rectify*" (as the Court saw it) the Register. However, that conclusion actually begs the whole question, and the Court does not explain why it felt able to draw any such inference. Lastly, the conclusion that intentions in 1969 extended to "*all parcels as they …are now*", when many, now, include land which was not owned by either vendor or purchaser under the Birtchnell Agreement, is wholly unsupported as either a finding of fact or a conclusion of law, and it is unsupportable.

195. The "assumption" made in the seventh paragraph (that the Noones knew of the terms of the Birtchnell Agreement when purchasing both their plots) can be construed as expressing a finding of fact made on the basis of the evidence. However, it is also framed as grounds for an implicit criticism of the Noones, with an implication that their having such knowledge has affected the Court's decision. If so, how it did so is not explained.

196. Lastly, in the eighth and final substantive paragraph, the reference to "*unnatural justice*" is legally meaningless, and rather unfortunate, for sounding like a jibe at Mr Noone's frequent invocation of the principles of natural justice in his procedural arguments. All it really means is "unfair". However, the judgment does not explain why it is unfair, if the Noones demonstrate a good legal case, to allow them the relief which they seek, nor how the perceived presence of any such "unfairness" provides a good case in law to justify the actual Order made. Once again this paragraph focuses only on the Birtchnell Agreement and makes no attempt to deal with the Cohen Transaction or the Dines Transaction, nor to consider the validity or effects of the actual entries on the various registers. In ignoring all these matters, the Court fell into error.

197. Standing back, the judgment really distils down to a decision that, since all the parties now owning land with some frontage on to the Yellow Strip appear to have assumed for a long time - and whether rightly or wrongly - that their land or property benefited, or was entitled to benefit, from the rights of access described in the Birtchnell Agreement, that expectation ought to be made good by enshrining those rights on the title registers. The justification for this as a matter of law is simply not dealt with, and it is actually a weaker case than it would be to claim the acquisition of a servitude by actual long user, which is not possible in Alderney law. Even if conferring such rights on a universal basis might, paternalistically, appear to be a reasonable overarching scheme, that is not the legal test. It is simply not, without more, a sufficient legal basis for the Order which the Court made.

Legal analysis

198. I therefore move on to analysing, from the evidence, what actually happened, what, in consequence it would have been appropriate to register, what, in practice was registered, and my conclusions as to the legal effects of all of that.

Legal framework

199. From the 1949 Law, one abstracts the legal proposition that all real property rights and interests in Alderney derive, first, from the Land Awards themselves which, once fixed, were to be final. Once these were completed and registered any alteration to these titles was only effective in law by the combination of a transaction (or a court order) and actual registration of its effect on the property register of the relevant title.

200. For a Minor Interest (ie an "interest less than ownership", such as a servitude) to be created in law therefore required both the relevant transaction AND the registration, on the dominant title register, of the Minor Interest in the servient land.

201. The registration of an Adverse Interest on the servient title did not operate in law to create a Minor Interest as part of the dominant title. At best it was notice, and evidence, of a transaction which might be registrable, elsewhere, as a Minor Interest, depending on the facts.

202. The entries on the present title registers and their histories require to be examined against the above background.

Preliminary point

203. As a preliminary to the chronological examination of the relevant transactions and entries, it is appropriate to record that the date of 11th April 1969 attributed to the sale of the Birtchnell land as entered on the title register to the original Plot 141 is simply wrong. There is no evidence to support any other possible conclusion. I think Advocate Barnes accepted this, but it is, in any event, plainly the case, for three reasons.

204. The first, and unassailable, reason is that the entry itself was made physically on the register immediately below the entry recording the Cohen Transaction, which was dated 29th April 1969. Entries on the paper sheets of the register were made in sequence, in list form, starting at the top of the page and moving downwards. The Birtchnell entry was therefore inevitably made after the Cohen entry and cannot have been made before 29th April 1969.

205. The second reason is that the Birtchnell entry was signed off by Mr Crombie as Land Registrar, but Mr Crombie was not the Land Registrar on 11th April 1969; Mr Radice was. Mr Crombie became Land Registrar some time after 29th April 1969 (Mr Radice registered the Cohen Transaction as Land Registrar on that date) and before 18th November 1969 (Mr Crombie registered the Dines Transaction as Land Registrar on that date). It was Mr Radice who registered the Birtchnell Transaction which created Title F141(b) on 16th June 1969 but he did so as Deputy Land Registrar, so it is possible that Mr Crombie had become Land Registrar by then. However, the precise date is not important.

206. The third reason is that if the registration of the Birtchnell sale had preceded the registration of the Cohen sale, the land parcel numbers of 141(a) and 141(b) would have been reversed.

207. The inescapable conclusion is that the date of 11th April 1969 given for the Birtchnell registration on the title to F141 is just wrong. The true date does not actually matter, but is probably after, even, the registration which opened Title F141(b), since the two registrations were made by different persons. This would seem unlikely if they were physically made on the same date.

Chronology

11th April 1969 - Birtchnell

208. In chronological order, the first thing that happened was the execution of the Birtchnell Agreement, on **11th April 1969**. It is a formal legal agreement document, typed on redline-framed "Deed" style legal paper, using lawyers' language and expressions, and was clearly bespoke. It recorded the deposit being paid, and that the sale was scheduled to be finalised with payment of the balance of the purchase price just under three weeks later, on 30th April 1969.

209. Clause 4 of the Agreement contained a "buy back" clause, providing that if, within two years of the signing of the Agreement, Mr Birtchnell should obtain a letter from the Natural Beauties Committee of Alderney stating that the plot being sold would not be considered acceptable for building on, Mrs Phillips would buy the land back at the same price.

210. Clause 5, interestingly, provided that

> "*This Agreement when duly completed by the said parties may be registered by either party as an adverse interest against the said property and this Agreement shall be deemed to be sufficient instruction for this Agreement to be so registered by the Land Registrar.*" (emphasis added).

"*Completed*" here clearly refers to execution of the Agreement itself, and not "completion" as the finalisation of the sale, since that interpretation would make it otiose. What this clause appears to be trying to do is to replicate the kind of protection afforded in English registered conveyancing by the statutory right to register "estate contracts" and suchlike, and thereby prevent any subsequent assign of a landowner taking the property in the interim without notice of, or being bound by, rights conferred by the contract. "*The said property*" must be treated as a reference to what was thought to be Mrs Phillips' relevant title or titles, as it cannot be a reference to the property agreed to be being sold because that title did not yet exist. The property being sold is in any event itself referred to as "*the said plot of land."*

211. I have already set out the terms of Clause 7 as to the agreed intended availability of rights of access over the Yellow Strip in favour of the Birtchnell property. I do not repeat the full text, but I note that those rights were intended to come into operation "… *after the signing of this Agreement*...". Whether that was legally possible, bearing in mind that Mr Birtchnell would not actually own the Birtchnell land for at least some days, is not clear, but the general tenor of the parties' intention is clear.

212. The Birtchnell Plan and Agreement show that both Mr Birtchnell and Mrs Phillips knew and intended that Mr Birtchnell would not be acquiring the actual Yellow Strip, but would be acquiring the red tinted land with rights over the Yellow Strip.

29th April 1969 - Cohen

213. On **29th April 1969** the Cohen sale was effected, and title to that property was legally transferred and separately created by registration. There is no written agreement supporting this transaction. Advocate Barnes (who I accept had the most experience of anyone in the court of conveyancing in Alderney) drew attention to the fact that a transfer of ownership could be effected in Alderney, at least at that time, relatively informally, by both parties attending the Land Registrar and making a purely oral request for registration of their transaction.

214. I consider it likely that this is, indeed, what happened here for two reasons. The first is that, if there had been a written agreement, it is (I think) virtually inconceivable that the Land Registrar would not have requested to see it, and if he had done so, it would have been noted on the register (as it was in respect of both the Birtchnell and the Dines Transactions at much the same time), and a copy would almost certainly have been filed. It does appear that there was a plan of the relevant land produced at the time of registration, and even annexed to the register, but that is all, and that plan cannot now be identified. Second, the terms of the Cohen Reservation do not have the style of having been extracted from a formal written agreement, but rather have the flavour of being a record of something said.

215. Looking at the situation at the time when the Cohen Transaction was given legal effect, therefore, Mrs Phillips' position was that she knew that she had already bound herself to afford rights of access over the Yellow Strip, (which she also knew she was now selling to Mr and Mrs Cohen) to Mr Birtchnell for the benefit of the land she was in the process of selling to him, which comprised part of Plot 141 and part of Plot 143. She knew this, because she had recently signed the Agreement to this effect. She also knew that she had authorised Mr Birtchnell to register the Agreement containing that prospective grant of rights against her then property (even though in the event he had not actually done so), because it says so in the Agreement. There was therefore no doubt about the seriousness of this

term of the Birtchnell Agreement; it could immediately take effect as an adverse interest against her property. She also knew from Clause 4 of the Agreement that Mr Birtchnell was keen to be assured that he would be able to build on the property he was buying - for which he would need the rights of access. She also knew that the Birtchnell sale was intended to be completed imminently, even the very next day. At the same time as knowing all the above, Mrs Phillips was entering into a sale of the access road to the Birtchnell land (the Yellow Strip) to Mr and Mrs Cohen.

216. Whilst there is no record of the actual agreement between Mrs Phillips and Mr and Mrs Cohen, it is clear, from the Adverse Interest entry made contemporaneously with the opening of the new Title F141(a) on 29th April 1969, that both parties intended some rights of access to be made available ("*afford[ed]")* to future owners of parts of the remainder of Mrs Phillips' land. The question is what they both (but crucially the Cohens, whose land would be burdened) were then intending and agreeing should be the land able to benefit from that potential grant. There are actually three common sense possibilities. The first is that the benefit was to be secured in favour of the whole of Mrs Phillips' retained land in both her titles. The second is that it was to be secured in favour of all the land which Mrs Phillips was currently selling to Mr Birtchnell. The third is that it was to be secured for the benefit of only the remaining land within Plot 141; it is this last which came to be expressly stated on the Adverse Interest register of Plot 141(a).

217. It is then appropriate to look for all the evidence of what Mr and Mrs Cohen were agreeing to. The terms of the formal entry made in the Adverse Interest section of the register of their title is, of course, *prima facie* evidence of their agreement to the last possibility. For their agreement to have been of any broader effect would, equally obviously, require their knowledge of and acquiescence, at least, in any reservation of rights being of any such wider potential scope.

218. Reviewing the position, it is surely inconceivable that, at the time of the Cohen sale, Mrs Phillips could have disregarded, or forgotten, the formal Agreement with Mr Birtchnell which she had executed only days previously and was expecting to give final effect to either the next day or not long thereafter, and its promised grant of rights of access to all the land which Mr Birtchnell was buying. I consider it equally inconceivable that, with that knowledge, she would not have made those potential rights known to the Cohens and obtained their recognition and agreement to their being put into effect. This is not least because if Mrs Phillips had deliberately sold what became Plot 141(a) to the Cohens without preserving the availability of the rights of access promised to Mr Birtchnell, she would not only have been committing a breach of contract with him, but very probably a fraud on him. On any basis, it simply makes no sense that Mrs Phillips should have deliberately set out to preserve rights of access only to the rest of Plot 141 in the very immediate context of her sale to Mr Birtchnell of a part of both Plot 141 and Plot 143. It makes even less sense that she should conceal the true extent of the actual proposed rights of access for Mr Birtchnell from the Cohens.

219. If Mr Birtchnell was to have the benefit of rights of access to his parts of Plot 143 as well as Plot 141, the requirement that the Cohens should know this, and consent to it in their purchase of Plot 141(a), is sufficiently obvious and fundamental that it appears to me (and I so find) that the Alderney Court must implicitly have found this to be the case in respect of the Birtchnell land, within their overall general finding that the Birtchnell rights were to be treated as enjoyed by all the current neighbouring titles to AY1213. I conclude that there was ample evidence (recounted above) to support such a finding by them.

220. I infer, therefore, that the Alderney Court made such finding and I find that it was open to them to do so, but were I to be considering the issue on my own account, I would come to the same conclusion. There seem to be two rational possibilities. The first is that Mrs Phillips was committing a bizarre and unnecessary fraud on Mr Birtchnell by proceeding to sell him land with rights which she knew she would not be able (and did not intend to be able) to deliver when he completed his purchase, because this is the only scenario which is consistent with the accuracy of the recorded terms of the Adverse Interest registered against Plot 141(a) at the time in the events which occurred. The alternative is that the joint intention of herself and the Cohens was to preserve such rights of access for Mr Birtchnell - but something went wrong with their registration.

221. The latter would seem to be the more likely, by far. It is not unlikely, and in fact eminently likely, that in the course of registering the Cohen sale at a meeting with just a plan produced to identify the land being sold, the need to reserve adverse rights against the Cohen property now being purchased for the benefit of the Birtchnell property about to be purchased, was recognised, but that then the extent of the property to be benefited was either misconveyed to the Land Registrar, or was misunderstood by him, or misrecorded by him, leading to the terms of the (acknowledged) adverse interest being registered in the precise terms in which it was. I do not think it open to reasonable doubt but that, in all the circumstances, the intention was that this adverse interest entry should, at least, extend to rights intended to be afforded to the further land in Plot 143 being sold to Mr Birtchnell.

222. In summary, therefore, I conclude that in respect of the land, the subject of the Birtchnell Agreement, there was evidence from which it was open to the Alderney Court to conclude (and that this was also the correct conclusion) that potential rights of access as set out in Clause 7 of the Birtchnell Agreement were actually intended, by both Mrs Phillips and Mr and Mrs Cohen (as well as Mr Birtchnell in the background), to be preserved for the benefit of the parts of Mrs Phillips' land retained at that moment, which would become Mr Birtchnell's land. The entry on the Adverse Interest register of Plot 141(a), did not reflect that in its terms, but it should have done.

223. But also on 29th April 1969, therefore, if it were intended to create a Minor Interest in law, comprising an "interest less than ownership" in the new Plot 141(a) for the benefit of some part of Mrs Phillips residual land, an appropriate Note of such Minor Interest should have been recorded in the Minor Interests register (Part IV) of such residual land. Taking the adverse interest entry at face value, this would have been Plot 141 in any event, but on the basis of the inferentially clear intention to preserve such rights for the benefit of the Birtchnell land it would also have been Plot 143. Neither happened. However, in the circumstances of this case where the contemporaneous intention to agree and create such a Minor Interest is so obvious, this can, in my judgment be fairly regarded, as a mistake or accidental omission.

16th June 1969 - Birtchnell

224. Transfer of title pursuant to the Birtchnell Transaction was effected on **16th June 1969** and the title to the newly created Plot 141(b) was opened. No intended rights of access were recorded in respect of Plot 141(a) on the Minor Interests register of Plot 141(b), as should have been the case. However, in the circumstances found above, it seems to me that the Cohens could not (and in fact they would not) have objected to any such appropriate Minor Interest being recorded in favour of the Birtchnell land. *Ex hypothesi* on the above findings, they had consented to this.

Decision as regards the Birtchnell land

225. *Prima facie* therefore, it is appropriate to rectify the registers of the relevant titles to record the above relationship between the land formerly within the old Plots 141(b) and 141(a) (the latter now AY1213). The powers conferred on the Court in this regard are exercisable by the Royal Court on appeal: see s. 22(1) of the Law. In practice, such rectification will amount simply to clarifying the application of entries which are already on the registers, as will be seen. (I note, in passing, that this means that, in fact, the late entry made on the register of Plot 141(a) on 10th September 1993, giving "further details" of the original adverse interest entry was actually accurate, if read in regard to the Birtchnell land, alone.)

226. I am certainly "*of the opinion"* that such rectification is required in consequence of my decision above, bringing the matter under s. 25(1)(a) of the Law. Although s 25 reads "*The Register may be recitified…."* I read the word "*may*" as indicating the situations in which there is the possibility of rectifying the register (situations thereafter listed) rather than as indicating that the question whether or not to rectify is a matter of the Court's discretion in the individual case. An order for rectification follows inexorably from the decision which I have made.

227. Whilst I was referred to s. 25(1)(g) of the Law, this does not, in my judgment, apply, because it is a "sweep up" clause, referring to "*in any other case*", and I have already held that s. 25(1)(a) applies.

However, I did examine the criteria for ordering rectification under this subsection, as well out of an abundance of caution.

228. The first qualification for this is that the Court should be contemplating doing so "*by reason of an error or omission in the Register or by reason of an entry made under a mistake*". I note that the qualification is totally general, and is not confined to a mistake made by the Land Registrar. It is not, therefore, necessary to consider or find who may have made the relevant mistake, but only to be satisfied that there has been some mistake, (or omission), leading to an erroneous entry (or the lack of one) on the register. This in fact simply records the nature of my "decision". That qualification is therefore met.

229. Thereafter the Court has power to order rectification of the register if it deems it to be just to do so. That qualification is also met. There has been nothing in the intervening history of the matter to effect any change in the relationship between these two original parcels of land as it should have been recorded.

230. In this context I would consider whether the change of ownership of AY1213 to the Noones could make it unjust to rectify the adverse interest register on AY1213 in the manner necessary, but I conclude that it would not be, even if I had a discretion. The necessary rectification does not actually affect the title of AY1213 more adversely than the registration which was already on the register of that title when the Noones acquired that property, even if they disagreed with it at that time. This is not, therefore a case of someone acquiring a title in detrimental reliance on an entry on the register which would then be amended to their disadvantage. There is therefore, in my judgment, no possible obstacle to rectifying the registers pertaining to AY1213 and those other titles which contain parts of the Birtchnell land, appropriately.

231. An Order directing rectification of the relevant registers will therefore be made and defined in terms of both an appropriate Adverse Interest entry in Part III of the Register against AY1213, and appropriate Notes of Minor Interests registered in Part IV of the relevant titles, (AY1210, AY1211 and AY1212) which contain land which was formerly within Plot 141(b).

1st November 1969 - Dines

232. The position with regard to the Dines land and Agreement, however, is very different from that surrounding the Birtchnell Agreement.

233. The Dines Agreement was made on **1st November 1969.** Matters had now moved on several months. The Dines Agreement was not being entered into, nor the sale completed, in parallel with either the Cohen Transaction or the Birtchnell Transaction, both of which were now settled in the past. The Dines Agreement was made in isolation.

234. The Dines Agreement is a two-page written document, also, typed on formal legal "Deed" style paper, and including legal expressions, but clearly from a template, as details are filled into gaps. It has plainly, therefore, had professional input of some sort, although not necessarily a lawyer's. I was told that Mrs Phillips herself was an estate agent.

235. That is all that there is. Within the Court papers – the Record Bundle – and immediately beside the copy of the Dines Agreement itself, there is a copy (in fact two copies) of a plan which is the same as the Birtchnell Plan but without the red and penciled annotations, noted above at [19]. However, there is nothing upon that Plan – no reference, comment, initials, date, or any acknowledgment – to link it with the Dines Agreement document itself, or to incorporate it into that agreement. Moreover, its stated measurement of the width of the relevant land differs from that stated in the Dines Agreement.

236. The first remarkable point is that the Dines Agreement, contains no reference whatsoever, direct or indirect, to the intended grant or transfer of any rights of access to the land, at all. There is no hint in the agreement that Mrs Phillips intended to confer or transmit any rights of access over any other land to the land which she was selling to Mr Dines, or that he expected to obtain any. As previously remarked, no rights of access were actually needed, because the land itself had road access all along

its southern boundary. The Dines Agreement simply records the intended sale of "*parts*" of the original Plots 141 and 143 by reference, only, to their area and measurements. The fact that it was in practice the entire remainder of Mrs Phillips' ownerships of Plots 141 and 143 is not stated in the agreement itself, therefore, but nothing turns on this.

237. Interestingly, the same protective right as was contained in Clause 5 of the Birtchnell Agreement, namely each party's right to register the agreement as an adverse interest against the property pending finalisation of the actual sale, also appears as Clause 4 in the Dines Agreement, and as part of the template used.

18th November 1969 - Dines

238. It appears to be only when the agreed purchase came to be completed and registered that the matter of any plan of the land for that purpose appears to have been considered. The register records, in Part II (and thus strictly, in "Particulars of Ownership" therefore) that the land in question was shown on the "*map annexed to the Agreement dated 1st November 1969 ...*". However, there is no other indication of what was being referred to and, as already mentioned there was no "*map*" or plan annexed to the Dines Agreement itself. I have drawn attention to the two copies of the Birtchnell Plan above at [235], and it is possible that this was the Birtchnell Plan as it existed in November 1969, before the red and penciled comments noted at [19] had been made. However, the plain fact is that it was not annexed to the Dines Agreement and that the measured width given on that plan of the two plots (part of F141 and F143 combined) does not correspond with the measurement given in the Dines Agreement. I have also noted the existence of the otherwise unidentified plan at page A16 of the Record Bundle (see [73] above), which does carry measurements corresponding to those mentioned in the Dines Agreement, and shows boundary positions which would have applied at that time. Whilst there is no indication that this actually was annexed to the 1st November 1969 Agreement, it is therefore possible that this could be the "map" referred to. However, it does not contain any suggestion of any right of way being granted or attached to what became the Dines land.

239. The descriptive entry in Part II of the register noted above was, therefore, all that was entered on the new Title 141(c) at the time. It is only knowledge of the measurements given in the Dines Agreement (or local knowledge of the land) which would enable one to deduce that what was being referred to was the area between the Birtchnell land and the southern public highway. Further register entries, and in particular the incorporation into this title register of the original title records to Plots 141 and 143 (now made defunct), only happened 24 years later - in fact in September 1993 in Mr Johnson's "tidying up" exercise.

240. Thus, there was, on examination of the new Title 141(c) itself, no contemporaneous registration at the time of its creation of any Minor Interest comprising rights of access over Plot 141(a) (now AY1213) nor any other reference which could be argued to evidence an intent to create, transfer or register any such interest. The only reference to any plan or map, even assuming it to be either a copy of what would have been the Birtchnell plan as it existed at that time, or the plan at A16, is only made for the purpose of identifying the bounds of the property being sold, not of registering any rights of access.

241. There was no contemporaneous reference to the Cohen Reservation rights, either. Although such a reservation now does appear, as the basis of an alleged Minor Interest, on the registers of land formerly in Plot 141(c), that interest was first entered on the registers only 25 years later, namely on 25th November 1994.

242. The absence of any express provision indicating an intention to transfer or confer rights of access in the Dines Agreement is, to my mind, all the more significant in the context that

- this was not a home-made agreement but a semi-professional one,
- Mrs Phillips would appear to have had some general professional acquaintance with real property rights, but in any event

- Mrs Phillips would hardly have forgotten the positive action needed to confer these when the Birtchnell Agreement had been drafted and executed, and, even more,

- there had been the apparent necessary flurry of activity about them when the Cohen Transaction had been registered,

all only a few months previously and in relation to the same general area of her land. The silence in the Dines Agreement is deafening.

243. Since there was no express provision dealing with rights of access in the Dines Agreement and none was even purportedly registered in favour of the Dines land at the time, the only way in which the Dines land could have acquired the benefit of any rights of access, would be

(a) if such rights were automatically carried, willy nilly, as part of the property included within the title to the land being acquired by Mr Dines (thus passing despite neither party apparently being aware of this, or thinking it worth recording) or

(b) if there had been a subsequent agreement to create such rights with the consent of the owner of the servient land.

244. As to (a), such rights could and would have been established as a Minor Interest appurtenant to the property sold (the Dines land) if they had previously been registered as such on the vendor's (Mrs Phillips') title(s). But they were not so registered. In fact, if any such rights, whether in respect only of Plot 141 as stated in the adverse interest registration on the title to Plot 141(a) or more generally, had been intended to pass, and the lack of their registration had been an accidental omission (and with the relative informality of Alderney Land Registration practice which must by now be evident, that might have been the case), this omission could have been rectified by a proper recording of such Minor Interest on Title 141(c) when it was created, and this would have been the obvious point at which one would have expected any such accidental omission to be noticed and corrected. Again, though, this would only have been thought of if there were, indeed, an underlying intention to transfer or create such rights for Mr Dines. However, once again, this was not done. (Since it was not done at all, there is no need to consider, in detail, the question of the Cohens' consent to such a "rectification" of the registers at that particular time, and whether this would have been necessary; it would obviously have been desirable, on any basis.) The situation is therefore that no Minor Interest in the Yellow Strip existed or was created on the register of Mr Dines' title to Plot 141(c).

245. I should mention here that Advocate Barnes submitted that the pages which might have contained Adverse Interests and Notes of Minor Interests as part of the original "source" title registers, ie those of Plots 141 and 143, were simply "missing". He submitted, in effect, that it could be inferred that such interests would have been registered on those missing sheets. Such sheets are indeed absent, but that is far from support for the proposition that there ever were such pages, let alone that they are more likely than not to have contained entries of the relevant interests. If such pages had ever existed, I find it difficult to believe that they would all have been missing, and with no reference to them in any other part of the Land Registry documents which were preserved. It is far more likely than not, and I so find if necessary, that they simply never existed. The form of the register of Title 141(a) suggests that any such pages were quite likely, at that time, simply to have been sheets which were attached to a main front page printed form of the Register if and when thought to be required.

246. The upshot, however, is that it was not then, and it is not now, possible to conclude that any rights were annexed to the Dines land at the time of its acquisition by him, by either route, ie by actual registration (now presumed to have been lost) and consequent automatic annexation, or by an actual agreed (and on some basis consented to by the Cohens) intention to transfer or create such rights at the time (there is no evidence of any such intention) and an accidental omission of the subsequent necessary registration.

247. The matter does not quite end there, though, because there are two other matters, contemporaneous with the creation of title 141(c) and its terms but extraneous to that which, are prayed in aid by

Advocate Barnes in support of his contention that the relevant parcels of land (AY1207, AY1208 and AY1211) are entitled to the benefit of rights of access over the Yellow Strip to at least some of the Dines land, and in fact even in favour of all of it.

248. The first is the pre-existing presence, on the title register of Plot 141(a) from the time of its creation in April 1969, of the Cohen Reservation. The argument is, in effect, that the registration of this adverse interest (ie the adverse interest against Plot 141(a)) impliedly equated to the registration, albeit indirectly, of a corresponding minor interest in that land in favour of the land being benefited. Advocate Barnes submitted that what was required for "registration" on a register could be construed benevolently and flexibly, and if the adverse interest entry were there, and effectively gave notice that there was inevitably a corresponding minor interest (which he submitted it effectively did), that could be treated as sufficing as registration of the latter, as well.

249. First, and on any basis this argument cannot be relied upon to confer rights of access to the Dines land in similar terms, *mutatis mutandis*, to the Birtchnell Agreement, ie not only to the land formerly in Plot 141, but also to that part of the Dines land comprised in the old Plot 143. The Cohen Reservation, on its face, expressly contemplates the conferring of rights only in respect of Plot 141. It does not mention Plot 143. The factors in relation to the Birtchnell Trandaction which I have found, above, to give rise to the possible (and indeed correct) finding that the registration of this adverse interest must have been meant to implement an intention actually held by the competent parties to confer such rights in respect of all the Birtchnell land, notwithstanding that that included also land within Plot 143, are simply not present in this instance. The maximum that this contention could support, therefore, would be the existence of rights of access confined to that part of the Dines land which was formerly within the old Plot 141. (For that reason alone, the global findings of the Court of Alderney could not stand in relation to those current registered titles which do not include any land which was once part of Plot 141(b)).

250. The second objection, though, is that this argument effectively assumes that the registration of such an adverse interest created, *as a matter of law*, a corresponding minor interest, benefiting the residual land of Mrs Phillips, and valid and effective from the time of the Cohen transaction, and that there can therefore *ipso facto* be no answer to a subsequent demand for its being recorded by physical registration.

251. I reject that argument as a matter of law. The Land Register is intended to be a complete and authoritative (subject to amendment in proper cases) record of real property interests and rights in Alderney. Rights and interests depend on registration in order to exist effectively as real property rights at all. The requirements for such effective recording are stipulated in the Law and the Rules. Therefore, I do not see how one can have an "implied" registration. If an interest is intended to exist but that registration is not made, then it will only be when the omission is remedied in fact and therefore in law that the interest can actually be said to take effect. The very fact that provision is made for the registration of both adverse interests and (where applicable) corresponding minor interests, inevitably on different titles, shows that they are regarded as separate (and, indeed, their purposes are different) and they require individual proper registration in order to be effective against all the world for their particular purpose. Sufficient registration must therefore be achieved, as prescribed in the Law and the Rules, as a matter of fact and cannot be implied.

252. (Section 18 (1) (b) of the Law is of no relevance here. Whatever the meaning of its somewhat opaque terms, it is expressly dealing with an implied effect by way of notice given by the registration of a Minor Interest; it is not dealing with the position here, which is an argument about the implied effect of the apparent registration of an Adverse Interest.)

253. No Minor Interest was noted on the register of Mrs Phillips' titles (ie the residual Titles to the original Plots 141 and 143) at the time of the Dines Transaction. No such interest was therefore transferred to Mr Dines. Of course, if this had all been obviously a mistake at the time, the register could have been corrected. However, it would appear that this could not have been done without the consent of the Cohens (see ss. 18(1) (b) and 18 (2) of the Law) because this would have been the first registration of a Note of a Minor Interest.

254. I would reject any argument that the Cohens' interest in Plot 141(a) was not "affected" by any such noting of a minor interest because the prior registration on their title of the Cohen Reservation had created a burden on their land already, such that they need not be consulted or notified. That would be an unreal interpretation of the situation, unjustifiably presuming much about the Cohens' understanding and attitude. An actual registration of a minor interest against their land where none had been registered before would detrimentally affect their interests in that it would enshrine such rights and facilitate their enforcement, preventing the Cohens from raising any doubts, disputes or objections they might have. However, and once again, since no such amendment occurred in fact at the time I am examining here, that aspect is hypothetical and I do not need to consider it further.

255. The only point for present purposes, therefore, is that I reject the argument that the apparent benefit of the Cohen Reservation rights was annexed to the title to Mrs Phillips' remaining land as a Minor Interest as a matter of law, despite its not being noted in the Minor Interests register of that land (which became Plot 141(c) in Mr Dines' hands), whether on 29th April 1969, or at the time of his purchase on 18th November 1969. Without proper registration, it was not so annexed.

256. The third objection is that the terms of the Cohen Reservation themselves do not actually, in practice and in any event, point inevitably to the conclusion that there was any common intention on 29th April 1969, to immediately annexe any rights of access to the residue of Mrs Phillips' land, even simply that within the original Plot 141.

257. This is a matter of construction of what I have labeled the Cohen Reservation. I have already remarked on the slightly unusual phraseology of the registered adverse interest: "*In buying this parcel Mr and Mrs Cohen agree to afford…*". This does not have the tenor of an immediately operative reservation of such rights, ie an unconditional (re)grant by Mr and Mrs Cohen of rights of access over their land, attaching to the remainder of Plot 141. It is equally consistent with the agreement being that Mr and Mrs Cohen would allow Mrs Phillips to grant such a *servitiude réelle* (ie rights of access in perpetuity) to any of her successors in title to "*parts*" of Plot 141, <u>if and insofar as she chose to do so</u>. In other words, they were granting Mrs Phillips the option herself to grant such rights if she saw fit. The use of the expression "*in favour of the owners of <u>parts</u> thereof*" (emphasis added) has this flavour; had the intention been for the Cohens to make an immediate regrant of rights of access "running with the land" then the more likely expression would have been the more immediate one: "*in favour of the owner or owners of the whole or any part thereof*".

258. Whilst this would therefore have been a right in the nature of a personal right rather than a real property right, it appears from practice at the time (eg Clause 5 of the Birtchnell Agreement and Clause 4 of the Dines Agreement) that registration of mere personal contractual rights, not yet ripened into fully legal interests in land, were regarded as appropriate to be registered as Adverse Interests on registered titles in Alderney. Indeed, the fact that no note of any actual Minor Interest was made at the time of registration of the Cohen Transaction, even when the Cohen Reservation itself was registered, adds support to the above interpretation.

259. In summary of the above, I conclude, therefore, that the presence of the Cohen Reservation on the title of Plot 141(a) from 29th April 1969 is not sufficient, in itself, to found any claim that a corresponding Minor Interest either arose *ipso facto*, or ought to have been, or could inevitably have been required to be, registered in favour of the relevant land at the time of the Dines Transaction, such that such a registration could have been entered on the relevant registers of title to the Dines land at any time after his purchase and even, still, now. That argument fails.

260. The second contemporaneous matter extraneous to the creation of the title to Plot 141(c), relied on by Advocate Barnes in support of his submission that there can and should be found to have been an intention to create rights of access in favour of Plot 141 (c) at the outset, so that these therefore can and should be recognised and given effect to today, is the entries which were made on the original registers to Plots 141 and 143 at the time of the Dines sale.

261. Advocate Barnes invokes the terms of those entries which record, in each case that

"Part 141 marked (c) and part 143 marked (c) on the plan [ie the relevant title plan] *sold to Malcolm James Dines* <u>*with strip of land 10' wide for access along the Western boundary of Parcel 141 to the public road*</u> *..."* (emphasis added).

He submits that this reference to the "*strip of land…. for access…*", construed in the context of the admittedly fairly loose way in which land registration in Alderney took place, supports the conclusion that there was an intention for rights of access, which must have been over the Yellow Strip, to be transferred or created for the benefit of the Dines land, and, further, that this reference can be taken to amount to a sufficient registration of these.

262. I cannot accept this argument. The existence of these entries simply will not bear that evidential weight even on their own, but certainly not in the context of the evidence which points the other way, already discussed.

263. First, on any basis, the title registers to these original Plots (ie F141 and F143) were not brought on to the title register of Plot 141(c) at the time; this only happened 24 years later in September 1993. At the time of the Dines sale, neither of the parties nor the then Land Registrar can have thought that the entries then made on the title registers of Plots 141 and 143 had any bearing on the rights attaching to the newly registered title to Plot 141(c), or this would have been recorded. It follows that this argument depends on attaching significance to entries made otherwise and elsewhere than in any actual connection with the sale which was being registered.

264. Second, the entries made on the original registers to Plots 141 and 143 were not registering any current rights of ownership at all, but were simply necessary to record the effect of the Dines sale in removing land from those registered titles. The terms of the entries had no dispositive effect in law. They were also, inevitably, made as a matter of law, after the moment when the Dines sale had already taken effect, because they purported to record that previous effect; they were not part of it. Moreover, as they were now removing the whole of the land remaining in those titles, they would not have been of any real interest to anyone, from that point onwards.

265. Third, there is actually no reason to believe that the parties to the transaction themselves had any input into the terms of these entries. There is no evidence, nor reason to believe, that the entries were made other than by the Land Registrar, after the event, and only for the purpose of updating the Land Register.

266. Fourth, the terms of the entries themselves are scarcely reliable, as they are wrong on any basis. They perpetuate the statement that the land is being sold "*with strip of land ... for access*" which was inaccurate when recorded against the Birtchnell transaction as a description of the land sold, and could only be rationalised as a reference – legally incorrect - to rights of access which were clearly (there) being intentionally granted as part of the Birtchnell Transaction itself. That interpretation simply cannot be attached to the Dines transaction, because there is no evidence that any such rights actually were being intended.

267. In fact, the perfectly obvious likely explanation for this entry is that Mr Crombie simply copied the form of the previous entries on the register of Plot 141, made accurately with regard to the Cohen transaction, but inaccurately with regard to the Birtchnell transaction, without giving critical thought to their content, and put a similar entry on the register of Plot 143.

268. In those circumstances, I do not consider that any weight at all can be attached to these entries, and they are certainly insufficient to support the propositions for which Advocate Barnes contends.

25th November 1994 – later entries

269. I conclude, therefore, that there is no basis for finding that any rights of access became attached to the Dines land as a minor interest at the time of its original purchase in November 1969, principally because none was registered, but also and in any event because none was intended and in practice none had ever been intended to be created. However, later entries were made on the registers of titles including the Dines land purporting to note such rights as a minor interests, in November 1994. This

was only, though, in terms of an assumed reflection of the Cohen Reservation (ie, only in favour of land formerly within the original Plot 141).

270. I have held above (see [253] *et seq*) that even noting the creation of any such minor interest on the register at the time of the Dines Transaction would, in my judgment, have required the consent of the Cohens for the purpose, at least, of confirmation of their consent. It could not have been justified as supposedly simply reflecting the Cohen Reservation and therefore not adversely affecting the Cohens' interests. As any such registration would have had at least an indirectly detrimental effect on their interests, their title was therefore affected, and their consent was therefore required to be confirmed, even (in my judgment) at the time of the Dines Transaction itself. But given the extreme length of time which had elapsed by 1994 since the registration of the Cohen Reservation, it is not even arguable, in my judgment, that a registration of a minor interest purporting to reflect the terms of the Cohen Reservation, 25 years after the event, could be validly made simply by the Land Registrar of his own motion, as supposedly correcting some clerical error, and without obtaining the Cohens' consent. Once again, this would be contrary to the terms of ss 18(1)(b), 18(2) and18(3) of the Law.

271. In fact, I think Advocate Barnes did not really seek to argue that it would have been legitimate to make these later entries without obtaining the Cohens' consent. He accepted that a new agreement giving their consent would have been required for these entries to be properly made. His argument, rather, was that it was perfectly possible that the correct procedures actually had been adopted, behind the scenes as to these entries, and that the necessary consent had been obtained. He submitted that it was impossible to know or determine exactly what had happened, at this remove in time, and that the Court therefore could and should assume that correct procedures had been observed.

272. This, though is effectively resorting to the "presumption of regularity". In my judgment no great weight can be attached to this presumption. It is only a starting point, and can be relatively easily rebutted by evidence. Given the many anomalies, inconsistences and errors which have appeared on the registers, even just through looking at the facts of this case, I do not think that that presumption can be relied on as foundation for a submission that it must effectively be found as fact that the Cohens' consent was obtained to the making of these entries, as would have been required for them to be validly made, simply because they were made.

273. In any event the probabilities are significantly against this having happened. If there had been any attempt to confirm the Cohens' consent, or even to notify them after the event to enable them to consider the position, I would have expected this to be noted as a "remark" on the Register. If the Land Registrar had appreciated the need for such a step that would have been the logical thing to do; it would have been significant enough to merit recording. Mr Johnson seems to have been quite prolific in making entries on the Register. However, there is no evidence at all that this actually happened and indeed, I find it more likely that it did <u>not</u> happen. This is not least because Mr Cohen had passed away on 12th October 1993, and the transfer of sole ownership to Mrs Cohen on the Land Register did not take place until 15th May 2000. That suggests that there can have been no contact between her and the Land Registrar in November 1994, or the demise of Mr Cohen would have been recorded then.

274. I should add that I do not consider that the registration of Mrs Cohen as sole owner of Plot 141(a), which took place before digitisation of the Register could, in itself, be regarded as implicit consent by her to the registration of the relevant Minor Interests dating from 1994 which are under consideration here. Those registrations were on different titles, not hers. I see no reason to think that Mrs Cohen was then alerted to them, or that she could have given informed consent of any sort so as arguably to ratify them.

275. For completeness, neither do I consider, in all the circumstances, that the Noones' acquisition of either of their own properties (in 2002 and 2012 respectively) could be argued to be an affirmation of the validity of any of the interests registered as affecting those properties at the time, precluding any objections now being taken. Once again Advocate Barnes rightly did not seek to argue that they were.

Decision as regards the Dines land

276. The upshot, therefore, is that I conclude that the registrations of the Minor Interests dependent on and purportedly reflecting the Cohen Reservation, effected initially on 25th November 1994 and now appearing on the registers of the land currently within Titles AY1207, AY1208 and AY1211, were invalidly and improperly made on any basis, and ought, *prima facie,* to be removed from those titles, for that reason. This is quite apart from the point which I have also made that there is a strong argument that the Cohen Reservation did not even intend to record the immediate annexation of rights of access, even to the residue of Plot 141, in any event, but only to keep open the possibility of Mrs Phillips' choosing to confer them on later sales. I regard that interpretation as sufficiently probable that I would make such a finding if necessary, but for present purposes it is not necessary; it merely serves to reinforce the other arguments for removing these entries from the relevant registers.

277. I have already noted the Court's powers to order rectification of the Register under s 25 (1) (a) and (g) of the Law. The former simply authorises me to order rectification of the register if I am "*of the opinion*" that this is "*required*" as a "*consequence of* [my] *decision*", and I regard that as plainly applying in this case. I have given the reasons for ordering the removal of these entries above. I find that they were not obtained regularly under the Law and Rules, and purport to create a minor interest which did not previously exist and was probably not even intended.

278. Again, I consider, therefore, that s 25(1) (g) does not apply, since it is intended to operate only "*in any other case*" (emphasis added.) I conclude that my decision actually mandates that the relevant registers must be rectified accordingly.

279. Out of an abundance of caution, though, I have considered whether the effects of my making the required orders for rectification ought to make me revisit the question whether I have do any discretion not to do so. In practice, I do not think that they do, in any event.

280. Whilst it appears that these entries may have been acted upon by certain members of the Gillingham family and their associates – albeit possibly under a misapprehension as to the extent of the rights they afford: see [299] below – I do not consider that to be a strong enough reason for leaving the entries in place if they were wrongly made. They appear to have been made in connection with Mr Gillingham Snr acquiring part of the Dines land from Mr Dines, with a particular interest in rights over Plot 141(a), in November 1994, but I do not see that as relevant. That would simply be rewarding these entries for having been irregularly obtained, by actually entrenching them on the register, and that simply does not seem just.

281. It is true that the Noones themselves did not appear on the scene until 2002, by which time these entries were already in place, and they will have bought initially (ironically) with the apparent benefit of the "Birtchnell" rights of access to Plot AY1209. By 2012, when they purchased AY1213, they must have been aware generally of what was happening or potentially happening with the adjoining parcels. But I do not see that this can prevent their contesting the validity of relevant registrations, if they believe they have a sound case for this, as I have previously said; there can be no question of any estoppel arising. Whilst it must mean that they purchased AY1213 on the basis of the rights which apparently affected that title at the time, even though they questioned and contested these, that would not give any other party the right to prevent them from pursuing any such challenge, insofar as they could maintain a good legal case in that regard.

282. I have considered whether the case advanced by Mr Noone, or the submission he made, might preclude my making the order I am minded to make, namely directing the removal of these entries. Mr Noone had, as I understood him, generally taken the position that the Cohen Reservation was confined to land in the original Plot 141, and that as this was the first parcel of land actually sold off by Mrs Phillips, the only rights of access with which AY1213 could possibly have been burdened were limited to this. He did also raise the question whether any rights of access could be regarded as having been correctly registered in principle, so as to be legally effective, having regard to the entries which were in evidence, but he did not push this point particularly hard; his submission seemed to be rather that all rights of

access to the remainder of Mrs Phillips' original land ought to be limited to the original Plot 141, but they had not been.

283. I noted that he seemed to agree with me when I suggested that the difference between his case and the Respondents' case boiled down to the proposition that he was arguing that all the rights of access must be restricted to benefit only the old Plot 141, whereas the Respondents argued that they could and should be treated as benefiting all the old Plot 141 and the old Plot 143 as well. From this it again appeared that he was prepared to accept that, provided the registrations were limited to the old Plot 141 land only, they would be correct. However, on looking back, I consider that in doing this, he was only responding courteously to the proposition which I was putting forward and, moreover, he was also doing so in the context that he presumed this limitation would apply to <u>all</u> the other titles. I therefore do not think it fair to regard this possible "concession" as binding on the Appellants, not least because I have concluded, in the event, that that limitation does <u>not</u> apply to <u>all</u> the other titles. I conclude that there is no reason, on this ground, not to give effect to the consequences of my findings above, in favour of the Appellants.

284. Again out of an abundance of caution, since I do not think that my order is really a matter of discretion, I have also considered the effects on the relevant Respondents of my ordering the removal of these entries or leaving them in place.

285. As to title AY 1208 (Ms Millan) that parcel cannot, in practice, exercise any rights of access directly over the Yellow Strip because it is separated from it. It may well be that even if such a Minor Interest had been legitimately registered originally in respect of part of the land in their title (ie land within the original Plot 141), the act of cutting their parcel off from the servient land would constitute abandonment of any such rights of access. I do not speculate further on this, since I heard no argument.

286. I was told by Mr Noone that Ms Millan and her partner had asked if he would grant them permission to lay service media from her property into and along the Yellow Strip (they had presumably gained such permission also from Odeon Heights as the owner of the residual 5ft strip between the two properties) and that he had given it to them. In those circumstances, they do not appear to be affected in any material respect by whether the relevant Minor Interest entered on their title remains there and is thus apparently effective, or is removed, because they have a fresh agreement with the Noones, insofar as they might need it.

287. As regards Title AY 1211 (Odeon Heights Ltd) the purported Minor Interest affects only the residual 5 ft strip noted above, as to which it can have no practical value.

288. The only party with any significant interest in maintaining the existing registered Minor Interest would seem to be Ms Manley, as the owner of Title AY1207. Her property clearly uses physical access and egress over the Yellow Strip and also, no doubt benefits from installed service media under it. However, on any basis, the minor interest rights of access in question only benefit the "front" part of her property, because they only benefit the original Plot 141. Just about all of her garage, and one third of her house are built on the old Plot 143, which is not benefited by the supposed minor interest. The fact that this area later became part of the second Plot to be designated "141" by the then Land Registrar (Mr Johnson), but in fact containing parts of the old 143 cannot enlarge the extent to which any minor interest supposedly agreed against the original Plot 141 applies. On any basis, therefore, Ms Manley's rights of access in respect of her property are vulnerable.

289. Ms Manley's position is complicated. I have not heard argument about it, and I am certainly not resolving her position here. I am considering it only from the point of view of whether or not the effects of removing the minor interest apparently registered as being the assumed (but not necessarily correct) mirror of the Cohen Reservation could possibly be so serious as to cause me even to revisit my view that I do not, in fact, have any discretion but to make such order in the circumstances of this case.

290. If that registration is left in position and therefore as apparently valid, Ms Manley would nonetheless be using her property in "*aggravation*" of even the rights of access thereby confirmed. If it is removed, she simply has no rights of access and is accessing her property as a trespass over the Yellow Strip. On either basis her position might be alleviated at law by resort to the doctrine of rights of necessity because

her property is, at least partly, "*enclavé*", but the way in which this argument would operate is not clear. It is a difficult area of law, and the factual position here is singular.

291. Without in any way prejudging the issue, I doubt whether any court would prevent her from using her property by issuing an injunction against her, but that might not come "free of charge". In that respect, she is in no different position, in principle, from those who are currently using rights of access over the Yellow Strip for the benefit of land which was never even within the old Plots 141 or 143.

292. The obvious practical answer is that an agreement be reached between her and the Noones, hopefully on neighbourly terms, as to the basis on which she should have clear and legitimate access for her property. But as to this, whether Ms Manley has legally established rights of access to the front part of her property only, or has no legal rights of access at all, appears to make very little difference in general principle. I cannot see that, even if I had a discretion as to whether or not to order rectification of the registers to accord with my findings of law and fact as to what they ought to be, any of the above matters could lead me to conclude that it would not be right to do so.

293. As already mentioned, Mr Noone has said that it is not his wish to prevent any of his neighbours having access to their homes. He has not given an undertaking to that effect, and it would not be right to ask him to do so. If he has a good legal case regarding his rights, he is entitled to relief without strings.

294. Mr Noone has also said, several times, that he simply wants to have any rights which attach to, or affect, his own property clearly defined and recorded so as not to cause problems and possibly affect the value of his properties, through lack of clarity giving rise to legal queries which might be argued adversely to affect a sale price.

295. I rather suspect that there will be more to it than that. It may be that his concerns revolve about control of the Yellow Strip, and being able to regulate its use and its surfacing. It may be that there are financial implications, in that he is concerned about the costs of upkeep of the Yellow Strip. Whatever the position may be, however, it seems to me that, given the principles applicable to both the creation of servitudes and the proper means of registering these in Alderney, the correct thing for me to do is to make an order which seeks to preserve the proper application of those rules and the correctness of the Alderney Land Register according to those rules, and leave it to the parties subsequently to make arrangements with each other, hopefully on a neighbourly basis, to enable their properties to be reasonably enjoyed in practical terms, but against the background of the rights which they truly have.

296. In reaching this conclusion, I have not ignored the fact that provision is made in s. 23 of the Law for anyone who suffers loss by reason of an "*error or omission in the Register*" to be compensated by a States backed insurance scheme. I regard the existence of any such scheme as completely irrelevant to the issue whether I ought, or ought not, to direct rectification of the Register. The correct course must be that the Register should reflect proper entries as to land and property title rights properly obtained and registered according to the Law and Rules. If achieving that result itself causes a loss to any person which might arguably fall under the scope of the relevant insurance scheme, then so be it; any such claim to compensation under such scheme would fall to be considered on its own facts and merits. But it would not, in my judgment be right to order that a wrongly obtained entry on the Register should be allowed to subsist against a party who validly objects to it with a good case in law, on the basis that that party could obtain compensation for suffering that adverse position under the Land Registry insurance scheme.

297. I conclude, therefore, that the correct order is for me to direct the removal of the Notes of these Minor Interests on these three titles, and the corresponding deletion of the adverse interest directed at the Cohen Reservation on the title of AY1213. This is because, as I have said, the minor interests were never properly and validly registered on any basis, even if they ever existed inchoately (which is itself highly questionable), and having considered the position, I can see no reason not to restore the Register to what it should have been.

Miscellaneous

298. Before turning to the detail of my order, I want to make the following miscellaneous comments and observations.

299. First, I have been struck by the fact that many people in this matter appear to have proceeded on the assumption that if one has a right of way over land in order to access a particular parcel (Plot A) then, once one is there, one can proceed to go on to further land (Plot B), not contained in Plot A and on which the right of access has not been conferred, and make any use one likes of Plot B with the aid of the original right of way. That is simply not the case. One cannot use Plot A as a "bridge" to Plot B, on the basis that, once one has got to Plot A, one can go to Plot B and use it as one wants simply because one can then physically access it. Using the right of way for the purposes of Plot B is, *prima facie*, "*aggravation*", or excessive user, of the right of way. This may not be an absolute position. For example, use of Plot B merely as ancillary to Plot A, such as for additional garden land, might not be precluded, whilst use of Plot B to erect another house with access through Plot A would clearly be. However, the precise rules and application of this doctrine are complicated and will have their roots in customary law, and therefore in accord with Norman, and French law. They may well, therefore, be different rules from those of English law.

300. An important point, though, is that in no way can the registered rights of access with which I have been concerned here enure automatically, or even presumptively, for the benefit of land which was originally part of the land contained in Plots 142 or 144, and this must be reflected in my directions.

301. Second, I have suggested above that courts are likely to be reluctant to grant injunctions which have the effect of sterilising property, or requiring it to be destroyed, because of breach of another's property rights, (such as erecting a house without valid rights of access), but will instead prefer to remedy the position, possibly by ordering compensation to be paid to the owner whose rights have been infringed, effectively as the price of a compulsory licence to legitimise the breach.

302. Whether the assessment of such compensation would be purely compensatory, compensating the damaged party only for loss suffered, which might be very small, or whether it might take into account the benefit secured by the infringing party, is a difficult question. It will not only be very fact and merit specific, but is also likely to depend on the general ethos of the legal system in question. Alderney and Guernsey law, which has its origins in the customary law, and is consequently rooted in Norman and Civil law principles, could well take a different attitude from any approach which has found favour in the English Courts, applying the ethos of English common law. In particular, from my own limited acquaintance, I would not be surprised if customary law principles were more inclined to concentrate on compensation for actual loss or detriment to any landowner whose land is burdened, rather than on terms reflecting the commercial benefit to the putative dominant land. However, I emphasise that this is only a very tentative comment, as I have heard no argument on the subject.

303. Third, I must also emphasise the very narrow ambit of my decision. All I have decided is what the entries on the various registers of title ought to be, and how these should be made clear on the Register. I have not decided anything at all about the consequences of those entries, either in practical terms, or in terms of any enforcement (or otherwise) of any such rights, or any other legal consequences of them in all the circumstances.

304. Fourth, my decision will, I hope, have assisted in setting out a starting point for some certainty in relation to the parties' respective rights and obligations. I would suggest and also hope, however, that with neighbourly goodwill, it would be possible for all the parties, starting from that point, to come to an equally clear and acceptable agreement amongst themselves to resolve any further disputes or problems to which the situation may give rise, without having to resort further to the Court.

Conclusions

305. To summarise my conclusions:

(1) I have held that there was evidence upon which it was open to the Court of Alderney to find, and they implicitly did find (and correctly) that Mrs Phillips and the Cohens intended that the land ultimately conveyed to Mr Birtchnell and becoming Plot 141(b) should enjoy the benefit of a

servitude consisting of rights of access, as described in Clause 7 of the Birtchnell Agreement over the Yellow Strip of land being part of Plot 141(a).

The failure to register this appropriately as a Minor Interest at the time, was an error or omission on the Register, which should be rectified, accordingly, following the directions which I will give as to the titles affected.

(2) I have also held that there was and is no evidence upon which it was open to the Court of Alderney to make any similar finding of any servitude as a minor interest, in respect of the land conveyed to Mr Dines, and which then became Plot 141(c) because

- There was no evidence of any intention to transfer or create the benefit of any such servitude for Mr Dines, at the time.
- There was no registration of a Minor Interest comprising any such servitude (or any servitude at all over the Yellow Strip) sufficient to carry such rights as a matter of law at the time.
- The adverse interest entered on the Title to Plot 141(a) was not a sufficient registration in principle of any such minor interest, and the terms of such adverse interest did not inevitably reflect the intended creation of a minor interest in any event.
- The subsequent purported registrations of minor interests on the titles including that land, based on the historic adverse interest entry on Title 141(a), were invalidly made and unlawful.

The Land Register should be rectified accordingly to remove these entries, according to the directions which I will give as to the relevant title.

Disposal

306. Consequent on the judgment above, I would propose to make the orders below. I assume that there is a title plan appended to each relevant title, on which the colourings which I have directed can be made. Where I have noted "Copy filed" the necessary filing will of course have to be made as well.

(1) On the Appeal dated 21st September 2023 (appeal against refusal to seek the appointment of a *Juge Delegué*):

No order

(2) On the two Appeals dated 21st September 2023 against the refusal of the Court of Alderney to order (i) further disclosure against the Land Registrar and (ii) further disclosure against the Respondents:

Appeals each dismissed

(3) On the Appeal dated 8th March 2024, against the Order of the Court of Alderney made on 5th January 2024:

(i) The Order of 5th January 2024 is set aside.

(ii) The Land Registrar of Alderney is directed to make the following amendments to the following registers of title as listed below.

(iii) Each such amendment should be prefaced with a note (or a "remark" if it is a deletion): "*By Order of the Royal Court of Guernsey sitting on appeal from the Court of Alderney, Case No Civ 2541, Noone and anor vs Hamon and ors, made on [date]*"

AY1207

The second entry on Part III of the Register (Charges and Adverse Interests) beginning "*The land is subject to the rights contained in an Agreement dated 11th April 1969...*" shall be deleted.

The only entry in Part IV of the Register (Minor Interests) beginning "*In buying this parcel Mr and Mrs Cohen agree…"*) shall be deleted.

AY1208

The only entry in Part IV of the Register (Minor Interests) beginning "*On the transfer of Parcel F141(a)…*" shall be deleted.

AY1209

No amendment required.

AY1210

(Note: This title contains land which was part of Plot 141(b). However, unless – which I doubt - there is a disguised reference to the Birtchnell rights of access contained in the Minor Interest which cites the Schedule to a Transfer dated 24th January 1997 which is not among the papers, these rights have not been purportedly conferred. I would therefore propose to make the following Order.)

Part IV of the Register (Minor Interests) shall have the additional entry:

"*The land tinted [brown] on the plan to this Title and part of this Title has the benefit of the rights of access mentioned in Clause 7 of an Agreement dated 11th April 1969 between Marjorie Sidonia Phillips and Arthur Kenneth William Birtchnell over the roadway tinted [yellow] shown on the plan to this Title [NOTE: COPY FILED]".*

[Note: The land tinted brown shall be that part of the land within this title which originally formed part of Plot 141(b). The land tinted yellow shall be the Yellow Strip.]

AY1211

The second entry on Part IV of the Register (Minor Interests beginning "*On the transfer of Parcel F141(a)…*" shall be deleted.

The following entry on shall be made in Part IV of the said Register shall be made.

"*The land tinted [brown] on the plan to this Title and part of this Title has the benefit of the rights of access mentioned in Clause 7 of an Agreement dated 11th April 1969 between Marjorie Sidonia Phillips and Arthur Kenneth William Birtchnell over the roadway tinted [yellow] shown on the plan to this Title [NOTE: COPY FILED]".*

[Note: The land tinted brown shall be that part of the land within this title which originally formed part of Plot 141(b). This appears to be just the road/track which debouches on to the Yellow Strip. The land tinted yellow shall be the Yellow Strip.]

AY1212

The second entry on Part III of the Register (Charges and Adverse Interests) beginning "*The land is subject to the rights contained in an Agreement dated 11th April 1969...*" shall be deleted.

The first entry in Part IV of the Register (Minor Interests) shall be deleted and there shall be substituted therefor:

"The land tinted [brown] on the plan to this Title and part of this Title has the benefit of the rights of access mentioned in Clause 7 of an Agreement dated 11th April 1969 between Marjorie Sidonia Phillips and Arthur Kenneth William Birtchnell over the roadway tinted [yellow]shown on the plan to this Title [NOTE: COPY FILED]".

[Note: The land tinted brown shall be that part of the land within this title which originally formed part of Plot 141(b). The land tinted yellow shall be the Yellow Strip.]

AY1213

The first entry in Part III of the Register (Adverse Interests) beginning *"In buying this parcel Mr and Mrs Cohen…"* shall be deleted.

The second entry in Part III of the Register (Adverse Interests) beginning *"The land is subject to…"* shall be amended to read

"The land tinted [yellow] on the plan to this Title and part of this Title is subject to the rights of access mentioned in Clause 7 of an Agreement dated 11th April 1969 between Marjorie Sidonia Phillips and Arthur Kenneth William Birtchnell [NOTE: COPY FILED] for the benefit of that part of the land tinted [brown] on the Plan to this title, which land is presently part of Titles AY1210, AY1211 and AY1212.]

[Note: The land tinted yellow shall be the "Yellow Strip" and the land tinted brown shall be those parts of the Titles AY1210, AY1211 and AY1212 tinted brown on those titles, as mentioned above.]

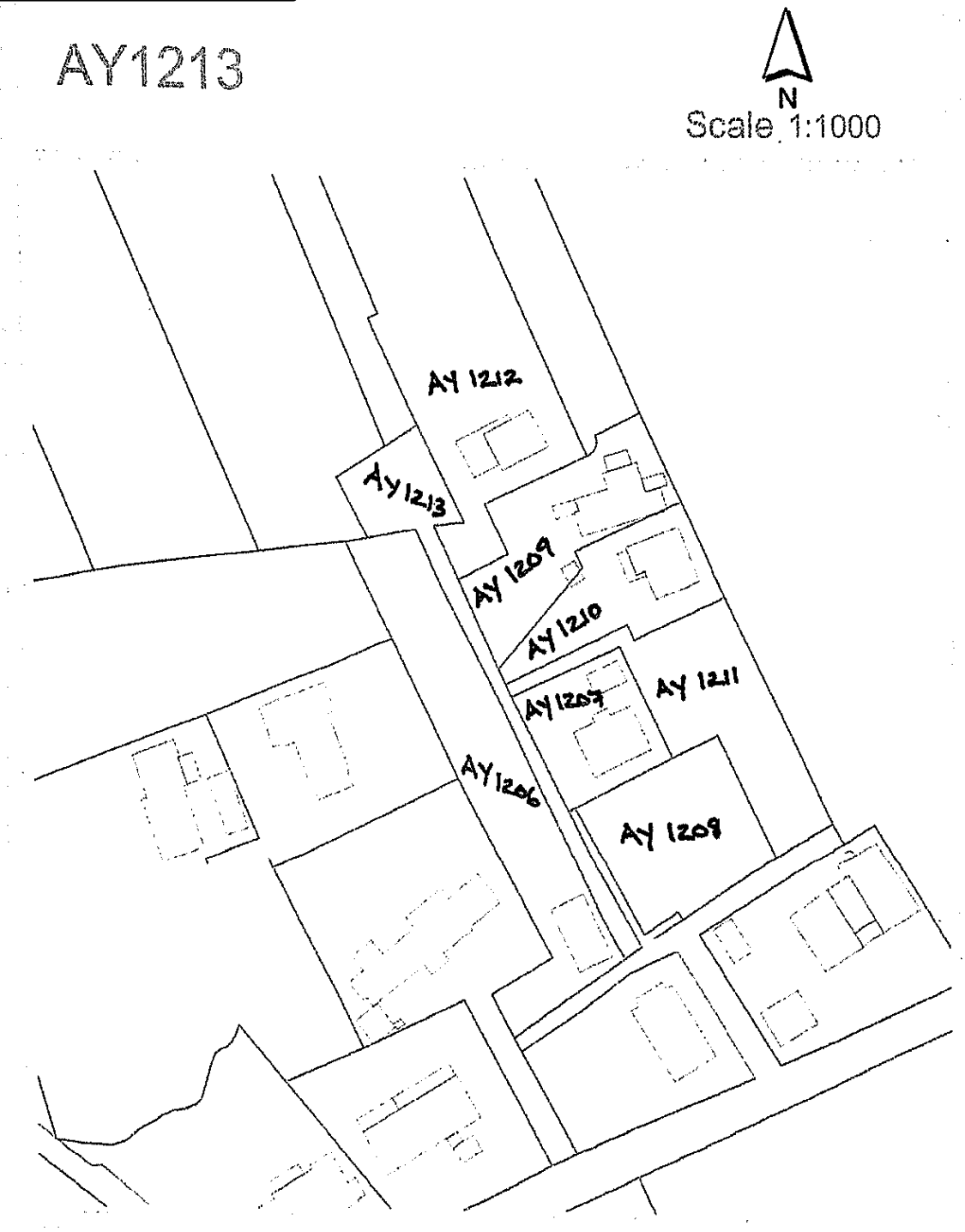
307. The one qualification to the above is that, for convenience, I will include a liberty to apply in my order, if so requested, in case there are any minor matters which occur to the parties which need further clarification.

308. As regards costs, it seems to me that neither "side" has been significantly more successful than the other. Whilst the Noones have succeeded in getting the Alderney Court's order set aside, they have been unsuccessful on both their procedural appeals, and have been only partially (though significantly) successful on their main appeal. In those circumstances, my initial view is that it would be appropriate to make no order as to costs, whether here or below. However, if the parties are not willing to accept this, I will receive submissions on costs and would propose to decide that matter on the papers.

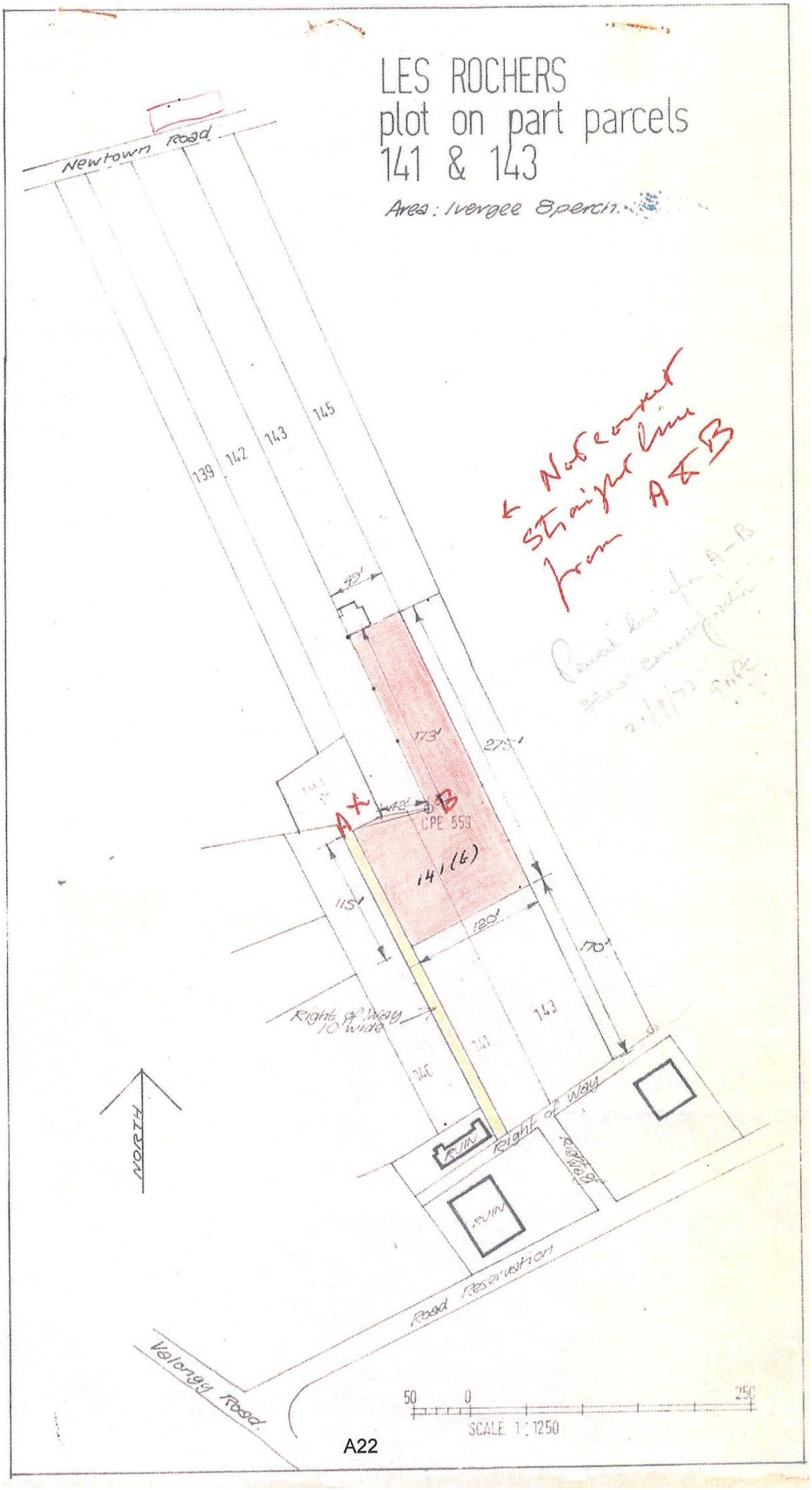
Annexures

Plan 1 – The Current Plan
Plan 2 – The Birtchnell Plan
Plan 3 – The Original Plan

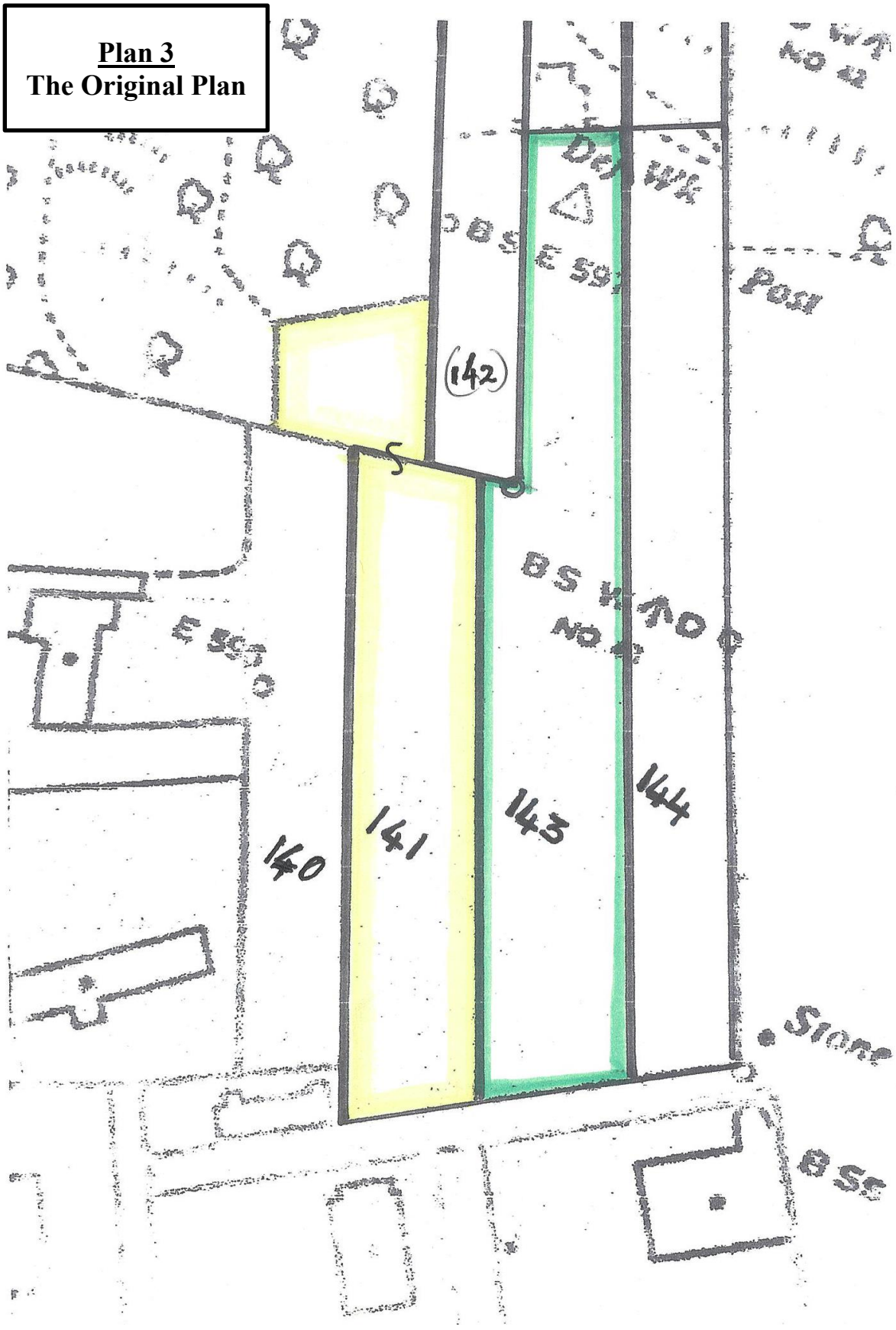
Plan 1
The Current Plan



Plan 2
The Birtchnell Plan



Plan 3
The Original Plan



Her Hon Hazel Marshall KC
Lt Bailiff

20th June 2025